

Rule 8.4(g) Snapshot
Last updated March 29, 2022

Prior to the August 2016 adoption of ABA Model Rule of Professional Conduct 8.4(g), 25 jurisdictions already addressed similar behavior in the black letter of their Rules. Those jurisdictions and rules were:

1. California Rule of Prof'l Conduct 2-400;
2. Colorado Rule of Prof'l Conduct 8.4(g);
3. Florida Rule of Prof'l Conduct 4-8.4(d);
4. Idaho Rule of Prof'l Conduct 4.4 (a);
5. Illinois Rule of Prof'l Conduct 8.4(j);
6. Indiana Rule of Prof'l Conduct 8.4(g);
7. Iowa Rule of Prof'l Conduct 8.4(g);
8. Maryland Lawyers' Rules of Prof'l Conduct 8.4(e);
9. Massachusetts Rule of Prof'l Conduct 3.4(i);
10. Michigan Rule of Prof'l Conduct 6.5;
11. Minnesota Rule of Prof'l Conduct 8.4(h);
12. Missouri Rule of Prof'l Conduct 4-8.4(g);
13. Nebraska Rule of Prof'l Conduct 8.4(d);
14. New Jersey Rule of Prof'l Conduct 8.4(g);
15. New Mexico Rule of Prof'l Conduct 16-300;
16. New York Rule of Prof'l Conduct 8.4(g);
17. North Dakota Rule of Prof'l Conduct 8.4(f);
18. Ohio Rule of Prof'l Conduct 8.4(g);
19. Oregon Rule of Prof'l Conduct 8.4(a)(7);
20. Rhode Island Rule of Prof'l Conduct 8.4(d);
21. Texas Rule of Prof'l Conduct 5.08;
22. Vermont Rule of Prof'l Conduct 8.4(g);
23. Washington Rule of Prof'l Conduct 8.4(g);

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24. Wisconsin Rule of Prof'l Conduct 8.4(i);

25. D.C. Rule of Prof'l Conduct 9.1.

Since the ABA's action in 2016, the following states have revised their rules further addressing these issues:

- Vermont,¹ Hawaii,² Maine,³ New Hampshire,⁴ Missouri,⁵ Colorado,⁶ New Mexico,⁷ Alaska,⁸ Connecticut,⁹ and Pennsylvania.¹⁰

Since the ABA's action in 2016, the following states have decided not to amend their current rules relating to discrimination and harassment after review of ABA MR 8.4(g):

- Arizona,¹¹ Idaho,¹² Montana,¹³ South Carolina,¹⁴ Tennessee,¹⁵ North Dakota¹⁶
- Petitioners withdrawn – Nevada,¹⁷ Louisiana¹⁸

Since the ABA's action in 2016, the following states are in the process of reviewing their state rules addressing these issues:

- South Dakota State Bar voted to send a proposal to amend its Rule 8.4 to the Supreme Court.¹⁹
- DC²⁰
- Iowa²¹
- Illinois²²
- New York²³

¹ Vermont Supreme Court order, July 17, 2017. (REPORTER'S NOTES--2017 AMENDMENT Rule 8.4(g) and new Comments [3]-[5] are amended to adopt, with minor verbal changes, amendments to the American Bar Association's Model Rules of Professional Conduct approved by the ABA on August 8, 2016. See ABA, House of Delegates 2016 Annual Meeting Daily Journal, at 5. Former Comment [3] is deleted and replaced by new Comment [3]. Former Comments [4] and [5] are renumbered [6] and [7].)

² Hawaii Supreme Court order SCRU-11-0001047, October 26, 2021.

³ Maine Supreme Court order, 2019 Me. Rules 05, May 13, 2019. Rule reads: (g) engage in conduct or communication related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity. (1) "Discrimination" on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity as used in this section means conduct or communication that a lawyer knows or reasonably should know manifests an intention: to treat a person as inferior based on one or

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more of the characteristics listed in this paragraph; to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics. (2) “Harassment” on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity as used in this section means derogatory or demeaning conduct or communication and includes, but is not limited to, unwelcome sexual advances, or other conduct or communication unwelcome due to its implicit or explicit sexual content. (3) “Related to the practice of law” as used in the section means occurring in the course of representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; or operating or managing a law firm or law practice. (4) Declining representation, limiting one’s practice to particular clients or types of clients, and advocacy of policy positions or changes in the law are not regulated by Rule 8.4(g).

⁴ New Hampshire Supreme Court Order, July 15, 2019. New (g) reads: take any action, while acting as a lawyer in any context, if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, harass or burden another person, including conduct motivated by animus against the other person based upon the other person’s race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity. This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation consistent with other Rules of Professional Conduct, nor does it preclude a lawyer from engaging in conduct or speech or from maintaining associations that are constitutionally protected, including advocacy on matters of public policy, the exercise of religion, or a lawyer’s right to advocate for a client.

⁵ Missouri Supreme Court order dated July 18, 2019. New (g) reads: manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or other similar factors, are issues. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 4-1.16. Revised Comment [4] reads: 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 or constitute harassment against others based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. 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 or the engagement in harassment 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 the circumstances; e.g., the gravity of the acts and whether the acts are part of a pattern of prohibited conduct. For purposes of Rule 4-8.4(g), “bias or prejudice” means words or conduct that the lawyer knew or should have known discriminate against, threaten, intimidate, or denigrate any individual or group. Examples of manifestations of bias or prejudice include, but are not limited to, epithets; slurs; demeaning nicknames; negative stereotyping; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to

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personal characteristics. For purposes of Rule 4-8.4(g), "harassment" is verbal or physical conduct that shows hostility or aversion toward a person based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. "Harassment" 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 the 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.

⁶ Colorado Supreme Court order 2019(14), Sept. 19, 2019. Adopted new (i): "It is professional misconduct for a lawyer to (i) engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities." Defines sexual harassment in a new Comment [5A] that reads: Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome. The substantive law of employment discrimination, including antiharassment statutes, regulations, and case law, may guide, but does not limit, application of paragraph (i).

"Professional activities" are not limited to those that occur in a client-lawyer relationship.

⁷ New Mexico Supreme Court order 19-8300-012, Oct. 15, 2019. Only difference in black letter is that the group of protected categories does not include socioeconomic status. Comments differ.

⁸ Alaska Supreme Court order 1964, May 5, 2021; effective Oct. 15, 2021.

⁹ Revisions adopted June 11, 2021; effective Jan. 1, 2022. Revised Practice Book issued July 13, 2021.

¹⁰ Pennsylvania Supreme Court order 213, July 27, 2021; effective August 27, 2021. On March 24, 2022, the U.S. District Court for the Eastern District of Pennsylvania found the Rule unconstitutional. 2022 WL 874953. At this time, no appeal has been filed.

¹¹ Arizona Supreme Court order, docket #17-0032, August 27, 2018. Arizona has adopted MR(d) "conduct prejudicial to the administration of justice" and Comment [3] addresses manifesting bias and prejudice.

¹² Letter from Chief Justice to Idaho State Bar ED, Sept. 6, 2018. Idaho does have Idaho Rule 4.4(a) which reads: 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.

¹³ The Montana legislature passed a resolution stating that if the supreme court adopted rule 8.4(g), it would be an "unconstitutional exercise [of] power" and would violate the First Amendment. Montana does not have a Rule or Comment addressing bias or prejudice.

¹⁴ Supreme Court order dated June 20, 2017, no. 2017-000498. South Carolina prohibits conduct prejudicial to the administration of justice. Comment [3] to South Carolina Rule 8.4 provides: 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 (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not

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violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

¹⁵ Tennessee Supreme Court order ADM2017-02244, April 23, 2018. Tennessee has a Comment [3] to its Rule 8.4 that addresses bias and prejudice.

¹⁶ North Dakota Joint Committee on Attorney Standards, minutes, Sept. 15, 2017. North Dakota Rule 8.4(f) addressed this issue prior to the ABA adoption of MR 8.4(g). That Rule reads: "It is professional misconduct for a lawyer to: (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;"

¹⁷ Nevada Supreme Court order allowing Nevada State bar to withdraw its petition to amend Rule 8.4, ADKT 526, Sept. 25, 2017. Nevada has not adopted a Comment or Rule addressing bias or prejudice.

¹⁸ Louisiana State Bar Committee on Rules of Professional Conduct votes 7-4 to not recommend the amendment to the Supreme Court or the state bar's House of Delegates. Louisiana does not have either a Rule or Comments addressing bias or prejudice.

¹⁹ South Dakota does not have a Rule or Comment addressing bias or prejudice.

²⁰ DC currently has Rule 9.1 addressing discrimination.

²¹ Iowa currently has Iowa Rule 8.4(g) which reads: 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.

²² Illinois has its Rule 8.4(j) that reads: It is professional misconduct for a lawyer to: (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.

²³ The New York City Bar [has recommended](#) that New York amend its Rules of Professional Conduct. The New York State Bar has also recommended amendments.