THE LONG ROAD TO NEW YORK'S ANTI-DISCRIMINATION AND ANTI-HARASSMENT ETHICS RULE

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I. INTRODUCTION

Initiatives to sanction discrimination and harassment in New York's legal ethics rules are longstanding and controversial. There was, and remains, significant debate as to whether, and to what extent, fundamental problems such as discrimination and harassment in the legal system could, or should, be addressed through ethics rules. In 1990, New York adopted a narrow ethics rule to sanction discrimination and since then bar associations and courts have revisited that rule in response to the acknowledgement of the harm it causes to individuals and the profession.[1]

The legal profession has long avowed that ethics rules are essential to self-regulation and that there is a need to improve the public perception of lawyers, as well as the perceived and actual fairness of the legal system. The legal profession has also acknowledged that one of the significant impediments to increasing opportunities for capable people to become lawyers and to reach their full potential is the enduring concern about discrimination and bias in the profession. Consequently, ethics committees in New York have proposed a revised version of Rule 8.4(g) that addresses such issues.[2] This Article traces New York's history in the

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1. Robert T. Begg, *Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275, 302-03, 307, 317 (1993).

2. *See* Memorandum from the N.Y. State Bar Ass'n Comm. on Standards Att'y Conduct, COSAC Proposal to Amend Rule 8.4(g) of the New York Rules of Professional Conduct 4-6 (June

development of the proposed New York Rules of Professional Conduct ("NYRPC") Rule 8.4(g).[3]

II. EXISTING RULE

In 1990, after extensive debate, New York adopted a narrow anti-discrimination ethics rule. It was addressed solely to employment discrimination and required exhaustion of judicial remedies.[4] Rule 8.4(g) provides:

> A lawyer or law firm shall not:
> (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.[5]

4, 2021), https://nysba.org/app/uploads/2021/03/COSAC-Report-on-Rule-8.4g-FINAL-Approved-by-HOD-June-12-2021.pdf [hereinafter N.Y. State Bar Ass'n Memorandum].

3. *See infra* Part III.C.

4. Marjorie E. Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility*, 18 FORDHAM URB. L.J. 283, 292-94, 336 (1991) [hereinafter Gross, *The Long Process of Change*]. Former New York Code of Professional Responsibility DR 1-102 (A)(6), adopted in 1990 (N.Y. CODE OF PRO. RESP. DR 1-102(A)(6) (1990)), became New York Rule of Professional Conduct 8.4(g) in 2009 (N.Y. RULES OF PRO. CONDUCT r. 8.4(g) (2009)) as part of the wholesale revision of New York's move from the Code of Professional Responsibility to the Rules of Professional Conduct. N.Y. COMP. CODES RULES & REGS. tit. 22, § 1200.0 Rule 8.4(g) (2021) (effective Apr. 1, 2009). When the New York Code of Professional Responsibility was first adopted in 1970 it contained no provision regarding discrimination or harassment. In February 1990, the Four Appellate Divisions, after a lengthy process, adopted DR 1-102(A)(6) among various other amendments. Marjorie E. Gross, *The Amendments to the New York Code of Professional Responsibility*, N.Y. L.J., Mar. 8, 1990, at 1-2 [hereinafter Gross, *The Amendments to the New York Code of Professional Responsibility*]. An Ethical Consideration ("EC") was also adopted at the time. Gross, *The Long Process of Change*, *supra*, at 293. The EC "encourage[d] lawyers to avoid bias toward participants in court proceedings." Gross, *The Long Process of Change*, *supra*, at 292 (exploring the authoritative history of the amendments); *see also*, ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 1961 (2020-2021 ed.). New York was a leader when, in 1990, it adopted then DR 1-102(A)(6). Rule 8.4(g) was identical to the previous Code of Professional Responsibility DR 1-102(A)(6).

5. N.Y. RULES OF PRO. CONDUCT r. 8.4(g) (2009).

In the 1990s, other states, responding to a noted increase in discriminatory practices and conduct among their lawyers, undertook similar initiatives to sanction such behavior.[6] Among these states were California, Colorado, Michigan, New Jersey, and Washington State.[7]

The rules varied.[8] Some rules, such as Michigan's, sanction purely private conduct unrelated to the practice of law including membership in certain organizations or making hateful speeches,[9] while others are limited to conduct engaged in the course of representing clients.[10] Some rules extend to discrimination based on socioeconomic status on the theory that refusing a poor client may be "socioeconomic" discrimination.[11] Some other rules prohibit only discrimination based on race, sex, or nationality;[12] still others extend to discrimination based on religion, disability, sexual orientation, and even marital status.[13]

III. NATIONAL DEBATE AND THE AMERICAN BAR ASSOCIATION RULE

Throughout the 1990s and even earlier, entities within the American Bar Association ("ABA")—notably, the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility ("SCEPR") repeatedly discussed the need to adopt rules

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6. Brenda Jones Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response to Discrimination on the Rise*, 7 NOTRE DAME J.L., ETHICS & PUB. POL'Y 5, 7, 11 (1993).

7. *See id.* at 11; Andrew E. Taslitz & Sharon Styles-Anderson, *Regulating Race, Gender, and Ethnic Bias in the Legal Profession: A Modest Proposal*, PRO. LAW., May 1996, at 10, 10; WASH. RULES OF PRO. CONDUCT r. 8.4(g) (2021).

8. *See, e.g.*, COLO. RULES OF PRO. CONDUCT r. 1.2(f) (1993); *cf.* FLA. RULES OF PRO. CONDUCT r. 4-8.4(d) (1993) (limiting sanctions to lawyerly behavior "in connection with the practice of law").

9. *See* WASH. RULES OF PRO. CONDUCT r. 8.4(g) (2021) (prohibiting discrimination based upon sex, race, creed, and other categories "in connection with the lawyer's professional activities," presumably including hateful speeches made to bar associations). Michigan adopted a rule requiring lawyers to "take particular care to avoid treating . . . a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic." MICH. RULES OF PROF. CONDUCT r. 6.5 (1995).

10. *See, e.g.*, COLO. MODEL RULES OF PROF. CONDUCT r. 1.2(f) (1993).

11. *See* Begg, *supra* note 1, at 313-14.

12. R.I. RULES OF PRO. CONDUCT r. 8.4(d) (1993) (barring engagement in conduct "prejudicial to the administration of justice, including but not limited to harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others" based on race, national origin, gender, religion, disability, age, sexual orientation or socioeconomic status).

13. *See Variations of the ABA Model Rules of Professional Conduct*, A.B.A., CPR POL'Y IMPLEMENTATION COMM. (Dec. 7, 2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf.

prohibiting harassment and discrimination in the disciplinary system.[14] The rationale for such rules then, as now, centered on the growing reports of discriminatory conduct and harassment against women and people of color and the deleterious effect of such conduct upon individuals and the profession.[15] Despite ongoing concerns, there was significant controversy over the ABA's adoption of such rules because of concerns that "legitimate advocacy" would be threatened.[16] Some argued that conduct should be prohibited only if it interfered with the administration of justice, while others contended that any provisions should only be aspirational.[17]

In 1994 and 1995, the ABA engaged in extensive study and vigorous debate, notably within the Young Lawyers Division and SCEPR.[18] These groups even submitted competing proposals to the ABA House of Delegates for amending the Model Rules of Professional Conduct.[19] Ultimately, however, these groups did not endorse a disciplinary rule because of persuasive arguments of the fear that it would limit lawyers' free speech rights and impose a "politically correct" agenda upon lawyers.[20] Instead, the ABA, at its August 1995 Annual Meeting, adopted a modified version of a policy statement submitted by the Young Lawyers Division that condemned discrimination by lawyers.[21]

The ABA policy statement acknowledged the longstanding and entrenched discrimination and harassment based upon race, gender, and ethnic identity. It noted that the problems are beyond grievance-rule solutions.[22] As Andrew Taslitz and Sharon Styles-Anderson described the problems:

> These problems include overtly insulting gender- or race-based behavior, demeaning sexual and racial innuendo, condescending verbal and non-verbal race- or sex-based conduct to gain a tactical advantage, and disparate treatment based upon allegedly inappropriate

14. *See* Taslitz & Styles-Anderson, *supra* note 7, at 10 (tracing the history of the American Bar Association's ("ABA") process on Rule 8.4(g)). The ABA adopts Model Rules of Professional Conduct, after which individual states typically engage in a lengthy, deliberative process to determine whether to adopt the Model Rule in whole or in modified form. *Id.*

15. *Id.*

16. Ronald D. Rotunda, *Racist Speech and Lawyer Discipline*, PRO. LAW., Feb. 1995, at 1, 5.

17. Taslitz & Styles-Anderson, *supra* note 7, at 10.

18. *Id.*

19. *See id.* (providing a description of the proposals).

20. *Id.*

21. *Id.*

22. *Id.*

> sex-specific role behavior (*e.g.*, an aggressive woman is a "bitch") or refusal to recognize female authority.[23]

Taslitz and Styles-Anderson further stated that:

> Further problems include overt appeals to jurors to decide cases on the basis of racial animus; animosity toward those who blow the whistle about race and gender discrimination; glass ceilings; disparate salaries and partnership shares for women; fewer opportunities for women and minorities to engage clients and generate fees; encouragement of female witnesses to cry on the witness stand; and treatment of testimony by female witnesses as less credible than that of their male counterparts.[24]

The argument for a rule emphasized that "[t]hese are deeply-rooted problems that require the strongest of measures to eliminate them: the force of a disciplinary rule, but a narrowly targeted one that will survive first amendment scrutiny."[25]

Debate within the ABA for the adoption of a rule to address discrimination and harassment continued from 1995 to 2016. Finally, the ABA held a public hearing in February 2016.[26] Intense discussion focused on (i) the scope of the rule, (ii) the need for an intent requirement, and (iii) whether there should be a carve-out for legitimate advocacy and advice.[27]

In August 2016, the ABA capped years of debate, discussion, and controversy, and amended the Model Rules of Professional Conduct (the "Model Rules") to prohibit discrimination and harassment in conduct related to the practice of law.[28] The ABA House of Delegates adopted the rule with an overwhelming voice vote.[29] No speaker addressed the House in opposition.[30] ABA Model Rule 8.4(g) provides:

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23. *Id.*

24. *Id.*

25. *Id.*

26. Letter from David Nammo, Chief Exec. Officer & Exec. Dir., Christian Legal Soc'y & Kimberlee Wood Colby, Dir., Christian Legal Soc'y, to Eileen D. Millett, Counsel, Off. of Ct. Admin. 1, 5-7 (May 18, 2021) (on file with author), *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2 [hereinafter May 18 Nammo Letter].

27. N.Y. State Bar Ass'n Memorandum, *supra* note 2, at 7, 173.

28. *Id.* at 3.

29. 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, 196-97 (2017).

30. *See id.* at 197, 209-211 (summarizing the years of discussion, debate and controversy regarding the amendment of Rule 8.4(g)); *see also* Am. Bar Ass'n, Standing Comm. on Ethics & Pro. Resp. et al., Report to the House of Delegates 3-4 (2016) (summarizing the historical events preceding the amendment of Rule 8.4(g)).

> Rule 8.4: Misconduct
> 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.[31]

The comments provide:

> COMMENT
> [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

31. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR. ASS'N 2020).

> representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).[32]

The ABA's Standing Committee on Ethics and Professional Responsibility noted in ABA Formal Opinion 493, interpreting the rule:

> Discriminatory and harassing conduct, when engaged in by lawyers in connection with the practice of law, engenders skepticism and distrust of those charged with ensuring justice and fairness. Enforcement of Rule 8.4(g) is therefore critical to maintaining the public's confidence in the impartiality of the legal system and its trust in the legal profession as a whole.[33]

A. Other States

As is customary after the ABA promulgates a Model Rule, states began to consider whether to adopt ABA Model Rule 8.4(g) in its entirety or a modified form. Maine and Vermont adopted the ABA Rule nearly verbatim.[34] Thirty jurisdictions have adopted an anti-discrimination, anti-harassment, or anti-bias rule.[35] Many of these rules, like New York's, are much narrower than Model Rule 8.4(g).

Many jurisdictions limit the applicability of the rule to conduct before tribunals, and judicial or quasi-judicial situations.[36] Other jurisdictions link any prohibition on discrimination and harassment in the profession to Rule 8.4(h), interference with the administration of

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32. *Id.* cmts. 3-5.

33. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020) (discussing Model Rule 8.4(g)'s "purpose, scope, and application").

34. *See* Vermont Supreme Court, *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, (July 14, 2017) at 1, https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf ("Rule 8.4(g) and new Comments [3]-[5] are amended to adopt, with minor verbal changes, amendments to the American Bar Association's Model Rules of Professional Conduct approved by the ABA on August 8, 2016."); *see also* State of Maine Supreme Judicial Court Amendment to the Maine Rules of Professional Conduct Order, 2019 Me. Rules 05 (May 13, 2019), https://www.courts.maine.gov/rules_adminorders/rules/amendments/2019_mr_05_prof_conduct.pdf (stating that the Maine Supreme Court adopted Model Rule 8.4(g) on May 13, 2019 and made it effective June 1, 2019).

35. *See Variations of the ABA Model Rules of Professional Conduct*, *supra* note 13. Some states that had adopted their version of 8.4(g) in the 1990s did not change their rule after the ABA's adoption of Model Rule 8.4(g). *Id.*

36. *See, e.g.*, MO. SUP. CT. R. 4-8.4 (amended July 18, 2019) (Missouri's rule prohibits an attorney to "manifest by words or conduct, *in representing a client*, bias or prejudice, or engage in harassment") (emphasis added); MICHIGAN RULES OF PROF. CONDUCT r. 6.5(a) (1995) ("A lawyer shall treat with courtesy and respect all persons involved in the legal process.").

justice.[37] Some prohibit "bias or prejudice" and do not refer to discrimination or harassment at all.[38] Nearly all jurisdictions that have an anti-bias, anti-discrimination, or anti-harassment rule exempt "[l]egitimate advocacy" and provide that a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of the rule.[39]

Some states have rejected Model Rule 8.4(g) or have no rule prohibiting discrimination.[40] The courts of South Carolina and Tennessee rejected the rule.[41] The Attorneys General of Texas and Louisiana have issued opinions against Model Rule 8.4(g).[42] The Montana legislature adopted a resolution declaring that the Montana Supreme Court lacks the power to adopt Model Rule 8.4(g).[43]

Nine states and Washington D.C. have only a comment.[44] Eleven jurisdictions have no rule and no comment.[45]

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37. *See, e.g.*, MD. ATT'YS RULES OF PRO. CONDUCT r. 19-308.4(e) (2016) (providing that it is prohibited to "knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is *prejudicial to the administration of justice*") (emphasis added).

38. *See, e.g.*, ARIZ. RULES OF PRO. CONDUCT r. 8.4(d) (2003).

39. *See, e.g.*, WASH. RULES OF PRO. CONDUCT r. 8.4(g) cmt. 3 (2021).

40. *Variations of the ABA Model Rules of Professional Conduct*, *supra* note 13.

41. *See* Order Re: Rule 42, ER 8.4, Rules of the Supreme Court, Ariz. Sup. Ct., No. R-17-0032 (Aug. 30, 2018) (rejecting proposals to adopt Model Rule 8.4(g)); Order Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct, S.C. Sup. Ct., Appellate Case No. 2017-000498 (June 20, 2017) ("declin[ing] to incorporate the ABA Model Rule [8.4(g)]" into South Carolina's Rules of Professional Conduct); *In re* Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g), Tenn. Sup. Ct., No. ADM2017-02244, (Apr. 23, 2018). The Tennessee Board of Professional Responsibility and the Tennessee bar association had proposed the adoption of Model Rule 8.4(g). *Id.* Tennessee's Supreme Court issued a summary rejection after stating, "The Court has received in excess of four hundred (400) pages of comments to the proposed amendment." *Id.*

42. *See*, Tex. Att'y Gen. Op. No. KP-0123, (Dec. 20, 2016); La. Att'y Gen. Op. No. 17-0114, (Sept. 8, 2017) (opposing ABA Model Rule 8.4(g) discussed in this report).

43. *See* S.J. Res. S.J.0015, 2017 Leg., 65th Sess. (Mont. 2017).

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

Id.

44. *See Variations of the ABA Model Rules of Professional* Conduct, *supra* note 13. The nine states include Arizona, Arkansas, Delaware, North Carolina, South Carolina, Tennessee, Utah, West Virginia, and Wyoming. *Id.* For example, Arizona's comment to its Rule of Professional Conduct ("RPC") 8.4 provides:

> A lawyer who in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. This does not preclude legitimate advocacy

B. New York Developments - Committee on Standards of Attorney Conduct 2017-2020

In 2017, New York's Committee on Standards of Attorney Conduct ("COSAC")[46] began an extensive, in-depth study of Rule 8.4(g). This study was based in part, on the September 2016 letter that John S. Gleason, the then-Chair of the ABA Center for Professional Responsibility Implementation Committee, sent to New York Court of Appeals Chief Judge Janet DiFiore expressing the ABA's "hope that [the] Court will undertake a review of the changes and consider integrating them into [their] state's rules of professional conduct."[47] COSAC undertook that review.[48]

> when race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status, or other similar factors, are issues in the proceeding.

ARIZ. RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (2003) (amended 2004). Arizona RPC 8.4(d) makes it professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." *Id.* 8.4(d). A comment to Arkansas's RPC 8.4: Subdivision (d) clarifies that subdivision (d) proscribes conduct that is "prejudicial to the administration of justice . . . includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law." ARK. RULES OF PRO. CONDUCT r. 8.4 (2002).

> The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such discriminatory conduct, when directed towards litigants, jurors, witnesses other lawyers, or the court, including race, sex, religion, national origin, or any other similar factors, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality . . . . This subdivision does not prohibit a lawyer from representing a client accused of committing discriminatory conduct.

Id. "Discriminatory" is not further defined. *See id.*

45. *See Variations of the ABA Model Rules of Professional Conduct*, *supra* note 13. The states are Alabama, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, Oklahoma, South Dakota, and Virginia. *Id.*

46. The COSAC is charged with monitoring and evaluating the New York Rules of Professional Conduct ("NYRPC") and other provisions that regulate lawyers and the practice of law in New York State. *See Committee on Standards of Attorney Conduct*, N.Y. STATE BAR ASSOC., https://nysba.org/committees/committee-on-standards-of-attorney-conduct (last visited Apr. 23, 2022). Its members come from across New York State and include private practitioners in small and large firms, government lawyers, and corporate counsel. *See id.*

47. *See* Letter from John S. Gleason former Chair, Am. Bar Ass'n Ctr. for Prof. Resp. Implementation Comm., to Janet DiFiore, C. J., N.Y. Ct. App. (Sept. 29, 2016) (on file with author).

48. *See* N.Y. State Bar Ass'n Memorandum, *supra* note 2, at 1, 3. In 2019, subcommittee chairperson, Barbara S. Gillers, submitted her comprehensive draft report to COSAC. *See* Memorandum from Michael Miller and Henry M. Greenberg to the Members House Delegates 1, 6, 39 (Apr. 2, 2019), https://nysba.org/app/uploads/2020/03/17-House-of-Delegates-April-2019-complete-packet-FINAL-min.pdf.

C. Limitations of N.Y. Rule 8.4(g)

COSAC's study reflected the longstanding critique that New York's rule is too limited.[49] One limitation is that Rule 8.4(g) only applies to existing state, federal, and local anti-discrimination law.[50] Thus, it is limited to employment contexts and does not, for example, necessarily include counsel's treatment of clients, court employees, coworkers, adversaries in depositions or negotiations or during travel for work.[51] It does not clearly cover sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.[52]

Additionally, limiting discriminatory conduct to that which is "unlawful" is overinclusive because it prohibits conduct that may not be knowing or intentional, but may be deemed unlawful because the standard to impose civil liability is discriminatory impact.[53] It is also underinclusive because it does not cover a great deal of harassment, except insofar as state or federal law prohibits it.[54] By contrast, ABA Rule 8.4(g) does not limit discrimination to that defined by law.[55] Without the word "unlawful," disciplinary authorities can sanction a wider range of conduct.

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49. The development of DR 1-102(A)(6) was as controversial in the 1970s, as in the 1990s. Initially, the New York State Bar Association ("NYSBA") Special Committee on Minorities in the Profession ("SCMP") and the NYSBA Special Committee on Women in the Courts ("SCWC") disagreed on the scope of a disciplinary rule. The SCMP "wanted to prohibit discrimination in hiring, promoting or otherwise determining conditions of employment." The SCWC "sought a far broader prohibition against discrimination." Gross, *The Amendments to the New York Code of Professional Responsibility*, *supra* note 4, at 6-7. The NYSBA House of Delegates "wanted to preserve a lawyer's ability to adopt affirmative action programs" but, at the same time, wanted to "make a formal statement prohibiting at least certain kinds of discrimination." *Id.* There was no proposal regarding harassment. *Id.* After extensive debate and review, the four appellate division courts adopted DR 1-102(A)(6). *Id.* at 2. There have been no changes since then except for "technical amendments" in 1987. *Id.* at 3. The technical amendments clarified the term "tribunal." *Id.* at 6.

50. N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2020-4 (2020).

51. Some of this conduct may be prohibited by New York Human Rights Law, as interpreted by courts. N.Y. EXEC. LAW § 296 (McKinney 2019). For instance, the public accommodations provisions of such laws may be applicable. *See, e.g.*, Petty v. Law Office of Robert P. Santoriella, P.C., 160 N.Y.S.3d 228, 230 (App. Div. 2021) (applying the public accommodation provisions of the equal employment laws to a law firm partner's harassment of a client because his sexual misconduct claim deprived the client of non-discriminatory access to legal services).

52. Nevertheless, some New York courts have disciplined lawyers under Rule 8.4(g) for offensive conduct such as "contumacious, abusive and strident conduct" in a deposition. *See, e.g.*, Principe v. Assay Partners, 586 N.Y.S.2d 182 (Sup. Ct. 1992) (insulting tone and repeatedly calling a woman lawyer names such as little girl, young girl, little mouse and little lady); *In re* Monaghan, 743 N.Y.S.2d 519 (App. Div. 2002) (sanctioning lawyer under DR 1-106(A)(6), predecessor to Rule 8.4(g) for "race-based abuse" of black woman attorney at a deposition).

53. N.Y. RULES OF PRO. CONDUCT r. 8.4(g) (2009).

54. *Id.*

55. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

Second, NYRPC 8.4(g) does not cover harassment at all except insofar as it is unlawful under local law or N.Y. Executive Law § 296.[56] One of the limitations of that Human Rights Law is that it prohibits discrimination only by employers and only for employers where there are at least four employees.[57] Of course, acts of harassment may be sanctioned under other ethics rules such as 8.4(d), a catch-all that provides that a lawyer may not engage in conduct that is prejudicial to the administration of justice.[58] New York's courts have addressed *some* conduct by using a patchwork of provisions.[59] Rule 8.4(h), which prohibits conduct that "adversely reflects on the lawyer's fitness" to practice law, is the primary support for these decisions.[60] NYRPC 3.3(f)(2), the rule against "undignified or discourteous conduct" before a tribunal, is also cited in some opinions.[61]

Third, the rule requires exhaustion of judicial remedies prior to filing a disciplinary complaint. Thus, people who do not comply with time limitations for filing judicial actions or who do not want to undertake the cost or other problems in pursuing litigation cannot bring complaints to the attention of the grievance committees.

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56. *See* SIMON, *supra* note 4, at 1963 (providing a discussion of the federal, state, and local laws).

57. Gross, *The Amendments to the New York Code of Professional Responsibility*, *supra* note 4, at 8.

58. *In re* Teague, 15 N.Y.S.3d 312, 314-15 (App. Div. 2015) (lawyer suspended for conduct that included "racist, sexist, homophobic and offensive epithets against other attorneys"); *In re* Kahn, 791 N.Y.S.2d 36, 37-38 (App. Div. 2005) (lawyer suspended for a pattern of misconduct involving sexually oriented and other offensive comments directed at female attorneys); *In re* Gilbert, 606 N.Y.S.2d 478, 478-79 (App. Div. 1993) (lawyer suspended for making sexual advances to two female clients, as well as inappropriate comments of a sexual nature to two female secretaries in his office).

59. *See supra* notes 51-52 and accompanying text.

60. N.Y. RULES OF PRO. CONDUCT r. 8.4(h) (2009).

61. *See* SIMON, *supra* note 4, at 1962; *In re* Chiofalo, 909 N.Y.S.2d 36, 37, 42 (App. Div. 2010) (imposing a two-year suspension for, *inter alia*, sending "a series of hostile, obscene, and derogatory written messages to his wife[,]" her lawyers, and others involved in his matrimonial proceeding in violation of the fitness rule and DR 1-102(A)(5) prejudicial to the administration of justice); *In re* Hayes, 777 N.Y.S.2d 120, 120-21 (App. Div. 2004) (public censure of a lawyer who accused a Housing Court judge and court clerk of prejudice and racism, as "conduct prejudicial to the administration of justice" under DR 1-102(A)(5) and in violation of DR 7-106(C)(6) ("undignified or discourteous conduct before a tribunal")); *In re* Schiff, 599 N.Y.S.2.d 242, 242-43 (App. Div. 1993) (public censure of a lawyer for "vulgar, obscene, and sexist epithets toward [the] anatomy and gender" of a female adversary at a deposition in violation of DR 1-102(A)(7) (conduct adversely reflecting on fitness)); *In re* Kavanagh, 597 N.Y.S.2d 24, 25-26 (App. Div. 1993) (public censure for insulting and making baseless accusations in court papers that opposing counsel had ties to organized crime which were likely motivated by "ethnic bias" and which reflected adversely "on [the lawyer's] fitness to practice law," as well as violated the rule against "engaging in undignified or discourteous conduct which is degrading to a tribunal").

Fourth, New York's ten listed bases of protected categories against discrimination—age, race, creed, color, national origin, sex, disability, marital status or sexual orientation—are more limited than the ABA rule that includes four additional categories: ethnicity, gender identity, socioeconomic status, and religion.[62] New York's protected groups are derived from New York State Human Rights Law, N.Y. Executive Law § 296, where each of these terms is defined and interpreted by the courts and the Human Rights Commission. Case law has expanded the scope of Executive Law § 296 in recent years to include military status, as well as "religious and cultural connection with uncut hair" and clothing.[63]

COSAC discussed Rule 8.4(g) and determined that the best course of action for any rule modification was to solicit broad input from segments of the bar. This decision was concurrent with several other key developments in connection with the ethics rules governing anti-discrimination and anti-harassment during 2020 including:

- On July 15, 2020, the ABA Standing Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 493, which provides guidance on the purpose, scope, and application of ABA Model Rule 8.4(g).[64]
- In Fall 2020, the Connecticut bar association submitted proposed amendments to Connecticut Rule 8.4(7) to the Connecticut Supreme Court for consideration.[65]

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62. N.Y. RULES OF PRO. CONDUCT r. 8.4(g) (2009); MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020). COSAC did not recommend adding "socioeconomic status" to the NYRPC 8.4(g). N.Y. State Bar Ass'n Memorandum, *supra* note 2, at 7. NYRPC 8.4(g) uses some different nomenclature, and lists "age, race, creed, color, national origin, sex, disability, marital status [and] sexual orientation." N.Y. RULES OF PRO. CONDUCT r. 8.4(g) (2009). New York uses "creed" referring to a set of religious or other beliefs which captures the term religion. *Id.*

63. Daniel Turinsky & Janeen Hall, *Practical Guidance for Complying with NY's Prohibition on Hair and Religious Garb Discrimination*, N.Y. L.J. Feb. 21, 2020; *See* SIMON, *supra* note 4, at 1963 (discussing New York State Human Rights Law).

64. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020).

65. CONN. RULES OF PRO. CONDUCT r. 8.4(7) (2022). Connecticut adopted Rule 8.4(7) in June 2021. *Id.* Rule 8.4(7) provides that it is unprofessional conduct for a lawyer 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.

Id. A lawsuit challenging its constitutionality was filed in November 2021 and is pending in the U.S. District Court for the District of Connecticut. *See* Complaint, Cerame v. Bowler, 21-cv-01502 (D Conn. Nov. 10, 2021), https://nclalegal.org/wp-content/uploads/2021/11/Complaint-in-the-United-States-District-Court-for-the-District-of-Connecticut.pdf.

- In September 2020, the New York City Bar Ethics Committee issued N.Y. City Bar Ethics Opinion 2020-4, which analyzed current New York Rule 8.4(g) and its weaknesses.[66]
- In October 2020, the New York City bar issued a report by the city bar's Professional Responsibility Committee, proposing amendments to New York Rule 8.4(g) that largely track ABA Model Rule 8.4(g).[67]

In June 2020, the Supreme Court of Pennsylvania approved amendments to Pennsylvania Rule 8.4(g) that were scheduled to take effect on December 8, 2020.[68] However, on December 7, 2020, the United States District Court for the Eastern District of Pennsylvania held that Pennsylvania's version of Rule 8.4(g) violated the Free Speech Clause of the First Amendment. The court granted an injunction that temporarily enjoined the Disciplinary Board of the Pennsylvania Supreme Court from enforcing the rule.[69] Specifically, the district court held that the amendments to Rule 8.4(g) and two new explanatory comments "consist of unconstitutional viewpoint discrimination in violation of the First Amendment."[70] The Pennsylvania bar filed a notice of appeal in the Third Circuit, but in March 2021 the bar voluntarily dismissed the appeal.[71]

On October 8, 2020, COSAC's Rule 8.4(g) subcommittee solicited input from New York State Bar Association ("NYSBA") committees and sections, as well as other relevant bar association groups in New York, as to whether New York should amend existing New York Rule 8.4(g) to conform more closely to ABA Model Rule 8.4(g).[72] The

66. N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2020-4 (2020); *see supra* notes 50-64 and accompanying text (discussing weaknesses in the current rule).

67. AEGIS FRUMENTO, N.Y.C. BAR ASS'N., REPORT BY PROFESSIONAL RESPONSIBILITY COMMITTEE PROPOSING AMENDMENT TO NEW YORK RULE OF PROFESSIONAL CONDUCT 8.4(g), (2020), https://s3.amazonaws.com/documents.nycbar.org/files/2019576-8.4gProposalProtectedClasses.pdf.

68. Greenberg v. Haggerty, 491 F. Supp. 3d 12, 15-16 (E.D. Pa. 2020).

69. *Id.* at 33.

70. *Id.* at 32.

71. Josh Blackman, *Pennsylvania Bar Dismisses 3rd Circuit Appeal in Rule 8.4(g) Challenge*, REASON (Mar. 16, 2021, 11:04 PM), https://reason.com/volokh/2021/03/16/pennsylvania-bar-dismisses-3rd-circuit-appeal-in-rule-8-4g-challenge.

72. Memorandum from the N.Y. State Bar Ass'n Comm. on Standards Att'y Conduct 8.4(g) Subcommittee to the N.Y. State Bar Ass'n Committee and Section Chairs (Oct. 8, 2020), *reprinted in*, N.Y. State Bar Ass'n Memorandum, *supra* note 2. I have been Chair of the 8.4(g) Subcommittee since September 2020. Other members of that subcommittee include Justin Chu, Brenda Dorsett and David Schraver. *Id.*

subcommittee's October 2020 letter set forth the limitations of New York's existing Rule 8.4(g).[73]

COSAC received wide-ranging comments in response to its October 2020 letter.[74] The proponents of a version of ABA Rule 8.4(g) believed that such a provision would strengthen ethics protections for all protected classes, advance the goal of eliminating harassment and discrimination in the legal profession, and create inclusivity in the profession.[75] Those who opposed amending New York Rule 8.4(g) to more closely conform to the ABA Model Rule raised concerns about the scope of the ABA rule, especially First Amendment considerations.[76] Specifically, opponents raised concerns that a version of ABA Model Rule 8.4(g) would impede religious freedom and would regulate lawyers' free speech, notably unpopular speech.[77] In addition, opponents expressed due process concerns of overbreadth and vagueness,[78] along with apprehension that lawyers would be subject to discipline for unfounded allegations of discrimination.[79] Opponents also expressed concern that the ABA Model Rule would be used against law professors to censor their speech.[80] COSAC also received a comment expressing concern about the impact of a rule upon lawyers' use of social media.[81]

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73. *Id.*

74. The subcommittee received written comments from the following entities and individuals: NYSBA Committee on Diversity and Inclusion (joined by NYSBA President's Committee on Access to Justice and the NYSBA Women in Law Section); NYSBA Committee on Disability Rights; Professors Josh Blackman, Eugene Volokh, and Nadine Strossen; Christian Legal Society; National Legal Foundation; NYSBA Committee on Legal Aid and the President's Committee on Access to Justice. PUBLIC COMMENTS TO COSAC'S APRIL 16, 2021 REPORT, *reprinted in*, N.Y. State Bar Ass'n Memorandum, *supra* note 2. "I do not believe that we should be amending the rule to address harassment claims differently than a developed body of federal, state and city statutory and decisional law has already aggressively addressed such claims." *Id.*

75. *See, e.g.*, Letter from Jill Paperno, President, Monroe Cnty. Bar Ass'n, to Members of the Comm. on Standards of Attn'y Conduct, N.Y. State Bar Ass'n (Jan. 8, 2021) (on file with author) ("[The] proposed rule ensures that our profession will continue to strive to eliminate bias and discrimination in legal institutions and among its practitioners.").

76. *See, e.g.*, May 18 Nammo Letter, *supra* note 26 (explaining that ABA Model Rule 8.4(g) is akin to a speech code for lawyers).

77. *Id.* at 1, 3-7.

78. Memorandum from the N.Y. State Bar Ass'n Fam. L. Section to N.Y. State Bar Ass'n Comm. on Standards of Att'y Conduct (Jan. 15, 2021) (on file with author) ("[W]e take issue with the breadth, vagueness, and imprecision of the language employed in ABA Model Rule 8.4(g) and propose that it be made more precise.").

79. *See* May 18 Nammo Letter, *supra* note 26, at 16-17 (discussing concerns that Rule 8.4(g) does not preclude a finding of professional misconduct based on a lawyer's implicit bias).

80. *See* Posting of William Hodes, aprl@listserv.aprl.net, to aprl@listserv.aprl.net (Apr. 18, 2021, 8:42 PM) (on file with author) (commenting in response to a 2021 solicitation noting that COSAC's modification of the ABA language from "conduct related to the practice of law" to "conduct in the practice of law" will have the effect of "tak[ing] [Continuing Legal Education

The comments made in opposition to Model Rule 8.4(g) or COSAC's proposed rule are consistent with those raised in 2015–2016 when the ABA was considering its adoption and with the various states that have proposed amendments to their respective anti-discrimination rules.

As a result of these numerous comments from NYSBA committees and sections, COSAC's own continued study and discussion, and consultation with other bar associations, including the Professional Responsibility Committee of the New York City Bar Association and the New York County Lawyers, COSAC repeatedly revised its proposed amendment to Rule 8.4(g) and circulated it for public comment on April 16, 2021.[82]

The April 2021 proposed Rule 8.4(g) was:

> A lawyer or law firm shall not:
> (g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:
> (1) unlawful discrimination, or
> (2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.
> (3) "Harassment," for the purposes of this Rule, means conduct that is:
> a. directed at an individual or specific individuals in one or more of the protected categories;
> b. severe or pervasive; and
> c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.
> (4) This Rule does not limit the ability of a lawyer or law firm to (i) accept, decline or withdraw from a representation, (ii) to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy, or

("CLE")] presentations right out of the picture. []If I give a talk about legal ethics or civil rights injunctions or workers compensation, am I engaged in 'conduct in the practice of law?'").

81. Memorandum from Scott Malouf to Author 103 (Jan. 15, 2021) (on file with author) (finding that "it is difficult to determine when online accounts or conduct are 'related to the practice of law'" and that "the language of the rule and comment are unclear regarding what online activity would be viewed as discrimination or harassment.").

82. *See generally* Memorandum from the N.Y. State Bar Ass'n Comm. on Standards of Att'y Conduct, Proposed Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct (Apr. 16, 2021) (on file with author).

> (iii) to provide advice, assistance or advocacy to clients consistent with these Rules.
> (5) "Conduct in the practice of law" includes:
> a. representing clients;
> b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;
> c. operating or managing a law firm or law practice; and
> d. participating in bar association, business, or professional activities or events in connection with the practice of law.[83]

The proposed comments were:

> COMMENT
> [5A] Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers or reaching their potential as lawyers.
> [5B] "Unlawful discrimination" refers to discrimination under federal, state and local law.
> [5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. However, severe conduct can consist of a single instance. Verbal conduct includes written as well as oral communication.
> [5D] A lawyer's conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York.
> [5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.
> [5F] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no violation of paragraph (g) may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.
> [5G] Nothing in Rule 8.4(g) is intended to narrow or limit the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from

83. *See id.* at 1-2.

> engaging in conduct, whether in or outside the practice of law, that "adversely reflects on the lawyer's fitness as a lawyer").[84]

Thus, Rule 8.4(h) may sometimes reach conduct that is not covered by Rule 8.4(g).

The Subcommittee noted that its proposal to amend Rule 8.4(g) incorporated the following:

- Eliminates the exhaustion of administrative remedies requirement;
- Provides definitions of discrimination and harassment;
- Expands the protected classes to conform to New York State anti-discrimination laws;
- Extends the rule to activities "in the practice of law"; and
- Provides examples of prohibited (and permissible) conduct.[85]

On March 19, 2021, a month before COSAC circulated its proposals for comments, the New York Unified Court System's Office of Court Administration circulated a "Request for Public Comment on the Proposal to Adopt ABA Model Rule 8.4(g) in New York's Rules of Professional Conduct," with a comment deadline of June 18, 2021.[86]

D. Comments About COSAC's April 2021 Proposal

During April and May 2021, COSAC received written comments from many entities and individuals, including NYSBA committees and sections, professors of law, legal foundations and societies, and individual practitioners.[87] Many of these individuals and entities

84. *Id.* at 2-3.

85. N.Y. State Bar Ass'n Memorandum, *supra* note 2, at 6; Memorandum from N.Y. State Bar Ass'n Comm. on Standards of Att'y Conduct 6-9 (June 4, 2021) (on file with author).

86. Comment Letter from Josh Blackman et al., to Comm. on Standards of Att'y Conduct April 16, 2021 Report Proposing Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct, *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2 [hereinafter Blackman et al., Comment Letter]. In June 2020, New York University Law Professor Stephen Gillers wrote to Chief Judge DiFiore encouraging the adoption of ABA Model Rule 8.4(g) as a substitute for New York's existing version of the rule. Letter from Stephen Gillers, Elihu Root Professor of L., N.Y. Univ., to Janet DiFiore, C.J., N.Y. Ct. App. (June 19, 2020) (on file with author) [hereinafter Gillers June 19 Letter]. In Gillers' view, the existing New York rule was defective insofar as it: (1) merely focused on discrimination in employment, (2) required exhaustion of administrative remedies as a precondition to the filing of a disciplinary complaint, and (3) prohibited only unlawful conduct, rather than conduct which was otherwise merely biased or harassing, such as sexualized or racial epithets. *Id.*

87. N.Y. State Bar Ass'n Memorandum, *supra* note 2, at 10. The following people and groups commented on COSAC's proposals: William T. Barker; Professor Alberto Bernabe (Professional Responsibility Blog); Brian Faughnan (Faughnan on Ethics blog); Professors Josh Blackman,

provided the same or similar comments to the court's March 19, 2021 request for commentary on Model Rule 8.4(g), as well as to COSAC's October 2020 request for comment.[88] The following are the key issues addressed by commentators.

1. Should Rule 8.4(g) Be Limited to "Unlawful" Discrimination (As Opposed to "Discrimination" Whether Lawful or Unlawful)?

Proponents of limiting Rule 8.4(g) to "unlawful" discrimination noted that this distinction: (1) provides clarity, (2) defers to governing legal authorities,[89] (3) mitigates against the constitutional concerns that the rule would regulate protected speech,[90] and (4) recognizes that there can be discrimination that is not unlawful.[91]

In contrast, other commentators opposed limiting actionable discrimination to what is "unlawful" and argued that an ethics rule should provide greater protection than a legal statute.[92] Different

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Eugene Volokh, and Nadine Strossen; Philip A. Byler; Christian Legal Society; Janice DiGennaro; Professors Stephen Gillers and Barbara S. Gillers; Zachary Greenberg; Richard Hamburger; William Hodes; National Legal Foundation; NYSBA Committee on Diversity and Inclusion; NYSBA Committee on Legal Aid and the President's Committee on Access to Justice (jointly); NYSBA Trial Lawyers Section; NYSBA Women in Law Section; Pacific Legal Foundation; Professor James Philips. *Id.*

88. *See supra* notes 75, 81, 87 and accompanying text.

89. Alberto Bernabe, *New York State Bar Committee Proposes New Anti-Discrimination Rule Akin to Model Rule 8.4(g), but It Is Very Different and the Best Yet*, PRO. RESP. BLOG (Apr. 18, 2021, 8:58 PM), https://bernabepr.blogspot.com/2021/04/new-york-state-bar-committee-proposes.html, *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2. ("By limiting the application of the rule to 'unlawful discrimination' the authority of the state to regulate speech is more limited, and presumably will be understood to allow only regulation of speech that is not constitutionally protected.").

90. Blackman et al., Comment Letter, *supra* note 86 (cautioning however, that "[t]he COSAC proposal only includes 'unlawful discrimination.' And that phrase 'refers to discrimination under federal, state and local law' . . . [which can] be in conflict. The most restrictive law will control. Generally, federal, state, and local discrimination laws would only govern relationships in the workplace.").

91. For example, a law office with three male lawyers may choose to hire a fourth male lawyer and should not be subject to claims of discrimination (current N.Y. Executive Law § 296 applies only to more than four lawyers). *But see* Letter from Stephen Gillers, Elihu Root Professor of L., N.Y. Univ., & Barbara S. Gillers, Adjunct Professor of L., N.Y. Univ., to Roy Simon, Chair, N.Y. State Bar Ass'n Comm. on Standards of Att'y Conduct 4 (May 27, 2021) [hereinafter Gillers & Gillers May 27 Letter], *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2 (adding the word "unlawful" to discrimination under the Rule "would tolerate discrimination outside employment or public accommodation situations, but within the practice of law, when discrimination is not unlawful") [hereinafter Gillers & Gillers May 27 Letter].

92. Memorandum from N.Y. State Bar Ass'n Women in Law Section on Proposed Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct 2 (May 28, 2021), *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2. Some at Women in Law Section

commentators noted that the limitation to "unlawful" discrimination would require disciplinary committees to reach a legal conclusion as to what discrimination is unlawful, or would in practice end up reinstating the exhaustion requirement because the disciplinary committee may choose to defer to other tribunals while the legal question is litigated.[93] Those opposed to the limitation noted that because unlawful discrimination could be dependent on local law, there would be a lack of uniformity across the state and will allow for discrimination that is not unlawful to continue in the practice of law.[94]

2. Should Rule 8.4(g)'s Scope Reach Conduct "Related to the Practice of Law," or Only Conduct "in the Practice of Law?"

Proponents of COSAC's formulation governing conduct "*in* the practice of law" (as opposed to the ABA Model Rule's broader formulation governing conduct "*related to* the practice of law") noted that COSAC's formula limited concerns about overbreadth and properly kept the rule's scope within the bar's core competency of regulating the "practice of law."[95] Proponents also noted the generally accepted idea that rules may constitutionally abridge an attorney's constitutional rights when the attorney is engaged in the practice of law, as opposed to the attorney's personal spheres outside the practice of law, and that COSAC's formulation works in parallel with those parameters.[96] Proponents argued that many complaints about harassment and discrimination occurred at bar association events, office dinners and professional meetings outside of the office, and thus, should be regulated.[97]

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suggested "includ[ing] a standard, but a lower standard than "unlawful" for finding discriminatory conduct in violation of the ethics rule." *Id.*

93. Gillers & Gillers May 27 Letter, *supra* note 91, at 3.

94. *Id.* at 4 (noting "the word ['unlawful'] may require a disciplinary committee to decide which jurisdiction's laws apply"; "your discussion does not take account of when discrimination against clients or potential clients based on the listed characteristics would not be "unlawful"; "the reference to 'local law' in [C]omment [5B] can result in different ethics rules for lawyers in different parts of the state. If, for example, New York City law forbids certain discrimination that federal and state law and local law elsewhere in the state does not, New York lawyers outside the city will be free to discriminate where lawyers in the city cannot"; and the proposal "would tolerate discrimination outside employment or public accommodation situations, but within the practice of law, when discrimination is not unlawful such as with clients, coworkers or court employees").

95. Bernabe, *supra* note 89 (applauding COSAC's use of "conduct in the practice of law" rather than the Model Rule's "conduct related to the practice of law" finding that this "simple change addresses the possible issue of overbreadth in the Model Rule").

96. Gillers & Gillers May 27 Letter, *supra* note 91, at 11.

97. *Id.*

Those opposed to COSAC's language (as well as comments opposing the ABA Model Rule) did not believe that the ethics rule should apply to circumstances outside the traditional practice of law, such as social events, Continuing Legal Education ("CLE") presentations, bar association dinners, etc.[98] Commentators raised constitutional concerns that lawyers would be subject to discipline based on actions in circumstances with little connection to their actual practice of law.[99] Many were opposed to the adoption of the language of "conduct in the practice of law," opining that it will restrain lawyers from presenting unpopular positions at bar association and other law-related events and because of its similarity to the ABA Model Rule pertaining to conduct that is too large in scope.[100]

3. What Kinds of "Harassment" Should Be Prohibited Under Rule 8.4(g)?

Comments in support of COSAC's definition of harassment as conduct that is "severe or pervasive" and directed at specific individual(s) in protected categories noted that this formulation bolstered

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98. Professors Josh Blackman, Eugene Volokh, and Nadine Strossen wrote:

> COSAC['s] proposal also extends to all 'events in connection with the practice of law.' This broad category is broad enough to embrace 'social activities.' With these changes, the New York Bar would expand the range of its jurisdiction to social functions. Presentations at a CLE debate would be covered by this rule. Private table conversations at a bar dinner would be covered by the rule. These contexts have little connection to the actual practice of law but could give rise to discipline.

Blackman et al., Comment Letter, *supra* note 86, at 2.

99. N.Y. State Bar Ass'n Memorandum, *supra* note 2, at A-4, A-5.

100. Blackman et al., Comment Letter, *supra* note 86, at 2-3; *see* Letter from Pac. Legal Found. to N.Y. State Bar Ass'n Comm. on Standards of Att'y Conduct 3 (May 28, 2021), *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2 (concluding that the scope of the rule is too large as it "will apply to CLE presentations, academic symposia, and even to conversations at a local bar dinner, which will stifle conversations about significant legal topics of controversy"). However, the Pacific Legal Foundation approves of the language "that the rule places no limits on a lawyer's ability [to] 'express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy.'" *Id.*; *see* Memorandum from Christian Legal Soc'y to N.Y. State Bar Ass'n Comm. on Standards of Att'y Conduct A-4, 5, *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2 (explaining that COSAC's language of "conduct in the practice of law" is "nearly identical" in meaning to the ABA Model language of "conduct related to the practice of law" and they pertain to the same too-large-in-scope conduct). The Christian Legal Society also argued that "[a] broader rule is unnecessary because current New York Rules of Professional Conduct 8.4(d) and 8.4(h), respectively, provide for discipline if a lawyer or law firm 'engage[s] in conduct that is prejudicial to the administration of justice' or 'engage[s] in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.'" Memorandum from Christian Legal Soc'y to N.Y. State Bar Ass'n Comm. on Standards of Att'y Conduct, A-4, 5, *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2; Blackman et al., Comment Letter, *supra* note 86, at 2 (noting that the phrase "conduct in the practice of law" is too large in scope because while attorney conduct can be regulated when the attorney is practicing law, if the regulation strays beyond that, "it begins to intrude on an attorney's personal spheres").

the argument for the rule's constitutionality; it avoids an interpretation that it can be used to regulate protected, but offensive speech such as jokes found to be offensive by others.[101]

However, other commentators opposed the "severe or pervasive" requirement as too limiting. These comments expressed concern that a "severe or pervasive" standard would require complainants to meet a Title VII standard for abusive workplace environments and would not address isolated incidents that, although severe, may not recur (for example, misconduct during a deposition).[102] These commentators also noted that because Rule 8.4(g) is more specific than Rule 8.4(h), COSAC's proposals would result in a more restricted scope for the application of Rule 8.4(h), as well.[103] In addition, the "severe or pervasive" standard was recently removed from New York State Human Rights Law and is not a part of the definition of harassment under New York City Human Rights Law.[104] Thus, the commentator noted that the potential substitute standard could be the following from the current version of the New York Executive Law § 296, conduct that "rise[s] above the level of what a reasonable victim of discrimination with the same protected characteristic or characteristics would consider petty slights or trivial inconveniences."[105]

Other commentators opposed defining "harassment" to reach beyond developed federal, state, and local statutory and decisional law, especially considering the plaintiff-friendly nature of New York State and City anti-discrimination laws.[106]

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101. Bernabe, *supra* note 89 ("By limiting the notion of 'verbal conduct' to speech directed at specific individuals, the proposal avoids the interpretation that it can be used to regulate protected speech that is offensive but constitutionally protected."); Posting of William Hodes, to aprl@listserv.aprl.net (Apr. 28, 2021, 7:54 PM), *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2 ("Another big change is the clarification that verbal attacks must be aimed at specific individuals in order to be disciplinable. That will remove *most* of the chilling effect of the most 'out there' claims of being 'unsafe' and the like. And I think there is a good chance that the ABA will see the wisdom of making *that* change, at least[.]"); Blackman et al., Comment Letter, *supra* note 86, at 5 ("First, the speech must be 'directed at an individual or specific individuals in one or more of the protected categories.' We think this element would obviate some of our concerns. Merely speaking about a contentious topic, in the abstract, would not give rise to liability, because it would not be 'directed at an individual.' The second element obviates other concerns. Off-hand remarks at a bar function would likely not give rise to liability. The speech must be 'severe or pervasive.'").

102. Blackman et al., Comment Letter, *supra* note 86, at 5; Gillers June 19 Letter, *supra* note 86, at 2.

103. Gillers June 19 Letter, *supra* note 86, at 2.

104. Memorandum from N.Y. State Bar Ass'n Women L. Section to N.Y. State Bar Ass'n Comm. on Standards of Att'y Conduct 2 (May 8, 2021), *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2.

105. *Id.* (quoting N.Y. EXEC. LAW § 296(1)(h) (McKinney 2019)).

106. E-mail from Janice DiGennaro, Partner-Gen. Couns., Rivkin Radler, to Roy D. Simon, Chair, N.Y. State Bar Ass'n Comm. on Standards Att'y Conduct (May 18, 2021 at 8:19 PM),

Various commentators opposed COSAC's proposed language that harassment includes "derogatory or demeaning" or "degrading, repulsive, abusive and disdainful" conduct—on the grounds that this language constitutes unconstitutional "viewpoint discrimination."[107] One commentator questioned why the actionable conduct in Rule 8.4(g)(3)(c)(ii) was framed as derogatory or demeaning "verbal conduct," given that "verbal conduct" is defined in Comment [5C] to include both oral and written communication.[108]

Other commentators argued that implementing COSAC's proposed Rule 8.4(g) would chill attorney free speech.[109] These commentators noted that, even if a grievance against a lawyer has a low likelihood of success or is ultimately unsuccessful, the rule would still chill speech by failing to protect a lawyer from an investigation and from the expense of defending his or her protected speech.[110] One commentator raised due process concerns about subjecting a lawyer to professional discipline for conduct that is not actionable civilly.[111]

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reprinted in N.Y. State Bar Ass'n Memorandum, *supra* note 2 ("I do not believe that we should be amending the rule to address harassment claims differently than a developed body of federal, state and city statutory and decisional law has already aggressively addressed such claims.").

107. Comment Letter from Christian Legal Soc'y, to N.Y. State Bar Ass'n Comm. on Standards of Att'y Conduct April 16, 2021 Report Proposing Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct 2-4, *reprinted in* N.Y. State Bar Ass'n Memorandum *supra* note 2; Memorandum from N.Y. State Bar Ass'n Comm. on Standards Att'y Conduct, to Eileen Millett, Counsel, Off. Ct. Admin. 23 (June 4, 2021) (on file with author); Blackman et al., Comment Letter, *supra* note 86 ("[T]he third element [of harassment] suffers from the same problem as the ABA Model Rule, the Administrative Board proposal, as well as the unconstitutional Pennsylvania rule: it imposes viewpoint discrimination against 'derogatory or demeaning verbal conduct.'").

108. *See* E-Mail from Richard Hamburger, Hamburger, Maxson, Yaffe & Martingale LLP, to N.Y. State Bar Ass'n Comm. on Standards Att'y Conduct April 16, 2021 Report Proposing Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct, *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2.

109. Comment Letter from Pac. Legal Found., to N.Y. State Bar Ass'n Comm. on Standards Att'y Conduct April 16, 2021 Report Proposing Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct 4, *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2.

110. *See* Comment Letter from Christian Legal Soc'y, to Eileen Millett, Counsel, Off. Ct. Admin. 19 (May 18, 2021) (on file with author).

111. E-mail from Janice DiGennaro, Partner-Gen. Couns., Rivkin Radler, to Roy D. Simon, Chair, N.Y. State Bar Ass'n Comm. on Standards of Att'y Conduct, *supra* note 106 ("The due process implications are quite extensive in my view relative to making conduct which is not actionable civilly an act of misconduct for which discipline can be imposed.").

4. Other Comments

Various commentators expressed support for COSAC's decision not to add "socioeconomic status" as a protected class.[112] COSAC also received comments both in favor of, and opposed to, adding pregnancy and gender expression as protected categories.[113] One commentator recommended that "color" as a protected class be expanded to "skin color" for the sake of clarity.[114]

Most commentators supported the elimination of the requirement to exhaust administrative remedies,[115] but there was some sentiment to retain it.[116]

Concerns were raised about the inconsistent application of the rule to attorneys practicing in different parts of New York—that is, because applicable local laws differ from place to place, what is misconduct under the rule for a lawyer in New York City might not be misconduct for a lawyer practicing upstate.[117] Another commentator stated that the

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112. Blackman et al., Comment Letter, *supra* note 86 ("There is no basis for the rules to categorically ban discrimination based on 'socioeconomic status'—a term not defined by the rule, but which is commonly used to refer to matters such as income, wealth, education, or form of employment.").

113. Comment Letter from Philip A. Byler, Senior Litig. Couns., Nesenoff & Miltenberg LLP, on N.Y. State Bar Ass'n Comm. on Standards Att'y Conduct Proposed New York Rule of Professional Conduct 8.4(g), *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2 (taking issue with expanding the protected classes to include gender identity and gender expression out of concern that doing so may contradict some attorneys' religious or moral beliefs and subject them to discipline for acting based on those beliefs); Bernabe, *supra* note 89. ("[T]he proposed rule adds pregnancy, gender expression, status as a member of the military, and status as a military veteran, none of which I have a problem with . . . .").

114. Bernabe, *supra* note 89.

115. N.Y. Bar Ass'n Comm. On Pro. Ethics, Formal Op. 2020-4, at 5-6 (2020) (responding to COSAC's October 2020 memo explaining that a majority of committee members who participated voted to eliminate the exhaustion requirement).

116. Comment Letter from Philip A. Byler, Comments on Comm. on Standards of Att'y Conduct Proposed N.Y. Rule of Pro. Conduct 8.4(g) 2-5, *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2 (fearing having no exhaustion requirement because using disciplinary fora would purportedly have negative due process ramifications for attorneys as they "have limited rights to discovery[,]" can't take depositions, "disciplinary hearings are conducted in private, and there is no jury trial").

117. E-mail from Stephen Gillers, Elihu Root Professor of L., N.Y. Univ. Sch. of L. and Barbara S. Gillers, Adjunct Professor of L., N.Y. Univ. Sch. of L., to Roy Simon, Chair, N.Y. Bar Ass'n Comm. on Standards of Attorney Conduct 4 (May 27, 2021), *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2 (noting that with regard to the term unlawful discrimination, the reference to local law in Comment [5B] can result in different ethics rules for lawyers in different parts of the state. If, for example, New York City law forbids certain discrimination that federal and state law and local law elsewhere in the state does not, New York lawyers outside the city will be free to discriminate where lawyers in the city cannot.); E-mail from Pac. Legal Foundation to Roy Simon, Chair, N.Y. Bar Ass'n Comm. on Standards of Att'y Conduct 4 (May 28, 2021), *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2 (citing Williams v. New York City Hous. Auth., 872 N.Y.S.2d 27, 40-41 (2009)) (noting that with regard to harassment, New York City

proposed amendments to New York's current version of Rule 8.4(g) were vague and not needed.[118]

Other commentators opined that using a standard that the lawyer "knowingly" harassed or discriminated—as opposed to using COSAC's (and the ABA's) standard of "knows or reasonably should know"—would mitigate some concerns about the constitutionality of the rule.[119]

One commentator sought confirmation that attorneys who, in the course of their practice, may need to use materials that are harassing or discriminatory because such materials are evidence in a case (for example, in depositions, negotiations, court filings, or otherwise, especially in employment and family law cases) would not be engaging in "harassment" actionable under COSAC's proposed amendments.[120] The same commentator suggested that this protection may be available under the following language in proposed Rule 8.4(g)(4): "This Rule does not limit the ability of a lawyer or law firm . . . (iii) to provide advice, assistance or advocacy to clients consistent with these Rules."[121]

IV. COSAC'S RESPONSE TO PUBLIC COMMENTS

COSAC made several changes to its proposed rule and comments in response to the public comments and after consultation with other bar associations.

Human Rights Law ("NYCHRL") defines harassment in a fashion that is far broader and more burdensome on speech than federal anti-discrimination standards. Under federal law, an employer or public accommodation can only be liable where there is discriminatory conduct or severe and pervasive harassment that creates a hostile work environment. In contrast, under the NYCHRL, anything that is more than a petty slight or trivial inconvenience can result in liability if it is intended to demean, humiliate, or offend a person. And the burden is on the employer or public accommodation to prove that its actions were just a petty slight or trivial inconvenience, which may unduly burden and chill expressive activity.); *see also* E-mail from Christian Legal Soc'y to Roy Simon, Chair, N.Y. Bar Ass'n Comm. on Standards of Att'y Conduct (May 25, 2021), *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2 ("COSAC's Proposed Rule's application, by its very terms, will vary depending on the locality in which a lawyer practices.").

118. E-mail from Gina Bartosiewicz, Sections and Meeting Liaison, N.Y. State Bar Ass'n, to Thomas Richards (May 5, 2021 9:19 AM), *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2.

119. Blackman et al., Comment Letter, *supra* note 86.

120. Memorandum from N.Y. State Bar Ass'n Women in Law Section on Proposed Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct to N.Y. State Bar Ass'n Committee on Standards of Attorney Conduct at 3 (May 28, 2021), *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2.

121. *Id.* at 13, A-32.

A. Prohibit Improper Behavior "in the Practice of Law"

COSAC's considered view was that the offending conduct should be prohibited not only while a lawyer is working in a law office, but when a lawyer is attending CLE programs or law firm or bar association events.[122] Such conduct should be prohibited in interacting with court personnel, witnesses, and others.[123] COSAC noted that the ABA study and other cited research indicates that much of the misbehavior occurred in non-litigation matters and in locations other than the law office or courtroom.[124]

COSAC recognized that the potential challenge if it had recommended the ABA's "related to the practice of law" language.[125] Consequently, it attempted to draft language that narrowed the scope of the ABA Model Rule yet captured the intent to prohibit conduct beyond the law office or courtroom.[126]

B. Expand the Protected Classes to Conform to New York State Anti-Discrimination Laws

COSAC's proposal targets discrimination and harassment based on a protected status.[127] It attempted to mirror federal and state anti-discrimination laws as much as possible because those laws provide a baseline to evaluate conduct.[128] It considered the protected categories and determined that the protected classes referenced in New York's current version of Rule 8.4(g) should be expanded to include "ethnicity," "gender expression," "gender identity," "status as a member of the military" and "status as a military veteran."[129] These expanded categories derive from New York case law.[130]

However, COSAC did *not* recommend adding "socioeconomic status" to the protected categories, as the ABA Model Rule does.[131] COSAC believed it best to have the protected categories mirror the protected classes identified in federal and state anti-discrimination laws.

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122. N.Y. State Bar Ass'n Memorandum, *supra* note 2, at 6-7.
123. *Id.* at 7.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

C. Prohibit Harassment (Lawful and Unlawful) and Define "Harassment"

Perhaps the most contentious and difficult issue was the extent to which harassment should be included within the rule's prohibition. The current version of New York Rule 8.4(g) does not cover harassment at all.[132] COSAC determined it should be defined as: (a) conduct directed at an individual or specific individuals in a protected category, (b) that is severe *or* pervasive, and (c) is either unwelcome physical conduct or derogatory or demeaning verbal conduct.[133] COSAC determined that the intent of the rule should be to prohibit conduct directed at those in the protected categories, and that the rule should be limited to conduct that is severe or pervasive.[134] "Unwelcome physical conduct" is clearly conduct but "derogatory or demeaning" conduct impinges upon speech and first amendment concerns. COSAC considered these significant concerns and determined that the prohibited conduct should be narrowly confined to "severe or pervasive."[135]

A corollary issue was whether there should be an objective, subjective or combined standard for evaluation of the conduct. Some believed that there should be no *mens rea* standard and that the conduct should subject a lawyer to sanction regardless of knowledge or intent. Others believed that the viewpoint from other victims of discrimination should be determinative. COSAC opted for a reasonable person standard: what the lawyer "knew or should have known."

D. Eliminate the Requirement to Exhaust Administrative Remedies

COSAC proposed to eliminate the New York requirement that "[w]here there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance."[136] COSAC recognized the cost and difficulty in pursuing and exhausting administrative remedies pertinent to a discrimination complaint and believed that requirement could prevent or deter complainants from filing meritorious grievances.[137] In

132. N.Y. RULES OF PRO. CONDUCT r. 8.4(g) (2009).

133. N.Y. State Bar Ass'n Memorandum, *supra* note 2, at 2.

134. *Id.* at 7.

135. Blackman et al., Comment Letter, *supra* note 86, at 5.

136. *See* Memorandum from the N.Y. State Bar Ass'n Comm. on Standards Att'y Conduct, COSAC's Redlined Proposal to Amend Current New York Rule 8.4(g) and Related Comments, *reprinted in* N.Y. State Bar Ass'n Memorandum, *supra* note 2.

137. N.Y. State Bar Ass'n Memorandum, *supra* note 2, at 8.

addition, the exhaustion requirement is a creature of the appellate divisions—it was never recommended by COSAC in 2008 (or before that). Nevertheless, COSAC also believes that if an administrative agency (such as the Equal Employment Opportunity Commission or the New York State Division of Human Rights) finds that a lawyer has engaged in unlawful discrimination, that should continue to be prima facie evidence of a violation of Rule 8.4(g), as under New York's current rule; this is reflected in a comment.[138]

COSAC's proposed Rule 8.4(g) and comments sent to the Administrative Board of the Courts on June 4, 2021, provided:

> A lawyer or law firm shall not:
> (g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:
> (1) unlawful discrimination, or
> (2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.
> (3) "Harassment," for purposes of this Rule, means conduct that is:
> a. directed at an individual or specific individuals in one or more of the protected categories;
> b. severe or pervasive; and
> c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.
> (4) This Rule does not limit the ability of a lawyer or law firm to, consistent with these Rules:
> a. accept, decline, or withdraw from a representation;
> b. express views on matters of public concern in the context of teaching, public speeches, continuing legal education programs, or other forms of public advocacy or education, or in any other form of written or oral speech protected by the United States Constitution or the New York State Constitution; or
> c. provide advice, assistance, or advocacy to clients.
> (5) "Conduct in the practice of law" includes:
> a. representing clients;
> b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;
> c. operating or managing a law firm or law practice; and

138. *Id.*

> d. participating in bar association, business, or professional activities or events in connection with the practice of law.
>
> COMMENT
> [5A] Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers or reaching their potential as lawyers.
> [5B] "Unlawful discrimination" refers to discrimination under federal, state and local law.
> [5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. However, severe conduct can consist of a single instance. Verbal conduct includes written as well as oral communication.
> [5D] A lawyer's conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York. This Rule is not intended to discourage and does not prohibit free expression, no matter how popular or unpopular the speaker's views.
> [5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.
> [5F] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no violation of paragraph (g) may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.
> [5G] Nothing in Rule 8.4(g) is intended to narrow or limit the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that "adversely reflects on the lawyer's fitness as a lawyer"). Thus, Rule 8.4(h) may sometimes reach conduct that is not covered by Rule 8.4(g).[139]

139. *Id.* at 1-3. COSAC's report summarized the changes in the comments, as indicated below. Comments are adopted by the New York House of Delegates and are not part of the adoption of Rules of Professional Conduct by the courts. The changes are as follows:

COSAC presented its proposed rule to the NYSBA House of Delegates in June 2021.[140] The NYSBA approved COSAC's modifications of Rule 8.4(g) and sent its report to the Administrative Board of the Court of Appeals.[141]

The report emphasized the importance of the legal profession aspiring to be "more diverse, more equitable, and more inclusive of its own members."[142] It noted an ABA article that summarized the 2020 ABA Model Diversity Survey as follows: "[m]inorities are getting hired as associates, but law firm leadership is mostly white and male because of a diversity 'bottleneck' and higher rates of minority attrition."[143]

> Replace existing Comment [5A], which merely repeats the text of the current rule, by adding language stating that discrimination and harassment in the practice of law undermine confidence in the legal profession and the legal system, and discrimination and harassment also discourage or prevent capable people from becoming or remaining lawyers or reaching their potential as lawyers.
>
> Add a new Comment [5B], which defines "unlawful discrimination" to encompass discrimination under federal, state, and local law.
>
> Add a new Comment [5C], which clarifies that (i) petty slights, minor indignities and discourteous conduct without more do not constitute harassment, (ii) "severe" conduct can consist of a single instance, and (iii) verbal conduct includes written as well as oral communication. [Deleted the sentence that "Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct."]
>
> Add a new Comment [5D] which provides guidance regarding the scope of the rule and adds that a lawyer's conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment to the United States Constitution or under Article I, Section 8, of the New York State Constitution. This language is intended to clarify that the Rule is not meant to censor or curtail free speech, no matter how popular or unpopular the speaker's views.
>
> Add a new Comment [5E] to clarify that Rule 8.4(g) is not intended to prohibit or discourage lawyers or law firms from engaging in conduct to promote diversity, equity, and inclusion in the legal profession. The [c]omment also describe[s] certain examples of permissible conduct.
>
> Add a new Comment [5F], drawing upon language from ABA Model Rule 8.4(g), stating that a judge's finding that peremptory challenges were exercised on a discriminatory basis or on another basis that is permitted by law does not, standing alone, establish a violation of Rule 8.4(g).
>
> Add a new Comment [5G] clarifying that Rule 8.4(g) as amended is not intended to narrow or limit the scope or applicability of Rule 8.4(h), which has been invoked to address instances of discrimination or harassment that occur separate from "conduct in the practice of law."

Id. at 9.

140. N.Y. State Bar Ass'n Memorandum, *supra* note 2, at 1.

141. *Id.*

142. *Id.* at 5.

143. *See* Debra Cassens Weiss, *Diversity 'Bottleneck' and Minority Attrition Keep Firm Leadership Ranks White and Male, New ABA Survey Says*, A.B.A. J. (Feb. 17, 2021, 12:51 PM), https://www.abajournal.com/news/article/diversity-bottleneck-and-minority-attrition-keep-law-firm-leadership-ranks-white-and-male-aba-survey-says; ABA COMM'N ON RACIAL & ETHNIC DIVERSITY PRO., 2020 MODEL DIVERSITY SURVEY 10 (2021), https://bit.ly/3ggU9Fe.

It also cited a national survey of women lawyers in which 293 out of 578 respondents reported that they had experienced discrimination, harassment, or sexual harassment (based on membership in a protected class), in conduct related to the practice of law.[144] In addition, 252 survey respondents reported *witnessing* discrimination, harassment, or sexual harassment, based on membership in a protected class, in conduct related to the practice of law.[145] This women lawyers survey was cited by the Connecticut Bar Association in its consideration of amendments to Rule 8.4(g).[146]

The COSAC Report also noted that in November 2020, the New York State Judicial Committee on Women in the Courts published an extensive report, entitled "Gender Survey 2020" that included questions about sexual harassment.[147] Responses from more than 5,300 attorneys showed (among other things) that male respondents believed harassment in law practice occurred less frequently than women believed.[148]

In January 2022, COSAC met to finalize and approve its presentation to the court. It is expected that the Administrative Board of the Courts will make its recommendation regarding adoption of new provisions for Rule 8.4(g) in 2022.

144. N.Y. State Bar Ass'n Memorandum, *supra* note 2, at 5.

145. *Still Broken: Sexual Harassment and Misconduct in the Legal Profession*, WOMEN LAWYERS ON GUARD, https://womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf (last visited Apr. 23, 2022); *see also* Cecil J. Thomas, *Rules Committee Agenda Item 2020-12, Proposal to Amend Rule 8.4 of the Connecticut Rules of Professional Conduct to Define Discrimination, Harassment and Sexual Harassment in Conduct Related to the Practice of Law as Professional Misconduct*, CONN. BAR ASS'N 6 (Dec. 4, 2020), https://www.ctbar.org/docs/default-source/rules-committee/january-11-2021/2020-012-aaa---additional-materials-from-cba.pdf?sfvrsn=8ca8a301_2.

146. Thomas, *supra* note 145, at 6-8.

147. *Gender Survey 2020*, NYCOURTS.GOV, https://nycourts.gov/LegacyPDFS/ip/womeninthecourts/Gender-Survey-2020.pdf (last visited Apr. 23, 2022).

148. *Id.* For more information about "Gender Survey 2020," see Debra Cassens Weiss, *Survey Finds Sexual Harassment Still a Problem in New York Courts, and Lawyers are Worst Offenders*, A.B.A. J. (Nov. 25, 2020), https://www.abajournal.com/news/article/survey-finds-sexual-harassment-still-a-problem-in-new-york-courts-and-lawyers-are-worst-offenders.