

## **MEMORANDUM**

**To: Members of the Bar and the Public**

**From: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)**

**Re: Proposed Amendments to Rule 8.4(g) of the New York Rules of Professional Conduct**

**Date: April 16, 2021**

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The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is comprehensive reviewing the New York Rules of Professional Conduct. This memorandum seeks public comment on COSAC’s proposed amendments to current New York Rule 8.4(g). The proposed amendments differ significantly from ABA Model Rule 8.4(g), which the Office of Court Administration (“OCA”) recently circulated for public comment.

COSAC seeks your comments on the proposals described in the memorandum. Please submit comments to the Chair of COSAC, Professor Roy Simon, at [roy.simon@hofstra.edu](mailto:roy.simon@hofstra.edu). **The deadline for submitting comments is Friday, May 28, 2021 at 5:00 PM.**

We first set out a clean version of COSAC’s proposed New York Rule 8.4(g) and related Comments (which would replace most of existing New York Rule 8.4(g) and Comment [5A]). We then discuss (i) COSAC’s consideration of Rule 8.4(g) and recent developments; (ii) comments and suggestions from NYSBA Sections, NYSBA Committees, and various others; (iii) support for and opposition to amending current New York Rule 8.4(g); (iv) COSAC’s reasons for proposing amendments to current NY Rule 8.4(g); (v) how COSAC’s proposal would improve current NY Rule 8.4(g); (vi) COSAC’s specific proposals for key segments of the rule; (vii) a summary of COSAC’s proposed amendments to the text of current New York Rule 8.4(g); (viii) a summary how COSAC’s proposed Comments to Rule 8.4(g); and (ix) a summary of how COSAC’s proposal differs from ABA Model Rule 8.4(g). An Appendix of primary sources reprints the full text of ABA Model Rule 8.4(g) and related Comments, the full text of current New York Rule 8.4(g) and Comment [5A], and a redline version of COSAC’s proposed Rule 8.4(g) and related Comments.

### ***Proposed New York Rule 8.4(g)***

**A lawyer or law firm shall not:**

**(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:**

**(1) unlawful discrimination, or**

**(2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.**

**(3) “Harassment,” for purposes of this Rule, means conduct that is:**

- a. directed at an individual or specific individuals in one or more of the protected categories;**
- b. severe or pervasive; and**
- c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.**

**(4) This Rule does not limit the ability of a lawyer or law firm (i) to accept, decline or withdraw from a representation, (ii) to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy, or (iii) to provide advice, assistance or advocacy to clients consistent with these Rules.**

**(5) “Conduct in the practice of law” includes:**

- a. representing clients;**
- b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;**
- c. operating or managing a law firm or law practice; and**
- d. participating in bar association, business, or professional activities or events in connection with the practice of law.**

## **COMMENT**

[5A] Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers.

[5B] “Unlawful discrimination” refers to discrimination under federal, state and local law.

[5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct. Verbal conduct includes written as well as oral communication.

[5D] A lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York.

[5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.

[5F] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no violation of paragraph (g) may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.

[5G] Nothing in Rule 8.4(g) is intended to affect the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that “adversely reflects on the lawyer’s fitness as a lawyer”).

### **New York’s Consideration of Rule 8.4(g) and Recent Developments**

In 2017, COSAC began an extensive in-depth study of Rule 8.4(g). In September 2019, COSAC preliminarily discussed Rule 8.4(g) and determined that the best course regarding the rule was to solicit broad input from outside COSAC. On October 8, 2020, COSAC’s Rule 8.4(g) Subcommittee solicited input from NYSBA committees and sections, as well as other relevant bar association groups in New York, on whether New York should amend existing New York Rule 8.4(g) to conform more closely to ABA Model Rule 8.4(g) (which the ABA adopted in August 2016). Several other key developments in connection with the rules governing anti-bias, anti-discrimination, and anti-harassment also occurred during 2020, including these:

- On July 15, 2020 the ABA Standing Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 493, which provides guidance on the purpose, scope, and application of ABA Model Rule 8.4(g).
- In October 2020, the NYC Bar issued a Report by the City Bar’s Professional Responsibility Committee proposing an amendment to New York Rule 8.4(g) that would make the rule conform closely to ABA Model Rule 8.4(g).
- In September 2020, the New York City Bar ethics committee issued N.Y. City Bar Ethics Opinion 2020-4, which analyzes current New York Rule 8.4(g) and its weaknesses.
- In June 2020, the Supreme Court of Pennsylvania approved amendments to Pennsylvania Rule 8.4(g) that were scheduled to take effect on December 8, 2020. However, on December 7, 2020 the United States District Court for the Eastern District of Pennsylvania held that Pennsylvania’s version of Rule 8.4(g) violated the Free Speech Clause of the First Amendment, and granted an injunction that temporarily enjoined the Disciplinary Board of the Pennsylvania Supreme Court from enforcing the rule. Specifically, the court held that the amendments to Rule 8.4(g) and two new explanatory Comments “consist of unconstitutional viewpoint

discrimination in violation of the First Amendment.” The Pennsylvania Bar filed a notice of appeal in the Third Circuit, but in March 2021 the Bar voluntarily dismissed the appeal (and will presumably start the drafting process again).

- In Fall 2020, the Connecticut Bar Association submitted proposed amendments to Connecticut Rule 8.4(7) to the Connecticut Supreme Court for consideration.

### **Comments from NYSBA Sections and Committees, and Others**

In October 2020, the COSAC Rule 8.4(g) Subcommittee requested comments on whether New York should amend existing Rule 8.4(g) to conform more closely to ABA Model Rule 8.4(g). The Subcommittee received written comments from the following entities and individuals:

- NYSBA Committee on Diversity and Inclusion (joined by NYSBA President’s Committee on Access to Justice and the NYSBA Women in Law Section)
- NYSBA Committee on Disability Rights
- Executive Committee of the Local and State Government Law Section
- NYSBA Commercial and Federal Litigation Section (“CFLS”)
- NYSBA Committee on Professional Ethics
- Professors Josh Blackman, Eugene Volokh, and Nadine Strossen
- Christian Legal Society
- A member (in his individual capacity) of the NYSBA CFLS Social Media & New Communication Technologies Committee

The Subcommittee also considered the perspectives and critiques by Professors William Hodes, Stephen Gillers, and Barbara Gillers at a December 3, 2020 New York Ethics Roundtable, and heard views expressed by the New York County Lawyers Committee on Professionalism and Professional Development at several of their meetings.

#### **Support for Amending Current New York Rule 8.4(g)**

The proponents of adopting a version of the Rule similar to ABA Model Rule 8.4(g) believe that such an amendment would strengthen ethics protections for all protected classes, advance the goal of eliminating harassment and discrimination in the legal profession, and foster diversity and inclusion in the profession.

#### **Opposition to Amending Current New York Rule 8.4(g)**

Those who opposed amending New York Rule 8.4(g) to more closely conform to the ABA Model Rule raised concerns about the scope of the ABA rule, especially First Amendment

considerations. Specifically, opponents raised concerns that a version of ABA Model Rule 8.4(g) would impede religious freedom, would regulate free speech by lawyers, and would regulate speech that is not popular. In addition, opponents expressed due process concerns of overbreadth and vagueness, along with apprehension that lawyers would be subject to discipline for unfounded allegations of discrimination and harassment. Opponents also expressed concern that language drawn from ABA Model Rule 8.4(g) would be used against law professors to censor their speech. These comments of opposition and concern are consistent with the arguments raised in 2015-2016 when the ABA was considering adopting Model Rule 8.4(g), and also in the various states that have proposed amendments to their respective anti-discrimination rules.

We also received comments asking COSAC to be mindful of the impact any amendment to the rule might have on lawyers who utilize social media.

### **COSAC’s Reasons for Proposing Amendments to Current NY Rule 8.4(g)**

COSAC believes that it is important to amend Rule 8.4(g) as proposed to increase the public’s confidence in the legal system. Such provisions would make it clear that the profession can regulate itself, which improves the public perception of lawyers and increases perceptions of fairness in the legal system. In addition, COSAC’s proposed rule promotes diversity and inclusion in the legal profession. In this connection, in 2020 the ABA Commission on Racial and Ethnic Diversity in the Profession published its first report on diversity, equity and inclusion in law firm practice. *See 2020 ABA Model Diversity Survey (2021)* (available at <https://bit.ly/3ggU9Fe>). The survey describes itself as “the tool to monitor, validate, and hold each other accountable for reaching the diversity, equity, and inclusion in the profession that we all profess to want and understand to be necessary.” An ABA article summarized the diversity survey as follows: “Minorities are getting hired as associates, but law firm leadership is mostly white and male because of a diversity ‘bottleneck’ and higher rates of minority attrition.” *See Debra Cassens Weiss, Diversity ‘Bottleneck’ and Minority Attrition Keep Firm Leadership Ranks White and Male, New ABA Survey Says*, ABA Journal (Feb. 17, 2021) (available at <https://bit.ly/3ajCQ2K>).

Equally important, the legal profession should aspire to be more diverse and to be inclusive of its own members. The Connecticut Bar Association, while considering whether to recommend amendments to its current version of Rule 8.4(g), cited a national survey of women lawyers. *See Women Lawyers on Guard, Still Broken: Sexual Harassment and Misconduct in the Legal Profession - A National Study (2020)* (available <https://bit.ly/3dkGGKO>), cited in letter from Connecticut Bar Association to Hon. Justice Andrew J. McDonald, Connecticut Supreme Court, in Dec. 4, 2020 (available at <https://bit.ly/3ad5thS>). Out of 578 total respondents to the national survey, 293 respondents reported that they had experienced discrimination, harassment, or sexual harassment, based on membership in a protected class, in conduct related to the practice of law.

Of the 293 respondents who reported *experiencing* discrimination, harassment, and/or sexual harassment:

- 78.5% reported experiencing discrimination (230 respondents)
- 31.4% reported experiencing harassment (92 respondents)
- 41.3% reported experiencing sexual harassment (121 respondents).

In addition, 252 survey respondents reported *witnessing* discrimination, harassment, or sexual harassment, based on membership in a protected class, in conduct related to the practice of law.

### **How COSAC’s Proposal Improves Current New York Rule 8.4(g)**

COSAC believes that New York’s current version of Rule 8.4(g) has several limitations and is inadequate for its intended purpose. Initially, the current rule requires that an attorney’s conduct be “unlawful,” and does not prohibit biased and harassing conduct that is not a violation of law. Second, the focus of the current rule is on employment discrimination. Third, the New York rule requires that a complainant exhaust administrative remedies before filing a grievance. Fourth, the New York Rule does not address use of sexual and racial epithets or biased conduct and harassment directed at opposing parties, lawyers, and others in the practice of law.

Taking into consideration (a) the various comments favoring and opposing New York’s adoption of a rule conforming closely to ABA Model Rule 8.4(g), (b) the limitations of New York’s current version of Rule 8.4(g), and (c) the overall goals of anti-discrimination, anti-bias, and anti-harassment ethics rules, COSAC has endeavored to draft a proposed rule that incorporates and expands on the objectives of current New York Rule 8.4(g), while simultaneously alleviating some of the concerns of those opposed to amending the New York Rule to conform more closely to ABA Model Rule 8.4(g). COSAC has also endeavored to provide guidance to practitioners to help them recognize conduct that is sanctionable. Accordingly, COSAC’s proposal to amend Rule 8.4(g) includes the following features:

- Eliminates the current requirement to exhaust administrative remedies before filing a grievance alleging discrimination;
- Adds and defines a prohibition on “harassment”;
- Expands the protected classes to conform to New York State anti-discrimination laws; and
- Extends the rule to cover activities in the practice of law beyond the terms and confns of employment.

**COSAC’s Specific Recommendations for Key Elements of Rule 8.4(g)**

This section addresses COSAC’s specific recommendations regarding four discrete elements of Rule 8.4(g).

**1. Prohibit improper behavior “in the practice of law” (and provide examples).**

It seemed odd to COSAC to prohibit conduct while a lawyer is sitting in an office, but not while in hallways or at a CLE or other places where lawyers interact with others. We also recognized (based on research cited by the ABA) that a majority of the misbehavior occurred in non-litigation matters and in locations other than the office or courtroom, at law firm social events, or at bar association functions.

Anticipating the challenges that would have been raised if we had recommended the ABA’s “related to the practice of law” language, we attempted to draft language that would narrow the scope of the ABA Model Rule, yet capture the intent to prohibit conduct beyond the law office or courtroom, and also provide examples in order to avoid concerns that the rule is overbroad. We suggest defining “conduct in the practice of law” as follows:

Conduct in the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaging in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or professional activities or events in connection with the practice of law.

**2. Expand the protected classes to conform to New York State anti-discrimination laws.**

The intent of COSAC’s proposal is to target discrimination and harassment on the basis of a protected status. We tried to mirror federal and state anti-discrimination laws as much as possible because those laws provide a baseline to evaluate conduct. We considered the protected categories and determined that the protected classes referenced in New York’s current version of Rule 8.4(g) should be expanded to include “ethnicity,” “gender expression,” “gender identity,” “status as a member of the military” and “status as a military veteran.” However, COSAC does *not* recommend adding “socioeconomic status” to the protected categories, as the ABA Model Rule does. Questions were raised about the definition of socioeconomic status. COSAC believed it best to have the protected categories mirror the protected classes identified in federal and state anti-discrimination laws.

**3. Prohibit harassment (lawful and unlawful) and define “harassment.”**

The current version of New York Rule 8.4(g) does not cover harassment at all. Recognizing that harassment is a construct of anti-discrimination laws and does not have its own independent cause of action under federal and state anti-discrimination laws, we determined it should be defined as (a) conduct directed at an individual or specific individuals in a protected category, (b) that is severe or pervasive, and (c) is either unwelcome physical conduct or derogatory or demeaning verbal conduct,. We determined that the intent of the rule should be to prohibit conduct for protected categories and we have limited the proposed rule by adding a definition of severe or pervasive conduct.

**4. Eliminate the requirement to exhaust administrative remedies.**

COSAC proposes to eliminate the New York requirement that “[w]here there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance.” COSAC recognizes the cost and difficulty in pursuing and exhausting administrative remedies pertinent to a discrimination complaint, and believes that requirement could prevent or deter complainants from filing grievances under Rule 8.4(g). In addition, the exhaustion requirement is a creature of the Appellate Divisions – it was never recommended by COSAC in 2008 (or before that). Nevertheless, COSAC also believes that if an administrative agency (such as EEOC or NYDHR) finds that a lawyer has engaged in unlawful discrimination, that should continue to be prima facie evidence of a violation of Rule 8.4(g), as under New York’s current rule. The complainant would thus be able to benefit from a finding by an administrative agency.

**Summary of COSAC’s Proposed Amendments to the Text of Current NY Rule 8.4(g)**

- Preserve in Rule 8.4(g)(1) the existing prohibition on engaging in conduct that is “unlawful discrimination”;
- Add Rule 8.4(g)(2) to provide that a lawyer shall not engage in conduct that is lawful or unlawful harassment against protected classes and adds pregnancy, religion, ethnicity, status as a veteran and gender identity or expression to the list of protected classes;
- Add Rule 8.4(g)(3) to define “harassment;”
- Add Rule 8.4(g)(4) to specify conduct that would *not* violate the rule; and
- Add Rule 8.4(g)(5) to define the scope of “conduct in the practice of law.”

### **Summary of COSAC’s Proposed Comments to NY Rule 8.4**

COSAC also recommends amending and substantially expanding the Comments to Rule 8.4. Currently, only one short Comment – Comment [5A] – pertains to paragraph (g), and it adds nothing to the text of the current rule. COSAC’s proposed Comments to NY Rule 8.4(g) go much further and may be fairly summarized as follows:

- Replace existing Comment [5A], which merely repeats the text of the current rule, by adding language stating that discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system, and discrimination and harassment also discourage or prevent capable people from becoming or remaining lawyers.
- Add a new Comment [5B], which defines “unlawful discrimination” to encompass discrimination under federal, state, and local law.
- Add a new Comment [5C], which clarifies that (i) petty slights, minor indignities and discourteous conduct do not constitute harassment, (ii) severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive and disdainful conduct, and (iii) verbal conduct includes written as well as oral communication.
- Add a new Comment [5D] which provides guidance regarding the scope and adds that a lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment to the United States Constitution or under Article I, Section 8, of the New York State Constitution. This language is intended to clarify that the Rule is not meant to censor or curtail free speech.
- Add a new Comment [5E] to clarify that Rule 8.4(g) is not intended to prohibit or discourage lawyers or law firms from engaging in conduct to promote diversity, equity, and inclusion in the legal profession. The Comment also describe certain examples of permissible conduct.
- Add a new Comment [5F], drawing upon language from ABA Model Rule 8.4(g), stating that a judge’s finding that peremptory challenges were exercised on a discriminatory basis or on another basis that is permitted by law does not, standing alone, establish a violation of 8.4(g).
- Add a new Comment [5G] clarifying that Rule 8.4(g) as amended is not intended to affect the scope or applicability of Rule 8.4(h), which has been invoked to address instances of discrimination or harassment that occur separate from “conduct in the practice of law.”

### **How COSAC's Proposal Differs from ABA Model Rule 8.4(g)**

COSAC’s proposed amendments differ from the ABA Model Rule in two key ways. First, COSAC’s proposal limits the Rule’s scope to conduct “in the practice of law,” a limitation not found in ABA Model Rule 8.4(g). Second, COSAC’s proposal limits and defines “harassment” to avoid overbreadth.

The remainder of this report is an Appendix containing useful primary sources.

# APPENDIX

## ABA Model Rule 8.4(g)

### **Rule 8.4: Misconduct**

**It is professional misconduct for a lawyer to:**

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

### **COMMENT**

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

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

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

does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

## **Current New York Rule 8.4(g)**

Below is New York's current version of Rule 8.4(g), as well as the sole Comment to Rule 8.4 (Comment [5A]) relating to paragraph (g).

### *Rule 8.4. Misconduct*

**A lawyer or law firm shall not:**

**(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.**

### **COMMENT**

[5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).

### **COSAC's Redlined Proposal to Amend the Rule 8.4(g) Black Letter and Comments**

(Additions to current New York Rule 8.4(g) are underscored in blue and deletions are ~~stricken through in red.~~)

### *Rule 8.4. Misconduct*

**A lawyer or law firm shall not:**

**(g) unlawfully discriminate the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint**

~~based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding~~

engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

(1) unlawful discrimination, or

(2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.

(3) “Harassment,” for purposes of this Rule, means conduct that is:

a. directed at an individual or specific individuals in one or more of the protected categories;

b. severe or pervasive; and

c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.

(4) This Rule does not limit the ability of a lawyer or law firm (i) to accept, decline or withdraw from a representation, (ii) to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy, or (iii) to provide advice, assistance or advocacy to clients consistent with these Rules.

(5) “Conduct in the practice of law” includes:

a. representing clients;

b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;

c. operating or managing a law firm or law practice; and

d. participating in bar association, business, or professional activities or events in connection with the practice of law.

## COMMENT

[5A] ~~Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).~~

Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers.

[5B] “Unlawful discrimination” refers to discrimination under federal, state and local law.

[5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive and disdainful conduct. Verbal conduct includes written as well as oral communication.

[5D] A lawyer’s conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York.

[5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.

[5F] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no disciplinary violation may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.

[5G] Nothing in this Rule 8.4(g) is intended to affect the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that “adversely reflects on the lawyer’s fitness as a lawyer”).