

ADOPTED AS REVISED

RESOLUTION

1 RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA
2 Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

3
4 Rule 8.4: Misconduct

5
6 It is professional misconduct for a lawyer to:

7
8 (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or
9 induce another to do so, or do so through the acts of another;

10
11 (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness
12 or fitness as a lawyer in other respects;

13
14 (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

15
16 (d) engage in conduct that is prejudicial to the administration of justice;

17
18 (e) state or imply an ability to influence improperly a government agency or official or to
19 achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

20
21 (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable
22 rules of judicial conduct or other law; or

23
24 (g) ENGAGE IN CONDUCT THAT THE LAWYER KNOWS OR REASONABLY
25 SHOULD KNOW IS HARASSMENT OR DISCRIMINATION ~~harass or discriminate~~ on the
26 basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender
27 identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule
28 PARAGRAPH does not limit the ability of a lawyer to accept, decline, or withdraw from a
29 representation in accordance with Rule 1.16. THIS PARAGRAPH DOES NOT PRECLUDE
30 LEGITIMATE ADVICE OR ADVOCACY CONSISTENT WITH THESE RULES.

DELETIONS STRUCK THROUGH; ADDITIONS UNDERLINED

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31 Comment

32
33 ...

34
35 [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence
36 in the legal profession and the legal system. Such discrimination includes harmful verbal or
37 physical conduct that manifests bias or prejudice towards others because of their membership or
38 perceived membership in one or more of the groups listed in paragraph (g). Harassment includes
39 sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who
40 is, or is perceived to be, a member of one of the groups. Sexual harassment includes unwelcome
41 sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a
42 sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law
43 may guide application of paragraph (g).

44
45 [4] Conduct related to the practice of law includes representing clients; interacting with witnesses,
46 coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or
47 managing a law firm or law practice; and participating in bar association, business or social
48 activities in connection with the practice of law. Paragraph (g) does not prohibit conduct
49 undertaken to promote diversity. **LAWYERS MAY ENGAGE IN CONDUCT UNDERTAKEN**
50 **TO PROMOTE DIVERSITY AND INCLUSION WITHOUT VIOLATING THIS RULE BY,**
51 **FOR EXAMPLE, IMPLEMENTING INITIATIVES AIMED AT RECRUITING, HIRING,**
52 **RETAINING AND ADVANCING DIVERSE EMPLOYEES OR SPONSORING DIVERSE**
53 **LAW STUDENT ORGANIZATIONS.**

54
55 [5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or
56 legal issues or arguments in a representation. **A TRIAL JUDGE'S FINDING THAT**
57 **PEREMPTORY CHALLENGES WERE EXERCISED ON A DISCRIMINATORY BASIS**
58 **DOES NOT ALONE ESTABLISH A VIOLATION OF PARAGRAPH (G).** A lawyer does not
59 violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting
60 the lawyer's practice to members of underserved populations in accordance with these Rules and
61 other law. A lawyer may charge and collect reasonable fees and expenses for a representation.
62 Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to
63 provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to
64 avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's
65 representation of a client does not constitute an endorsement by the lawyer of the client's views or
66 activities. See Rule 1.2(b).

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68 ...

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON DISABILITY RIGHTS
DIVERSITY & INCLUSION 360 COMMISSION
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COMMISSION ON WOMEN IN THE PROFESSION

REPORT TO THE HOUSE OF DELEGATES

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2 Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

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6 It is professional misconduct for a lawyer to:

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

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

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

15
16 (d) engage in conduct that is prejudicial to the administration of justice;

17
18 (e) state or imply an ability to influence improperly a government agency or official or to
19 achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

20
21 (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable
22 rules of judicial conduct or other law; or

23
24 (g) engage in conduct that the lawyer knows or reasonably should know is harassment or
25 discrimination ~~harass or discriminate~~ on the basis of race, sex, religion, national origin, ethnicity,
26 disability, age, sexual orientation, gender identity, marital status or socioeconomic status in
27 conduct related to the practice of law. This ~~Rule paragraph~~ does not limit the ability of a lawyer
28 to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph
29 does not preclude legitimate advice or advocacy consistent with these Rules.

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30 Comment

31

32 [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of
33 Professional Conduct, knowingly assist or induce another to do so or do so through the acts of
34 another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a),
35 however, does not prohibit a lawyer from advising a client concerning action the client is legally
36 entitled to take.

37

38 [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses
39 involving fraud and the offense of willful failure to file an income tax return. However, some kinds
40 of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses
41 involving "moral turpitude." That concept can be construed to include offenses concerning some
42 matters of personal morality, such as adultery and comparable offenses, that have no specific
43 connection to fitness for the practice of law. Although a lawyer is personally answerable to the
44 entire criminal law, a lawyer should be professionally answerable only for offenses that indicate
45 lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty,
46 breach of trust, or serious interference with the administration of justice are in that category. A
47 pattern of repeated offenses, even ones of minor significance when considered separately, can
48 indicate indifference to legal obligation.

49

50 ~~[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct,~~
51 ~~bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation~~
52 ~~or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the~~
53 ~~administration of justice. Legitimate advocacy respecting the foregoing factors does not violate~~
54 ~~paragraph (d). A trial judge's finding that peremptory challenges were exercised on a~~
55 ~~discriminatory basis does not alone establish a violation of this rule.~~

56

57 [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence
58 in the legal profession and the legal system. Such discrimination includes harmful verbal or
59 physical conduct that manifests bias or prejudice towards others ~~because of their membership or~~
60 ~~perceived membership in one or more of the groups listed in paragraph (g).~~ Harassment includes
61 sexual harassment and derogatory or demeaning verbal or physical conduct ~~towards a person who~~
62 ~~is, or is perceived to be, a member of one of the groups.~~ Sexual harassment includes unwelcome
63 sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a
64 sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law
65 may guide application of paragraph (g).

66

67 [4] Conduct related to the practice of law includes representing clients; interacting with witnesses,
68 coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or
69 managing a law firm or law practice; and participating in bar association, business or social
70 activities in connection with the practice of law. ~~Paragraph (g) does not prohibit conduct~~
71 ~~undertaken to promote diversity.~~ Lawyers may engage in conduct undertaken to promote diversity
72 and inclusion without violating this Rule by, for example, implementing initiatives aimed at

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

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73 [recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student](#)
74 [organizations.](#)

75
76 ~~[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or~~
77 ~~legal issues or arguments in a representation. A trial judge's finding that peremptory challenges~~
78 ~~were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A~~
79 ~~lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's~~
80 ~~practice or by limiting the lawyer's practice to members of underserved populations in~~
81 ~~accordance with these Rules and other law. A lawyer may charge and collect reasonable fees~~
82 ~~and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their~~
83 ~~professional obligations under Rule 6.1 to provide legal services to those who are unable to pay,~~
84 ~~and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good~~
85 ~~cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an~~
86 ~~endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).~~

87
88 [4] [6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief
89 that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to
90 the validity, scope, meaning or application of the law apply to challenges of legal regulation of the
91 practice of law.

92
93 [5] [7] Lawyers holding public office assume legal responsibilities going beyond those of other
94 citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role
95 of lawyers. The same is true of abuse of positions of private trust such as trustee, executor,
96 administrator, guardian, agent and officer, director or manager of a corporation or other
97 organization.

REPORT

“Lawyers have a unique position in society as professionals responsible for making our society better. Our rules of professional conduct require more than mere compliance with the law. Because of our unique position as licensed professionals and the power that it brings, we are the standard by which all should aspire. Discrimination and harassment . . . is, and unfortunately continues to be, a problem in our profession and in society. Existing steps have not been enough to end such discrimination and harassment.”

ABA President Paulette Brown, February 7, 2016 public hearing on amendments to ABA Model Rule 8.4, San Diego, California.

I. Introduction and Background

The American Bar Association has long recognized its responsibility to represent the legal profession and promote the public’s interest in equal justice for all. Since 1983, when the Model Rules of Professional Conduct (“Model Rules”) were first adopted by the Association, they have been an invaluable tool through which the Association has met these dual responsibilities and led the way toward a more just, diverse and fair legal system. Lawyers, judges, law students and the public across the country and around the world look to the ABA for this leadership.

Since 1983, the Association has also spearheaded other efforts to promote diversity and fairness. In 2008 ABA President Bill Neukum led the Association to reformulate its objectives into four major “Goals” that were adopted by the House of Delegates.¹ Goal III is entitled, “Eliminate Bias and Enhance Diversity.” It includes the following two objectives:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2. Eliminate bias in the legal profession and the justice system.

A year before the adoption of Goal III the Association had already taken steps to address the second Goal III objective. In 2007 the House of Delegates adopted revisions to the Model Code of Judicial Conduct to include Rule 2.3, entitled, “Bias, Prejudice and Harassment.” This rule prohibits judges from speaking or behaving in a way that manifests, “bias or prejudice,” and from engaging in harassment, “based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.” It also calls upon judges to require lawyers to refrain from these activities in proceedings before the court.² This current proposal now before the House will further implement the Association’s Goal III objectives by placing a similar provision into the Model Rules for lawyers.

¹ ABA MISSION AND GOALS, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited May 9, 2016).

² Rule 2.3(C) of the ABA Model Code of Judicial Conduct reads: “A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.”

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When the Model Rules were first adopted in 1983 they did not include any mention of or reference to bias, prejudice, harassment or discrimination. An effort was made in 1994 to correct this omission; the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility (SCEPR³) each proposed language to add a new paragraph (g) to Rule 8.4, “Professional Misconduct,” to specifically identify bias and prejudice as professional misconduct. However, in the face of opposition these proposals were withdrawn before being voted on in the House. But many members of the Association realized that something needed to be done to address this omission from the Model Rules. Thus, four years later, in February 1998, the Criminal Justice Section and SCEPR developed separate proposals to add a new antidiscrimination provision into the Model Rules. These proposals were then combined into Comment [3] to Model Rule 8.4, which was adopted by the House at the Association’s Annual Meeting in August 1998. This Comment [3] is discussed in more detail below. Hereinafter this Report refers to current Comment [3] to 8.4 as “the current provision.”

It is important to acknowledge that the current provision was a necessary and significant first step to address the issues of bias, prejudice, discrimination and harassment in the Model Rules. But it should not be the last step for the following reasons. It was adopted before the Association adopted Goal III as Association policy and does not fully implement the Association’s Goal III objectives. It was also adopted before the establishment of the Commission on Sexual Orientation and Gender Identity, one of the co-sponsors of this Resolution, and the record does not disclose the participation of any of the other Goal III Commissions—the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, and the Commission on Disability Rights—that are the catalysts for these current amendments to the Model Rules.

Second, Comments are not Rules; they have no authority as such. Authority is found only in the language of the Rules. “The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”³

Third, even if the text of the current provision were in a Rule it would be severely limited in scope: It applies (i) only to conduct by a lawyer that occurs in the course of representing a client, and (ii) *only* if such conduct is also determined to be “prejudicial to the administration of justice.” As the Association’s Goal III Commissions noted in their May 2014 letter to SCEPR:

It [the current provision] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. This limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms). The comment also does not address harassment at all, even though the judicial rules do so.

In addition, despite the fact that Comments are not Rules, a false perception has developed over the years that the current provision is equivalent to a Rule. In fact, this is the only example in the Model Rules where a Comment is purported to “solve” an ethical issue that otherwise would require resolution through a Rule. Now—thirty-three years after the Model Rules were first

³ MODEL RULES OF PROF’L CONDUCT, Preamble & Scope [21] (2016).

adopted and eighteen years after the first step was taken to address this issue—it is time to address this concern in the black letter of the Rules themselves. In the words of ABA President Paulette Brown: “The fact is that skin color, gender, age, sexual orientation, various forms of ability and religion still have a huge effect on how people are treated.”⁴ As the Recommendation and Report of the Oregon New Lawyers to the Assembly of the Young Lawyers Division at the Annual Meeting 2015 stated: “The current Model Rules of Professional Conduct (the “Model Rules”), however, do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation.”⁵ The Association should now correct this omission. It is in the public’s interest. It is in the profession’s interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law.

II. Process

Over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998. The emphasis has been on open discussion and publishing drafts of proposals to solicit feedback, suggestions and comments. SCEPR painstakingly took that feedback into account in subsequent drafts, until a final proposal was prepared.

This process began on May 13, 2014 when SCEPR received a joint letter from the Association’s four Goal III Commissions: the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identify. The Chairs of these Commissions wrote to the SCEPR asking it to develop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination and to implement Goal III. These Commissions explained that the current provision is insufficient because it “does not facially address bias, discrimination, or harassment and does not thoroughly address the scope of the issue in the legal profession or legal system.”⁶

In the fall of 2014 a Working Group was formed under the auspices of SCEPR and chaired by immediate past SCEPR chair Paula Frederick, chief disciplinary counsel for the State Bar of Georgia. The Working Group members consisted of one representative each from SCEPR, the Association of Professional Responsibility Lawyers (“APRL”), the National Organization of Bar Counsel (“NOBC”) and each of the Goal III Commissions. The Working Group held many teleconference meetings and two in-person meetings. After a year of work Chair Frederick

⁴ Paulette Brown, *Inclusion Not Exclusion: Understanding Implicit Bias is Key to Ensuring An Inclusive Profession*, ABA J. (Jan. 1, 2016, 4:00 AM),

http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring.

⁵ In August 2015, unaware that the Standing Committee on Ethics and Professional Responsibility was researching this issue at the request of the Goal III Commissions, the Oregon State Bar New Lawyers Division drafted a proposal to amend the Model Rules of Professional Conduct to include an anti-harassment provision in the black letter. They submitted their proposal to the Young Lawyers Division Assembly for consideration. The Young Lawyers Division deferred on the Oregon proposal after learning of the work of the Standing Committee on Ethics and Professional Responsibility and the Goal III Commissions.

⁶ Letter to Paula J. Frederick, Chair, ABA Standing Committee on Ethics and Professional Responsibility 2011-2014.

presented a memorandum of the Working Group’s deliberations and conclusions to SCEPR in May 2015. In it, the Working Group concluded that there was a need to amend Model Rule 8.4 to provide a comprehensive antidiscrimination provision that was nonetheless limited to the practice of law, in the black letter of the rule itself, and not just in a Comment.

On July 8, 2015, after receipt and consideration of this memorandum, SCEPR prepared, released for comment and posted on its website a Working Discussion Draft of a proposal to amend Model Rule of Professional Conduct 8.4. SCEPR also announced and hosted an open invitation Roundtable discussion on this Draft at the Annual Meeting in Chicago on July 31, 2015.

At the Roundtable and in subsequent written communications SCEPR received numerous comments about the Working Discussion Draft. After studying the comments and input from the Roundtable, SCEPR published in December 2015 a revised draft of a proposal to add Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association, including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016.⁷ Written comments were also invited.⁸ President Brown and past President Laurel Bellows were among those who testified at the hearing in support of adding an antidiscrimination provision to the black letter Rule 8.4.

After further study and consideration SCEPR made substantial and significant changes to its proposal, taking into account the many comments it received on its earlier drafts.

III. Need for this Amendment to the Model Rules

As noted above, in August 1998 the American Bar Association House of Delegates adopted the current provision: Comment [3] to Model Rule of Professional Conduct 8.4, *Misconduct*, which explains that certain conduct may be considered “conduct prejudicial to the administration of justice,” in violation of paragraph (d) to Rule 8.4, including when a lawyer knowingly manifests, by words or conduct, bias or prejudice against certain groups of persons, while in the course of representing a client *but only* when those words or conduct are also “prejudicial to the administration of justice.”

Yet as the Preamble and Scope of the Model Rules makes clear, “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”⁹ Thus, the ABA did not squarely and forthrightly address prejudice, bias, discrimination and harassment as would have been the case if this conduct were addressed in the text of a Model Rule. Changing the Comment to a black letter rule makes an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and harassment. It also clearly puts lawyers on notice that refraining from such conduct is more than an illustration in a comment to a rule about the administration of justice. It is a specific requirement.

⁷ *American Bar Association Public Hearing* (Feb. 7, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf.

⁸ MODEL RULE OF PROFESSIONAL CONDUCT 8.4 DEC. 22 DRAFT PROPOSAL COMMENTS RECEIVED, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html (last visited May 9, 2016).

⁹ MODEL RULES OF PROF’L CONDUCT, Preamble & Scope [14] & [21] (2016).

Therefore, SCEPR, along with its co-sponsors, proposes amending ABA Model Rule of Professional Conduct 8.4 to further implement Goal III by bringing into the black letter of the Rules an antidiscrimination and anti-harassment provision. This action is consistent with other actions taken by the Association to implement Goal III and to eliminate bias in the legal profession and the justice system.

For example, in February 2015, the ABA House of Delegates adopted revised *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*, which now include anti-bias provisions. These provisions appear in Standards 3-1.6 of the Prosecution Function Standards, and Standard 4.16 of the Defense Function Standards.¹⁰ The Standards explain that prosecutors and defense counsel should not, “manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status.” This statement appears in the black letter of the Standards, not in a comment. And, as noted above, one year before the adoption of Goal III, the Association directly addressed prejudice, bias and harassment in the black letter of Model Rule 2.3 in the 2007 Model Code of Judicial Conduct.

Some opponents to bringing an antidiscrimination and anti-harassment provision into the black letter of the Model Rules have suggested that the amendment is not necessary—that the current provision provides the proper level of guidance to lawyers. Evidence from the ABA and around the country suggests otherwise. For example:

- Twenty-five jurisdictions have not waited for the Association to act. They have already concluded that the current Comment to an ABA Model Rule does not adequately address discriminatory or harassing behavior by lawyers. As a result, they have adopted antidiscrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct.¹¹ By contrast, only thirteen jurisdictions have decided to address this

¹⁰ ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, http://www.americanbar.org/groups/criminal_justice/standards.html (last visited May 9, 2016); ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html (last visited May 9, 2016).

¹¹ See California Rule of Prof'l Conduct 2-400; Colorado Rule of Prof'l Conduct 8.4(g); Florida Rule of Prof'l Conduct 4-8.4(d); Idaho Rule of Prof'l Conduct 4.4 (a); Illinois Rule of Prof'l Conduct 8.4(j); Indiana Rule of Prof'l Conduct 8.4(g); Iowa Rule of Prof'l Conduct 8.4(g); Maryland Lawyers' Rules of Prof'l Conduct 8.4(e); Massachusetts Rule of Prof'l Conduct 3.4(i); Michigan Rule of Prof'l Conduct 6.5; Minnesota Rule of Prof'l Conduct 8.4(h); Missouri Rule of Prof'l Conduct 4-8.4(g); Nebraska Rule of Prof'l Conduct 8.4(d); New Jersey Rule of Prof'l Conduct 8.4(g); New Mexico Rule of Prof'l Conduct 16-300; New York Rule of Prof'l Conduct 8.4(g); North Dakota Rule of Prof'l Conduct 8.4(f); Ohio Rule of Prof'l Conduct 8.4(g); Oregon Rule of Prof'l Conduct 8.4(a)(7); Rhode Island Rule of Prof'l Conduct 8.4(d); Texas Rule of Prof'l Conduct 5.08; Vermont Rule of Prof'l Conduct 8.4(g); Washington Rule of Prof'l Conduct 8.4(g); Wisconsin Rule of Prof'l Conduct 8.4(i); D.C. Rule of Prof'l Conduct 9.1.

issue in a Comment similar to the current Comment in the Model Rules.¹² Fourteen states do not address this issue at all in their Rules of Professional Conduct.¹³

- As noted above, the ABA has already brought antidiscrimination and anti-harassment provisions into the black letter of other conduct codes like the *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* and the 2007 ABA Model Code of Judicial Conduct, Rule 2.3.
- The Florida Bar’s Young Lawyer’s Division reported this year that in a survey of its female members, 43% of respondents reported they had experienced gender bias in their career.¹⁴
- The supreme courts of the jurisdictions that have black letter rules with antidiscrimination and anti-harassment provisions have not seen a surge in complaints based on these provisions. Where appropriate, they are disciplining lawyers for discriminatory and harassing conduct.¹⁵

IV. Summary of Proposed Amendments

A. Prohibited Activity

SCEPR’s proposal adds a new paragraph (g) to Rule 8.4, to prohibit conduct by a lawyer related to the practice of law that harasses or discriminates against members of specified groups. New Comment [3] defines the prohibited behavior.

¹² See Arizona Rule of Prof’l Conduct 8.4, cmt.; Arkansas Rule of Prof’l Conduct 8.4, cmt. [3]; Connecticut Rule of Prof’l Conduct 8.4, Commentary; Delaware Lawyers’ Rule of Prof’l Conduct 8.4, cmt. [3]; Idaho Rule of Prof’l Conduct 8.4, cmt. [3]; Maine Rule of Prof’l Conduct 8.4, cmt. [3]; North Carolina Rule of Prof’l Conduct 8.4, cmt. [5]; South Carolina Rule of Prof’l Conduct 8.4, cmt. [3]; South Dakota Rule of Prof’l Conduct 8.4, cmt. [3]; Tennessee Rule of Prof’l Conduct 8.4, cmt. [3]; Utah Rule of Prof’l Conduct 8.4, cmt. [3]; Wyoming Rule of Prof’l Conduct 8.4, cmt. [3]; West Virginia Rule of Prof’l Conduct 8.4, cmt. [3].

¹³ The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.

¹⁴ The Florida Bar, *Results of the 2015 YLD Survey on Women in the Legal Profession* (Dec. 2015), [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/\\$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement).

¹⁵ In 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four female clients and one female employee. *In re Moothart*, 860 N.W.2d 598 (2015). The Wisconsin Supreme Court in 2014 disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was “a cool person to know.” On one day, the lawyer sent 19 text messages asking whether the victim was the “kind of girl who likes secret contact with an older married elected DA . . . the riskier the better.” One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a \$350,000 home. *In re Kratz*, 851 N.W.2d 219 (2014). The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student’s appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him. *In re Griffith*, 838 N.W.2d 792 (2013). The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? *In re McGrath*, 280 P.3d 1091 (2012). The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made repeated disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. *In re Campiti*, 937 N.E.2d 340 (2009). The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a “black male” and that such association was placing the children in harm’s way. During a hearing, the lawyer referred to the African-American man as “the black guy” and “the black man.” *In re Thomsen*, 837 N.E.2d 1011 (2005).

Proposed new black letter Rule 8.4(g) does not use the terms “manifests . . . bias or prejudice”¹⁶ that appear in the current provision. Instead, the new rule adopts the terms “harassment and discrimination” that already appear in a large body of substantive law, antidiscrimination and anti-harassment statutes, and case law nationwide and in the Model Judicial Code. For example, in new Comment [3], “harassment” is defined as including “sexual harassment and derogatory or demeaning verbal or physical conduct . . . of a sexual nature.” This definition is based on the language of Rule 2.3(C) of the ABA Model Code of Judicial Conduct and its Comment [4], adopted by the House in 2007 and applicable to lawyers in proceedings before a court.¹⁷

Discrimination is defined in new Comment [3] as “harmful verbal or physical conduct that manifests bias or prejudice towards others.” This is based in part on ABA Model Code of Judicial Conduct, Rule 2.3, Comment [3], which notes that harassment, one form of discrimination, includes “verbal or physical conduct,” and on the current rule, which prohibits lawyers from manifesting bias or prejudice while representing clients.

Proposed new Comment [3] also explains, “The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).” This provision makes clear that the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context. Thus, conduct that has a discriminatory impact alone, while possibly dispositive elsewhere, would not necessarily result in discipline under new Rule 8.4(g). But, substantive law regarding discrimination and harassment can also guide a lawyer’s conduct. As the Preamble to the Model Rules explains, “A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”¹⁸

B. Knowledge Requirement

SCEPR has received substantial and helpful comment that the absence of a “mens rea” standard in the rule would provide inadequate guidance to lawyers and disciplinary authorities. After consultation with cosponsors, SCEPR concluded that the alternative standards “knows or reasonably should know” should be included in the new rule. Consequently, revised Rule 8.4(g) would make it professional misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination....”

Both “knows” and “reasonably should know” are defined in the Model Rules. Rule 1.0(f) defines “knows” to denote “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” The inference to be made in this situation is not what the lawyer should or might have known, but whether one can infer from the circumstances what the lawyer actually knew. Thus, this is a subjective standard; it depends on ascertaining the lawyer’s actual state of mind. The evidence, or “circumstances,” may or may not support an inference about what the lawyer knew about his or her conduct.

¹⁶ The phrase, “manifestations of bias or prejudice” is utilized in proposed new Comment [3].

¹⁷ ABA Model Code of Judicial Conduct Rule 2.3, Comment [4] reads: “Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.”

¹⁸ MODEL RULES OF PROF’L CONDUCT, Preamble & Scope [5] (2016).

Rule 1.0(j) defines “reasonably should know” when used in reference to a lawyer to denote “that a lawyer of reasonable prudence and competence would ascertain the matter in question.” The test here is whether a lawyer of reasonable prudence and competence would have comprehended the facts in question. Thus, this is an objective standard; it does not depend on the particular lawyer’s actual state of mind. Rather, it asks what a lawyer of reasonable prudence and competence would have comprehended from the circumstances presented.

SCEPR believes that any standard for the conduct to be addressed in Rule 8.4(g) must include as alternatives, both the “knowing” and “reasonably should know” standards as defined in Rule 1.0. As noted, one standard is a subjective and the other is objective. Thus, they do not overlap; and one cannot serve as a substitute for the other. Taken together, these two standards provide a safeguard for lawyers against overaggressive prosecutions for conduct they could not have known was harassment or discrimination, as well as a safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination.

There is also ample precedent for using the “knows or reasonably should know” formulation in proposed Rule 8.4(g). It has been part of the Model Rules since 1983. Currently, it is used in Rule 1.13(f), Rule 2.3(b), Rule 2.4(b), Rule 3.6(a), Rule 4.3 [twice] and Rule 4.4(b).

“Harassment” and “discrimination” are terms that denote actual conduct. As explained in proposed new Comment [3], both “harassment” and “discrimination” are defined to include verbal and physical conduct against others. The proposed rule would not expand on what would be considered harassment and discrimination under federal and state law. Thus, the terms used in the rule—“harassment” and “discrimination”—by their nature incorporate a measure of intentionality while also setting a minimum standard of acceptable conduct. This does not mean that complainants should have to establish their claims in civil courts before bringing disciplinary claims. Rather, it means that the rule intends that these words have the meaning established at law.

The addition of “knows or reasonably should know” as a part of the standard for the lawyer supports the rule’s focus on conduct and resolves concerns of vagueness or uncertainty about what behavior is expected of the lawyer.

C. Scope of the Rule

Proposed Rule 8.4(g) makes it professional misconduct for a lawyer to harass or discriminate while engaged in “conduct related to the practice of law” when the lawyer knew or reasonably should have known the conduct was harassment or discrimination. The proposed rule is constitutionally limited; it does not seek to regulate harassment or discrimination by a lawyer that occurs outside the scope of the lawyer’s practice of law, nor does it limit a lawyer’s representational role in our legal system. It does not limit the scope of the legal advice a lawyer may render to clients, which is addressed in Model Rule 1.2. It permits legitimate advocacy. It does not change the circumstances under which a lawyer may accept, decline or withdraw from a representation. To the contrary, the proposal makes clear that Model Rule 1.16 addresses such conduct. The proposal also does not limit a lawyer’s ability to charge and collect a reasonable fee for legal services, which remains governed by Rule 1.5.

Note also that while the provision in current Comment [3] limits the scope of Rule 8.4(d) to situations where the lawyer is representing clients, Rule 8.4(d) itself is not so limited. In fact, lawyers have been disciplined under Rule 8.4(d) for conduct that does not involve the representation of clients.¹⁹

Some commenters expressed concern that the phrase, “conduct related to the practice of law,” is vague. “The definition of the practice of law is established by law and varies from one jurisdiction to another.”²⁰ The phrase “conduct related to” is elucidated in the proposed new Comments and is consistent with other terms and phrases used in the Rules that have been upheld against vagueness challenges.²¹ The proposed scope of Rule 8.4(g) is similar to the scope of existing antidiscrimination provisions in many states.²²

Proposed new Comment [4] explains 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.*” (Emphasis added.) The nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer.

The scope of proposed 8.4(g) is actually narrower and more limited than is the scope of other Model Rules. “[T]here are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity.”²³ For example, paragraph (c) to Rule 8.4 declares that it is professional misconduct for a lawyer to engage in conduct “involving dishonesty, fraud, deceit or misrepresentation.” Such conduct need not be

¹⁹ See, e.g., *Neal v. Clinton*, 2001 WL 34355768 (Ark. Cir. Ct. Jan. 19, 2001).

²⁰ MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. [2].

²¹ See, e.g., *Grievance Adm’r v. Fieger*, 719 N.E.2d 123 (Mich. 2016) (rejecting a vagueness challenge to rules requiring lawyers to “treat with courtesy and respect all person involved in the legal process” and prohibiting “undignified or discourteous conduct toward [a] tribunal”); *Chief Disciplinary Counsel v. Zelotes*, 98 A.3d 852 (Conn. 2014) (rejecting a vagueness challenge to “conduct prejudicial to the administration of justice”); *Florida Bar v. Von Zamft*, 814 So. 2d 385 (2002); *In re Anonymous Member of South Carolina Bar*, 709 S.E.2d 633 (2011) (rejecting a vagueness challenge to the following required civility clause: “To opposing parties and their counsel, I pledge fairness, integrity, and civility”); *Canatella v. Stovitz*, 365 F.Supp.2d 1064 (N.D. Cal. 2005) (rejecting a vagueness challenge to these terms regulating lawyers in the California Business and Profession Code: “willful,” “moral turpitude,” “dishonesty,” and “corruption”); *Motley v. Virginia State Bar*, 536 S.E.2d 97 (Va. 2000) (rejecting a vagueness challenge to a rule requiring lawyers to keep client’s “reasonably informed about matters in which the lawyer’s services are being rendered”); *In re Disciplinary Proceedings Against Beaver*, 510 N.W.2d 129 (Wis. 1994) (rejecting a vagueness challenge to a rule against “offensive personality”).

²² See Florida Rule of Professional Conduct 4-8.4(d) which addresses conduct “in connection with the practice of law”; Indiana Rule of Prof’l Conduct 8.4(g) which addresses conduct a lawyer undertakes in the lawyer’s “professional capacity”; Iowa Rule of Prof’l Conduct 8.4(g) which addresses conduct “in the practice of law”; Maryland Lawyers’ Rules of Prof’l Conduct 8.4(e) with the scope of “when acting in a professional capacity”; Minnesota Rule of Prof’l Conduct 8.4(h) addressing conduct “in connection with a lawyer’s professional activities”; New Jersey Rule of Prof’l Conduct 8.4(g) addressing when a lawyer’s conduct is performed “in a professional capacity”; New York Rule of Prof’l Conduct 8.4(g) covering conduct “in the practice of law”; Ohio Rule of Prof’l Conduct 8.4(g) addressing when lawyer “engage, in a professional capacity, in conduct”; Washington Rule of Prof’l Conduct 8.4(g) covering “connection with the lawyer’s professional activities”; and Wisconsin Rule of Prof’l Conduct 8.4(i) with a scope of conduct “in connection with the lawyer’s professional activities.”

²³ MODEL RULES OF PROF’L CONDUCT, Preamble [3].

related to the lawyer's practice of law, but may reflect adversely on the lawyer's fitness to practice law or involve moral turpitude.²⁴

However, insofar as proposed Rule 8.4(g) applies to "conduct related to the practice of law," it is broader than the current provision. This change is necessary. The professional roles of lawyers include conduct that goes well beyond the representation of clients before tribunals. Lawyers are also officers of the court, managers of their law practices and public citizens having a special responsibility for the administration justice.²⁵ Lawyers routinely engage in organized bar-related activities to promote access to the legal system and improvements in the law. Lawyers engage in mentoring and social activities related to the practice of law. And, of course, lawyers are licensed by a jurisdiction's highest court with the privilege of practicing law. The ethics rules should make clear that the profession will not tolerate harassment and discrimination in any conduct related to the practice of law.

Therefore, proposed Comment [4] explains that operating or managing a law firm is conduct related to the practice of law. This includes the terms and conditions of employment. Some commentators objected to the inclusion of workplace harassment and discrimination within the scope of the Rule on the ground that it would bring employment law into the Model Rules. This objection is misplaced. First, in at least two jurisdictions that have adopted an antidiscrimination Rule, the provision is focused entirely on employment and the workplace.²⁶ Other jurisdictions have also included workplace harassment and discrimination among the conduct prohibited in their Rules.²⁷ Second, professional misconduct under the Model Rules already applies to substantive areas of the law such as fraud and misrepresentation. Third, that part of the management of a law practice that includes the solicitation of clients and advertising of legal services is already subjects of regulation under the Model Rules.²⁸ And fourth, this would not be the first time the House of Delegates adopted policy on the terms and conditions of lawyer employment. In 2007, the House of Delegates adopted as ABA policy a recommendation that law firms should discontinue mandatory age-based retirement polices,²⁹ and earlier, in 1992, the House recognized that "sexual harassment is a serious problem in all types of workplace settings, including the legal profession, and constitutes a discriminatory and unprofessional practice that must not be tolerated in any work

²⁴ MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. [2].

²⁵ MODEL RULES OF PROF'L CONDUCT, Preamble [1] & [6].

²⁶ See D.C. Rule of Prof'l Conduct 9.1 & Vermont Rule of Prof'l Conduct 8.4(g). The lawyer population for Washington DC is 52,711 and Vermont is 2,326. Additional lawyer demographic information is available on the American Bar Association website: http://www.americanbar.org/resources_for_lawyers/profession_statistics.html.

²⁷ Other jurisdictions have specifically included workplace harassment and discrimination among the conduct prohibited in their Rules. Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require a prior finding of employment discrimination by another tribunal. See California Rule of Prof'l Conduct 2-400 (lawyer population 167,690); Illinois Rule of Prof'l conduct 8.4(j) (lawyer population 63,060); New Jersey Rule of Prof'l Conduct 8.4(g) (lawyer population 41,569); and New York Rule of Prof'l Conduct 8.4(g) (lawyer population 175,195). Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require that the conduct be unlawful. See, e.g., Iowa Rule of Prof'l Conduct 8.4(g) (lawyer population of 7,560); Ohio Rule of Prof'l Conduct 8.4(g) (lawyer population 38,237); and Minnesota Rule of Prof'l Conduct 8.4(h) (lawyer population 24,952). Maryland has included workplace harassment and discrimination as professional misconduct when the conduct is prejudicial to the administration of justice. Maryland Lawyers' Rules of Prof'l Conduct 8.4(e), cmt. [3] (lawyer population 24,142).

²⁸ See MODEL RULES OF PROFESSIONAL CONDUCT R. 7.1 - 7.6.

²⁹ ABA HOUSE OF DELEGATES RESOLUTION 10A (Aug. 2007).

environment.”³⁰ When such conduct is engaged in by lawyers it is appropriate and necessary to identify it for what it is: professional misconduct.

This Rule, however, is not intended to replace employment discrimination law. The many jurisdictions that already have adopted similar rules have not experienced a mass influx of complaints based on employment discrimination or harassment. There is also no evidence from these jurisdictions that disciplinary counsel became the tribunal of first resort for workplace harassment or discrimination claims against lawyers. This Rule would not prohibit disciplinary counsel from deferring action on complaints, pending other investigations or actions.

Equally important, the ABA should not adopt a rule that would apply to lawyers acting outside of their own law firms or law practices but not to lawyers acting within their offices, toward each other and subordinates. Such a dichotomy is unreasonable and unsupportable.

As also explained in proposed new Comment [4], conduct related to the practice of law includes activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law. SCEPR was presented with substantial anecdotal information that sexual harassment takes place at such events. “Conduct related to the practice of law” includes these activities.

Finally with respect to the scope of the rule, some commentators suggested that because legal remedies are available for discrimination and harassment in other forums, the bar should not permit an ethics claim to be brought on that basis until the claim has first been presented to a legal tribunal and the tribunal has found the lawyer guilty of or liable for harassment or discrimination.

SCEPR has considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rules. There is no such limitation in the current provision. Legal ethics rules are not dependent upon or limited by statutory or common law claims. The ABA takes pride in the fact that “the legal profession is largely self-governing.”³¹ As such, “a lawyer’s failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process,” not the civil legal system.³² The two systems run on separate tracks.

The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system. In fact, as a self-governing profession we have made it clear that “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.”³³ Thus, legal remedies are available for conduct, such as fraud, deceit or misrepresentation, which also are prohibited by paragraph (c) to Rule 8.4, but a claimant is not required as a condition of filing a grievance based on fraud, deceit or misrepresentation to have brought and won a civil action against the respondent lawyer, or for the lawyer to have been charged with and convicted

³⁰ ABA HOUSE OF DELEGATES RESOLUTION 117 (Feb. 1992).

³¹ MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [10].

³² MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [19].

³³ MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [20].

of a crime.³⁴ To now impose such a requirement, only for claims based on harassment and discrimination, would set a terrible precedent and send the wrong message to the public.

In addition, the Model Rules of Professional Conduct reflect ABA policy. Since 1989, the ABA House of Delegates has adopted policies promoting the equal treatment of all persons regardless of sexual orientation or gender identity.³⁵ Many states, however, have not extended protection in areas like employment to lesbian, gay, or transgender persons.³⁶ A Model Rule should not be limited by such restrictions that do not reflect ABA policy. Of course, states and other jurisdictions may adapt ABA policy to meet their individual and particular circumstances.

D. Protected Groups

New Rule 8.4(g) would retain the groups protected by the current provision.³⁷ In addition, new 8.4(g) would also include “ethnicity,” “gender identity,” and “marital status.” The antidiscrimination provision in the ABA Model Code of Judicial Conduct, revised and adopted by the House of Delegates in 2007, already requires judges to ensure that lawyers in proceedings before the court refrain from manifesting bias or prejudice and from harassing another based on that person’s marital status and ethnicity. The drafters believe that this same prohibition also should be applicable to lawyers in conduct related to the practice of law not merely to lawyers in proceedings before the court.

“Gender identity” is added as a protected group at the request of the ABA’s Goal III Commissions. As used in the Rule this term includes “gender expression”, which is a form of gender identity. These terms encompass persons whose current gender identity and expression are different from their designations at birth.³⁸ The Equal Employment Opportunities Commission interprets Title VII as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.³⁹ In 2015, the ABA House adopted revised Criminal Justice Standards for the Defense Function and the Prosecution Function. Both sets of Standards explains that defense counsel and prosecutors should not manifest bias or prejudice based on another’s gender identity. To ensure notice to lawyers and to make these provisions more parallel, the Goal III Commission on Sexual

³⁴ *E.g.*, *People v. Odom*, 941 P.2d 919 (Colo. 1997) (lawyer disciplined for committing a crime for which he was never charged).

³⁵ A list of ABA policies supporting the expansion of civil rights to and protection of persons based on their sexual orientation and gender identity can be found here:

http://www.americanbar.org/groups/sexual_orientation/policy.html.

³⁶ For a list of states that have not extended protection in areas like employment to LGBT individuals see:

<https://www.aclu.org/map/non-discrimination-laws-state-state-information-map>.

³⁷ Some commenters advised eliminating references to any specific groups from the Rule. SCEPR concluded that this would risk including within the scope of the Rule appropriate distinctions that are properly made in professional life. For example, a law firm or lawyer may display “geographic bias” by interviewing for employment only persons who have expressed a willingness to relocate to a particular state or city. It was thought preferable to specifically identify the groups to be covered under the Rule.

³⁸ The U.S. Office of Personnel Management Diversity & Inclusion Reference Materials defines gender identity as “the individual’s internal sense of being male or female. The way an individual expresses his or her gender identity is frequently called ‘gender expression,’ and may or may not conform to social stereotypes associated with a particular gender.” See *Diversity & Inclusion Reference Materials*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> (last visited May 9, 2016).

³⁹ https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

Orientation and Gender Identity recommended that gender identity be added to the black letter of paragraph (g). New Comment [3] notes that applicable law may be used as a guide to interpreting paragraph (g). Under the Americans with Disabilities Act discrimination against persons with disabilities includes the failure to make the reasonable accommodations necessary for such person to function in a work environment.⁴⁰

Some commenters objected to retaining the term “socioeconomic status” in new paragraph (g). This term is included in the current provision and also is in the Model Code of Judicial Conduct. An Indiana disciplinary case, *In re Campiti*, 937 N.E.2d 340 (2009), provides guidance as to the meaning of the term. In that matter, a lawyer was reprimanded for disparaging references he made at trial about a litigant’s socioeconomic status: the litigant was receiving free legal services. SCEPR has found no instance where this term in an ethics rule has been misused or applied indiscriminately in any jurisdiction. SCEPR concluded that the unintended consequences of removing this group would be more detrimental than the consequences of keeping it in.

Discrimination against persons based on their source of income or acceptance of free or low-cost legal services would be examples of discrimination based on socioeconomic status. However, new Comment [5] makes clear that the Rule does not limit a lawyer’s ability to charge and collect a reasonable fee and reimbursement of expenses, nor does it affect a lawyer’s ability to limit the scope of his or her practice.

SCEPR was concerned, however, that this Rule not be read as undermining a lawyer’s pro bono obligations or duty to accept court-appointed clients. Therefore, proposed Comment [5] does encourage lawyers to 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 to not avoid appointments from a tribunal except for “good cause.”

E. Promoting Diversity

Proposed new Comment [4] to Rule 8.4 makes clear that paragraph (g) does not prohibit conduct undertaken by lawyers to promote diversity. As stated in the first Goal III Objective, the Association is committed to promoting full and equal participation in the Association, our profession and the justice system by all persons. According to the ABA Lawyer Demographics for 2016, the legal profession is 64% male and 36% female.⁴¹ The most recent figures for racial demographics are from the 2010 census showing 88% White, 5% Black, 4% Hispanic, and 3% Asian Pacific American, with all other ethnicities less than one percent.⁴² Goal III guides the ABA toward greater diversity in our profession and the justice system, and Rule 8.4(g) seeks to further that goal.

⁴⁰A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. Examples of reasonable accommodations include making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; providing qualified readers or interpreters; and reassignment to a vacant position.

⁴¹ American Bar Association, *Lawyer Demographics Year 2016* (2016), http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf.

⁴² *Id.*

F. How New Rule 8.4(g) Affects Other Model Rules of Professional Conduct

When SCEPR released a draft proposal in December 2015 to amend Model Rule 8.4, some commenters expressed concern about how proposed new Rule 8.4(g) would affect other Rules of Professional Conduct. As a result, SCEPR's proposal to create new Rule 8.4(g) now includes a discussion of its effect on certain other Model Rules.

For example, commenters questioned how new Rule 8.4(g) would affect a lawyer's ability to accept, refuse or withdraw from a representation. To make it clear that proposed new Rule 8.4(g) is not intended to change the ethics rules affecting those decisions, the drafters included in paragraph (g) a sentence from Washington State's Rule 8.4(g), which reads: "This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." Rule 1.16 defines when a lawyer shall and when a lawyer may decline or withdraw from a representation. Rule 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if: "(1) the representation will result in violation of the rules of professional conduct or other law." Examples of a representation that would violate the Rules of Professional Conduct are representing a client when the lawyer does not have the legal competence to do so (*See* Rule 1.1) and representing a client with whom the lawyer has a conflict of interest (*See* Rules 1.7, 1.9, 1.10, 1.11, and 1.12).

To address concerns that this proposal would cause lawyers to reject clients with unpopular views or controversial positions, SCEPR included in proposed new Comment [5] a statement reminding lawyers that a lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities, with a citation to Model Rule 1.2(b). That Rule reads: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

Also, with respect to this rule as with respect to all the ethics Rules, Rule 5.1 provides that a managing or supervisory lawyer shall make reasonable efforts to insure that the lawyer's firm or practice has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Such efforts will build upon efforts already being made to give reasonable assurance that lawyers in a firm conform to current Rule 8.4(d) and Comment [3] and are not manifesting bias or prejudice in the course of representing a client that is prejudicial to the administration of justice.

SCEPR has also agreed to develop a formal Ethics Opinion discussing Model Rule 5.3 and its relationship to the other ethics rules, including this new Rule.

G. Legitimate Advocacy

Paragraph (g) includes the following sentence: "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules." The sentence recognizes the balance in the Rules that exists presently in current Comment [3] to Rule 8.4. It also expands the current sentence in the existing comment by adding the word "advice," as the scope of new Rule 8.4(g) is now not limited to "the course of representing a client" but includes "conduct related to the practice of law."

H. Peremptory Challenges

The following sentence appears in the current provision: “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.” SCEPR and the other cosponsors agreed to retain the sentence in the comments.

V. CONCLUSION

As noted at the beginning of this Report the Association has a responsibility to lead the profession in promoting equal justice under law. This includes working to eliminate bias in the legal profession. In 2007 the Model Judicial Code was amended to do just that. Twenty-five jurisdictions have also acted to amend their rules of professional conduct to address this issue directly. It is time to follow suit and amend the Model Rules. The Association needs to address such an important and substantive issue in a Rule itself, not just in a Comment.

Proposed new paragraph (g) to Rule 8.4 is a reasonable, limited and necessary addition to the Model Rules of Professional Conduct. It will make it clear that it is professional misconduct to engage in conduct that the lawyer knows or reasonably should know constitutes harassment or discrimination while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.

As the premier association of attorneys in the world, the ABA should lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us. Adopting the Resolution will advance this most important goal.

Respectfully submitted,

Myles V. Lynk, Chair
Standing Committee on Ethics and Professional Responsibility
August 2016

**THE SCIENTIFIC BASIS FOR THE ETHICAL OBLIGATION TO REQUIRE ACTION
TO ELIMINATE BIAS AND PROMOTE DIVERSITY IN THE LEGAL PROFESSION**
By David Douglass¹

In 2012, the Institute for Inclusion in the Legal Profession (IILP) wrote to the ABA requesting that it amend the Model Rules of Professional Responsibility to require lawyers to promote diversity in the profession.² The letter observed:

The legal profession continues to lag behind other professions in terms of diversity. Given the importance of our justice system, and the roles and responsibilities that lawyers and judges bear, it is critical for our profession to affirmatively address diversity in the Model Rules of Professional Conduct.³

IILP proposed the addition of a new section:

[The new section] would specifically make efforts to increase diversity and inclusion in the legal profession a matter of ethics and professional conduct. Doing so would align well with both the ABA’s existing Goal III, which seeks to “eliminate bias and enhance diversity” in the legal profession, and with existing standards in several states. The worth objectives of Goal III promote “full and equal participation in the association, our profession, and the justice system by all persons” and to eliminate “bias in the legal profession and the justice system.” Goal III and its objectives are indisputably admirable.⁴

The ABA declined this request:

Model Rule 8.4 Comment 3 already clarifies “that any conduct that manifest by words or conduct bias or prejudice is prejudicial to the administration of justice and therefore is prohibited.” The Committee did note that it might be an appropriate issue for consideration by the Diversity Center.⁵

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² September 14, 2012 letter from Institute for Inclusion in the Legal Profession, Marc Firestone, Chairman. Available at <http://www.theiilp.com/modelrules> (last viewed 12/19/2015).

³ Id.

⁴ Id.

⁵ December 12, 2012 letter from Jack Rives, Executive Director and Chief Operating Officer, ABA. Available at <http://www.theiilp.com/modelrules> (last viewed 12/19/2015). The letter actually misquotes Comment [3], which does not explicitly prohibit prejudicial conduct or words but rather, links prejudicial conduct back to Rule 8.4(d), which classifies conduct that is prejudicial to the administration of justice as “professional misconduct” The effect of the ABA’s response is to overstate the force of the Comment’s prohibition. In so doing, it creates the appearance

The response, disappointing as it is, reflects an outdated understanding of the causes, nature and impact of bias. This ignorance causes the Rules to perpetuate the very discriminatory behaviors the ABA claims it prohibits. This paper will argue that the scientific understanding of implicit bias reveals that all lawyers -- indeed everyone -- engages in bias on the basis of race, sex, lifestyle, disability, age, and religion every day, in every aspect of our practice. Implementing reasonable measures to overcome this implicit bias is necessary to comply with the letter and the spirit of the Model Rules.

A. Implicit Bias

What is implicit bias? Interestingly, the ABA's Litigation Section offers an explanation:

We naturally assign people into various social categories divided by salient and chronically accessible traits, such as age, gender, race, and role. And just as we might have implicit cognitions that help us walk and drive, we have implicit social cognitions that guide our thinking about social categories. Where do these schemas come from? They come from our experiences with other people, some of them direct (i.e., real-world encounters) but most of them vicarious (i.e., relayed to us through stories, books, movies, media, and culture).

If we unpack these schemas further, we see that some of the underlying cognitions include stereotypes, which are simply traits that we associate with a category. For instance, if we think that a particular category of human beings is frail - such as the elderly - we will not raise our guard. If we think that another category is foreign - such as Asians - we will be surprised by their fluent English. These cognitions also include attitudes, which are overall, evaluative feelings that are positive or negative. For instance, if we identify someone as having graduated from our beloved alma mater, we will feel more at ease. The term "implicit bias" includes both implicit stereotypes and implicit attitudes.

Though our shorthand schemas of people may be helpful in some situations, they also can lead to discriminatory behaviors if we are not careful. Given the critical importance of exercising fairness and equality in the court system, lawyers, judges, jurors, and staff should be particularly concerned about identifying such possibilities.⁶

that the ABA treated dismissively a constructive suggestion to address a serious issue by an organization and individuals committed to promoting diversity in the profession.

⁶ Jerry Kang, *Implicit Bias: A Primer for Courts*, prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts, Aug. 2009.

To oversimplify, the science of neuro-cognition reveals that our subconscious brain processes information faster than our conscious brain influencing our attitudes and actions. Because, by definition, we are unaware of our subconscious processing, we are unaware of these thoughts and how they can influence our attitudes and actions. Scientists can now observe and measure this implicit bias through the Implicit Association Test, which has been used worldwide for more than 20 years.

The Implicit Association Test (IAT) essentially measures our implicit bias by measuring how long it takes the subject to sort words when presented juxtaposed against images of people. The IAT reveals that when positive words -- happy, nice, smart -- are juxtaposed against a Caucasian face, we can sort them faster than when they are juxtaposed against an African-American face. We sort negative words -- violent, dumb, mean -- faster when juxtaposed to an African-American face than when juxtaposed against a Caucasian face. What does that mean? It means that we are so conditioned to associate negative images with African-Americans that when a favorable word or concept is associated with an African-American face it takes a heartbeat longer to sort that word properly. (And when I say “we” I mean all of us. The results are universal across racial, gender and age groups. All of us associate negative concepts with African-Americans more so than we do with Caucasian Americans).

One’s initial reaction may be, so what, it’s just a heartbeat, less than a second. After that heartbeat the conscious mind kicks in, catches up, takes over and overcomes that initial split-second reaction. Right? No Not so much. According to Professor Kang:

There is increasing evidence that implicit biases, as measured by the IAT, do predict behavior in the real world--in ways that can have real effects on real lives. Prof. John Jost (NYU, psychology) and colleagues have provided a recent literature review (in press) of ten studies that managers should not ignore. Among the findings from various laboratories are:

- implicit bias predicts the rate of callback interviews (Rooth 2007, based on implicit stereotype in Sweden that Arabs are lazy);
- implicit bias predicts awkward body language (McConnell & Leibold 2001), which could influence whether folks feel that they are being treated fairly or courteously;
- implicit bias predicts how we read the friendliness of facial expressions (Hugenberg & Bodenhausen 2003);
- implicit bias predicts more negative evaluations of ambiguous actions by an African American (Rudman & Lee 2002), which could influence decision-making in hard cases;
- implicit bias predicts more negative evaluations of agentic (i.e. confident, aggressive, ambitious) women in certain hiring conditions (Rudman & Glick 2001);
- implicit bias predicts the amount of shooter bias -- how much easier it is to shoot African Americans compared to Whites in a videogame simulation (Glaser & Knowles 2008);
- implicit bias predicts voting behavior in Italy (Arcari 2008);
- implicit bias predicts binge-drinking (Ostafin & Palfai 2006), suicide ideation (Nock & Banaji 2007), and sexual attraction to children (Gray 2005).⁷

To summarize, the science of implicit bias reveals that all of us have subconscious biases against those who are portrayed negatively in a society, which negatively impacts attitudes toward and interactions with members of those groups. In other words, we all discriminate. We can't help ourselves. And our subconscious discrimination perpetuates the social inequalities our conscious minds are committed to eliminating.

B. Implicit Bias and the Model Rules

Comment 3 to Model Rule 8.4 (Misconduct) 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.

⁷ Id. at 4.

The science of implicit bias reveals that each of us, regardless of our social category manifest bias or prejudice against socially disfavored groups. It necessarily follows that all attorneys are violating the Model Rule’s prohibition on bias or prejudice. The question the ABA must address is whether the fact that we all do it makes it okay. Can it be, should it be, that it is misconduct to consciously discriminate but okay to do so subconsciously when we know that both forms of discrimination invidiously inflict measurable harm on those against whom we have a bias? The answer must be no.

The harm goes beyond our complicity in perpetuating systems of inequality we have committed to eradicate, as serious as that is. It harms our clients in ways that also fail to meet our professional obligations. Model Rule 1.1 provides “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The Comments to the Rule emphasize the importance of thoroughly analyzing and understanding all dimensions of the client’s legal needs. See generally, Model Rule 1.1 Competence – Comment 5 (“Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation”).

The business case for diversity, which has become popular in the profession, rests on the premise that in a diverse society it is essential for companies to understand their diverse customers. Consequently, many actively, and some aggressively, promote diversity in their organizations and demand their outside counsel do the same.

I would argue that while there is a business, i.e., financial, case for diversity, there is also an ethical case for diversity. Further, the two are inextricably linked. Implicit bias distorts our

perception, impairs our understanding with respect to those with whom we interact on behalf of our clients, and blinds us to opportunities. The lack of diversity in the profession deprives lawyers of cultural experiences upon which to draw in an effort to meet a client's needs, whether by failing to understand the client or failing to understand the opposing party. Lawyers that do not associate with diverse lawyers are less able to provide the culturally competent legal counsel, to which their clients are entitled. As Sylvia Stevens has observed:

A lawyer who doesn't recognize cultural differences may be insensitive to a client's cultural taboos, expectations, family norms or communication and conflict-resolution styles. The lawyer will be less effective in establishing a relationship of trust and confidence with clients from other cultures, and the failure to understand the significance of cultural differences and misinterpretation of client behavior may lead the lawyer to implement ineffective case strategies.⁸

In the face of demonstrable, universal and persistent forces that frustrate the letter and spirit of the Model Rules, what should the ABA do? It should acknowledge the science of implicit bias and its demonstrable harm to the impartial administration of justice. The ABA Section of Litigation has already done just that. It has established a "landmark website offering critical information and resources for ABA members and other stakeholders" to "help combat implicit bias in the justice system."⁹

Next, the ABA should acknowledge that it is no longer sufficient to prohibit conscious bias or prejudice; lawyers have a professional obligation to remedy implicit bias. These remedial measures can be as simple moving the offices of diverse lawyers closer to influential lawyers in the firm. Or perhaps less simple but not burdensome, changing the point in the interview process at which grades are considered to provide space for the interviewer to get to know the candidate. Ensuring that recruitment and evaluation committees are diverse and promoting diverse lawyers

⁸ Sylvia Stevens, "Cultural Competency *Is There an Ethical Duty*" Oregon State Bar Bulletin, January 2009

⁹ <http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html>

to senior positions in the organization have also been shown to improve the success of diverse lawyers. There are many others. The specific measure or measures that a lawyer or firm should adopt should of course be left to the lawyer or firm but requiring lawyers to take steps to represent clients more effectively is certainly well-within the spirit if not the letter of the Rules:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.¹⁰

By amending the Model Rules to require lawyers to undertake efforts to promote diversity in the profession, the ABA will foster solutions to the enduring lack of diversity in the profession. Delaying action to address implicit bias is itself inconsistent with the Rules:

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; ... Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Model Rule 1.3 Diligence – Comment

How true. The lack of diversity in the profession has been a persistent and pernicious problem. Delay in responding despite scientific evidence of the nature of the problem and the inefficacy of our solutions thus far is frustrating our clients' demands for a more diverse legal workforce.

For these reasons, the ABA should reconsider its rejection of IILPs request. Acknowledging a professional obligation to remedy implicit bias, which science tells us is necessary to achieve the Model Rule's goals, will be a transformative step forward in the ABA's long commitment to promoting equality in the profession.

¹⁰ Model Rule 1.3 Diligence (Comment).



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PRESIDENT'S MESSAGE

Inclusion ≠ Exclusion: Understanding implicit bias is key to ensuring an inclusive profession

POSTED JANUARY 1, 2016, 4:00 AM CST

BY PAULETTE BROWN

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Photo of ABA President Paulette Brown by Marc Hauser.

In today's society, the attitudes and stereotypes that we all hold in our hearts can affect our understanding, actions and decisions in an unconscious manner.

The phenomenon is called implicit bias and it is very real. It does not in any way make people unsavory, but implicit bias can impede not only diversity and inclusion, but also implementation of a fair justice system.

We all know about overt biases, such as racism and sexism. But implicit bias includes subtle acts of discrimination, which can be unintentional yet still extremely powerful and potentially harmful.

While we all have unconscious biases, what's important is how we address them. As legal professionals, we play an important role in promoting frank discussions about implicit bias so that we can stem the tide of its negative impact within our profession and our justice system.

A number of research projects have uncovered widespread and deep-seated tendencies to associate African-Americans and Latinos with criminality. The fact is that skin color, gender, age, sexual orientation, various forms of ability and religion still have a huge effect on how people are treated. It is one reason why studies show that people of different races, backgrounds and economic circumstance who commit the same offense and go before the same judges get disparate sentences.

Even leaders with the best intentions may be unconsciously stifling diversity and inclusion. Acknowledging the existence of implicit bias is the first step toward addressing it. To better understand implicit bias, I urge everyone to go online and take the Project Implicit test on social attitudes. You may be surprised, but should not be disturbed by, the results.

While our biases may be unintentional, avoiding the negative behavior that results from them requires us to be very intentional. Practice and training are the best ways to overcome unconscious bias.

Another useful method to combat implicit bias is through closer association with the groups outside of our own. Powerful cultural signals push in one direction to drive implicit bias, but awareness, close relationships and experience with different people can push back.

For law firms, changing course requires not only training, but also being open-minded in recruiting efforts and casting a wide net. It is important to invite diverse lawyers into your circle and include them in leadership positions. Use the mentoring process to consciously promote diversity and inclusion. All of us have more in common than we realize. We should explore our similarities so that we can understand our differences.

As president of the ABA, I am proud to say that the diversity of my appointments to ABA leadership positions set an all-time high, not just with people of different races and genders, but also people of various sexual orientations, forms of ability and ages, including many young people. It continues the ABA's leadership in this area.

As part of our Diversity and Inclusion 360 Commission, we have created an Implicit Bias Working Group that is producing educational and other resource materials, including training videos and manuals for judges, prosecutors and public defenders. These tools will help lawmakers understand the existence of implicit bias in the justice system and explore what can be done about it. A training video for judges is expected to be available by the ABA's Midyear Meeting in February in San Diego.

We are building on efforts such as the ABA's Joint Committee on Fighting Implicit Bias in the Justice System, which is publishing a book on the subject. We also have been in discussions with the U.S. Department of Justice and the National Center for State Courts to build upon some of their very good work in this area.

Implicit bias poses big challenges, for the legal community and society. But they are surmountable. The objective of being inclusive does not equate to excluding any

segment of the population.

We can all become better when we recognize that none of us are exempt from bias. And we can start to move closer to a fair society.

- *To find out your implicit associations about race, gender, sexual orientation and other topics, please go to implicit.harvard.edu/implicit/takeatest.html.*
- *Follow President Brown on Twitter @Brown4Lawyers.*



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