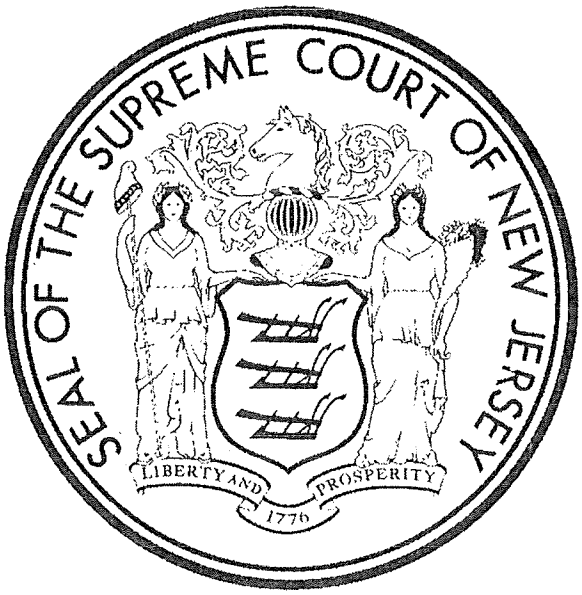
2018 - 2024 REPORT OF THE PROFESSIONAL RESPONSIBILITY RULES COMMITTEE



August 22, 2024

Chair: Ronald E. Bookbinder, A.J.S.C. (ret.)

I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. NEW JERSEY RULE OF PROFESSIONAL CONDUCT 8.4(G) (DISCRIMINATORY CONDUCT)

In 2017, the Supreme Court referred to the Professional Responsibility Rules Committee proposals from the New Jersey State Bar Association and Garden State Bar Association, each requesting amendments to RPC 8.4(g) to conform to American Bar Association (ABA) Model Rule 8.4(g). After thorough consideration, the Committee submitted a report to the Court dated January 31, 2018, recommending that the Rule be expanded to include a reference to "gender identity" as a protected classification. The Court then requested that the Committee continue its review of RPC 8.4(g) to consider certain language in the Rule (such as "handicap"); the full range of potential protected classifications; and the scope of lawyers' conduct that could be subject to the Rule (conduct in a "professional capacity" or "conduct related to the practice of law").

The Committee recommends that the terminology of RPC 8.4(g) be amended to mirror that in the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-3 (protected classifications: race, creed, color, national origin, ancestry, age, sex, gender identity or expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability, or nationality), with the addition of religion. It further

recommends that a sentence be added to the Official Comment: "It is intended that this provision be interpreted to include harassment." Lastly, it decided to retain the language defining the scope of lawyers' conduct (conduct in a "professional capacity") rather than adopt the ABA language ("conduct related to the practice of law"), finding the current language narrower than that of the ABA.

RPC 8.4(g) provides:

It is professional misconduct for a lawyer to:

* * *

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap, where the conduct is intended or likely to cause harm.

Official Comment by Supreme Court (May 3, 1994)
This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the courthouse, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the courthouse, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the

disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

"Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.

Case law has already suggested both the area covered by this amendment and the possible direction of future cases. In re Vincenti, 114 N.J. 275 (554 A.2d 470) (1989). The Court believes the administration of justice would be better served, however, by the adoption of this general rule than by a case by case development of the scope of the professional obligation.

While the origin of this rule was a recommendation of the Supreme Court's Task Force on Women in the Courts, the Court concluded that the protection, limited to women and minorities in that recommendation, should be expanded. The groups covered in the initial proposed amendment to the rule are the same as those named in Canon 3A(4) of the Code of Judicial Conduct.

Following the initial publication of this proposed subsection (g) and receipt of various comments and suggestions, the Court revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, to restrict the scope to conduct intended or likely to cause harm, and to include discrimination because of sexual orientation or socioeconomic status, these categories having been proposed by the ABA's Standing Committee on Ethics and Professional Responsibility as additions to the groups now covered in Canon 3A(4) of the New Jersey Code of Judicial Conduct. That Committee has also proposed that judges require attorneys, in proceedings before a judge, refrain from manifesting by words or conduct any bias or prejudice based on any of these categories. See proposed Canon 3A(6). This revision to the

RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. See, e.g., In re Vincenti, 114 N.J. 275 (554 A.2d 470) (1989).

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990; paragraph (g) amended May 3, 1994, to be effective September 1, 1994; paragraph (e) amended November 17, 2003 to be effective January 1, 2004.

ABA Model Rule 8.4(g) 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.

Comments pertaining to Model RPC 8.4(g) provide:

[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.

Paragraph (g) of New Jersey's RPC 8.4 was enacted in 1994, in response to a recommendation of the Supreme Court's Task Force on Women in the Courts. The protected classifications were those in Canon 3A(4) of the Code of Judicial Conduct, plus sexual orientation and socioeconomic status. RPC 8.4(g) applies to a lawyer's conduct in and out of the courthouse, though not to "purely private activities." The Rule also explicitly excludes "employment discrimination in hiring, firing, promotion, or partnership status," unless adjudicated. Additionally, "discrimination" is intended to be broadly construed, including "sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups" that is intended or likely to cause harm. Through paragraph (g), the Court intends to "cover all discrimination where the attorney

intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive."

After thorough review, the Committee recommends that the list of classifications in paragraph (g) be broadened to mirror classifications set forth in the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-3. Use of the LAD list in lieu of the Judicial Canon list also has the benefit of removing some anachronistic terms, such as "handicap," which is referred to as "disability" in the LAD. The LAD includes "creed" though the Committee recommends adding "religion" to the list. While the terms "creed" and "religion" are somewhat interchangeable, there are subtle differences; further, the word "religion" in the context of discrimination may be more commonly understood than "creed."

With regard to the scope of lawyer conduct that triggers discipline under the Rule, New Jersey uses the term "in a professional capacity," while the ABA uses the term "conduct related to the practice of law." The comments to both Rules explicitly state that the Rule's provisions apply to conduct outside the courthouse and law firm offices, including bar association activities.

The Committee prefers the language currently in New Jersey's Rule. The ABA Model Rule's language – "conduct related to the practice of law" has a

slightly broader sweep. This could have practical implications, possibly requiring an expansion of malpractice insurance and increasing lawyers' responsibility for subordinates. Given the effect discipline can have on a lawyer's career, the Committee finds that it should be reserved for lawyer conduct that occurs squarely in the lawyer's professional capacity and not in an even broader context.

The Committee also discussed the language in RPC 8.4(g) that specifies the requisite level of intent of discriminatory conduct to support discipline. New Jersey's Rule prohibits "conduct involving discrimination" that "is intended or likely to cause harm," while the ABA Model Rule prohibits conduct that the lawyer "knows or reasonably should know is harassment or discrimination." Both versions include intentional discrimination – New Jersey by using the word "intended" and the ABA by using the word "knows." Both versions include a state of mind for discriminatory conduct that is less than intentional – New Jersey by stating that the lawyer's discriminatory conduct be "likely to cause harm" and the ABA by stating that the lawyer "reasonably should know" that the conduct is discriminatory.

The difference between these two lesser standards of mens rea is difficult to grasp in the abstract. There are no Disciplinary Review Board cases that address, much less construe, this portion of the New Jersey Rule language. ABA Model Rule 8.4(g) is relatively new; it was enacted in 2016, has been adopted by only a

few jurisdictions, and research has not disclosed case law construing this portion of the Model Rule language. Evolving case law may illustrate a difference between the two standards. At this point in time, then, the Committee does not recommend a change in the language of New Jersey's Rule regarding intent.

Lastly, the Committee considered whether "harassment" should be added to RPC 8.4(g). The Official Comment states that "discrimination" in this Rule "includes sexual harassment, derogatory or demeaning language, and generally, any conduct towards the named groups that is both harmful and discriminatory." The Rule itself, however, does not mention "harassment."

The Committee found that "harassment" is generally considered to be enveloped in "discrimination," so there is no need to include the word in the language of the Rule. The Committee, however, recommends that the Official Comment be supplemented to include this sentence: "It is intended that this provision be interpreted to include harassment."

Accordingly, the Committee recommends that RPC 8.4(g) be amended to state:

It is professional misconduct for a lawyer to:

* * *

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of <u>race, religion, creed, color, national origin, ancestry, age, sex, gender identity or</u>

expression, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability, or nationality, ~~race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap,~~ where the conduct is intended or likely to cause harm.

Official Comment:

It is intended that this provision be interpreted to include harassment.

B. NEW JERSEY RULE OF PROFESSIONAL CONDUCT 1.5(B) (BASIS AND RATE OF FEE)

The Supreme Court, by letter dated August 30, 2017, requested that the Committee consider whether an amendment to RPC 1.5(b) is necessary to clarify that a lawyer should communicate the basis and rate of fee when representation of a regular client involves a different type of legal matter and different method of calculating the fee. The Court had considered a disciplinary matter, IMO Nelson Gonzalez (D-50-16), in which the lawyer represented a client in a workers' compensation matter and then was retained to represent the same client in a bankruptcy matter. The fee in the second matter was different but its basis and rate was not communicated to the client in writing.

RPC 1.5(b) provides:

> When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

In the disciplinary matter, IMO Nelson Gonzalez (D-50-16), the lawyer represented his client in two workers' compensation matters; fees in such matters are set by statute. The client subsequently retained respondent to handle a bankruptcy matter, for which the lawyer would charge $1,050 in fees and costs. The lawyer did not prepare a written fee agreement but claimed he told his client that he would not commence work on the bankruptcy until the entire fee was paid.

According to the ethics complaint, the client expected his lawyer to file the petition after receiving only partial payment and alleged that his lawyer had not explained that full payment was required. The complaint alleged that the lawyer's failure to set forth in writing the rate or basis of his fee for the bankruptcy matter violated RPC 1.5(b). The DRB determined that this client was a regular client at the time he retained the lawyer for the bankruptcy and, therefore, a fee writing was not required by the Rule. Consequently, the DRB dismissed the charge. Two members disagreed, positing that, because the fee structures varied, an understanding as to the basis or rate of the fee had not evolved and, thus, the lawyer was not exempt from the writing requirement. The Court agreed with the majority of the DRB and dismissed the charge.

In its 1983 report, the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct (Debevoise Committee) stated that when a lawyer regularly represents a client, it ordinarily results in "an understanding concerning the basis or rate of the fee. It is on that basis that the directive of this paragraph is made applicable only to those situations in which the lawyer has not regularly represented the client, i.e., in which there is not a preexisting understanding as to the fee rate or basis." Debevoise Committee Report, N.J.L.J. July 28, 1983, supp. at 11.

The Committee agrees that a lawyer should not change the basis or rate of the fee without presenting it to the client in writing, even when the client has regularly represented the client. It recommends that the Rule be amended to state that lawyers must state the basis or rate of the fee in writing at the beginning of the representation and also whenever there is a material change in the fee structure. It further recommends that the Rule clarify that if the fee structure will remain the same, no subsequent writing is required.

Accordingly, the Committee recommends that RPC 1.5(b) be amended to provide:

> ~~When the lawyer has not regularly represented the client, t~~The basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation. Any changes in the basis or rate of the fee shall also be communicated to the client in writing. Where a lawyer undertakes

a new representation for a previous client and the fee structure is the same, no such writing is required.

II. RULE AMENDMENTS CONSIDERED AND PILOT PROGRAM RECOMMENDED

A. RULE OF PROFESSIONAL CONDUCT 1.7 (WAIVER OF CONFLICT BY PUBLIC ENTITIES)

New Jersey Attorney General Matthew J. Platkin submitted a request to Acting Administrative Office of the Courts Director Glenn A. Grant dated August 14, 2023, requesting that the RPCs be amended to provide that when a public entity is represented by the Attorney General's Office, the Attorney General may consent to a conflict of interest on behalf of the public entity. The Rules currently provide that a public entity cannot consent to conflicted representation; such conflicts are nonwaivable. The Committee decided to recommend a pilot program to permit the Attorney General to waive such conflicts for a period of two years and then submit a report to the Court.

RPC 1.7(a)(1) states that it is a concurrent conflict of interest when a lawyer represents a client who is adverse to another client in an unrelated matter, while RPC 1.7(a)(2) states that it is a concurrent conflict when there is a substantial risk that the lawyer's representation will be materially limited by the lawyer's responsibilities to another client, a former client, a third person, or a personal

interest of the lawyer. RPC 1.7(b)(1) provides that if a concurrent conflict of interest exists, a lawyer may represent a client if "each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation."

RPC 1.9(a) states that a lawyer may not represent a client against a former client in the same or substantially related matter when the interests of the client and former client are materially adverse. Pursuant to RPC 1.9(d), a public entity cannot consent to waive a former client conflict.

RPC 1.8(k) provides: "A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client." RPC 1.8(l) provides: "A public entity cannot consent to a representation otherwise prohibited by this Rule."

New Jersey has prohibited public entities from consenting to conflicted representation since at least 1963. In Ahto v. Weaver, 39 N.J. 418 (1963), the Court stated: "Where the public interest is involved, [a lawyer] may not represent conflicting interests even with consent of all concerned." Id. at 431. The Court then issued a Notice to the Bar clarifying that the prohibition also applies to

lawyers for a municipality or other public agency who represent "private clients whose interests come before or are affected by it." Notice to the Bar, 86 N.J.L.J. 713 (December 19, 1963). That same year, the Advisory Committee on Professional Conduct stated, in Opinion 4 (June 27, 1963): "While an attorney representing two private clients may properly act in exceptional cases with the consent of each, even though a possibility of conflicting interests exists, consent is generally unavailable where the public interest is involved."

The principle was emphasized two years later in In re A & B, 44 N.J. 331 (1965), in which the Court noted the possibility of "public misunderstanding" when a lawyer representing the local government also represents developers operating in that municipality. Id. at 334. The Court found that such government lawyers may not represent those developers at all, in any matter. Ibid.

The Court subsequently reinforced the prohibition in 1983 and 2003. In 1983, the Debevoise Committee recommended that RPC 1.7 be adopted and further recommended that the appearance of impropriety standard be deleted. Its version of RPC 1.7 did not include a provision prohibiting government entities from consenting to a conflict. In its 1983 Administrative Determinations, the Court stated: "The Court has revised subparagraphs (a)(2) and (b)(2) of the recommendation of the Debevoise Committee so as to preserve New Jersey's rule that a government agency cannot consent to representation if a conflict of interest

exists or if the appearance of such a conflict exists. Thus, if there is a conflict that can only be cured by consent and if a governmental entity is one of the parties that must consent, that conflict cannot be avoided and representation of one or more of the clients must be terminated." Supreme Court Comment to RPC 1.7 (Administrative Determinations, July 12, 1984).

In 2003, the Supreme Court Commission on the Rules of Professional Conduct (Pollock Commission) recommended that RPC 1.7 be revised, primarily to remove the appearance of impropriety standard. The Commission's version of RPC 1.7 also did not include the language prohibiting a public entity from consenting. Pollock Commission Report, page 65. In its 2003 Administrative Determinations, the Court stated: "The Court has concluded, however, that the current prohibition against consent by public entities to the conflict of interests covered by this rule should be retained (see paragraph (b)(1))." Supreme Court Comment to RPC 1.7 (Administrative Determinations, September 10, 2003).

According to the Restatement of the Law Governing Lawyers, Volume 2, § 122, Comment g(ii) (ALI 2000), the prohibition on consent by public entities was first announced in ABA Formal Opinion 16 (1929), in which the ABA Committee found that a lawyer could not prosecute a criminal case while his partner served as defense counsel. The ABA Opinion stated: "No question of consent can be involved as the public is concerned and it cannot consent."

The analysis then shifted during the passing years. The Restatement now takes the position that any client, including governmental clients, can consent to a conflict, though governmental clients must have legal authority to do so and the officer who consents must not be "personally interested in consenting to the conflict." Id. at Comment c(ii).

New Jersey is currently the only State that prohibits, by Court Rule, a public entity from consenting to conflicted representation. There is case law from two other jurisdictions limiting the ability of public entities to consent in certain matters due to the appearance of impropriety.[1]

The Attorney General stated that his office has had difficulty securing legal representation by qualified outside counsel due to conflicts of interest, particularly in consumer protection litigation. He further noted that outside counsel may need to withdraw from litigation after the engagement commences due to a conflict, which causes undue expense to the State. The Attorney General limited his request to cases in which the Attorney General's Office is providing legal representation, and the Attorney General would provide the consent. His proposed amendments to the Rules would not apply to local government.

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[1] City of Little Rock v. Cash, 277 Ark. 494 (Ark. 1982) (lawyer concurrently represented city in one case and sued city in unrelated case which raised appearance of impropriety; city could not consent); State ex rel. Morgan Stanley & Co. v. MacQueen, 187 W.Va. 97, 102 (W.Va. 1992) (dual representation raised an appearance of impropriety and the State could not consent to the conflict).

The Committee requested the Attorney General provide additional information. It asked:

1. Please provide recent examples of cases or circumstances (without identifiers) in which the Attorney General's Office had difficulty retaining outside counsel. Has this arisen only in consumer protection litigation?

2. Please provide recent examples of cases or circumstances (without identifiers) where a conflict of interest has arisen in the midst of a case, requiring outside counsel to withdraw from representation.

3. Please explain whether the difficulties retaining outside counsel primarily arise from conflicts of interest under RPC 1.7(a)(1) (representation of an adverse party in an unrelated case); RPC 1.7(a)(2) (representation limited by the lawyer's responsibilities to another client, a former client, a third person, or a personal interest of the lawyer); or RPC 1.9(a) (representation of a client against a former client in the same or substantially related matter).

4. Please explain why this Rule change should apply only to cases in which the Attorney General's Office is providing legal representation, and not to all governmental clients, including local government or State agencies/authorities not represented by the Department of Law & Public Safety."

The Attorney General responded by letter dated March 19, 2024. He stated that there was one matter where the State sought outside counsel to develop a litigation strategy against a State contractor in a specialized regulatory area and it took two months to retain a firm that did not have a conflict of interest. There was also one matter where the State sought to retain a specific law firm to represent it in a consumer protection case in the healthcare industry but the firm had a conflict.

He stated that the State has difficulty retaining bond counsel because firms often also represent underwriters, which gives rise to a conflict.[2]

The Attorney General further suggested that conflicts may be a barrier when State agencies facing litigation or potential litigation by State employees seek advice from outside counsel who present private employers in employment litigation, since the law firms often represent employers in unrelated matters before the agency. He noted that if a State entity were to undertake joint litigation or investigation with an agency that law firms may have a conflict with, the State entity would have to find a non-conflicted firm or retain separate counsel. Lastly, he stated that his office expends resources determining if a conflict exists before retaining counsel while other parties have the option of just waiving a conflict without needing to determine if a conflict actually exists.

In response to the question about recent cases or circumstances where a conflict of interest has caused a lawyer to withdraw from representation in the midst of a case, the Attorney General pointed to one affirmative consumer protection case where the law firm representing the State decided to take on a new client that presented a conflict with the State litigation and the firm was required to withdraw from the State litigation. He noted another consumer protection

[2] Note that the Court, in In re Opinion 33, 160 N.J. 63, 81 (1999), permitted the Attorney General to retain out-of-state bond counsel should it be necessary in complex matters.

litigation case in which outside counsel represented a group of states, including New Jersey, and a conflict arose that other states were able to waive but New Jersey was not. (The firm resolved the conflict and continued the representation.) He stated that two firms retained for environmental litigation withdrew (apparently prior to beginning the representation) because they did not want to forego representing private clients before the State agency. He noted that an outside lawyer retained to review a State agency's guidelines "developed a conflict" and the Attorney General's Office had to complete the review in-house.

The Attorney General further stated that bond counsel on State appropriation-backed financing was removed just prior to the bond resolution approval because counsel represented another client before the agency, and another bond counsel withdrew from initiating representation because the underwriter selected by the agency for the bonds was a client of the firm. Lastly, he stated that there may be cases with multiple parties that could present conflicts issues, if an entity against which a claim is brought declares bankruptcy and the interests of the State and the other creditor-parties diverge, or if counsel represents the State and other parties and the claims are consolidated in multi-district litigation and the interests of the lawyer's clients diverge.

The Attorney General confirmed that most of the difficulties retaining outside counsel arise from conflicts of interest under RPC 1.7(a)(1) (representation

of an adverse party in an unrelated case), though some conflicts under RPC 1.7(a)(2) also arise. He states that conflicts under RPC 1.9 do not arise frequently but he includes a request to waive conflicts arising under that RPC "to make the conflict waiver language consistent across the RPCs."

The Attorney General explained that he seeks Rule amendments only as to matters in which the Attorney General's Office is providing representation because he lacks information about conflicts and difficulties experienced by counsel for local government or for State agencies/authorities not represented by the Department of Law and Public Safety.

The Committee notes that there may be other reasons why the Attorney General's Office experiences difficulty retaining lawyers in certain areas. Outside counsel often are paid at a reduced rate and must qualify to be in the pool of outside counsel. Payment for legal services also can be delayed, due to State payment-processing procedures. Compliance with complex regulations governing political contributions may also affect the depth of the outside counsel pool.

There is certainly no dearth of lawyers in New Jersey: we are ranked seventh in the nation in lawyers-by-population (4.3 per 1,000 people), behind New York, California, and a few other states, according to the 2023 ABA Profile of the Legal Profession. While clients should have the right to counsel of their choice, the Attorney General's client is not an individual, it is the State government. The

Committee pondered whether the Attorney General's Office was being too selective about its choice of lawyers and whether this handful of preferred law firms that had nonwaivable conflicts justifies such a momentous Rule change.

The Committee considered the policy reasons for prohibiting public entities from waiving conflicts of interest. New Jersey has held to this position since at least 1963 and the Court explicitly reaffirmed this position when amending the Rules in both 1983 and 2003. The justification for the position – that it is necessary to protect public confidence in governmental operations – has support in the history of public corruption in New Jersey.

The prohibition, however, can also be viewed as paternalistic. In almost all other jurisdictions, the public client can choose to waive conflicted representation by its lawyers. The sky has not fallen in these other states. The Committee acknowledges that there is good reason to consider a Rule change when New Jersey is such an outlier.

The Committee first considered compromise positions. As the Attorney General noted, conflicts may arise in the midst of multi-state litigation when a settlement offer may not satisfy all of the party-States. The Committee agrees that multi-state litigation, where the same lawyer represents New Jersey and other states, justifies a limited ability to waive conflicts.

The Committee further considered recommending that public entities may consent only to those conflicts that arise under RPC 1.7(a)(1) – where the lawyer represents a private client before or against the State agency while concurrently representing that State agency in an unrelated matter. As the Attorney General confirmed, this is the primary source of conflicts of interest for outside counsel. Such conflicts tend to be less attenuated than former client conflicts or conflicts under RPC 1.7(a)(2). The Committee, however, decided that if a change is to be made, it should extend to all conflicts.

While New Jersey proudly forges its own path on many issues of public import, the Committee was troubled that we are the only state with a court rule that prohibits public entities from consenting to conflicts of interest. This paternalistic position has its justifications but, after weighing the competing policy considerations, the Committee found that it is time to try a different approach, though on a temporary basis.

The Committee recommends the Court enact a two-year pilot program to permit the Attorney General to waive conflicts of interest for clients represented by the Attorney General's Office. A waiver of conflict under the pilot program would extend throughout the litigation, even if the pilot program ends before the litigation is completed.

As this would be a significant change in the rules governing public lawyering, the Committee suggests that it first be tested for a limited period of time, to permit an assessment of both its execution and its necessity. The Committee recommends that the pilot program contain a requirement that the Attorney General report to the Court, at the end of the period, what conflicts were waived, in what specific cases, for what firms, and for what reason, so the Court can assess the need for such conflict waivers.

The Committee decided not to recommend that the pilot program be extended to local government. The Attorney General's Office has a professional infrastructure designed to insulate decision-making from problematic conflicts. Many of New Jersey's 564 municipalities have no such infrastructure.

III. RULE AMENDMENTS CONSIDERED AND REJECTED

A. RULE OF PROFESSIONAL CONDUCT 1.6(D)(2) (RESPONDING TO NEGATIVE ONLINE REVIEWS)

The New Jersey State Bar Association (NJSBA) wrote to Acting Administrative Director Grant by letter dated August 15, 2023, requesting that the Court provide "clarifying guidance under RPC 1.6(d)(2) to allow attorneys to respond to online reviews in an objective, measured fashion." The NJSBA takes issue with Advisory Committee on Professional Ethics (ACPE) Opinion 738

(December 2020), which reminded lawyers of their obligations under RPC 1.6 to refrain from disclosing confidential information relating to representation in response to negative online reviews.

RPC 1.6(a) provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for . . . disclosures of information that is generally known . . . ." RPC 1.6(d)(2) permits a lawyer to reveal confidential information to the extent the lawyer reasonably believes it necessary to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved."

As the ACPE noted in Opinion 738, "pursuant to Rule of Professional Conduct 1.6(d)(2), a lawyer may disclose certain confidential information to the extent necessary to defend a discipline charge or legal malpractice action brought by the client, to pursue an action seeking fees from the client, or similar matters when the information is relevant to the defense or the claim." The ACPE found that "an informal 'controversy' between a lawyer and a client does not fall within the safe harbor of Rule of Professional Conduct 1.6(a)(2)." Hence, lawyers may not disclose confidential information relating to representation in response to a negative online review.

The NJSBA acknowledges that ACPE Opinion 738 follows the reasoning of many other jurisdictions with regard to this issue but "suggests that the tide is turning as online information becomes more prevalent and is more frequently relied upon as a relevant source of information." It cites an Arizona ethics opinion that posits that clients can forfeit their right to confidentiality when they make public accusations of misconduct. Arizona Ethics Opinion No. EO-19-0010. The opinion, however, did not make this finding; the single-member dissent appended to the opinion discusses potential forfeiture of confidentiality. Arizona, like New Jersey, construes the RPC 1.6 "controversy" safe harbor to exclude "a public allegation criticizing an attorney in representing a client." Ibid.

The NJSBA requests that the Court issue guidance that allows lawyers to respond to online reviews when the review contains an "objectively inaccurate factual statement" that "directly impugns the lawyer's ability to represent clients, including honesty, competency, integrity, knowledge of the law and similar legal attributes." In such cases, according to the NJSBA proposal, the lawyer would reach out to the client and ask that the post be removed and notify the client that if it is not, the lawyer will "release the client's confidential information in order to rebut the online post."

The Committee acknowledges that false information in online reviews is a significant problem for lawyers but it is not in favor of a Rule amendment to carve

out an exception to permit lawyers to disclose otherwise confidential information about their clients online. This would be a significant change in lawyers' obligations to maintain confidentiality. Rather, the Committee finds that lawyers in this situation should respond with the suggested language set forth in the ACPE Opinion: "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point by point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events." ACPE Opinion 738 (quoting Pennsylvania Bar Association Formal Opinion 2014-200 (2014)). The Committee agrees that this language accords with New Jersey lawyers' ethical obligations and does not recommend that any changes be made to RPC 1.6(d)(2).

IV. CONCLUSION

The Chair and members of the Professional Responsibility Rules Committee appreciate the opportunity to serve the Supreme Court.

Respectfully submitted,

Hon. Ronald E. Bookbinder, A.J.S.C. (ret.), Chair
Jeffrey S. Apell, Esq.
Domenick Carmagnola, Esq.
Ronald K. Chen, Esq.
Hon. Mary Catherine Cuff, P.J.A.D. (ret.)
Nancy Giacumbo, Esq.
William Harla, Esq.
Brett R. Harris, Esq.
Hon. Virginia Long, J. (ret.)
Michael T. McCormick, Esq.

Committee Staff:
Carol Johnston, Esq.

EXHIBIT A

SUPREME COURT OF NEW JERSEY
PROFESSIONAL RESPONSIBILITY RULES COMMITTEE

P.O. BOX 970
TRENTON, NJ 08625-0970

STAFF:
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MEMORANDUM

TO: Supreme Court

FROM: PRRC Members

RE: RPC 8.4(g) Referrals: Discriminatory Conduct

DATE: January 31, 2018

The Court asked the Committee to consider two proposals from the New Jersey State Bar Association (NJSBA) and the Garden State Bar Association (GSBA) requesting amendments to RPC 8.4(g) to conform with the American Bar Association's recent amendments to its Model Rule of Professional Conduct 8.4(g). The Court requested that the Committee review and analyze the proposals and prepare a report detailing any recommendations for action, to be submitted to the Court in early 2018.

The following memorandum discusses Model Rule 8.4(g), our RPC 8.4(g) and its history, a brief summary of other jurisdictions' approaches to this issue, and the Committee's recommendations for action.

Model Rule 8.4(g)

The ABA House of Delegates adopted the amendments to Model Rule 8.4(g) on August 8, 2016, with the unanimous support of the New Jersey delegation. ABA Model Rule 8.4(g) is

an expansive rule, expressly prohibiting both harassing and discriminating conduct by lawyers that is in any way related to the practice of law. The rule states:

> 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 representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The report provided by the ABA's Standing Committee on Ethics and Professional Responsibility (SCEPR) (attached) provides significant background as to the perceived need for, and evolution of, revised Model Rule 8.4(g). A brief summary of the SCEPR report follows.

The Model Rules, which were adopted in 1983, did not contain any reference to bias, prejudice, harassment, or discrimination. In 1998, in lieu of amending Model Rule 8.4 to contain an anti-discrimination provision, a comment to the rule was adopted, which contained anti-discrimnation language. The language applied only to conduct that was prejudicial to the administration of justice and which occurred during the course of representation. Beginning in 2014, the ABA determined to address the absence of a model rule directly related to issues of harassment and discrimination.

SCEPR, following the recommendation of a Working Group, concluded that there was a need to amend Model Rule 8.4 to provide a comprehensive anti-discrimination provision limited to the practice of law within the body of the rule itself, not just in the Comment. Opposition to this proposal suggested that a rule amendment was unnecessary, and that the existing Comment provided the proper level of guidance.

In the new Comment 3 to Model Rule 8.4(g), discrimination is defined as "harmful verbal or physical conduct that manifests bias or prejudice towards others" on the basis of their membership in one or more of the classifications listed in paragraph (g), while harassment is defined as including "sexual harassment and derogatory or demeaning verbal or physical conduct." The Comment makes it clear that, while substantive law on anti-discrimination and anti-harassment may provide guidance in the application of paragraph (g), it is not necessarily dispositive.

SCEPR explained that Model Rule 8.4(g) is limited to harassment or discrimination that occurs while a lawyer is engaged in "conduct related to the practice of law." It does not regulate conduct occurring outside the scope of a lawyer's practice, nor does it impose any limits or requirements on the scope of a lawyer's professional expertise. Comment 4 to Model Rule 8.4(g) provides that 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." SCEPR further noted that use of the term "conduct related to the practice of law" is similar to the scope of existing provisions in many states, including New Jersey RPC 8.4(g), which uses the term "in a professional capacity." SCEPR points out that, while the scope of Model Rule 8.4(g) is narrower and more limited than other Model Rules, its application to "conduct related to the practice of law" was broader than the existing Model Rule 8.4, a change SCEPR deemed necessary in order to "make clear that the profession will not tolerate harassment and discrimination in all conduct related to the practice of law."

That being said, SCEPR made it clear the Model Rule 8.4(g) is not intended to replace employment discrimination law or to prohibit deferring action on complaints pending other investigations. SCEPR rejected concerns that suggested prohibiting an ethics claim on the basis of discrimination and harassment until the claim was first addressed by a legal tribunal which found the lawyer guilty of either discrimination or harassment. It explained that no other model rule contains such a requirement, pointing out that ethics rules are not limited by statutory or common law claims. Given the profession's self-governance, a lawyer's failure to comply with an ethics rule invokes the disciplinary process, not the civil legal system. In SCEPR's view, requiring claims to proceed first through the civil legal system "would set a terrible precedent and send the wrong message to the public."

Furthermore, when it proposed Model Rule 8.4(g), SCEPR identified specific classifications because not doing so would risk inclusion of appropriate distinctions made in the course of professional life, such as requiring interviewees to be willing to relocate. Model Rule 8.4(g) retains the classifications protected by the former provision, adding ethnicity, gender identity, and marital status. With respect to the term "socioeconomic status," SCEPR explained that the Rule is not intended to limit a lawyer's ability to charge and collect a reasonable fee, with the proviso that lawyers should remain mindful of their pro bono obligations and/or duty to accept court-appointed clients. Similarly, Model Rule 8.4(g) does not limit a lawyer's ability to accept, refuse, or withdraw from representation, although, in an effort to prevent lawyers from rejecting clients with unpopular or controversial views, new Comment 5 reminds lawyers that representation does not constitute an endorsement of those views. Additionally, Model Rule 8.4(g) does not prohibit conduct undertaken to promote diversity.

SCEPR concluded that Model Rule 8.4(g) "is a reasonable, limited and necessary addition to the Model Rules of Professional Conduct[,]" which "will make it clear that it is professional misconduct to harass or discriminate while engaged in conduct related to the practice of law."

New Jersey RPC 8.4(g)

New Jersey RPC 8.4(g) states that it is professional misconduct for an attorney to:

> engage in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap, where the conduct is intended or likely to cause harm.

According to the Supreme Court's Official Comment issued at the time of the addition of paragraph (g), May 3, 1994, creation of this provision arose from a recommendation of the Supreme Court's Task Force on Women in the Courts. Although the recommendation limited the protections afforded by paragraph (g) to women and minorities, the Court concluded that it should be expanded and determined that the provision should cover the same classifications named in Canon 3A(4) of the Code of Judicial Conduct, as well as sexual orientation and socioeconomic status.

The Comment to RPC 8.4(g) makes clear that paragraph (g) "is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity." The comment expands on the term "professional capacity," explaining that paragraph (g) applies to a lawyer's conduct in and out of the courthouse, whether or not it directly relates to litigation. However, "purely private activities" are not covered. The comment also explicitly excludes

"employment discrimination in hiring, firing, promotion, or partnership status," unless adjudicated. Additionally, "discrimination" is intended to be broadly construed, including "sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups" that is intended or likely to cause harm. Through paragraph (g), the Court intends to "cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent[.]"

Although at the time of the provision's adoption, case law was suggesting the possible future direction of cases, the Court determined that adoption of a general rule would better serve the administration of justice than case-by-case development of an attorney's "professional obligation." Additionally, it determined that the language of the provision, along with existing case law, sufficiently narrowed the breadth of the rule in order to avoid any suggestion that it is over broad.

Other Jurisdictions

Prior to the ABA's adoption of Model Rule 8.4(g), twenty-two states[1], including New Jersey and the District of Columbia already had adopted anti-discrimination and/or anti-harassment provisions into their rules of professional conduct. Alternatively, thirteen states had

[1] The following states had addressed the issue in a rule: California RPC 2-400; Colorado RPC 8.4(g); Florida RPC 4-8.4(d); Illinois RPC 8.4(j); Indiana RPC 8.4(g); Iowa RPC 8.4(g); Maryland RPC 8.4(e); Massachusetts RPC 3.4(i); Minnesota RPC 8.4(h); Missouri RPC 4-8.4(g); Nebraska RPC 8.4(d); New Jersey RPC 8.4(g); New Mexico RPC 16-300; New York RPC 8.4(g); North Dakota RPC 8.4(f); Ohio RPC 8.4(g); Oregon RPC 8.4(a)(7); Rhode Island RPC 8.4(d); Texas RPC 5.08; Vermont RPC 8.4(g); Washington RPC 8.4(g); Wisconsin RPC 8.4(i); and D.C. RPC 9.1.

addressed the issue in comments similar to the 1998 Comment added to the ABA's Model Rules.[2] An additional fourteen states had not yet addressed this issue in their rules of professional conduct.[3] The SCEPR report noted that jurisdictions with black letter rules addressing discrimination and harassment had not seen surges in complaints based on those provisions.

Since the ABA's adoption of Model Rule 8.4(g), there has been division among states as to whether to expand their rules to include the Model Rule's language. David L. Hudson, Jr., "States Split on New ABA Model Rule Limiting Harassing or Discriminatory Conduct," ABA Journal, October 2017 (attached). Specifically, there has been significant concern regarding the Model Rule's potential to infringe on a lawyer's freedom of speech. One constitutional law expert suggested that the rule's failure to require that harassment be severe or pervasive, a requirement of federal and state anti-discrimination laws, could lead to a single comment resulting in discipline. Ibid. Another scholar, Eugene Volokh, opined that the rule may chill speech on important topics and turn employment disputes into disciplinary matters. Ibid. Volokh stated that, while restricting discrimination and harassment by a lawyer in the context of litigation may be within a court's authority, the rule extends beyond the confines of litigation to social functions and bar activities related to lawyering. Idid. However, Model Rule 8.4(g)'s

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[2] The following states had addressed the issue in comments to a rule: Arizona RPC 8.4; Arkansas RPC 8.4; Connecticut RPC 8.4; Delaware RPC 8.4; Idaho RPC 8.4; Maine RPC 8.4; North Carolina RPC 8.4; South Carolina RPC 8.4; South Dakota RPC 8.4; Tennessee RPC 8.4; Utah RPC 8.4; Wyoming RPC 8.4; and West Virginia RPC 8.4.

[3] Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia have not addressed this issue in their rules or the comments to their rules.

defenders counter that the rule "provides a useful symbolic statement and educational function," which is unlikely to present any actual First Amendment threat. Ibid.

On July 14, 2017, the Vermont Supreme Court adopted a version of the rule (attached), but a cursory review of other jurisdictions shows that many have rejected the rule or are facing significant opposition in efforts to adopt it:

- While the South Carolina Supreme Court issued a June 20, 2017, order rejecting the rule (attached), it noted that its Commissions on Lawyer and Judicial Conduct, which expressed the belief that discrimination and lack of diversity within the profession should be addressed, were free to submit alternative proposed amendments to South Carolina RPC 8.4.
- The Supreme Court of Nevada solicited comments on the adoption of Model Rule 8.4(g) through July 2017, with a public hearing scheduled for November 6, 2017. However, before the hearing occurred, the Board of Governors of the State Bar of Nevada requested permission to withdraw its petition seeking to amend Nevada RPC 8.4 until such time as the language used in other jurisdictions became more consistent. On September 25, 2017, the Court granted the request (attached).
- The Montana Supreme Court is currently considering adopting the Model Rule 8.4(g) language. However, in April 2017, the Montana legislature passed a joint resolution (attached) condemning Model Rule 8.4(g) as unconstitutional given its infringement on the First Amendment rights of licensed Montana attorneys. The resolution stated that, despite "hundreds" of comments submitted during the comment period "pointedly observing that the proposed rule seeks to destroy the bedrock foundations and traditions of American independent thought, speech, and

action[,]" the Court "relentlessly pursues adoption of the Proposed Rule 8.4(g)[.]" The Montana legislature determined that the rule's Comment 4, addressing the definition of "[c]onduct related to the practice of law," demonstrated the expansive over-reach of the rule. Specifically, it objected to the rule's potential ability to control the speech of legislators and legislative staff who may be licensed to practice law, as well as the social conduct and speech of all licensed Montana attorneys. The legislature further determined that adoption of Model Rule 8.4(g) would impose a speech code on attorneys, thereby chilling their speech, threatening their careers, and depriving citizens of zealous legal representation.

- The Utah Supreme Court solicited comments on whether to adopt the language in Model Rule 8.4(g) until July 28, 2017. At this time, it is unclear whether any further steps toward adoption have been taken.
- On March 23, 2017, the New Hampshire Supreme Court Advisory Committee on Rules issued a letter (attached) reporting that the Ethics Committee of the New Hampshire Bar Association completed its review of Model Rule 8.4(g) and, with some revisions, proposed adopting the rule. It is unclear whether further action has been taken.
- While it is unclear what steps have been taken in Pennsylvania to adopt Model Rule 8.4(g) or a variation thereof (a Notice of Proposed Rulemaking was issued by the Disciplinary Board on November 16, 2016, but I did not find any documents stating whether a new rule was adopted), on October 26, 2016, the Philadelphia Bar Association passed a resolution (attached) supporting its

adoption. On December 2, 2016, the Pennsylvania Bar Association similarly recommended amendment of Pennsylvania RPC 8.4 "to include a prohibition on harassment and discrimination in the practice of law in substantial conformity with" Model Rule 8.4(g).

- In December 2016, the Attorney General of Texas issued an opinion letter (attached) expressing the belief that a court would find that Model Rule 8.4(g) "unconstitutionally restrict[s] freedom of speech, free exercise of religion, and freedom of association for members of the State Bar." The Attorney General further opined that "a court would likely conclude that it was overbroad and void for vagueness."
- As of August 2017, the Illinois Supreme Court Committee on Professional Responsibility is considering modifying its existing rule to mirror Model Rule 8.4(g). In December 2016, the Illinois State Bar Association noted its opposition to the Model Rule, submitting that the rule does not define "discrimination" and "harassment" in a way that will properly achieve its intent. Additionally, the Association expressed concerns about subjecting attorneys to unfounded disciplinary complaints and may have a chilling effect on the willingness of attorneys to participate in and serve on boards of religious organizations whose tenets may be considered discriminatory under the Model Rule.
- On September 8, 2017, the Louisiana Attorney General issued an opinion (attached) regarding the constitutionality of Model Rule 8.4(g), which, in modified form, had been proposed as an addition to Louisiana's current RPC 8.4 by a Subcommittee of the Louisiana State Bar Association's Rules of Professional

Conduct Committee. The Attorney General concluded that it was likely a court would find Model Rule 8.4(g) "unconstitutional under the First and Fourteenth Amendments[,]" suffering from vagueness and overbreadth. The Attorney General, along with several District Attorneys, also submitted a September 15, 2017, letter (attached) further explaining their objections to the rule.

- While there is no indication that the Kansas Supreme Court is contemplating adopting the Model Rule, it is clear that licensed professionals in that state are concerned about the potential effects of any future efforts to adopt it, as evidenced by the Wichita Bar Association's upcoming Lunch & Learn (attached), entitled "ABA Model Rule 8.4(g): Straddling the Line Between Attorney Misconduct and Free Speech Rights."

Conclusion

In its request, the NJSBA stressed that the ABA's adoption of Model Rule 8.4(g) had unanimous support from the New Jersey delegation. For its part, the NJSBA believes that a lawyer's conduct in a non-representational setting is just as important as in a representational one, and submits that Model Rule 8.4(g) will ensure that lawyers maintain the dignity and respect of the profession in any setting related to the practice of law. The NJSBA asserts that adopting Model Rule 8.4(g) as written "will bring New Jersey's legal profession closer to the goal of eradicating the cancer of discrimination and harassing behavior from our noble profession."

The GSBA similarly requests that Model Rule 8.4(g) be adopted as written. The GSBA points to the current rule's limited scope and workplace exception as reasons for adopting Model

Rule 8.4(g). It asserts that "[t]he extra protection afforded in [Model Rule 8.4(g)] not only provides additional safeguards, it also holds our attorneys to a higher standard for our noble profession."

On its face, Model Rule 8.4(g) appears innocuous and generally beneficial; however, it is clear from the significant concerns raised by other jurisdictions that widespread adoption of the rule as it is written is highly unlikely. In considering recommendations for action related to the proposals regarding amendments conforming to Model Rule 8.4(g), the PRRC was cognizant of the following variations between Model Rule 8.4(g) and RPC 8.4(g):

- RPC 8.4(g) does not currently include harassment;
- RPC 8.4(g) does not include "knows or reasonably should know" language;
- Model Rule 8.4(g) adds several additional protected classifications (ethnicity and gender identity; note also that RPC 8.4(g) uses the term "handicap" rather than "disability); and
- RPC 8.4(g) is limited in scope to conduct which occurs "in a professional capacity," rather than Model Rule 8.4(g)'s more expansive conduct "related to the practice of law."

PRRC members met via conference call on January 2, 2018, to further discuss the referral (see attached Minutes). Member Frost noted that, since RPC 8.4(g)'s adoption in 1990, discipline was only imposed in three cases as a result of an RPC 8.4(g) violation. In each instance, the DRB and Court seemed to be hewing close to the current Rule's restriction that conduct have occurred "in a professional capacity." With respect to the Rules, where personal behavior is subject to discipline, it is typically because the behavior is criminal or quasi-criminal in nature.

Justice Long suggested that RPC 8.4(g) be expanded to include the gender identity category from the Model Rule. Members expressed agreement with this suggestion, noting that the paucity of cases in which RPC 8.4(g) was invoked suggests that there is no current need to change it beyond expanding the protected categories.

However, members concurred that the motivation for Model Rule 8.4(g) was laudable, and felt that, in time, it may be necessary to enhance the protections afforded by RPC 8.4(g). Examining the wording of the Model Rule, members saw its use of the phrase "conduct related to the practice of law" as problematic, given that it could extend the rule to non-representational activities, such as NJSBA events or client dinners. Members also noted practical implications that should be considered, such as the possible effect of an expansion on malpractice insurance or responsibility for subordinates. Moreover, there may be an impact on the disciplinary system, which currently is operating at full capacity. Members also expressed concern over the mens rea included in the Model Rule, which prohibits conduct the lawyer "knows or reasonably should know is harassment or discrimination[.]" (emphasis added).

Members expressed the view that the level of discussion during the call indicated a need for further in-depth consideration of whether the Model Rule should be adopted as written or as modified, if at all. Per a vote, the Committee unanimously recommended that the Court modify the existing rule to include "gender identity," but that the Committee be permitted to continue exploring further revision of RPC 8.4(g) in line with the Model Rule.

Attachments

- August 30, 2017, referral memo from Clerk, including referral letters from the NJSBA and GSBA, Model Rule 8.4(g) and the SCEPR report

- RPC 8.4
- David L. Hudson, Jr., "States Split on New ABA Model Rule Limiting Harassing or Discriminatory Conduct," ABA Journal, October 2017
- Orders and letters relating to the adoption and/or proposed adoption of Model Rule 8.4(g) in other jurisdictions
- ABA CPR Policy Implementation Committee's Report on Variations of the ABA Model Rules of Professional Conduct, Model Rule 8.4: Misconduct (as of September 29, 2017)
- PRRC January 2, 2018 Conference Call – Minutes of Meeting

Additional Resources

- Stephen Gillers, "A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)," 30 Geo. J. Legal Ethics 195 (2017)
- Josh Blackman, "Reply: A Pause for State Courts Considering Model Rule 8.4(g)," 30 Geo. J. Legal Ethics 241 (2017)
- George W. Dent, Jr., "Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political," Notre Dame Journal of Law, Ethics and Public Policy (2017)

SUPREME COURT OF NEW JERSEY

MARK NEARY
CLERK

GAIL GRUNDITZ HANEY
DEPUTY CLERK

OFFICE OF THE CLERK
PO BOX 970
TRENTON, NEW JERSEY 08625-0970

August 30, 2017

Thomas L. Weisenbeck, A.J.S.C. (ret.)
Chair, Professional Responsibility Rules Committee
Bressler, Amery & Ross, P.C.
325 Columbia Turnpike
Suite 301
Florham Park, NJ 07932

Re: Supreme Court Referrals

Dear Judge Weisenbeck:

By this letter, the Supreme Court is referring two proposals to the Professional Responsibility Rules Committee. The proposals request amendments to RPC 8.4(g) to conform with the American Bar Association recent amendments to its Model Rule of Professional Conduct 8.4(g). Attached are copies of letters to Chief Justice Rabner from Thomas Prol, then-President of the New Jersey Bar Association, and Lloyd Freeman, the President of the State Bar Association, documenting the positions of their respective organizations.

The Court requests that the Committee review and analyze the proposals and prepare a written report for the Court that may include the Committee's recommendations for action. The Court further requests that the report be submitted no later than January 2018 so that it may be considered as part of the 2017-2018 rule cycle.

Very truly yours,

Mark Neary
Clerk

c: Steven D. Bonville, Chief of Staff, AOC
Heather L. Baker, Esq., staff to the PRRC

NEW JERSEY STATE BAR ASSOCIATION

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May 16, 2017

Hon. Stuart Rabner, Chief Justice
New Jersey Supreme Court
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08624

Re: Proposed Amendment to RPC 8.4(g)

Dear Chief Justice Rabner:

On behalf of the New Jersey State Bar Association (NJSBA), I respectfully request the New Jersey Supreme Court to consider amending the New Jersey Rules of Professional Conduct to include the proscription against discriminating and harassing behavior found in American Bar Association (ABA) Model Rule 8.4(g). The NJSBA believes the Model Rule clearly and accurately reflects the standard to which lawyers should be held and urges its adoption.

While New Jersey's existing RPC 8.4(g) prohibits discriminatory conduct, it is limited to conduct in a professional capacity and it includes a workplace exception. The ABA Model Rule is more expansive, specifically prohibiting harassing, as well as discriminating, conduct that is in any way related to the practice of law, without exception. The text of the rule 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 socio-economic 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.

The proposed Rule change was adopted by the ABA House of Delegates on Aug. 8, 2016 with unanimous support from the New Jersey delegation to the ABA House; it was championed by then-ABA President Paulette Brown and her Diversity 360 Commission headed by David Wolfe, Esq. The report submitted to the ABA House of Delegates in advance of that successful adoption of the Model Rule provides further background and is attached for your review. The comments

accompanying the rule further clarify and emphasize that it is meant to govern a lawyer's conduct in any setting, in any capacity that is related to the practice of law, whether meeting with a client, managing a law firm or participating in bar association activities. For the sake of the profession, the NJSBA believes that a lawyer's conduct is just as important in those settings as in a representational setting.

As officers of the court, lawyers are charged with exhibiting the highest degree of ethics and professionalism in every facet of their lives that is connected to the practice of law. ABA Model Rule 8.4(g) reflects that ideal and ensures that lawyers maintain the dignity and respect of the profession in any action, without undermining their ability to zealously advocate for their clients.

As President Paulette Brown noted at one of the public hearings on the Model Rule: "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."

The NJSBA respectfully urges the Supreme Court to continue its laudable efforts to end discrimination and harassment and, in doing so, take the necessary next steps to affirm there is no place for such conduct in the legal profession. Zealous advocacy can, indeed, be accomplished in a professional, civilized and dignified manner. We fervently believe that adopting ABA Model Rule 8.4(g) will send that message and will bring New Jersey's legal profession closer to the goal of eradicating the cancer of discrimination and harassing behavior from our noble profession.

This is likely the last letter you will receive from me as the sitting state bar president and I will allow I cannot imagine a more fitting proposal to present for your review as a capstone to my term.

Thank you, as always, for your consideration of this request. Should you require any further information, please do not hesitate to contact me or the incoming President, Robert Hille, Esq.

Respectfully,

Thomas H. Prol
NJSBA President

cc: Robert B. Hille, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 8-9, 2016

RESOLUTION

RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows:

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

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

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

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

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

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

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

(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.

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Comment

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

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

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines 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).

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

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

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[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."

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 (SCEPR") 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 anti-discrimination 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

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

require resolution through a Rule. Now—thirty-three years after the Model Rules were first 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

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[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.

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 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 anti-discrimination 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 amend 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 anti-discrimination 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

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[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).

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.

Therefore, SCEPR, along with our co-sponsors, propose amending ABA Model Rule of Professional Conduct 8.4 to further implement Goal III by bringing into the black letter of the Rules an anti-discrimination 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 anti-discrimination 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-two states and the District of Columbia have not waited for the Association to act. They 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 anti-discrimination 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 issue in a Comment similar to the current Comment in the Model

[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 Professional Conduct 8.4(g); Florida Rule of Professional Conduct 4-8.4(d); 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); 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.

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 anti-discrimination 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 anti-discrimination 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]

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[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.

[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).

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.

Proposed new black letter Rule 8.4(g) does not use the terms "manifests . . . bias or prejudice"[16] which appear in the current provision. Instead, the new rule adopts the terms "harass or discriminate" which are based on the words "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], "harass" is defined as including "sexual harassment and derogatory or demeaning language towards a person who is, or is perceived to be, a member of one of the groups. . . . unwelcome sexual advances, requests for sexual favors, and or other unwelcome 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 because of their membership or perceived membership in one or more of the groups listed in paragraph (g)." 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. Mens Rea Requirement

Proposed new Rule 8.4(g) does not use the term "knowingly." SCEPR received many comments about whether new paragraph (g) should include a specifically stated requirement that the

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[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).

misconduct be "knowing" discrimination or harassment. SCEPR concluded that a "knowing" or "knowingly" requirement in new paragraph (g) is neither necessary nor appropriate.

Rule 8.4(d), which current Comment [3] illuminates, prohibits "conduct that is prejudicial to the administration of justice." It does not include an additional requirement that such conduct be "knowing." Current Rule 8.4(d) does not require one to "knowingly" engage in conduct that is prejudicial to the administration of justice.

Some commentators suggested that the term "knowingly" should be preserved from the current Comment, which explains that "a lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice ... violates paragraph (d) when such actions are prejudicial to the administration of justice." As noted above, Comments provide interpretive guidance but are not elements of the Rule.

"Knowingly" as used in the Model Rules denotes "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Rule 1.0(f).[19] And the use of the term "knowingly" in the current provision makes sense in the context of that comment, which deals with bias and prejudice. Bias and prejudice are states of mind that can only be observed when they are made manifest by knowing acts (words or conduct). So it was appropriate to require a "knowing" manifestation as the basis for discipline.

By contrast, "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—"harass and discriminate"—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 well-developed meaning and well-delineated boundaries of these terms in legal doctrine rebuts any notion that the standard imposes strict liability based on a vague and subjective proscription.

Also, the mens rea of the respondent, as well as the harm caused by the conduct, are factors that could be taken into account under the Standards for Imposing Lawyer Sanctions, for example, when determining what sanctions, if any, would be appropriate for the conduct.

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." The 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

[19] Thus, for example, where the word "knowingly" is used elsewhere in the Model Rules—in paragraphs (a) and (f) to Rule 8.4 and in Rule 3.3(a) for example—the lawyer's state of mind and knowledge or lack thereof can readily be inferred from the conduct involved and the circumstances surrounding that conduct.

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. And, as new Comment [4] makes clear, the proposed Rule does not impose limits or requirements on the scope of a lawyer's professional expertise.

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.[20]

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."[21] 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.[22] The proposed scope of Rule 8.4(g) is similar to the scope of existing anti-discrimination provisions in many states.[23]

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.

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

[21] MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [2].

[22] *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").

[23] *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."

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."[24] 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 related to the lawyer's practice of law, but may reflect adversely on the lawyer's fitness to practice law or involve moral turpitude.[25]

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.[26] 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 all 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 which have adopted an anti-discrimination Rule, the provision is focused entirely on employment and the workplace.[27] Other jurisdictions have also included workplace harassment and discrimination among the conduct prohibited in their Rules.[28] 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 which includes the solicitation of clients and advertising of legal services are already subjects of regulation under the Model Rules.[29] And fourth, this would not be the first time the House of Delegates adopted policy on the terms and

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[24] MODEL RULES OF PROF'L CONDUCT, Preamble [3].

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

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

[27] *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.

[28] 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).

[29] *See* MODEL RULES OF PROFESSIONAL CONDUCT R. 7.1 - 7.6.

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,[30] 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 environment."[31] 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 which 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 only 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."[32] 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.[33] 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

[30] ABA HOUSE OF DELEGATES RESOLUTION 10A (Aug. 2007).
[31] ABA HOUSE OF DELEGATES RESOLUTION 117 (Feb. 1992).
[32] MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [10].
[33] MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [19].

breached."[34] 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 of a crime.[35] 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.[36] Many states, however, have not extended protection in areas like employment to lesbian, gay, or transgender persons.[37] 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.[38] In addition, new 8.4(g) would also include "ethnicity," "gender identity," and "marital status." The anti-discrimination 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 as a form of gender identify. These terms encompass persons whose current gender identity and expression are different from their designations at birth.[39] The Equal Employment Opportunities

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

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

[36] 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.

[37] 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.

[38] 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.

[39] 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).

Commission interprets Title VII as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.[40] 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 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.[41]

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 Judicial Code. The term has not been applied indiscriminately or irrationally in any jurisdiction which has adopted it. The 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 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.[42] The most recent figures for racial

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[40] https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

[41] A 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.

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

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.[43] 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.

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, 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 Rule 8.4(d) and are not manifesting bias or prejudice in the course of representing a client that is prejudicial to the administration of justice.

G. Legitimate Advocacy

New Comment [5] to Rule 8.4 includes the following sentence: "Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation." This retains and updates the statement on legitimate advocacy that is contained

[43] *Id.*

in the current provision. The current provision reads: "Legitimate advocacy respecting the foregoing factors does not violate paragraph (d)."

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." This statement is analogous to a statement in Disciplinary Rule 4-101 of the 1969 Model Code of Professional Responsibility, where the ethical obligation of confidentiality was linked to the legal evidentiary standard of attorney-client privilege.[44] Just as the Model Rules subsequently separated the evidentiary standard from the ethical standard, so too SCEPR determined to separate a determination by a trial judge on peremptory challenges from a decision as to whether there has been discrimination under the Model Rules. The weight given to the trial judge's determination should be decided as part of the disciplinary process, not determined by a comment in the Model Rules of Professional Conduct. Thus, SCEPR concluded that this question might more appropriately be addressed under the Model Rules for Lawyer Disciplinary Enforcement or the Standards for Imposing Lawyer Sanctions.

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-three 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 harass or discriminate 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 anti-discrimination, 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

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[44] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 114 (Art Garwin ed., 2013).

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GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Ethics and Professional Responsibility

Submitted By: Dennis Rendleman, Ethics Counsel

1. Summary of Resolution(s). The resolution would amend Model Rule of Professional Conduct 8.4, *Misconduct*, to create new paragraph (g) that would create in the black letter of the Rules an anti-discrimination and anti-harassment provision. The resolution also amends Comment [3], creates new Comments [4] and [5] to Rule 8.4 and renumbers current Comments [4] and [5].

2. Approval by Submitting Entity. The Standing Committee on Ethics and Professional Responsibility approved filing this resolution in April 2016. Co-sponsors, the Civil Rights & Social Justice Section, the Commission on Disability Rights, the Diversity & Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession signed on during the months of April and May 2016. The Commission on Hispanic Legal Rights & Responsibilities and the Center for Racial and Ethnic Diversity voted to support the resolution in May 2016.

3. Has this or a similar resolution been submitted to the House or Board previously? This resolution is new. But, the House has acted on similar resolutions. For example, in February 1994 the Young Lawyers Division authored a resolution to bring an anti-discrimination and anti-harassment provision into the black letter of the ABA Model Rules of Professional Conduct. It was withdrawn. Also in February 1994, the Standing Committee on Ethics and Professional Responsibility authored a similar provision. It, too, was withdrawn.

   In February 1995, the House adopted Resolution 116C submitted by the Young Lawyers Division. Through that resolution the Association condemned lawyer bias and prejudice in the course of the lawyer's professional activities and opposed unlawful discrimination by lawyers in the management or operation of a law practice.

   In February 1998, the Criminal Justice Section recommended that the Model Rules of Professional Conduct include within the black letter an anti-discrimination provision. At the same meeting, the Standing Committee on Ethics and Professional Responsibility submitted a resolution recommending a Comment that included an anti-discrimination provision. Both resolutions were withdrawn.

   In August 1998, a joint resolution of the Standing Committee on Ethics and Professional Responsibility and the Criminal Justice Section was submitted and was adopted. The resolution created Comment [3] to Rule 8.4 suggesting that it could be misconduct that is prejudicial to the administration of justice when a lawyer, in the course of representing a client, knowingly manifest by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? The adoption of this resolution would result in amendments to the ABA Model Rules of Professional Conduct. Goal III of the Association—to promote full and equal participation in the Association, the profession, and the justice system by all persons and to eliminate bias in the legal profession and the justice system—would be advanced by the adoption of this resolution.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. (If applicable) N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The Center for Professional Responsibility will publish any updates to the ABA Model Rules of Professional Conduct and Comments, and also will publish electronically other newly adopted policies. The Policy Implementation Committee of the Center for Professional Responsibility has in place the procedures and infrastructure to successfully implement any policies proposed that are adopted by the House of Delegates.

8. Cost to the Association. (Both direct and indirect costs) None.

9. Disclosure of Interest. (If applicable) N/A

10. Referrals. The Standing Committee on Ethics and Professional Responsibility has been transparent in its research and drafting process for this resolution. First, the Committee appointed a Working Group to research and craft a proposal. The Working Group included representatives from the following Goal III Commissions: Disability, Racial and Ethnic Diversity in the Profession, Sexual Orientation and Gender Identity, and Women in the Profession. The Ethics Committee then hosted two public events—an informal Roundtable in July 2015 at the ABA Annual Meeting in Chicago on its summer 2015 Working Discussion Draft and a formal public hearing in February 2016 at the ABA MidYear Meeting in San Diego on its draft proposal. At these two events, the Ethics Committee accepted written and verbal comments on two different discussion drafts.

    The Ethics Committee developed a Rule 8.4 website to communicate information about its work. Drafts and comments received were posted. Through this website, the Committee received more than 450 comments to its December 2015 draft rule.

    Using email, the Ethics Committee reached out directly to numerous sections and committees communicating with both the entity's chairman and the entity's staff person about the public hearings and procedure for providing comments. Groups solicited included: the Standing Committees on Professional Discipline, Professionalism, Client Protection, Specialization, Legal Aid and Indigent Defendants, the Commissions on Law and Aging and Hispanic Rights and Responsibilities, the Sections on Business Law, Litigation, Criminal Justice, Family Law, Trial Tort and Insurance Practice, and the Judicial Division, the Solo, Small

Firm and General Practice Section, the Senior Lawyers Division, and the Young Lawyers Division.

The Ethics Committee's work on this issue was the subject of news articles in the Lawyers' Manual on Professional Conduct and the ABA Journal.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution amends Model Rule of Professional Conduct 8.4, *Misconduct*, to create new paragraph (g) that establishes a black letter rule prohibiting discrimination and harassment. The resolution also amends Comment [3], creates new Comments [4] and [5] to Rule 8.4 and renumbers current Comments [4] and [5].

Discriminate and harass are both defined in amended Comment [3]. Discrimination is harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Protected persons include those listed in current Comment [3] (persons discriminated on the basis of race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status) and also includes persons discriminated on the basis of ethnicity, gender identity, and marital status. This brings the Model Rules more into line with the Model Code of Judicial Conduct and the Criminal Justice Standards for the Prosecution Function and Standards for the Defense Function.

The scope of new paragraph (g) is "conduct related to the practice of law." The resolution defines covered conduct as "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." Adoption of policy on the terms and conditions of lawyer employment is not foreign to the House of Delegates.

New Rule 8.4(g) includes the statement, "This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." ABA Model Rule of Professional Conduct 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if "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 is representing a client when the lawyer does not have the legal competence to do so (Rule 1.1) and representing a client with whom the lawyer has a conflict of interest under the Rules including Rule 1.7 (current client) and Rule 1.9 (former client).

2. Summary of the Issue that the Resolution Addresses

This Resolution is a reasonable and rational implementation of ABA's Goal III: to eliminate bias in the justice system. The ABA has adopted anti-discrimination and anti-bias provisions in the black letter of the Model Code of Judicial Conduct and in the black letter of the Criminal Justice Standards for the Prosecution Function and the Defense Function. Twenty-three jurisdictions have already adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules. It is time for the Association to now address bias and prejudice squarely in the black letter of the Model Rules of Professional Conduct.

3. Please Explain How the Proposed Policy Position will address the issue

In the 23 jurisdictions that have adopted a black letter rule that provides it is misconduct for a lawyer to discriminate or harass another, disciplinary agencies have investigated and successfully prosecuted lawyers for discriminatory and harassing behavior.

For example, in 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four women clients and one female employee. In Wisconsin, the Supreme Court 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. The victim reported she felt that if she did not respond, the district attorney would not prosecute the domestic violence complaint.

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.

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? 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."

Those states are leading while the ABA has not kept pace.

This proposal is a measured response to a need for a revised Model Rule of Professional Conduct that implements the Association's Goal III – to eliminate bias in the legal profession and the justice system.

4. Summary of Minority Views

As explained in the Report, 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.

In December 2015, SCEPR published a revised draft of a proposal to amend 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. Written comments were also invited.

After the comment period closed in March 2016, SCEPR made substantial and significant changes to the Resolution based on minority views submitted. Changes include:

- At the request of the ABA Section of Real Property, Trust and Estate Law, the Resolution now defines discriminate in Comment [3]; it explains that disciplinary counsel may use the substantive law of antidiscrimination and anti-harassment to guide application of paragraph (g) in Comment [3]; and provides additional guidance including a statement that lawyers who charge and collect reasonable fees do so without violating paragraph (g)'s prohibition on discrimination based on socioeconomic status in Comment [5].
- At the request of the ABA Labor and Employment Law Section, this Report now explains that the terms and conditions of employment are included within the scope of "operating or managing a law firm." Labor and Employment Law requested that the proposal include a statement that the Rule be interpreted and implemented in accordance with Title VII case law. This Report explains why the Sponsors rejected this recommendation and the Sponsors' position that legal ethics rules are not dependent upon or limited by statutory or common law claims.
- At the request of the ABA Business Law Section Professional Responsibility Committee, the Resolution defines "conduct related to the practice of law" in Comment [4]; it includes guidance on how lawyers may ethically limit their practice under Model Rule 1.16; and it explains that paragraph (g) does not prohibit conduct to promote diversity.

In response to the language released April 12, 2016, concerns have been expressed to the Sponsors about the following:

- That paragraph (g) should include a mens rea of "knowing." The Report addresses this issue and explains why the Sponsors did not include a mens rea.
- That the Comment should retain the statement, "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule." This Report addressed this issue and explains why the Sponsors did not want to mix evidentiary law with the professional responsibility rules.
- That current Comment language, "Legitimate advocacy respecting the foregoing factors does not violate paragraph (d)," should be retained. The Report addresses this issue and explains why the Sponsors did retain this sentence, as amended.
- That social activities in connection with the practice of law should be more clearly defined. The Sponsors concluded that the definition provided in the Comment is

sufficient for the variety of activities addressed. The critical common factor of such activities is their relationship to the practice of law.

- That Sponsors delete "operating and managing a law firm" from the scope of the Rule or that the Rule require a prior adjudication of discrimination or harassment by a competent tribunal. The Report addresses this issue and explains why the Sponsors determined that creating two separate spheres of conduct, one inside the law firm and one outside the law firm, was inappropriate.
- Finally, some opponents express the opinion that no black letter rule is necessary.[45]

[45] Not every concern raised is listed here but we have identified the significant concerns that were expressed.

June 30, 2017

Hon. Stuart Rabner
Chief Justice
New Jersey Supreme Court
Hughes Justice Complex
P.O. Box 037
Trenton, New Jersey 08624

Dear Chief Justice Rabner:

On behalf of the officers and members of the Garden State Bar Association ("GSBA"), I write this letter in support of the recent amendment to Model Rule 8.4(g) adopted by the American Bar Association ("ABA"). The GSBA respectfully requests that the New Jersey Supreme Court similarly adopt the Model Rule and amend the existing New Jersey Rules of Professional Conduct ("RPC") to mirror it.

At present, New Jersey's RPC 8.4(g) states, in relevant part:

> It is professional misconduct for a lawyer to . . . (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

The newly adopted Model Rule 8.4(g) expands upon the above prohibited acts and proscribes any discriminatory conduct related in any way to the practice of law. Specifically, the Model Rule 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 socio-economic status in conduct related to the practice of law.

As the oldest and largest professional organization for African-American lawyers, judges and law students, the Garden State Bar Association is acutely aware of the discrimination and unfair treatment that minorities have endured both within our profession and in society generally.

While we applaud New Jersey's current RPC 8.4(g) and its prohibition of discriminatory conduct, the current Rule is limited in scope and includes a workplace exception. The Model Rule expands upon the prohibited conduct and includes additional protected classes covered under the Rule's reach. The extra protection afforded in the Model Rule not only provides additional safeguards, it also holds our attorneys to a higher standard for our noble profession. By doing so, the Model Rule will ensure that we are comporting ourselves with the utmost levels of professionalism and fairness.

Over two dozen states have already adopted the Model Rule to govern the conduct of their attorneys. However, I understand that the Model Rule has faced some criticism from a small number of states who argue that the Rule's language infringes upon the First Amendment rights of lawyers. We vehemently disagree with this position. Rather, from our reading of the Model Rule, this amendment to New Jersey's RPC 8.4(g) would only serve to promote increased civility and decorum in all facets of our legal practice. As members of the bar, we take an oath to uphold the laws of this State; the Model Rule simply expounds upon that obligation and suggests that it reside in the RPCs with the numerous other ethical responsibilities upon which we must abide. In our view, the language in the Model Rule rounds out the Rules of Professional Conduct and provides a guidepost for future attorneys to use in ethically governing their practice of law.

We respectfully request that the Court adopt ABA Model Rule 8.4(g). Our profession will greatly benefit from its progressive content and strong prohibition against discrimination related to the practice of law.

Respectfully submitted,

Lloyd Freeman

Lloyd Freeman
President, Garden State Bar Association

Cc: Robert B. Hille, Esq., NJSBA President
Angela Scheck, NJSBA Executive Director

EXHIBIT B

SUPREME COURT OF NEW JERSEY

MARK NEARY
CLERK

GAIL GRUNDITZ HANEY
DEPUTY CLERK

OFFICE OF THE CLERK
PO BOX 970
TRENTON, NEW JERSEY 08625-0970

August 30, 2017

Thomas L. Weisenbeck, A.J.S.C. (ret.)
Chair, Professional Responsibility Rules Committee
Bressler, Amery & Ross, P.C.
325 Columbia Turnpike
Suite 301
Florham Park, NJ 07932

Re: Supreme Court Referral

Dear Judge Weisenbeck:

By this letter, the Supreme Court is referring to the Professional Responsibility Rules Committee consideration of a possible amendment to RPC 1.5(b). That provision requires a lawyer to communicate in writing to the client the basis or rate of the fee "[w]hen the lawyer has not regularly represented the client . . . ." The Court asks the Committee to consider if an amendment is necessary to clarify whether the safe harbor afforded by regular representation should apply if the newly undertaken representation involves a different type of legal matter and a different method of calculating the fee.

This question came to the Court's attention as the result of its consideration of a disciplinary matter, IMO Nelson Gonzalez (D-50-16), during the preceding term. A copy of the decision of the Disciplinary Review Board (DRB) in that matter is attached. Also attached is a copy of the Court's order of dismissal, consistent with the recommendation of the DRB.

The Court requests the Committee to review and analyze the issue and prepare a written report for the Court that may include the Committee's recommendations for action. The Court has not established a deadline for the completion of the report and notes that it may be submitted to the Court for consideration outside of the regular rule cycle.

Very truly yours,

Mark Neary
Clerk

c: Steven D. Bonville, AOC Chief of Staff
Heather L. Baker, Esq., Staff to the PRRC

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 16-140
District Docket No. XB-2015-0015E

IN THE MATTER OF	:
NELSON GONZALEZ	:
AN ATTORNEY AT LAW	:

Decision

Decided: November 23, 2016

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us on a certification of default filed by the District XB Ethics Committee (DEC), pursuant to R. 1:20-4(f). The complaint charged respondent with violations of RPC 1.5(b) (failure to set forth in writing the basis or rate of the fee) and RPC 1.2(c) (unilaterally limiting the scope of the representation without the client's informed consent). We determine to dismiss the complaint.

Respondent was admitted to the New Jersey bar in 1997. He has no history of discipline.

Service of process was proper in this matter. On February 2, 2016, the DEC sent respondent a copy of the complaint, and service letter, in accordance with R. 1:20-4(d) and R. 1:20-7(h), by

regular and certified mail. The certified mail was accepted on February 10, 2016, but the signature on the green return receipt card is illegible. The regular mail was not returned.

On March 10, 2016, the DEC sent a second letter to respondent, at the same address, by both certified and regular mail. The letter informed respondent that, unless he filed an answer to the complaint within five days of the date of the letter, the allegations of the complaint would be deemed admitted and the record would be certified directly us for the imposition of discipline. The letter further informed respondent that the complaint was amended to include a charge of RPC 8.1(b) (failure to cooperate). The certified mail was accepted on March 5, 2016, but the signature on the green return receipt card is illegible. The regular mail was not returned.

As of March 22, 2016, the date of the certification of the record, respondent had not filed an answer to the ethics complaint.

On July 11, 2016, respondent filed a motion to vacate the default. In order to vacate a default, a respondent must overcome a two-pronged test. First, a respondent must offer a reasonable explanation for his/her failure to answer the ethics complaint. Second, a respondent must assert a meritorious defense to the underlying charges.

As to his failure to answer the ethics complaint, respondent,

through counsel, filed a certification in which he claimed that, after filing a five-page reply to the ethics grievance, he was "waiting for a response," but heard nothing further about the investigation.

Respondent stated that, in May 2016 (mistakenly referred to as 2015), he received a document titled "OAE Transmittal Checklist to DRB," with which he was not familiar. Respondent did not state how he came into possession of that document, which he then gave to counsel. Sometime later, counsel provided respondent with "the documents," presumably a copy of the complaint.

Thereafter, respondent discovered that, although his secretary, Gail Little, had signed the Certified Return Receipts, she had not given the mail to him. Respondent offered no explanation for Little's failure to inform him of her receipt of the mail. According to respondent, Little is the only person authorized to receive mail in the office and, since this event, is required to telephone respondent when she receives certified mail in his absence.

Respondent's certification did not address the fact that the DEC also served the complaint and the five-day letter by regular mail at his office – envelopes that were not returned to the DEC.

In respect of prong two, meritorious defenses, respondent urges that he prepared the bankruptcy petition for which he was

retained, and that the long-time client, who was frequently seen in the office during the representation, always knew that the petition would not be filed until respondent received full payment. The client paid small amounts toward the balance from time to time, but never paid the total balance due. A client intake sheet, attached as an exhibit to the motion to vacate default, contains a handwritten notation about the fee ($750) and bankruptcy filing fee ($300), as well as a comment that the total amount must be paid prior to filing. Respondent contends that, because the client was a long-time client, a written fee agreement was not necessary.

In a July 15, 2016 letter-brief in reply to respondent's motion to vacate default, Office of Attorney Ethics (OAE) Assistant Ethics Counsel stated that, in 2014, during an ethics investigation, the OAE filed a motion for respondent's temporary suspension, after he failed to cooperate with the OAE investigation in that matter. The Court issued an Order requiring respondent to reply to the grievance and to appear for a demand OAE interview.

On September 12, 2014, respondent replied to the grievance investigated by the OAE, claiming that his wife/paralegal, Anicia Gonzalez, had received the certified mail in that matter and hidden it from him. Respondent explained the corrective measures that he immediately put in place:

> As of September 5, 2014 I implemented a new policy whereas **I am the only one that gets the**

> mail, and office mail gets held by the post office and I am the only one authorized to get it from the post office, I then open it and disperse to the office staff if further attention is needed [Exhibit 1].
>
> [OAEb2.][1]

According to the OAE, as a result of respondent's 2014 "near brush with suspension," he assured the OAE that he would be "singularly responsible" for the future handling of all law office mail. The OAE noted that, in the motion to vacate the default in this matter, respondent was "entirely silent" in his brief about his wife's alleged previous interference with office mail and about his representation that he had taken full control over mail intake.

It is clear to us that respondent's office received both the certified and regular mail copies of the complaint and the five-day letters in this matter. Respondent's claim, for a second time in two years, that someone in his office (this time his secretary, Little), diverted mail sent by ethics authorities, so that he would not receive it, is not credible. Moreover, respondent neither provided an explanation for Little's alleged concealment of the mail, nor presented a certification from her that would support his version of events.

[1] OAEb refers to the OAE's July 15, 2016 letter-brief in reply to respondent's motion to vacate default.

Because respondent has not satisfied the first prong of the test to vacate a default – a reasonable explanation for not filing an answer, we determine to deny the motion to vacate the default. We now turn to the allegations of the complaint.

In 2005, Carlos Suarez retained respondent on a contingent fee basis for two workers' compensation claims. At some point during the pendency of those cases, respondent and Suarez discussed a possible bankruptcy filing for Suarez. In January 2009, Suarez retained respondent to file a Chapter 7 bankruptcy petition, for which he agreed to pay a total of $1,050 for fees and costs. Respondent did not prepare a written fee agreement for the representation, but claimed to have told Suarez that he would not commence work on the bankruptcy petition until the entire $1,050 was paid.

Between January 2009 and October 2, 2013, Suarez paid respondent $700 on account of the bankruptcy matter. In April 2009, he provided respondent with required tax returns for the preceding three years, creditor information, and other documents.

From April 9, 2009 to May 25, 2011, the date on which Suarez went to respondent's office to take a mandatory credit-counseling

course, respondent allegedly had performed no legal work on the bankruptcy matter.[2]

A year later, on June 18, 2012, respondent sent a letter to Suarez, requesting additional documentation to support the bankruptcy filing. Hearing nothing, he sent Suarez a second letter, dated July 5, 2012, again requesting those documents.

Apparently because the credit-counseling certificate was not filed with the bankruptcy court within one year, the certificate expired. Therefore, on January 18, 2013, Suarez repeated the course, presumably at respondent's office. On that same date, respondent's secretary told Suarez that the petition had been prepared, but not yet filed. According to the ethics complaint, Suarez had expected respondent to file the bankruptcy petition after receiving only partial payment of his fee. The complaint did not specify the basis for Suarez' belief in that regard. Rather, the complaint stated that respondent had not "reasonably or adequately" explained to Suarez that he would not file the petition without full payment.

The complaint alleged that respondent's failure to set forth in writing the rate or basis of his fee violated RPC 1.5(b) and

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[2] The bankruptcy rules require the debtor to take a certified credit-counseling course prior to filing a petition. A certificate obtained from the counseling company is then attached to the petition when it is filed.

his failure to "reasonably or adequately" explain to Suarez that he would not file the petition, until he received his full fee, placed a limitation on the scope of the representation, a violation of RPC 1.2(c).

* * *

Respondent's failure to file an answer is deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. R. 1:20-4(f)(1). Nevertheless, each charge in an ethics complaint must be supported by sufficient facts for us to determine that unethical conduct occurred.

RPC 1.5(b) states as follows:

> When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing before or within a reasonable time after commencing the representation.

According to the complaint, respondent was in the midst of representing Suarez in two workers' compensation matters when they first discussed a bankruptcy representation. It would appear, therefore, that Suarez may have been a regular client at the time he retained respondent for the bankruptcy matter. Thus, under the plain language of RPC 1.5(b), because respondent "regularly represented" Suarez, a fee writing was not required. The complaint does not set forth any other facts to establish a duty on

respondent's part to reduce to writing the basis of his fee in the bankruptcy matter, other than to remark that the fee structures among the three matters were different. We note that, in its report, the Debevoise Committee commented

> when a lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. It is on that basis that the directive of this paragraph is made applicable only to those situations in which the lawyer has not regularly represented the client, *i.e.*, in which there is not a preexisting understanding as to the fee rate or basis.
>
> [Debevoise Committee Report, N.J.L.J. July 28, 1983, supp. at 11.]

Nonetheless, we discern no such qualifier in the RPC itself and we decline to impute one in the face of the clearly stated standard therein. Thus, for lack of clear and convincing evidence that a written fee agreement was required, we determine to dismiss the RPC 1.5(b) charge.

RPC 1.2(c) provides that:

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

In our view, RPC 1.2(c), is not applicable to respondent's conduct here. Even if Suarez' version of events is true, respondent's decision not to perform legal services until paid in full did not place a limitation on the scope of the representation. Rather, it dictated when respondent would commence work – upon

payment of his entire fee. Therefore, we also dismiss the RPC 1.2(c) charge, as inapplicable.

Although the two cited RPC violations warrant dismissal, there remains respondent's alleged failure to cooperate with ethics authorities, based solely on his failure to file an answer to the complaint. As previously noted, the DEC's March 10, 2016 letter to respondent served as an amendment to the complaint, charging him with failure to cooperate with an ethics investigation, in violation of RPC 8.1(b).

The complaint itself did not charge respondent with a failure to cooperate with the ethics investigation. Indeed, respondent provided the investigator with a detailed letter-reply to the underlying grievance. Thereafter, the DEC filed a complaint containing only the RPC 1.2(c) and RPC 1.5(b) charges — both of which, in our view, cannot be sustained under the clear and convincing evidence standard.

Thus, the question becomes whether respondent's failure to file an answer to the complaint may serve as a basis for finding that he violated RPC 8.1(b). We answer that inquiry in the negative.

RPC 8.1(b), in relevant part, prohibits a lawyer from knowingly failing to respond to a lawful "demand for information" from a disciplinary authority. We do not view a failure to file

an answer to a formal ethics complaint to constitute a failure to respond to a demand for information. Indeed, our Court Rules contemplate the circumstance that a respondent may not file an answer to the complaint and set forth certain consequences for that failure.

Specifically, R. 1:20-4(f)(1) provides that a failure to file a verified answer shall be deemed an admission that the allegations of the complaint are true and that they provide a sufficient basis for the imposition of discipline. That Rule does not provide that such a failure shall also constitute a violation of RPC 8.1(b), as is the case in other Court Rules. See R. 1:20-20(c) (providing that a failure to comply with that Rule shall also constitute violations of RPC 8.1(b) and RPC 8.4(d)) and R. 1:21-6(i) (providing that a failure to comply with the requirements of the recordkeeping rule or to respond to a request to produce such records shall be deemed a violation of RPC 1.15(d) and RPC 8.1(b)).

In our view, respondent's failure to file an answer to the complaint did nothing more than trigger the consequences contained in R. 1:20-4(f): deeming the allegations of the complaint to be true and allowing the matter to be certified directly to us for the imposition of discipline. Indeed, respondent took a risk by not filing an answer to the complaint. Had we found the misconduct charged in the complaint, we would have considered respondent's

default as an aggravating factor, and could have imposed a higher level of discipline on that basis. See In re Kivler, 193 N.J. 332, 342 (2008) ("[a] respondent's default or failure to cooperate with the investigative authorities operates as an aggravating factor, which is sufficient to permit a penalty that would otherwise be appropriate to be further enhanced"). Here, however, we have dismissed those charges, leaving no basis for enhancement based on the default posture of this matter.

For these reasons, although respondent did not file an answer to the complaint, as required, we do not find that he violated RPC 8.1(b) and, therefore, determine to dismiss the complaint in its entirety.

Members Gallipoli and Zmirich voted to find a violation of RPC 1.5(b) and to impose an admonition. They would find that, because the fee structures of the matters for which respondent had been retained were varied, an understanding as to the basis or rate of the fee had not evolved between respondent and Suarez and that respondent, thus, was not exempt from the writing requirement.

Vice-Chair Baugh did not participate.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Nelson Gonzalez
Docket No. DRB 16-140

Decided: November 23, 2016

Disposition: Dismiss

Members	Admonition	Dismiss	Did not participate
Frost		X	
Baugh			X
Boyer		X	
Clark		X	
Gallipoli	X		
Hoberman		X	
Rivera		X	
Singer		X	
Zmirich	X		
Total:	2	6	1

Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
D-50 September Term 2016
078583

IN THE MATTER OF :
NELSON GONZALEZ, :
AN ATTORNEY AT LAW :
(Attorney No. 020401997) :

FILED
JUL 19 2017

ORDER

The Disciplinary Review Board having filed with the Court its decision in DRB 16-140, concluding on the record pursuant to Rule 1:20-4(f)(default by respondent) that the formal ethics complaint filed against NELSON GONZALEZ of DOVER, who was admitted to the bar of this State in 1997, should be dismissed for lack of clear and convincing evidence of unethical conduct;

And NELSON GONZALEZ having been ordered to show cause why he should not be disbarred or otherwise disciplined;

And the Court agreeing with the Disciplinary Review Board that the charged violations of RPC 1.5(b) and RPC 1.2(c) should be dismissed;

And the Court also finding that respondent's failure to file an answer to the complaint does constitute a violation of RPC 8.1(b), but the Court concluding that discipline is not warranted for this violation alone under the circumstances presented, where respondent provided representation to the

client and obtained the relief sought;

It is ORDERED that the formal ethics complaint filed against NELSON GONZALEZ in District Docket No. XB-2015-0015E, is dismissed.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 18th day of July, 2017.

CLERK OF THE SUPREME COURT

EXHIBIT C

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL
PO BOX 080
TRENTON, NJ 08625-0080

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

MATTHEW J. PLATKIN
Attorney General

August 14, 2023

The Honorable Glenn A. Grant, J.A.D.
Director, Administrative Office of the Courts
Richard J. Hughes Justice Complex
25 Market Street, PO Box 037
Trenton, NJ 08625-0037

Re: Modifying the Public Entity Waiver Prohibition in Conflict of Interest Rules

Dear Judge Grant:

My office requests the assistance of the Administrative Office of the Courts in modifying the State's Rules of Professional Conduct ("RPCs") to allow public entities represented by attorneys within the Department of Law & Public Safety ("LPS") to waive conflicts of interest in appropriate circumstances by way of informed consent.[1] Currently, New Jersey's RPCs include a *per se* ban on public entities waiving conflicts of interest. This prohibition places public entities represented by attorneys within LPS at a disadvantage by significantly limiting their ability to secure legal representation, including, in appropriate cases, representation by qualified outside counsel who may be otherwise conflicted due to their counsel of private clients adverse to the public entity.

For example, on several occasions, the State's inability to waive conflicts of interest materially impacted its ability to choose outside counsel in the State's consumer protection cases in a way that private parties do not have to contemplate. This limitation ultimately harms the public as it hinders the State's ability to advance its interest in robust enforcement of its consumer protection laws. In addition, the current prohibition may require the State to switch counsel where a conflict emerges after an engagement commences, which may come at great expense to the State and create delays in advancing matters to resolution.

Allowing public entities represented by LPS attorneys—who handle nearly all litigation occurring at the State level, *see* N.J.S.A. 52:17A-1 and Governor Florio Executive Order No. 6 (1990)—to waive conflicts of interest in appropriate circumstances would be in the best interest of the public as it would greatly expand the pool of qualified outside counsel available to a State agency that may require certain legal expertise for a particular matter. We hope our offices can work together to modify the State's RPCs with the ultimate goal of better serving the people of New Jersey.

[1] For purposes of this proposal, "public entities" includes public officers to the extent that public officers are covered by the RPCs' current prohibition on conflict waivers by public entities.

New Jersey's RPC 1.7 sets forth the general rule for conflicts of interest. The Rule's waiver provision states that clients can waive a conflict arising from a representation by "giv[ing] informed consent, confirmed in writing, after full disclosure and consultation, *provided, however, that a public entity cannot consent*[.]" RPC 1.7(b)(1) (emphasis added). RPC 1.8(l) and RPC 1.9(d), which set forth specific rules on duties to current and former clients, similarly state that "a public entity cannot consent to a representation otherwise prohibited by" the Rules. Thus, as the RPCs currently stand, private clients may provide informed consent to waive conflicts while public entities cannot.

New Jersey stands alone in maintaining these prohibitions in its RPCs. Indeed, for decades, there has been a national movement away from a *per se* ban on government consent to waive conflicts of interest. For example, in 1986, the Illinois State Bar Association rejected a *per se* ban, opining that "a *per se* 'rule' that a public entity may never grant consent . . . is neither compelled by the relevant case law nor required to achieve the purposes of the Code of Professional Responsibility."[2] Likewise, in a 1992 opinion rejecting a *per se* ban, the New York State Bar Association Committee on Professional Ethics observed: "[W]e believe that a blanket prohibition against lawyers accepting the consent of governmental entities is paternalistic and excessive."[3]

Moreover, since at least 1983 when it adopted the Model Rules of Professional Conduct, the American Bar Association ("ABA") has also taken the position that a government client can provide informed consent to waive a conflict of interest. In a 1997 formal opinion, the ABA squarely addressed the issues raised when a lawyer seeks to simultaneously represent a government entity and private clients against the government, reiterating its position that a government client can provide informed consent to the representation, and also underscoring the analysis the lawyer must undertake to comply with her ethical obligations, regardless of client consent:

> A lawyer is not barred by Model Rule 1.7 from agreeing to perform legal services for a government entity at the same time she is also representing private clients against another government entity in the same jurisdiction, as long as the two government entities involved are not considered the same client so as to make the two representations "directly adverse" and therefore prohibited under Rule 1.7(a). . . . Even if Rule 1.7(a) does not apply, the lawyer must still assure herself that neither representation would be "materially limited" by the other in violation of Rule 1.7(b). If either of these provisions is implicated, the lawyer may not undertake the second representation without assuring herself that neither

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[2] Illinois State Bar Association Advisory Opinion on Professional Conduct, Op. No. 86-4 (1986). Our research has identified similar opinions in several other jurisdictions acknowledging that public entities can consent to waive conflicts of interest. *See, e.g.*, Missouri (Informal Opinion Number: 20040059 - Rule Number: 4-1.7, available at https://mobar.org/public/ethics/InformalOpinionsIndex.aspx); Virginia (Legal Ethics Op. 1086 (1988)).

[3] New York State Bar Association Committee on Professional Ethics, Op. 629 (1992). The Committee was of the view that "the danger [of corruption] is adequately addressed by several Disciplinary Rules," such as those prohibiting lawyers from engaging in conduct involving dishonesty or from stating or implying that they have an ability to influence a public official. New Jersey's RPCs include similar restrictions. For example, under RPC 8.4, it is considered "professional misconduct for a lawyer to," among other things, "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or "state or imply an ability to influence improperly a government agency or official." RPC 8.4(c), (e).

representation would be adversely affected, and without obtaining each affected client's consent, as required by Rule 1.7.[4]

In 2003, the New Jersey Supreme Court considered whether to eliminate the *per se* ban on public entity consent from the RPCs and decided against it. Responding to a report from the Court's Commission on the Rules of Professional Conduct, which recommended elimination of the public entity language in RPC 1.7 as part of its edits to remove the "appearance of impropriety" language in the Rule at the time, the Court stated, without explanation: "the Court approves the elimination of the 'appearance of impropriety' language from the RPCs. The Court has concluded, however, that the current prohibition against consent by public entities to the conflict of interests covered by this rule should be retained."[5] The Court, to our knowledge, has not reconsidered the issue since. We believe now is the time to do so, as it has become increasingly clear in recent years—especially in the context of the State's high-profile consumer protection litigation and the expansion of its affirmative enforcement work in areas such as civil rights, environmental justice, and labor enforcement, to name a few—that the waiver prohibition puts the State at a significant disadvantage in comparison to private parties.

In short, we believe New Jersey should join its sister states and modify its current prohibition on public entities waiving conflicts of interest in appropriate circumstances otherwise permitted by the RPCs for non-government parties. To be clear, our proposal seeks only to allow public entities represented by LPS attorneys under the supervision of the Attorney General to be able to waive conflicts with informed consent.

Accordingly, we propose the following modifications to the RPCs:

Modify the language in RPC 1.7(b)(1) to state "provided, however, that a public entity cannot consent to any such representation, <u>except such consent may be provided, with the approval of the Attorney General, by a public entity represented by the Department of Law and Public Safety."</u>

Modify the language in RPC 1.8(l) to state: "A public entity cannot consent to a representation otherwise prohibited by this Rule, <u>except such consent may be provided, with the approval of the Attorney General, by a public entity represented by the Department of Law and Public Safety."</u>

Modify the language in RPC 1.9(d) to state: "A public entity cannot consent to a representation otherwise prohibited by this Rule, <u>except such consent may be provided, with the approval of the Attorney General, by a public entity represented by the Department of Law and Public Safety."</u>

---

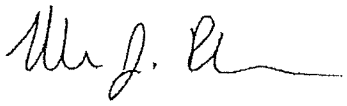
[4] ABA Formal Op. 97-405 (1997). New Jersey's RPCs likewise require a similar ethical analysis in the case of private entities. Under RPC 1.7, in addition to obtaining informed consent from each client, a lawyer may represent a client notwithstanding a conflict of interest only if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." RPC 1.7(b)(2).

[5] Supreme Court of New Jersey, "Administrative Determinations in Response to the Report and Recommendation of the Supreme Court Commission on the Rules of Professional Conduct" (Sept. 10, 2003).

With these modifications, the Court—and the public—should be assured that appropriate discretion and thoughtfulness will be part of any waiver request. And as other jurisdictions and the ABA have recognized, there are sufficient guardrails in other parts of the Rules to protect the public interest as well. *See, e.g.*, RPC 1.7(b)(2) (lawyer must "reasonably believe" she can provide "competent and diligent representation to each affected client" regardless of client consent); RPC 8.4(c), (e) (lawyers may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" or "state or imply an ability to influence improperly a government agency or official").

At your convenience, I am happy to discuss this proposal further and answer any questions you may have. I look forward to working together on this important endeavor.

Sincerely,



Matthew J. Platkin
Attorney General

c: Steven Bonville, Chief of Staff, Administrative Office of the Court
Shirley Emehelu, Executive Assistant Attorney General
Jonathan Garelick, Chief of Staff to the Attorney General
Kate McDonnell, Chief Counsel to the Attorney General
Jeremy Feigenbaum, Solicitor General
Michael T.G. Long, Director, Division of Law
Melissa Liebermann, Chief Ethics and Compliance Officer

https://nysba.org/app/uploads/1992/03/opn629.pdf

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 629 - 3/23/92 (20-91)

Modifies: NY State 40 (1966), 110 (1969), 111 (1969), 143 (1970), 149 (1970), 176 (1971), 218 (1971), 247 (1972), 257 (1972), 322 (1973), 323 (1974), 364 (1974), 392 (1975), 413 (1975), 450 (1976), 482 (1978), 578 (1986), 580 (1987), 588 (1988) and 603 (1989).

Topic: Conflict of interest; governmental entities.

Digest: A lawyer whose current or past representation of a governmental entity gives rise to a conflict of interest with respect to contemplated or continued employment by another client, or whose obligations to other clients give rise to a conflict of interest with respect to contemplated or continued employment by a governmental entity, may accept or continue the employment with the consent of the governmental entity, provided (i) such consent is obtained in accordance with DR 5-105(C) and all other applicable disciplinary rules, (ii) the lawyer is reasonably certain that both the entity is legally authorized to waive the conflict and all legal prerequisites to the consent have been satisfied, and (iii) the process by which the consent is granted is sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.

Code: DR 1-104(A)(4), 5-105(C), 8-101(A), 9-101(C); EC 8-8; Canon 9.

QUESTION

In circumstances involving a conflict of interest, in which a lawyer may accept or continue a representation only with the consent of a current, past or prospective client, must the lawyer decline or withdraw from the representation solely because one of the clients in question is a governmental entity?

OPINION

This Committee frequently is presented with inquiries concerning situations in which a lawyer's conflict of interest can be cured by obtaining the consent of one or more past, present or prospective clients, provided such consent is given after full disclosure of the relevant facts and their implications. On a number of occasions, however, one of the clients has been a governmental entity. In such cases, we have opined that a governmental entity may not consent to a conflict of interest, and the representation may not be accepted or continued under any circumstances, "because the public interest is involved."[1]

Although couched in language suggesting that the governmental entity's power or capacity to give consent is limited with respect to waiving conflicts of interest, these opinions in reality have held that a lawyer who could not accept or continue a representation without the consent of a governmental entity ethically may not do so even though the consent of that entity has been or could be obtained pursuant to DR 5-105(C). Having considered the so-called "government cannot consent" rule in depth, and giving due regard to its underpinnings and to the concerns expressed by those who would perpetuate the rule, we have concluded that a per se ban is unjustified and should no longer be imposed in this State.

The well-spring for the "government cannot consent" rule is ABA 16 (1929), which barred one member of a law firm from representing criminal defendants in cases prosecuted by another member of the same firm in his capacity as part-time prosecutor. The ABA Committee opined: "The prosecutor himself cannot represent both the public and the defendant and neither can a law firm serve two masters." The Committee went on to state, however, that "[n]o question of consent can be involved as the public is concerned and it cannot consent." This precept was reiterated without further elaboration in other ABA opinions during the early 1930's. See ABA 34 (1931) (part-time city attorney may not represent defendants in criminal proceedings in city court); ABA 71 (1932) (attorney who did legal work in connection

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1 See N.Y. State 40 (1966), 110 (1969), 111 (1969), 143 (1970), 149 (1970), 176 (1971), 218 (1971), 247 (1972), 257 (1972), 322 (1973), 323 (1974), 364 (1974), 392 (1975), 413 (1975), 450 (1976), 482 (1978), 578 (1986), 580 (1987), 588 (1988) and 603 (1989), all of which hold that the government may not waive a conflict of interest. In N.Y. State 453 (1976), we opined that a governmental entity may not consent to the use of its confidences and secrets, relying on N.Y. State 322 .

with a municipal bond issue may not subsequently attack the validity of the bonds on behalf of the city commission or a taxpayer); ABA 77 (1932) (prosecutor may not simultaneously represent in a civil action a person he is prosecuting).

None of the ABA opinions proffer a rationale or suggest any authority for the dogmatic, all-encompassing rule they embrace. This Committee, nevertheless, has relied upon the government cannot consent rule in its opinions, ordinarily with little more than a direct or indirect reference to the early opinions of the ABA Committee, thereby creating the impression that the rule is well-entrenched and axiomatic.

In recent years, a number of state and local ethics committees[2] and the courts of New York[3] and other jurisdictions[4] have either examined and expressly rejected the government cannot consent rule, or concluded that a representation, otherwise impermissible because of a conflict of interest, may be undertaken or continued with the consent of the affected governmental entity, thereby implicitly assuming that a governmental entity can waive a conflict.

Even the ABA Committee appears to have abandoned the government cannot consent rule, and has not cited it for the past 20 years. See ABA Inf. 1235 (1972)[5] The most recent ABA opinion to address the issue of governmental consent

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2 See Alabama Ops. R0-82-656 (1982), R0-86-12 (1986), R0-86-30 (1986), R0-88-100 (1988); Connecticut Inf. Op. 88-22 (1988); Illinois Op. 86-4 (1986); Kentucky Op. E-200 (1979); Maryland Op. 84-13 (1983); Massachusetts Op. 88-1 (1988); Michigan Inf. Ops. CI-1158 (1986), CI-760 (1983); Mississippi Op. 117 (1986); Missouri Inf. Op. 25 (1979); Nassau Co. Op. 9/88 (1988); N.Y. City 894 (1978); Ohio Sup. Ct. Op. 88-22 (1988); Ohio Op. 81-7 (1981); Tennessee Op. 84-F-59 (1984); Virginia Ops. 819 (1986), 864 (1986), 1086 (1988), 1167 (1989).

3 See Prodell v. State, 125 A.D.2d 805, 806, 509 N.Y.S.2d 911 (3d Dep't 1986) (although the lawyer arguably took a position contrary to interests of school district he represented in a related litigation, the school district's consent vitiated any conflict).

4 See City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193 (N.D. Ohio), aff'd mem., 573 F.2d 1310 (6th Cir. 1977), cert. denied, 435 U.S. 996 (1978); Black v. State, 492 F. Supp. 848, 867 (W.D. Mo. 1980); In re Petition for Review of Opinion 552 of Advisory Committee on Professional Ethics, 102 N.J. 194, 507 A.2d 233, 238-39 (1986) (overruling over 20 years of precedent, including In re A & B, 44 N.J. 331, 209 A.2d 101 [1965] and Ahto v. Weaver, 39 N.J. 418, 189 A.2d 27 [1963]); State v. Jones, 726 S.W.2d 515, 520 (Tenn. 1987); Miller v. Norfolk & Western Ry. Co., 183 Ill. App.3d 261, 538 N.E.2d 1293 (4th Dist. 1989) (disagreeing with In re LaPinska, 381 N.E.2d 700 [Ill. 1978]).

5 Arguably, the ABA began its retreat from the government cannot consent rule in ABA 306 (1962), which held that a lawyer could engage in lobbying activities on behalf of a client before a legislative committee where the lawyer's partner or associate was a member of the legislature, provided there was constitutional or statutory authority, i.e., express or implied public "consent," for doing so. This constituted a modification of a prior opinion, ABA 296 (1959), which had held that such conduct was per se improper, citing ABA 16 for the proposition that "no question of consent could be involved as the public is concerned and it cannot consent."

expressly recognized that the question of the government's power to consent is one of law, not of ethics:

> We give no opinion on applicable law as to the authority of a public officer or public body to give consent to the representation of parties having differing interests when one of the parties is a public or governmental body or agency.

ABA Inf. 1433 (1978) (conflict for municipal attorney's office to represent municipal corporation and autonomous civil service commission in litigation against one another). Any doubt concerning the ABA's position was laid to rest by the adoption in 1983 of the Model Rules of Professional Conduct, Rule I.II(a) of which expressly contemplates governmental consent.

This Committee's prior statements that a government cannot consent to a conflict of interest should not be viewed as expressions of a legal conclusion that a governmental body or officer lacks the requisite legal authority or power to consent, because this Committee is not empowered to issue opinions on questions of law. Accordingly, our prior opinions held only that, when a conflict of interest affects a governmental entity, it would be unethical for the conflicted lawyer to undertake or continue the representation in question even if the governmental entity's consent has been secured in accordance with DR 5-105(C).

We consider, then, whether there is a sufficient and reasoned basis for maintaining such a blanket ethical prohibition. Those who would perpetuate a per se rule against lawyers accepting the consent of governmental entities argue that this rule is justified because lawyers actually may use, or suggest an ability to use, their relationship with the governmental entities to gain an improper advantage for private clients, or alternatively, may secure consent through corruption.[6]

While we recognize the risk of corruption where governmental entities are involved, we believe that a blanket prohibition against lawyers accepting the consent of governmental entities is paternalistic and excessive, and that the danger is adequately addressed by several Disciplinary Rules, including the following:

DR 9-101(C), which prevents lawyers from stating or implying that they

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6 One treatise on legal ethics speculates that the government cannot consent rule arises from a concern about the danger of corruption, but continues:

> Such a flat rule threatens more harm than good unless it is limited to circumstances in which the potential for corruption is high because of the lawyer's relationship to the governmental body or to powerful political groups that might strongly influence decisions made in the body's behalf.

Charles Wolfram, Modern Legal Ethics § 7.24, at 348 (1986)(footnotes omitted).

have an ability to influence any tribunal, legislative body or public official impermissibly or on irrelevant grounds.[7]

DR 8-101(A), which prevents a lawyer from using his or her public position to obtain or attempt to obtain a special advantage in legislative matters for the lawyer or a client. See also EC 8-8.

DR 1-104(A)(4), which prevents lawyers from engaging in conduct involving, among other things, "dishonesty," including participation in governmental corruption.[8]

Various statutory provisions governing the conduct of public officials potentially provide additional safeguards against the procurement of consents through governmental corruption.[9] Among these provisions are several criminal statutes, see, e.g., Penal Law §§ 100.00 (criminal solicitation), 105.00 (conspiracy), 195.00 (official misconduct), 195.20 (defrauding the government) and 200 (bribery and unlawful gratuities), which arguably apply not only to corrupt public officials, but also to attorneys obtaining consent through unlawful means, see Penal Law § 10.00(14) (defining "public servant" as including "every person specially retained to perform some government service").[10] Additionally, a special counsel retained by a municipality generally is subject to the codes of ethics applicable to municipal officials. See 1971 Op. Atty. Gen. (Inf.) 141. See also Gen. Mun. Law §§ 806, 808 (requiring the adoption of codes of ethics by every county, city, town, village and school district and the creation of ethics boards).

The ethical preconditions generally applicable to the acceptance or continuation of a representation, regardless of client consent, also are intended to protect the public interest and the legal profession from the unscrupulous lawyer or politician. Chief among these preconditions are those set forth in DR 5105(C) itself, which renders it improper for a lawyer to seek client consent unless it is "obvious"

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7 Indeed, a lawyer must not create the impression that prior or current practice before, or employment by, a governmental entity enables the lawyer to obtain some special advantage, must dispel such impression if it exists, and must decline employment if the potential client has such an expectation. See N.Y. State 507 (1979); N.Y. State 447 (1976); N.Y. State 435 (1976). See also A Mississippi Attorney v. Mississippi State Bar, 453 So. 2d 1023 (Miss. 1984); In re Connaghan, 613 S.W.2d 626 (Mo. 1981); In re Thompson, 67 N.J. 26, 335 A.2d 1 (1975).

8 See, e.g., In re Weishoff, 75 N.J. 326 (1978).

9 Although this Committee does not opine on questions of law, we cannot render ethical guidance in a legal vacuum. In appropriate circumstances, such as those present here, we must for contextual purposes take into account pertinent legal principles.

10 See also Public Officers Law §§ 73 et seq. (conflicts of interest), 75 (bribery) and 77 (unlawful fees and payments); New York City Charter Ch. 68, § 2604 (ethics in general).

that he or she can adequately represent each client, including a client that happens to be a governmental entity, and requires full disclosure of the possible effect of the representation on the exercise of the lawyer's professional judgment on behalf of each client. See generally Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339, 1350 (9th Cir. 1981) ("We believe the 'public interest' and 'prejudice' language used on occasion by the courts is merely another way of saying that 'adequate representation' could not be provided in those cases").[11]

The other purported justification for a per se government cannot consent rule, the appearance of impropriety Canon 9 counsels lawyers to avoid, see, e.g., N.Y. State 431 (1976), is insufficient standing alone to warrant the imposition of a per se rule in these circumstances.

Accordingly, we conclude that where a lawyer is faced with a conflict of interest, and one of the affected parties is a governmental entity, the lawyer may accept or continue the representation with the entity's consent, provided there is full compliance with DR 5-105(C), i.e., the "obviousness" test is satisfied and full disclosure has been made. Of course, the lawyer must comply with all other disciplinary rules in obtaining the consent of and in representing all affected clients.[12] Whether the governmental entity has the legal authority to give such consent is a question of law we cannot address. See N.Y. City 894 (1978).

In addition, because governmental officials have a unique responsibility to act on behalf of the public, a lawyer seeking consent from such an official must be satisfied not only that the official in question is legally authorized and empowered to furnish the requested consent and has complied with all applicable legal requirements, but also that the process by which the consent is granted is sufficient to preclude any reasonable public perception that the consent was provided in a manner inconsistent with the official's public trust. In the context of a consent sought

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11 The facts of ABA 16, in which one member of a law firm wished to represent criminal defendants in cases prosecuted by another member of the same firm, present an excellent example of circumstances in which client consent would not be effective to cure a conflict of interest. Were that inquiry before this Committee today, we would conclude under DR 5-105(C) that it was not obvious that the interests of both clients could be represented adequately by the firm, thereby rendering consent unavailable. See also ABA 77 (part-time prosecutor seeking to represent in a civil action a person he is currently prosecuting).

12 As the Georgia Supreme Court recently held in Request for Issuance of Proposed Formal Advisory Opinion, Request No. 88-R7 (July 25, 1991), neither adopting nor rejecting an opinion proposed by the Formal Advisory Opinion Board of the State Bar of Georgia which would have incorporated a government cannot consent rule:

> The practice of law on behalf of public agencies is too varied and complex to warrant a per se rule of disqualification. At the same time, the potential for conflicts of interest in that practice are [sic] such that a purported waiver by a public agency may not be sufficient, in se, to eliminate questions of conflicts.

from a municipality or other local governmental entity, public disclosure of the request for consent ordinarily will satisfy this objective. In any case, lawyers should be alert to the potentially significant pitfalls that may accompany the relaxation of a long-established bright-line rule, particularly in the absence of applicable case law and in the face of enabling legislation that may not, explicitly at least, address the appropriate manner of procuring a DR 5-105(C) consent from a governmental entity.

Therefore, we modify our prior opinions (cited in note I) insofar as they state that, as a matter of legal ethics, consent of a governmental entity cannot cure a lawyer's conflict of interest in the same way that consent of a private client can under DR 5-105(C). This is not to say that the results in those opinions necessarily would change. Rather, the result in each opinion might well have been the same because it was not obvious that the lawyer could adequately represent both clients under DR 5-105(C), because some other provision of the Code would have been violated by the proposed representation, or because, as a matter of law, the governmental entity lacked authority to consent to the conflict or had not done so in the required manner.

We recognize that the foregoing constitutes a deviation from 25 years of Committee precedent. We are also mindful that lawyers and governmental entities may have refrained from entering into attorney-client relationships based on our prior opinions. However, as Chief Judge Charles Breitel stated:

> Always critical to justifying adherence to precedent is the requirement that those who engage in transactions based on the prevailing law be able to rely on its stability ... The absence of such factors, on the other hand, makes easier the reassessment of aberrational departures from precedents and accepted principles .

People v. Hobson, 39 N.Y.2d 479, 489, 384 N.Y.S. 2d 419 (1976); accord, Benjamin Cardozo, The Nature of the Judicial Process 151 (1921). Our retraction of a per se ban on a government waiver of a conflict of interest in favor of a more flexible rule neither renders improper past or ongoing attorney-client relationships nor requires lawyers to withdraw from existing engagements. Rather, it serves the salutary purpose of expanding the availability of counsel to those governmental entities that may wish to retain a certain law firm notwithstanding its other obligations.[13]

CONCLUSION

For the reasons stated and subject to the qualifications expressed above, the

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13 See In re Petition for Review of Opinion 552 of Advisory Committee on Professional Ethics, 507 A.2d at 239 ("We are additionally moved by the severe financial strains the per se rule imposes on local governments. ... Such burdens are not justified in the absence of a demonstrable, albeit potential, conflict of interests realistically militating against effective representation and lawyer-client fidelity.")

question posed is answered in the negative.

State of New Jersey
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PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

MATTHEW J. PLATKIN
Attorney General

March 19, 2024

Ms. Carol Johnston
Professional Responsibility Rules Committee
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625-0037

Re: Modifying the Public Entity Waiver Prohibition in Conflict of Interest Rules

Dear Ms. Johnston:

Thank you for following up on our proposal to modify the State's Rules of Professional Conduct ("RPCs") to provide that a public entity represented by the Department of Law and Public Safety ("LPS") be permitted to waive conflicts of interest in appropriate circumstances by way of informed consent. We provide the following in response to your e-mail dated February 9, 2024 setting forth requests for additional information from the Professional Responsibility Rules Committee ("PRRC").

1. **Please provide recent examples of cases or circumstances (without identifiers) in which the Attorney General's Office had difficulty retaining outside counsel. Has this arisen only in consumer protection litigation?**

The State has had difficulty retaining outside counsel for numerous State entities in both affirmative and defensive matters, not just in the context of consumer protection litigation. Below are several recent examples:

- Regulatory Litigation
  - The State sought to retain outside counsel to develop a litigation strategy against a State contractor. The dispute was of a nature that being able to move quickly had significant strategic value to the State. Because this work involved highly specialized regulatory litigation, only a small number of firms had the relevant expertise. The State approached the qualified firms, but several of them represented clients with small, unrelated petitions before the State entity. Because those concurrent conflicts could not be waived, it took almost two months to retain outside counsel with the necessary expertise and that did not have a conflict.

- Requests for Proposal (RFPs) for Bond Counsel
  - In several instances, a State agency issued RFPs for bond counsel and received few responses. In post-RFP diligence, we discovered that qualified firms often do not submit responses because they represent the underwriters selected by the agency in unrelated financing transactions in other jurisdictions. Many of the firms that perform work nationwide are not willing to run the risk that they would be conflicted out of representing an underwriter in a deal in another state because they are representing a New Jersey state-level issuer as bond counsel.

- Consumer Protection Litigation
  - The State considered retaining a particular law firm with significant subject matter expertise to represent it in connection with a potential consumer protection matter in the healthcare industry. The State has not retained the firm because, among other reasons, it identified numerous potential conflicts given the firm's representation of other public entity clients that are potentially adverse to the State in unrelated litigation.

- Joint Agency Litigations and Investigations
  - State entities that wish to do joint litigations or investigations with an agency for which many firms are conflicted from representing would likewise be limited in their choice of outside counsel. The agencies would either have to find a non-conflicted firm to represent them both or, more likely, would have to retain separate outside counsel. This latter scenario is not only inefficient but would present its own risks, deterring sister agencies from collaborating with each other.

- Employment Litigation
  - When facing litigation or potential litigation by State employees, State agencies sometimes seek the expertise of outside counsel whose practice largely consists of representation of private employers in similar matters. However, for State agencies that regulate aspects of the employer-employee relationship, the law firms with the requisite expertise typically are conflicted because of their representation of employers in unrelated matters before the agency.

In addition to these particular examples, we note that the inability to waive conflicts often results in situations where the State is compelled to engage in rigorous analysis to determine whether a conflict exists or to assess the likelihood that a conflict will arise, while parties that are permitted to waive conflicts can simply provide the waiver instead of reaching definitive conclusions on such questions. In some matters that have posed novel or complex conflicts questions, the State either has been required to retain an outside conflicts expert or has retained separate counsel to represent a particular State official or agency out of an abundance of caution to avoid the possibility of a conflict; both scenarios have imposed costs on the State that could have been avoided if conflict waivers were permitted.

2. **Please provide recent examples of cases or circumstances (without identifiers) where a conflict of interest has arisen in the midst of a case, requiring outside counsel to withdraw from representation.**

Below are several recent examples of cases or circumstances in which a conflict of interest arose in the midst of a case:

- Consumer Protection Litigation
  - In an affirmative litigation, the State was represented by national and local outside counsel against defendant companies. During the course of that representation, outside counsel was engaged to pursue similar claims against the same defendants in unrelated litigation. It was determined that outside counsel's pursuit of monetary recovery for multiple plaintiffs (including the State) from the same defendants was a conflict. In other states, this type of concurrent conflict is routinely waived upon the clients' informed consent. This is especially true where the outside counsel has expertise in the underlying subject matter, the type of litigation (i.e., class actions, multi-district litigation), or the venue in question. In this instance, despite being very advanced into the litigation with extremely experienced law firms, the State had to terminate representation because the conflicts were not waivable under the current RPCs.

  - In an affirmative litigation in which outside counsel represented a group of states, including New Jersey, a conflict of interest arose in the midst of the case. Outside counsel asked all the member States to waive the conflict upon informed consent. All states except New Jersey were able to consent to the waiver. Although the firm was ultimately able to resolve the conflict and withdrawal was unnecessary, this situation demonstrates how New Jersey is constrained in a way that other states are not.

- Environmental Litigation
  - In several matters, the State sent outside counsel letters alerting them to a potential future conflict of interest due to outside counsel's representation of other private clients before the State agency. The State explained to outside counsel that if a conflict were to arise, the agency would not be able to waive the conflict due to the State's RPCs. In at least two instances, outside counsel withdrew certain retentions because they did not want to risk a conflict arising and preferred to continue representing their private clients.

- Regulatory Review
  - The State retained outside counsel to review a State agency's guidelines that were lengthy and complicated. When outside counsel developed a conflict mid-project, we ended up having to complete the review in-house, which has resulted in substantial delay and inefficiencies.

- Bond Counsel
  - The State had to remove bond counsel on a State appropriation-backed financing shortly before the agency board meeting in which the bond resolution was being approved because we discovered that bond counsel represented another client before the agency in an unrelated matter. We had to quickly find

new, non-conflicted bond counsel and get them up-to-speed on an expedited basis.

- The State selected bond counsel for a State agency after a competitive Request for Qualification (RFQ) process. Soon after the State obtained all the necessary approvals to move forward with the firm's retention, the firm declined the representation because it found out that the underwriter selected by the agency for its bonds was a client of the firm in an unrelated matter.

In addition to these particular examples, certain forms of multi-party litigation generally have significant potential to introduce new conflicts or potential conflicts after litigation has commenced. As an example, the State may have retained outside counsel to handle a claim against an entity that subsequently declares bankruptcy, resulting in the claims of the State and other creditors being disposed of in a single bankruptcy proceeding. If the outside counsel also represents one or more other creditors, their interests may diverge from the State's during the bankruptcy proceeding and present the question of whether outside counsel has a conflict that is not waivable by the State under the current Rules. Similar questions may arise when outside counsel represents the State as well as one or more other parties in connection with claims against one or more common defendants and their separate claims are consolidated in a multi-district litigation where their interests may not be fully aligned.

3. **Please explain whether the difficulties retaining outside counsel primarily arise from conflicts of interest under RPC 1.7(a)(1) (representation of an adverse party in an unrelated case); RPC 1.7(a)(2) (representation limited by the lawyer's responsibilities to another client, a former client, a third person, or a personal interest of the lawyer); or RPC 1.9(a) (representation of a client against a former client in the same or substantially related matter).**

Historically, the State's difficulties retaining outside counsel have arisen most frequently from conflicts of interest under RPC 1.7(a)(1)—where a firm represents a party adverse to the public entity in an unrelated matter. However, concurrent conflicts under RPC 1.7(a)(2) also have presented significant problems, and informed consent and waiver should likewise be available in that situation even though it arises less frequently. Similarly, while conflicts under Rule 1.9(a) do not arise frequently, our proposal seeks to make the conflict waiver language consistent across the RPCs.

4. **Please explain why this Rule change should apply only to cases in which the Attorney General's Office is providing legal representation, and not to all governmental clients, including local government or State agencies/authorities not represented by the Department of Law & Public Safety.**

Our request is specific to this Office's representation of clients based on the challenges we have experienced, as outlined above, related to conflicts and the prohibitions related to waiving them. The legal representation provided by this Office is vast, and indeed is designed as such under Executive Order No. 6 (1990), which requires that State agencies receive legal representation exclusively from the Attorney General. The wide scope of issues presented by the array of State agencies we represent presents frequent opportunities for conflicts to arise. In addition, we lack information regarding the potential conflicts and difficulties, if any, that other governmental entities may face in their own representations, and are not in a position to speculate on their impact. We take no position as to the application of the proposed revisions to other units of government, and

expect that those entities are well positioned to advocate on their own behalf related to Rule changes related to them.

In short, as the above examples illustrate, LPS represents numerous public entity clients with broad portfolios that handle a large number of matters both big and small. Under the Rule's current non-waiver provisions, the State's ability to retain and maintain outside counsel for these clients is materially and negatively impacted. Our proposed revisions to the RPCs would put LPS clients on equal footing with private parties and make our Rules consistent with the rest of our sister States. We hope this additional information helps solidify our proposal to modify the RPCs to permit public entities represented by LPS to waive conflicts of interest in appropriate circumstances with informed consent.

At your convenience, I am happy to discuss this proposal further and answer any other questions the PRRC, or anyone else, may have.

Sincerely,

Matthew J. Platkin
Attorney General

c: The Honorable Glenn A. Grant, J.A.D., Director, Administrative Office of the Courts
Steven Bonville, Chief of Staff, Administrative Office of the Courts
Shirley Emehelu, Executive Assistant Attorney General
Jonathan Garelick, Chief of Staff to the Attorney General
Jeremy Feigenbaum, Solicitor General
Michael T.G. Long, Director, Division of Law
Melissa Liebermann, Chief Ethics and Compliance Officer

EXHIBIT D

NEW JERSEY STATE BAR ASSOCIATION

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August 15, 2023

Hon. Glenn A. Grant
Administrative Director of the Courts
Hughes Justice Complex / P.O. Box 037
Trenton, NJ 08625-0037

RE: Proposal for Guidance for Attorneys in Responding to Negative Online Reviews

Dear Judge Grant:

The integrity and reputation of an attorney is critical to the attorney's ability to effectively represent their client's interests. Attorneys spend their entire careers building and protecting their reputations because that is ultimately how their true value is measured by clients, the courts and the public. Opinion 738 of the Advisory Committee on Professional Ethics (ACPE) allows disgruntled clients to tear down an attorney's well- and hard-earned reputation by posting misinformation about the attorney online to which the attorney is unable to accurately respond. The New Jersey State Bar Association (NJSBA) asks the Judiciary to address this growing issue by providing clarifying guidance under RPC 1.6(d)(2) to allow attorneys to respond to online reviews in an objective, measured fashion.

Pursuant to ACPE 738, attorneys may respond to online reviews posted by clients, former clients, or prospective clients expressing general disagreement, but that response cannot reveal "information relating to representation," except information that is "generally known," unless the client consents. RPC 1.6(d)(2) allows attorneys to respond more extensively but only if the lawyer reasonably believes it is necessary to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense . . . based upon the conduct in which the client was involved." ACPE 738 makes clear that responding to negative online reviews does not fall within the safe harbor of the rules, and states that "lawyers may not disclose confidential information merely to protect their online reputation in response to negative comments of this type."

The NJSBA's Putting Lawyers First Task Force heard from numerous lawyers about how inaccurate negative online reviews affected their reputations and how they were left feeling frustrated and disheartened with no ability to correct the public misstatements. After reviewing information provided by the Task Force, the NJSBA believes that a balance has to be struck between the obligation lawyers have to refrain from sharing information about their representation and the widespread reputational harm an attorney could suffer from an unchallenged client's online review that places the representation in issue and is not factually accurate. Not only does leaving such information unchecked have the potential to unfairly harm practicing attorneys, it also has the potential to mislead the public, with no meaningful opportunity for the truth to be presented.

While the ACPE followed other states' leads in reaching its conclusion in Opinion 738, the NJSBA suggests that the tide is turning as online information becomes more prevalent and is more frequently relied upon as a relevant source of information. The NJSBA notes that the Supreme Court of Arizona's Attorney Ethics Advisory Committee issued an opinion last December noting the rise of blogs and social media platforms that allow disgruntled clients a wider and more diverse audience to spread information, or misinformation, and that most online content is permanent. (Supreme Court of Arizona Attorney Ethics Advisory Committee Ethics Opinion File No. EO-19-0010.) The opinion notes that an attorney's duty of confidentiality is to protect a client, but that a client may forfeit that protection. It further suggests that a client may not use confidentiality as both a sword and a shield in legal or disciplinary proceedings, and that should similarly not be permissible when making public accusations of misconduct.

The NJSBA asks that the Judiciary consider adopting a modified approach to the issue by combining the ACPE's conclusion with parameters for an additional, limited response that maintains client protections as much as possible but allows attorneys to correct misinformation. The NJSBA suggests the following guidance:

> A lawyer should generally limit a response to negative online reviews in a restrained manner, as noted in ACPE Opinion 738, citing the following recommended response contained in Pennsylvania Bar Association Formal Opinion 2014-200:

> A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.

To the extent that lawyers wish to provide more information in a response to a negative online review posted by a client, however, including confidential client information, lawyers are permitted to do so in limited situations and subject to the following criteria:

1. Only where an objectively inaccurate factual statement directly impugns the lawyer's ability to represent clients, including honesty, competency, integrity, knowledge of the law and similar legal attributes, may a lawyer utilize confidential client information to respond.

2. Before a lawyer is permitted to utilize confidential client information, a written, thirty (30) day warning must be sent to the former client by certified mail, email with delivery receipt, or guaranteed overnight delivery capable of being tracked, identifying the objectively inaccurate information, explaining (and documenting, where feasible) why such information is inaccurate, requesting that the former client remove the online post, and warning that if the post is not removed within thirty (30) days, the former client may be subject to legal action and/or the release of the client's confidential information in order to rebut the online post.

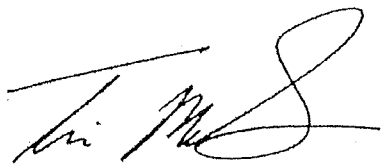
3. The disclosure of confidential information must be narrowly tailored and limited to what is reasonably necessary in order to rebut the objectively inaccurate claim(s).

4. Lawyers can indicate their disagreement with the post only if it contains objectively inaccurate facts. More generalized comments or opinions about the lawyer would not constitute objectively inaccurate factual statements.

The NJSBA believes that adopting this approach and providing parameters for a response to online negative reviews will not meaningfully alter the intent and focus of ACPE Opinion 738 or RPC 1.6(d)(2); rather it will serve as much-needed guidance to attorneys about how to ethically and reasonably respond to attacks on their integrity and reputation.

The NJSBA thanks the Judiciary for considering this proposal, and remains ready to provide any additional information, analysis or assistance that is needed to adopt the approach advocated for.

Sincerely,



Timothy F. McGoughran, Esq.
President

cc: William H. Mergner Jr., Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director

SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE
Ethics Opinion File No. EO-19-0010

The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1 and Administrative Order Nos. 2018-110 and 2019-168.

This opinion addresses the ethical considerations that apply when a lawyer responds to any online review.

Online reviews of a lawyer's performance have become more common and may have an impact on prospective clients. When a lawyer comes across an online review, the lawyer may feel inclined to respond. However, a lawyer's ability to disclose protected information or communications is extremely limited.

There is no rule barring a lawyer from responding to an online review, whether negative or positive. However, the lawyer must always adhere to the duty of confidentiality contained within E.R. 1.6.

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER _")

E.R. 1.6:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER 3.3(a)(3).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

(d) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes
necessary:

(1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(2) to mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's

commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

(6) to prevent reasonably certain death or substantial bodily harm.

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

OPINION

Disclosing confidential client information in response to an online review is not impliedly authorized to carry out the representation. Furthermore, when the client has not consented to disclosure after consultation for purposes of ER 1.6(a); and further that no exception set forth in ER 1.6(b) or (c) or ER 3.3(a)(2) applies, and further that disclosure is not authorized "to establish a defense to a criminal charge against the lawyer based upon conduct in which the client was involved" or "to respond to allegations in any proceedings concerning the lawyer's representation of the client" under ER 1.6(d), a lawyer may not disclose confidential information.

Although the confidentiality rule provides an exception under 1.6(d) that authorizes a lawyer to disclose confidential information to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" this exception is not applicable to the disclosure of information in response to an online review.

The rise of the internet, with its multiple methods of sharing or presenting information or comments, social media in its many forms, and undoubtedly other means of expression that are too numerous to list or even predict, presents a unique challenge to a lawyer who is being commented upon by a client or former client. Such online expressions may be anonymous and even those that have attribution may not themselves establish with certainty that the client is

actually the source of the comments. Because of this, a lawyer may not respond by disclosing confidential information relating to representation of a client or former client.

If a lawyer chooses to respond to an online review, one possible acceptable response is as follows:

> "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point by point fashion in this forum. Suffice it to say, I do not believe that the post presents a fair and accurate picture of the events."

This is not the only acceptable response a lawyer can provide consistent with ER 1.6, but a lawyer may never reveal confidential information related to client representation when responding to an online review.

Because it is impossible for an attorney to ascertain the identity of the person behind an online posting, an attorney may not disclose confidential information with regard to a client controversy pursuant to E.R. 1.6(d). In other situations, such disclosures may be permissible, but in the online forum due to the anonymity of postings, disclosure of protected information is expressly prohibited.

State Bar of Arizona, Rules of Professional Conduct Committee, Ariz. Op. 93-02 interprets the concept of "client controversy" under ER 1.6(d)(4) in a way suggesting that confidential client information may be disclosed in response to a public allegation criticizing an attorney in representing a client To the extent Ariz. Op. 93-02 is inconsistent with the direction provided in this opinion, it is disapproved and superseded.

DISSENT[1]

The amount of misdirection, misstatement of fact, downright meanness, and, yes, even fake news, that appears daily on the internet is staggering. The legal profession is not immune from this phenomenon. Criticism may come to a lawyer from many quarters, and most certainly lawyers are frequently the target of on-line criticism from clients and former clients, sometimes fairly, sometimes unfairly. Proposed EO-19-0010 announces an inflexible rule that precludes a lawyer from responding to such criticism with anything but platitudes. This new EO will unequivocally bar lawyers from responding to even the most scurrilous accusations with anything that even approaches confidential information or privileged communications. The premise for this restriction, unstated in the EO, is the assumption that lawyers, if left unchecked, will unnecessarily reveal private and confidential information online they have learned about their clients, all to the client's detriment. The empirical data supporting this premise has yet to be presented for consideration. Taken to its extreme conclusion, under the proposed EO a lawyer could not even respond to an online comment acknowledging that the person who posted it is or was a client because the very fact of representation is itself confidential and cannot be disclosed without client consent.

The proposed EO hamstrings and harms lawyers who are the subject of unfair or untrue online attacks. In the long run, it also harms the consumers of legal services because they are never able to get "the rest of the story."

My suggestion is that an EO on this topic be crafted along the following lines, the intent of which is to protect clients first and foremost, but at the same time provide a means for lawyers to protect themselves from unjustified online attacks.

ISSUE PRESENTED

When may a lawyer ethically divulge confidential information or privileged communications (hereafter "protected information or communications") relating to a current or former client in response to negative comments by that client which are posted online or in social media and that refer to or discuss protected information or communications?

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT

ER 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are implicitly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c) and (d) or ER 3.3(a)(3).

*****

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

*****

[1] The dissenting Committee member is Wm. Charles Thomson.

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

ER 1.9 Duties to Former Clients

*****

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

OPINION

Discussions between a lawyer and their client concerning the client's case or matter must be kept strictly confidential according to ER 1.6(a), which prohibits a lawyer from disclosing "information relating to the representation" of a client unless the disclosure is impliedly authorized to carry out the representation, the client consents after consultation, or an exception set forth in ER 1.6(b), (c), (d) or ER 3.3(a)(3) applies. The duty to keep such information confidential extends to former clients through ER 1.9(c).

The only exception reasonably likely to be applicable to the question presented here is ER 1.6(d)(4). This sub-rule identifies three situations in which a lawyer may disclose confidential information relating to a client or former client:

- To establish a claim or defense on behalf of the lawyer *in a controversy between the lawyer or client,*

- To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or

- To respond to allegations in *any proceeding concerning the lawyer's representation of the client.*

[Parenthetically, and for this Dissent only, I make the following observations about ER 1.6(d)(4):

Taking these "permitted disclosures" in reverse order, "any proceeding" presumably means just that, civil, criminal, administrative, disciplinary, and so on, that "concerns" the representation of the client. This category covers the water front of claims that can be filed somewhere by somebody.

The second exception is considerably narrower. It applies only to establishing "a defense by the lawyer to a criminal charge or civil claim based upon conduct in which the client was involved." Whatever this covers, it is by no means the entire water front as is the first exception discussed above, or anything close to that.

The last (but first stated) exception is, again, exceedingly broad. It permits disclosures of confidential information by a lawyer to establish either a claim or a defense "in a controversy with a client."

The comments to ER 1.6 do not explain what a "controversy" entails. Comment [12] refers to "legal claim," "disciplinary charge," "claim," "charge," "a wrong alleged," "action," and "proceeding," but inexplicably does not mention the word "controversy."]

For purposes of this opinion we are assuming that no formal action or suit has been initiated or filed.

The rise of the internet, with its multiple methods of sharing or presenting information or comments (for example, Avvo or Yelp), social media in its many forms, and undoubtedly other means of expression that are too numerous to list or even predict, presents a unique challenge to a lawyer who is being negatively commented upon or reviewed by a client. Such online expressions may be anonymous and even those that have attribution may not themselves establish with certainty that the client is actually the source of the comments. Because of this, the first task for the lawyer who is considering a response is to satisfy themselves that the client actually posted the comments in question or is otherwise responsible for them. The lawyer must establish this nexus with objective certainty. If the lawyer fails to make this connection to the client and then responds with the disclosure of protected information or communications, a disciplinary charge against the lawyer will be the likely result.

Having satisfied this requirement, the next step for the lawyer before responding is to determine whether the client comments rise to the level of a "controversy" under ER 1.6(d)(4). It is again emphasized that information and communications exchanged between a lawyer and client concerning representation of the client are, in the first instance, to be kept strictly confidential. Disclosure is the rare exception to this rule.

Comments posted in one form or another by a client online can cover a broad spectrum ranging from gripes about an outcome or the cost of the representation, for example, to serious charges of malpractice or unethical conduct. The two ends of that spectrum make for easy analysis. Comments amounting to a gripe rarely, if ever, create a controversy under ER 1.6(d)(4), but allegations of malpractice, unethical conduct, or other serious malfeasance frequently will. Comments in the grayer area in the middle of the spectrum require careful analysis by the lawyer. Given the numerous fact patterns that are likely to emerge in this context, an all-encompassing general rule cannot be articulated. That said, the lawyer is admonished to consider responding with the disclosure of protected information or communications only in the most extreme circumstances that lie much nearer to the serious allegation end of the spectrum.

ER 1.6(d)(4) refers to *both "a controversy between the lawyer and client" and "any proceedings concerning the representation of the client."* Some authorities suggest that a lawyer may disclose protected information or communications only in defense of a formal civil, criminal, disciplinary, or other action that has already been filed or in connection with which the intent to file it has been "manifested." See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64, Cmt. c. We believe, however, that online assertions made against the lawyer by the client or former client to the effect, for example, that the lawyer acted incompetently or dishonestly or refused to follow instructions, etc., can in the proper circumstances themselves be sufficient to establish a "controversy" between the lawyer and client for purposes of ER 1.6(d)(4). Otherwise, use of the

phrase "a controversy between the lawyer and client" would be superfluous in light of the breadth of "any proceedings concerning the representation of the client" also found in ER 1.6(d)(4). *[Presumably, the drafters of ER 1.6 did not intend "proceeding" and "controversy" to have the same meaning.]*

The final requirement, assuming the preceding analysis otherwise would allow disclosure of protected information or communications, is to determine the permissible, and proper, substance of any response.

It is emphasized that a lawyer is always entitled to respond to an online client comment, regardless of its content, by stating, in substance: "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."

A response along these lines should always be the first option considered when responding to any online comment. It is not too trite to say that lawyers should always in the first instance consider taking the proverbial high road. But, in those limited situations where disclosure of protected information or communications is both justified and necessary to respond to an online comment, a lawyer is permitted to make a proportionate and restrained response that includes protected information or communications in order to protect the reputation of the lawyer or vindicate the lawyer's conduct. The concepts of "justification and necessity," on the one hand, and "proportionality and restraint," on the other, are not mere filler. Even if there is a "controversy," a lawyer is "justified" in disclosing protected information or communications only to the extent the client's online post waives the protection otherwise afforded to that information or those communications. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS recognizes that both the attorney-client privilege and the protection afforded to confidential client information can be waived by the client. See § 64, Cmt. f.; § 80, Cmt. c. ("A client who contends that a lawyer's assistance was defective waives the privilege with respect to the communications relevant to that contention. Waiver affords interested parties fair opportunity to establish the facts underlying the claim.") An online post by the client would be the kind of "subsequent disclosure" recognized as a waiver. Id., § 79, Cmt. b. ("Voluntary disclosure of a privileged communication [or confidential information] is inconsistent with a later claim that the communication [or information] is to be protected.")

Comment e. to § 64 of the RESTATEMENT further states, "When a client has made a public charge of wrongdoing, a lawyer is warranted in making a proportionate and restrained public response." The concept of proportionality works as a governor that limits the extent of the lawyer's disclosure. ER 1.6(d)(4) permits disclosure by the lawyer of only so much confidential information or privileged communications as is reasonably necessary under the existing circumstances to respond directly to the client's online comment or allegations. We emphasize that a lawyer may not simply open up their file in response to such a client "controversy." The lawyer must first determine whether they can adequately respond without disclosing protected information or communications. Ultimately, whether disclosure is "reasonably necessary" for purposes of ER 1.6(d)(4) is within the independent judgment of the lawyer involved after careful assessment of the facts and the nature of the controversy.

In conclusion, we do not believe that a lawyer's right to disclose protected information or communications in these circumstances is limited only to responding to a pending or imminent

formal proceeding. Section 64 of the RESTATEMENT, Cmt. a., recognizes an exception to the general confidentiality rule that gives a lawyer limited permission to employ protected client information or communications. Otherwise, Comment a. further notes "lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group."

Many jurisdictions that have addressed this question answer it differently than does this Committee. See, e.g., New York State Bar Association Ethics Opinion 1032 (2014) ("Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice. We do not believe that Rule 1.6(b)(5)(i) should be interpreted in a manner that could chill such discussion."); Pennsylvania State Bar Association Formal Opinion 2014-200 ("We conclude that a lawyer cannot reveal client confidential information in a response to a client's negative online review absent the client's informed consent.").

This Committee acknowledges the foregoing (and other) different points of view from around the country and agrees with them to the extent they emphasize the seriousness of a lawyer revealing protected client information or communications and the very limited circumstances in which it is appropriate. Our disagreement is over whether there are, in fact, ever proper circumstances in which limited disclosure of such information or communications in response to an online post or comment is "reasonably necessary," and we believe as discussed herein that there are.

Wm. Charles Thomson
Member, Attorney Ethics Advisory Committee

Issued by ACPE December 9, 2020

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

ACPE OPINION 738

Responding to Negative Online Reviews

Several lawyers have sought guidance from the Advisory Committee on Professional Ethics and the attorney ethics research assistance hotline regarding negative online reviews. Lawyers have stated that former prospective clients or former clients have posted false, misleading, and/or inaccurate statements about the lawyer on online reviews and ask whether, consistent with Rules of Professional Conduct 1.6 and 1.18, they may publicly respond to these online reviews.

Rule of Professional Conduct 1.6(a) provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for . . . disclosures of information that is generally known . . . ." Rule of Professional Conduct 1.18(a) provides that "[a] lawyer who has had discussions in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues . . . ."

Lawyers are permitted to respond to online reviews posted by clients, former clients, or prospective clients, but that response cannot reveal "information relating to representation,"

except information that is "generally known," unless the client consents to the release of such information.[1] See RPC 1.6(a). Hence, while lawyers may express general disagreement with the prospective client's statements, they may not reveal confidential "information relating to the representation" unless the information is "generally known."

Rule of Professional Conduct 1.6(d)(2) permits a lawyer to reveal confidential information to the extent the lawyer reasonably believes it necessary to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved." Hence, pursuant to Rule of Professional Conduct 1.6(d)(2), a lawyer may disclose certain confidential information to the extent necessary to defend a discipline charge or legal malpractice action brought by the client, to pursue an action seeking fees from the client, or similar matters when the information is relevant to the defense or the claim.

The Committee finds that an informal "controversy" between a lawyer and a prospective or former client, arising from the posting of a negative online review, does not fall within the

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[1] In the Official Comment to Rule of Professional Conduct 1.6, the Court adopted the comment in the Restatement (Third) of the Law Governing Lawyers on confidential information, which states:

> Whether information is "generally known" depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.

safe harbor of Rule of Professional Conduct 1.6(d)(2). Lawyers may not disclose confidential information merely to protect their online reputation in response to negative comments of this type.

The Committee reviewed ethics opinions from other jurisdictions on revealing information in response to online reviews. There is general agreement that a lawyer may not disclose client information in response to a former client's negative online review, though a lawyer may respond in a "proportionate and restrained" manner and state that the lawyer disagrees with the facts presented by the reviewer. See Pennsylvania Bar Association Formal Opinion 2014-200 (2014); New York State Bar Association Opinion 1032 (October 30, 2014); Bar Association of San Francisco Opinion 2014-1 (January 2014); The Professional Ethics Committee for the State Bar of Texas Opinion No. 662 (August 2016); Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion No. 525 (December 6, 2012); Bar Association of Nassau County Committee on Professional Ethics Opinion No. 2016-01 (November 2015); Colorado Bar Association Opinion 136 (April 15, 2019); West Virginia Legal Ethics Opinion No. 2015-02 (September 22, 2015). See also In re Skinner, 758 S.E.2d 788 (Ga. 2014) (State Bar disciplined a lawyer who responded to online negative reviews from a client, providing personal and confidential information about the client).

The Pennsylvania Bar Association suggested that lawyers respond with this language: "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point by point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events." Pennsylvania Bar Association Formal Opinion 2014-200 (2014). The Committee agrees that this language accords with New Jersey lawyers' ethical obligations.

Lastly, the Committee notes that lawyers' ethical obligations to maintain confidentiality under Rule of Professional Conduct 1.6 differs from their obligations to maintain lawyer-client privilege. As noted above, Rule of Professional Conduct 1.6 broadly requires lawyers to maintain confidentiality of "information relating to representation of a client." In contrast, the attorney-client privilege protects only "communications" made in confidence between a lawyer and his or her client. The privilege is part of the Rules of Evidence and applies to admissibility of information in court proceedings. The body of law concerning waiver of the evidentiary privilege is inapplicable to lawyers' ethical obligations under Rule of Professional Conduct 1.6.

In sum, lawyers may respond to negative online reviews posted by clients, former clients, or prospective clients by stating that they disagree with the facts presented by the reviewer, but they may not disclose "information relating to representation," except information that is "generally known."