

ORIGINAL

FILED

04/11/2017

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 09-0688

Shaun R. Thompson
Chief Disciplinary Counsel
P.O. Box 1099
Helena, MT 59624-1099
Tele.: (406) 442-1648
Fax: (406) 442-2685
srthompson@montanaodc.org

Office of Disciplinary Counsel

FILED

APR 10 2017

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. AF 09-0688

IN RE THE MODEL RULES OF
PROFESSIONAL CONDUCT

ODC'S COMMENTS RE ABA
MODEL RULE 8.4(g)

The Office of Disciplinary Counsel ("ODC") offers the following comments
on proposed new Rule 8.4(g) to the Montana Rules of Professional Conduct.

Background Information

By letter to Chief Justice Mike McGrath dated September 29, 2016, John S.
Gleason, Chair of the ABA Center for Professional Responsibility Policy
Implementation Committee, urged the Court to consider the adoption of new
Model Rule of Professional Conduct 8.4(g). By Order dated October 26, 2016, the

//

1 Court, pursuant to § VI of the Internal Operating Rules, *sua sponte* initiated this
2 procedure to determine whether to adopt ABA Model Rule 8.4(g).

3 Before the promulgation of Model Rule 8.4(g), the Model Rules did not
4 contain a black letter rule against discrimination.

5 There was, however, anti-discrimination language in the comments to Model
6 Rule 8.4. Comment 3 stated:

8 [3] A lawyer who, in the course of representing a client,
9 knowingly manifests by words or conduct, bias or
10 prejudice based upon race, sex, religion, national origin,
11 disability, age, sexual orientation or socioeconomic
12 status, violates paragraph (d) when such actions are
13 prejudicial to the administration of justice. Legitimate
14 advocacy respecting the foregoing factors does not
15 violate paragraph (d). A trial judge's finding that
16 peremptory challenges were exercised on a
17 discriminatory basis does not alone establish a violation
18 of this rule.

19 *Annotated Model Rules of Professional Conduct*, p. 670 (8th ed. 2015)

20 The rationale for adopting Model Rule 8.4(g) was to replace the comment
21 with a black letter rule. See Adopted Revised Resolution 109 and its
22 accompanying Report (as noted in the letter to Chief Justice McGrath, can be
23 found at:

24 [http://www.americanbar.org/content/dam/aba/administrative/professional_responsi](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf)
25 bility/final_revised_resolution_and_report_109.authcheckdam.pdf).

//

1 While Montana's Rules of Professional Conduct are based to a large extent
2 on the ABA Model Rules of Professional Conduct, they are not entirely. Further,
3 the Montana Supreme Court never adopted the comments to the ABA Model
4 Rules.

5 *ODC Concerns*

6
7 The language of Model Rule 8.4(g) is very broad. ODC can envision any
8 unhappy litigant claiming discrimination (for one or more of the types of
9 discrimination named in the rule) by another party's attorney. (E.g., an attorney is
10 running up discovery costs because he or she knows the other party cannot afford
11 it.)

12
13 Further, there is no requirement under Model Rule 8.4(g) that a claim be first
14 brought before an appropriate regulatory agency that deals with discrimination,
15 such as the Montana Human Rights Bureau.

16
17 The membership of the National Organization of Bar Counsel ("NOBC") is
18 primarily made up of regulators for lawyer disciplinary agencies across the United
19 States and Canada. The NOBC Board of Directors declined to take a position on
20 whether Model Rule 8.4(g) should be approved. In a February 23, 2016 email to
21 NOBC members (a copy of which is attached hereto as Appendix A), NOBC
22 President Paul J. Burgoyne stated:
23

24
25 The Board has discussed this proposal at length. We
decided not to take a position. Members of the Board

1 raised an [sic] myriad of issues, which we believe reflect
2 the varying views of our membership on the proposal.
3 For example, there were a number of simple regulatory
4 issues, not the least of which is the possibility of
5 diverting already strained resources to investigate and
6 prosecute these matters. This along with several other
7 arguments resulted in deciding not to support the
8 proposal.

9 ODC has concerns, as well, about diverting resources to investigate and
10 prosecute discrimination claims.

11 *An Alternative Proposal*

12 In the letter to Chief Justice McGrath, Mr. Gleason pointed out that:
13 “Twenty-five jurisdictions have adopted anti-discrimination or anti-harassment
14 provisions in the black letter of their ethics rules.”

15 The rules adopted by the twenty-five jurisdictions, however, differ greatly.
16 At ODC’s request, the ABA provided ODC with a chart of those rules, which is
17 attached hereto as Appendix B. In reviewing the rules, ODC was drawn to the
18 Illinois Supreme Court’s Rule 8.4(j), which renders it professional misconduct for
19 a lawyer to:

20
21 (j) violate a federal, state or local statute or ordinance that
22 prohibits discrimination based on race, sex, religion,
23 national origin, disability, age, sexual orientation or
24 socioeconomic status by conduct that reflects adversely
25 on the lawyer’s fitness as a lawyer. Whether a
discriminatory act reflects adversely on a lawyer’s fitness
as a lawyer shall be determined after consideration of all
the circumstances, including: the seriousness of the act;

1 whether the lawyer knew that the act was prohibited by
2 statute or ordinance; whether the act was part of a pattern
3 of prohibited conduct; and whether the act was
4 committed in connection with the lawyer's professional
5 activities. No charge of professional misconduct may be
6 brought pursuant to this paragraph until a court or
7 administrative agency of competent jurisdiction has
8 found that the lawyer has engaged in an unlawful
9 discriminatory act, and the finding of the court or
10 administrative agency has become final and enforceable
11 and any right of judicial review has been exhausted.

12 Illinois' rule makes certain types of discrimination unethical and subject to
13 discipline. For there to be a violation of the rule, a lawyer has to have been found
14 to have violated an anti-discrimination law, and the lawyer disciplinary process
15 cannot be initiated until there is a finding to that effect by a court or administrative
16 agency. Further, the conduct must reflect adversely on the lawyer's fitness as a
17 lawyer.

18 ODC submits the Illinois rule serves the purpose of making discrimination a
19 violation of the Rules of Professional, but limits the situations in which a
20 complaint can be processed in the lawyer disciplinary system.

21 In view of the forgoing, ODC respectfully suggests that the Court consider
22 adopting a rule similar to Illinois' Rule 8.4(j) as opposed to ABA Model Rule
23 8.4(g).¹

24
25 ¹ It should be noted that ODC has been informed that Illinois is in the process of reviewing its anti-discrimination provisions.

1 RESPECTFULLY SUBMITTED this 10th day of April, 2017.

2 OFFICE OF DISCIPLINARY COUNSEL

3
4 By Shaun R. Thompson
5 Shaun R. Thompson
6 Chief Disciplinary Counsel
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Appendix A

Shaun Thompson

From: NOBCmembers <nobcmembers-bounces+srthompson=montanaodc.org@lists.nobclists.org> on behalf of Burgoyne, Paul <Paul.Burgoyne@pacourts.us>
Sent: Tuesday, February 23, 2016 8:00 AM
To: New NOBC ListServe
Subject: [NOBCmembers] NOBC BOARD POSITION ON PROPOSED AMENDMENT TO MRPC 8.4
Attachments: Untitled attachment 00004.txt

NOBC Colleagues,

Since we don't have a newsletter, we are making an attempt to keep the membership up-to-date on actions your Board is taking with these occasional ListServe emails. One area where we believe we have been remiss over the years, is addressing the positions we take with regard to proposals to change ABA Policy and Model Rules. Recently, we shared our position and actions with regard to Resolution 105, "Model Regulatory Objectives for the Provision of Legal Services" adopted by the House of Delegates in San Diego.

The current issue of some controversy is the draft proposal of the Standing Committee on Ethics and Professional Responsibility to amend ABA Model Rule of Professional Conduct 8.4 and Comment [3] to Rule 8.4. The proposal and other relevant information can be found at the link provided. The proposed amendment to the rule would add subsection (g) to the MRPC which states that "[I]t is professional misconduct for a lawyer to"

in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html

The Board has discussed this proposal at length. We decided not to take a position. Members of the Board raised an myriad of issues, which we believe reflect the varying views of our membership on the proposal. For example, there were a number of simple regulatory issues, not the least of which is the possibility of diverting already strained resources to investigate and prosecute these matters. This along with several other arguments resulted in deciding not to support the proposal.

On the other hand¹, we were of the view that professionals should not behave in ways which violate the spirit of the proposal. So, opposing the change was "off the table."

While we believe that it is important that NOBC be involved in proposals which will result in any change in how and what we regulate, we are aware that often there are disparate points of view on such matters. We have bosses. We have Courts. And they often have positions of their own. Matters where there is no clear consensus among our members, let alone their bosses and their courts, a certain level of diplomatic skill is necessary to determining what position to take, or even whether to take one.

We have advised all concerned that we will, as always, be of assistance in any way we can by providing the regulators concerns. But there are times when it is impractical to take a formal position. The Board unanimously decided that this was one of those times.

Obviously, you, your bosses and your courts can express opinions and provide comments. The deadline for written comments on this draft proposal is Friday, March 11, 2016.

pjb

¹ President Truman was always looking for the elusive "one-handed economist." In these situations, I understand his predicament.

PAUL J. BURGOYNE
President, National Organization of Bar Counsel
1601 Market Street, Suite 3320
Philadelphia, PA 19103-2337
(215) 560-6296, Ext. 4966

I like escalators, because an escalator can never break; it can only become stairs. There should never be an "Escalator Temporarily Out of Order" sign. It should say: "Escalator Temporarily Stairs... Sorry for the Convenience."

Appendix B

ABA STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE

Research Document

**Re: States with Anti-Discrimination/Harassment Black Letter Professional Conduct Rule
July 18, 2016**

CHART IV

States with Anti-discrimination/Harassment Professional Conduct Rule (25)

<u>CA</u>	Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice (A) For purposes of this rule: (1) “law practice” includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law; (2) “knowingly permit” means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public. (B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in: (1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or (2) accepting or terminating representation of any client. (C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed. <i>Discussion:</i> In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule. A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed. A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court’s inherent authority to impose discipline, or other disciplinary standard.
-----------	--

CO	RPC 8.4(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or RPC 8.4(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law. Comment [3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.
District of Columbia	<u>Rule 8.4(d): Engage in conduct that seriously interferes with the administration of justice;</u> Comment [3] A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. <u>Rule 9.1 – Discrimination in Employment</u> A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap. Comment [1] This provision is modeled after the D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), though in some respects is more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law. [2] The investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission. Such experience may involve, among other things, methods of analysis of statistical data regarding discrimination claims. These agencies also have, in appropriate circumstances, the power to award remedies to the victims of discrimination, such as reinstatement or back pay, which extend beyond the remedies that are available through the disciplinary process. Remedies available through the disciplinary process include such sanctions as disbarment, suspension, censure, and admonition, but do not extend to monetary awards or other remedies that could alter the employment status to take into account the impact of prior acts of discrimination. [3] If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Disciplinary Counsel may be deferred or abated

	where there is substantial similarity between the complaint filed with Disciplinary Counsel and material allegations involved in such other proceedings. <i>See</i> §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.
<u>FL</u>	Rule 4-8.4: (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic; Comment [5] Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct.
<u>ID</u>	RPC 4.4 (a) In representing a client, a lawyer shall not: (1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person, including conduct intended to appeal to or engender bias against a person on account of that person's gender, race, religion, national origin, or sexual preference, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants Comment [2] Paragraph (a) contains an anti-bias provision, requiring lawyers to refrain from pejorative conduct that serves no purpose other than to exploit differences based on the listed categories. Nothing in the rule is intended to limit a lawyer's full advocacy on behalf of a client.
<u>IL</u>	RPC 8.4 (j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this

	paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.
<u>IN</u>	RPC 8.4(g) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.
<u>IA</u>	RPC 32:8.4(g) engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so. Comment [3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. For another reference to discrimination as professional misconduct, see paragraph (g).
<u>MD</u>	Rule 8.4(e): knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph; Comment [3] Sexual misconduct or sexual harassment involving colleagues, clients, or co-workers may violate paragraph (d) or (e). This could occur, for example, where coercion or undue influence is used to obtain sexual favor in exploitation of these relationships. <i>See Attorney Grievance Commission v. Goldsborough</i>, 330 Md. 342 (1993). See also Rule 1.7. Comment [4] Paragraph (e) reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in paragraph (e) and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must require lawyers to refrain from the conduct described in paragraph (e). <i>See Md. Rule 16-813, Maryland Code of Judicial Conduct, Rule 2.3.</i>

<u>MA</u>	RPC 3.4(i): in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person. This paragraph does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding. Comment [7] Paragraph (i) is taken from former DR 7-106(C)(8) concerning conduct before a tribunal that manifests bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation of any person. When these factors are an issue in a proceeding, paragraph (i) does not bar legitimate advocacy.
<u>MI</u>	RPC 6.5 (a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment. (b) A lawyer serving as an adjudicative officer shall, without regard to a person's race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and respect. To the extent possible, the lawyer shall require staff and others who are subject to the adjudicative officer's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal. Comment: (not officially adopted by the Court – only to aid the reader) <i>DUTIES OF THE LAWYER</i> A lawyer is an officer of the court who has sworn to uphold the federal and state constitutions, to proceed only by means that are truthful and honorable, and to avoid offensive personality. It follows that such a professional must treat clients and third persons with courtesy and respect. For many citizens, contact with a lawyer is the first or only contact with the legal system. Respect for law and for legal institutions is diminished whenever a lawyer neglects the obligation to treat persons properly. It is increased when the obligation is met. A lawyer must pursue a client's interests with diligence. This often requires the lawyer to frame questions and statements in bold and direct terms. The obligation to treat persons with courtesy and respect is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly. Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly rude. A lawyer's professional judgment must be employed here with care and discretion. A lawyer must take particular care to avoid words or actions that appear to be improperly based upon a person's race, gender, or other protected personal characteristic. Legal institutions, and those who serve them, should take leadership roles in assuring equal treatment for all. A judge must act "[a]t all times" in a manner that promotes public confidence in the impartiality of the judiciary. Canon 2(B) of the Code of Judicial Conduct See

	also Canon 5. By contrast, a lawyer's private conduct is largely beyond the scope of these rules. See Rule 8.4. However, a lawyer's private conduct should not cast doubt on the lawyer's commitment to equal justice under law. A supervisory lawyer should make every reasonable effort to ensure that subordinate lawyers and nonlawyer assistants, as well as other agents, avoid discourteous or disrespectful behavior toward persons involved in the legal process. Further, a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm on the basis of race, gender, or other protected personal characteristic. See Rules 5.1 and 5.3. <i>DUTIES OF ADJUDICATIVE OFFICERS</i> The duties of an adjudicative officer are included in these rules, since many legislatively created adjudicative positions, such as administrative hearing officer, are not covered by the Code of Judicial Conduct. For parallel provisions for judges, see the Code of Judicial Conduct.
<u>MN</u>	Adopted MRPC 8.4(d) but not Comment [3]. Added: RPC 8.4(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status in connection with a lawyer's professional activities; RPC 8.4(h) commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: (1) the seriousness of the act, (2) whether the lawyer knew that the act was prohibited by statute or ordinance, (3) whether the act was part of a pattern of prohibited conduct, and (4) whether the act was committed in connection with the lawyer's professional activities; Comment (comments included for convenience and does not reflect court approval) [4] Paragraph (g) specifies a particularly egregious type of discriminatory act-harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly. [5] Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status may violate either paragraph (g) or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in connection with the lawyer's professional activities. Harassment, even if not committed in connection with the lawyer's professional activities, violates paragraph (h) if the harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely on the lawyer's fitness as a lawyer,

	determined as specified in paragraph (h). [6] Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities. [7] Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. See, e.g., Minn. Stat. Section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).
<u>MO</u>	RPC 8.4 (g) manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or other similar factors, are issues. Comment [4] Rule 4-8.4(g) identifies the special importance of a lawyer's words or conduct, in representing a client, that manifest bias or prejudice against others based upon race, sex, religion, national origin, disability, age, or sexual orientation. Rule 4-8.4(g) excludes those instances in which a lawyer engages in legitimate advocacy with respect to these factors. A lawyer acts as an officer of the court and is licensed to practice by the state. The manifestation of bias or prejudice by a lawyer, in representing a client, fosters discrimination in the provision of services in the state judicial system, creates a substantial likelihood of material prejudice by impairing the integrity and fairness of the judicial system, and undermines public confidence in the fair and impartial administration of justice. Whether a lawyer's conduct constitutes professional misconduct in violation of Rule 4-8.4(g) can be determined only by a review of all of the circumstances; e.g., the gravity of the acts and whether the acts are part of a pattern of prohibited conduct. For the purpose of Rule 4-8.4(g), "manifest ... bias or prejudice" is defined as words or conduct that the lawyer knew or should have known discriminate against, threaten, harass, intimidate, or denigrate any individual or group. Prohibited conduct includes, but is not limited to, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (a) submission to that conduct is made, either explicitly or implicitly, a term or condition of an individual's employment; (b) submission to or rejection of such conduct by an individual is used as a factor in decisions affecting such individual; or (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an intimidating, hostile or offensive environment.

NE	RPC 3-508.4(d) engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding. Comment [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.
NJ	(*NOTE: Comments are not included in NJRPC but Court made exception for this Rule). RPC 8.4(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm. *Official Comment by Supreme Court (May 3, 1994) This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs. "Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory. Case law has already suggested both the area covered by this amendment and the possible direction of future cases. <i>In re Vincenti</i>, 114 N.J. 275 (554 A.2d 470) (1989). The Court believes the administration of justice would be better served, however, by the adoption of this general rule than by a case by case development of the scope of the professional obligation.

	While the origin of this rule was a recommendation of the Supreme Court's Task Force on Women in the Courts, the Court concluded that the protection, limited to women and minorities in that recommendation, should be expanded. The groups covered in the initial proposed amendment to the rule are the same as those named in Canon 3A(4) of the Code of Judicial Conduct. Following the initial publication of this proposed subsection (g) and receipt of various comments and suggestions, the Court revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, to restrict the scope to conduct intended or likely to cause harm, and to include discrimination because of sexual orientation or socioeconomic status, these categories having been proposed by the ABA's Standing Committee on Ethics and Professional Responsibility as additions to the groups now covered in Canon 3A(4) of the New Jersey Code of Judicial Conduct. That Committee has also proposed that judges require attorneys, in proceedings before a judge, refrain from manifesting by words or conduct any bias or prejudice based on any of these categories. See proposed Canon 3A(6). This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. <i>See, e.g., In re Vincenti</i>, 114 N.J. 275 (554 A.2d 470) (1989).
NM	Rule 16-300. Prohibition against invidious discrimination. In the course of any judicial or quasi-judicial proceeding before a tribunal, a lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, age, or sexual orientation against the judge, court personnel, parties, witnesses, counsel or others. This rule does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age or sexual orientation is material to the issues in the proceeding. Committee Commentary: [1] For purposes of this rule, the term "judicial or quasi-judicial proceeding" shall refer to any and all courts, regardless of their jurisdiction or location, as well as any governmental agency, board, commission, or department before whom the lawyer is engaged in the practice of law. The rule also encompasses arbitration or mediation proceedings, whether or not court ordered. [2] For purposes of this rule, the term "proceeding" shall mean any judicial or administrative process relating to the adjudication or resolution of legal disputes (including, but not limited to, discovery procedures, arbitration and mediation), rule making, licensing, lobbying, the imposition or withholding of sanctions or the granting or withholding of relief. For purposes of this rule, the term "sexual orientation" shall mean heterosexuality, bisexuality or homosexuality.
<u>NY</u>	RPC 8.4(g) Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status,

	or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding. The Appellate Division does not adopt Comments to the Rules. Comments are provided by the New York State Bar Association as guidance: Comment [5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (b) of this Rule.
<u>ND</u>	Rule 8.4(f) engage in conduct that is prejudicial to the administration of justice, including to knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel, or others, except when those words or conduct are legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding; Comment [3] A lawyer who, in the course of representing a client knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation violates paragraph (f) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (f). For example, a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.
<u>OH</u>	RPC 8.4(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability; Comment [3] Division (g) does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.
<u>OR</u>	Rule 8.4(a)(7): in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability. Rule 8.4(c): Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.

<u>RI</u>	Rule 8.4(d): engage in conduct that is prejudicial to the administration of justice, including but not limited to, harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, national origin, gender, religion, disability, age, sexual orientation or socioeconomic status;” Comment [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A judicial finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.
<u>TX</u>	Rule 5.08 Prohibited Discriminatory Activities (a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity. (b) Paragraph (a) does not apply to a lawyer’s decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as confidential information under these Rules. See Rule 1.05(a),(b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy: (i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and (ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure. Comment: 1. Subject to certain exemptions, paragraph (a) of this Rule prohibits willful expressions of bias or prejudice in connection with adjudicatory proceedings that are directed towards any persons involved with those proceedings in any capacity. Because the prohibited conduct only must occur “in connection with” an adjudicatory proceeding, it applies to misconduct transpiring outside of as well as in the presence of the tribunal’s presiding adjudicatory official. Moreover, the broad definition given to the term “adjudicatory proceeding” under these Rules means that paragraph (a)’s prohibition applies to many settings besides conventional litigation in federal or state courts. See Preamble: Terminology (definitions of “Adjudicatory Proceeding” and “Tribunal”). 2. The Rule, however, contains several important limitations and exemptions. The first, found in paragraph (a), is that a lawyer’s allegedly improper words or conduct must be shown to have been “willful” before the lawyer may be subjected to discipline. 3. In addition, paragraph (b) sets out four exemptions from the prohibition of paragraph (a). The first is a lawyer’s decision whether to represent a client. The second is any communication made by the lawyer that is “confidential” under Rule 1.05(a) and (b). The third is a lawyer’s communication that is necessary to represent a client properly and that complies with applicable rulings and orders of

	the tribunal as well as with applicable rules of practice or procedure. 4. The fourth exemption in paragraph (b) relates to the lawyer's words or conduct in selecting a jury. This exemption ensures that a lawyer will be free to thoroughly probe the venire in an effort to identify potential jurors having a bias or prejudice towards the lawyer's client, or in favor of the client's opponent, based on, among other things, the factors enumerated in paragraph (a). A lawyer should remember, however, that the use of peremptory challenges to remove persons from juries based solely on some of the factors listed in paragraph (a) raises separate constitutional issues.
<u>VT</u>	RPC 8.4(g) discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual. Comment: [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.
<u>WA</u>	RPC 8.4(g) commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, or marital status. This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16; RPC 8.4(h) in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, lawyers, or LLLTs, other parties, witnesses, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments Comment [3] Legitimate advocacy respecting the factors set forth in paragraph (h) does not violate paragraphs (d) or (h). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

<u>WI</u>	RPC 8.4(i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i). Wisconsin Committee Comment: Paragraphs (f) through (i) do not have counterparts in the Model Rule. What constitutes harassment under paragraph (i) may be determined with reference to anti-discrimination legislation and interpretive case law. Because of differences in content and numbering, care should be used when consulting the ABA Comment.
-----------	--