PROFESSIONAL MISCONDUCT—
KNOWINGLY ENGAGING IN HARASSING OR
DISCRIMINATORY CONDUCT RELATED TO THE PRACTICE OF LAW

By Gilda T. Russell[1]

I. Introduction.

The American Bar Association's ("ABA") recent adoption of a new paragraph (g) to ABA Model Rule of Professional Conduct 8.4. {"Model Rule") is of interest to law firm risk management. Under Model Rule 8.4(g), a lawyer's knowing engagement in harassing or discriminatory conduct that is related to the practice of law constitutes professional misconduct. The Rule, its history, and the scope of its coverage are discussed below.

II. Model Rule 8.4(g)—Knowingly Engaging in Harassing Or Discriminatory Conduct Related to the Practice of Law is Professional Misconduct.

In August, 2016, the ABA House of Delegates adopted Resolution 109 of the ABA Standing Committee on Ethics and Professional Responsibility ("ABA Standing Committee") containing new paragraph (g) to Model Rule 8.4 and three new Comments. Paragraph (g) provides that it is professional misconduct 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."

The new Comments, Comments 3 – 5 to paragraph (g), provide:

> "[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

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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 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 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)."

III. Brief History of Model Rule 8.4(g).

Model Rule 8.4(g) came about as the result of at least a couple of years of drafting, negotiation, and compromise among various participants within and outside of the ABA.[2] The need for this type of ethics rule was expressed at the hearings on proposed Model Rule 8.4(g).[3] And, at the time of its adoption, the then immediate past President of the ABA Paulette Brown stated: "The current Model Rules of Professional Conduct … do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation. The [A]ssociation should now correct this omission. It is in the public's interest. It is in the profession's interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to

[2] *See* "ABA Adopts New Anti-Discrimination Rule 8.4 (g)," ABA, September, 2016, http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html

[3] Stakeholders weigh in on proposed amendment to Model Rule 8.4" ABA, March, 2016, http://www.americanbar.org/publications/youraba/2016/march-2016/stakeholders-weigh-in-on-proposed-amendment-to-model-rule-8-4.html

the practice of law."[4] Indeed, Comment 3 to Model Rule 8.4(g) articulates a similar rationale in providing that "[d]iscrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system."[5] In addition, another aspect of the commentary favoring adoption of the proposed Model Rule focused on the need to address bias in law firm hiring and retention of women, persons of color, and persons with disabilities.[6]

Modifications were added to the proposed Model Rule before adoption, including the "knows or reasonably should know" requirement, which prevents unintentional violations. Some criticized the insertion of the "knowledge" requirement into the final version of Model Rule i8.4(g), including former ABA President Brown who stated: "'Knowing' discrimination establishes a very high standard of proof that exceeds the well-known standards that already exist for federal and state laws against discrimination."[7]

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[4] *See* "ABA Adopts New Anti-Discrimination Rule 8.4 (g)," ABA, September, 2016, http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html

It should be noted that 25 states have adopted ethics provisions similar to Model Rule 8.4 (g). (For a chart of these state provisions, *see* "ABA, CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct," updated as of September 15, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.authcheckdam.pdf)

As stated by Myles Lynk, Chair of the ABA Standing Committee on Ethics and Professional Responsibility, at the time of Model Rule 8.4(g) adoption:
"The states have not waited for the ABA to act. …They have been laboratories of change…It is time for the ABA to catch up." See "ABA strengthens provision making harassment, discrimination professional misconduct," ABA, August, 2016, http://www.americanbar.org/news/abanews/aba-news-archives/2016/08/aba_strengthens_prov.html

[4] "Stakeholders weigh in on proposed amendment to Model Rule 8.4" ABA, March, 2016, http://www.americanbar.org/publications/youraba/2016/march-2016/stakeholders-weigh-in-on-proposed-amendment-to-model-rule-8-4.html

[5] Model Rule 8.4(g), Comment 3.

[6] Stakeholders weigh in on proposed amendment to Model Rule 8.4" ABA, March, 2016, http://www.americanbar.org/publications/youraba/2016/march-2016/stakeholders-weigh-in-on-proposed-amendment-to-model-rule-8-4.html

[7] *Id*.

However, the ABA Standing Committee stated in its report on the proposed Model Rule that "knowingly," "known." or "knows" are defined in Model Rule 1.0 (f) Terminology, "reasonably should know" is also a defined term, and these terms are used throughout the Model Rules.[8] The Committee further noted:

> "Taken together, these … standards provide a safeguard for lawyers against overaggressive prosecutions for conduct they could not have known was harassment or discrimination, as well as a safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination."[9]

Prior to adoption, amendments also were made to the Comments to Model Rule 8.4(g). A sentence regarding peremptory challenges was added to Comment 5. The sentence provides: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g)."[10] Model Rule 8.4(g) contains other limitations including that the Rule "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with [Model] Rule 1.16. …[The Rule] does not preclude legitimate advice or advocacy consistent with… [the Model] Rules."[11]

In addition, Comment 4 to Model Rule 8.4(g) provides that "[l}awyers may engage in conduct undertaken to promote diversity and inclusion without violating th[e] Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse student organizations."[12] Comment 5 also states that "[a] lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the

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[8] "ABA adopts new anti-discrimination Rule 8.4 (g)," ABA, September, 2016, http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html

[9] *Id*.

[10] Model Rule 8.4(g), Comment 5. This sentence previously appeared in former Comment 3 to Rule 8.4. The sentence has been characterized as the "Batson Sentence," stemming from the United States Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), in which the Supreme Court held that the Equal Protection Clause of the Constitution prohibits a prosecutor from using peremptory challenges based on race. See "ABA adopts new anti-discrimination Rule 8.4 (g)," ABA, September, 2016, http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html.

[11] Model Rule 8.4(g).

[12] Model Rule 8.4(g), Comment 4.

lawyer's practice to members of underserved populations in accordance with these Rules and other law."[13]

Notwithstanding the modifications and limitations contained in the final version of Model Rule 8.4(g) and the Comments, there has been significant negative commentary concerning the new Rule, including claims that the ABA has overruled First Amendment protections of free speech[14] and religious liberty,[15] and that the ABA's actions "border on fascism."[16]

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[13] Model Rule 8.4(g), Comment 5.

[14] *See* Ron Rotunda, "ABA Overrules First the Amendment," Wall Street Journal, August 16, 2016. *See also* a somewhat more vehement attack in this same regard in Brad Abramson, "American Bar Association attacks attorney speech rights," Jurist, Professional Commentary, August 20, 2016, http://www.jurist.org/hotline/2016/08/brad-abramson-speech-rights.php

[15] Nate Madden, "American Bar Association Rule is a Nightmare for Religious Liberty," Conservative Review, August 9, 2016, https://www.conservativereview.com/commentary/2016/08/amended-bar-association-rule-is-a-nightmare-for-religious-liberty Madden writes: "Opponents of the measure … claim that the [Rule's] provisions… would create a de facto 'speech code' for attorneys … potentially purging certain political, philosophical, or even theological viewpoints from the profession as a whole." *Id.*

[16] Edwin Meese III and Kelly J. Schackleford, Letter to Patricia Lee Refo, ABA House of Delegates, August 5, 2016, http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf

In the letter, Meese and Schackleford state:

> "[B]randing certain opinions on matters of race and socioeconomics, certain religious-based beliefs on marriage, abortion, and moral judgments on various subjects, as so deplorable that they should trigger draconian sanctions is truly noxious to the foundational principles of a free society. Such hostility to those who deviate from the approved orthodoxy resembles the laws and tactics of oppressive regimes around the globe that America unapologetically opposes. It is not an overstatement to say that this proposed rule borders on fascism."

Id. Accord, Edwin Meese III and Kelly J. Schackleford, "How the lawyers plan to stifle speech and faith," Washington Times, August 17, 2016. http://www.washingtontimes.com/news/2016/aug/17/how-the-lawyers-plan-to-stifle-speech-and-faith/

IV. Scope of Model Rule 8.4(g)

In spite of the criticisms of Model Rule 8.4(g), it has been adopted and is available for consideration by state jurisdictions that have not yet formulated such a rule or have a rule but may wish to amend it following the approach of Model Rule 8.4(g). As such, law firm risk management should be familiar with the scope of Model Rule 8.4(g)'s provisions and, as well, with the scope of any similar state provision applicable in a firm's jurisdiction/s.

Under Model Rule 8.4 (g), 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."[17] Comment 3 to Model Rule 8.4(g) defines discrimination as including "harmful verbal or physical conduct that manifests bias or prejudice towards others."[18] Comment 3 also defines harassment as including: "sexual harassment and derogatory or demeaning verbal or physical conduct,"[19] and sexual harassment is defined as including "unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature."[20]

Perhaps most important for law firm risk management with regard to Model Rule 8.4(g) and similar state provisions is the listing of the type of activities encompassed by the terms "conduct related to the practice of law." Comment 4 to Model Rule 8.4(g) provides that activities related to the practice of law include:

--"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 practice", and

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[17] Model Rule 8.4(g).

[18] Model Rule 8.4(g), Comment 3.

[19] *Id.*

[20] *Id.* In addition, Comment 3 provides that "[t]he substantive law of anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (g)." Model Rule 8.4(g), Comment 3.

--"participating in bar association, business or social activities in connection with the practice of law."[21]

Hence, the types of activities that can lead to charges of professional misconduct against lawyers under Model Rule 8.4(g) are many in number. "Conduct related to the practice of law" appears to extend to a lawyer's dealings with *all* whom are involved with the lawyer's legal matters, as well as to a lawyer's actions in firm operation and management -- which would include hiring, promotion, and retention -- and when participating in bar, business or social activities in connection with law practice.[22]

V. Conclusion.

Model Rule 8.4(g) is controversial. There are concerns that it does not go far enough in eradicating discrimination and harassment in the legal profession. On the other hand, there is criticism that it goes too far and violates Constitutional principles.

Notwithstanding these concerns and criticisms, Model Rule 8.4(g) and similar state provisions have been adopted. Thus, law firm risk management should educate themselves and firm lawyers as to:

--the applicable law in the firm's jurisdiction/s regarding the ethics consequences of lawyer discrimination or harassment of others based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status;

--whether applicable law employs a "knowledge" requirement such as that contained in Model Rule 8.4(g) in order for a lawyer's discriminatory or harassing conduct to constitute professional misconduct;

--whether applicable law requires, as does Model Rule 8.4(g), that for a lawyer's discriminatory or harassing conduct to constitute professional misconduct it must be related to the practice of law;

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[21] ABA Mode Rule 8.4(g), Comment 4.

[22] The breath of coverage of Model Rule 8.4(g) is precisely what troubled some commentators who claim that the terms "related to the practice of law" are ambiguous, the terms "harass" and "discriminate" are vague, and that the entire Model Rule is overly broad. *See* Brad Abramson, "American Bar Association attacks attorney speech rights," Jurist, Professional Commentary, August 20, 2016, http://www.jurist.org/hotline/2016/08/brad-abramson-speech-rights.php

--what types of lawyer conduct under applicable law are considered to be discriminatory or harassing conduct, and

--what types of lawyer activities under applicable law are considered to be related to the practice of law.

An understanding of the above aspects of applicable law will inform firm lawyers as to what discriminatory or harassing behavior constitutes ethical misconduct. It also should aide in preventing civil claims against a firm or charges of professional misconduct against firm lawyers based on allegations of attorney discrimination or harassment.