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The Sword and the Scale: Model Rule 8.4(g) as a Tool of Racial Justice in the Legal Profession

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ABSTRACT

Lady Justice. Have you seen her? Standing regal and tall with blindfolded eyes. A sword in one hand and a scale in the other. Her image represents a symbol of hope and idealism in protecting and delivering her virtues. Lawyers enter this noble profession to do right by her and carry on her legacy. We serve our clients with the aim that she will ultimately be both our arbiter of facts and our judge. While the symbolism of her blindfold is often the subject of commentary on justice, consider the symbolism of the powerful tools she has chosen in her hands—the sword and scale. With the mighty sword, Lady Justice can exact a devastating blow to her

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enemies—those who align with the antithesis to her values and pose a threat to her existence. Her powerful scale allows her to remedy harms while furthering equitable aims. Lady Justice's tools extend beyond the courtroom and offer an opportunity for the legal profession to take up her cause in fighting against the injustices of racial bias and discrimination in the legal profession. This Article illuminates the virtues of anti-discrimination ethics code provisions, like ABA Model Rule of Professional Responsibility 8.4(g), as powerful tools in promoting the elimination of bias and discrimination (the sword) and improving the balance of diversity in the profession (the scale). This Article highlights the importance of setting uniform professional ethical standards that: (1) hold lawyers accountable for discrimination and bias; (2) deter discriminatory conduct that undermines confidence in the profession; and (3) remediate the lack of progress of attorneys of color, particularly Black female lawyers. This Article also serves as a call to action to states that have resisted enacting an anti-discrimination rule for lawyers, using ABA Model Rule of Professional Responsibility 8.4(g) as guidance.

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INTRODUCTION

In the past five years, the concepts of racial justice and equity in the United States have received attention throughout the world. Contemporary focus on racial justice in education, policing, industry, public institutions, and among numerous professions creates an imperative for the legal profession to confront its own vulnerabilities. The legal profession has an opportunity to promote the elimination of bias and discrimination by holding its own members accountable for incidents of racial bias and discrimination. To promote confidence in the justice system, modern attorney ethics rules should hold attorneys accountable uniformly throughout the United States for engaging in conduct that manifests discrimination and bias.

As a framework for establishing a uniform national standard in anti-discrimination ethics rules, in 2016, the American Bar Association (ABA) passed an amendment to Model Rule of Professional Responsibility 8.4(g) ("Model Rule 8.4(g)"), categorizing engagement in bias, discrimination, or harassment in the profession as actionable attorney misconduct. According to ABA Model Rule of Professional Conduct 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.[1]

1. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N, 2016).

While many states have enacted anti-discrimination and anti-bias provisions modeled after Model Rule 8.4(g) in their state lawyer ethics codes, efforts at enactment in the remaining states have stalled in an echo chamber of critique.[2] The lack of uniformity among state ethics codes in enacting anti-discrimination rules has left the legal profession in an inconsistent state of disarray, with only pockets of accountability.

This Article illuminates the virtues of anti-discrimination ethics code provisions, like Model Rule 8.4(g), as powerful tools in promoting the elimination of bias and discrimination (the sword) and improving the balance of diversity in the profession (the scale). This Article highlights the importance of setting uniform professional ethical standards that: (1) hold lawyers accountable for discrimination and bias; (2) deter discriminatory conduct that undermines confidence in the profession; and (3) remediate the lack of progress of attorneys of color, particularly Black female lawyers. This Article also uses Model Rule 8.4(g) to call to action states that have resisted enacting an anti-discrimination rule for lawyers.

This Article highlights how, by providing accountability for bias and discrimination perpetuated by its own members, the legal profession can contribute to greater diversity and open pathways for the advancement of attorneys of color within the profession. The Article illuminates the existence of bias and discrimination in the profession and its impact on the advancement of attorneys of color, including attorneys who confront the intersectional implications of racial and gender discrimination. By emphasizing the need for a uniform anti-discrimination rule throughout the legal profession, this Article serves as a call to action for jurisdictions that have failed to adopt Model Rule 8.4(g) or any other anti-discrimination rule to hold lawyers accountable for bias and discrimination.

2. *See, e.g.*, William Hodes, *See Something, Say Something: Model Rule 8.4(g) Is Not OK*, 50 HOFSTRA L. REV. 579 (2022); Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN'S L. REV. 121 (2022); George W. Dent, Jr., *Model Rule 8.4(g) Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J.L. ETHICS & PUB POL'Y 135 (2018); Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 TEX. REV. L. & POL. 41 (2019); Caleb Wolanek, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(g) of the Model Rules of Professional Conduct*, 40 HARV. J.L. & PUB. POL'Y 773 (2017).

I. THE LEGAL PROFESSION'S RACIAL RECKONING

> "We have also come to this hallowed spot to remind America of *the fierce urgency of now*. This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to make real the promises of democracy. *Now is the time to rise from the dark and desolate valley of segregation to the sunlit path of racial justice. Now is the time to lift our nation from the quicksands of racial injustice* to the solid rock of brotherhood. Now is the time to make justice a reality for all of God's children. *It would be fatal for the nation to overlook the urgency of the moment*."
>
> – Dr. Martin Luther King, Jr.[3]

In 2020, the world confronted the dual pandemics of Covid-19 and racial discrimination against Black people, which erupted with the worldwide viewing of the killing of George Floyd in Minneapolis, Minnesota.[4] Protests, introspection, and outrage all contributed to a national reckoning with and reassessment of the role of racial bias and discrimination in systems, institutions, and individuals.[5] The legal profession was not exempt, as law firms, companies, and legal service organizations alike began to reassess their role in furthering racial justice and equity within their own organizations and in legal practice as a whole.[6]

A. Racial Disparities in Representation Within the Legal Profession

In light of the recent U.S. Supreme Court decision on affirmative action emphasizing the colorblind nature of the Fourteenth Amendment, the need for anti-discrimination ethics codes to address

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3. Martin Luther King, Jr., I Have a Dream, Address at March on Washington (Aug. 28, 1963), http://tinyurl.com/mt4etz2n [https://perma.cc/GH5K-WYP7] (emphasis added).

4. *See* Christine Hauser et al., *'I Can't Breathe': 4 Minneapolis Officers Fired After Black Man Dies in Custody*, N.Y. TIMES (May 26, 2020), https://tinyurl.com/2p9u7hc6 [https://perma.cc/M2DX-3RTP]; *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), https://tinyurl.com/55ekphk3 [https://perma.cc/N2GF-Z322]; Jenice Armstrong, *George Floyd's Death Inspired a Racial Reckoning, but Two Years Later, Has Anything Really Changed?*, PHILA. INQUIRER (May 26, 2022, 8:52 AM), https://tinyurl.com/3t9xxn4d [https://perma.cc/3FGR-YNQN].

5. *See* Michael T. Heaney, *The George Floyd Protest Generated More Media Coverage Than Any Protest in 50 Years*, WASH. POST (July 6, 2020), https://tinyurl.com/yuc2eyrh [https://perma.cc/QJ5N-EPAN].

6. *See* Dylan Jackson, *George Floyd's Death Ushered in a New Era of Law Firm Activism and There's No Going Back*, AM. LAW. (May 25, 2021), https://tinyurl.com/2r9zbz49 [https://perma.cc/9BKT-J9VE]; Ravi Mattu, *Law Firms Urged to Talk Less and Do More on Ethnic Diversity*, FIN. TIMES (Oct. 1, 2020), https://tinyurl.com/efw4252s [https://perma.cc/YHK8-SKRM].

discrimination in the legal profession remains paramount.[7] The lack of advancement of lawyers of color is a racial justice and racial equity concern for the legal profession. Presently, Black lawyers are the most underrepresented racial and ethnic group in the legal profession, demonstrating the starkest underrepresentation as compared to their representation in the U.S. population.[8] Black people represent a mere 4.5 percent of the legal profession but constitute 13.4 percent of the U.S. population.[9] This figure has remained largely unchanged over the past decade.[10]

Lawyers of color as a whole constitute approximately 19 percent of the profession, while White attorneys are overrepresented, making up 81 percent of attorneys despite being only 60 percent of the general population.[11] While the number of lawyers of color increased by 7 percent in the past decade, the gains were largely attributed to the gains in numbers of Asian American lawyers, which doubled to 5.5 percent—a figure commensurate with their share of the U.S. population, 5.9 percent.[12] Hispanic attorneys' representation in the profession increased from 3.5 percent to 5.8 percent since 2012, but Hispanic attorneys are still underrepresented as compared to their 18.5 percent presence in the U.S. population. Mixed race lawyers represent 2.7 percent of U.S. lawyers, which corresponds to their presence as 2.8 percent of the U.S. population.[13] Native American lawyers represent the smallest racial or ethnic group of lawyers in the country with less than half of one percent (0.5 percent), also largely unchanged in a decade.[14] Native Americans' representation in the legal profession is marginally aligned to their presence in the U.S. population of 1.3 percent.[15]

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7. *See* Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 208–09 (2023).

8. *See* AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 26 (2022), http://tinyurl.com/4pxxzddm [https://perma.cc/2MKD-KNTT] [hereinafter ABA PROFILE OF THE LEGAL PROFESSION].

9. Hispanic attorneys are the second most underrepresented group with a 12.7 percent differential between their presence in the legal profession and their presence in the U.S. population. *See id.*

10. In 2012, Black lawyers represented 4.7 percent of all lawyers. *See id.*; *see also 10-Year Trend in Lawyer Demographics*, ABA NAT'L LAW. POPULATION SURV. (Dec. 31, 2022), https://tinyurl.com/2bh4t48d [https://perma.cc/EEC3-CM56]. Non-Hispanic white people constitute 60.1 percent of the U.S. population. *See* ABA PROFILE OF THE LEGAL PROFESSION, *supra* note 8, at 26.

11. *See* ABA PROFILE OF THE LEGAL PROFESSION, *supra* note 8, at 26.

12. *See id.* This increase may be attributable to California beginning to report its numbers of attorneys of color in 2022. California attorneys represent a large segment of attorneys in the profession, 13 percent of whom are Asian American. *See id.*

13. *See id.*

14. *See id.* Native American lawyers represented 0.6 percent of the lawyer population in 2012. *See also 10-Year Trend in Lawyer Demographics*, *supra* note 10.

15. ABA PROFILE OF THE LEGAL PROFESSION, *supra* note 8, at 26.

Similar trends are reflected in the most financially lucrative practice settings within the profession—law firms and corporate legal departments.[16] Only 10.75 percent of law firm partners are attorneys of color, with 2 percent being Black and less than 1 percent being Black women.[17] In 2019, 11.5 percent of general counsel of the Fortune 1000 corporations were attorneys of color: 5 percent Black, 4.3 percent Asian, and 2.1 percent Latinx attorneys.[18]

B. The Pervasive Problem of Bias and Discrimination in the Legal Profession

The correlation between incidents of bias within the profession and lack of advancement of attorneys of color within the profession has been highlighted in legal scholarship, trade books, blogs, and in the tenuous exchange of war stories on Continuing Legal Education panels and bar association deliberations.[19] Narratives documenting the experiences of attorneys of color detail harassment, incivility, and harsh language often intertwined at the indistinguishable intersection of race and gender.[20] For example, a lawyer was disciplined for referring in an office email to a Black female judge as a "Ghetto Hippopotamus" and "a despicable impersonation of a human woman, who ought to [have] her cervix yanked out of her by the Silence of

16. In 2022, the average law firm partner salary was $1.21 million for male partners and $905,000 for female partners. *See* MAJOR, LINDSEY & AFRICA, 2022 PARTNER COMPENSATION SURVEY 79 (2022), https://tinyurl.com/22a29mu6 [https://perma.cc/W3NG-74SH]. In 2019, the average salary in corporate legal departments ranged from $201,277 for Counsel to $503,078 for General Counsel/Chief Legal Officers. *See* MAJOR, LINDSEY & AFRICA, 2020 IN-HOUSE COUNSEL COMPENSATION SURVEY 5 (2020), https://tinyurl.com/ye28jpwv [https://perma.cc/P76Y-E8UK]. This only includes total cash compensation, not bonuses, and does not account for vast differences in compensation based on geographic location. *Id.*

17. *See* NAT'L ASS'N FOR L. PLACEMENT, 2021 REPORT ON DIVERSITY IN U.S. LAW FIRMS 7 (2022), https://tinyurl.com/5f47h3xs [https://perma.cc/Y7V4-SZC4]. *See also* ABA PROFILE OF THE LEGAL PROFESSION, *supra* note 8, at 27–28; VAULT & MINORITY CORP. COUNS. ASS'N, 2019 VAULT/MCCA LAW FIRM DIVERSITY SURVEY 19 (2019), https://tinyurl.com/z9a28frk [https://perma.cc/SSC9-TV4F] (noting that women of color as a whole represent 3.61 percent of law firm partners). Additionally, the impact of the intersectional aspect of gender and race on the advancement of Black women specifically in the legal profession is stark and will be the topic of in-depth discussion in a subsequent companion article.

18. *See* MINORITY CORP. COUNS. ASS'N, 2020 MCCA FORTUNE 1000 GC SURVEY 3 (2020), https://tinyurl.com/3tdd3y9h [https://perma.cc/2M7H-EBYG].

19. *See generally* RACHEL MORAN & DEVON CARBADO, RACE LAW STORIES (2008).

20. *See generally* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1998) (coining the phrase "intersectionality").

the Lamb[s] guy, and force[-]fed to her," among other remarks.[21] Attorneys of color tend to suffer the disparate impact of bias and discrimination in the practice of law.

In addition to lawyers of color suffering underrepresentation in the legal profession, they also leave legal employment at historic levels. In 2018, 19 percent of first and second year associates that left firms were women of color, and 12 percent of all lawyers that left firms were women of color.[22] Black lawyers see less career progress while working at law firms, and end up leaving those law firms at a rate higher than any other racial or ethnic group.[23] Without accountability for implementing strategies that remediate the root causes of disparities in representation, the legal profession will continue to experience stagnant advancement of attorneys of color, leading to continued economic inequities in who consistently earns the highest salaries in the profession and to continued widening of the racial wage gap in the United States.[24] The narrative of inequity becomes more evident as we evaluate the status of women of color, particularly Black women in the legal profession, and examine the role that discrimination and bias play in their lack of advancement.[25]

C. The Intersectional Stain of Bias and Discrimination for Women of Color

In 1872, Howard University School of Law graduate Charlotte E. Ray became the first Black woman to enter the legal profession.[26] By the 1880s, she left the practice to become a teacher, as she was unable to sustain a steady client flow to maintain a profitable practice because of bias and discrimination.[27] By 1900, a decade after Charlotte Ray left the profession, it was estimated that 75 percent of

21. Petition for Disciplinary or Remedial Action at 2, Att'y Grievance Comm'n of Md. v. Markey, No. 468469-V (Md. Cir. Ct. Jun. 17, 2019); *see also* Att'y Grievance Comm'n of Md. v. Markey, 469 Md. 485, 489 (2020).

22. *See* VAULT & MINORITY CORP. COUNS. ASS'N, *supra* note 17, at 7.

23. *See id.* at 9.

24. *See generally* Aditya Aladangady & Akila Forde, *Wealth Inequality and the Racial Wealth Gap*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Oct. 22, 2021), https://tinyurl.com/yd4wxhce [https://perma.cc/5WCB-AXG7].

25. This Article references women of color as a monolith but also delineates statistics and experiences related to Black women when data supports highlighting their unique experiences of vulnerability.

26. *See* Ollie May Cooper, *Women in the Law*, *in* REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS 24, 24 (J. Clay Smith, Jr. ed. 2000).

27. *Id.*

women of color left firms within 5 years and the number increased to 86 percent leaving the practice within 8 years.[28]

Over a century later, in 2006, the American Bar Association Commission on Women issued a report of groundbreaking findings revealing the obstacles faced in the profession by women of color entitled *Visible Invisibility: Women of Color in Law Firms*.[29] The report estimated that 81 percent of women of color left firms within 5 years—levels that paralleled experiences of women of color over a century prior.[30]

The 2006 report also detailed the experiences of women of color in law firms and corporations that appeared to underlie the exodus, including harassment, demeaning comments, less favorable work assignments, lower rates of compensation, and unfair performance evaluations, among other impediments.[31] Despite White women experiencing some overlapping barriers, their retention rates were drastically higher than women of color (67 percent White women; 72 percent White men).[32]

In 2020, the Commission on Women published another groundbreaking report, *Left Out and Left Behind: The Hurdles, Hassles and Heartaches of Achieving Long-Term Legal Careers for Women of Color*, that revealed minimal gains since 2005 and slow elimination of barriers for women of color in the profession.[33] The report concluded that "many women of color want to leave the profession because they see the disparity between themselves and their white counterparts but do not see viable alternatives to their current situation."[34] Women

28. JANET E. GANS EPNER, ABA COMM'N ON WOMEN IN THE PRO., VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 1 (2006), http://tinyurl.com/pj6bn7cm [https://perma.cc/HR59-TFDM].

29. *See generally id.*

30. *Id.* at 1.

31. *See id.* at 10, 21, 26–28, 35–37. For example, the study found that 49 percent of female attorneys of color experienced demeaning comments or harassment, as compared to 3 percent of their White male counterparts. *Id.* at 35. Nearly two-thirds of women of color experienced marginalization from professional networking opportunities, leading to feelings of loneliness and isolation at work. *Id.* at xii. Additionally, 67 percent of women of color expressed a strong desire for mentoring opportunities. *Id.* at 12. Many women of color also reported harsher treatment and exaggeration of mistakes as well as feeling that they were denied promotional opportunities. *Id.* at 25–26. Most emblematic of the exodus of women of color were experiences of feeling invisible and not free to be themselves, even often being confused with individuals in the work environment with less hierarchical status (e.g., administrative support staff, paralegals, or court personnel). *Id.* at 18.

32. *Id.* at 30.

33. DESTINY PEERY, PAULETTE BROWN & EILEEN LETTS, ABA COMM'N ON WOMEN IN THE PRO., LEFT OUT AND LEFT BEHIND: THE HURDLES, HASSLES, AND HEARTACHES OF ACHIEVING LONG-TERM LEGAL CAREERS FOR WOMEN OF COLOR 20–21 (2020).

34. *Id.* at iii.

of color maintain the highest rates of attrition from law firms and comprise less than four percent of law firm partners. Most of the participants in the study reported specifically facing bias, stereotyping, microaggressions, and microinequities.[35] Female attorneys of color routinely experienced cases of mistaken identity—often mistaken for criminal defendants, cleaning staff, or court personnel, even while representing clients.[36] The data gathered from these reports, spread across several decades, demonstrates that today's women of color are experiencing bias and discrimination similar to that experienced by women of color in the early 1900s. Almost 150 years after Charlotte Ray left the profession, the data demonstrates that discrimination and bias continue to push women of color out of their jobs early in their career, and in some cases out of the legal profession altogether.

Disruptions to the careers of women of color have produced inequities in financial gains and economic advancement along with inadequate representation in the profession.[37] These findings further establish that unmitigated bias and discrimination have created a systematic obstacle to the advancement of women of color in the legal profession.[38] With Black women attorneys experiencing the highest attrition rates in the profession and falling out of the hierarchy of advancement, it is imperative for the legal profession to take urgent action to hold lawyers accountable for the discrimination and bias that has perpetuated systematic depression of the economic advancement of Black women attorneys for over a century.

II. THE CASE FOR HOLDING LAWYERS UNIFORMLY ACCOUNTABLE FOR BIAS AND DISCRIMINATION

A. Anti-discrimination Ethics Rules are Consistent with the History of Attorney Ethics Rules in the United States

The role of ethics in the legal profession was contemplated well in advance of the enactment of formal attorney ethics codes. One of the earliest identifiable sources included an essay written by a 19th century jurist and scholar, George Sharswood. Sharswood began lecturing on ethics at the University of Pennsylvania's Law School

35. *Id.* at 7.

36. *Id.* at ix (discussing findings from Joan C. Williams et al., *You Can't Change What You Can't See: Interrupting Racial & Gender Bias in the Legal Profession*, ABA COMM'N ON WOMEN IN THE PRO. & MINORITY CORP. COUNS. ASS'N (2018)).

37. *See generally* Williams et al., *supra* note 36.

38. *Id. See generally* PEERY, BROWN & LETTS, *supra* note 33.

in 1854, and later turned these lectures into an essay.[39] His aim in drafting his essay was "to arrive at some accurate and intelligible rules by which to guide and govern the conduct of professional life."[40] Sharswood's essay is credited with influencing the drafting of the first comprehensive code of ethics for lawyers, published in 1908.[41]

In several portions of his essay, Sharswood spoke to normative views of attorney conduct that remain a centerpiece of professionalism and civility in modern ethics codes. He wrote:

> The responsibilities, legal and moral, of the lawyer, arise from his relations to the court, to his professional brethren and to his client.[42]
>
> . . .
>
> Indeed, it is highly important that the temper of an advocate should be always equal. He should most carefully aim to repress everything like excitability or irritability. When passion is allowed to prevail, the judgment is dethroned. Words are spoken, or things done, which the parties afterwards wish could be unsaid or undone. Equanimity and self-possession are qualities of unspeakable value.[43]
>
> . . .
>
> He should never unnecessarily have a personal difficulty with a professional brother. He should neither give nor provoke insult. Nowhere more than at the Bar is that advice valuable: "Beware Of entrance to a quarrel."[44]

Baltimore lawyer David Hoffman is also credited with influencing the early enactment of professional codes in the United States. In 1817, while serving as a lecturer at the University of Maryland Law School, he drafted a book to accompany his teaching entitled *A Course of Legal Study*.[45] In 1836, in his second edition, one section of the book was entitled, "Fifty Resolutions in Regard to Professional

39. Deborah Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 34–35 (1992); Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 678–88 (1979); Linda D. Schwartz & Kaye B. Bushel, *The Roots of Legal Ethics*, 40 MD. BAR J. 12, 13 (2007); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (3d ed. 1869).

40. SHARSWOOD, *supra* note 39, at 56.

41. *Final Report of the Committee on Code of Professional Ethics,* 33 ANN. REP. A.B.A. 567 (1908) (commonly referred to as the "Canons of Professional Ethics"); *see also* Alfred L. Brophy, *Race, Class and the Regulation of the Legal Profession in the Progressive Era: The Case of the 1908 Canons*, 12 CORNELL J.L. & PUB. POL'Y 607, 613 (2003); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 241–47, 267–72 (1992).

42. SHARSWOOD, *supra* note 39, at 56.

43. *Id.* at 64–65.

44. *Id.* at 75.

45. DAVID HOFFMAN, A COURSE IN LEGAL STUDY (1st ed. 1817).

Deportment," which some consider the earliest attempt at an ethics code.[46] His resolutions are also credited for influencing the code developed by the ABA, as well as provisions of state ethics codes.[47]

Notably, several of Hoffman's resolutions relate to the behavioral comportment of lawyers. These standards are foundational to modern notions of professionalism and civility and also correspond to the aims of barring discriminatory conduct by lawyers within ethics codes:

> 5. In all intercourse with my professional brethren, I will always be courteous. No man's passion shall intimidate me from asserting fully my own or my client's rights, and no man's ignorance or folly shall induce me to take any advantage of him. I shall deal with them all as honorable men, ministering at our common altar. But an act of unequivocal meanness or dishonesty, though it shall wholly sever any personal relation that may subsist between us, shall produce no change in my deportment when brought in professional connection with them. My client's rights, and not my own feelings, are then alone to be consulted.
> 6. To the various officers of the court I will be studiously respectful, and specially regardful of their rights and privileges.
> . . .
> 45. Success in any profession will be much promoted by good address. Even the most cautious and discriminating minds are not exempt from its influence: the wisest judges, the most dispassionate juries, and the most wary opponents being made thereby, at least, more willing auditors–and this, of itself, is a valuable end. But whilst address is deservedly prized, and merits the highest cultivation, I fully concur in sentiment with a high authority, that we should be "respectful without meanness, easy without too much familiarity, genteel without affectation, and insinuating without any art or design."[48]

Neither Sharswood nor Hoffman spoke explicitly to a lawyer's professional responsibility to not engage in biased or discriminatory behavior. In fact, at the time of their writings, slave codes were still being enforced in the United States and the Emancipation Proclamation of 1863 was still almost 30 years away.[49] The first Black lawyer,

46. DAVID HOFFMAN, A COURSE IN LEGAL STUDY 752–775, 870 (2d ed. 1836).

47. Hoffman's resolutions may have influenced Maryland's Rules of Professional Conduct Rules 1.1 (competence), 1.15 (safekeeping of property), 4.2 and 4.3 (duties when communicating with represented individuals), and 1.7 (conflicts of interest). *Id.*; *see* Schwartz & Bushel, *supra* note 39, at 2.

48. HOFFMAN, *supra* note 46, at 752–53, 771–72.

49. *See* Proclamation No. 95 (Jan. 1, 1863) (commonly known as the "Emancipation Proclamation"); *see also* J. Clay Smith, Jr., *Justice and Jurisprudence and the Black Lawyer*, 69 NOTRE DAME L. REV. 1077, 1105–1113 (1994); JACOB D. WHEELER,

Macon Bolling Allen, had not yet been admitted to practice in the United States.[50] While the nation was on the brink of a civil war over the morality of slavery and the racial subrogation of Blacks in America, it is not surprising that the earliest influences of our modern ethics codes did not bother to reference anti-discrimination as a norm of professionalism and civility. While Hoffman and Sharswood's writings are characterized by some scholars as a justice-centered vision of personal accountability, their vision of professional ethics was silent with respect to the role that discrimination and bias would contribute to the professional responsibility of the lawyer.[51]

In 1887, the first professional ethics code was adopted by the Alabama State Bar Association. The language of Alabama's ethics code provided a foundation for a subsequent comprehensive code in 1908 by the ABA.[52] Drafters of the Alabama Code appeared motivated to recover from the Civil war's impact on the legal profession in the south, while a growing movement of professionalization in the practice of law took place in Northern cities.[53] The Alabama Code sought to heighten the standards of the bar, including introducing disbarment procedures and the adoption of a code of ethics.[54]

The American Bar Association was established in 1878, a decade prior to the enactment of the first ethics code in Alabama. ABA founders were also concerned with elevating standards of legal education, regulating admission to the bar, and, as referenced in the ABA Constitution, "uphold[ing] the honor of the profession."[55] In 1908, working toward this aim, the ABA enacted the Canons of Professional Ethics ("1908 Canons"), designed to protect consumers and the integrity of the legal profession by raising standards of entrance, protecting the quality of legal services, and protecting the integrity of the legal system.[56] Many of the principles of Sharswood's essay,

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A PRACTICAL TREATISE ON THE LAW OF SLAVERY (Allan Pollock, Jr. & Benjamin Levy eds., 1837).

50. *See* Smith, *supra* note 49, at 1077–78.

51. *See generally* Schwartz & Bushel, *supra* note 39; *see* Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1420–22 (2003).

52. *See generally* Pearce, *supra* note 41; Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 471 n.2 (1998).

53. Marston, *supra* note 52, at 472.

54. *Id*. at 473.

55. *Id.* at 474 (referencing the ABA Constitution and M. LOUISE RUTHERFORD, THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION 89, 13 (1937)).

56. Brophy, *supra* note 41, at 609; Pearce, *supra* note 41, at 267.

Hoffman's resolutions, and Alabama's ethics code were codified in the 1908 Canons.[57]

After an amendment to the 1908 Canons in 1963, the ABA promulgated the Model Code of Professional Responsibility ("Model Code"), adopted in 1969. Subsequently, the Model Rules of Professional Conduct ("Model Rules") were adopted in 1983 with the intent that they would serve as a model for ethics rules in jurisdictions throughout the country.

B. Anti-discrimination Ethics Rules are Consistent with Modern Attorney Ethics, Civility, and Professional Formation Goals for Lawyers and Judges

Current standards of ethics, civility, and professionalism demand eradication of discrimination in the legal profession and are ripe to be uniformly adopted. The profession currently holds lawyers to a standard of professionalism and civility that furthers the goal of elimination of bias, discrimination, and harassment through various proscriptions throughout the Model Rules, in civility and professionalism codes, and in judicial ethics codes. In addition to the direct prohibition in Model Rule 8.4(g), the preamble of the ABA Model Rules of Professional Conduct provides a description of the lawyer as a public citizen that supports a lawyer's role in the elimination of bias and discrimination. The preamble describes the "lawyer as a public citizen" as participating in reform of the law, improvement of the legal system, and strengthening the public's confidence in the rule of law and legal institutions, stating in relevant part:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.[58]

The "lawyer as public citizen" role is one in which the lawyer is expected to work to eliminate bias and discrimination, particularly where it would strengthen the legal system and improve the public's

57. Marston, *supra* note 52, at 471.

58. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 6 (AM. BAR ASS'N 2020) (emphasis added).

confidence in the judicial system. Allowing gaps in accountability for lawyers acting in a biased or discriminatory manner hurts the profession, client confidence, and the public's confidence in fair outcomes, particularly when these biases could have manifested during client contact or during contact with the public. By holding lawyers accountable for bias and discrimination, state disciplinary bodies will improve both the legal system and the public's confidence in it.

The preamble also states that, "*[a] lawyer should* aid the legal profession in pursuing these objectives and should *help the bar regulate itself in the public interest*."[59] As a self-regulated profession, the responsibility rests in each state's bar and lawyer ethics regulatory body's authority to regulate the conduct of lawyers. In addition to the implementation of ethics codes, many states' lawyer ethics bodies have developed separate civility codes (also called professionalism codes), with the aim of articulating a standard of lawyer conduct as an aspiration that undergirds professional attorney conduct. Unlike ethics codes, these separate civility codes typically do not pose the force of attorney discipline by the state's attorney disciplinary body, but rather proscribe principles to which lawyers and judges agree to conduct themselves.[60] Forty-five states maintain a civility or

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59. *Id.* (emphasis added).

60. For example, the Preamble of the New York State Standards of Civility states:

> The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Code of Professional Responsibility and its Disciplinary Rules, or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course. The Standards are divided into four parts: lawyers' duties to other lawyers, litigants and witnesses; lawyers' duties to the court and court personnel; judges' duties to lawyers, parties and witnesses; and court personnel's duties to lawyers and litigants.
>
> As lawyers, judges and court employees, we are all essential participants in the judicial process. That process cannot work effectively to serve the public unless we first treat each other with courtesy, respect and civility.

STANDARDS OF CIVILITY pmbl. (N.Y. BAR ASS'N 2013). Similarly, the Preamble of the D.C. Bar Voluntary Standards of Civility in Professional Conduct states:

> Civility in professional conduct is the responsibility of every lawyer. While lawyers have an obligation to represent clients zealously, we must also be mindful of our obligations to the administration of justice. Incivility to opposing counsel, adverse parties, judges, court personnel, and other participants in the legal process demeans the legal profession, undermines the administration of justice, and diminishes respect for both the legal process

professionalism code that is separate from their formal ethics codes.[61] Civility remains a priority and ideal in the legal profession in response to rising trends of incivility in the practice of law.[62] It also remains a focus of professional formation programs and courses in legal education, with several law schools establishing professional formation centers and required classes in the law school curriculum.[63] The implementation of civility codes as a compliment to ethics codes demonstrates that the profession has not only a commitment to hold lawyers accountable for self-regulating, but also an interest in

> and the results of our system of justice. Our judicial system is a truth-seeking process designed to resolve human and societal problems in a rational, peacefully, and efficient manner and designed to be perceived as producing fair and just results. We must be careful to avoid actions or statements that undermine the system or the public's confidence in it. The organized bar and the judiciary, in partnership with each other, have a responsibility to promote civility in the practice of law and the administration of justice. Uncivil conduct of lawyers or judges impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. Such conduct may delay or deny justice and diminish the respect for law, which is a cornerstone of our society and our profession. Civility and professionalism are hallmarks of a learned profession dedicated to public service. These standards are designed to encourage us, as lawyers and judges, to meet our obligations of civility and professionalism, to each other, to litigants, and to the system of justice. The goal is to ensure that lawyers and judges will conduct themselves at all times, in both litigated and nonlitigated matters, with personal courtesy and professionalism in the fullest sense of those terms. While these standards are voluntary and are not intended by the D.C. Bar Board of Governors to be used as a basis for litigation or sanctions, we expect that lawyers and judges in the District of Columbia will make a commitment to adhere to these standards in all aspects of their dealings with one another and with other participants in the legal process. Finally, we believe these standards should be incorporated as an integral component of the teaching of professionalism to law students and practicing lawyers alike. We therefore believe that it is important for law schools in our community to incorporate these standards in their curricula and for the District of Columbia Bar, the voluntary bar associations, law firms, government agencies, and other legal institutions in our community to teach and promote these standards as part of their continuing legal education programs.

D.C. BAR VOLUNTARY STANDARDS OF CIVILITY IN PRO. CONDUCT pmbl. (D.C. BAR ASS'N 1997).

61. *See Professionalism Codes*, AM. BAR ASS'N (Mar. 8, 2021), https://tinyurl.com/3bhrxwet [https://perma.cc/RH9T-DK36].

62. Approximately 71 percent of lawyers report having experienced unprofessional behavior, including rudeness, swearing, inappropriate comments, condescension, and sarcasm. *See* LEO J. SHAPIRO & ASSOCIATES LLC, SURVEY ON PROFESSIONALISM: A STUDY OF ILLINOIS LAWYERS 22 (2007), https://tinyurl.com/3e9s333m [https://perma.cc/ZQ9F-VGH8].

63. *See, e.g.*, *Parris Institute for Professional Excellence,* PEPP. CARUSO SCH. L., https://tinyurl.com/z5r56yyt [https://perma.cc/GA92-6PHA] (last visited Jan. 14, 2024); *About the Holloran Center*, UNIV. ST. THOMAS SCH. L., https://tinyurl.com/2p92ywz8 [https://perma.cc/JL29-FPD2] (last visited Jan. 14, 2024).

shaping the values of the profession through the articulation of aspirational conduct for lawyers. Failing to hold lawyers accountable for biased and discriminatory behavior directly contradicts these standards of civility and professionalism and constrains the bar's ability to regulate itself in the public interest as the Model Rules' preamble suggests.[64]

Moreover, anti-discrimination attorney ethics provisions are also consistent with modern judicial ethical standards and were incorporated within the ethics rules for judges in the Model Code of Judicial Conduct.[65] The ethical guidance is specific and detailed for judges in Rule 2.3, including in relevant part:

> (A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
> (B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
> (C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.
> (D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.[66]

Further, Comment 1 to Rule 2.3 states: "A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."[67]

The ethical guidelines for judges largely parallel the foundational ethical requirement for lawyers in Model Rule 8.4(g). However, the judicial ethical guidance from the Model Code of Judicial Conduct articulates a more specific requirement that judges not only refrain from manifesting bias in their own actions, but that they also

64. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 6 (AM. BAR ASS'N 2020).
65. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.3 (AM. BAR ASS'N 2020).
66. *Id.* (emphasis added).
67. *Id.* at cmt. 1.

hold their courtroom staff and lawyers that appear in front of them to the same standard. This presents a powerful compliment to Model Rule 8.4(g) when bias occurs before a judge or is reported to a judge in connection with litigation. Accordingly, judges who vehemently enforce these ethical requirements become powerful advocates for eliminating bias and discrimination in attorney conduct. However, where attorney conduct does not occur within the context of litigation or in front of a judge, there still exists a strong public interest in enacting accountability measures that would hold lawyers accountable for offending conduct. Nonetheless, the goals of anti-discrimination lawyer ethics rules remain consistent with the norms of judicial responsibility to eliminate bias and discrimination, as manifested under the Model Code of Judicial Conduct.

C. Anti-discrimination Ethics Rules Instill Confidence in the Legal Profession and Legal System by Fostering Structural Accountability

It is important that responsibility for anti-discrimination falls not just on judges but on attorneys themselves. The presence of anti-discrimination ethics rules in the legal profession fosters accountability and enhances the profession's ability to eliminate bias and discrimination. A system of accountability arms lawyers, clients, and the public to refer offending attorneys for disciplinary proceedings with an expectation that justice will be served. Without a system of accountability for lawyer bias and discrimination, lawyers, clients, and the public have no opportunity to report incidents of bias and discrimination nor do they have a reasonable expectation of rectifying the offending behavior. Without means of redress, there is a risk that the offending behavior can reoccur, persist, and permeate. Moreover, the lack of accountability for attorney discipline in instances of bias and discrimination undermines public confidence in the legal profession and the legal system. In a graduation speech to law students, U.S. District Judge Sven Erik Holmes described public confidence, in relevant part, as:

> [T]he popularly held belief that our system of law aspires to achieve the right result . . . is the force that causes our legal system to function.[68]
>
> . . .
>
> We are individuals undertaking to act as institutions—constantly seeking to ensure that our system works. Our collective goal is

68. Sven Erik Holmes, *A Lawyer's Responsibility to Maintain Confidence in Our Legal System*, 25 OKLA. CITY U. L. REV. 625, 626 (2000).

> to produce results that are just and impartial and principled—in short, results that will inspire public confidence in the rule of law.[69]
> . . .
> The responsibility of lawyers to maintain confidence in our legal system is just as great as that of judges.[70]
> . . .
> Without public confidence, the rule of law cannot survive. The duty to ensure such confidence resides with every member of the legal profession.[71]

Accordingly, demonstrating that the attorney disciplinary system holds lawyers who engage in bias and discrimination accountable will strengthen the public's confidence that the lawyers upon whose advice they rely are also held to account.[72] As a result, the public can develop greater confidence in the legal system and profession as a whole. Fostering public confidence is critical in the perceived legitimacy of legal institutions, particularly in light of statistical trends demonstrating decline of public confidence in U.S. institutions. A 2023 Gallup poll indicated that public confidence in the U.S. Supreme Court is at a mere 27 percent and confidence in the criminal justice system is even lower at 17 percent.[73]

Further, these ethics rules also foster structural accountability for lawyer misconduct. Structural accountability involves "acknowledging the ongoing biases of US institutions, embracing institutional transformation, and providing reparation for prior damages."[74] Establishing structural accountability in the legal profession through anti-discrimination rules is a powerful tool to instill confidence in the profession and legal system because it acknowledges the ongoing role that bias and discrimination play within the profession and provides accountability as a form of reparation.[75] To that end, uniform enactment of anti-discrimination ethics rules would promote an aspirational standard for the legal profession, ignite lawyers as social change agents, and continue to transform society through lawyers' unique contributions. But when the legal profession fails to aspire to accountability, and instead allows unchecked bias and discrimination

69. *Id.* at 626–27.
70. *Id.* at 628.
71. *Id.* at 632.
72. Pamela Keller, *Tell the Story of the Professional Lawyer*, 81 J. KAN. B. ASS'N 10, 10 (2012) ("Incivility undermines public confidence in the legal system and erodes lawyers' ability to protect the rule of law.")
73. Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP (July 6, 2023), http://tinyurl.com/29s2dw44 [https://perma.cc/L7EX-UQKQ].
74. *See* MARCUS BOARD, JR., INVISIBLE WEAPONS: INFILTRATING RESISTANCE AND DEFEATING MOVEMENTS 12 (2022).
75. *Id.*

to be the norm, then any potential to foster change becomes improbable, and public trust in the profession and legal institutions is eroded.[76]

Regrettably, the legal profession remains among the last professions to adopt such a rule while other professions have adopted industry-wide anti-bias and anti-discrimination rules.[77] With no uniform accountability, the integrity of the legal profession is undermined. Lack of accountability is also a form of violence against those who were victimized by bias and discrimination in the first instance.[78] Confidence in the legal profession will diminish if it fails to join other

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76. *Id.*

77. Physicians, dentists, architects, psychologists, pathologists, audiologists, arbitrators, social workers and realtors have all adopted an anti-discrimination ethics rule. *See* A.M.A. CODE OF MED. ETHICS § 1.1.2 (AM. MED. ASS'N 2023) ("Physicians must also uphold ethical responsibilities not to discriminate against a prospective patient on the basis of race, gender, sexual orientation or gender identity, or other personal or social characteristics that are not clinically relevant to the individual's care."); A.D.A. CODE OF PRO. CONDUCT § 4.A (AM. DENTAL ASS'N 2023) ("While dentists, in serving the public, may exercise reasonable discretion in selecting patients for their practices, dentists shall not refuse to accept patients into their practice or deny dental service to patients because of the patient's race, creed, color, gender, sexual orientation, gender identity, national origin or disability."); A.I.A. CODE OF ETHICS & PRO. CONDUCT r. 1.401 (AM. INST. ARCHITECTS 2020) ("Members shall not engage in harassment or discrimination in their professional activities on the basis of race, religion, national origin, age, disability, caregiver status, gender, gender identity, or sexual orientation."); ETHICAL PRINCIPLES OF PSYCHS. & CODE OF CONDUCT § 3.01 (AM. PSYCH. ASS'N 2017) ("In their work-related activities, psychologists do not engage in unfair discrimination based on age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, socioeconomic status, or any basis proscribed by law."); A.S.H.A. CODE OF ETHICS r. I.C (AM. SPEECH-LANGUAGE-HEARING ASS'N 2023) ("Individuals shall not discriminate in the delivery of professional services or in the conduct of research and scholarly activities on the basis of age; citizenship; disability; ethnicity; gender; gender expression; gender identity; genetic information; national origin, including culture, language, dialect, and accent; race; religion; sex; sexual orientation; or veteran status."); A.A.A. STATEMENT OF ETHICAL PRINCIPLES (AM. ARB. ASS'N 2024) ("Our integrity demands impartial and fair treatment of all people with whom we come in contact, regardless of gender, race, ethnicity, age, religion, sexual orientation, or other characterization."); N.A.S.W. CODE OF ETHICS § 4.02 (NAT'L ASS'N SOC. WORKERS 2021) ("Social workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical ability."). Additionally, the American Medical Association has issued a policy recognizing racism as a threat in medicine and Section 1557 of the Patient Protection and Affordable Care Act prohibits discrimination in federally funded health programs or activities. *See Racism as a Public Health Threat*, AM. MED. ASS'N (2023), http://tinyurl.com/259cz3fz [https://perma.cc/S8Q8-P9TR]; Patient Protection and Affordable Care Act § 1557, Pub. L. No. 111-148, 124 Stat. 119 (2010).

78. *See supra* Part I (discussing experiences of pervasive bias and discrimination in the profession).

professions in taking responsibility to deal with bias and discrimination within its own ranks.[79]

D. Lawyers are Uniquely Positioned to Promote Anti-Discrimination & the Elimination of Bias in the Legal Profession

> "[A] lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards."
>
> – Former U.S. Supreme Court Justice Potter Stewart[80]

The unique professional calling of the lawyer necessitates a uniform anti-discrimination ethics rule, which uniquely promotes the elimination of bias. Lawyers have been historically regarded as advisors and guardians of justice and equity in the most embattled moments of our country's history in the struggle of civil rights and race relations. In 1963, President John F. Kennedy called for the establishment of committees of lawyers around the country to pursue the extension of civil rights after observing the absence of the organized bar in civil rights efforts.[81] In addressing a group of 244 lawyers gathered in the East Wing of the White House, President Kennedy, Vice President Lyndon B. Johnson, and Attorney General Robert F. Kennedy urged legal professionals to involve themselves in the civil rights movement.[82] Attorney General Robert Kennedy specifically reminded the lawyers in attendance that they had sworn an oath to the Constitution and were obligated to advance the rule of law and should therefore use their specialized knowledge and skills to advance civil rights for African-Americans.[83] The fact that lawyers have historically used their unique advocacy skills and specialized knowledge of the law as leaders in advancing civil rights, and yet presently remain among the few professionals to not enact a uniform anti-discrimination ethics code, is inexplicable.

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79. Holmes, *supra* note 68, at 632; *see generally* Keller, *supra* note 72.

80. *In re* Sawyer, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring).

81. *History*, LAWS.' COMM. FOR C.R. UNDER L., https://tinyurl.com/4f6ax4h8 [https://perma.cc/7TAF-JTWK] (last visited Oct. 1, 2023).

82. *Id.*

83. Myesha Braden & Kristen Clarke, *Remembering RFK and the Lawyers' Committee He Inspired*, ABA J. (June 21, 2018), https://tinyurl.com/mvnhe2np [https://perma.cc/U58J-ZEH6].

III. THE NEXT FRONTIER: THE FUTURE OF A PROTOTYPE FOR A UNIFORM NATIONAL STANDARD

Since 2016, the ABA Model Rules have explicitly contained an anti-discrimination provision that states can adopt or modify to apply within their own jurisdictions.[84] The current amended version of Model Rule 8.4(g) states in relevant part:

> 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.[85]

Comment 3 to Model Rule 8.4(g) emphasizes the impact that discrimination and harassment have on undermining the profession and the legal system as a whole:

> 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).[86]

A. History of Enactment of Model Rule 8.4(g)

Prior to 2016, the Model Rules did not explicitly reference discrimination or bias, but defined attorney misconduct as "engag[ing] in conduct that is prejudicial to the administration of justice."[87] The earliest reports of an effort by the ABA to enact a model ethics rule prohibiting bias and discrimination are from 1994, when both the Young Lawyers Division and the Standing Committee on Ethics and

84. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016).
85. *Id.*
86. *Id.* at cmt. 3.
87. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N, Revised Resolution 2016).

Professional Responsibility proposed similar but divergent amendments.[88] The Young Lawyers Division's version made it misconduct to "commit a discriminatory act prohibited by law or to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or marital status, where the act of discrimination or harassment is committed in connection with a lawyer's professional activities."[89]

The proposal sought to prohibit unlawful discrimination, define a broad and extensive class of protected individuals, and include a wide scope of activities and zone of conduct that could be captured under the rule.[90] Potential violations of the rule were not limited to circumstances related to the representation of clients.[91]

The Ethics Committee, on the other hand, proposed an intent requirement and limited the rule's scope to conduct within the practice of law.[92] Their version proposed to make it misconduct for an attorney to:

> [K]nowingly manifest by words or conduct, in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. This paragraph does not apply to a lawyer's confidential communications to a client or preclude legitimate advocacy with respect to the foregoing factors.[93]

The Ethics Committee also proposed a rule comment explaining that the rule:

> [I]dentifies the special importance of lawyers' words or conduct, in the course of the representation of clients, that knowingly manifest bias or prejudice against others, based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. When lawyers act as officers of the court and the judicial system, their conduct must reflect a respect for the law. Discriminatory conduct toward others on bases that are generally viewed as unacceptable manifests a lack of respect for the law and undermines a lawyer's professionalism. Excluded from paragraph (g), however, are a lawyer's confidential communications to a

88. *See Rep. No. 3 of the Standing Comm. on Ethics and Pro. Resp.*, 119 A.B.A. REP. 106, 106–10 (1994); *Rep. No. 1 of the Young Laws. Div.*, 119 A.B.A. REP. 353, 353–58 (1994).

89. *See Rep. No. 1 of the Young Laws. Div.*, *supra* note 88, at 353.

90. *See id.*

91. *See id.*

92. *See Rep. No. 3 of the Standing Comm. on Ethics & Pro. Resp.*, *supra* note 88, at 106.

93. *Id.*

> client. Also excluded are those instances in which a lawyer engages in legitimate advocacy with respect to these factors. Perhaps the best example of this is when a lawyer employs these factors, when otherwise not prohibited by law, in the selection of a jury.[94]

Neither proposal received support in the ABA House of Delegates, and both were withdrawn.[95] Despite the signs of interest in addressing this area, the resolution apparently had little impact, as the ABA next took up the issue at the 1998 ABA Midyear Meeting, with very different language:

> A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).[96]

That proposal was withdrawn and re-proposed six months later (with the joint support of the Criminal Justice Section) at the 1998 ABA Annual Meeting.[97] In July 2015, the Ethics Committee proposed rules and comments which established that it was professional misconduct to "knowingly harass or discriminate against persons" based on a list of 11 attributes, so long as the conduct occurred while the lawyer was "engaged in the practice of law" or while the lawyer was "engaged in conduct related to the practice of law."[98]

In 2016, at the ABA's Annual Meeting, the draft was amended with the language "knows or reasonably should know" modifying both discrimination and harassment. The ABA House of Delegates approved the amendment to Model Rule 8.4(g), holding attorneys subject to discipline for engaging in bias, discrimination, or harassment in the profession.

B. The Current State of Model Rule 8.4(g)

Although the model rules are intended to promote uniformity among and between the states, when enacting legal ethics codes, states have the option to adopt, modify or reject the model rules, including

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94. *Id.*
95. *Id.*
96. *Rep. of the Standing Comm. on Ethics & Pro. Resp.*, 123 A.B.A. REP. 81, 81 (1998).
97. *See Rep. of the Standing Comm. on Ethics & Pro. Resp.*, 123 A.B.A. REP. 611, 611 (1998).
98. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N, Discussion Draft 2015), https://tinyurl.com/mteu537t [http://perma.cc/P66X-34EE].

8.4(g). Presently, 28 states and the District of Columbia have enacted formal ethics rules addressing anti-discrimination.[99] A minority of those states, including California, Colorado, and New York, had already taken action to include an anti-discrimination rule in their state ethics codes prior to the enactment of Model Rule 8.4(g).[100]

On the contrary, 22 states have no formal disciplinary rule to address bias and discrimination.[101] A subset of 8 of those 22 states reference bias and discrimination in rule comments, even though they adopted no formal rule.[102] The remaining 14 states have failed to adopt Model Rule 8.4(g), enact parallel rules, or make any reference to the prohibition of bias and harassment in their rule comments.[103] One of those states, Hawaii, addresses sexual harassment only, but not discrimination based on race as a protected class.[104] Several of the 14 states that have declined to adopt a version of 8.4(g) have also sharply criticized the rule, primarily on First Amendment grounds. These states have taken action to reject adoption of any anti-discrimination rule governing attorney conduct in their jurisdiction.[105] For example, when the Louisiana State Bar Association's Professional Conduct Committee proposed enactment of Model Rule 8.4(g), the Louisiana Attorney General issued a letter rejecting the proposal stating, among other reasons, that the phrase "conduct related to the practice of law" is "unconstitutionally broad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct."[106] While Texas already has a parallel anti-discrimination rule that predated Model Rule 8.4(g), the Texas Attorney General wrote a similar letter as the Louisiana Attorney General.[107] In his letter, the Texas Attorney General indicated that 8.4(g) "would severely

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99. *Variations of the ABA Model Rules of Professional Conduct Rule 8.4: Misconduct*, AM. BAR ASS'N (Feb. 7, 2023) https://tinyurl.com/yxr249vb [https://perma.cc/VPA6-JE97].

100. *See* CAL. RULES OF PRO. CONDUCT r. 8.4.1 (STATE BAR OF CAL. 2023); COLO. RULES OF PRO. CONDUCT r. 8.4(G) (COLO. BAR. ASS'N 2023); N.Y. COMP. CODES. R. & REGULS. tit 22, § 1200.0 (2023).

101. *See Variations of the ABA Model Rules of Professional Conduct Rule 8.4: Misconduct*, *supra* note 99.

102. *Id.*

103. *Id.*

104. *Id.*

105. Kristine A. Kubes, Cara D. Davis & Mary E. Schwind, *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination and Harassment in the Practice of Law*, AM. BAR ASS'N (Mar. 12, 2019), https://tinyurl.com/4arkz87t [https://perma.cc/ZH3L-FRE5].

106. *Id. See* Letter from Jeff Landry, Att'y Gen., to Warren Montgomery, Dist. Att'y (Sept. 8, 2017), http://tinyurl.com/33v85nax [https://perma.cc/DV7G-C5VJ].

107. *Id. See* Letter from Ken Paxton, Att'y Gen., to Charles Perry, Sen. (Dec. 20, 2016), http://tinyurl.com/595sdm77 [https://perma.cc/LT5H-37Y2].

restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues."[108] The letter also expressed fear of subjecting attorneys to discipline for candid dialogue on topics such as illegal immigration, same-sex marriage, or restrictions on bathroom usage, and suppressing their "thoughtful and complete exchanges about these complex issues."[109] Additionally, the Montana legislature passed a joint resolution criticizing Model Rule 8.4(g) as "seek[ing] to destroy the bedrock foundations and traditions of American independent thought, speech, and action."[110]

States that have criticized the rule are opting to have no anti-discrimination protection against offending lawyer conduct rather than focusing on offering viable solutions to rectify the perceived First Amendment concerns. This decision leaves individuals in every protected class without recourse and accountability for bias and discrimination they may face from lawyers, further undermining the public's confidence in the legal profession.

In addition to several states affirmatively signaling that they will not enact the rule because it is an unconstitutional violation of the First Amendment, legal challenges have arisen in states that have adopted anti-discrimination ethics rules.[111] In Pennsylvania, an attorney who has not yet been disciplined by the state's anti-discrimination rule challenged it as potentially infringing on his First Amendment rights.[112] In other states, legal challenges were made to result in narrowing of the rule's language. For example, in Connecticut, after a legal challenge, the state revised their code to say that conduct proscribed by their version of 8.4(g) "must be directed at a person."[113] Model Rule 8.4(g) continues to face opposition in the states that have failed to enact it and legal challenges in the states that have adopted it, with the goal of either striking it down or significantly narrowing its language (which essentially has the effect of removing its teeth). Nonetheless, no court has yet struck down a state's anti-discrimination rule as unconstitutional.

Nonetheless, Model Rule 8.4(g) has been upheld and affirmed in some states. For example, the Colorado Supreme Court affirmed

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108. *Id.*

109. *Id.*

110. S.J. Res. 15, 2017 Leg., 65th Sess. (Mont. 2017).

111. *In re* Abrams, 488 P.3d 1043, 1050 (Colo. 2021).

112. Greenberg v. Lehocky, 81 F.4th 376, 385 (3d Cir. 2023), *petition for cert. filed* (Feb. 2, 2024) (finding attorney lacked standing to bring pre-enforcement disciplinary challenge of PA's Rule 8.4(g)).

113. Cerame v. Bowler, No. 3:21-cv-1502, 2022 U.S. Dist. LEXIS 154801, at *6 (D. Conn. 2022).

the state's anti-discrimination rule in response to a legal challenge.[114] In 2021, the Colorado Supreme Court upheld the constitutionality of their corollary to Model Rule 8.4(g), Colorado Rule of Professional Conduct 8.4(g) ("RPC 8.4(g)"), after a First Amendment challenge by an attorney that had been disciplined for repeatedly referring to the presiding judge with an anti-gay slur in his communications with his clients.[115] The court found that RPC 8.4(g) was constitutional because it was narrowly tailored to limit as little speech as was necessary to further several compelling state interests, including: (1) regulating attorney conduct in the course of client representation; (2) protecting clients and others in the legal process from harassment and discrimination; (3) eliminating expressions of bias from the legal profession; (4) promoting public confidence in the system; (5) ensuring effective administration of justice; and (6) protecting clients and other participants in the justice system from discrimination and harassment.[116] The court relied on its well-established principle that "the state has a compelling interest in regulating the legal profession both to protect the public and to ensure public confidence in the integrity of the system."[117] The court reasoned that "there is no question that a lawyer's use of derogatory or discriminatory language that singles out individuals involved in the legal process damages the legal profession and erodes confidence in the justice system."[118] The court also found that the rule was neither overbroad nor unconstitutionally vague in appropriately regulating attorneys' conduct as officers of the court.[119]

C. The Future of Uniform Adoption

> "Not everything that is faced can be changed, but nothing can be changed until it is faced."
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> – James Baldwin[120]

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114. *In re Abrams*, 488 P.3d at 1050.

115. *Id. See also* COLO. RULES PRO. CONDUCT r. 8.4(g) (COLO. BAR. ASS'N 2023) ("[I]t is professional misconduct for a lawyer to . . . engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.").

116. *In re Abrams*, 488 P.3d at 1050–53.

117. *Id.* at 1053.

118. *Id.*

119. *Id.* at 1050.

120. James Baldwin, *As Much Truth as One Can Bear*, N.Y. TIMES (Jan. 14, 1962), http://tinyurl.com/32zwk2dp [perma.cc/8C4X-YT2F].

States should adopt a version of Model Rule 8.4(g) that includes a proscription against bias and discrimination in the practice of law to ensure that attorneys of color and women are able to advance in the profession. Women of color in particular need a remedial response mechanism to address the bias and discrimination impeding their career trajectory and economic advancement. Implementation of an ethics rule holding lawyers accountable for bias and discrimination in the profession is vital to remediating ill effects suffered by women of color in the profession, given that many women of color encounter bias and discrimination at the hands of other lawyers in their practice. Without accountability built into the attorney ethics rules, women of color have no remedy. Further, state ethics authorities should provide the enforcement mechanism to ensure that attorneys take adherence to anti-discrimination rules seriously, or else any remedy provided is toothless.

Given the stark barriers that attorneys of color face in advancing their careers, elimination of bias must remain among the highest priorities in the legal profession. Despite the foundational support in existing ethics authority, further action is required in the form of the adoption of uniform explicit language in lawyer ethics codes throughout the country to improve the gaps in the profession's ability to eliminate bias and discrimination. While every state within the United States has the exclusive right to regulate the conduct and licensing of lawyers within its jurisdiction, the ABA Model Rules exist to incentivize uniformity throughout the nation in areas of professional responsibility deemed most essential to upholding the integrity of the profession. In the words of Frederick Douglass, "[i]f there is no struggle, there is no progress."[121] The time for progress is now.

121. *See (1857) Frederick Douglass, "If There Is No Struggle, There Is No Progress"*, BLACKPAST (Jan. 25, 2007), http://tinyurl.com/4rebxnax [https://perma.cc/ZKS2-6J56].