

February 4, 2021

NOTE: *This is a draft of a memorandum we hope to circulate to interested groups as part of the process of asking the supreme court to strengthen our rules regarding diversity, inclusivity, and discrimination.*

FROM: Standing Committee on Professional Ethics

TO: Board of Governors

SUBJECT: Proposed Adoption of ABA Model Rule 8.4(g) – Consideration of ABA Model Rule 8.4(d)

In response to the call of Past-President Jill Kastner, our committee has considered ways of strengthening our responses to issues of discrimination, diversity, and inclusivity.¹ We believe that replacing the current SCR 20:8.4(i) with ABA Model Rule 8.4(g) is one action that would advance these goals. We ask for your support in petitioning the supreme court for such a change.

This memorandum explains the reasons underlying our request.

Anti-discrimination rules in Wisconsin

Prior to 2007, Wisconsin did not have a specific rule that addressed harassment or discrimination.² SCR 20:8.4(i) was proposed and adopted as part of the Ethics 2000 initiative. It provides:

It is professional misconduct for a lawyer to ... (i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i).³

¹ Other actions may be warranted to improve our profession's response to issues of discrimination, diversity, and inclusivity. For example, our committee is working on a revision of the attorney's oath, SCR 40.15, and has suggested to the Board of Bar Examiners including diversity and inclusion training as part of our continuing education requirements.

² Several other rules address related issues, including, SCR 20:1.9(j) (prohibition against sexual relations with clients); SCR 20:3.5(c)(3) (prohibition against coercion, misrepresentation, duress or harassment of jurors); SCR 20:4.4(a) (prohibition against conduct that may delay, burden, or embarrass a third party), and SCR 20:7.3(b)(3) (controls on solicitation of clients). Although not adopted in Wisconsin, ABA Model Rule 8.4(d), which prohibits "conduct that is prejudicial to the administration of justice ...", has also been viewed as a control over discriminatory or harassing conduct. Of note, the Wisconsin Code of Judicial Conduct has contained rules that prohibit bias or discrimination by judges or lawyers appearing before them since 1995. SCR 60.04(1)(e), (f).

³ The Wisconsin Committee note explained:

It has rarely been the basis of lawyer discipline.⁴

ABA Model Rule 8.4(g)

In 2016, the ABA adopted Model Rule 8.4(g). It provides:

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.

Enactment followed a lengthy, thorough, and contentious process.⁵ Previously, the ABA Model Rules addressed discriminatory conduct only in the rule's comments:

[3] 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. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

When the current version of Model Rule 8.4(g) was adopted, the commentary was changed by deleting former paragraph three and adding the following paragraphs:

[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).

Paragraphs (f) through (i) do not have counterparts in the Model Rule. What constitutes harassment under paragraph (i) may be determined with reference to anti-discrimination legislation and interpretive case law. Because of differences in content and numbering, care should be used when consulting the ABA Comment.

⁴ See *Disciplinary Proceedings Against Kratz*, 2014 WI 31 and *Disciplinary Proceedings Against Isaacson*, 2015 WI 33. A review of these decisions suggests intentional conduct of an egregious nature.

⁵ See *ABA Delegates Overwhelmingly Approve Anti-Bias Rule*, 32 Law. Man. Prof. Conduct 481 (Aug. 10, 2016); Revised Resolution and Report 109 to the ABA House of Delegates.

[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).

More than half of the states address discrimination and harassment in their ethics rules. Their approaches vary widely.⁶ Thirteen states do not address the issue at all in their rules.⁷

We have examined the various approaches, and believe we are best served by adopting the ABA version. For one, it is based on extensive debate and consideration. Adoption would provide the benefits of the ABA’s lengthy and thorough deliberative process and its history would provide a substantial body of interpretive aids.

Next is a comparison of our current rule and Model Rule 8.4(g).

Comparison of SCR 20:8.4(i) and Model Rule 8.4(g)

1. Prohibited Behavior

Our current rule prohibits harassment of a person. Model Rule 8.4(g) would expand the prohibited behavior to include “harassment or discrimination”. Its text does not require that the conduct be directed at a particular person, although ¶3, in explaining that the behavior must be “harmful” and directed towards “others”, suggests such a limitation.

⁶ Attached are a memorandum and spreadsheet detailing the responses of other states to the issues presented. It is current as of November of 2020.

⁷ Id.

Both versions suggest substantive law provide helpful interpretive guidance. Neither version requires, as do the rules of some states, a violation of other law or a judicial finding of wrongdoing as a precondition to discipline.⁸

2. Mental State

SCR 20:8.4(i) is a strict liability rule – if the lawyer’s conduct constitutes harassment there is a violation regardless of whether it was intended or realized. Model Rule 8.4(g) narrows its reach to instances in which “the lawyer knows or reasonably should know” the behavior violates the rule.⁹ The addition of a mental state limits the rule to situations in which the lawyer is aware or should be aware that their conduct is inappropriate.¹⁰ A review of related disciplinary cases suggests this change would likely make little difference. Most cases reflect repeated, intentional and egregious and intentional conduct.¹¹

3. Scope

There are three basic options for defining the scope of anti-discrimination rules: (1) limiting its reach to conduct directly related to client representation, (2) applying the rule to all activities connected to the practice of law, or (3) applying it without limit to the lawyer’s professional and personal conduct.

Both the current Wisconsin and ABA rules take the middle ground. In Wisconsin, SCR 20:8.4(i) applies to behavior “in connection with the lawyer’s professional activities” whereas ABA Model Rule 8.4(g) applies to “conduct related to the practice of law”. There does not appear to be a significant difference between the two.¹² Paragraph four of the ABA comments gives examples of how the provision might apply.

The committee believes the middle ground strikes the appropriate balance.¹³ A lawyer’s behavior at the firm, conferences, seminars, or business meetings reflects on the individual lawyer and the profession as much as conduct in litigation and may be more visible. This approach is not new.

⁸ See, Ill. Rule 8.4(j)(requires final adjudication of a violation of statute or ordinance); Minn. Rule 8.4(h), (g) (one provision of rule requires proof of violation of a statute or ordinance whereas the latter does not); N.J. Rule 8.4(g) (rule violation requires final determination of law violation in cases involving employment discrimination); N.Y. Rule 8.4(g) (prohibits a lawyer from “unlawfully discriminat[ing] in the practice of law” and exhaustion of other remedies if available); Washington Rule 8.4(g), (h)(varied approach – certain claims must violation separate state laws and others not).

⁹ See SCR 20:1.0(g), (m).

¹⁰ Revised Resolution and Report 109 to the ABA House of Delegates 8 (Aug. 2016).

¹¹ See cases cited in 101 *Law. Man. Prof. Conduct* 801 (2020).

¹² Comment ¶3 to the pre-2016 ABA version of Rule 8.4 suggested it would apply only to conduct “in the course of representing a client”.

¹³ Twelve jurisdictions would limit the rule to conduct related to the representation of a client. See Excel Spreadsheet – *State Bar Ethics – Discrimination Rules*.

Lawyers are already subject to discipline for conduct outside of the courtroom, and in some instances, outside of their professional activities.¹⁴

4. Protected categories.¹⁵

Both the current Wisconsin rule and ABA Model Rule 8.4(g) include sex, race, age, religion, national origin, disability, and marital status as protected categories.

SCR 20:8.4(i) also includes creed, color, and sexual preference, categories not included in the ABA Model Rule. On the other hand, ABA Model Rule 8.4(g) includes categories not addressed in the Wisconsin rule – ethnicity, gender identity and socio-economic status.

The committee believes the ABA approach is preferable to the current Wisconsin rule. An examination of the various categories may be useful in comparing the two.

The following categories would be omitted if Model Rule 8.4(g) replaced the current SCR 20:8.4(i).

The term “creed” is defined as “a brief authoritative formula of religious belief” or “a guiding principle”.¹⁶ If the former, it would be redundant, as both rule versions include religion as a protected category. Alternatively, if any “guiding principle” were included, individuals and groups espousing racism, anti-Semitism or white supremacy as their creeds would be protected.

“Color” would appear to be included by “race” and if so, would be unnecessary to include as a separate category.

“Sexual preference” as a term has fallen into disfavor as it suggests sexual orientation is a choice. It has been largely replaced by “sexual orientation”.¹⁷

The following categories would be added if Model Rule 8.4(g) is adopted.

“Ethnicity” is conceptually broader than “race” or “color” and has been defined as “a social group that shares a common and distinctive culture, religion, language, or the like.”¹⁸ Given the

¹⁴ See SCR 20:8.4(b)(criminal conduct reflecting on fitness to practice) and SCR 20:8.4(c) (dishonesty or misrepresentation whether or not related to client representation). Perhaps the most noted example of the latter was former President Clinton’s disbarment for lying in a deposition, where he was found to violate a variant of SCR 20:8.4(c).

<http://lprb.mncourts.gov/articles/Articles/In%20Re%20Unprofessional%20Conduct%20of%20William%20J.%20Clinton.pdf>

¹⁵ See Chart – Comparison of SCR 20:8.4(i) and ABA MRPC 8.45(g).

¹⁶ <https://www.merriam-webster.com/dictionary/creed>.

¹⁷ <https://www.apa.org/pi/lgbt/resources/language>.

¹⁸ <https://www.dictionary.com/browse/ethnicity>.

ambiguity that may arise with terms such as race or national origin including “ethnicity” may be a useful descriptive term.

ABA Model Rule 8.4(g) includes “gender identity” as a protected category. It appears this term was intended to embrace both “gender identity” and “sexual orientation”.¹⁹ If so, it would be responsive to objections to use of “sexual preference” and expand coverage as well.

Finally, the ABA version extends protections to “socioeconomic status”. This addresses discrimination or harassment based on one’s economic status or the acceptance of free or low-cost legal services.²⁰ As income inequality expands, increasing numbers of persons must rely on free or low-cost legal services to be represented at all. Any lawyer who has worked in these areas know that disparagement of the attorneys and parties in such cases is common. This seems an appropriate addition to the class of protected categories.

On balance, the committee believes the ABA listing of protected categories is an improvement over those in SCR 20:8.4(i).

5. Exceptions.

Both the Wisconsin and ABA rules include exceptions.²¹ SCR 20:8.4(i) states, “[l]egitimate advocacy respecting the foregoing factors does not violate par. (i).” ABA Model Rule 8.4(g) is more expansive, noting, “[t]his 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.”

The committee views the ABA language as preferable as it provides greater clarity about the rule’s interface with rules involving the acceptance, declination, or withdrawal from representation in SCR 20:1.16, as well as tendering advice or providing representation.²²

6. Free speech considerations.

From the time it was proposed, ABA Model Rule 8.4(g) has generated debate about whether it improperly restricts a lawyer’s right to free speech.²³ In fact, a federal district court recently

¹⁹ Revised Resolution and Report 109 to the ABA House of Delegates 12; <https://www.hrc.org/resources/glossary-of-terms>.

²⁰ Revised Resolution and Report 109 to the ABA House of Delegates 13. Comment ¶5 explains that this provision does not limit a lawyer’s ability to collect a reasonable fee or limit her practice to clients able to pay.

²¹ More than thirty jurisdictions have created exceptions like those in Wisconsin and in the ABA Model Rule. See Excel Spreadsheet – *State Bar Ethics – Discrimination Rules*.

²² See generally, 101 *Law. Man. Prof. Conduct* 801 (2020).

²³ See Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 *Geo. J. Legal Ethics* 31 (2018); Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 *Geo. J. Legal Ethics* 195 (2017); Blackman, *Reply: A Pause for State*

enjoined the newly enacted Pennsylvania rule for this very reason.²⁴ Of primary concern was the textual prohibition against “words [that] manifest bias or prejudice”, and the fact that the rule was not limited to courtroom conduct.²⁵ The objectionable language in the Pennsylvania rule does not appear in the text of either SCR 20:8.4(i) or Model Rule 8.4(g). Not surprisingly, the ABA has defended the language chosen²⁶ and it is likely the district court decision will be appealed.

A thorough review of the First Amendment issues is beyond the scope of the memorandum. However, the committee believes Model Rule 8.4(g) is likely to survive constitutional challenges, that any limits it imposes upon lawyers are far outweighed by the benefits of taking a strong stand against discriminatory behavior, and that it would constitute a significant improvement over our current rule. For these reasons we urge your support of seeking adoption of Model Rule 8.4(g).

Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 241, 265 (2017); Taslitz & Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 Geo. J. Legal Ethics 781, 788 (1996).

²⁴ *Greenberg v. Haggerty*, 20 CV 3822(E.D. Penn., December 8, 2020).

²⁵ *Id.* at 30, 32-33.

²⁶ See ABA Formal Opinion 493 at 9-12.