The Amended ABA Model Rule 8.4

Anti-harassment, Anti-discrimination Rule
New Section (g)

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Where does it fit in the rules overall?

Model Rule 8.4 already prohibited misconduct related to the practice of law such as:

- a. Violating or attempting to violate the rules, or doing so through another;
- b. Committing certain criminal acts;
- c. Engaging in dishonesty, fraud, deceit, or misrepresentation;
- d. Engaging in conduct prejudicial to the administration of justice;
  (NOTE: the prior comment regarding bias or prejudice was tied to this subsection)
- e. Communicating an ability to influence improperly a government agency or official;
- f. Helping a judicial officer to engage in unethical conduct.
- Now NEW (g) added to the concept of misconduct related to the practice of law.
What is New Section (g)?

Model Rule 8.4: Misconduct

It is professional misconduct for a lawyer to: …

“(g) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This Paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”
The ABA Model Rules have included this concept as Comment [3] to Rule 8.4 since 1998:

“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...”

How does the new provision relate to the justice system and ABA goals?

- All lawyers have a special responsibility for the quality of the justice system and its fair operation.
- The ABA is long committed to enhancing that goal with its ABA Goal III that includes the objectives of full and equal participation by all persons in the profession and the justice system and to eliminate bias in the profession and the legal system.
- This amendment furthers that goal.
Comment [3] was “the only example in the Model Rules where a Comment is purported to ‘solve’ an ethical issue that otherwise would require resolution through a Rule.” Report to the House of Delegates
Important differences between old Comment [3] and the new Rule 8.4 (g) that make it more concrete and easier for the lawyer to follow:

- Substitutes more specific phrase “harassment or discrimination” for “bias or prejudice” in accord with legal standards in many areas of the law.

- Eliminates “knowingly manifests by words or conduct” and uses clearer and stricter standard “engage in conduct that the lawyer knows or reasonably should know” which are defined terms.

- Adds to the preexisting eight prohibited bases the new ones: ethnicity, gender identity, and marital status in accord with recent developments in the law.
How does section (g) help the legal profession?

- Helps the profession with public perception.
- Helps lawyers with clear definitions and parameters of what is prohibited, even though some of this conduct is already prohibited by law.
- Sets out guidelines and comments to protect the operation of the law practice and the right of free speech, thought, association or religious practice.
- Limits its application to “conduct related to the practice of law.”
Q: What is “conduct related to the practice of law”?

A: Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating and managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.

Q: Will I have to take every case that comes in?

A: No. The rule would not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with current rules.
No.

Discrimination against persons based on their source of income, or based on their acceptance of free or low-cost legal services, are examples of discrimination based on socioeconomic status.

Comment [5] of Model Rule 8.4 makes it clear that the rule would not limit a lawyer’s ability to charge and collect a reasonable fee and reimbursement of expenses, nor would it affect a lawyer’s ability to limit the scope of his or her practice.
Does it limit advocacy?

- No, not in any way not already encompassed in the Model Rules of Professional Conduct and other applicable laws and court rules.
- New paragraph (g) would not inhibit a lawyer’s ability to represent a client or argue a position for the client.
- Paragraph (g) does not prohibit “legitimate advice or advocacy” consistent with the Model Rules of Professional Conduct.
- A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.
Safeguards in enforcement

- Burden of proof still remains with disciplinary prosecutor.
- Conduct must meet definitions of “knows or reasonably should know”, which are the same standards applied to many legal proceedings and other rules of professional conduct.
- Conduct to be examined must relate to the practice of law.
There are already examples of enforcement using the prior rule with its comment or similar language in state rules.

Lawyer sent two ex parte communications to judge disparaging opposing party on basis of national origin and immigration status. In re Disciplinary Proceeding against McGrath, 280 P.3d 1091 (Wash. 2012).

Lawyer accused prosecutor of hiding true identity as granddaughter of former Dominican Republic dictator Rafael Trujillo; filing motion with “false statements and unnecessary and offensive references to ancestry.” United States v. Kouri-Perez, 8 F. Supp. 2d 133 (D.P.R. 1998).

Lawyer made anti-Semitic remark to opposing counsel at deposition, rule violated as lawyer went beyond right to represent his clients vigorously, aggressively, and zealously. In re Williams, 414 N.W.2d 394 (Minn. 1987).

New comments provide practice guides

- Lawyers may engage in conduct undertaken to promote diversity and inclusion.
- A lawyer may limit the scope or subject matter of the lawyer’s practice or may limit the practice to members of underserved populations.
- A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.
- This Rule does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Model Rule 1.16.
Why should your jurisdiction adopt new section (g)?

- Lawyers, judges, clients and the public benefit when the legal system is fair and unbiased. Positive public perception of an unbiased system assists the operation of the courts and the practice of law.

- Lawyers should engage in conduct that promotes the good of the profession and these provisions assist lawyers in complying with this goal when they are engaged in the practice of law.

- Consistent rules from jurisdiction to jurisdiction aid practitioners and their clients engaged in interstate business.

- 25 jurisdictions have adopted some form of anti-discrimination/anti-harassment black letter rules, including 13 that have adopted the language from the previous Comment 3 of Model Rule 8.4.