

# SEXISM “RELATED TO THE PRACTICE OF LAW”: THE ABA MODEL RULE 8.4(g) CONTROVERSY

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## INTRODUCTION

If you want to play with me, this is what you’ll have to put up with. I will use your gender to ridicule you, to embarrass you, and to discredit you. I will call you by your first name or any other diminutive term I can get away with. I will sexualize you, trivialize you, and ignore you. If I do it long enough, maybe you will finally go away.<sup>1</sup>

Take a historical glance at graduating class composite photographs that today line the walls in most law schools. Examine closely the studious expressions of the faces staring back, to see significantly fewer female portraits interjected among this prevailing “man’s world.”<sup>2</sup> This is a snapshot of the legal profession that begins to slowly change as the viewer turns the corner to gaze at the legal scholars arising out of more recent years. Do you see an increasingly gender-balanced picture? Currently, this Note author attends the Indiana University Robert H. McKinney School of Law, home to a female population of approximately forty-five to fifty-one percent of full-time students and thirty-eight to fifty percent of part-time students, recorded between 2015 and 2016.<sup>3</sup> The integration of females entering the practice of law poses the question of whether or not equality in the field has similarly evolved at a sufficient pace to address

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1. Elizabeth A. Delfs, *Foul Play in the Courtroom: Persistence, Cause and Remedies*, 17 WOMEN’S RTS. L. REP. 309, 310-11 (1996) (Delfs’ summation characterizing sexism).

2. See generally Lisa Mazzie, *Ponderings of a Law Professor: It’s (Still) a Man’s, Man’s World*, Ms. JD (Apr. 20, 2011), <http://ms-jd.org/blog/article/ponderings-law-professor-its-still-mans-mans-world> [<https://perma.cc/3NTV-XKW7>] (discussing the barriers women face in male-dominated law firms).

3. *McKinney by the Numbers*, IND. UNIV. ROBERT H. MCKINNEY SCH. LAW <https://mckinneylaw.iu.edu/about/numbers/class-profiles.html> [<https://perma.cc/T7NG-DYCC>] (last visited May 16, 2017) (J.D. class profiles).

women falling prey to gender bias and discrimination. For over fifty years, discriminatory conduct against members of a protected class such as gender has been deemed illegal.<sup>4</sup> Yet, over this time span, there were no successful attempts to create ethical rules of black letter law to regulate the legal community in its statewide capacity.<sup>5</sup>

Historically, the practice of law has been defined as one that “self-regulat[es]” among its licensed professionals in terms of establishing civility and ethical conduct expectations.<sup>6</sup> The National Association of Women Lawyers (NAWL) lobbied the American Bar Association (ABA) to provide a model rule for legal practitioners to address issues of sexism both in and out of the courtroom.<sup>7</sup> The ABA, a voluntary legal professional association in existence since 1878, seeks to improve the practice of law and accredits law schools.<sup>8</sup> The ABA works to craft model rules of professional responsibility to establish guidelines within legal practice.<sup>9</sup> The NAWL’s 5,200 female-member pool advocated for a specifically outlined anti-harassment and discrimination provision to be included within the existing Model Rule of Professional Conduct 8.4 *Misconduct* (ABA Model Rule 8.4)<sup>10</sup> as a remedial effort to prevent sexism in the profession.<sup>11</sup> The ABA Standing Committee on Ethics and Professional Responsibility (SCEPR) sponsored the development of the official language for the amendment proposal to change ABA Model Rule 8.4.<sup>12</sup> This proposal is more

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4. House of Delegates, *Annual Meeting 2016: ABA amends Model Rules to add anti-discrimination, anti-harassment provision*, ABA, at 19:10 (Aug. 9, 2016, 1:11 PM), [https://www.americanbar.org/news/abanews/aba-news-archives/2016/08/annual\\_meeting\\_20161.html](https://www.americanbar.org/news/abanews/aba-news-archives/2016/08/annual_meeting_20161.html) [https://perma.cc/2UPE-MJEZ] (Wendi S. Lazar speech).

5. *Id.* at 19:18.

6. Hon. Louraine C. Arkfeld, *Amending Rule 8.4 of the Model Rules of Professional Conduct*, VOICE EXPERIENCE, [http://www.americanbar.org/publications/voice\\_of\\_experience/2016/july-2016/amending-rule-8-4-of-the-model-rules-of-professional-conduct.html](http://www.americanbar.org/publications/voice_of_experience/2016/july-2016/amending-rule-8-4-of-the-model-rules-of-professional-conduct.html) [https://perma.cc/86HH-9739] (last visited Feb. 8, 2017).

7. Elizabeth Olson, *Bar Association Considers Striking ‘Honeys’ From the Courtroom*, N.Y. TIMES DEALBOOK (Aug. 4, 2016), [http://www.nytimes.com/2016/08/05/business/dealbook/sexual-harassment-ban-is-on-the-abas-docket.html?action=click&contentCollection=DealBook&module=RelatedCoverage&region=EndOfArticle&pgtype=article&\\_r=0](http://www.nytimes.com/2016/08/05/business/dealbook/sexual-harassment-ban-is-on-the-abas-docket.html?action=click&contentCollection=DealBook&module=RelatedCoverage&region=EndOfArticle&pgtype=article&_r=0) [https://perma.cc/9FZJ-RXQN].

8. *About the American Bar Association*, ABA, [http://www.americanbar.org/about\\_the\\_aba.html](http://www.americanbar.org/about_the_aba.html) [https://perma.cc/2PJB-N5MR] (last visited Feb. 8, 2017).

9. *Id.*

10. MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 1983) (amended 2016).

11. Olson, *supra* note 7; Email from Marsha L. Anastasia, President, National Association of Women Lawyers, to Myles V. Lynk, Chair, ABA Standing Committee on Ethics & Professional Responsibility (July 21, 2016), *available at* [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/nawl\\_letter\\_support\\_resolution\\_109.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/nawl_letter_support_resolution_109.authcheckdam.pdf) [https://perma.cc/XG8F-Z3PJ].

12. 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, 197 n.2 (2017).

commonly referred to as Resolution 109.<sup>13</sup> After formal presentation of the final draft of Resolution 109 to the floor of the House of Delegates, the “decisionmaking [sic] body of the ABA,”<sup>14</sup> the amendment passed by voice vote on August 8, 2016.<sup>15</sup> In summation, the passage of Resolution 109 officially added the new anti-harassment and discrimination provision (g) to the contextual black-letter language of the existing ABA Model Rule 8.4.<sup>16</sup> Resolution 109 also revised, added, and renumbered the advisory Comments, which accompany the rule.<sup>17</sup>

However, the story does not end with this seemingly smooth-sailing ABA summer session decision. Rather, the construction of ABA Model Rule 8.4(g) and the aftermath of its passage have created a significant amount of controversy.<sup>18</sup> As the consideration emerged over the course of research and drafting of this Note in 2016-2017, *Law360* dialogue mentioned it as a rule change worth “[w]atch[ing],” speaking to its timeliness, relevance, changes, and challenges to the legal profession as a whole.<sup>19</sup> Particularly worth examining is the departure that many states are allowed to take within adoption of the ABA recommendations.<sup>20</sup> This Note examines specifically how Indiana addresses harassment and discrimination under its own disciplinary rule.<sup>21</sup> Although the ABA Model Rule 8.4 amendment is the first concrete step in addressing gender bias regulation in legal communities across the country, it will be up to individual states to adopt the language of Resolution 109 into the local code of professional conduct that exists for that particular area.<sup>22</sup> Policy decisions to adopt ABA Model Rule 8.4(g) include consideration of concerns, raised prior to and after the passage of Resolution 109, that the rule may risk infringement upon an attorney’s

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13. Peter Geraghty, *ABA adopts new anti-discrimination Rule 8.4(g)*, ABA (Sept. 2016), <http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g-at-annual-meeting-in-.html> [https://perma.cc/24DH-88AA].

14. John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 88 (2013); see also *ABA House of Delegates*, ABA, [http://www.americanbar.org/groups/leadership/house\\_of\\_delegates.html](http://www.americanbar.org/groups/leadership/house_of_delegates.html) [https://perma.cc/7HC5-L55J] (last visited Mar. 16, 2017) (development of ABA policies).

15. Geraghty, *supra* note 13.

16. *Id.*

17. *Id.*

18. See Marilyn Odendahl, *ABA takes stronger stance on harassment, discrimination*, IND. LAW. (Aug. 24, 2016), <http://www.theindianalawyer.com/aba-takes-stronger-stance-on-harassment-discrimination/PARAMS/article/41236> [https://perma.cc/UAH5-8CV3] (discussing concerns of opponents to the rule).

19. Andrew Strickler, *3 Attorney Rule Changes to Watch*, LAW360 (July 5, 2016, 2:34 PM), <http://www.law360.com/articles/813289/3-attorney-rule-changes-to-watch> [https://perma.cc/GVY6-C7PJ].

20. Odendahl, *supra* note 18 (Indiana lack of scienter requirement, which is included in the ABA rule).

21. See *id.* (discussing Indiana rule).

22. Gillers, *supra* note 12, at 198.

speech due to its provisional verbiage.<sup>23</sup> Overly broad and vague construction that reaches out to regulate attorney conduct beyond litigation proceedings or the scope of representation of a client has been deemed additionally troubling.<sup>24</sup> Proponents for the rule change purport there is a compelling interest in the legal profession's regulatory ability to protect not only women in the profession, but also other classes susceptible to harassment and discrimination, clients, and individuals who routinely interact with the legal process.<sup>25</sup> Proponents argue a lawyer's responsibility as "an 'officer of the court'" is essential to establishing justice and takes on a heightened level of censorship compared to that of an average citizen.<sup>26</sup>

This Note outlines the scope of the gender bias problem within the practice of law.<sup>27</sup> This Note presents the rationale and implications of the 2016 ABA Model Rule 8.4(g) amendment as applicable to sexist conduct in the legal community.<sup>28</sup> Further legal analysis illustrates there are concerns that ABA Resolution 109 will infringe upon lawyers' First Amendment rights and broaden their exposure to disciplinary action.<sup>29</sup> However, there must be a balancing test weighing the concern of First Amendment protections with the ability to effectively regulate attorney conduct within the profession.<sup>30</sup> Such balancing interest should allow the rule to overcome constitutional challenges to stand as currently written.<sup>31</sup> This Note argues ABA Model Rule 8.4(g) is a positive steppingstone to combating harassment and discrimination but by itself is not enough to encompass the entire white elephant in the room.<sup>32</sup>

Part I sheds light on the gravity of gender bias even in today's legal market, calling for a removal of rose-colored glasses of failure to acknowledge the phenomenon exists, posing significant challenges to attorney retention and diversity within the profession. Part II of this Note presents a historical review of the evolution of legal ethics and ABA Model Rule 8.4 *Misconduct* from its

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23. *Id.* at 234-36; *see generally* Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and "Conduct Related to the Practice of Law"*, 30 GEO. J. LEGAL ETHICS 241 (2017).

24. *See* Blackman, *supra* note 23, at 251, 254 (asserting that the broad language of Model Rule 8.4 is an "unprecedented expansion" of oversight into attorneys' private speech); *see also* Gillers, *supra* note 12, at 219 (describing the broad scope of the rule).

25. Geraghty, *supra* note 13; *see also* Blackman, *supra* note 23, at 245-48 (discussing classes besides that of sex that are protected under the rule).

26. *See In re Sawyer*, 360 U.S. 622, 668 (1959) (Frankfurter, J., dissenting) (asserting that an attorney's conduct during an ongoing trial but outside of the courtroom was not constitutionally protected partly because an attorney acts as "an 'officer of the court'"); Olson, *supra* note 7 (explaining that as "officers of the court," lawyers "set a standard of conduct").

27. *See infra* Part I.

28. *See infra* Part II, Part III.

29. *See infra* Part V.

30. *See infra* Part V.

31. *See infra* Part V.

32. *See infra* Part VI.

original adoption to the present 2016 amended version in Resolution 109. Part III of this Note investigates the predominant support of and opposition to the ABA amendment, examining the heated debate that has generated controversial buzz in legal journals and blogs among ethical experts. Part IV focuses on state responses prior to and after Resolution 109. Part IV pays particular attention to Indiana’s Model Rule 8.4(g) for purposes of comparison and contrasting analysis to the ABA enacted version. Part V argues the language of newly amended ABA Model Rule 8.4(g) and its additional Comments do not curtail First Amendment protection of freedom of speech; rather, the compelling interest of ethical practice in law outweighs the fear of infringement. Finally, Part VI of this Note argues sexism is a deep-seated cultural problem arising as early as law school and calls for alternative methods to combat conscious and implicit bias within legal practice. The rule, standing as written or further developed to address the aforementioned concerns, cannot be expected to target behaviors larger than its scope to bring monumental change in gender equality.

#### I. SEXISM IN THE PRACTICE OF LAW

Further examination of gender harassment and discrimination in the practice of law reveals a wide range of victims of sexist conduct, including even the most accomplished female leaders.<sup>33</sup> Sexism inside courtroom walls is not a new or novel concept; it was notably broadcast on every television in America in a showcase of the demeaning treatment of Marcia Clark, prosecutor of the infamous O.J. Simpson Trial.<sup>34</sup> Clark, with cameras in the courtroom, experienced defense counsel calling her “hysterical.”<sup>35</sup> Presiding Judge Lance Ito repeatedly interrupted Clark’s opening statements, negatively commented on her appearance and clothing, and impeded the trial process.<sup>36</sup> Ito treated Clark’s male opposing counsel, Johnnie Cochran, noticeably more respectfully, engaging in light-hearted courtroom banter.<sup>37</sup> After retiring from both prosecution and defense work, Clark is still asked in interviews about what it was like to be a woman in the profession and about her views on gender bias.<sup>38</sup> Clark has stated the treatment of women

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33. See, e.g., Bill Murphy, Jr., *Want to Raise a Trail-Blazing Daughter? Justice Ruth Bader Ginsburg Says Do These 7 Things*, INC. (Oct. 4, 2016), <http://www.inc.com/bill-murphy-jr/7-things-successful-people-need-to-do-courtesy-of-ruth-bader-ginsburg.html> [https://perma.cc/7A58-U69L]; Rebecca Traister, *Marcia Clark Is Redeemed*, CUT, <http://nymag.com/thecut/2016/02/marcia-clark-redeemed-c-v-r.html> [https://perma.cc/PZ5Q-EFNC] (last visited Sept. 16, 2016); Staci Zaretsky, *‘You Don’t Need to Be Here’: Hillary Clinton’s First Experience With Sexism In The Law*, ABOVE LAW (Sept. 9, 2016, 10:29 AM), <http://abovethelaw.com/2016/09/you-dont-need-to-be-here-hillary-clintons-first-experience-with-sexism-in-the-law/> [https://perma.cc/37CM-3H4Q].

34. Traister, *supra* note 33.

35. *Id.*

36. *Id.*

37. Delfs, *supra* note 1, at 313.

38. House of Mystery Radio - KKNW Seattle 1150 A.M., *KFNX Marcia Clark - Moral Defense*, YOUTUBE, at 23:03 (Nov. 18, 2016), <https://www.youtube.com/watch?v=BERIdZM6kAk>

often “depends on what court you’re in,” and such location variability may cause a female to feel condescending and demeaning behavior in ways similar to Clark’s experiences with Ito.<sup>39</sup> Clark still cited her experience with Ito as being the most egregious form of sexism she has encountered throughout her “entire career.”<sup>40</sup>

Honorable Justice Ruth Bader Ginsburg described difficulty as a young lawyer in attaining a coveted clerkship and other employment opportunities simply because of being female, married, and raising a child.<sup>41</sup> Former Secretary of State Hillary Clinton reflected on the early stages of law school admissions by sharing her experience in sitting for a law school admission exam.<sup>42</sup> A group of young men audibly told Clinton, “You don’t need to be here” and, “There’s plenty else you can do.”<sup>43</sup> Attaining the Democratic Party nomination to run for President of the United States in 2016, Clinton attempted to become the first female to ultimately “shatter the glass ceiling” for all women, including those who practice law.<sup>44</sup> Commentators placed sexism on the list as “a central theme” of discussion surrounding the historic election<sup>45</sup> and Clinton’s ultimate loss.<sup>46</sup>

Among frequently reported acts of gender bias against female attorneys are situations where members of the legal community refer to women by first name only;<sup>47</sup> confuse them for administrative support staff such as a secretary; use a “term of endearment”; accuse them of using an unpleasant high-pitched vocal tone; or simply patronize them.<sup>48</sup> Terms such as “honey” or “darling,” accompanied by the degradation of a pat on the head or a side-arm hug along with inappropriate, off-color sexist statements, are often a social norm of communication towards female attorneys both in and out of the courtroom.<sup>49</sup> Should a woman advocate zealously for her client, this passionate speaking

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(podcast interview featuring Marcia Clark).

39. *Id.* at 23:13.

40. *Id.* at 23:55.

41. Murphy, Jr., *supra* note 33.

42. Zaretsky, *supra* note 33.

43. *Id.*

44. Alan Rappeport & Alexander Burns, *Highlights of Hillary Clinton’s Concession Speech and President Obama’s Remarks*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/politics/donald-trump-won-now-what.html> [<https://perma.cc/EPC4-UUFH>].

45. Alyson Cole, *Why Sexism Is So Central to This Presidential Race*, FORTUNE (Oct. 19, 2016), <http://fortune.com/2016/10/19/trump-clinton-sexism-presidential-debate/> [<https://perma.cc/UG5Z-PPEY>].

46. Jacqueline Thomsen, *Ginsburg: Sexism was a ‘major factor’ in Clinton’s election loss*, HILL (Sept. 27, 2017, 2:36 PM), <http://thehill.com/blogs/blog-briefing-room/news/352719-ginsburg-sexism-was-a-major-factor-in-clintons-election-loss> [<https://perma.cc/4P5U-4JYS>].

47. Rebecca Korzec, *Gender Bias: Continuing Challenges and Opportunities*, 29 LITIG. 14, 18 (2003).

48. Connie Lee, *Gender Bias in the Courtroom: Combating Implicit Bias Against Women Trial Attorneys and Litigators*, 22 CARDOZO J. L. & GENDER 229, 234 (2016).

49. Olson, *supra* note 7.

timbre has been dismissed as too much feminine emotion,<sup>50</sup> prompting such verbal remarks as, “[O]nly ‘b[itch]y’ women could be good trial lawyers.”<sup>51</sup> Presiding judges have been reported stating pantsuits worn by women are “unprofessional[.]” business dress and that women dressed this way “should not appear in court.”<sup>52</sup>

Unfortunate responses to sexist action lean toward women remaining silent or turning the other cheek in an attempt to ignore inappropriate behavior rather than risk reporting it.<sup>53</sup> The decision to speak up or grin and bear it is a catch-22, in which a woman chances potentially angering a judge, affecting reputation with a jury, facing retaliation in the form of loss of promotion and case assignment,<sup>54</sup> or taking on the appearance of the fragile or too sensitive counselor.<sup>55</sup> Exposure to sexism in the legal profession may prove damaging to the psychological wellbeing, confidence, and self-esteem of female attorneys.<sup>56</sup> ABA Commission on Women in the Profession research illustrates “that implicit bias hinders the progress of women lawyers.”<sup>57</sup> This is further supported by a Defense Research Institute study showing that “[seventy percent] of women attorneys [surveyed] experienced gender bias in the courtroom.”<sup>58</sup> A call for action to end discriminatory practices targeted toward women is a necessary effort to level the playing field.<sup>59</sup> Cynthia Thomas Calvert, a founder of Project for Attorney Retention (PAR), raised a common belief, illustrative of bias, in which “men are presumed competent, while women still have to prove it.”<sup>60</sup> Calvert believes such

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50. See Lee, *supra* note 48, at 242 (noting a study in which judges viewed women who spoke loudly in court as “shrill”).

51. Amy J. Coco, *Should Ethics Codes Include Prohibitions on Biased Conduct in the Practice of Law?*, ALLEGHENY COUNTY B. ASS’N LAW. J., Jan. 8, 2016, at 10, 10, available at <https://www.whc-pc.com/articles/ethicscodes.pdf> [<https://perma.cc/7UJN-FR55>].

52. *Id.*

53. See Olson, *supra* note 7 (“[Women] ignore insults or sexist comments for fear of imperiling their careers or being labeled less than a team player.”).

54. Delfs, *supra* note 1, at 310-11; Meredith Mandell, *Lawyers Need to Regulate Their Harassment of Colleagues. Here’s Why*, BLOOMBERG LAW BIG LAW BUS. (Aug. 11, 2016), <https://bol.bna.com/lawyers-need-to-regulate-their-harassment-of-colleagues-heres-why/> [<https://perma.cc/KKF8-52F8>].

55. Korzec, *supra* note 47, at 16, 64-65.

56. See Delfs, *supra* note 1, at 310, 321 (noting the psychological toll on women who attempt to ignore harassment and that female law students lose self-confidence in school).

57. STEPHANIE A. SCHARF & ROBERTA D. LIEBENBERG, *FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE: A RESEARCH REPORT ON THE PARTICIPATION OF WOMEN LAWYERS AS LEAD COUNSEL AND TRIAL COUNSEL IN LITIGATION 14* (Am. Bar Found. & Am. Bar Ass’n 2015), available at [http://www.americanbar.org/content/dam/aba/marketing/women/first\\_chairs2015.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdam.pdf) [<https://perma.cc/59QF-4AY5>].

58. *Id.* at 15.

59. See generally *id.* (analyzing the gender gap in the legal profession and suggesting changes to the legal field to reduce the disparity).

60. G.M. Filisko, *Yes, Virginia, There Is Still Gender Bias in the Profession*, BEFORE B. (Apr.

ideals contribute to a sexist culture within legal employment environments, causing women to be denied ample compensation and fair promotion<sup>61</sup> or to disappear from the profession too early and ultimately, entirely.<sup>62</sup>

Yet, harassment and discrimination in the legal realm do not affect just the female population. Sexist conduct occurs in terms of gender identity and sexual orientation,<sup>63</sup> calling for additional campaigns of regulation. Mark Johnson Roberts, Chair of the Commission on Sexual Orientation and Gender Identity, testified publicly in front of the House Delegates prior to the vote to pass Resolution 109.<sup>64</sup> In this personal disclosure, Roberts described obstacles faced in his own career, including one in which he was passed over for a hiring opportunity.<sup>65</sup> As Roberts phrased it, the hiring committee “decided that a gay man couldn’t be a litigator.”<sup>66</sup> Twenty-eight years later, during this session meeting, Roberts proved his naysayers wrong when he spoke as both chair of an ABA commission and as the deputy general counsel of the state bar association of his home state of Oregon.<sup>67</sup> Roberts powerfully utilized his story as well as tales of others to call attention to the need for an ABA response to pass Resolution 109 in an effort to eliminate unfair disparity.<sup>68</sup>

In fact, the history of sexism in the legal profession is as longstanding and complex as perhaps the development of professional codes of conduct themselves. The road to the ABA’s eventual adoption of anti-harassment and discrimination provision 8.4(g) has not been without obstacles in coming to fruition.

## II. EVOLUTION OF LEGAL ETHICS & ABA MODEL RULE 8.4 MISCONDUCT

To understand the drafting circumstances that surrounded Resolution 109, one must first be familiar with the broad evolution of legal ethics. Historical review illustrates the timeline of the language changes of ABA Model Rule 8.4, which governs various forms of misconduct in the legal community. Early fundamental ethics compilation efforts for legal practice were rooted in publications and judicial lectures developed between 1836 and 1854.<sup>69</sup> Alabama

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2, 2013), <https://abaforlawstudents.com/2013/04/02/yes-virginia-still-gender-bias-profession/> [https://perma.cc/Y2PY-Y4EF] (quoting Cynthia Thomas Calvert).

61. *Id.*

62. *See id.* (“[Women] leave the profession in greater numbers than men.”).

63. *See* Jeena Cho, *Perspective: Seyfarth Attorney on Being LGBT in Big Law*, BLOOMBERG LAW BIG LAW BUS. (May 10, 2016), <https://biglawbusiness.com/perspective-seyfarth-attorney-on-being-lgbt-in-big-law/> [https://perma.cc/LR7P-YB3W] (noting that some law firms may fire an attorney because the person identifies as LGBTQ).

64. House of Delegates, *supra* note 4.

65. *Id.* at 11:20.

66. *Id.* at 11:23.

67. *Id.* at 10:55, 11:08.

68. *See id.* at 11:53 (describing harassment experienced by one of Roberts’ colleagues).

69. Peter Geraghty, *History of U.S. legal ethics standards*, ABA (Dec. 2016),



would set the tone as the first state to ratify a legal code of ethics in 1887,<sup>70</sup> prompting interest in the establishment of comprehensive guidelines to provide recommendations to all states.<sup>71</sup> With the professional inception of the ABA, the early 1900’s brought a uniform collection of ethical standards for the legal world that would progress as changes in the field demanded.<sup>72</sup> From the early ABA Canons of Professional Ethics prior to 1969, to the Model Code of Professional Responsibility governing through the early 1980’s, the ABA continued to build and amend ethical conduct recommendations to formulate the existing ABA Model Rules of Professional Conduct (ABA Model Rules).<sup>73</sup>

Originally promulgated in 1983, the ABA Model Rules serve as a nonbinding code of conduct for states, per individual discretion, to adopt or modify to regulate legal practitioner conduct within each sovereign state.<sup>74</sup> Currently, the ABA retains membership of approximately one third of the 1.2 million lawyers located in the United States.<sup>75</sup> Serving today as a trade association and accreditation body, the ABA ensures law school core curriculums include mandatory ethics courses spanning the content of the ABA Model Rules.<sup>76</sup> In 2016, the ABA reported forty-nine states utilized some or all of the ABA Model Rules’ language in codifying their own state ethical codes.<sup>77</sup> Each ABA Model Rule is made up of two components.<sup>78</sup> First is the briefly concise black letter language of the rule itself, followed by extended Comment(s) that appear below the rule, specifically developed to provide further interpretation to aid in the determination of how the rule should be applied through offered definitions of terms or examples.<sup>79</sup> If an ABA Model Rule is adopted by a state, it is only the black letter portion of the rule that becomes “authoritative,” as Comment(s) only bring clarity to the contextual meaning behind the rule.<sup>80</sup> Prior to 2002, ABA Model Rule 8.4 contained no hint of harassment or discrimination rule provisions or related Comment(s) that rendered such behavior as grounds for attorney

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<http://www.americanbar.org/publications/youraba/2016/december-2016/a-brief-history-of-the-development-of-legal-ethics-standards-in-.html> [https://perma.cc/4UAS-YLPJ].

70. *Id.*

71. See Travis Pickens, *A Short History of Legal Ethics*, 81 OKLA. B.J. 1710, 1710 (2010), available at <http://www.okbar.org/members/EthicsCounsel/Articles/LegalEthics.aspx> [https://perma.cc/P667-T49Z] (“A few other states followed Alabama’s lead.”).

72. Geraghty, *supra* note 69.

73. *Id.*

74. RICHARD ZITRIN ET. AL, *LEGAL ETHICS IN THE PRACTICE OF LAW* 7-9 (4th ed. 2013). California is the only state that has not adopted the ABA Model Rules. *Id.* at 9.

75. Ron Rotunda, *The ABA Overrules the First Amendment*, WALL ST. J. (Aug. 16, 2016, 7:00 PM), <http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418> [https://perma.cc/T3S7-XCYP].

76. *Id.*

77. Geraghty, *supra* note 69.

78. ZITRIN ET. AL, *supra* note 74, at 8-9.

79. *Id.*

80. *Id.*

misconduct.<sup>81</sup> The advancement for the ABA Model Rules to include a bias protection has been no small feat. Various attempts have been made at writing, reconstructing, and fine-tuning both black letter and Comment(s) contextual language.<sup>82</sup> It is this particular attention to the history and continued expansion of the wording of ABA Model Rule 8.4 that has led to the debated constitutionality and questionable effectiveness of Resolution 109.<sup>83</sup>

*A. Previous Language “In the Course of Representing a Client”<sup>84</sup>*

The 1983 version of ABA Model Rule 8.4 made no reference to bias, harassment, or discrimination under its outlined provisions (a) through (f).<sup>85</sup> This version labeled *misconduct* as the violation of another ABA Model Rule; the commission of criminal acts or conduct directly involving a lawyer’s honesty and fitness; the involvement in behavior prejudicial to justice; the creation or implication of abuse of power; and facilitating misconduct with other judicial figures.<sup>86</sup> It was not until 1992, when the ABA issued a report, *Achieving Justice in a Diverse America*, finding problematic occurrences of both “racial and ethnic bias” within the legal realm.<sup>87</sup> The creation of a clearly defined model rule provision to deem such actions as misconduct was recommended in an effort to move from mere innate thinking that bias was wrong, to the enactment of black letter code, to formally acknowledge its unacceptability in practice.<sup>88</sup> In response to the reported concern and request, two drafting bodies, the Young Lawyer’s Division (YLD) and the SCEPR, proposed new provisional options for ABA Model Rule 8.4 language constructions.<sup>89</sup> These proposals, once drafted, evidenced two very different positions on what action needed to be taken to address bias conduct.<sup>90</sup> The YLD purported to expand the scope of biased conduct to extend *past the walls* of the courtroom into a lawyer’s professional activities.<sup>91</sup> Conversely, the SCEPR considered biased conduct applicable *only* in representation of a client as grounds for disciplinary action.<sup>92</sup> Both drafts were

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81. MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 1983).

82. Arkfeld, *supra* note 6; *see also* Andrew E. Taslitz & Sharon Styles-Anderson, *Regulating Race, Gender, and Ethnic Bias In the Legal Profession: A Modest Proposal*, 7 PROF. LAW. 10 (1996) [hereinafter *Regulating*].

83. *See generally* Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 795-825 (1996).

84. MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2002).

85. MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 1983).

86. *Id.*

87. Taslitz & Styles-Anderson, *supra* note 83, at 784.

88. *Id.*

89. *Id.*

90. *Id.* at 784-800.

91. *Id.* at 784.

92. *Id.*

halted due to negative commentary from the legal community that construction of such a far-reaching rule could pose a grave risk to attorneys’ First Amendment speech protection.<sup>93</sup> As a result, the ABA only released a general policy statement condemning racially and ethnically biased conduct to document the organization’s disapproval and discouragement for the behavior.<sup>94</sup>

Movement in terms of bias would not be addressed until the Ethics 2000 (E2K) “full-scale revision” of the 1983 rules, leading to the amended publication of 2002 ABA Model Rule 8.4.<sup>95</sup> Still, a black letter biased or prejudicial conduct provision did not yet exist.<sup>96</sup> ABA Model Rule 8.4(d) made it professional misconduct when a lawyer “engage[s] in conduct that is prejudicial to the administration of justice.”<sup>97</sup> The newly adopted Comment [3] was the first attempt by the ABA to address bias or prejudicial conduct in the context of a rule since its initial bare bones policy statement.<sup>98</sup> However, this still remained only slightly significant because the revised language was only a part of the non-authoritative Comment(s) section in relationship to the ABA Model 8.4 black letter provision (d), as a means to identify how provision (d) should be applied.<sup>99</sup> Comment [3] stated:

A lawyer who, **in the course of representing a client**, knowingly manifests by words or conduct, **bias** or **prejudice** based upon . . . sex . . . sexual orientation . . . violates paragraph (d) when such actions are **prejudicial to the administration of justice**.<sup>100</sup>

However, with the idea of defining the scope of bias or prejudicial attorney misconduct to only violating the rule when committed “in the course of representing a client,” the ABA seems to favor the more conservative initial SCEPR proposal in 1992, which utilized the same verbiage.<sup>101</sup>

Additional changes to the ethical codes came in 2009 with the Ethics 20/20 Commission that intentionally reviewed the rules to further define any terms relating to technological advancements in the law including electronic and digital communication.<sup>102</sup> However, no changes were made regarding bias, harassment, or discrimination.<sup>103</sup> The ABA eventually gained momentum to expand Model Rule 8.4 in 2014 when it designated a special task force group to take on the

93. *Id.* at 784-85.

94. *Id.* at 800; *see also* *Regulating*, *supra* note 82, at 10.

95. ZITRIN ET. AL, *supra* note 74, at 8-10.

96. MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2002).

97. MODEL RULES OF PROF’L CONDUCT r. 8.4(d) (AM. BAR ASS’N 2002).

98. MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 2002).

99. *Id.*; ZITRIN ET. AL, *supra* note 74, at 8-9 (noting Comment(s) are regarded as policy guidance and are not authoritative).

100. MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 2002) (emphasis added).

101. *Id.*; *see also* Taslitz & Styles-Anderson, *supra* note 83, at 784-800.

102. ZITRIN ET. AL, *supra* note 74, at 9-10.

103. *Id.* (only technological changes made in this revision).

endeavor to review an SCEPR draft of an anti-harassment and discrimination provision for elevation into the authoritative black letter language of the rule itself.<sup>104</sup> This would spark notable change to ABA Model Rule 8.4 by adding a (g) provision entirely devoted to anti-harassment and discrimination prevention, and it would move the 2002 Comment [3] language of mere guidance in application of the rule to now establish an obligation for attorneys to follow or risk disciplinary action in the event of non-compliance.<sup>105</sup> The ABA spent the last two years drafting SCEPR Resolution 109 to be presented for approval at the August 8, 2016 annual meeting.<sup>106</sup> With Resolution 109 came greater change than any of the previous attempts to address bias in legal practice, and not everyone was excited about the broad scope of its reach.

*B. New Language “In Conduct Related to the Practice of Law”<sup>107</sup>  
Among Black Letter*

The current state of the ABA’s recommendations regarding anti-harassment and discrimination is found in the 2016 amendment to ABA Model Rule 8.4 through its addition of provision (g), which allocates new parameters as to what can be considered misconduct under the rule.<sup>108</sup> ABA Model Rule 8.4(g) now defines misconduct in part as:

engag[ing] in conduct that the lawyer knows or reasonably should know is **harassment** or **discrimination** on the basis of . . . sex . . . sexual orientation, gender identity . . . **in conduct related to the practice of law.**<sup>109</sup>

Furthermore, new Comments [3] through [5] were added to ABA Model Rule 8.4 as applicable to provision (g).<sup>110</sup> New Comment [3] defines discrimination as “harmful verbal or physical conduct that manifests bias or prejudice towards others” and “[h]arassment [as] include[ing] sexual harassment and derogatory or demeaning verbal or physical conduct.”<sup>111</sup> Perhaps what is most significant about this new black letter language is the paradigm shift expanding this type of misconduct from its roots of “in the course of representing a client” to all actions “related to the practice of law” exposing legal professionals to a vast range of disciplinary grounds.<sup>112</sup> Contextual language of this new provision seems to circle back to the idea of a more liberal application of how far disciplinary arms may

104. Arkfeld, *supra* note 6.

105. *Id.*

106. Geraghty, *supra* note 13.

107. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

108. Geraghty, *supra* note 13.

109. *Id.*; MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016) (emphasis added).

110. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 3-5 (AM. BAR ASS’N 2016).

111. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2016).

112. Strickler, *supra* note 19.

reach as proposed by the YLD to address bias and prejudice conduct in 1992.<sup>113</sup> Resolution 109 eliminates the stricter requirement for the conduct to be “prejudicial to the administration of justice.”<sup>114</sup>

This wider canvas set by new Comment [4] includes applying misconduct in terms of harassment or discrimination that the attorney engages in while “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law.”<sup>115</sup> Misconduct may be applicable to occurrences happening in law firms, within bar association membership, or even in the context of activities connecting to law outside of the office or courtroom.<sup>116</sup>

### III. STRONG REACTIONS TO ABA MODEL RULE 8.4(g) AMENDMENT AND COMMENTS

After a year of committee meetings, coordination, and discussion to develop an ABA Model Rule provision to prevent harassment and discrimination, the ABA published a Working Discussion Draft in February of 2016 and allowed an open commentary period until March 11, 2016, for legal practitioners to submit feedback.<sup>117</sup> A wave of commentary surfaced in the form of written letters, legal blog posts, public hearings, and verbal discussions that illustrated both extreme support and disdain for the proposed content of the amendment.<sup>118</sup> At the end of the comment period, the ABA finalized Resolution 109 for presentation before its House of Delegates, which included multiple committee members making brief statements in support of the rule.<sup>119</sup> In an unusually speedy twenty-seven minutes, the House of Delegates, almost unanimously, voted in favor of the amendment.<sup>120</sup>

#### *A. Supporting Advocacy Groups and Rationale for Change*

During the Resolution 109 meeting, sixty-nine ABA attorneys desired to speak in support of the rule change, and key individuals stepped up to the podium to offer personal testimony of how sexism affected their work or clients in the legal profession.<sup>121</sup> Although the accounts primarily presented experiences

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113. Taslitz & Styles-Anderson, *supra* note 83, at 795.

114. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2002); Geraghty, *supra* note 13.

115. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS'N 2016).

116. *Id.*

117. Arkfeld, *supra* note 6.

118. *Id.*; see also Brad Abramson, *American Bar Association Attacks Attorney Speech Rights*, JURIST (Aug. 17, 2016, 8:08 PM), <http://www.jurist.org/hotline/2016/08/brad-abramson-speech-rights.php> [<https://perma.cc/8AEW-RCT7>].

119. House of Delegates, *supra* note 4.

120. *Id.*; see also Abramson, *supra* note 118.

121. Merrit Kennedy, *Don't Call Me 'Darling': American Bar Association Bans Sexist Language*, NPR (Aug. 11, 2016, 11:55 AM), <http://www.npr.org/sections/thetwo->

targeting women, the rule encompasses additional traditionally protected classes such as race and religion, as well as categories of marital or socioeconomic status, not formally recognized as “protected.”<sup>122</sup> The ABA Chair of the Commission on Sexual Orientation and Gender Identity, Mark Johnson Roberts, delivered a poignant address describing the personal story of a female colleague who was approached by opposing counsel at an after-hours work event.<sup>123</sup> Opposing counsel “groped” her inappropriately and verbally inquired about “what sexual activity she might be planning with her husband that night.”<sup>124</sup> Upon attempting to file a formal disciplinary complaint with her local bar association, the female attorney was denied remedy as the opposing counsel was found to have violated no written rule of misconduct.<sup>125</sup> Her only option of recourse was to seek relief under criminal charges.<sup>126</sup> While the woman did file a police report that ended with her colleague’s criminal conviction, not every female would find that speaking out against sexist conduct outweighed the possibility of retaliation or potential job loss.<sup>127</sup>

Proponents of the new rule recognized that extending legal misconduct outside the walls of the courtroom could work to eliminate similar stories.<sup>128</sup> Additional key supporters of Resolution 109 included the SCEPR, Women in the Profession, the ABA Section of Litigation, and the ABA Section of Labor and Employment.<sup>129</sup> Resolution 109 was additionally referred to as a rule “for law students” as a means to encourage the celebration of diversity upon studying within and entering the practice of law, giving hope to the future of the profession.<sup>130</sup>

### *B. Opposition to Resolution 109*

Though Resolution 109 was not verbally opposed during its passage at the ABA Annual Meeting, fifty-two ABA attorneys across many states and the District of Columbia filed commentary, raising cautionary flags that the rule purports to control “politically incorrect speech,” threatening First Amendment protections of a lawyer’s words.<sup>131</sup> Notable UCLA Professor and First Amendment scholar, Eugene Volokh, called the new rule a “speech code” in which expressing unpopular viewpoints posed greater risks of disciplinary

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way/2016/08/11/489611201/don't-call-me-darling-american-bar-association-bans-sexist-language [https://perma.cc/C2ME-E6PZ].

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Geraghty, *supra* note 13.

130. House of Delegates, *supra* note 4, at 19:55.

131. Geraghty, *supra* note 13; Abramson, *supra* note 118.

action.<sup>132</sup> A former Attorney General of the United States, Edwin Meese III, addressed the ABA directly in a formal letter strongly calling the new amendment “an unprecedented violation of the First Amendment.”<sup>133</sup> The ABA Business Law Section voiced similar discontent concerning due process<sup>134</sup>

Most ripe for argument was the SCEPR’s own initial reluctance in proposing the new rule’s language, due to ambiguity regarding subjective terms such as “related to the practice of law,” “harassment,” and “discrimination.”<sup>135</sup> Concern for Resolution 109 is illustrated by the following SCEPR comment:

We fear that without resolution of these questions and concerns and more precise definitions, lawyers and regulators will be left to guess what conduct may be covered under the proposed Rule . . . [.] The Discipline Committee remains concerned that the proposed Model Rule 8.4(g) is overbroad . . . and therefore questions whether it would withstand a constitutional challenge.<sup>136</sup>

Yet, the SCEPR effectively passed the amendment despite its own internal conflicts.<sup>137</sup>

Model Rule 8.4(g) raised fears that commonplace settings may pose areas not otherwise ripe for disciplinary action. Volokh cites areas of the workplace water cooler, private or public conversation, legal panel discussions, informal social events, bar association dinners, or even a law review article publication as new territory the rule may invade.<sup>138</sup> Does the rule make broadly sweeping generalizations that would count as misconduct if remarks were generally offensive to an entire group, but not necessarily an individual?<sup>139</sup> Would an attorney still be able to accept and reject clients without fear of misconduct implication?<sup>140</sup> Perhaps even the next continuing legal education course or colloquy in a law school class initiated by professors could succumb to the new rule as there is no specified requirement that the questionable speech be “severe or pervasive” in nature like that included in both federal and state anti-discrimination laws.<sup>141</sup> Opposition argues the rule leaves many questions

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132. Abramson, *supra* note 118.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Eugene Volokh, *Texas AG: Lawyer speech code proposed by American Bar Association would violate the First Amendment*, WASH. POST (Dec. 20, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/20/texas-ag-lawyer-speech-code-proposed-by-american-bar-association-would-violate-the-first-amendment/?utm\\_term=.57c66684de08](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/20/texas-ag-lawyer-speech-code-proposed-by-american-bar-association-would-violate-the-first-amendment/?utm_term=.57c66684de08) [<https://perma.cc/UL8P-3226>]; see also David L. Hudson, Jr., *Constitutional Conflict: States Split on Model Rule Limiting Harassing Conduct*, 103 A.B.A.J. 25, 26 (2017).

139. Volokh, *supra* note 138.

140. *Id.*

141. Hudson, Jr., *supra* note 138, at 25 (Josh Blackman cautions such risks may exist).

unanswered.

#### IV. WHAT DOES THIS MEAN FOR STATES?

While initially at the forefront of pivotal issues, the ABA was far behind on the topic of regulating discrimination in practice.<sup>142</sup> Prior to the Resolution 109 debate, twenty-four state jurisdictions and the District of Columbia had already enacted similar requirements including harassment and/or discrimination provisions in black letter rule language, under state-adopted model rules.<sup>143</sup> Aforementioned jurisdictions already invoking harassment and discrimination discipline provisions spanned across each region of the United States.<sup>144</sup> The grand question hanging in the newly dried ink of Resolution 109 is how many additional states will adopt the ABA recommendation or amend existing model rules in an effort to comply with this newly articulated standard? Now that the ABA Model Rule 8.4 change is in effect, its adoption by states can impose monetary or licensure consequences for conduct deemed harassing or discriminatory within a larger context of legal practice.<sup>145</sup>

##### *A. State Adoption of ABA Model Rule 8.4(g)*

A total of fourteen states, at the writing of this Note, had adopted no provision to address harassment or bias.<sup>146</sup> Those jurisdictions that have developed such provisions greatly vary in the language assigned to their individual rules, which may address harassment, discrimination, or some combination of the two.<sup>147</sup> Some, like Texas and Indiana, have chosen not to mirror the past ABA Model Rule 8.4 or the new Resolution 109.<sup>148</sup> Others, such as Utah, retain stricter application standards defining misconduct as “engag[ing] in conduct that is prejudicial to the administration of justice[,]” providing further guidance regarding harassment and discrimination in the state’s Comment [3] below the rule.<sup>149</sup> The concern has resonated all over the map with Arizona,

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142. Geraghty, *supra* note 13; *see also* Arkfeld, *supra* note 6.

143. Geraghty, *supra* note 13; *see also* Arkfeld, *supra* note 6.

144. Sindhu Sundar, *Legal Industry Struggles To Shake Its Sex Harassment Problem*, LAW360 IN-DEPTH (Oct. 31, 2016, 5:31 PM), <http://www-law360-com.proxy.mckinneylaw.uits.iu.edu/articles/854436/legal-industry-struggles-to-shake-its-sex-harassment-problem> [<https://perma.cc/Z9BH-BDXY>] (VT, NY, MA, RI, NJ, MD, DC, FL, MI, OH, IN, IL, MO, TX, WI, IA, NE, NM, MN, ND, CO, CA, OR, ID, WA).

145. Olson, *supra* note 7.

146. Andrew Strickler, *ABA Bias Rule Push Begins Amid Signs of Resistance*, LAW360 (Oct. 11, 2016, 7:06 PM), <https://www.law360.com/articles/849450/aba-bias-rule-push-begins-amid-signs-of-resistance> [<https://perma.cc/GM2X-CYKV>].

147. Sundar, *supra* note 144.

148. Strickler, *supra* note 146 (Texas’ provision refers to harassment and discrimination in the context of an adjudicatory proceeding creating a largely narrowed form of application); *see also* Odendahl, *supra* note 18 (Indiana’s no scienter requirement).

149. Keith A. Call, *Focus on Ethics & Civility: Implementing the ABA’s New Anti-*



Tennessee, North Carolina, and Oregon Supreme Courts refusing to either elevate ABA Comment [3] to the black letter state model rule or to adopt a provision regarding harassment or discrimination altogether.<sup>150</sup> New Hampshire specifically raised constitutional concerns as rationale for not passing such a provision<sup>151</sup> Louisiana legal professor, Dane Ciolino, commented on his state’s approach in adoption of the new rule that “unless there is a clear reason for a deviation, and that’s always been [the] approach in Louisiana,” typically many states fall in line with the ABA.<sup>152</sup> However, Ciolino did not have high hopes for this rule.<sup>153</sup> In the fall of 2017, Louisiana’s Attorney General’s Office released a powerful statement publicly concluding ABA Model Rule 8.4(g) would likely be found unconstitutional on both First Amendment and due process grounds.<sup>154</sup>

In light of Buckley Sander LLP’s December 2015 investigation of Pennsylvania’s Office of the Attorney General for a series of offensive emails found on government servers, the Philadelphia Bar Association, Pennsylvania Bar Association, and Disciplinary Board advocated for implementation of an anti-harassment and discrimination provision in their ethical code.<sup>155</sup> Former prosecutors, private legal practitioners, government employees, and judicial officials were among those linked to sending and receiving the derogatory emails.<sup>156</sup> An example of a recovered email contained a picture of “a large group of bare-breasted, dark skinned women of African ancestry standing outdoors by a river[,]” with a caption stating, “Can you guess what this is? It’s the next thing taxpayers will have to pay for! Michelle Obama’s high school reunion!”<sup>157</sup> The email scandal resulted in two state Supreme Court justices stepping down as well as an undetermined amount of legal professionals reported to the disciplinary

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*Discrimination Rule*, 29 UTAH BAR J. 42, 42-43 (Nov./Dec., 2016).

150. See generally Letter from Bradley S. Abramson et. al, ABA members, to ABA SCEPR (2016), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208\\_4\\_comments/joint\\_comment\\_52\\_member\\_attys\\_1\\_19\\_16\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/joint_comment_52_member_attys_1_19_16_authcheckdam.pdf) [<https://perma.cc/T8WG-ZEPP>] (undersigned by attorneys across twenty-two states and the District of Columbia).

151. *Id.* at 13.

152. Strickler, *supra* note 146.

153. *Id.*

154. Dane S. Ciolino, *Louisiana Attorney General Concludes That Proposed Anti-Discrimination Rule is Unconstitutional*, LA. LEGAL ETHICS (Oct. 29, 2017), <https://lalegaethics.org/louisiana-attorney-general-concludes-that-proposed-anti-discrimination-rule-is-unconstitutional/> [<https://perma.cc/LGG9-SGXX>].

155. Matt Fair, *Pa. Email Scandal Prompts Renewed Calls for Anti-Bias Rule*, LAW360 (Nov. 22, 2016, 8:22 PM), <http://www-law360-com.proxy.mckinneylaw.uits.iu.edu/legaethics/articles/865576/pa-email-scandal-prompts-renewed-calls-for-anti-bias-rule> [<https://perma.cc/38YM-9DWV>].

156. *Id.*; Matt Fair, *3 More Pa. Judges Implicated In Lewd Emails Report*, LAW360 (Nov. 22, 2016, 1:15 PM), <http://www-law360-com.proxy.mckinneylaw.uits.iu.edu/articles/865406/3-more-pa-judges-implicated-in-lewd-emails-report> [<https://perma.cc/F3RB-F8FL>].

157. Fair, *supra* note 155.

board.<sup>158</sup> Absent an anti-harassment and discrimination provision in the Pennsylvania Rule 8.4, this email conduct does not rise to the level of the state definition of misconduct that must be “prejudicial to the administration of justice,” nor have the electronic communications been found to definitively show evidence of affecting client representation or litigation outcome.<sup>159</sup> Further opining of legal experts questions whether or not a Pennsylvania adoption of the ABA Resolution 109 8.4(g) provision would encompass the emails as misconduct “related to the practice of law,” as the speech, while unprofessional, could be seen as lewd jokes between friends or colleagues over an email thread.<sup>160</sup>

The number of states that will ratify Resolution 109 as part of their ethical rules is difficult to discern with differing sentiments of support and skeptical concerns. Wendi Lazar, of the ABA Commission on Women in the Profession, cautioned the ABA not to assume state compliance will be an easy road ahead with unanimous or majority cooperation.<sup>161</sup> In fact, considered an “outlier,” Vermont’s unanimous adoption of the rule, with specific additions of eliminating harassment and discrimination against “color, ancestry and place of birth,” may not be “repeated even in left-leaning states.”<sup>162</sup> Spring and summer 2018 is still seeing strong responses to the rule adoption, particularly on the heels of the #MeToo movement which has continued to cast light on occurrences of sexual harassment and discrimination as a social issue.<sup>163</sup> Current ABA tallies note the declination of rule adoption by Illinois and Minnesota with the jury still out on Arizona’s decision, among others.<sup>164</sup> Snell and Wilmer law firm, located in Phoenix, stated “To adopt a rule governing lawyers’ conduct, without also telling lawyers what fate might befall them for a violation, would amount to adopting a half-rule—and one fundamentally unfair to the practicing bar[.]”<sup>165</sup> This Note will refer to other reasons why the newly amended rule is a “half” or “incomplete” rule to combat bias in Part VI. Most recently, on April 23, 2018, the Tennessee Supreme Court rejected a proposed “modified” ABA Model Rule 8.4(g) change; among concerns were those of the Attorney General that “[t]he proposed rule would apply to virtually any speech or conduct that is even tangentially related

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158. Fair, *supra* note 156 (Seamus McCaffery and J. Michael Eakin resign).

159. Fair, *supra* note 155.

160. *Id.*

161. Andrew Strickler, *Contentious ABA Anti-Bias Rule Could Face Local Challenges*, LAW360 (Aug. 9, 2016, 7:46 PM), <https://www.law360.com/articles/826423/contentious-aba-anti-bias-rule-could-face-local-challenges> [<https://perma.cc/GP8X-H3LT>].

162. Andrew Strickler, *Vermont’s Anti-Bias Rule Vote An Outlier In Heated Debate*, LAW360 (Aug. 14, 2017, 9:30 PM), <https://www.law360.com/articles/953530/vermont-s-anti-bias-rule-vote-an-outlier-in-heated-debate> [<https://perma.cc/9W58-XPXL>].

163. Scott Flaherty, *Several States Weigh ABA’s Anti-Discrimination Rule*, AM. LAW. (May 22, 2018, 4:59 PM), <https://www.law.com/americanlawyer/2018/05/22/several-states-weigh-abas-anti-discrimination-rule/> [<https://perma.cc/E5S8-EZHN>].

164. *Id.*

165. *Id.*

to an individual’s status as a lawyer.”<sup>166</sup> Let’s take a closer look at where Indiana stands in the controversy.

*B. Indiana’s 8.4(g): A Lack of Mens Rea*

Particularly worth noting is the grave departure that Indiana has taken within adoption of ABA recommendations in terms of its misconduct provision (g) enacted eighteen years ago.<sup>167</sup> Indiana explicitly removed the “awareness” requirement that an attorney “knows or reasonably should know” his or her sexist conduct “in a professional capacity” may rise to the rule’s level of harassment or discrimination.<sup>168</sup> This poses a slippery slope for application and regulation of speech.<sup>169</sup> Examining disciplinary proceedings since the adoption of Indiana’s Model Rule 8.4(g) may shed light on the varying case conclusions that have resulted under the no “mens rea” provision.

*In re Kelley* involved an attorney who acted on behalf of her spouse, after he had received solicitation phone messages at her private unlisted number by directly contacting the company herself.<sup>170</sup> Upon speaking to a male customer service representative who sounded feminine to her, the attorney explicitly asked if the man was “gay” or “sweet” in her conversation.<sup>171</sup> The company employee found the incident unprofessional and offensive, disconnected the call, and reported the incident.<sup>172</sup> A public reprimand resulted as the lawyer was found to be “in a professional capacity” under Indiana Model Rule 8.4(g).<sup>173</sup> Despite the attorney conducting *personal* business affecting her household, the broad corners of the rule found enough *professional capacity* in the occurrence to allow for minor discipline due to the fact the attorney conveyed herself to the customer service employee as communicating on the behalf of her spouse.<sup>174</sup>

*In re McCarthy* involved a lawyer for a seller of property who instructed his secretary to send email correspondence to the involved title company.<sup>175</sup> Within the email, the lawyer referred to himself in a racially derogatory manner.<sup>176</sup> Though the term was discriminatory to his person, under the Indiana rule, the email was found written and sent within a *professional capacity*, resulting in a

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166. Kim Colby, *The Tennessee Supreme Court Rejects ABA Model Rule 8.4(g)*, FEDERALIST SOC’Y (May 1, 2018), <https://fedsoc.org/commentary/blog-posts/the-tennessee-supreme-court-rejects-aba-model-rule-8-4-g> [<https://perma.cc/4HET-RFBT>].

167. Odendahl, *supra* note 18.

168. *Id.*; see generally *In re Kelley*, 925 N.E.2d 1279, 1279 (Ind. 2010) (public reprimand for attorney found in violation of 8.4(g)).

169. Odendahl, *supra* note 18.

170. 925 N.E.2d at 1279.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See generally 938 N.E.2d 698 (Ind. 2010).

176. *Id.* at 698.

thirty-day suspension *without automatic reinstatement*.<sup>177</sup> This disciplinary action raises the question whether punishment for this self-imposed discriminatory name-calling exceeds the type of conduct the far-reaching Indiana rule was intended to prevent.

Perhaps more clear-cut is the application of the rule to an attorney's language describing an opposing counsel's client. In *In re Barker*, the attorney representing the Respondent in a marital dissolution and child custody circumstance drafted and sent a letter to the opposing counsel during the proceedings.<sup>178</sup> In the letter, the attorney referred to the opposing counsel's female Petitioner client by stating, "Your client doesn't understand what laws and court orders mean I guess. Probably because she's an illegal alien to begin with. I want you to repeat to her in whatever language she understands that we'll be demanding she be put in **JAIL** for contempt of court."<sup>179</sup> The attorney authoring the letter was suspended for thirty-days *with automatic* reinstatement due to a violation of Indiana Model Rule 8.4(g), as the court found the attorney acted outside "legitimate advocacy," creating accusations regarding immigration status and national origin as a means to "embarrass or burden [the] Mother."<sup>180</sup> When compared with the aforementioned *McCarthy* case, involving the lawyer calling himself a derogatory term receiving no automatic reinstatement, the *Barker* matter allowed automatic reinstatement for actions taken against another party, presenting differing punitive outcomes.<sup>181</sup>

Similarly, *In re Campiti* involved a family law child support modification hearing in which the attorney representing the father "made repeated disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge."<sup>182</sup> The attorney claimed "his emotional involvement in the case" affected his decision making and behavior in the public courtroom forum; yet, this proved no excuse for violating Indiana Model Rule 8.4(g) by "manifesting bias or prejudice based upon national origin and/or socioeconomic status."<sup>183</sup> The court easily determined the attorney was acting in a *professional capacity*, as he was appearing in court; however, the disciplinary order called for a public reprimand.<sup>184</sup> Comparing this case to the aforementioned *Kelley*, *McCarthy*, and *Barker* cases, all of which involved conduct *outside* of the courtroom, the *Campiti* matter occurring on the record, attained the same disciplinary action as *Kelley*, but fell short of suspension.<sup>185</sup>

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177. *Id.* at 698-99.

178. 993 N.E.2d 1138, 1139 (Ind. 2013).

179. *Id.* (emphasis in original).

180. *Id.*

181. *Id.*; *McCarthy*, 938 N.E.2d at 698-99.

182. 937 N.E.2d 340, 340 (Ind. 2009).

183. *Id.*

184. *Id.*

185. *See generally id.*; *Barker*, 993 N.E.2d at 1138-39; *McCarthy*, 938 N.E.2d at 698 (compare and contrast to ponder whether the disciplinary orders under the state rule seem consistent or unpredictable).

*In re Usher* involved a lawyer’s inappropriate unrequited relationship with a law student intern in which the lawyer, out of retaliation, played what he called an email “prank” on the female.<sup>186</sup> Prior to the intern’s collegiate career, she engaged in acting roles, one of which involved a body double (portraying the intern’s film character) appearing nude in a horror film.<sup>187</sup> The lawyer, upset at the intern’s lack of romantic interest in him, obtained the nude clip, falsely presented the actor in the clip to be the intern, and electronically forwarded it to the intern’s new employer.<sup>188</sup> Later, the attorney drafted an email, which included the film clip and false “reviews” and commentary from what was made to look like lawyers and high-profile professionals.<sup>189</sup> The email was circulated to a number of well-known Indiana law firms and contained derogatory comments that attempted to prevent the intern from attaining future gainful employment opportunities.<sup>190</sup> Although the lawyer was found in violation of a number of other disciplinary rules, his comments were determined not in violation of Indiana Model Rule 8.4(g).<sup>191</sup> Instead, the conduct was determined by the state to have been made in acts of anger toward the female and did not rise to the level of biased or prejudicial nature.<sup>192</sup> In comparison to the aforementioned disciplinary cases, the outcome reached in *Usher* seems largely inconsistent and surprising under the Indiana Model Rule 8.4(g), illustrating the polar extremes of application.<sup>193</sup> The lack of an Indiana scienter requirement poses additional consideration for misapplication of the rule.

### C. How Far Is Too Far?

As states consider whether to adopt ABA Model Rule 8.4(g) to attack harassment and discrimination, 2017 brought further examples outside of Indiana of just how far the rule may expand to include disciplinary misconduct. In August 2017, just a year after the ABA passed Resolution 109, Drew Quitschau, a lawyer from Bloomington, Illinois, found himself in “the hot seat” after he used a female legal colleague’s information to open a fake Match.com site for the woman.<sup>194</sup> Quitschau also registered the female attorney for the Obesity Action Coalition,

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186. 987 N.E.2d 1080 (Ind. 2013).

187. *Id.* at 1083-84.

188. *Id.*

189. *Id.* at 1084-85.

190. *Id.*

191. *Id.* at 1086.

192. *Id.* at 1087-89.

193. *See generally id.*; *In re Barker*, 993 N.E.2d 1138 (Ind. 2013); *In re McCarthy*, 938 N.E.2d 698 (Ind. 2010); *In re Kelley*, 925 N.E.2d 1279 (Ind. 2010); *In re Campiti*, 937 N.E.2d 340 (Ind. 2009).

194. Leigh Jones, *Lawyer Who Rigged Fake Match.com Profile as Female Attorney Is in the Hot Seat*, LAW.COM (Aug. 15, 2017, 3:39 PM), <https://www.law.com/sites/almstaff/2017/08/15/lawyer-who-rigged-fake-match-com-profile-as-a-female-attorney-in-the-hot-seat/> [https://perma.cc/53HU-7F4P].

information about lap-band kits and weight loss surgery, and Pig International, a pork production publication sending regular email advertisements.<sup>195</sup> The attorney is currently involved in a disciplinary action surrounding his conduct.<sup>196</sup> Despite such a prima facie example of harassment and discrimination, the Illinois State Bar Association voted against state implementation of ABA Model Rule 8.4(g), which may have directly addressed the attorney's online "speech" providing disciplinary remedy.<sup>197</sup>

Meanwhile during the summer of 2017, at Howard University, Professor Reginald Robinson drafted a hypothetical question for a law school examination that was deemed in violation of the institution's sexual harassment policy.<sup>198</sup> Students taking the exam were asked to consider whether or not a spa owner could succeed on a demurrer motion if a customer filed a complaint alleging improper touching during a Brazilian wax appointment.<sup>199</sup> When two students reported the exam question to a faculty administrator, the question was deemed harassment due to its text containing the word "genital," which raised suspicion that the professor may have attempted to illicit personal responses from students, and the conclusion that the subject matter of the question was not "necessary to teach the subject."<sup>200</sup> Although the circumstance did result in a formal letter of reprimand to the professor's employment file and ordered completion of sensitivity training, there were no reported disciplinary actions pursued under state model rules.<sup>201</sup> However, should Washington D.C. adopt the expanded anti-harassment and discrimination provisions of ABA Model Rule 8.4(g), such occurrences in law schools may count as a violation, further reiterating Blackman's concern.<sup>202</sup> If the ABA Model Rule 8.4(g) provisions overcome constitutionality challenges, is the rule the most appropriate forum to address sexism, harassment, and discrimination, or does it risk taking discipline so far that even hypothetical questions must be screened for violation potential?

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195. *Id.*

196. *Lawyer Search: Attorney's Registration and Public Disciplinary Record*, ARDC, <https://www.iardc.org/lawyersearch.asp> [<https://perma.cc/4V54-NW75>] (last visited Jun. 4, 2018) (case pending, *In re* Drew Randolph Quitschau, 17PR0084).

197. Walter E. Dellinger & John J. Park, *The Fight Over ABA Rule 8.4(g) Proceeds to the States*, FEDERALIST SOC'Y (July 13, 2017), <https://fedsoc.org/commentary/blog-posts/the-fight-over-aba-rule-8-4-g-proceeds-to-the-states> [<https://perma.cc/XAA2-FUR5>].

198. Debra Cassens Weiss, *Law prof's exam question on Brazilian wax is deemed harassment; is academic freedom threatened?*, ABA J. (July 10, 2017, 4:05 PM), [http://www.abajournal.com/news/article/law\\_prof\\_exam\\_question\\_on\\_brazilian\\_wax\\_is\\_deemed\\_harassment\\_he\\_sees\\_threatened](http://www.abajournal.com/news/article/law_prof_exam_question_on_brazilian_wax_is_deemed_harassment_he_sees_threatened)?utm\_source=maestro&utm\_medium=email&utm\_campaign=weekly\_email [<https://perma.cc/367G-85RP>].

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*; Hudson, Jr., *supra* note 138, at 25 (Josh Blackman cautions such risks may exist).

## V. FIRST AMENDMENT RESTRICTIONS

Within the window of open commentary during the ABA revision consideration of the new rule, a majority of the 494 responses collected from ABA member attorneys strongly argued against Resolution 109 due to fear of constitutional infringement in this arena.<sup>203</sup> Little reaction was paid to the outpour of opposition except a timely addition of a reasonable or actual knowledge element in an effort to forge compromise and gain increased support among ABA members.<sup>204</sup> Most striking was the early SCEPR decision, addressed in Part II of this Note, to retract its revision drafts of Model Rule 8.4 in 1994 due to the overwhelming concern that a discriminatory provision, similar to this 2016 language, would fail to outweigh First Amendment guarantees.<sup>205</sup>

A. *Protections Under the Constitution*

The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech . . . .”<sup>206</sup> Freedom of speech is not guaranteed under some unprotected categories, including speech comprised of fighting words to provoke violence, obscene nature, defamation, or involving child pornography.<sup>207</sup> All other forms of speech invoke constitutional shield.<sup>208</sup> The U.S. Supreme Court addressed “politically correct” speech in the 1989 landmark case, *Texas v. Johnson*, when it stated, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>209</sup> Although a lawyer is also a citizen with First Amendment protections, due to the call of the profession, speech may be curtailed during the development of court proceedings.<sup>210</sup>

*Gentile v. State Bar of Nevada*, opined a lawyer’s speech regarding a case during an ongoing judicial proceeding is “extremely circumscribed.”<sup>211</sup> Yet, a rule containing vague and ambiguous terms or imprecise parameters for who may be punished may fail to provide an attorney fair notice of potential disciplinary action.<sup>212</sup> The U.S. Supreme Court applies a “substantial likelihood of material prejudice” standard in *Gentile*, requiring such a finding to regulate attorney

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203. Abramson, *supra* note 118.

204. Strickler, *supra* note 146.

205. Taslitz & Styles-Anderson, *supra* note 83, at 784-86.

206. U.S. CONST. amend. I.

207. Lindsey Keiser, *Lawyers Lack of Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers’ First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629, 630 (2015).

208. *Id.*

209. 491 U.S. 397, 414 (1989) (derogatory comments regarding the American Flag).

210. *See generally* *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991) (lawyer could not make statements at press conference during adjudicative proceeding).

211. *Id.* at 1071.

212. *Id.* at 1048.

speech during a trial.<sup>213</sup> Only “narrow and necessary limitations [can be placed] on lawyers’ speech.”<sup>214</sup> *Grayned v. City of Rockford* weighed implications of vagueness and overbroad language in First Amendment protection arguments, holding that regulations lacking such clarity threaten due process.<sup>215</sup> In terms of bias, in *Saxe v. State College Area School District*, the U.S. Court of Appeals, Third Circuit stated, “There is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.”<sup>216</sup>

*B. ABA Model Rule 8.4(g) Problems for Constitutionality?*

The issues with possible First Amendment speech protection conflicts and ABA Model Rule 8.4 did not develop overnight. Rather, as previously mentioned, these arguments have been raised at significant stages in the evolution of the rule as well as now.<sup>217</sup> In 2002, there were concerns of First Amendment infringement when the rule was expanded to include conduct “in the course of representing a client” that must rise to a level “prejudicial to the administration of justice.”<sup>218</sup> With Resolution 109 lifting portions of Comment [3] language to black letter provision (g) encompassing conduct “related to the practice of law,” further strains on the constitutionality of the rule are present now that more than a mere interpretation guideline exists.<sup>219</sup> Resolution 109 removed the heavier standard that verbal conduct must be “prejudicial to the administration of justice,” thus officially severing this requirement from provision (g) entirely, making the fears of those opposed to past rule proposals come to light.<sup>220</sup> Although there are Comment guides to assist in some interpretation of “discrimination,” “harassment,” and “related to the practice of law,” there is no standard developed in which to measure what may constitute a violation under these terms.<sup>221</sup> This arguably lends the rule to dangerously vague and overbroad interpretation.<sup>222</sup> ABA Model Rule 8.4(g) encroaches on the notion that a regulation of a lawyer’s speech must be “narrow and necessary” by widening the gap of disciplinary exposure, causing potential personal grievances or unpopular views to become catalysts for punishment.<sup>223</sup> If speech is found to be protected under the First Amendment, there can be no disciplinary violation falling under a model rule

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213. *Id.* at 1048, 1075-76.

214. *Id.* at 1075.

215. 408 U.S. 104 (1972).

216. 240 F.3d 200, 204 (3d Cir. 2001).

217. *See generally* Keiser, *supra* note 207; Taslitz & Styles-Anderson, *supra* note 83; Abramson, *supra* note 118.

218. *See* Keiser, *supra* note 207, at 629.

219. Letter from Bradley S. Abramson et al., *supra* note 150.

220. *Id.* at 13-14.

221. *Id.* at 14-18.

222. *Id.*

223. Odendahl, *supra* note 18; Strickler, *supra* note 146.



regulating conduct.<sup>224</sup>

Lawyers faced with potential punishment under ABA Model Rule 8.4(g), are thus met with a disconcerting reminder that disciplinary proceedings do not allow attorneys a jury of their peers or the same rules of evidentiary protections available in other adjudicative processes.<sup>225</sup> Rather than outline a new proposal for ABA Model Rule 8.4(g) and Comment(s) or assess a scrutiny level test that should be applied in interpreting the rule as other articles referenced have done,<sup>226</sup> this Note purports that any rule *alone*, regardless of how it is written, is not the best method to combat sexism and gender bias in the legal profession. In arguably more minor Indiana cases of *Kelley* and *McCarthy*, lawyers were disciplined under the state rule for a brief comment made in a personal phone call and a derogatory remark directed at the lawyer himself.<sup>227</sup> However, the Supreme Court of Indiana dismissed the seemingly more egregious nature of *Usher* as remarks made in anger and found no 8.4(g) violation.<sup>228</sup> Application of the ABA Model Rule 8.4(g) or various departures states may codify presents an apparent and understandable First Amendment infringement concern. State courts weighing in on conduct rules “have found that biased remarks are protected by the First Amendment when they would fall within its protection in the criminal context.”<sup>229</sup> Colorado’s *In re Green* determined an African American attorney’s private letters encouraging a trial judge to elect recusal in a case because he was “racist and [a] bigot” were merely statements of opinion protected under the First Amendment rather than “false statements of fact” that would warrant greater compelling interest to regulate attorney speech.<sup>230</sup> Such variable applications and outcomes of the ABA Model Rule 8.4(g), or one of its derived state counterparts, may work to swallow the rule altogether.

### C. Why ABA Model Rule 8.4(g) Should Stand as Written

According to an early 2008 ABA Mission Statement, the organization outlined a two prong articulation of carefully defined goals including aiming to both 1) “Promote full and equal participation in the association, [the] profession, and the justice system by all persons[,]” and 2) “Eliminate bias in the legal

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224. Keiser, *supra* note 207, at 631.

225. Rotunda, *supra* note 75.

226. See generally Caleb C. Wolanek, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(G) of the Model Rules of Professional Responsibility*, 40 HARV. J.L. & PUB. POL’Y 773 (2017); see also Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(G): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201 (2017); Gillers, *supra* note 12; Blackman, *supra* note 23.

227. *In re Kelley*, 925 N.E.2d 1279 (Ind. 2010); *In re McCarthy*, 938 N.E.2d 698 (Ind. 2010).

228. See generally *In re Usher*, 987 N.E.2d 1080 (Ind. 2013).

229. Jennifer M. Trulock & Matt Wood, *Model Rule 8.4(G): Whether States, Including Texas, Are Taking Action to Adopt the New Rule*, AM. LAW INST. 1-12, 4 (July 27-29, 2017) (SZ002 ALI-CLE 2947 materials).

230. 11 P.3d 1078, 1085-87 (Colo. 2000).

profession and the justice system.”<sup>231</sup> In the continued drafting of Resolution 109, the ABA did consider the implications surrounding a lawyer’s First Amendment rights and ensured there were special revisions to the amendment to safeguard against misapplication.<sup>232</sup> According to Myles Link, Chair of the ABA Standing Committee on Ethics and Professional Responsibility, the ABA was simply asking the organization to pass an anti-harassment and discrimination provision that has already been adopted as part of the Criminal Justice Standards for Prosecution Function, the Standards for Defense Function, and the Model Code of Judicial Conduct.<sup>233</sup> It would follow that the ABA adoption of Resolution 109 was merely a natural progression of a trend in regulating the practice of law to comply with the ABA’s aforementioned goals.<sup>234</sup> In order to alleviate fears that frivolous or voluminous complaints would be filed under this rule, the Honorable Louraine C. Arkfeld writes there is no current documented evidence of such abuse of the rule within the states already working under similar provisions to ABA Model Rule 8.4(g).<sup>235</sup> Finally, the final last minute addition of a scienter requirement to Resolution 109, which states that a lawyer cannot be punished for conduct he did not subjectively know was harassment or discrimination, granted an extra outlined protection under the rule.<sup>236</sup> It was this last push that solidified vital support from additional committees within the ABA as well as the SCEPR itself, contributing to a nearly unanimous passage of Resolution 109.<sup>237</sup>

Further concerns raised regarding a lawyer’s freedom to choose clients, maintain religious protection, utilize peremptory challenges in the courtroom, and engage in legitimate zealous advocacy on behalf of the client are ensured as explicit exceptions within ABA Model Rule 8.4 and its (g) provision.<sup>238</sup> Though the newly amended rule may not be the entire answer to solving harassment and discrimination in terms of gender bias along with other protected groups, the ABA maintains a compelling interest to maintain the ability to regulate the profession, establish renewed confidence in the legal system, and instill an expectation that lawyers understand the integrity of their calling.<sup>239</sup> Such compelling interest has been illustrated in cases such as *Florida Bar v. Went For It, Inc.*, in which the U.S. Supreme Court documented a “broad power” that allows states to determine standards of regulating licensure and practice of professions such as law.<sup>240</sup> Though lawyers are not asked to give up freedoms

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231. Gillers, *supra* note 12, at 201.

232. *See generally* House of Delegates, *supra* note 4 (scienter requirement mentioned and definitions of dual standard).

233. *Id.* at 2:45-3:16.

234. *Id.* at 7:10 (ABA following suit after other jurisdictions).

235. Arkfeld, *supra* note 6.

236. House of Delegates, *supra* note 4, at 21:48.

237. *Id.*

238. *See generally id.* (speakers make note of these additional issues of concern and how the rule does not infringe upon them).

239. *See generally id.* (speakers discussing goals of the ABA and the role adoption).

240. 515 U.S. 618, 625 (1995).

under the First Amendment, their conduct must align with set standards of professional conduct.<sup>241</sup> While the profession of law leads in defending liberty, it should follow the ABA and states should also lead in terms of trying to reach equality.<sup>242</sup>

## VI. A RULE IS NOT ENOUGH

This Note has examined the history of policy statements and language the ABA has attempted to use to address bias. The rule itself falls short of its goals to attain diversity and retention in practice<sup>243</sup> There are no clear lines in the rule application or specifically outlined punitive actions for violations, as punishments are left to the state disciplinary bodies making the enactment of ABA Model Rule 8.4(g) “largely symbolic.”<sup>244</sup> While ethical rules are important to the integrity of the practice, “oppression in the legal profession [is] real, deep, and beyond symbolic band-aid solutions.”<sup>245</sup> Resolution 109 addresses only the more conscious forms of harassment and discrimination, that which we are or should be aware of, in terms of gender bias, while Indiana’s rule disregards the need for an awareness element altogether regarding the actor’s conduct.<sup>246</sup> Neither of these rule-based approaches attacks the heart of implicit bias, which is unconscious and present within each human being based on learned and environmental factors.<sup>247</sup> In effect, how can we “know,” what we do not “know”?

### A. *The Dangers of the Unconscious Bias*

The danger of bias that hides within the unconscious is an invisible beast all of its own. Implicit bias is defined as that which happens outside conscious awareness and may include preconceived notions a person is not aware he or she may have.<sup>248</sup> Such form of bias stems from a person’s exposure and interaction with the outside world, images shared within media, or the established culture of an existing work setting that sets fire to the development of stereotypical

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241. *United States v. Wunsch*, 84 F.3d 1110, 1116 (9th Cir. 1996).

242. *See generally* House of Delegates, *supra* note 4 (speakers discussing goals of the ABA and the role adoption).

243. *See generally* *Regulating*, *supra* note 82; Gillers, *supra* note 12.

244. Sundar, *supra* note 144.

245. *Regulating*, *supra* note 82, at 10.

246. Odendahl, *supra* note 18.

247. *3 techniques to address your implicit biases*, ABA E-NEWS MEMBERS (Nov. 2016), [http://www.americanbar.org/publications/youraba/2016/november-2016/we-all-have-\\_the-illusion-of-objectivity--recognizing-and-address.html](http://www.americanbar.org/publications/youraba/2016/november-2016/we-all-have-_the-illusion-of-objectivity--recognizing-and-address.html) [<https://perma.cc/L2ZQ-YG45>].

248. *See generally* ABA et. al, *Implicit Bias: How to Recognize and Address It—and New Model Rule 8.4(g)*, ABA CLE (Oct. 6, 2016), [http://media.beaconlive.com/viewitem?resc=16165, available at http://www.americanbar.org/content/dam/aba/administrative/cle/materials/2016/10/ce1610imp.authcheckdam.pdf](http://media.beaconlive.com/viewitem?resc=16165,available%20at%20http://www.americanbar.org/content/dam/aba/administrative/cle/materials/2016/10/ce1610imp.authcheckdam.pdf) [<https://perma.cc/D8QH-6WEP>] (CLE video and written materials viewed by author).

attitudes.<sup>249</sup> Implicit bias is compared to the “snap judgments we make every day[,]” largely without realizing we are making them.<sup>250</sup> Why do some see women as more emotive, or why is it assumed the female is the secretary? Perhaps it is our own internal cognitions that play an integral role to outward actions. Referred to as a “silent killer of diversity in the legal profession,” implicit bias can manifest as confirmation bias that tricks the brain into taking “[a] mental short cut . . . engaged by the brain that makes one actively seek information, interpretation and memory to only observe and absorb that which affirms established beliefs while missing data that contradicts established beliefs.”<sup>251</sup> Dangerously, we no longer look for what refutes our internal biases. We must first recognize implicit bias exists before instilling counter efforts to actively stop it in its tracks.<sup>252</sup> “By far, the large majority of men and women law students believe there’s no gender bias, and one reason is they haven’t encountered it yet,” according to Laurel Bellows, former 2012 ABA President.<sup>253</sup> When one thinks of prominent female tenured professors or the numerous academic written works of such female minds, there may be a false sense that implicit bias does not exist.<sup>254</sup>

Most lack knowledge in the identification of their own implicit bias that can be revealed in such famous studies as the 2012 Yale University Résumé experiment, in which six university laboratory scientists were given two identical résumés from equally qualified candidates for review pending a hiring process.<sup>255</sup> Though the scientists conducting the résumé reviews were not told of the nature of the experiment and intended to remain objective, “John’s” résumé was rated 4.0 out of 7.0, constituting a determined good candidate for the position.<sup>256</sup> Conversely, “Jennifer’s” résumé resulted in a 3.3 out of 7.0, ranking her as less competent and not a first choice for hire.<sup>257</sup> In a similar 2014 study involving race, Dr. Arin Reeves asked sixty lawyers to review a memo submitted by a faux third year New York associate, “Thomas Meyer.”<sup>258</sup> Half of the reviewing attorneys were told the associate was Caucasian, while the other half were told Meyer was African American.<sup>259</sup> The results of the reviewed memo showed Caucasian

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249. *Id.*

250. Stella Tsai & Debra Rosen, *Know Thyself: Affinity Bias in the Legal Profession*, WOMAN ADVOCATE (Mar. 9, 2015), <https://apps.americanbar.org/litigation/committees/womanadvocate/articles/winter2015-0315-know-thyself-affinity-bias-legal-profession.html> [https://perma.cc/2926-MR5D].

251. Renwei Chung, *Implicit Bias: The Silent Killer of Diversity in The Legal Profession*, ABOVE LAW (Feb. 6, 2015, 11:02 AM), <https://abovethelaw.com/2015/02/implicit-bias-the-silent-killer-of-diversity-in-the-legal-profession/> [https://perma.cc/2FKX-SNEQ].

252. Tsai & Rosen, *supra* note 250.

253. Filisko, *supra* note 60.

254. *Id.*

255. ABA et. al, *supra* note 248.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

“Meyer” scored a 4.1 out of 5.0, while the African American “Meyer” scored 3.2 out of 5.0.<sup>260</sup> Reviewers found an increased number of errors in the memo submitted by the African American “Meyer.”<sup>261</sup> The surprise to the study participants was that the memos were identical and each contained the same number of errors.<sup>262</sup> This is a simple illustration of the subtler gender and racial biased effects that can stem from an unconscious bias present during résumé or work product reviews. While ABA Model Rule 8.4(g) makes strides to fight unambiguous incidents of harassment and discrimination, it fails to draw lines of its own jurisdictional boundaries. What is direct or indirect harassment or discrimination becomes gray with a myriad of methods to apply the rule. “[T]hese policies [were] not set up to address discrimination that is more subtle and part of the unconscious reactions of both those who discriminate and those who are discriminated against.”<sup>263</sup>

### *B. Necessary Alternative Methods to Combat Sexism*

This Note argues a model rule of professional conduct is not equipped to target the nuanced problems to improve the retention and diversity of women and eliminate gender bias in the profession of law. This Note’s proposed recommendations seek to address what a “catch all” rule, especially one that must be carefully constructed to outweigh First Amendment infringement and instill a mens rea requirement, cannot. “Rule 8.4(g) tries to mandate interpersonal diversity by disciplining noncompliant lawyers, but tolerance can also be promoted through informal means[,]” which are often more effective.<sup>264</sup> Perhaps the best news about bias is that it is not hardwired, but rather can be made “malleable” with self and profession wide awareness.<sup>265</sup> This Note finds Model Rule 8.4(g), in order to achieve maximum potential, needs supplement from external education and training in gender bias, harassment, and discrimination. This Note proposes the ABA require law schools to implement education by investing in implicit bias training. To rid ourselves of implicit bias, we must rethink or retrain the brain to operate differently by first identifying our individual biases.<sup>266</sup>

Dr. Mahzarin Banaji, a Harvard professor, created the Implicit Association Test (IAT), which helps people reveal where their bias may reside.<sup>267</sup> Even Banaji admits her own gender bias as a test subject documenting her own IAT scores.<sup>268</sup> By taking the online tests, generated scores would allow people to specifically

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260. *Id.*

261. *Id.*

262. *Id.*

263. Tsai & Rosen, *supra* note 250.

264. Wolanek, *supra* note 226, at 790.

265. Halaby & Long, *supra* note 226, at 244, 245 n.224.

266. ABA et. al, *supra* note 248.

267. *Id.*

268. *Id.*

identify their unconscious bias in terms of disability, race, gender, or religion, for example.<sup>269</sup>

Through the development of Diversity and Inclusion Plans within law firms, a culture shift needs to take place to increase positive female workforce development, to create mentoring opportunities of young women in the legal realm, and to utilize work-life balance employment models, as more effective modalities to reduce sexism and level the playing field.<sup>270</sup> The 2017 Marty Fay Africa Golden Hammer Award winner, Roberta Liebenberg, spoke of a call to action for law firms during the ABA Women's Rainmakers presentation.<sup>271</sup> Liebenberg stated legal work environments must "make substantial structural and cultural reforms[,] in order to hold attorneys accountable for sexist conduct."<sup>272</sup> Monumental strides to improve the work place should include both men and women speaking up against double standards and identifying implicit bias when observed.<sup>273</sup> The ABA should place resources into continually funded educational campaigns, creating sexism and gender bias awareness among legal professionals, while law schools should promote advancing diversity and inclusion courses in curriculums.<sup>274</sup> Law schools should use existing successful programs, such as Cynthia Thomas Calvert's work with the Project for Attorney Retention (PAR), as resources and models to begin to educate students early in diversity, retention, sexism or bias issues that may arise in internships or in situations within a law firm.<sup>275</sup>

#### CONCLUSION

With no satisfactory or unified regulation solution in place, the legal realm thus continues to operate within the sexist foundation of a man's world. The glass ceiling for female attorneys, though not easily shattered, is not inevitably impossible to achieve. The author of this Note does not deny that sexism and gender bias in the legal community exist and pose a significant mountain for women to climb. Nor does this Note aim to say that other protected classes of harassment and discrimination should not receive equal interest in combatting attorney misconduct. The ABA and its ethics committees have responded to bias and prejudicial conduct by enacting 2016 Resolution 109, amending ABA Model Rule 8.4 *Misconduct* to fight an age-old issue with a heavy hand in disciplinary action. While motivation is positive discussion for the advancement of explicit

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269. *Id.*

270. Lee, *supra* note 48, at 247-50.

271. Roberta Liebenberg, *A Call to Action*, LAW PRACTICE TODAY (Feb. 14, 2017), [http://www.lawpracticetoday.org/article/marty-fay-africa-golden-hammer-award-2017/?utm\\_source=February17&utm\\_medium=email&utm\\_campaign=February17LPTemail](http://www.lawpracticetoday.org/article/marty-fay-africa-golden-hammer-award-2017/?utm_source=February17&utm_medium=email&utm_campaign=February17LPTemail) [<https://perma.cc/4X5R-NG76>].

272. *Id.*

273. *Id.*

274. *Regulating*, *supra* note 82, at 12.

275. Filisko, *supra* note 60.

and implicit bias knowledge, this Note argues ABA Model Rule 8.4 (g) provision and modified Comments are just an initial step that is not complete without additional outlined components of education and training. Elevating an anti-harassment and discrimination provision to the contextual black letter rule, expanding the long arm of disciplinary reach to touch any activity “related to the practice of law,” and replacing the “prejudicial to the administration of justice” standard with no standard at all, risks caution of application.

Must every verbal comment be screened for fear of repercussions because it may be deemed offensive? Stanford University law professor, Deborah L. Rhode viewed the ABA Model Rule 8.4(g) as vital to the law noting “[t]here are enough incidents of sexual harassment that make it important for the profession to have largely what is a symbolic statement[.]”<sup>276</sup> The constitutional protection of the First Amendment and case precedent affirm that while a certain level of civility is expected under admission to the bar, lawyers are still citizens afforded the same rights.

This Note argues that, as written, Resolution 109 limits its ability to be misapplied, unlike the Indiana Model Rule 8.4(g), due to its arbitrary disciplinary decisions, the subjective nature of regulation, and potentially sweeping innocent individuals protected under the First Amendment within its wide net. The apprehensiveness of several states to seek to implement the new rule, as well as the drastic departure Indiana has taken from it, challenge fairness in policing sexism and gender bias. Therefore, this questions the effectiveness of the SCEPR’s intent in drafting the rule to mitigate harassment and discrimination. No matter how many ways one drafts the rule, the heart of implicit bias still ruminates underneath, fostering more outward direct expressions of harassment and discrimination to come to the surface. This Note proposed long-lasting measures fronting education, mentorship, and workforce development to increase more discussion (not a speech code) to heighten awareness of the problem. The 2016 ABA Model Rule 8.4(g) may surmount to a loosely sticking band-aid for a deep-seated wound further limiting its ability to heal.

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276. Hudson, Jr., *supra* note 138, at 25.