

## Comparison of State Black-Letter Rules to Model Rule 8.4(g)

**Summary:** Twenty-three states and the District of Columbia have adopted black-letter rules dealing with “bias” issues.<sup>1</sup> Thirteen states have adopted a comment, while the remaining fourteen states have adopted neither a rule nor a comment addressing the issue.

Each of these black-letter rules differs from ABA Model Rule 8.4(g) and is in some significant way narrower than that rule. Examples of the differences between state black-letter rules and Model Rule 8.4(g)’s expansive scope include –

- Many states’ black-letter rules apply only to *unlawful discrimination* and require that a tribunal (other than a state bar adjudicatory body) find that an attorney engaged in unlawful discrimination before disciplinary action can be initiated.
- Many states limit their prohibition to “conduct in the course of representing a client,” in contrast to Model Rule 8.4(g)’s expansive scope of “conduct related to the practice of law.”
- Many states require that the conduct be prejudicial to the administration of justice.
- Almost no state black-letter rule enumerates all eleven of the Model Rule 8.4(g)’s protected characteristics, particularly socioeconomic status, gender identity, and ethnicity.
- While many state black-letter rules protect “legitimate advocacy,” none utilizes the Model Rule 8.4(g)’s “circular non-protection” that covers “legitimate advocacy . . . consistent with these rules.”

This comparison of the state black-letter rules is not intended to be comprehensive but provides an initial comparison of each state’s black-letter rule with ABA Model Rule 8.4(g). It does not include a comparison of the thirteen states’ comments that are not black-letter rules. Nor does it include any examination of state ethics opinions or court decisions regarding the rules or comments.

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<sup>1</sup> Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/language\\_choice\\_narrative\\_with\\_appendices\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf)

## **1) California**

California's Rule 2-400 is narrower than Model Rule 8.4(g) because:

1. In order for discriminatory conduct to be actionable, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under the rule. Model Rule 8.4(g) does not require that discriminatory conduct be unlawful.
2. California's rule is limited to "in the management or operation of a law practice," in contrast to Model Rule 8.4(g)'s broader scope of "conduct related to the practice of law."
3. Even then, the California rule applies only to:
  - 1) employment or
  - 2) accepting or terminating representation of a client.
4. California's rule does not include ethnicity, gender identity, marital status, or socioeconomic status as protected characteristics, unlike Model Rule 8.4(g).
5. California's rule does not explicitly apply to speech.
6. California's rule applies only to discrimination, not to harassment.

## **2) Colorado**

Colorado's Rule 8.4(g) and accompanying Comment 3 are narrower than Model Rule 8.4(g) because:

1. Colorado's rule applies only to conduct "in the representation of a client," in contrast to Model Rule 8.4(g)'s broad scope of application to "conduct related to the practice of law."
2. Colorado's rule does not include ethnicity or gender identity as protected characteristics, unlike Model Rule 8.4(g).

### **3) Florida**

Florida's Rule 4-8.4(d) is narrower than Model Rule 8.4(g) because:

1. Florida's rule prohibits "conduct in connection with the practice of law that is prejudicial to the administration of justice," whereas Model Rule 8.4(g) deleted the limitation, which had been found in the former Comment 3, that the conduct be "prejudicial to the administration of justice."
2. Florida's rule is limited to "discriminat[ion] against litigants, jurors, witnesses, court personnel, or other lawyers," whereas Model Rule 8.4(g) covers any discrimination against "others."

### **4) Illinois**

Illinois' Rule 8.4 is narrower than Model Rule 8.4(g) because:

1. Illinois' rule requires that the conduct "violate a federal, state or local statute or ordinance that prohibits discrimination," in contrast to Model Rule 8.4(g), which does not require that the conduct be unlawful before an attorney is subject to disciplinary charges.
2. Under Illinois' rule, "[n]o charge may be brought . . . until a court of administrative agency . . . has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted." Again, Model Rule 8.4(g) does not require that a tribunal have found that the conduct was unlawful before a disciplinary charge can be brought.

### **5) Indiana**

Indiana's Rule 8.4 is narrower than Model Rule 8.4(g) because:

1. Indiana's rule gives greater protection to "legitimate advocacy" by specifically providing that "[l]egitimate advocacy respecting the foregoing factors does not violate this subsection," in contrast to Model Rule 8.4(g)'s circular non-protection, which protects "legitimate advocacy" only if it is "consistent with these rules." In other words, "legitimate advocacy" does not violate Model Rule 8.4(g) if it does not violate Model Rule 8.4(g).

### **6) Iowa**

Iowa's Rule 32:8.4 is narrower than Model Rule 8.4(g) because:

1. Iowa's rule prohibits only "unlawful discrimination," in contrast to Model Rule 8.4(g), which does not require that the conduct be unlawful before an attorney is subject to disciplinary charges.

## **7) Maryland**

Maryland's Rule 19-308.4 is narrower than Model Rule 8.4(g) because:

1. Maryland's rule prohibits only words or conduct that are "prejudicial to the administration of justice," whereas Model Rule 8.4(g) deleted the limitation, which had been found in the former Comment 3, that the conduct be "prejudicial to the administration of justice."
2. Maryland's rule does not include ethnicity, gender identity, or marital status as protected characteristics, unlike Model Rule 8.4(g).
3. Maryland's rule protects "legitimate advocacy," in contrast to Model Rule 8.4(g)'s circular non-protection, which protects "legitimate advocacy" only if it is "consistent with these rules."

## **8) Massachusetts**

Massachusetts Rule 3.4 is narrower than Model Rule 8.4(g) because:

1. Massachusetts' rule is limited to conduct "before a tribunal," in contrast to Model Rule 8.4(g)'s broad application to "conduct related to the practice of law."
2. Massachusetts' rule does not include ethnicity, gender identity, marital status, or socioeconomic status as protected characteristics, unlike Model Rule 8.4(g).
3. Massachusetts' rule protects "legitimate advocacy," in contrast to Model Rule 8.4(g)'s circular non-protection, which protects "legitimate advocacy" only if it is "consistent with these rules."
4. Massachusetts' rule does not define "conduct" explicitly to include words or verbal conduct, unlike Model Rule 8.4(g).

## 9) Michigan

Michigan Rule 6.5 is narrower than Model Rule 8.4(g) because:

1. Michigan's rule requires a lawyer to take particular care to avoid treating any person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic, which approaches attorneys more as the professionals they are than does Model Rule 8.4(g).
2. Michigan's rule requires a lawyer serving as an adjudicative officer to treat every person fairly without regard to race, gender, or other protected personal characteristic with courtesy and respect, as well as those under his or her control and direction.
3. Michigan's rule does not speak in terms of harass or discriminate, unlike Model Rule 8.4(g).
4. Michigan's rule speaks in terms of the lawyer's right to speak and write that must be balanced with the requirement to be courteous and respectful and recognizes that it is not possible to write a hard and fast rule that properly balances the two.
5. Michigan's rule respects attorneys' rights of expression when it states in its comment that: "A lawyer must pursue a client's interests with diligence. This often requires the lawyer to frame questions and statements in bold and direct terms. The obligation to treat persons with courtesy and respect is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly. Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly rude. A lawyer's professional judgment must be employed here with care and discretion.
6. Michigan's rule urges that: "A lawyer must take particular care to avoid words or actions that appear to be improperly based upon a person's race, gender, or other protected personal characteristic. Legal institutions, and those who serve them, should take leadership roles in assuring equal treatment for all."

## 10) Minnesota

Minnesota Rules 8.4(g) & (h) are narrower than Model Rule 8.4(g) because:

1. Minnesota's rules prohibit unlawful discriminatory acts, defined as "a discriminatory act prohibited by federal, state, or local statute or ordinance," in contrast to Model Rule 8.4(g), which does not require that the conduct be unlawful before an attorney is subject to disciplinary charges.
2. Minnesota's rules prohibits unlawful discriminatory acts that "reflect[] adversely on the lawyer's fitness as a lawyer," in contrast to Model Rule 8.4(g), which does not require that a discriminatory act necessarily reflect adversely on the lawyer's fitness as a lawyer.
3. Minnesota's rules do not include gender identity or socioeconomic status as protected characteristics, unlike Model Rule 8.4(g). In addition, Minnesota's rules limit "socioeconomic status" to "status with regard to public assistance," which is narrower than Model Rule 8.4(g)'s use of "socioeconomic status."
4. Minnesota's rules provide some additional protection for attorneys' freedom of speech and free exercise of religion when it provides in its comment: "For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. *See, e.g.,* Minn. Stat. Section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly)."

## 11) Missouri

Missouri Rule 4-8.4 is narrower than Model Rule 8.4(g) because:

1. Missouri's rule largely restates the former Comment 3 to Model Rule 8.4(g), whereas Model Rule 8.4(g) greatly exceeds the former Comment's scope.
2. Missouri's rule applies only to conduct in the course of representing a client.
3. Missouri's rule does not include socioeconomic status, gender identity, marital status, or ethnicity in its protected characteristics.
4. Missouri's rule gives greater protection to "legitimate advocacy" than does Model Rule 8.4(g), which protects only "legitimate advocacy" that is "consistent with the rules." Comment clarifies that: "Rule 4-8.4(g) excludes those instances in which a lawyer engages in legitimate advocacy with respect to these factors."

## 12) Nebraska

Nebraska Rule 3-508.4(d) is narrower than Model Rule 8.4(g) because:

1. Nebraska's rule basically adopts former Comment 3, which is much narrower than Model Rule 8.4(g). Comment 4 to Rule 3-508.4(d) adopts former Comment 3 verbatim.
2. While Rule 3-508.4(d) is not a verbatim reproduction of Comment 3. It is quite close and, therefore, narrower than Model Rule 8.4(g).
3. It appears that Rule 3-508.4(d) prohibits conduct that is prejudicial to the administration of justice.
4. Nebraska's rule is limited to conduct when employed in a professional capacity, which is narrower than Model Rule 8.4(g), which is not limited to when a lawyer is "employed."
5. Nebraska's rule is limited to "adverse discriminatory conduct," which is narrower than the "harass or discriminate" prohibition in Model Rule 8.4(g).
6. Nebraska's rule is limited to treatment of specific persons ("litigants, witnesses, lawyers, judges, judicial officers or court personnel") whom a lawyer encounters in the legal context and not all persons as covered by Model Rule 8.4(g).
7. The protected characteristics in Nebraska's rule do not include ethnicity, gender identity, sex, or marital status (instead protecting "gender" rather than "sex").
8. Nebraska's rule is more protective of "legitimate advocacy" than is Model Rule 8.4(g).

### **13) New Jersey**

New Jersey Rule 8.4(g) is narrower than Model Rule 8.4(g) because:

1. It requires that the conduct be intended to or likely to cause harm, while Model Rule 8.4(g) does not require a showing of harm or intent to cause harm.
2. It does not apply to employment discrimination unless there has been a final agency or judicial determination of discrimination, whereas Model Rule 8.4(g) applies to all employment situations.
3. It applies to conduct when the lawyer is acting “in a professional capacity,” which is narrower than Model Rule 8.4(g), which covers “conduct related to the practice of law.”
4. It does not cover two characteristics covered by Model Rule 8.4(g), which are ethnicity and gender identity.

### **14) New Mexico**

New Mexico Rule 16-300 is narrower than Model Rule 8.4(g) because:

1. It is limited to words or conduct “in the course of any judicial or quasi-judicial proceeding before a tribunal,” as opposed to Model Rule 8.4(g)’s much broader application to “conduct related to the practice of law.”
2. It requires intent to manifest bias or prejudice.
3. It does not cover ethnicity, gender identity, or socioeconomic status as does Model Rule 8.4(g).
4. It does not preclude “legitimate advocacy” that “is material to the issues in the proceeding,” which is narrower than Model Rule 8.4(g)’s circular protection of “legitimate advocacy” that is “consistent with these rules.”

## **15) New York**

New York Rule 8.4 is narrower than Model Rule 8.4(g) because:

1. It prohibits only discrimination that is unlawful, unlike Model Rule 8.4(g).
2. It requires that a complaint of unlawful discrimination be heard before a tribunal with jurisdiction in the first instance.
3. It does not include ethnicity, socioeconomic status, gender identity, or religion (unless creed is considered a synonym for religion).

## **16) North Dakota**

North Dakota Rule 8.4(f) is narrower than Model Rule 8.4(g) because:

1. It retains the requirement that the conduct be “prejudicial to the administration of justice.”
2. It applies only “in the course of representing a client” as opposed to Model Rule 8.4(g)’s application to “conduct related to the practice of law.”
3. It does not cover ethnicity, socioeconomic status, marital status, or gender identity, unlike Model Rule 8.4(g).
4. It gives broader protection to “legitimate advocacy,” as opposed to Model Rule 8.4(g)’s circular protection of “legitimate advocacy” that is “consistent with the rules.”

## **17) Ohio**

Ohio Rule 8.4(g) is narrower than Model Rule 8.4(g) because:

1. Ohio’s rule prohibits only discrimination that is “prohibited by law,” as opposed to Model Rule 8.4(g), which is not limited to unlawful discrimination.
2. Ohio’s rule does not cover ethnicity, gender identity, or socioeconomic status, unlike Model Rule 8.4(g).
3. Ohio’s rule applies to conduct “in a professional capacity,” in contrast to Model Rule 8.4(g), which applies to all “conduct related to the practice of law.”
4. Ohio’s rule does not apply to “legitimate advocacy” in contrast to Model Rule 8.4(g)’s circular protection of “legitimate advocacy . . . consistent with these rules.”

## **18) Oregon**

Oregon Rule 8.4 (a)(7) is narrower than Model Rule 8.4(g) because:

1. Oregon's rule is limited to conduct "in the course of representing a client," as opposed to Model Rule 8.4(g)'s broader scope of "conduct related to the practice of law."
2. Oregon's rule does not cover discrimination based on socioeconomic status.
3. Oregon's rule protects "legitimate advocacy" without the circular non-protection of Model Rule 8.4(g), which only protects "legitimate advocacy . . . consistent with the rules."
4. Oregon's rule prohibits conduct that "intimidates or harasses" but not necessarily conduct that "discriminates," leaving punishment of discrimination to federal, state, and local laws generally.

## **19) Rhode Island**

Rhode Island Rule 8.4(d) is narrower than Model Rule 8.4(g) because:

1. It is limited to "conduct that is prejudicial to the administration of justice" rather than the broader scope of Model Rule 8.4(g), which applies to "conduct related to the practice of law."
2. It does not cover ethnicity and gender identity, unlike Model Rule 8.4(g).
3. It gives greater protection to "legitimate advocacy" in its comment, than does Model Rule 8.4(g), which gives circular non-protection to "legitimate advocacy . . . consistent with the rules."

## **20) Texas**

Texas Rule 5.08 is narrower than Model Rule 8.4(g) because:

1. Texas' rule is limited to words or conduct "in connection with an adjudicatory proceeding," as opposed to Model Rule 8.4(g), which applies more broadly to "conduct related to the practice of law."
2. Texas' rule does not cover socioeconomic status, marital status, ethnicity, or gender identity, as does Model Rule 8.4(g).
3. Texas' rule requires that the attorney act "willfully," in contrast to Model Rule 8.4(g)'s broader requirement of "knowingly."
4. Texas' rule does not apply to "confidential information," whereas Model Rule 8.4(g) does not provide that limitation to its scope.
5. Texas' rule does not preclude advocacy that is necessary to an adjudicatory proceeding and is in conformity with the tribunal's rulings and orders.
6. Texas' rule allows peremptory challenges that are otherwise constitutional that are based on the protected characteristics, according to Comment 4, while Comment 5 to Model Rule 8.4(g) merely says that a finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of the rule.

## **21) Vermont**

Vermont Rule 8.4(g) is narrower than ABA Model Rule 8.4(g) because:

1. Vermont's rule applies only to discrimination in employment, whereas Model Rule 8.4(g) has a much broader scope.
2. Vermont's rule does not cover ethnicity, gender identity, and marital status, it qualifies disability to be "against a qualified handicapped individual," and it covers socioeconomic status only in the comment, not in the black-letter rule.
3. Vermont's rule protects "legitimate advocacy" more than Model Rule 8.4(g), which gives circular non-protection to "legitimate advocacy . . . consistent with these rules."

## **22) Washington**

Washington Rules 8.4(g) and (h) are narrower than ABA Model Rule 8.4(g) because:

1. Washington's Rule 8.4(g) is limited to a "discriminatory act prohibited by state law."
2. Washington's Rule 8.4(h) is limited to conduct "in the course of representing a client," whereas Model Rule 8.4(g) applies to "conduct related to the practice of law."
3. Washington's Rule 8.4(h) is limited to conduct that "a reasonable person would interpret as manifesting bias or prejudice," whereas Model Rule 8.4(g) lacks the "reasonable person" standard.
4. Washington's Rule 8.4(h) is limited to conduct that is prejudicial to the administration of justice, whereas Model Rule 8.4(g) deleted that limitation.
5. Washington's Rule 8.4(h) is limited toward conduct that is directed at "judges, lawyers, or LLLTs, other parties, witnesses, jurors, or court personnel or officers," where Model Rule 8.4(g) broadly applies to conduct directed toward "others."
6. Washington's Rules 8.4(g) and (h) do not cover socioeconomic status, ethnicity, and gender identity, which Model Rule 8.4(g) covers.
7. Washington's Rule 8.4(h) does not apply to legitimate advocacy, in contrast to Model Rule 8.4(g)'s circular non-protection for "legitimate advocacy . . . consistent with these rules."

## **23) Wisconsin**

Wisconsin Rule 20:8.4(h) is narrower than ABA Model Rule 8.4(g) because:

1. Wisconsin's rule prohibits harassment but not discrimination.
2. Wisconsin's rule does not cover socioeconomic status, ethnicity, and gender identity, as does Model Rule 8.4(g).
3. Wisconsin's rule does not prohibit "legitimate advocacy," in contrast to Model Rule 8.4(g)'s circular non-protection of "legitimate advocacy . . . consistent with these rules."

## **24) Washington, D.C.**

Washington, D.C., Rule 9.1, is narrower than Model Rule 8.4 (g) because:

1. It applies only to employment discrimination.
2. It does not include ethnicity, gender identity, or socioeconomic status among its protected characteristics, and its definition of “physical handicap” may not encompass all disability, unlike Model Rule 8.4(g).
3. It states that it “is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.”