Comment of Professors Josh Blackman, Eugene Volokh, and Nadine Strossen

We are constitutional law professors. One of us teaches at a New York law school. Two of us have commented on ABA Model Rule 8.4(g),[1] and have submitted letters to several jurisdictions that have considered adopting Rule 8.4(g).[2]

Currently, there are two proposals to revise New York Rule 8.4(g). First, on March 19, 2021, the Administrative Board of the New York Unified Court System requested public comment on a proposal to adopt ABA Model Rule 8.4(g), with certain modifications, to replace New York Rule 8.4(g). Second, on April 16, 2021, the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") sought public comment to replace New York Rule 8.4(g) with a rule it claims "differ[s] significantly from ABA Model Rule 8.4(g)."

Recently, the U.S. District Court for the Eastern District of Pennsylvania declared unconstitutional Pennsylvania's version of the ABA Model Rule.[3] The Pennsylvania Bar chose not to appeal that ruling. That decision casts serious doubt on the proposals from the Administrative Board and COSAC. We do not think either proposal will pass constitutional muster.

In this joint statement, we will compare and contrast ABA Model Rule 8.4(g), the Administrative Board's proposal, and the COSAC proposal across nine dimensions: (1) the scope of the rule, (2) the locations where "the practice of law" can occur, (3) the list of prohibited activities, (4) the definition of "discrimination," (5) the definition of "harassment," (6) the protected classes, (7) the mens rea requirement, (8) diversity and inclusion, and (9) protection for speech. We will conclude with our recommendations. We also include the text of the proposals in the appendix.

I. Scope of the rule

- **Current NY Rule 8.4(g)**: "A lawyer or law firm shall not . . . unlawfully discriminate *in the practice of law*."
- **ABA Model Rule**: "engage . . . in *conduct related to the practice of law*"
- **Administrative Board Proposal**: ". . . engage in *conduct related to the practice of law*"
- **COSAC Proposal**: " . . . A lawyer or law firm shall not . . . *engage in conduct in the practice of law*"

[1] Josh Blackman, ABA Model Rule 8.4(g) in the States, 68 Catholic University Law Review 629 (2020); Josh Blackman, Reply: A Pause for State Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 241 (2017); Eugene Volokh, A Nationwide Speech Code for Lawyers?, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA.

[2] http://bit.ly/8-4g-letters

[3] *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020).

The current version of New York Rule 8.4(g) extends to "the practice of law." In contrast, the ABA Model Rule and the Administrative Board proposal extend to "*conduct related to* the practice of law." And the COSAC proposal extends to "*conduct in* the practice of law." The decision to expand the scope of Rule 8.4(g) is the root cause of many constitutional difficulties. Traditionally, the bar's core competency was regulating the "practice of law." And when an attorney is engaged in the practice of law, such as in court or in other forums, his constitutional rights can be abridged. But as the state deviates from this traditional function, it begins to intrude on an attorney's personal spheres. And in those spheres, attorneys have robust individual rights that cannot be abridged. New York Rule 8.4(g) should remain limited to "the practice of law."

II. Locations where "the practice of law" can occur

- **ABA Model Rule**: "Conduct related to the practice of law includes [a] representing clients; [b] interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; [c] operating or managing a law firm or law practice; and [d] participating in *bar association, business or social activities in connection with the practice of law*."
- **Administrative Board Proposal**: "Conduct related to the practice of law includes [a] representing clients, [b] interacting with witnesses, co-workers, court personnel, lawyers, and others while engaged in the practice of law; [c] operating or managing a law firm or law practice; and [d] participating in *bar association, business or social activities in connection with the practice of law*."
- **COSAC Proposal**: "Conduct in the practice of law includes . . . [a] representing clients; [b] interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law; [c] operating or managing a law firm or law practice; and [d] participating in *bar association, business, or professional activities or events in connection with the practice of law*."

The proposal from the Administrative Board explains that "conduct related to the practice of law" can occur in "bar association, business or *social* activities." The COSAC proposal uses slightly different language: "bar association, business, or *professional* activities or events in connection with the practice of law." The word "social" was changed to "professional." But this change is immaterial, because the COSAC proposal also extends to all "events in connection with the practice of law." This broad category is broad enough to embrace "social activities." With these changes, the New York Bar would expand the range of its jurisdiction to social functions. Presentations at a CLE debate would be covered by this rule. Private table conversations at a bar dinner would be covered by the rule. These contexts have little connection to the actual practice of law, but could give rise to discipline.

The government does not have an "unfettered power" to regulate the speech of "lawyers," simply because they provide "personalized services" after receiving a "professional license." *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2375 (2018) (*NIFLA*). To be sure, *NIFLA* recognized that there are two categories of lawyer speech that may sometimes be more restrictable. First, the Court has "applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" Id. at 2372 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). The proposals, however, are not limited to "commercial speech" (which generally means commercial advertising), and do not simply "require professionals to disclose factual, noncontroversial information." Moreover, the Court noted that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372. But the state cannot flip this rule by regulating speech on the grounds that it incidentally involves professional conduct—indeed, the *NIFLA* Court declared unconstitutional this sort of regulation.

The Administrative Board proposal included the constitutional analysis from ABA Formal Opinion 493. But this opinion failed to even discuss *NIFLA*.[4]

III. Prohibited activities

- **ABA Model Rule**: ". . . harassment or discrimination . . ."
- **Administrative Board Proposal**: " . . . harassment or discrimination . . ."
- **COSAC Proposal**: " . . . unlawful discrimination, or harassment, whether or not unlawful . . ."

The ABA Model Rule and the Administrative Board proposal would prohibit the same activities: ". . . harassment or discrimination . . ." The COSAC proposal uses slightly more precise language. Harassment would be prohibited, whether lawful or unlawful. But only unlawful discrimination would be prohibited.

IV. Definition of "discrimination"

- **ABA Model Rule**: "discrimination"
    - Comment [3] "Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. . . . The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)."
- **Administrative Board Proposal**: [No definition of discrimination]

[4] https://reason.com/volokh/2020/07/15/aba-issues-formal-opinion-on-purpose-scope-and-application-of-aba-model-rule-8-4g/

- **COSAC Proposal**: "'Unlawful discrimination' refers to discrimination under federal, state and local law."

The ABA Model Rule defines "discrimination" as "harmful verbal or physical conduct that manifests bias or prejudice towards others." And anti-discrimination law "may" provide a guide. The Administrative Board did not define "discrimination." (There is a lengthy definition of "harassment," which we will discuss below.) The COSAC proposal only includes "unlawful discrimination." And that phrase "refers to discrimination under federal, state and local law." In some cases, these three categories of discrimination laws may be in conflict. The most restrictive law will control. Generally, federal, state, and local discrimination laws would only govern relationships in the workplace.

The prohibition of "discrimination" is unlikely to run afoul of the First Amendment. The prohibition of "harassment," however, does raise serious constitutional concerns.

V. Definition of "harassment"

- **ABA Model Rule**: "harassment"
    - Comment [3]: "Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)."
- **Administrative Board Proposal**: "harassment"
    - Comment [5B]: "Harassment includes harmful, derogatory, or demeaning verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Typically, a single incident involving a petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature."
- **COSAC Proposal**: (3) "Harassment," for purposes of this Rule, means conduct that is: a. directed at an individual or specific individuals in one or more of the protected categories; b. severe or pervasive; and c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.
    - Comment [5C]: Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct. Verbal conduct includes written as well as oral communication

Under the ABA Model Rule, the word "harassment" includes "derogatory or demeaning verbal . . . conduct." The Administrative Board proposal adds an additional adjective: "*harmful*, derogatory, or demeaning verbal . . . conduct." These words are, in practice, likely to end up being mere synonyms for speech that is offensive and disparaging. And *Matal v. Tam* held that exclusion (even from a government-run benefit program) of "disparag[ing]" or "contempt[uous]" speech was unconstitutionally viewpoint-based. 137 S.Ct. 1744, 1750 (2017). ABA Formal Opinion 493 also did not discuss *Matal v. Tam*.

The Administrative Board proposal includes an additional definition of harassment: "conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive." But by its terms, that proposal merely "includes" such conduct, rather than being limited to it.

The COSAC proposal advances a three-factor test to define "harassment." First, the speech must be "directed at an individual or specific individuals in one or more of the protected categories." We think this element would obviate some of our concerns. Merely speaking about a contentious topic, in the abstract, would not give rise to liability, because it would not be "directed at an individual." The second element obviates other concerns. Off-hand remarks at a bar function would likely not give rise to liability. The speech must be "severe or pervasive."

Alas, the third element suffers from the same problem as the ABA Model Rule, the Administrative Board proposal, as well as the unconstitutional Pennsylvania rule: it imposes viewpoint discrimination against "derogatory or demeaning verbal conduct." No rule with this language can pass constitutional muster. The first two factors cannot overcome this deficiency.

Comment [5C] of the COSAC proposal attempts to mitigate these constitutional concerns. But in the process, it introduces additional grounds of vulnerability. First, it states "Petty slights, minor indignities and discourteous conduct without more do not constitute harassment." What is a "petty slight" to some may be a "severe intrusion" to others. Second, the phrase "minor indignities" is not much more helpful--just another way of defining offensiveness. The third category simply adds further constitutional problems: "discourteous conduct." Attempts to police civility in this fashion will simply impose another form of viewpoint discrimination, as well as being potentially unconstitutionally vague. Fourth, the comment defines "severe or pervasive derogatory or demeaning conduct" as "degrading, repulsive, abusive, and disdainful conduct." These synonyms suffer from the same problems under *Matal v. Tam*: they impose a viewpoint discrimination. And again they would likely be unconstitutionally vague, since all of them (with the possible exception of "abusive") are not familiar legal terms of art.

The Administrative Board proposal also attempts to narrow the definition of harassment. The Administrative Board proposal states: "Typically, a single incident involving a petty slight,

unless intended to cause harm, would not rise to the level of harassment under this paragraph." The Administrative Board proposal, however, falls *far* short of the "severe or pervasive" requirement that the COSAC proposal adopts. The word "typically" is a hedge, and suggests that rule will not always apply. Moreover, the phrase "petty slight" is unclear. What may be "petty" to one person can be "severe" to another. Finally, the mens rea requirement in this sentence ("intended to cause harm") seems to be at odds with the mens rea element in the rule ("lawyer knows or reasonably should know").

Greenberg v. Haggerty declared unconstitutional Pennsylvania's Rule 8.4(g), which was premised on the ABA Model Rule. That opinion stated:

> There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance. Yet the government cannot set its standard by legislating diplomatic speech because although it embarks upon a friendly, favorable tide, this tide sweeps us all along with the admonished, minority viewpoint into the massive currents of suppression and repression. Our limited constitutional Government was designed to protect the individual's right to speak freely, including those individuals expressing words or ideas we abhor. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020).

The definition of harassment in the Administrative Board Proposal and the COSAC proposal are unconstitutional for the same reasons.

VI. Protected classes

- **ABA Model Rule**: "on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status . . . "
- **Administrative Board Proposal**: "on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity *or expression*, marital status or socioeconomic status . . . "
- **COSAC Proposal**: " . . . on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender *expression*, marital status, *status as a member of the military, or status as a military veteran . . .*"

The Administrative Board proposal adds one protected category to the list from the ABA Rule: "gender expression." The COSAC proposal also includes "gender expression," as well as "status as a member of the military, or status as a military veteran."

The COSAC proposal eliminates socioeconomic status. We think the elimination of socioeconomic status is prudent: There is no basis for the rules to categorically ban discrimination based on "socioeconomic status"—a term not defined by the rule, but which is commonly used to refer to matters such as income, wealth, education, or form of employment. A law firm, for instance, may prefer more-educated employees—both as lawyers and as staffers—over less-educated ones. Or a law firm may contract with expert witnesses and expert consultants who have had especially prestigious educations or employment. Or a firm may prefer employees who went to high-"status" institutions, such as Ivy League schools. Yet each of these commonplace actions would constitute discrimination on the basis of socioeconomic status under the new rule.

VII. The mens rea requirement

- **ABA Model Rule**: ". . . engage in conduct that the lawyer *knows or reasonably should know* . . . in conduct related to the practice of law. . . ."
- **Administrative Board Proposal**: ". . . engage in conduct related to the practice of law that the lawyer *knows or reasonably should know* . . . "
- **COSAC Proposal**: ". . . engage in conduct in the practice of law that the lawyer or law firm *knows or reasonably should know* constitutes . . . "

All three proposals adopt the same mens rea requirement: "knows or reasonably should know." We previously commented on a draft proposal from COSAC in February 2021. That draft stated that a "lawyer shall not *knowingly* engage in conduct..." COSAC seems to have reduced the mens rea requirement from "knowingly" to "knows or reasonably should know." A requirement of "knowingly" would mitigate some of the constitutional problems with this rule. Scienter would avoid unknowing harassment, however that phrase is defined.

VIII. Diversity and inclusion

- **ABA Model Rule**: "Lawyers 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."
- **Administrative Board Proposal**: "Paragraph (g) does not prohibit conduct undertaken to promote diversity and inclusion by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations."

- **COSAC Proposal**: "This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories."

The drafters of the ABA Model Rule and the Administrative Board proposal recognized an obvious problem: promoting various diversity and inclusion measures could run afoul of Rule 8.4(g). For example, advocating for the use of affirmative action for certain racial groups could constitute "harmful verbal . . . conduct that manifests bias or prejudice towards other" racial groups. To avoid this problem, both the ABA Model Rule and the Administrative Board proposal create several exemptions: it is not misconduct to "promote diversity and inclusion." Likewise, the COSAC proposal uses similar language.

Yet these rules thus create an explicit form of viewpoint discrimination. Those who speak in ways that promote diversity and inclusion efforts, such as affirmative action policies, are protected. Those who criticize the same diversity and inclusion efforts are not protected. In theory, it would be possible to strip this sentence from the Administrative Board proposal. But that change would be a poison pill. In the absence of this protection for diversity and inclusion efforts, many lawyers and law firms would face potential liability.

IX. Express protection of speech

- **ABA Model Rule**: [No express protection]
- **Administrative Board Proposal**: [No express protection]
- **COSAC Proposal**: "This Rule does not limit the ability of a lawyer or law firm . . . to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy . . ."
    - Comment [5D]: A lawyer's conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York.

The COSAC proposal includes two express protections for the freedom of speech. First, the Comment explains that this rule would not prohibit speech protected by the federal or state Constitutions. This comment, though helpful, doesn't add much. Of course a state ethics rule cannot violate the federal or state Constitutions.

Second, the rule would not "limit the ability of a lawyer or law firm . . . to express views on matters of public concern in the context of teaching, public speeches, or other forms of public

advocacy." This rule would obviate some of our concerns with respect to speaking or presenting at CLE or bar functions. But it would still allow punishment for dinnertime conversation at one of these events. A presenter would be safe to discuss a controversial idea. But if an attendee repeated the same exact remarks to colleagues afterwards, he could be held liable.

We recognize that the rule is designed to prohibit sexual harassment in social functions that are related to the practice of law. But the current rule sweeps too broadly. The draft could be improved by protecting the expression of "views on matters of public concern" in *all* contexts.

Conclusion

It is our opinion that the Administrative Board proposal would be declared unconstitutional for the same reasons that the Pennsylvania rule was declared unconstitutional: it imposes an unconstitutional form of viewpoint discrimination. The COSAC proposal is an improvement, but still permits the imposition of liability for "derogatory or demeaning verbal conduct." We do not think this element is valid under *Matal v. Tam* (2017).

We recognize that the New York courts, and the attorneys of New York, are eager to take some form of action to address perceived problems in the profession. But the way to resolve these issues is not through adopting an unconstitutional rule. If adopted, Rule 8.4(g) will lead to years of litigation and acrimony. A better course is to adopt a more modest rule on firm constitutional grounding. For example, the rule could only extend to formal "discrimination," rather than the nebulous term of "harassment." The rule could be limited to "the practice of law" rather than ancillary conduct. The rule would not extend to social functions. These suggestions could address some of the perceived need for a change, without raising difficult constitutional questions. But in its present form, both proposals will likely meet the same unconstitutional fate.

It would be our pleasure to provide any further insights to inform your deliberations.

Sincerely,

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Appendix

Current ABA Rule 8.4(g)

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.

Pertinent comments to this section of the rule

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).
>
> [4] 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. Lawyers 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.
>
> [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

Current NY Rule 8.4(g)

A lawyer or law firm shall not: (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;

Pertinent comments to this section of the rule

> [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 (g).

ABA Model Rule 8.4(g)

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.

Pertinent comments to this section of the rule

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] 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. Lawyers 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.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

Administrative Board's Proposed Rule 8.4(g)

A lawyer or law firm shall not:

(g) engage in conduct 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, gender identity or expression, marital status or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

<u>Pertinent comments to this section of the rule</u>

[3] Discrimination and harassment by lawyers in violation of paragraph(g) undermine confidence in the legal profession and the legal system. Harassment includes harmful, derogatory, or demeaning verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Typically, a single incident involving a

petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

[4] Conduct related to the practice of law includes representing clients, interacting with witnesses, co-workers, 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. Paragraph (g) does not prohibit conduct undertaken to promote diversity and inclusion by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations. A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

COSAC Proposed Rule 8.4(g)

A lawyer or law firm shall not:

(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

(1) unlawful discrimination, or
(2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.
(3) "Harassment," for purposes of this Rule, means conduct that is:
a. directed at an individual or specific individuals in one or more of the protected categories;
b. severe or pervasive; and
c. either (i) unwelcome physical contact or (ii) derogatory or demeaning verbal conduct.

(4) This Rule does not limit the ability of a lawyer or law firm (i) to accept, decline or withdraw from a representation, (ii) to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy, or (iii) to provide advice, assistance or advocacy to clients consistent with these Rules.

(5) "Conduct in the practice of law" includes:

a. representing clients;

b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law;

c. operating or managing a law firm or law practice; and

d. participating in bar association, business, or professional activities or events in connection with the practice of law.

Pertinent comments to this section of the rule

[5A] Discrimination and harassment in the practice of law undermines confidence in the legal profession and the legal system and discourages or prevents capable people from becoming or remaining lawyers.

[5B] "Unlawful discrimination" refers to discrimination under federal, state and local law.

[5C] Petty slights, minor indignities and discourteous conduct without more do not constitute harassment. Severe or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct. Verbal conduct includes written as well as oral communication.

[5D] A lawyer's conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8, of the Constitution of the State of New York.

[5E] This Rule is not intended to prohibit or discourage lawyers or law firms from engaging in conduct undertaken to promote diversity, equity, and/or inclusion in the legal profession, such as by implementing initiatives aimed at (i) recruiting, hiring, retaining, and advancing employees in one or more of the protected categories, or (ii) encouraging or assisting lawyers and law students to participate in organizations intended to promote the interests of persons in one or more of the protected categories.

[5F] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. Moreover, no

violation of paragraph (g) may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law.

[5G] Nothing in Rule 8.4(g) is intended to affect the scope or applicability of Rule 8.4(h) (prohibiting a lawyer from engaging in conduct, whether in or outside the practice of law, that "adversely reflects on the lawyer's fitness as a lawyer").