2022

Anti-Discrimination Ethics Rules and the Legal Profession

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ANTI-DISCRIMINATION ETHICS RULES AND THE LEGAL PROFESSION

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I. INTRODUCTION

"Reputation ought to be the perpetual subject of my Thoughts, and Aim of my Behaviour. How shall I gain a Reputation! How shall I Spread an Opinion of myself as a Lawyer of distinguished Genius, Learning, and Virtue."[1] So wrote twenty-four-year-old John Adams in his diary in 1759.[2] He had been a licensed lawyer for just three years at that time, and had already believed himself to be hounded by "Petty foggers" and "dirty Dablers in the Law"—unlicensed attorneys who, Adams claimed, fomented vexatious litigation, for the fees they might earn.[3] Adams believed his embrace of virtue, along with genius and learning, would gain him a good reputation among the people of Braintree, Massachusetts.[4] That reputation would enable him to succeed in the practice of law.

Just eleven years later, Adams represented both Captain Thomas Preston and the eight soldiers tried for murder in the Boston Massacre.[5] Though a patriot supporting the cause of the colony of Massachusetts, Adams willingly defended servants of the British crown. Fellow patriots and opposing loyalists alike viewed suspiciously nearly every action Adams took in both trials.[6] He helped gain an acquittal for Preston, and

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1. JOHN ADAMS, *Diary and Autobiography of John Adams*, *in* THE ADAMS PAPERS, at 78 (L. H. Butterfield ed., Ser. No. 1, 1956).

2. *Id.* at xiii, 78.

3. *Id.* at 137-38.

4. *Id.* at 137.

5. HILLER B. ZOBEL, THE BOSTON MASSACRE 242 (1st ed. 1970); ERIC HINDERAKER, BOSTON'S MASSACRE 187, 189 (2017) (ebook).

6. ZOBEL, *supra* note 5, at 242, 247-48. *But see* HINDERAKER, *supra* note 5, at 193 (explaining how the townsmen had ample opportunity to "assert themselves by packing Queen

subsequently as well for six of the eight soldiers in their trial.[7] The two soldiers convicted were found guilty of manslaughter, not murder.[8] Both received benefit of clergy instead of a death sentence.[9] Adams managed to avoid both the patriotic clamor for blood and loyalist demand for vindication. His actions, in hindsight, have long been viewed as one of the most courageous efforts in the history of the American legal profession.[10]

Very few lawyers ever find themselves in a position even somewhat similar to Adams's. On the rare occasions when they do, the choice can be between living according to one's principles or maintaining one's practice.[11]

Lawyers have justified their exercise of immense power in the American system of government by proclaiming their independence from both government and community, and by their adherence to norms of lawyer ethics. When pressed, the legal profession will qualify these assertions. Independence from government and the community means relative independence. Lawyers are licensed by the government, but the bar is largely self-regulated, lessening the pressures a government might bring to bear on a maverick lawyer.[12] Lawyers are also part of the community in which they practice, and if the community shuns the lawyer because it finds repellent her clients, her ability to earn a living practicing law may be fatally compromised.

The consensus view that lawyers are "relatively" independent of state and society greatly reduces the importance of virtue in the practice of law. Because lawyers are largely insulated from most of the pressures state or society might bring to bear, the instances in which a lawyer must choose between virtue and livelihood are few. Additionally, the adversary system's emphasis on zealous and diligent representation encourages lawyers to consider their role in more liberal than

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Street and the courtroom with prospective jurors hostile to Preston and the soldiers [but] again, there is no evidence that they did so").

7. HINDERAKER, *supra* note 5, at 187.

8. *Id.*

9. *See id.* at 210.

10. *See Law Day Celebrates Legacy of President John Adams*, A.B.A. (May 1, 2011), https://www.americanbar.org/advocacy/governmental_legislative_work/publications/governmental_affairs_periodicals/washingtonletter/2011/may/2011lawday. For example, in 2011, President Barack Obama declared the annual May 1 Law Day in honor of "The Legacy of John Adams: From Boston to Guantanamo." *See id.*

11. *See, e.g.*, MICHAEL S. ARIENS, THE LAWYER'S CONSCIENCE: A HISTORY OF AMERICAN LAWYER ETHICS (forthcoming 2022) (discussing difficulties some lawyers faced in representing alleged Communists during the early 1950s and civil rights activists in the early 1960s).

12. MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020).

communitarian terms.[13] Only a prosecutor has a duty to seek justice.[14] All other practicing lawyers serve as agents of their clients.[15] The lawful goals of the representation are for the client to decide; the lawyer acts to try to fulfill those goals.[16] Whether those goals are socially harmful or valuable is irrelevant once the lawyer agrees to represent the client.[17]

When instances of lawyer misconduct become public knowledge, lamentations follow regarding the power the legal profession exercises. Lawyers usually respond to a lawyer's scandal by emphasizing paltry few miscreants are licensed to practice law. Most lawyers, apologists argue, conform their conduct to the rules of lawyer ethics.[18] They serve their clients, and by extension the community, competently and admirably.

As far back as 1786, in response to a series of essays in a Boston newspaper advocating the abolition of the legal profession, "A Lawyer" replied in agreement: "That there are abuses in the profession, productive of private distress and publick uneasiness, I most readily agree."[19] But the number of lawyers abusing their position was small. Nearly two centuries later, American Bar Association ("ABA") President David Maxwell reached a similar conclusion.[20] His 1957 address to ABA members praised the dedication of lawyers to the public interest.[21] He then complained that "the contumacious conduct of an infinitesimal number of our profession who persist in flouting our canons of ethics" instead commanded the attention of the public.[22] Whether "A Lawyer" and Maxwell were empirically accurate in their

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13. *See* ARIENS, *supra* note 11; *see also Final Report of the Committee on Code of Professional Ethics*, 33 ANN. REP. A.B.A. 567, 579 (1908).

14. *See Final Report of the Committee on Code of Professional Ethics*, *supra* note 13, at 576.

15. *See, e.g.*, James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court"*, 48 BUFF. L. REV. 349, 387 (2000).

16. *Id.* at 400-01.

17. *Id.* at 403-04.

18. *See* David F. Maxwell, *The Public View of the Legal Profession*, 82 ANN. REP. A.B.A. 362, 362 (1957).

19. Benjamin Russell, *Mifcellanies for the Centinel to Honestus*, MASS. CENTINEL, April 26, 1786. This was in reply to HONESTUS, OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW 3, 5-6 (1786) [hereinafter OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW]. Revised versions can be found in Honestus, *Observations on the Pernicious Practice of the Law*, *in* SOURCES OF THE HISTORY OF THE AMERICAN LAW OF LAWYERING 45, 45-104 (Michael H. Hoeflich ed., 2007) [hereinafter SOURCES OF THE HISTORY OF THE AMERICAN LAW OF LAWYERING], and in Honestus, *Observations on the Pernicious Practice of the Law*, 13 AM. J. LEGAL HIST. 244-302 (1969). The 1819 edition no longer called for the abolition of the legal profession. *See* OBSERVATIONS ON THE PERNICIOUS PRACTICE OF THE LAW, *supra*, at 5-6; SOURCES OF THE HISTORY OF THE AMERICAN LAW OF LAWYERING, *supra*, at 51, 53.

20. *See* Maxwell, *supra* note 18, at 362.

21. *See id.*

22. *See id.*

assessment, that is, that the number of unethical lawyers was a small part of the legal profession, is unclear.[23] But the legal profession, like every other human institution, has always comprised the virtuous and the venal.

From the late eighteenth through most of the twentieth century, the disbarment of a lawyer was rare.[24] This was in significant part due to the "scandalous" situation that, in many states, the discipline of lawyers was "practically nonexistent."[25] Other states had a formal system of lawyer discipline, but it was often "antiquated" and consequently ineffective.[26] These were two of the conclusions found in the ABA's 1970 Clark Report, named after former Supreme Court Justice Tom Clark.[27] Clark was the chairman of an ABA Special Committee evaluating the legal profession's efforts to discipline lawyer misconduct.[28] The scandal exposed in the Clark Report served as the impetus to act for those charged with protecting the public from unethical lawyers. Even today, though nearly all states have adopted modernized and more effective lawyer disciplinary systems, the percentage of lawyers who are publicly disciplined each year is around 0.17% of the profession.[29] The 2019 ABA Survey on Lawyer Discipline listed 2,308 public disciplinary

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23. *Cf.* JEROME E. CARLIN, LAWYERS ON THEIR OWN 160, 210-11 (1962) (arguing more ethical lapses of lawyers exist than ordinarily considered); JEROME E. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 52-53, 67, 72-76 (1966) (finding that a significant number of lawyers do not accept ethical norms of the profession and that more ethical violations exist than commonly believed within the profession).

24. *See, e.g.*, *Report of the Special Committee on Evaluation of Disciplinary Enforcement*, 95 ANN. REP. A.B.A. 783, 797-98, 856, 971 (1970) (explaining that, in most jurisdictions, despite the authority to institute investigations and disciplinary proceedings for attorney misconduct, such authority was "rarely used" and no disciplinary action was taken).

25. *Id.* at 797.

26. *Id.*

27. *See id.* at 783, 797-98; *see also* Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 33-35 (2004–2005).

28. *See* Johnson, *supra* note 27, at 35.

29. *See* A.B.A. CTR. FOR PRO. RESP. STANDING COMM. ON PRO. REGUL., 2019 SURVEY ON LAWYER DISCIPLINE SYSTEMS (S.O.L.D.) CHART III- PART B SANCTIONS IMPOSED 5 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sold-survey/2019-chart3b.pdf; Nicole Black, *ABA 2019 Report: Lawyer Demographics, Earnings, Tech Choices, and More*, MYCASE BLOG https://www.mycase.com/blog/aba-2019-report-lawyer-demographics-earnings-tech-choices-and-more (last visited Apr. 23, 2022); *see also* MICHAEL ARIENS, LONE STAR LAW: A LEGAL HISTORY OF TEXAS 186 (2011) (noting that by 2006–2007, just 0.4% of all licensed Texas lawyers were publicly disciplined, and only thirty, or 0.038%, were disbarred); Debra Moss Curtis & Billie Jo Kaufman, *A Public View of Attorney Discipline in Florida: Statistics, Commentary, and Analysis of Disciplinary Actions Against Licensed Attorneys in the State of Florida from 1988-2002*, 28 NOVA L. REV. 669, 689 (2004) (finding that just 0.30% of all licensed Florida lawyers were disciplined in 2003).

actions of lawyers, of whom only 565 (389 involuntarily, and 176 voluntarily) were disbarred.[30]

Given how few lawyers are the subject of public discipline, either "A Lawyer" and Maxwell were right, or the legal profession is not effectively disciplining lawyers for misconduct. Whatever the actual state of actionable lawyer misconduct, the legal profession spends a great deal of time and effort to assure the public that it takes seriously its responsibility to protect the public from unprofessional lawyer conduct. It does so most prominently through amending and supplementing the rules of professional conduct.[31]

Part II describes the relevant changes in the goals of the rules of ethics applicable to lawyers from the ABA's 1908 Canons of Professional Ethics, through its 1983 Model Rules of Professional Conduct.[32] Part III evaluates the recent efforts in Connecticut, New York, and Pennsylvania to proscribe discriminatory and harassing conduct by lawyers against protected persons, and calls on their respective Disciplinary Counsels to amend their ethics rules accordingly.[33]

These efforts are a response to the ABA's adoption in 2016 of Model Rule 8.4(g), an anti-discrimination (and anti-harassment) rule. Rule 8.4(g) declares it unprofessional conduct 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."[34]

Pennsylvania's 2020 effort to amend its anti-discrimination rule in light of (though not a copy of) Model Rule 8.4(g) was held unconstitutional on free speech viewpoint-discrimination grounds later that year.[35] The District Court's decision has crystallized the issue of the constitutionality of the various anti-discrimination ethics provisions

30. A.B.A. CTR. FOR PRO. RESP. STANDING COMM. ON PRO. REGUL., *supra* note 29, at 5. The survey lacked information from California, Massachusetts, New Jersey, the First and Third Departments of New York, South Carolina, South Dakota, Vermont, and West Virginia. *Id.* at 6.

31. *See, e.g.*, *Model Rules of Professional Conduct*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct (last visited Apr. 23, 2022) (showing the recent changes to the Model Rules, with the most recent being in August 2020).

32. *See infra* Part II.

33. *See infra* Part III.B.

34. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

35. Greenberg v. Haggerty, 491 F. Supp. 3d 12, 27, 29, 30, 33 (E.D. Pa. 2020).

adopted across states.[36] Pennsylvania responded with an amended rule.[37] Connecticut recently adopted an amended anti-discrimination provision.[38] A Committee of the New York State Bar Association has worked on amending its anti-discrimination ethics rule for over half a decade.[39] This Article will look at whether these efforts meet Supreme Court precedent regarding impermissible viewpoint-discrimination under the First Amendment.[40]

II. THE GOAL OF THE RULES OF ETHICS

In 1907, Thomas Hubbard, chairman of the ABA's Committee on Code of Professional Ethics, informed its members of the Committee's progress.[41] He quoted from a letter sent to him by Supreme Court Justice David Brewer regarding the structure of the Code.[42] Brewer urged the ABA to create an ethics code consisting of two parts. One part listed "a body of rules to be given operative and binding force."[43] The second part was "a canon of ethics, which shall discuss the duties of lawyers under the various conditions of professional action."[44] The body of rules constituted minimum standards in the practice of law. The canons of ethics were to list "ethical considerations which should ever control the action of the profession."[45] The Committee followed Brewer's suggestion: it drafted a distinct set of thirty-two canons comprising Brewer's "ethical considerations," followed by an Oath of Admission

36. *See generally id.* at 28 ("Although the final version of Rule 8.4(g) does not include this comment, the fatal language, 'by words . . . manifest bias or prejudice,' remains. . . . That this language . . . remained in the final version of Rule 8.4(g) illustrates the Rule's broad and chilling implications.").

37. *See Supreme Court Amends Harassment Provisions of Rule 8.4*, DISCIPLINARY BD. SUP. CT. PA. (July 27, 2021), https://www.padisciplinaryboard.org/news-media/news-article/1439/supreme-court-amends-harassment-provisions-of-rule-84; *see also Greenberg*, 491 F. Supp. 3d at 32.

38. *See* CONN. RULES OF PRO. CONDUCT r. 8.4(g) (2021).

39. Memorandum from the N.Y. State Bar Ass'n Comm. on Standards Att'y Conduct, COSAC Proposal to Amend Rule 8.4(g) of the New York Rules of Professional Conduct 4-6 (June 4, 2021), https://nysba.org/app/uploads/2021/03/COSAC-Report-on-Rule-8.4g-FINAL-Approved-by-HOD-June-12-2021.pdf [hereinafter N.Y. State Bar Ass'n Memorandum].

40. *See infra* Part III.B.1.

41. *Transactions of the Thirtieth Annual Meeting of the American Bar Association*, 31 ANN. REP. A.B.A 3, 61, 64 (1907).

42. *Id.* at 62-63.

43. *Id.*

44. *Id.* at 63.

45. *Id.*

listing seven "rules."[46] In 1908, the ABA adopted the Code of Professional Ethics.[47]

One example to help understand the different purposes of the two parts of the 1908 ABA Code is the lawyer's duty not to divulge a client's confidences.[48] That duty is found as the fifth of seven statements every lawyer is sworn by oath to obey.[49] The failure to keep true to one's oath was intended to lead to disbarment.[50] None of the thirty-two canons adopted by the ABA concerned the lawyer's duty to maintain the confidences of a client. That was because the purpose of the canons was to offer "ethical considerations."[51] Such considerations guided the lawyer faced with two or more choices in how to act. The duty to keep a client's confidences was clear; it did not permit the lawyer any discretion to act.[52]

The ABA did not revisit the issue of the ethical standards of the legal profession until 1964, when a Special Committee, known as the Wright Committee, began a six-year effort culminating in the adoption of the Code of Professional Responsibility (1969).[53]

The Code of Professional Responsibility organized the standards of ethical behavior in three parts. First, it listed nine black-letter canons, which spoke more and less generally about a topic of lawyer ethics.[54]

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46. *Id.*; *see Transactions of the Thirty-First Annual Meeting of the American Bar Association*, 33 ANN. REP. A.B.A. 3, 57-59 (1908).

47. *Transactions of the Thirty-First Annual Meeting of the American Bar Association*, *supra* note 46, at 85-86.

48. *Final Report of the Committee on Code of Professional Ethics*, *supra* note 13, at 577.

49. *Id.* at 585 ("I will maintain the confidence and preserve inviolate the secrets of my client.").

50. *Id.* at 584-85.

51. *Transactions of the Thirtieth Annual Meeting of the American Bar Association*, *supra* note 41, at 63.

52. *Cf.* MODEL RULES OF PRO. CONDUCT 6.1 (AM. BAR ASS'N 2020). The 1908 Code did not consider possible exceptions to this duty, such as disclosing a confidence when the lawyer believed it necessary to prevent the death of a third person. *See Transactions of the Thirty-First Annual Meeting of the American Bar Association*, *supra* note 46, at 73; *see also* COLIN M. LEONARD ET AL., PLENARY THREE: CANDOR BEFORE THE TRIBUNAL 1-2 (2019), https://nysba.org/NYSBA/Sections/Commercial%20Federal%20Litigation/ComFed%20Display%20Tabs/Events/2019/Spring%20Meeting%20Materials/Candor%20Before%20the%20Tribunal.pdf.

53. *See Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 ANN. REP. A.B.A. 378, 389-92 (1969) (showing that, though there was some disagreement, the House eventually adopted the code as proposed); *see also* Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 433-43 (2008) [hereinafter *American Legal Ethics in an Age of Anxiety*] (discussing the history of the Code); Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689, 691 (2016) [hereinafter *The Last Hurrah*].

54. *See American Legal Ethics in an Age of Anxiety*, *supra* note 53, at 439; *see also Report of the Special Committee on Evaluation of Ethical Standards*, 94 ANN. REP. A.B.A. 729, 734, 738, 756, 759, 763, 772, 774, 791, 794 (1969); *The Last Hurrah*, *supra* note 53, at 700.

For example, Canon 7 declared, "A lawyer should represent a client zealously within the bounds of the law."[55] Within each canon, the drafters included ethical considerations and, finally, disciplinary rules. "The [e]thical [c]onsiderations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations."[56] The disciplinary rules were "unlike" the ethical considerations because the former were "mandatory in character."[57]

The ABA's 1969 Code had a brief life. Though states eagerly adopted the Code initially, by 1977 the ABA called for a new statement of the ethical responsibilities of lawyers.[58] The ABA created another Special Committee on Evaluation of Ethical Standards, known after its chairman Robert Kutak, as "the Kutak Commission," to draft a new code of ethics.[59]

The Kutak Commission quickly decided to dismantle the tripartite structure of the 1969 Code, and replace it with a "'Restatement'-like" structure.[60] The Commission intended to declare a series of "black-letter" rules followed by explanatory commentary.[61] The rules stated the minimum standard of conduct required of a lawyer. A violation of that standard subjected the lawyer to discipline. In early 1982, after the Kutak Commission issued its Proposed Final Draft, the ABA House of Delegates formally approved of the Kutak Commission's "Restatement" approach.[62] The Model Rules of Professional Conduct were finally approved by the ABA at its August 1983 annual meeting.[63]

The two succeeding ethics reform efforts of the ABA—Ethics 2000 and Ethics 20/20—have worked only at the margins of the Model Rules. Most importantly, those efforts kept unaltered the Restatement policy

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55. *Report of the Special Committee on Evaluation of Ethical Standards*, *supra* note 54, at 774.

56. CODE OF PRO. RESP. pmbl. & preliminary statement (AM. BAR ASS'N 1969), *reprinted in* CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS 1, 1-2 (1969).

57. *Id.*

58. William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, BAR LEADER, Nov.–Dec. 1977, at 2, 2-3. Spann was serving as American Bar Association President. *Id.*

59. *See The Last Hurrah*, *supra* note 53, at 689-92 (summarizing the history of development of Model Rules of Professional Conduct in the late 1970s and early 1980s).

60. *See id.* at 700.

61. *See id.* (noting initial decisions of the Kutak Commission).

62. *See Proceedings of the 1982 Midyear Meeting of the House of Delegates*, 107 ANN. REP. A.B.A. 273, 301 (1982).

63. *Proceedings of the 1983 Annual Meeting of the House of Delegates*, 108 ANN. REP. A.B.A. 763, 766-88 (1983).

that the Model Rules serve as minimum standards of professional conduct.

The most important instance in the Model Rules for which the above statement is untrue is Model Rule 6.1. The initial efforts of the Kutak Commission included a provision mandating lawyers to annually perform a number of hours of pro bono legal services.[64] After substantial criticism, the Commission eliminated the mandatory aspect of public interest pro bono.[65] It kept Rule 6.1, and altered the duty with the plea, "a 'lawyer shall render unpaid public interest legal service.'"[66]

III. ANTI-DISCRIMINATION, ETHICS RULES, AND THE FIRST AMENDMENT

A. Introduction

Model Rule 8.4(g) was adopted by the ABA in 2016.[67] It states it is 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."[68] The rule was the culmination of a quarter-century-long effort to sanction discriminatory conduct in the legal profession.[69] In fact, twenty-five jurisdictions had already adopted anti-discrimination provisions, making it an ethical violation for a lawyer to harass or discriminate against another, before the ABA ever acted.[70] Even before these states adopted their anti-discrimination provisions, they used other standards to discipline lawyers for abusive

64. *See The Last Hurrah*, *supra* note 53, at 708, 715 (noting mandatory pro bono was included in both the 1979 "working draft" and 1980 Discussion Draft, but not in the Proposed Final Draft or later).

65. *Id.* at 717-18.

66. *Id.* at 709.

67. *See, e.g.*, Michael Ariens, *Model Rule 8.4(g) and the Profession's Core Values Problem*, 11 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 180, 216 (2021) (recounting history and adoption of Model Rule 8.4(g)).

68. MODEL RULES OF PRO. CONDUCT 8.4(g) (AM. BAR ASS'N 2020).

69. *See* Ariens, *supra* note 67, at 215 (explaining that Comment [2] served as the exclusive authority on the issue of sanctioning a lawyer's discriminatory or harassing behavior, for fifteen years); *see also id.* at 210-16 (noting the absence of debate and vote at the culmination of the fifteen-year gap in authority on the issue).

70. *See id*. at 220 n.264 (citing authorities).

verbal conduct that evidenced discrimination on the basis of race and gender.[71]

Since 2016, no published disciplinary case involving discriminatory speech has appeared. Four states, Vermont (2017),[72] Maine (2019),[73] New Mexico (2020),[74] and Pennsylvania (2020),[75] have adopted an anti-discrimination rule. Pennsylvania's was the subject of an immediate and successful pre-enforcement challenge in *Greenberg v. Haggerty*.[76]

Both before and since the district court's decision in *Greenberg*, bar associations and other organizations tied to a state's legal profession have wrestled with anti-discrimination ethics provisions. This Subpart calls in three states, Pennsylvania, New York, and Connecticut,[77] to draft ethics provisions that sanction discrimination and harassment by lawyers and which meet the demands of the Constitution.

B. Amending State Anti-Discrimination Lawyer Ethics Rules

1. *Greenberg* and Pennsylvania's Amended Rule 8.4(g)

In *Greenberg v. Haggerty*, Pennsylvania's anti-discrimination Rule 8.4(g) was held unconstitutional on First Amendment viewpoint-discrimination grounds.[78] Its rule declared it misconduct for a lawyer to, "in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination" on the basis of eleven different grounds, including race, sex, and religion.[79] Pennsylvania subsequently dropped its appeal. In July 2021,

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71. *See id.* at 214 (noting some ethics code provisions prohibiting discrimination on account of race, gender, ethnicity or other category, and others discouraging or prohibiting lawyer manifestations of bias or prejudice, in addition to their prohibition on discrimination); *see also In re* Schiff, 599 N.Y.S.2d 242, 242-43 (N.Y. App. Div. 1993) (per curiam) ("While representing a plaintiff at a deposition in a personal injury action, respondent was unduly intimidating and abusive toward the defendant's counsel, and he directed vulgar, obscene and sexist epithets toward her anatomy and gender. Respondent's conduct is inexcusable and intolerable.").

72. Ariens, *supra* note 67, at 221 & n.265.

73. *Id.* at 221 & n.266.

74. *Id.* at 221 & n.267.

75. *Id.* at 221 & n.268.

76. 491 F. Supp. 3d 12, 27, 29, 30, 32-33 (E.D. Pa. 2020).

77. For a discussion on how Nebraska is beginning a similar process to consider amending its rule analogous to Model Rule 8.4(g), see Neb. State Bar Ass'n, *Notice of Comment Period* 1-3, https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/NE%20Notice%20of%20omment%20Period%203-508.4RuleAmds.pdf?_ga=2.258508041.2069473406.1644513882-1614642460.1644513882 (last visited Apr. 23, 2022).

78. 491 F. Supp. 3d at 32-33.

79. *Id.* at 16 (quoting original PA. RULES OF PRO. CONDUCT r. 8.4(g) (2020)); *see also id.* at 17.

the Pennsylvania Supreme Court adopted an amended anti-discrimination Rule 8.4(g).[80] It declared it was misconduct for a lawyer to:

> [I]n the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. 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 advice or advocacy consistent with these [r]ules.[81]

The amended rule altered the original version in several ways. First, it deleted "by words or," before "conduct," thus limiting the rule's text to conduct.[82] Second, it re-structured its scienter requirement. It deleted the phrase "knowingly manifest bias or prejudice, or engage in" before "harassment."[83] It moved the scienter requirement to modify the verb "engage." It thus read, "knowingly engage in conduct."[84] Third, it limited the rule's applicability to "conduct constituting harassment or discrimination," and deleted the clause that defined harassment and discrimination in light of federal, state, and local law.[85] As a result, the amended rule was directed at a lawyer who "knowingly engage[d] in conduct constituting harassment and discrimination."[86] The same eleven categories of prohibited discriminatory or harassing conduct remained as before.

In addition to amending Rule 8.4(g), the Court amended the comments to Rule 8.4.[87] It did so in two important respects. First, it defined the practice of law to include interactions with others "in connection with representation of a client," "operating or managing a law firm," and participation in a number of bar-related activities, but not any communication "outside th[os]e contexts."[88] Second, it further

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80. *See Supreme Court Amends Harassment Provisions of Rule 8.4*, *supra* note 37.

81. PA. RULES OF PRO. CONDUCT r. 8.4(g) (2021).

82. *Compare id.*, *with* PA. RULES OF PRO. CONDUCT r. 8.4(g) (2020).

83. *Compare* PA. RULES OF PRO. CONDUCT r. 8.4(g) (2021), *with* PA. RULES OF PRO. CONDUCT r. 8.4(g) (2020).

84. *Compare* PA. RULES OF PRO. CONDUCT r. 8.4(g) (2021), *with* PA. RULES OF PRO. CONDUCT r. 8.4(g) (2020).

85. *Compare* PA. RULES OF PRO. CONDUCT r. 8.4(g) (2021), *with* PA. RULES OF PRO. CONDUCT r. 8.4(g) (2020).

86. *Compare* PA. RULES OF PRO. CONDUCT r. 8.4(g) (2021), *with* PA. RULES OF PRO. CONDUCT r. 8.4(g) (2020).

87. Greenberg v. Haggerty, 491 F. Supp. 3d 12, 16-17 (E.D. Pa. 2020).

88. PA. RULES OF PRO. CONDUCT r. 8.4(g) cmt. 3 (2021).

defined harassment in Comment [4] and discrimination in Comment [5].[89]

Harassment was defined to include "conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g)."[90] Comment [4] included a second sentence banning sexual harassment, including by verbal conduct, that is, speech ("requests for sexual favors").[91]

Discrimination was defined in Comment [5] as:

> [C]onduct that a lawyer knows or manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in paragraph (g); to disregard relevant considerations of individual characteristics or merit because of one or more of the characteristics; or to attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.[92]

By deleting the specific mention in original Rule 8.4(g) that a lawyer's "words" could trigger discipline, Pennsylvania's amended Rule 8.4(g) appears to seek to avoid a First Amendment speech challenge. In both Comment [4] and Comment [5], the Court expanded the definitions of harassment and discrimination, respectively, which enveloped some speech within its understanding of conduct. That limits the effectiveness of the Court's apparent intentions.

Comment [4] defines harassment to include "conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person."[93] Government prohibitions on speech that intends to intimidate is likely constitutional.[94] In *Virginia v. Black*, the Supreme Court held unconstitutional Virginia's ban on cross-burning.[95] In doing so, however, the Court declared that "a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate."[96] Virginia's statute was unconstitutional because it made burning any cross *prima facie* evidence of an intent to intimidate.[97] All of the Justices, other than Justice Thomas, concluded the defendants' conduct in burning a cross was "expressive conduct," making Virginia's ban

89. *See id.* cmts. 4, 5.
90. *Id.* cmt. 4.
91. *Id.*
92. *Id.* cmt. 5.
93. *Id.*
94. Virginia v. Black, 538 U.S. 343, 348, 360, 362-63, 365 (2003).
95. *See id.* at 347-48.
96. *Id.* at 347.
97. *See id.* at 367.

subject to First Amendment analysis.[98] The Pennsylvania Supreme Court's use of "intimidate" appears to have met the strictures of *Virginia v. Black*.

Ordinarily, one "denigrates" a person, institution, or other object through speech, not conduct.[99] One may intend to denigrate another through racist speech. In the 1952 case of *Beauharnais v. Illinois*, the Supreme Court held constitutional an Illinois statute that criminally punished a person for speech that "portrays depravity, criminality unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion."[100] In *Chaplinsky v. New Hampshire*, the Supreme Court held constitutional a criminal ban on "fighting words," "face-to-face words plainly likely to cause a breach of the peace by the addressee."[101] Speech that sexually objectifies the listener is also denigrating.[102] Sexual harassment through verbal conduct may be prohibited by the government without raising any First Amendment concerns.[103]

One difficulty with the Pennsylvania Supreme Court's definition of "conduct . . . intended to . . . denigrate or show hostility or aversion toward a person"[104] is the minimal value of *Beauharnais* and *Chaplinsky*. Though never formally overruled, *Beauharnais* is effectively a dead letter.[105] The fighting words doctrine enunciated in *Chaplinsky* remains in existence, but as the Montana Supreme Court recently noted, "[T]he United States Supreme Court has never again upheld a conviction based on the 'fighting words' categorical exception."[106] The Court's decision in *Cohen v. California* protecting "offensive" speech also limits the maneuvering room to prohibit some

98. *Id.* at 358; *id.* at 368 (Stevens, J., concurring); *id.* at 388 (Thomas, J., dissenting) ("I believe that the majority errs in imputing an expressive component to the activity in question . . . . In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means.").

99. *See Supreme Court Amends Harassment Provisions of Rule 8.4*, *supra* note 37.

100. 343 U.S. 250, 251 (1952).

101. 315 U.S. 568, 573 (1942).

102. *See, e.g.*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020) ("[S]exual harassment includes but is not limited to sexual advances, *requests* for sexual favors, and other *verbal* or physical conduct of a sexual nature that is unwelcome.") (emphasis added).

103. *See id.* ("Courts have consistently upheld professional conduct rules similar to Rule 8.4(g) against First Amendment Challenge.").

104. PA. RULES OF PRO. CONDUCT r. 8.4(g) cmt. 4 (2021).

105. *See* Nuxoll *ex rel*. Nuxoll. v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 672 (7th Cir. 2008) ("Anyway, though *Beauharnais v. Illinois* has never been overruled, no one thinks the First Amendment would today be interpreted to allow group defamation to be prohibited.") (citation omitted).

106. State v. Dugan, 303 P.3d 755, 762 (Mont. 2013); *see also* Gooding v. Wilson, 405 U.S. 518, 523 (1972) (narrowing the application of the fighting words doctrine).

vile lawyer speech.[107] The greater difficulty facing the Pennsylvania Supreme Court is the recent decision in *Matal v. Tam*.[108]

Simon Tam sought to register the trademark "The Slants," the name of a musical group, with the Patent and Trademark Office.[109] It refused to do so because the federal Lanham Act banned the registration of any trademark that might disparage any person.[110] As noted at the beginning of Justice Alito's opinion, "'Slants' is a derogatory term for persons of Asian descent, and members of the band are Asian-Americans. But the band members believe that by taking that slur as the name of their group, they will help to 'reclaim' the term and drain its denigrating force."[111] Though fractured in their reasons, the members of the Court unanimously (with Justice Gorsuch not participating) held the disparagement clause of the Lanham Act was unconstitutional on viewpoint-discrimination grounds.[112]

The following year, the Court held, in *National Institute of Family and Life Advocates v. Becerra*, that professional speech is not a category of speech subject to less stringent First Amendment evaluation than ordinary speech.[113] *Becerra* makes it much more likely lawyers will file First Amendment challenges to ethics rules.

Pennsylvania is on shakier ground in declaring as harassment "conduct that is intended to . . . show hostility or aversion to a person."[114] Expressive or verbal conduct by a lawyer in such a situation is easy to imagine. A lawyer represents a client alleging racial discrimination in housing, and learns in discovery the defendant's lawyer owns a Ku Klux Klan robe. The lawyer publicly speaks of her disgust that a lawyer would own such an item. The lawyer's verbal conduct demonstrates hostility to a person, and thus appears to meet the Comment [4]'s definition of harassment.

Explanatory Comment [5] on discrimination creates other interpretive problems: What is an "intention" to treat a person as an "inferior" through conduct, particularly expressive conduct?[115] A

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107. *See generally* 403 U.S. 15 (1971) (holding "Fuck the Draft" offensive but wholly protected speech); *see also Gooding*, 405 U.S. at 520. *But see Dugan*, 303 P.3d at 762 ("The Court clarified in *Cohen v. California* that words must be directed at a specific person and likely to provoke a violent response from the hearer to constitute protected 'fighting words.'") (citation omitted).

108. 137 S. Ct. 1744 (2017); *see* Iancu v. Brunetti, 139 S. Ct. 2294, 2303 (2019).

109. *Matal*, 137 S. Ct. at 1754.

110. *Id.* at 1751.

111. *Id.*

112. *Id.* at 1765-66.

113. 138 S. Ct. 2361, 2371-72 (2018).

114. PA. RULES OF PRO. CONDUCT r. 8.4 (2021).

115. *Id.* cmt. 5.

continuing legal education speaker urges abolition of the rules of professional conduct in favor of a market-based approach tied to legal malpractice. Vigorous debate opposing this idea might include one or more statements along the lines of, "Are you an idiot?" Does such a comment, which can be interpreted as attacking a person on the basis of "disability," (or otherwise if the speaker and listener are of differing races, religions, ethnicities and so on) subject the lawyer to discipline?

Zachary Greenberg has sued again in federal court, alleging amended Rule 8.4(g) is unconstitutional.[116] Amended Rule 8.4(g) runs into trouble not in its text, but in the explanatory comments that more broadly state that some kinds of verbal conduct are impermissible.

2. Amending New York's Rule 8.4(g)

On June 4, 2021, the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") issued its report on its proposal to amend New York's Rule 8.4(g).[117] COSAC's proposal was intentionally narrower than Model Rule 8.4(g).

COSAC's proposal, Proposed Rule 8.4(g)(1), bans "unlawful discrimination."[118] Making only unlawful discrimination subject to discipline appears to solve any First Amendment problem. Proposed Comment [5F], however, states, "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."[119] It is difficult to square these propositions. Why is a lawyer who has been found by a governmental actor to have engaged in discrimination not subject to discipline for that discriminatory act alone? The *Batson* rule, after all, is over thirty-five years old, and well-settled law.[120] Because COSAC's proposed rule prohibiting unlawful discrimination appears limited to non-expressive conduct, whether the government engaged in viewpoint-discrimination in banning only certain kinds of proscribable speech may not be at issue.[121] A lawyer found to have engaged in discrimination in making peremptory challenges is engaged in both speech and conduct.[122]

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116. Greenberg v. Haggerty, 491 F. Supp. 3d 12, 16-17 (E.D. Pa. 2020).

117. N.Y. State Bar Ass'n Memorandum, *supra* note 39, at 1. The Committee on Standards of Attorney Conduct's ("COSAC") is one of three proposals to amend New York's Rule 8.4(g). *See id.* at A-31. Because COSAC has written the narrowest of the three proposals, I focus on it.

118. *Id.* at 1.

119. *Id*. at 3.

120. *See generally* Batson v. Kentucky, 476 U.S. 79 (1986) (holding unconstitutional racially discriminatory peremptory challenge to jury venire member by prosecutor).

121. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992).

122. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3. (AM. BAR ASS'N 2020).

Proposed Rule 8.4(g)(2) declares it unprofessional conduct for a lawyer to engage in "harassment, whether or not unlawful."[123] Like the unlawful discrimination provision, a lawyer would be subject to discipline for harassment "on the basis of" any one of fourteen categories.[124] The scienter provision was also the same: a lawyer was subject to discipline if the lawyer knew, or reasonably should have known, the conduct, including verbal conduct, was harassment.[125] Proposed Rule 8.4(g)(3) defines harassment as 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."[126]

COSAC's definition comes close to the Equal Employment Opportunity Commission's ("EEOC") definition of harassment in the employment context. In that context, if a reasonable person would find the conduct, including verbal conduct, intimidating, hostile, or abusive, it has reached the level of severe and pervasive harassment.[127] The speech issues are twofold: First, can the EEOC's definition of harassment apply to verbal conduct outside of the employment context; and, second, is the adoption of the phrasing "derogatory or demeaning" in the second part of the third element, constitutionally relevant? Insofar as it limits speech that is offensive, it is. Whether harassment at a bar association meeting and harassment in the workplace are equivalent in law is uncertain.

COSAC adopts EEOC language in Comment [5C], which declared, "Petty slights, minor indignities and discourteous conduct without more do not constitute harassment."[128] The problem with this language is its negative implication: if speech is more than a "petty" slight, or greater than a "minor" indignity, or constitutes "discourteous" conduct (including verbal conduct), such speech may constitute harassment. This would likely sweep too far.

Proposed Rule 8.4(g)(4)(b) protects a lawyer's ability to "express views on matters of public concern in the context of teaching, public speeches, continuing legal education programs, or other forms of public

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123. N.Y. State Bar Ass'n Memorandum, *supra* note 39, at 2.

124. *See id.* at 2, 7, 17 (noting COSAC intentionally did not include socioeconomic status as one of the protected categories).

125. *Id.* at 7, 17-18.

126. *Id*. at 2.

127. *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/harassment (last visited Apr. 23, 2022).

128. N.Y. State Bar Ass'n Memorandum, *supra* note 39, at 3; *see Harassment*, *supra* note 127 ("Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality.").

advocacy or education, or in any other form of written or oral speech protected by the United States Constitution or the New York State Constitution . . . ."[129]

Connecticut made a similar statement in its Comment [6].[130] It is unclear what either is attempting to signal by such a statement. As a matter of constitutional law, these statements are both axiomatic and banal. The issue is whether the anti-discrimination rules impinge on free speech rights of lawyers, or have a chilling effect on constitutional speech by lawyers.

3. Amending Connecticut's Rule 8.4(7)

Connecticut's modified Rule 8.4(7) was made effective January 1, 2022.[131] It is the subject of a lawsuit raising First Amendment claims.[132]

As amended, Connecticut Rule of Professional Conduct 8.4(7) states:

> It is professional misconduct for a lawyer to: . . . (7) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital 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, or to provide advice, assistance or advocacy consistent with these rules.[133]

Connecticut Rule 8.4(7) avoids using the phrases "by words," or "verbal conduct."[134] By focusing on conduct that discriminates or harasses, the amended rule avoids many of the problems of Pennsylvania's original Rule 8.4(g). Like Pennsylvania's amended rule 8.4(g), Connecticut's amended rule is vulnerable to constitutional challenge in light of the comments that attended the rule change.

Connecticut added six comments to assist in the rule's interpretation. The first, Comment [3], states in part, "Discrimination includes harmful verbal or physical conduct directed at an individual or

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129. N.Y. State Bar Ass'n Memorandum, *supra* note 39, at 2.

130. CONN. RULES OF PRO. CONDUCT r. 8.4(7) (2021) ("A lawyer's conduct does not violate paragraph (7) when the conduct in question is protected under the first amendment of the United States constitution or article first, § 4 of the Connecticut constitution.").

131. *See id.*

132. *See id.*; *see also* Complaint at 3, Cerame & Moynahan v. Bowler, No. 3:21-cv-01502 (D. Conn. Nov. 10, 2021).

133. CONN. RULES OF PRO. CONDUCT r. 8.4(7) (2021).

134. *Id.*

individuals that manifests bias or prejudice on the basis of one or more of the protected categories."[135] If one stitches together the rule's text with this comment, it reads to the effect that a lawyer engages in discrimination when the lawyer reasonably should know the speech manifests bias or prejudice against a person or persons who are in one or more of the protected categories.

The use of the phrase "manifests bias or prejudice" in Comment [3] echoes language from Pennsylvania's original anti-discrimination rule. That language was first used in the Model Rules when it was added to Comment [2] to ABA Model Rule 8.4 in 1998.[136] Comment [2] took that phrase from Canon 3B(5) of the ABA's 1990 Model Code of Judicial Conduct, which continued as Rule 2.3(C) of the ABA's 2007 Model Code of Judicial Conduct.[137] Comment [2] of the 2007 Model Code of Judicial Conduct stated a judge manifested bias or prejudice through "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics."[138]

As applied to judges, the ban on manifesting bias or prejudice makes sense. Lawyers who demean witnesses, opposing parties, other lawyers, court personnel, and others, should not be praised. Their condemnatory speech, however, is fully protected under Supreme Court precedent.[139]

Comment [4] states, "Harassment includes severe or pervasive derogatory or demeaning verbal or physical conduct."[140] This is similar to COSAC's definition of harassment in Proposed Rule 8.4(g)(3)(c)(ii).[141] Again, this definition comes close to the EEOC's definition of harassment in the employment context. As with COSAC's Proposed Rule, the issues are whether harassment as defined in the workplace also applies in other contexts. Additionally, whether the phrasing "derogatory or demeaning" constitutes offensive but protected speech is uncertain. However, it appears Connecticut has a stronger case in defending its definition of harassment than discrimination.

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135. *Id.* cmt. 3.

136. *See Report of the Standing Committee on Ethics and Professional Responsibility*, 123 ANN. REP. A.B.A. 81, 81 (1998).

137. MODEL CODE OF JUD. CONDUCT 2.3(c) (AM. BAR ASS'N 2010).

138. *Id.* cmt. 2.

139. Cohen v. California, 403 U.S. 15, 23-24, 26 (1971).

140. CONN. RULES OF PRO. CONDUCT r. 8.4(7) (2021).

141. N.Y. State Bar Ass'n Memorandum, *supra* note 39, at 17, A-4.

IV. CONCLUSION

Can a person's beliefs be changed (corrected?) under the threat of sanction? When voluntary state bar associations began crafting codes of ethics for their members, some lawyers pushed back, arguing a code of ethics would have no impact on the behavior of those shysters and pettifoggers who disgraced the profession.[142] The ABA rejected that view when it adopted an oath and thirty-two canons of ethics.[143] The ABA successfully promoted the code of ethics; most state bar associations had adopted it by 1924.[144]

The largely hortatory 1908 ABA Code served an important purpose: it provided the foundational materials to the lawyer who wished to educate himself about how to practice law in an ethical fashion.[145] This was crucial in large part because the legal profession never constituted simply an elite. Legal elites desperately tried to keep the law "pure" through making it more difficult to gain a license admitting the applicant to the bar.[146] They succeeded only in fits and starts, and failed to restrict admission to the extent medical doctors did.[147] This was largely for the nation's good. Its lawyers did not comprise a small group relatively unsullied by the frailties that all of us carry.

When the 1908 Code was supplanted by the ABA's 1969 Code of Professional Responsibility, that educative function remained in the Ethical Considerations of the Code. The swift displacement of the code by the Model Rules of Professional Conduct in 1983 marked an important change in the purpose of a code of ethics: the Model Rules were intended to serve as "thou-shall-nots," a Restatement of what was prohibited.[148] They were educative only in rare circumstances, such as Rule 6.1, which encouraged lawyers to meet their "Voluntary Pro Bono Publico Service."[149] The "Rules of Professional Conduct" focused on the

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142. *Report of the Standing Committee on Professional Ethics and Grievances*, 49 ANN. REP. A.B.A. 466, 473 (1924).

143. *See Transactions of the Thirtieth Annual Meeting of the American Bar Association*, *supra* note 41, at 86 (adopting oath and canons).

144. *See Report of the Standing Committee on Professional Ethics and Grievances*, *supra* note 142, at 467-68.

145. *See Final Report of the Committee on Code of Professional Ethics*, *supra* note 13, at 569, 574-75.

146. *See, e.g.*, *id.* at 584 n.1 ("The oaths administered on admission to the Bar in all of the other [sixteen] states [listed] require the observance of the highest moral principle in the practice of the profession, but the duties of the lawyer are not as specifically defined by law as in the states named.").

147. *See Report of the Special Committee on Evaluation of Disciplinary Enforcement*, *supra* note 24, at 912-13, 983.

148. *See The Last Hurrah*, *supra* note 53, at 700, 714.

149. MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS'N 2020).

duty of a lawyer to meet a minimum threshold of conduct. Failure to do so subjected the lawyer to discipline. Lawyers, then, were given the signal to look at the bare minimum standard of professional conduct.

Model Rule 8.4(g) meets the standards of a disciplinary rule. If a lawyer engages in certain types of conduct, that lawyer may be disciplined. In action, however, it has done little. Its constitutionality is uncertain.[150] Though more than half of state lawyer regulatory bodies have adopted a version of Model Rule 8.4(g), it is unused other than for its *in terrorem* effect.

One of COSAC's policy justifications for amending New York's anti-discrimination rule rings as true as ever: "[T]he legal profession should aspire to be more diverse, more equitable, and more inclusive of its own members."[151] Inclusion, of course, works in a variety of ways. One such way is to acknowledge that stark differences among lawyers have and will always exist.

150. *See supra* Part III.A–B; *see also supra* notes 92-93 and accompanying text.
151. N.Y. State Bar Ass'n Memorandum, *supra* note 39, at 5.