I. Panel Description
   a. What does it mean when you are a female and/or diverse attorney practicing labor law? Are you judged the same or differently than your majority peers? Are there times when your gender and/or minority status may work to your advantage? Does it depend on who you are representing? This panel will examine how our unconscious biases may impact our ability to successfully advocate for our clients and navigate different aspects of our practice, while exploring implications of the amended ABA Model Rule of Professional Responsibility 8.4, which prohibits discrimination or harassment of attorneys in a variety of aspects of their professional life.

II. The New Rule 8.4(g)
   a. ABA History
      i. Gender Discrimination – ABA is an organization that for its first 40 years (1878 – 1918) did not admit women even though women had been admitted to practice law in various states by 1860’s.²
         1. Notably, it was not until 1840’s to 1870’s that states began rolling back coveture laws. But around the same time women were not considered property, they started getting law degrees and practicing law – smart move.
         2. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), which denied women the right to practice law under the 14th Amendment.
            a. Myra Bradwell was the wife of a liberal judge in Chicago. She obtained a law degree and because the editor of Chicago Legal News a profitable and well respected paper. She used the editorial page to support women’s rights, but she is relatively moderate in her feminism. When she takes the bar she keeps it clear that she is married, and she will be her husband’s helper.
            b. Justice Bradley wrote, "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life... [T]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

¹ This outline was created for the Diversity and Ethics panel at the 2017 Midwinter Meeting of the Committee on Practice and Procedure Under the NLRA.

ii. Racial Discrimination - Not until 1962 did the ABA admit African-Americans, even judges, as members.

1. On January 4, 1912, the ABA Executive Committee rescinded the membership of William H. Lewis, the first black assistant attorney general of the United States. Although Lewis had been elected to membership in August 1911, the Executive Committee reports that the ABA had acted, “in ignorance of material facts” and that “the settled practice of the Association has been to elect only white men as members.”

2. The ABA’s exclusion of African-Americans does not in the least suggest that African-Americans did successfully engage in the practice of law. They made their own way.

3. After graduating first in his class at Howard University, Thurgood Marshall opened his successful law practice in Baltimore in 1933.3

4. In 1927, the African-American female attorney Sadie Alexander, joined the prestigious African American law firm founded in 1923 by her husband, Raymond Pace Alexander, where she became a well-respected practitioner of probate and domestic relations law. But it was Sadie’s activities outside the firm, that established her reputation on a national scale. She served for twenty-five years as the secretary of the National Urban League, and was elected to the national board of the ACLU. In 1946, President Harry Truman appointed Alexander to his President's Committee on Civil Rights. 4

iii. Socio-Economic Discrimination - Arguably, throughout its history, the ABA has engaged in socioeconomic discrimination. In the early twentieth century it adopted severe restrictions on contingency fees. Around that time immigrants and those considered to be of lesser social and economic status found entry into the legal profession via contingency fees for personal injury cases, the bar screamed that a crisis was afoot. With the advent of factories, cars, and trains there was an alarming increase in work and transportation related accidents. These victims were expected to bear the cost of doing dangerous work and assume the risk of living in an industrialized world. Contingency fees provided a way for a poor, injured factory worker to be represented by an attorney in a lawsuit against his employer. However, the ABA inequitably scrutinized such fees in its ethical cannons. Such restrictions were arguably classist and racist. The contingency fees were subject to judicial scrutiny, but the enormous retainers corporations paid to the large firms were not given a second glance by professional associations. The personal injury attorneys were condemned for soliciting clients, but the ABA said nothing about hospital

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visits by company claim agents who visited workers to urge a quick, small settlement.5

iv. Changing profession: steady increase in 1970s, female students today are nearly on parity with males at American law schools.6 The percentage of minority law students has increased from 17.8% in 1993–94 to 28.5% in 2013–14.7 However, but only 35% of licensed attorneys are women

b. Adoption of current Rule

i. After more than two years of drafting and negotiation with entities, both from within and outside of the American Bar Association, the ABA Standing Committee on Ethics and Professional Responsibility’s (SCEPR) Resolution 109 regarding a new Rule 8.4(g) Misconduct was adopted on August 8, 2016 by the ABA House of Delegates at the ABA Annual Meeting in San Francisco. At the time the model rule was adopted, 25 jurisdictions had already adopted an anti-discrimination provision in their black letter Rules of Professional Conduct.

ii. Stated Goal - Eliminate Bias and Enhance Diversity in the Legal Profession

C. Model Rule 8.4(g) Text

i. It is professional misconduct for a lawyer to: 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.

ii. Paragraphs 3 through 5 of the Comment to the rule were also added.

d. Defining Words in the Rule

i. What is Harassment? The comment to Rule 8.4(g) says: “Harassment includes sexual harassment and derogatory or demeaning verbal or

6 Parity was over 100 years in the making. In 1890 Cornell and NYU were the first law schools in the country to open their doors to women, even though at this same time over 60% of U.S. colleges were open to women. SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY, VIRGINIA G. DRACHMAN, Harvard University Press, 2001.
7 Statistics on women and minority law students over time can be found at https://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf
physical conduct towards a person. Sexual harassment includes unwelcome sexual advances, requests for sexual favor, and other unwelcome sexual advances. The substantive law of . . .anti-harassment statutes and case law may guide application of paragraph (g).” Rule 8.4(g) comment [3].

ii. Do we know what “know” means? “knows or reasonably should know” for both discrimination and harassment. These words eliminate the possibility of a strict liability construction. Other Model Rules have a mens rea requirement. See, e.g., Rules 3.6(a)(“Trial Publicity”); 4.3 (“Dealing with Unrepresented Person”); and Rule 4.4(b)(“Respect for the Rights of Third Persons”). “Knowingly,” “known,” and “knows” are defined in Rule 1.0(f). “Reasonably should know” is defined in Rule 1.0(j). Contrast with the rules without a mens rea requirement. See, e.g., Rule 1.7 (“Conflict of Interest: Current Client”); and Rule 1.9(a)(“Duties to a Former Client”)

e. Scope – What is the nexus between the lawyer’s conduct and his or her professional self?

i. New Comment [4] explains: …Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.

ii. Formerly Comment [3] to Rule 8.4 used the phrase “in the course of representing a client.”

iii. New Rule has broader reach. It forbids certain conduct when “related to the practice of law.” Would cover client matters that are not before a tribunal, such as negotiation or counseling, and would apply to a lawyer’s words or conduct toward others in his or her law office and at professional meetings or on bar committees. It would cover a lawyer who made unwelcome sexual overtures to a subordinate and peer lawyer

iv. Model Rule 8.4(g) adopted by the ABA has addressed major concerns—it prohibits only knowing conduct and expressly allows a lawyer to refuse to represent a client without fear of reprisal.

f. How Does New Rule Compare to Existing State Rules? Lawyers are governed by rules adopted by courts in the jurisdictions in which they are admitted.

i. Today, twenty-four states and Washington, D.C., have such a rule, but none is as broad as the new ABA rule.
Most are narrower. California Rule of Prof'l Conduct 2-400; Colorado Rule of Prof'l Conduct 8.4(g); Florida Rule of Prof'l Conduct 4-8.4(d); Idaho Rule of Prof'l Conduct 4.4 (a); Illinois Rule of Prof'l Conduct 8.4(j); Indiana Rule of Prof'l Conduct 8.4(g); Iowa Rule of Prof'l Conduct 8.4(g); Maryland Lawyers’ Rules of Prof'l Conduct 8.4(e); Massachusetts Rule of Prof'l Conduct 3.4(i); Michigan Rule of Prof'l Conduct 6.5; Minnesota Rule of Prof'l Conduct 8.4(h); Missouri Rule of Prof'l Conduct 4-8.4(g); Nebraska Rule of Prof'l Conduct 8.4(d); New Jersey Rule of Prof'l Conduct 8.4(g); New Mexico Rule of Prof'l Conduct 16-300; New York Rule of Prof'l Conduct 8.4(g); North Dakota Rule of Prof'l Conduct 8.4(f); Ohio Rule of Prof'l Conduct 8.4(g); Oregon Rule of Prof'l Conduct 8.4(a)(7); Rhode Island Rule of Prof'l Conduct 8.4(d); Texas Rule of Prof'l Conduct 5.08; Vermont Rule of Prof'l Conduct 8.4(g); Washington Rule of Prof'l Conduct 8.4(g); Wisconsin Rule of Prof'l Conduct 8.4(i); D.C. Rule of Prof'l Conduct 9.1.

Other states have a comment to their professional rules but no rule: Arizona Rule of Prof'l Conduct 8.4, cmt.; Arkansas Rule of Prof'l Conduct 8.4, cmt. [3]; Connecticut Rule of Prof'l Conduct 8.4, Commentary; Delaware Lawyers’ Rule of Prof'l Conduct 8.4, cmt. [3]; Idaho Rule of Prof'l Conduct 8.4, cmt. [3]; Maine Rule of Prof'l Conduct 8.4, cmt. [3]; North Carolina Rule of Prof'l Conduct 8.4, cmt. [5]; South Carolina Rule of Prof'l Conduct 8.4, cmt. [3]; South Dakota Rule of Prof'l Conduct 8.4, cmt. [3]; Tennessee Rule of Prof'l Conduct 8.4, cmt. [3]; Utah Rule of Prof'l Conduct 8.4, cmt. [3]; Wyoming Rule of Prof'l Conduct 8.4, cmt. [3]; West Virginia Rule of Prof'l Conduct 8.4, cmt. [3].

Still other states have no rule and no comment concerning anti-bias and anti harassment in the practice of law. Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.

However, a court in a state without a rule or a comment could nevertheless impose discipline under a less specific rule or using its inherent power. See, e.g., Claypole v. Country of Monterey, 2016 Westlaw 145557 at *4 (N.D. Cal. 2016)(court relies on inherent power to sanction a lawyer for a “sexist remark” at a deposition).

Why Have a Rule?

Despite the institutional racism, sexism, and classism of the American bar, way back in 1905, Justice Brandeis said, “the practice of law tends to make the lawyer judicial in attitude and extremely tolerant.” Is there any truth in that statement? Do lawyers need a special rule?

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b. There are many laws on the books dealing especially in terms of employer/employee relationships. Existing statutes are not enough because they do not apply to most lawyers nor to the types of discrimination this proposed ethical rule is trying to reach. Federal civil rights law applies to employers and businesses, not individuals and often limit applications to employers with a minimum number of employees. Most lawyers are employees themselves or are in small practices. Further, there are no non-discrimination laws that will prevent a lawyer from discriminating against or harassing opposing counsel, opposing parties or witnesses or any others.

c. The ABA’s Standing Committee on Ethics and Professional Responsibility (“the Ethics Committee”), the sponsor of Rule 8.4(g) before the House of Delegates, gave the following examples.

1. “The Wisconsin Supreme Court in 2014 disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was “a cool person to know.” On one day, the lawyer sent 19 text messages asking whether the victim was the “kind of girl who likes secret contact with an older married elected DA . . . the riskier the better.” One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a $350,000 home. In re Kratz, 851 N.W.2d 219 (2014).

2. The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student’s appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him. In re Griffith, 838 N.W.2d 792 (2013).

3. The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? In re McGrath, 280 P.3d 1091 (2012).

4. The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made repeated disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. In re Campiti, 937 N.E.2d 340 (2009).

5. The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a “black male” and that such association was placing the children
in harm’s way. During a hearing, the lawyer referred to the African-American man as “the black guy” and “the black man.” *In re Thomsen, 837 N.E.2d 1011 (2005).*

d. More Examples:

6. **Claypole v. County of Monterey, 2016 WL 145557 (N.D. Cal. 2016)** (“At a contentious deposition, when Plaintiffs’ counsel asked Bertling not to interrupt her, Bertling told her, ‘[D]on’t raise your voice at me. It’s not becoming of a woman or an attorney who is acting professionally under the rules of professional responsibility’”). The court wrote: “The Northern District's Guidelines for Professional Conduct are just that: guidelines. They only ‘encourage’ counsel to comply with them, and the court ‘does not anticipate that these Guidelines will be relied upon as the basis for a motion.’ A one-off lapse, then, may not be a big deal. Attorneys are people, and people make mistakes. But where, as here, an attorney repeatedly and unapologetically flouts guideline after guideline, it is a big deal—and the court has little choice but to do something about it.”

7. **In Cruz-Aponte v. Caribbean Petroleum Corp., 2015 WL 5006213 (D.P.R. 2015),** Mr. Salas had the following exchange with Ms. Monserrate, the opposing lawyer, during a deposition: MR. NEVARES: The air conditioner works. MS. MONSERRATE: I don't know, but it's hot in here. MR. SALAS: ¿Tienes calor todavía. [“You’re still warm.”] You're not getting menopause, I hope. MS. MONSERRATE: That's on the record. MR. SALAS: No, no, no. MS. MONSERRATE: You know that a lawyer here got in big trouble for a comment just like that. MR. SALAS: Really.

8. **Laddcap Value Partners, LP v. Lowenstein Sandler P.C, 2007 WL 4901555, at *2–7 (N.Y. Sup.Ct. 2007)** (ordering referee supervision of future depositions after male attorney addressed female attorney as “dear,” “hon,” and a “sorry girl,” said she had a “cute little thing going on,” and asked why she was not wearing her wedding ring during deposition)

9. **Principe v. Assay Partners, 586 N.Y.S.2d 182, 184 (Sup. Ct. N.Y. Co. 1992):** As Beth Rex, Esq., was representing the fourth party defendant in a deposition, Lawrence Clarke, Esq. … in front of numerous attorneys, the witness, and the reporter, made a number of remarks…directed to his colleague…: “I don't have to talk to you, little lady”; “Tell that little mouse over there to pipe down”; “What do you know, young girl”; “Be quiet, little girl”; “Go away, little girl.” Ms. Rex states these comments “were accompanied by disparaging gestures … dismissively flicking his fingers and waving a back hand at me.” The transcript contains the remarks and an attorney for another party corroborates the description of the gestures. The affidavit in opposition justifies the comments as “name-calling”.
10. The Florida Bar v. Martocci, 791 So.2d 1074 (Fla. 2001), the referee found that “after a hearing... upon exiting an elevator, Martocci told Ms. Figueroa that she was a ‘stupid idiot’ and that she should ‘go back to Puerto Rico.’” “The record reflects that Martocci: (1) made insulting facial gestures to Ms. Berger and Ms. Figueroa; (2) called Ms. Figueroa a ‘bush leaguer’; [and] (3) told Ms. Figueroa that depositions are not conducted under ‘girl's rules.’”

e. As awful as these examples are, if we look strictly to the reported decisions only, bias and harassment in the practice of law is a persistent but not a pervasive problem.

IV. Criticism of Rule 8.4(g)

a. Too restrictive and infringes upon free speech
   i. Verbal conduct = speech, but the Rule and Comments make no reference to the First Amendment.
   
   ii. Is there a governmental interest in the regulation of attorney conduct at CLE events or law firm social functions? Some of the areas regulated seem to bear a weak relation to the delivery of legal services to the public.
   
   iii. The December 2015 version of Comment 3 included language that the Rule “does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment.” Should this language have been retained?
   
   iv. The Rule may have a chilling effect on a lawyer’s ability to critique matters of public concern, such as proposals to amend non-discrimination laws or highly-publicized cases like Obergefell v. Hodges.
   
   v. Some critics have argued that the Rule should be limited to “severe or pervasive” harassment.
   
   vi. Comment 4 provides that, “[l]awyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.” Does this exception for speech promoting diversity create viewpoint discrimination?

b. Doesn’t go far enough – the mens rea requirement
   i. Imposing the mens rea requirement may make it easier to escape a violation through denial of knowledge.
   
   ii. Imposing the mens rea requirement may make it more difficult for a disciplinary commission to prove a violation.
iii. Comment 3 provides that, "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." Can this effectively help bridge the gap?

c. Vague:
    i. Not all discrimination and harassment are illegal in other contexts.
    
    ii. Could harassment be construed to cover merely annoying, but persistent conduct?

    iii. Model Rules have always used vague terms. Examples include "significant risk," "significantly harmful," "substantial likelihood," "substantial purpose," and "reasonable possibility." See, respectively, Rule 1.7(a)(2) ("Conflicts of Interest: Current Clients"); Rule 1.18(c) ("Duties to Prospective Client"); (Rule 3.6(a) ("Trial Publicity"); Rule 4.3 ("Dealing with Unrepresented Person"); Rule 4.4(a) ("Respect for Rights of Third Persons").

    iv. The words "reasonably" or "unreasonable" appear dozens of times in the Model Rules. See, e.g., Rule 1.3 ("Diligence"); Rule 1.4(a)(2) and (3) ("Communication"); 1.5(a) ("Fees"); Rule 1.13(b) ("Organization as Client"); and Rule 3.3(a)(3) ("Candor Toward the Tribunal").

V. Intersection of Model Rule and the Practice of Labor Law

    a. How will the new rule impact practice of Labor Law? Are their discrimination issues that are unique to the Labor law practice?

    b. Union Side Practice – Are Unions immune to some kinds of discrimination but more vulnerable to others? Race, Gender, Religion v. Socio-Economic

    i. Issue of Gender and Labor Unions
        1. What is the significance of gender divisions in industries – construction trades vs. nurses.
        2. Interestingly, Supreme Court Justice Bradley was a former union attorney and wrote the opinion in the famous case, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), which denied women the right to practice law.

    ii. Race and Labor Unions
        1. Among major race and ethnicity groups, Black workers continued to have a higher union membership rate in 2016 (13.0 percent) than workers who were White (10.5 percent), Asian (9.0 percent), or Hispanic (8.8 percent). Bureau of labor statistics. https://www.bls.gov/news.release/pdf/union2.pdf
2. History of Racial Discrimination and Unions
   b. MLK linked civil rights to labor organizing.
   c. Founder of the United Farm Workers, Cesar Chavez, along with Dolores Huerta and other labor activists, organized a national boycott of grapes. The boycott had widespread support, after five years the grape growers agreed to contract that granted most of the Mexican Americans demands (Hart, 2008, pg. 610) (http://clnet.ucla.edu/research/chavez/bio/)

c. Management Side Practice – are there discrimination issues unique to management side practice?

d. A Word About Labor Law and Socio-Economics
   i. Does it help to have a working class background when representing labor unions? Can you be an effective advocate for workers if you only know affluence?

   ii. What about for management? Does it help or hurt their client if the lawyer from modest means was the first in her family to graduate from college and can empathize with low wage workers?

VI. Conclusion
   a. Can we accept the premise that no lawyer has a First Amendment right to demean or harass another lawyer (or anyone else involved in the legal process)? There is no First Amendment right to call a female opponent a bitch, to mock another lawyer’s accent, to sexually harass, to use a racial epithet, to refuse categorically to represent Mormons, atheists, or racial minorities, or persons with disabilities. When an attorney makes these kinds of comments, “it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice.” Cruz-Aponte v. Caribbean Petroleum Corp., Case No. 09-cv-02092, 2015 WL 5006213, at *3 (D.P.R. Aug. 17, 2015).

   b. No doubt there are racist, sexist, classist, and elitist threads woven into the complex fabric of America’s legal history and thus its established bar. But in
1905 Justice Brandeis said, “the great opportunity of the American bar is and will be to stand again as it did in the past, ready to protect . . . the interests of the people.” Can we agree that a bar that not only prohibits discrimination but also promotes diversity of perspective, background, and thought is better able to protect the interests of the people?

c. Next Steps? Predictions?

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