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Model Rule 8.4(g) and the Profession's Core Values Problem

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Abstract. Model Rule 8.4(g) declares it 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." The American Bar Association (ABA) adopted the rule in 2016 in large part to effectuate the third of its four mission goals: Eliminate Bias and Enhance Diversity. The ABA adopted these goals in 2008, and they continue to serve as ABA's statement of its mission.

A substantial number of lawyers opposed the ABA's adoption of Rule 8.4(g), most often on free speech and religious liberty grounds. Since its adoption by the ABA, lawyers have argued for and against state adoption of Rule 8.4(g), in part based on competing understandings of the "core values" at stake in this debate.

References to the core values of the American legal profession emerged relatively recently. They are also often mentioned absent any particular definition. Not surprisingly, lawyers disagree about whether some normative declaration expresses a core value for American lawyers. They also disagree whether there exists a hierarchical ranking of core values, and if so, how to organize core values in tension with one another. In part, this represents a long-existing debate among lawyers about how to fulfill one's duties to client, court, third parties, and community. It also reflects a split among American lawyers. The American legal profession has been fractured along a number of axes for a long time. Private practice lawyers specialize in vastly different fields of law;

they work alone, in Big Law, in government, in corporations, and in legal aid/public interest entities; they represent disparate types of clients, such as individuals and organizations, and within those hemispheres, they represent persons and organization with diverse legal needs and interests; they work in small towns and large cities; they earn millions and support themselves by taking second jobs; and they differ in their views regarding the usual subjects, politics, culture, and religion. Such a disaggregated group will struggle to form a consensus, much less an overwhelming majority, about what values lie at the core of a definition of "lawyer," "legal profession," the "practice of law," or "the lawyer's duties." The Rule 8.4(g) debate may offer some insight into why the parties seem to speak past one another, and whether any core values are embraced across the divisions within the legal profession. Relatedly, the ABA's shrinking membership reflects the difficulty of speaking of a (singular) legal profession, and the decline in the ABA's influence indicates it is less likely to be able to generate a broader acceptance of specific core values as reflected in rules such as 8.4(g).

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I. INTRODUCTION

At the August 2003 annual meeting of the American Bar Association (ABA), members of its House of Delegates debated whether to approve two proposed amendments to Model Rule 1.6(b).[1] These amendments created additional exceptions to the lawyer's duty to keep a client's confidences.[2] The House had balked at doing so two years earlier,[3] when the Commission on Evaluation of the Rules of Professional Conduct, popularly known as the Ethics 2000 Commission, made its recommendations.[4] The ABA's decision to reconsider arose after the large energy corporation, Enron, filed for bankruptcy amid allegations of financial improprieties in early December 2001.[5] The once-rejected exceptions were re-offered and supported by a coalition of twelve ABA presidents, twelve ABA section cosponsors, and the "Conference of Chief Justices," an organization of state supreme court chief justices.[6] Despite this firepower, a significant debate took place about the compatibility of these exceptions with the legal profession's core values.[7] Both sides claimed they were the true defenders of the profession's

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1. *See Proceedings of the 2003 Annual Meeting of the House of Delegates*, 128:2 ANN. REP. A.B.A. 1, 14–19 (2003) (providing the debate over Report 119A, which sought to add two provisions to Model Rule 1.6).

2. *Id.* The proposed exceptions it adopted allowed a lawyer to disclose a client confidence "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services," and "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." *Report No. 1 of the Task Force on Corporate Responsibility et al.*, 128:2 ANN. REP. A.B.A 499, 499–500 (2003) (recommending adding Rules 1.6(b)(2) and 1.6(b)(3)).

3. *See Proceedings for the Annual Meeting of the House of Delegates*, 126:2 ANN. REP. A.B.A. 1, 35–37 (2001) (striking the proposed additions to Rule 1.6(b)). The Ethics 2000 Committee, proposing amendments to the Model Rules of Professional Conduct, suggested three changes to Model Rule 1.6(b). The Delegates approved only one amendment, which permitted (but did not require) a lawyer to disclose a client confidence "to prevent reasonably certain death or substantial bodily harm." *Id.* at 61–62.

4. *Report of the Commission on Evaluation of the Rules of Professional Conduct*, 126:2 ANN. REP. A.B.A. 257, 257, 261 (2001).

5. Two excellent studies of the fall of Enron are KURT EICHENWALD, CONSPIRACY OF FOOLS: A TRUE STORY (2005) and BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (10th Anniversary ed. 2013). For a pointillist study of the history of the Model 1.6(b) amendments, see generally Michael Ariens, *"Playing Chicken": An Instant History of the Battle Over Exceptions to Client Confidences*, 33 J. LEGAL PRO. 239 (2009).

6. *Proceedings of the 2003 Annual Meeting of the House of Delegates*, 128:2 ANN. REP. A.B.A. 1, 14 (2003).

7. *Id.* at 14–19.

core values. Incoming ABA president, Dennis W. Archer, supported the proposed exceptions.[8] He argued, "confidentiality, professional integrity, independence, and autonomy are core values which are sacrificed when a lawyer is deprived of the ability to reveal information necessary to prevent a client from misusing the profession and the lawyer's services to commit a crime, fraud, causing substantial harm to innocent third parties."[9] The incoming President-elect (that is, Archer's successor), Robert J. Grey, Jr., argued in opposition to the proposed amendments to Rule 1.6(b).[10] In his view, "this was not the time to take the position that the core values of this profession are subject to compromise."[11] Grey was joined by Sharon Stern Gerstman, a member of the ABA's Board of Governors.[12] She argued the House had properly "refused to allow its core values to diminish"[13] when it rejected those amendments in 2001. The House of Delegates approved the amendments in a recorded vote by just 218 to 201.[14]

This was the second debate about core values in the House of Delegates in three years. ABA Model Rule of Professional Conduct 5.4(a) (1983) generally prohibits a lawyer from sharing legal fees with a nonlawyer.[15] Rule 5.4(b) bans a lawyer from forming "a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."[16] Both provisions were justified on the belief that allowing lawyers and nonlawyers to join together to offer legal and other professional services (e.g., accounting) in a jointly-owned entity might permit the latter to control the relationship between lawyer and client.[17] Such control, supporters of these Rules traditionally argued, might harm the interests of the lawyer's

8. *Id.* at 18.

9. *Id.*

10. *Id.* at 16.

11. *Id.*

12. *Id.* at 17.

13. *Id.*

14. *Id.* at 18 (recording the vote); *see also* James Podgers, *The Non-Revolution: Proponents of a New ABA Ethics Rule on Confidentiality Downplay Its Impact*, 89 A.B.A J. 80, 80 (Oct. 2003) (recounting the debate).

15. MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2020).

16. *Id.* at R. 5.4(b).

17. *See id.* at R. 5.4 cmts. 1 & 2 (indicating the Rule expresses traditional limitations regarding the importance of an attorney's independence and professional judgment in rendering advice to a client).

clients. The usual argument was that profits would come before duty to legal client.[18]

By the late 1990s, the largest accounting firms (then the "Big Five") employed thousands of lawyers.[19] The Big Five offered their clients tax, accounting, consulting, regulatory, and other services, including services often provided by lawyers. This worried large law firms, the part of the organized bar that often competed with the Big Five.[20] These firms feared they faced a competitive disadvantage if the traditional rules remained. That fear led the ABA to reconsider the ethics rules banning multidisciplinary practice (MDP) organizations owned by both lawyers and nonlawyers.[21] It created a Commission on Multidisciplinary Practice in August 1998 to recommend how the ABA should proceed.[22]

The Commission reported back a year later in support of amending the rules and permitting lawyers "to deliver legal services through a multidisciplinary practice."[23] For reasons relating to internal ABA politics, its recommendation was postponed.[24] The Commission returned a year later, reaffirming its recommendation.[25] It added the proviso that any specific changes to the Model Rules be implemented to protect the public and preserve "the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of

18. *See id.* (drawing a comparison to Rule 1.8(f), which permits a lawyer to accept payment from a third party so long as it did not interfere "with the lawyer's independent professional judgment" and the client gave informed consent).

19. *See* Laurel S. Terry, *A Primer on MDPS: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 878 & n.31 (1999) (counting 6,362 lawyers in Big Five firms other than tax lawyers).

20. *See id.* at 878–79 (indicating, when a leading journal combined "statistics of the Big Five firms with the statistics from traditional law firms," a list "of the ten largest law firms worldwide included three of the Big Five").

21. *See Report of the Commission on Multidisciplinary Practice*, 124:2 ANN. REP. A.B.A. 223, 225 (1999) [hereinafter *Report*] (indicating the ABA president, in response to professional service firms delivering legal services, formed a commission to determine if the ABA should amend Model Rules of Professional Conduct to address the situation).

22. *Id.*

23. *Id.* at 223.

24. The Florida Bar pushed for delay. *See Report of the Florida Bar*, 124:2 ANN. REP. A.B.A. 753, 753 (1999) (recommending the ABA delay changing the Model Rules); *Proceedings for the Annual Meeting of the House of Delegates*, 124:2 ANN. REP. A.B.A. 1, 10–14 (1999) (recording the debate on and decision to delay).

25. *Report of the Commission on Multidisciplinary Practice*, 125:2 ANN. REP. A.B.A. 183, 183 (2000) [hereinafter *Multidisciplinary Report*].

interest, and *pro bono publico* obligations."[26] The ABA House of Delegates rejected the Commission's recommendation at its August 2000 meeting.[27] It then resolved to adopt a set of core values of the profession. It urged states considering whether to permit lawyers to practice in MDPs to make their decisions in such a way as to "preserve the core values of the legal profession."[28] As adopted by the House, those values overlapped but were not congruent with the Commission's core values.[29]

These two debates suggested both that invoking core values in an argument was perceived as necessary to win a debate, and that the content of the American legal profession's core values was unsettled at best, and malleable and lacking any definitional rigor at worst. These propositions do not mesh well.

When H. Thomas Wells became ABA president in mid-2008, he wrote in his first monthly column for the *ABA Journal* that his presidency would concentrate on making progress on four of "the common core values all lawyers share": "access to justice, independence of the bar and judiciary, diversity and the rule of law."[30] That same year, the ABA formally adopted four "goals" intended to aid the ABA in meeting its mission. Those goals were: "[s]erve [o]ur [m]embers," "[i]mprove [o]ur [p]rofession," "[e]liminate [b]ias and [e]nhance [d]iversity," and "[a]dvance the [r]ule of [l]aw."[31] Each goal included several specific measures.[32]

The ABA House of Delegates adopted Model Rule 8.4(g) at its 2016 annual meeting in significant part to make progress on the ABA's third goal:

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26. *Id.*

27. *Proceedings for the Annual Meeting of the House of Delegates*, 125:2 ANN. REP. A.B.A. 1, 24 (2000).

28. *Id.*

29. *Id.* at 24–25. The most important difference was an emphasis in the House of Delegates on the lawyer's duty to the public. The House's fifth core value was "the lawyer's duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." *Id.* at 24. The language listing the lawyer's multiple "responsibilities" is taken directly from Preamble [1] of the Model Rules. MODEL RULES OF PROF'L CONDUCT Preamble (AM. BAR ASS'N 2020). The demise of Enron, which was quickly followed by the indictment and conviction of the Big Five accounting firm of Arthur Andersen, BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON 143–44 & 406 (10th Anniversary ed. 2013), led states to halt efforts to amend Rule 5.4. *See* Lawrence J. Fox, *MDPs Done Gone: The Silver Lining in the Very Black Enron Cloud*, 44 ARIZ. L. REV. 547, 548 (2002) (recounting, by a fervent opponent of MDPs, how "Enron proved the death knell of MDPs").

30. H. Thomas Wells Jr., *Justice to the Core*, A.B.A. J., Sept. 2008, at 9.

31. *ABA Mission and Goals*, ABA, https://www.americanbar.org/about_the_aba/aba-mission-goals/ [https://perma.cc/8VV9-6CKE].

32. *See id.* (listing each goal's objective).

"[e]liminate [b]ias and [e]nhance [d]iversity."[33] It did so with "no debate in the House and few overt signs of opposition" when it came time for discussion and vote.[34] However, it is also clear that significant debate and opposition occurred in the roughly year-long process prior to the ABA's adoption of Model Rule 8.4(g).[35] Model Rule 8.4(g) declares it 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."[36] It also includes two exceptions: "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."[37]

Model Rule 8.4(g) demands lawyers consider the question of core values. Proponents of Rule 8.4(g) wanted a rule with more teeth to lessen (if not end) invidious discrimination in the profession.[38] Rule 8.4(g) would go some way to meeting the ABA's third goal, to "eliminate bias and enhance diversity." One argument its opponents used centered on its possible impact on the core value of the independence of lawyers from state control.[39] This tension between core values is unlikely to dissipate.

The goal of this Article is to examine the rise of the idea of the profession's core values and how that idea informs the divided reception of Model Rule 8.4(g). Since its adoption in the ABA, states have been at odds in deciding whether to adopt it as a rule of discipline for their lawyers. This Article begins with a survey of the background of the principles espoused in the ABA's lawyer ethics rules from the adoption of the Canons of Ethics in 1908. It then discusses the reasons for the debate on the profession's

33. *Id.*; *see* Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(G): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PRO. 201, 204, 211, 221 (2017) (noting only one ABA section mentioned any goal other than Goal III).

34. Lorelei Laird & James Podgers, *House Passes Bias Rule*, A.B.A. J., Oct. 2016, at 59.

35. *See* Halaby & Long, *supra* note 33, at 204, 219–23 (describing the process leading up to Model Rule 8.4(g)'s adoption).

36. MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (AM. BAR ASS'N 2020).

37. *Id.*

38. *See generally* Laird & Podgers, *supra* note 34 (describing how many proponents of Rule 8.4(g) believed the Model Rules needed a binding provision to prohibit discrimination and harassment).

39. *See id.* at 59 (describing how the Rule's opposition worried the Rule would, for example, "undermine free speech and religious freedom").

core values. After discussing the history of Rule 8.4(g), it assesses the responses in the profession to the proposal.

II. ILLUSTRATIONS AND PRINCIPLES

A. *Canons of Professional Ethics (1908)*

The ABA committee that drafted the Canons of Ethics (1908) included a number of well-known legal ethics writers, the most important of whom was Thomas Goode Jones. Jones wrote the first code of ethics, adopted by the Alabama State Bar Association in 1887.[40] The Alabama code included an oath and fifty-seven canons of ethics, and served as the blueprint for the ABA.[41] As adopted, the ABA code of ethics consisted of an oath and thirty-two canons of ethics.[42] It was praised by many,[43] and by 1914, thirty-one state bar associations had adopted it.[44] A few, however, were disappointed. The most important of those dissenters was Charles A. Boston, a New York lawyer.[45] From 1908 until shortly before his death in 1935, Boston spent a

40. Thomas Goode Jones, *Code of Ethics*, *in* GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION 45, 45–59 (Carol Rice Andrews et al. eds., 2003); *see also* BRENT J. AUCOIN, THOMAS GOODE JONES: RACE, POLITICS, AND JUSTICE IN THE NEW SOUTH 19 (2016) (explaining how Jones's "most noteworthy accomplishment as a lawyer" was writing the legal "profession's first ever Code of Legal Ethics" adopted by the Alabama State Bar Association).

41. *See generally* Jones, *supra* note 40 (providing the oath and fifty-seven canons of ethics); *see also* AUCOIN, *supra* note 40, at 19 (indicating Jones's Code of Legal Ethics "served as the basis for the Code of Professional Ethics adopted by the American Bar Association in 1907").

42. CANONS OF ETHICS (AM. BAR ASS'N 1908).

43. *See generally* Simeon E. Baldwin, *The New American Code of Legal Ethics*, 8 COLUM. L. REV. 541 (1908) (praising the code). Baldwin founded the ABA in 1878. *See* JOHN AUSTIN MATZKO, BEST MEN OF THE BAR: THE EARLY YEARS OF THE AMERICAN BAR ASSOCIATION, 1878–1928, at 14–24 (2019) (explaining how "Baldwin moved that a committee of three be appointed to consider the propriety of organizing a national association of lawyers"); EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 3–13 (1953) (providing a history of the beginnings of the American Bar Association); Charles C. Goetsch, *Baldwin, Simeon Eben*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 25 (Roger K. Newman ed., 2009) ("Baldwin was the key founder of the American Bar Association in 1878 . . . .").

44. *Report of the Committee on Professional Ethics*, 37 ANN. REP. A.B.A. 559, 560–61 & n.3 (1914) (listing thirty plus Arizona). All state bar associations were voluntary at this time. The mandatory bar movement, which required every lawyer licensed in a state to be a member of the state bar association, began in 1920. *See* DAYTON DAVID MCKEAN, THE INTEGRATED BAR 21–29 (1963) (providing a brief history of bar integration in the United States).

45. William W. Miller, *Charles A. Boston, 1863–1935*, A.B.A. J., May 1935, at 281; Frederick C. Hicks, *Boston, Charles Anderson*, *in* DICTIONARY OF AMERICA BIOGRAPHY SUPPLEMENT 1, at 98 (1944).

significant amount of time volunteering his services to bar associations to promote lawyer ethics.[46]

Boston criticized the ABA Canons of Professional Ethics for failing to draft a set of principles and, instead, offering illustrations of behavior that were condoned or condemned.[47] As Boston became more immersed in the subject of lawyer ethics, his opinion of the Canons hardened. This was a consequence of his work as chairman of the professional ethics committee of the New York County Lawyers' Association (NYCLA).[48] Boston convinced the NYCLA Board that the ethics committee should offer guidance to lawyers by answering their ethics questions. It began to do so in 1913.[49] By the early 1920s, Boston believed the Canons were out-of-date, as the illustrations were so specific they too often failed to address current ethics problems. He stated: "I think that comparatively few of the questions submitted to our [NYCLA ethics] committee could be answered by any provision of the canons."[50]

Boston was appointed chairman of the ABA Committee on Supplements to Canons of Professional Ethics in 1924.[51] The committee published its draft proposals in the *ABA Journal* in

46. Boston served as the chairman of the professional ethics committee of the New York County Lawyers' Association (NYCLA) from 1909 until 1932. For much of that time it was the most important ethics committee in the country, for, at Boston's urging, it was the first ethics committee to answer ethics questions asked by practitioners. *See The Legal Ethics Clinic of the New York County Lawyers Association*, 7 ILL. L. REV. 554, 554 (1913) (discussing NYCLA's service in answering ethics questions proposed by members of the bar). Boston was an original member and the second chairman of the ABA's Committee on Professional Ethics from 1913 to 1916. From 1921 to 1924, he served as secretary to the ABA Committee on Canons of Judicial Ethics and was responsible for drafting the Canons of Judicial Ethics. From 1924 to 1928, he was the chairman and principal draftsman of the Committee on Supplements to Canons of Professional Ethics. He continued to serve as chairman of that committee off and on from 1928 until 1934. This information is taken from the list of committee members published in the Annual Report of the American Bar Association, as well as the annual reports to the ABA. *See, e.g.*, *infra* note 51 and accompanying text; *see also* Miller, *supra* note 45, at 281–82 (describing Boston's various roles and impact on the area of legal ethics).

47. Charles A. Boston, *A Code of Legal Ethics*, 20 GREEN BAG 224, 225 (1908).

48. *Cf. supra* note 46 (describing Boston's work as NYCLA chairman).

49. *See supra* note 46 (describing how Boston urged the NYCLA to begin answering ethics questions posed by practitioners).

50. Thomas Francis Howe, *The Proposed Amendment to the By-Laws*, A.B.A. J., July 1922, at 436 (quoting Boston).

51. *See Special Committees*, 47 ANN. REP. A.B.A. 24, 26 (1924) (listing Boston as chairman of the Special Committee on Supplements to Canons of Professional Ethics).

mid-1927.[52] The final proposed supplemental canon was titled *Summary of the Professional Ideals of the Lawyer*.[53]

This summary canon was written by Henry Wynans Jessup, also a New York lawyer and member of the ABA Committee.[54] Boston and Jessup had worked together on the NYCLA's ethics committee from 1908 until Jessup resigned in 1924. They were long-time friends with a deep interest in working out the ethical standards of the legal profession. Both agreed that the failure of the ABA Code was that it lacked reference to principles.

Jessup had been working on a summary of professional ideals for nearly two decades. He published his summary in a 1922 essay[55] and in a 1925 book.[56] It was slightly modified and adopted by the committee, but one member of Boston's committee, Massachusetts lawyer Frank W. Grinnell, dissented from Jessup's *Summary of the Professional Ideals of the Lawyer*.[57]

Controversies over several proposed supplemental canons led Boston to move to postpone consideration of the Supplemental Canons. ABA members agreed. Though Grinnell was the only dissenting voice on the fifteen-person committee in 1927, the *Summary* Canon was not among the proposed additions the following year.[58]

Five years later, the ABA made additional changes to the Canons of Ethics.[59] For several of these years, including 1933, Charles Boston was the chairman of the special committee in charge of this project. In addition to proposed changes, the committee issued a *Statement of General Principles of Legal Ethics*.[60] Boston's introduction to the *Statement* lamented that the ABA Canons were written only "as applicable to selected situations," or as

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52. *See generally Proposed Supplements to Canons of Professional Ethics*, A.B.A. J., May 1927, at 268 (presenting "the text of the Proposed Canons as approved by the majority of" the Special Committee on Supplementing the Canons of Professional Ethics).

53. *Id.* at 271–73.

54. *Id.* at 269 (noting initial proposed supplemental canons, "including a final canon, prepared by Mr. Henry W. Jessup, summariz[ed], in a generic way, the principles underlying all of the canons").

55. Henry W. Jessup, *The Ethics of the Legal Profession*, 101 ANNALS AM. ACAD. POL. & SOC. SCI. 16, 25–29 (1922).

56. HENRY WYNANS JESSUP, THE PROFESSIONAL IDEALS OF THE LAWYER: A STUDY OF LEGAL ETHICS 11–14 (1925).

57. *Proposed Supplements to Canons of Professional Ethics*, *supra* note 52, at 273; *see also Report of the Special Committee on Supplements to Canons of Professional Ethics*, 50 ANN. REP. A.B.A. 372, 390–95 (1927) (dissenting from Jessup's proposed supplemental Canon and offering a substitute).

58. *Important Supplemental Canons of Ethics Proposed*, A.B.A. J., May 1928, at 292, 292.

59. *Proceedings of the Fifty-Sixth Annual Meeting of American Bar Association Grand Rapids, Michigan*, 56 ANN. REP. A.B.A. 41, 152–80 (1933).

60. *Report of the Special Committee on Canons of Ethics*, 56 ANN. REP. A.B.A. 428, 437–40 (1933).

"illustrative," and did not include "a statement of general principles."[61] Though the committee did not recommend the ABA initiate such an effort, it invited ABA members to consider principles of legal ethics to guide lawyer behavior.

The principles were based on work done by Boston and Jessup in 1910 for the NYCLA.[62] The 1933 iteration of a *Summary of Professional Ideals of the Lawyer* consisted of sixteen items.[63] These items were framed in relational terms: among others, lawyer to legal system, lawyer to client, and lawyer to community.[64] The lawyer's duty to the members of the community in which the lawyer lived was one of "peculiar responsibility."[65] The lawyer owed the community the duty to expose judicial corruption, to report for professional discipline lawyers engaged in professional misconduct, and to protect the rights and liberties of community members according to law.[66] The lawyer was not simply an instrument of a client's desires, but responsible for protecting the broader community, nearly all of whom were not clients.

Boston's invitation was never taken up by the organized bar.

B. *Code of Professional Responsibility (1969)*

In 1964, the ABA created a Special Committee on Evaluation of Ethical Standards.[67] Five years later, it adopted the committee's proposed Code of Professional Responsibility without amendment.[68] The Code consisted of nine Canons. Within each of the nine Canons the Code listed Ethical Considerations, aspirational in nature, and Disciplinary Rules, mandatory in

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61. *Id.* at 437.

62. *See* EDWIN DAVID ROBERTSON, BRETHREN AND SISTERS OF THE BAR: A CENTENNIAL HISTORY OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION 33 (2008) (describing the work done during 1910); *see also* Charles A. Boston, *The Recent Movement Toward the Realization of High Ideals in the Legal Profession*, 35 ANN. REP. A.B.A. 761, 771–73 (1912) (discussing unsuccessful effort to persuade NYCLA adopt a code of ethics).

63. *See Report of the Special Committee on Canons of Ethics*, *supra* note 60, at 439 (providing the sixteen items that composed the "statement of the professional duties of the lawyer in [New York]").

64. *See id.* (addressing the lawyer's duties to support the law and the lawyer's relations with clients and community).

65. *Id.* (referencing item twelve).

66. *Id.*

67. *Proceedings of the House of Delegates at the 1964 Annual Meeting*, 89 ANN. REP. A.B.A. 365, 383 (1964).

68. *Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 ANN. REP. A.B.A. 378, 389–92 (1969).

nature.[69] The Canons included several broad statements of the lawyer's duty. For example, Canon 1 indicated, "A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession," and Canon 8 stated, "A Lawyer Should Assist in Improving the Legal System."[70] Others completely missed the mark: Canon 3, "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law,"[71] reeked of economic self-interest rather than protection of the public. Both Canon 4 ("A Lawyer Should Preserve the Confidences and Secrets of a Client") and Canon 7 ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law")[72] were drafted at a relatively specific level of generality. Both concerned the broader idea of the extent of the lawyer's duty of loyalty to clients. In general, these canons offered little in the way of principle.

The Preamble to the Code, on the other hand, was intended to serve as a statement of professional principles. "[A] free and democratic society" could exist only when its members believed that justice was possible.[73] This justice was "based upon the rule of law."[74] Lawyers were the "guardians of the law,"[75] making justice possible. As a result, lawyers served a "vital role in the preservation of society."[76] This vital role included the privilege of serving as mediators between the state and the individual. The lawyer's privileged position in society thus required lawyers not to abuse it for their benefit. Therefore, lawyers were "to maintain the highest standards of ethical conduct."[77] Additionally, lawyers needed to be independent of the state to protect the right and dignity of their clients when the state exercised power. That required the legal profession to regulate itself. The "fundamental ethical principles" were the guide for the lawyer, who played various roles and engaged in difficult tasks that called for the exercise of sound judgment.[78]

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69. *See generally* MODEL CODE OF PROF'L RESP. (AM. BAR ASS'N 1969) (providing "Ethical Considerations" and "Disciplinary Rules" in each Canon).

70. *Id.* at Canons 1, 8.

71. *Id.* at Canon 3.

72. *Id.* at Canons 4, 7.

73. *Id.* at Preamble.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

The adoption of the Code without amendment by the House of Delegates was a harbinger of its general acceptance.[79] States and state bar associations rapidly adopted the Code, and most made few, if any, changes.[80] Yet, by mid-1977, the Code was so roundly criticized that the ABA created another special committee to draft what became the Model Rules of Professional Conduct (1983).[81]

C. *Model Rules of Professional Conduct (1983)*

The initial approach of this second Special Commission on Evaluation of Ethical Standards (Kutak Commission) was to emphasize the public duties of the lawyer. It intended to remind lawyers that law was a public profession. Lawyers owed some duties to the public, in addition to the duties they owed their clients. When the Model Rules were adopted by the ABA in 1983, the emphasis shifted to detailing the lawyer's specific, rule-based duties to clients.[82]

The Kutak Commission scrapped the three-tiered structure of the Code for a set of rules stating minimum standards of lawyer conduct. It did, however, follow the Code and include a Preamble. Like the Code's Preamble, the Preamble to the Rules discussed the principles animating the legal profession. It began: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[83] In this last role:

> [The 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

79. *Proceedings of the 1969 Annual Meeting of the House of Delegates*, *supra* note 68, at 389–92.

80. *Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility*, 96 ANN. REP. A.B.A. 676, 676 (1971) (noting thirty-one states, eleven state bar associations, and the District of Columbia Bar had adopted Code); *see id.* 96 ANN. REP. A.B.A. 242, 243 (1971) (reporting most states adopted Code without making any changes).

81. *See, e.g.*, William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, BAR LEADER, Nov.–Dec. 1977, at 2–3 (discussing reasons, including failure of Code to work as desired, why Spann, as ABA president, created Kutak Commission to reassess the code and the substantive and procedural facets of legal ethics).

82. *See* Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689, 692 (2016) (discussing the history of the Kutak Commission).

83. MODEL RULES OF PROF'L CONDUCT Preamble [1] (AM. BAR. ASS'N 2020).

> 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.[84]

The Preamble did not create enforceable duties applicable to lawyers. Only a violation of the rules could subject a lawyer to regulatory discipline. Both the emphasis on rules and the changing economics of the private practice of law affected the legal profession's thinking about broad-based (much less universally applicable) principles. Lawyers predominantly looked at the rules in light of the lawyer's specific duties and standards of conduct when representing clients. At the forefront of those duties to clients was the duty of loyalty. This narrower understanding of the lawyer's responsibility was one reason why the debates on adding exceptions to the duty not to disclose client confidences were so hotly contested in the House of Delegates in 2001 and 2003.[85]

The extent to which a lawyer's duty of loyalty prevented the disclosure of client confidences had been fiercely discussed when the Model Rules were debated in 1983.[86] The changes proposed by the ABA's Ethics 2000 commission returned the issue to the House. Even after the shock of Enron's bankruptcy, the dissolution of the Big Five accounting firm Arthur Andersen, and the bankruptcies of several other high-flying stock market darlings, the representatives in the House of Delegates strongly disagreed with one another, as made clear in the narrowness of the votes.[87] The fundamental nature of this dispute and others in the proposed Ethics 2000 amendments may be why the ABA's summary of the discussion in the House includes nine uses of the phrase "core values."[88]

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84. *Id.* at Preamble [6].

85. *See Proceedings for the Annual Meeting of the House of Delegates*, 126:2 ANN. REP. A.B.A. 1, 37 (2001) (providing the House debate from 2001); *see also Proceedings of the 2003 Annual Meeting of the House of Delegates*, 128:2 ANN. REP. A.B.A. 1, 14–18 (2003) (providing the House debate from 2003).

86. *Proceedings of the 1983 Midyear Meeting of the House of Delegates*, 108 ANN. REP. A.B.A. 289, 295–99 (1983).

87. *See supra* note 85; *see also* Ariens, *supra* note 5, at 295–300 (giving a timeline of events in the Appendix).

88. *Proceedings for the Annual Meeting of the House of Delegates*, 126:2 ANN. REP. A.B.A. 1, 36–39, 59 (2001) (mentioning "core values" nine times in debate of Ethics 2000 proposed amendments).

III. CORE VALUES

A. *Stirrings*

Lawyers did not use the phrase "core values" in relation to the practice of law or the role of the American legal profession when the Kutak Commission drafted the Model Rules between 1977 and 1983. The ABA's two-year study on the apparent decline in professionalism (and call for its renewal) in the mid-1980s urged lawyers to adopt the "goals" of "integrity, competence, fairness, independence, courage and a devotion to the public interest."[89] It did not discuss core values. Neither did legal ethics writers. Charles Wolfram's comprehensive *Modern Legal Ethics* (1986) begins his study of the lawyer's duty to keep confidences by discussing "The Confidentiality Principle."[90] The American Law Institute's (ALI) *Restatement of the Law Governing Lawyers*, drafted between the mid-1980s and finally published in 2000, does not appear to use the phrase core values.[91] It is barely used in books covered in Google's Ngram Viewer, though the number of references increase from nearly nothing to barely something between 1980 and 2020.[92]

In legal writings, the phrase "core values" was used occasionally before 1990 to discuss the essential meaning of particular provisions of the Constitution. For example, in the 1968 case of *Pickering v. Board of Education*,[93] the Supreme Court, in an opinion by Justice Thurgood Marshall, wrote of "[t]he public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment . . . ."[94] "Core values" was very rarely used to refer to the purpose of the work of lawyers in law review or bar journal articles before then.[95]

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89. *Report of the Commission on Professionalism*, 111:2 ANN. REP. A.B.A. 369, 371, 418 (1986). The report was also published at 112 F.R.D. 243 (1986) and as a book. COMM'N ON PROFESSIONALISM, AM. BAR ASS'N, ". . . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986).

90. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.1, at 242 (1986).

91. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. (AM. L. INST. 2000).

92. Search for "Principles, Values, Core Values", GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/ [https://perma.cc/EL5W-HEW5].

93. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

94. *Id.* at 573.

95. The exception to this is James Y. Preston, *The President's Message*, N.C. ST. BAR Q., Summer 1988, at 2 (discussing "the importance of certain core values for the legal profession—values like justice, truth and service—as being essential to the survival of the profession and of its practitioners");

The change began in a 1990 essay by Geoffrey Hazard[96] on *The Future of Legal Ethics*.[97] Hazard was the most well-known legal ethics scholar of this time. He served as Reporter to the Kutak Commission from 1978 to 1983.[98] In 1984, he became ALI Director, and under his leadership the ALI began its *Restatement (Third) of the Law Governing Lawyers* project.[99] Hazard's essay argued that the "basic ethical rules of representation" of clients had remained remarkably stable for two centuries.[100] When a lawyer represents a client, "[t]he rules enforce three core values: loyalty, confidentiality, and candor to the court."[101] The first two core values "legitimate" the lawyer's representation of the client, and the last "legitimates the bar's affiliation with the judiciary."[102]

Hazard did not further explain. Thus, it is unclear why Hazard distinguished confidentiality from loyalty, for a lawyer keeps a client's (and former client's) confidences to demonstrate the lawyer's loyalty to the client. It is also unclear whether Hazard's understanding of core values refers to the values of the legal profession, the values held by some subset of lawyers (litigators?), an individual lawyer's beliefs, or as values clients desire their lawyers to possess. Hazard's description of the profession's core values was largely ignored until the late 1990s, when the Commission on Multidisciplinary Practice adopted both the phrase and Hazard's core values of loyalty and confidentiality.[103]

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see also Robert G. Baynes, *The President's Message*, N.C. ST. BAR Q., Fall 1988, at 2 (noting his predecessor's (Preston's) emphasis on core values that all lawyers accept, but not naming such values).

96. Hazard was the reporter for the Kutak Commission that drafted the Model Rules of Professional Conduct, the director of the American Law Institute when it initiated (and throughout) its Restatement of the Law Governing Lawyers project, co-author of *The Law of Lawyering* (GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING (4th ed., 2014)), co-author of a popular casebook on legal ethics, and the preeminent legal ethics authority of his time. *See* Stephen Gillers, *Hazard, Geoffrey C., Jr.*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 259 (Roger K. Newman ed., 2009); *see also In Memoriam: Geoffrey C. Hazard, Jr.*, A.L.I. REP., Spring 2018, at 1, 4–5 (honoring Hazard).

97. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1246 (1991).

98. *See supra* note 96.

99. *See supra* note 96.

100. Hazard, *supra* note 97, at 1246.

101. *Id.*

102. *Id.*

103. *See* Geoffrey C. Hazard, Jr., *Foreword: The Future of the Profession*, 84 MINN. L. REV. 1083, 1092–93 (2000) (noting idea of core values and listing confidentiality, loyalty, and competence and adding the negative core value of "being as nasty as we can be").

B. *The MacCrate Report and Fundamental Values*

In 1992, the Section on Legal Education and Admissions to the Bar issued the *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, known as the MacCrate Report.[104] Its mission was to identify ways in which law schools and the legal profession could work together to ease the transition of law students to the practice of law. To do so, the Task Force recognized that "it was not possible to consider how to 'bridge' or 'narrow' the alleged 'gap' between law schools and the practicing bar without first identifying the fundamental skills and values that every lawyer should acquire" before practicing law.[105] It seconded this idea by declaring, at its outset, "the law has remained a single profession identified with a perceived common body of learning, skills and values."[106] The Task Force acknowledged its inability to draft "a comprehensive statement of skills and values that all members of the profession would—or could reasonably be expected to—accept as definitive."[107] Even so, it was useful for the progress of the American legal profession to begin the process.[108] In addition to ten fundamental lawyering skills, the MacCrate Report listed four "[f]undamental [v]alues of the [p]rofession": 1) "Provision of Competent Representation; 2) "Striving to Promote Justice, Fairness and Morality"; 3) "Striving to Improve the Profession"; and 4) "Professional Self-Development."[109]

These "fundamental values" do not overlap the three "core values" listed by Hazard. Additionally, the MacCrate Report's four fundamental values substantially overlap one another. The duty to provide competent representation has much in common with the duty to engage in professional self-development. The value of striving to promote justice overlaps with all of the other values. Incompetently representing a client is a form of injustice and demonstrates a failure to develop one's professional abilities. It also detracts from the capacity of legal institutions to do justice.

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104. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT]. Robert MacCrate served as the chair of the task force. *Id.* at v.

105. *Id.* at 7.

106. *Id.* at 11.

107. *Id.* at 123.

108. *See id.* at 124 (describing the benefits of composing a statement regarding the "nature of the skills and values that are central to the role and functioning of lawyers in practice").

109. *Id.* at 140–41, 207–21 (offering detailed statements of four fundamental values).

Two notable articles—further described below—discussed core values of the American legal profession in the mid-1990s, neither of which made any reference to Hazard. Both were concerned with the ongoing issue of what lawyer professionalism meant, especially in a market-driven legal profession. In a 1995 speech on professionalism, former ABA President George Bushnell discussed the "core values . . . [of] ensuring access to justice for all persons and defending the sanctity of our Constitution . . . ."[110] Both were threatened by Congress, the former by attacks on legal services for the poor, and the latter by proposals to amend the Constitution.[111] The latter threats included efforts to overturn Supreme Court precedents protecting the right to burn an American flag and allowing public schools to require students to pray.[112] Such threats to the First Amendment rights to speech and religion would "cripple our freedoms and subject us all to a more authoritarian government."[113]

A 1994 essay in the ABA publication, *Business Law Today*, was titled *Reclaiming Our Core Values.*[114] Author Ronald Kessel, the managing partner of Palmer and Dodge, a large Boston firm, sought a renewed sense of professional community. Too often, law firms had fallen into the trap of valuing the "limited" currency of "dollars and billable hours."[115] This made the practice of law more like work in a nineteenth century sweatshop than a professional endeavor. Law firms would be well served by a "revitalized institutional commitment to professional values and the professional growth of its lawyers."[116] Kessel did not define the contours of "core" or "professional" values; for him, the heart of the matter was the imbalance caused lawyers by a focus on monetary rewards.

C. *Core Values and Lawyer Ethics, 1997–2003*

In 1997, ABA President Jerome Shestak dedicated his year of service to fulfilling the profession's "fundamental professional values,"[117] building on

110. George E. Bushnell, Jr., *Francis X. Riley Lecture on Professionalism*, 16 N. ILL. U. L. REV. 1, 4 (1995).

111. *Id.* at 4–5.

112. *Id.* at 5–6.

113. *Id.* at 6.

114. Ronald H. Kessel, *Reclaiming Our Core Values*, BUS. L. TODAY, Jan.–Feb. 1994, at 6.

115. *Id.* at 9.

116. *Id.*

117. Jerome J. Shestack, *Putting Our Professional Values to Work*, A.B.A. J., Nov. 1997, at 8, 8; *see also* Jerome J. Shestack, *Defining Our Calling*, A.B.A. J., Sept. 1997, at 8, 8 (calling for lawyers to "enhance[] our professionalism").

the recommendations made in the MacCrate Report. In his inaugural speech, he argued, "rapid changes in the profession and technology make a comprehensive study and review necessary to take the legal profession into the next century."[118] He therefore urged the creation of a Commission on Evaluation of Professional Standards (Ethics 2000).[119] Shestak returned to this theme in this swan song. Shestak asked ABA members to "commit to the essential values and conduct that make a lawyer worthy of being called a professional"; he did not examine in detail which values were essential or fundamental.[120]

Shestak's successor, Philip Anderson, began his term by noting the American Institute of Certified Public Accountants was readying adoption of its vision statement, which had "a distinctly market-oriented bent."[121] Further, this vision statement perceived growth not in the areas of taxation and accounting, work traditionally done by accountants, but in "consulting services, including legal services."[122] Anderson also noted that four of the five largest employers of lawyers were accounting firms.[123] The Big Five accounting firms looked ready to enter the "legal consulting" market,[124] in effect, the practice of law. This possibility was a threat to those large firms that competed with the Big Five. Anderson decided to create a Commission on Multidisciplinary Practice.[125] It was to recommend whether organizations in which both legal and other services were offered, and which were owned by lawyers and other nonlawyer service providers, should be permitted in the Rules of Professional Conduct.[126] If so, this would alter or abolish Rule 5.4(b)'s ban on nonlawyer ownership of entities in which the practice of law occurred. It was given less than a year to report back.

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118. James Podgers, *Model Rules Get the Once-Over*, A.B.A. J., Dec. 1997, at 90, 90 (quoting Shestack).

119. *Id.* The formal name of the Commission was Commission on Evaluation of the Rules of Professional Conduct, and popularly known as the Ethics 2000 Commission. *See id.* (using the names interchangeably).

120. Jerome J. Shestak, *Taking Professionalism Seriously*, A.B.A. J., Aug. 1998, at 70, 70.

121. Philip S. Anderson, *We All Must Be Accountable*, A.B.A. J., Oct. 1998, at 6, 6.

122. *Id.*

123. *Id.*

124. John Gibeaut & James Podgers, *Feeling the Squeeze: Commission Appointed to Assess Threat from Accountants*, A.B.A. J., Oct. 1998, at 88, 88 (noting the creation of a commission in response to efforts by accounting firms to enter markets long thought by lawyers to be theirs alone).

125. *Id.*

126. *See id.* (describing the issue the commission would assess and indicating it would recommend a response to the House of Delegates).

The Multidisciplinary Practice Commission met its deadline. Its Report favored amending Model Rule 5.4 to permit lawyers and nonlawyers jointly to own an MDP.[127] The Commission recommended this change on the condition that the bar "protect its core values, independence of professional judgment, protection of confidential client information, and loyalty to the client through the avoidance of conflicts of interest . . . ."[128] The last two, of course, were values listed by Hazard in his 1990 essay;[129] Hazard was a member of the Commission on Multidisciplinary Practice.[130] Independence of professional judgment, not Hazard's "candor to the court," was the Commission's third core value.[131] It seems likely that listing this core value was more a consequence of the issue before the Commission than an effort to displace candor as a core value.

Most states created similar commissions.[132] The Association of the Bar of the City of New York (City Bar) was one. The City Bar responded favorably to the initial report of the ABA Commission on Multidisciplinary Practice in support of amending the Model Rules, though it added more core values:

> MDPs should be permitted, but only under a regime that requires MDPs to respect and preserve the core values of the legal profession—independence of judgment, loyalty to the client, preservation of confidences, competence, avoiding improper solicitation, and support for *pro bono* legal services and improving the legal system.[133]

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127. *Report*, *supra* note 21, at 223; *see also* Debra Baker, *View from the Other Side*, A.B.A. J., Apr. 1999, at 83, 83 (quoting Lawrence Fox at the February 1999 ABA Midyear Meeting in opposition to MDPs: "The whole notion that all of our core values shall be destroyed sends shivers through me . . . ").

128. *Report*, *supra* note 21, at 223. The report continues and gives a detailed description of itself. *Id.* at 225–32 (discussing the report in detail).

129. *See supra* notes 96–97, 101 (describing Hazard's 1990 essay).

130. *Report*, *supra* note 21, at 232 (listing members).

131. *Id.* at 223.

132. George C. Nnona, *Situating Multidisciplinary Practice Within Social History: A Systemic Analysis of Inter-Professional Competition*, 80 ST. JOHN'S L. REV. 849, 857 n.21 (2006) (noting "forty-four states and the District of Columbia" created commissions on the subject).

133. *Statement of Position on Multidisciplinary Practice*, 54 REC. ASS'N BAR CITY N.Y. 585, 596 (1999). The list is written slightly differently by its Executive Committee. *Id.* at 589 (including "decision-making" as part of independence of judgment and adding "avoidance of conflicts of interest" to the core value of loyalty to the client, and "maintaining the independence and integrity of the judicial system" to the last duty noted).

The Florida Bar issued a report recommending the ABA not act on the Commission's recommendation until further study was completed and demonstrated that this change would not adversely affect the values of lawyer independence and the duty of client loyalty. It argued the Commission had not thoroughly evaluated whether the public understood and supported this change to "a fundamental value of the independence of the profession."[134] The ABA agreed to the delay.

The Commission returned with the same recommendation in 2000.[135] It again made its recommendation with the proviso that the profession protect the public interest and the "core values of the legal profession."[136] It added two core values, "competence, . . . and *pro bono publico* obligations," to the three listed in its report the previous year.[137] It also tartly informed the House of Delegates that the study proposed by the Florida Bar was infeasible.[138]

The Commission's recommendation triggered a disagreement in the House of Delegates about who better understood and interpreted the core values of the legal profession.[139] Those supporting the Commission's recommendation lost by a nearly 3–1 margin.[140] Its recommendation was displaced by a resolution reaffirming the majority's understanding of core values. The House resolved that each jurisdiction "implement the following principles and preserve the core values of the legal profession."[141] The six core values the House listed were: 1) a "duty of undivided loyalty to the

134. *Report of the Florida Bar*, 124:2 ANN. REP. A.B.A. 753, 754 (1999).

135. *Multidisciplinary Report*, *supra* note 25, at 183; *see also Report*, *supra* note 21, at 223–25 (mentioning "core values" nine times in the 2000 debate on multidisciplinary firms); Fox, *supra* note 29, at 547–48 (alluding to the Commission's recommendation and its alleged connection to protecting core values). The MacCrate Report is discussed in "Professionalism and the Lawyer's Role," above. *Proceedings for the Annual Meeting of the House of Delegates*, *supra* note 27, at 26 (indicating MacCrate led effort in the House of Delegates to keep the ABA ethics rules ban on multidisciplinary firms).

136. *Multidisciplinary Report*, *supra* note 25, at 183.

137. *Id.* at 183. The Commission noted: "It is undeniable that competence is a core value of the profession and the Commission's original recommendation should have so identified it." *Id.* at 188. On pro bono, it declared: "Through recognizing that pro bono service is not mandatory, the Commission nevertheless believes it is a core value of the legal profession." *Id.* at 190.

138. *Id.* at 192–93.

139. *See Report of the Illinois Bar Association Presented Jointly with the New Jersey State Bar Association*, 125:2 ANN. REP. A.B.A. 343, 343, 345 (2000) (offering a "statement of principles" that included four "core values": undivided loyalty to clients, competence, keeping client confidences inviolate, and duty to avoid conflicts of interest with a client); *see also id.* at 345 (referencing the MacCrate report).

140. *See* John Gibeaut, *'It's a Done Deal': House of Delegates Vote Crushes Chances for MDP*, A.B.A. J., Sept. 2000, at 92, 92 (noting the vote against the proposal was 314–106).

141. *Proceedings for the Annual Meeting of the House of Delegates*, 125:2 ANN. REP. A.B.A. 1, 24 (2000).

client"; 2) a "duty competently to exercise independent legal judgment" on a client's behalf; 3) a duty to keep client confidences inviolate; 4) a duty to avoid a conflict of interest with a client; 5) a duty to "maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibilit[ies] for the quality of justice; and" 6) a "duty to promote access to justice."[142]

A leader in the House who rejected MDPs was Robert MacCrate, a former ABA president for whom the MacCrate Report was named. As a former president, MacCrate was permitted to make a report to delegates opposing the Commission's recommendation.[143] He noted the work of the Special Committee on the Law Governing Firm Structure and Operation of the New York State Bar Association, which he served as chairperson.[144] Its report was titled, *Preserving the Core Values of the American Legal Profession.*[145] The committee listed seven core values. Four were fiduciary duties owed to clients (confidentiality, avoiding conflicts of interest, independent judgment, and competence), and three were duties "arising" from the lawyer's role in the adversary and governmental systems (advocacy, access to legal services, and "[t]he independent legal profession and the rule of law").[146]

The MDP debate in the ABA and in state bar associations had generated a broad discussion of the contours of the legal profession's core values. The June 2000 issue of the *Minnesota Law Review* (that is, after the ABA's 1999 delay and before its reconsideration of MDPs in 2000) published articles from a symposium on multidisciplinary practice, core values, and the future of the legal profession. One contribution looked closely at the core values issue, similarly to the New York State Bar Association. The authors asked, what were the profession's core values from the perspectives of 1) clients, and 2) society?[147] They listed several core values from each perspective. To effectuate the client's interests, a lawyer had to be competent, truthful

142. *Id.* Promoting access to justice was one of Bushnell's core values, as discussed in his 1995 lecture. *See supra* note 110.

143. *Report of Robert MacCrate, Former President*, 125:2 ANN. REP. A.B.A. 603 (2000).

144. *Id.* at 604.

145. SPECIAL COMM. ON THE L. GOVERNING FIRM STRUCTURE & OPERATION, N.Y. STATE BAR ASS'N, PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION (2000), https://nysba.org/app/uploads/2020/01/MACRATEREPORTAccessible.pdf [https://perma.cc/2GA4-GJ83].

146. *Id.* at 309–24.

147. James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1186 (2000).

and honest, keep client confidences, and exercise independent judgment for the benefit of the client.[148] Regarding this last core value, a lawyer was unable to exercise independent judgment if there existed a conflict of interest with the client.[149] To meet society's interests, the lawyer needs to abide by the law, speak candidly and truthfully to any tribunal, speak truthfully to adversaries and third parties, provide access to the system of justice, and "work to improve the system of justice."[150]

The 2003 House of Delegates debate whether to add two exceptions to Rule 1.6 protecting client confidences brought more heat than light to the core values question. The duty to keep "inviolate the confidence, and at every peril to themselves, to preserve the secrets of their clients" had long been one of the "duties specifically enjoined by law on attorneys," as Thomas Goode Jones wrote in 1887.[151] This inviolate duty was accompanied by the common law crime-fraud exception to the attorney-client privilege. This exception applied when a lawyer's services were used to permit a person to commit what the client knew or reasonably should have known was a crime or fraud.[152] "Inviolate" may not have been quite the right word.

At the end of these two debates, the following had been nominated as professional core values:

- Competence, including a "duty competently to exercise independent legal judgment" on a client's behalf;
- Confidentiality, sometimes referred to as the duty to keep confidences "inviolate";
- Undivided loyalty to client, sometimes reflected in a duty to avoid any conflict of interest with the client;

148. *Id.* at 1187.

149. *Id.* at 1187–88.

150. *Id.* at 1188–89.

151. Jones, *supra* note 40, at 46–47 (listing, as the fourth duty of seven, to "maintain inviolate the confidence, and at every peril to themselves, to preserve the secrets of their clients"); *see* ABA Code of Ethics, 31 ANN. REP. A.B.A. 567, 585 (1908) (listing as the fifth oath provision: "I will maintain the confidence and preserve inviolate the secrets of my client . . . ").

152. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 82 (AM. L. INST. 2000), which differs slightly from proposed, but rejected, FED. R. EVID. 503(d)(1) (1975) ("[S]ervices of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud . . . .").

- A duty to exercise "independent judgment" on behalf of the client;
- A duty to be truthful and honest with one's clients;
- Avoiding improper solicitation;
- Candor to the court, also stated as a duty to speak candidly and truthfully to any tribunal;
- A duty of advocacy arising from the lawyer's role in the adversary system;
- Professional self-development;
- Providing *pro bono publico* services;
- Striving to promote justice, fairness and morality;
- Contributing to the profession's fulfillment of its responsibility to enhance the capacity of law and legal institutions to do justice;
- A "duty to promote access to justice" or to "provide" access to the system of justice;
- A duty to work to improve the system of justice;
- A duty to maintain "a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibilit[ies] for the quality of justice";
- A duty to promote access to legal services;
- A duty to maintain the independent legal profession and the rule of law; and
- A duty to abide by the law.[153]

There was pushback. Professor Nathan Crystal closely assessed four of the six core values listed in the ABA's resolution in 2000 and found them wanting. This list had "rhetorical appeal but is fundamentally misleading."[154] Additionally, "reliance on the core values of the

153. *See, e.g.*, *supra* notes 141–52 and accompanying text (describing the debates and core values nominated during the debates).

154. Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 748 (2001).

profession" harms those of moderate means in need of legal services.[155] The ABA ignored his critical, well-reasoned analysis.

D. *Core Values and the ABA, 2000–2010*

The *ABA Journal* publishes a column from its president in each issue. Most reflect the president's particular goals or the ABA's mission. From 2000 through 2010, many ABA presidents favorably discussed the importance of protecting and enhancing the legal profession's core values in one or more monthly columns.[156] Nearly all did so without referring to any particular core values. One exception was H. Thomas Wells, Jr., who served as president from 2008–2009. Wells's objective as president was to foster four core values that "all lawyers share": "access to justice, independence of the bar and judiciary, diversity and the rule of law."[157] All concerned institutional core values, an expected focus. The core value of "diversity" was the only one of these four core values new to the list.

Wells included diversity in response to the decision of the ABA House of Delegates to "reform[] its goals and mission" in 2008.[158] Its mission was

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155. *Id.*

156. *See* Carolyn B. Lamm, *Help Spread the Word: Inform Your Colleagues of Benefits and Public Service Aspects of ABA Membership*, A.B.A. J., Dec. 2009, at 9, 9 (reflecting on how ABA members serve the profession and the public); *Next in Line: Michael Greco Begins His Term as ABA President-Elect*, A.B.A. J., Oct. 2004, at 76, 76 (quoting new president, Michael Greco); Dennis W. Archer, *Times Have Changed: Join My Family, Our ABA Family in Improving the Justice System and the World*, A.B.A. J., Sept. 2003, at 8, 8 (describing a core value he resolved to focus on); Alfred P. Carlton Jr., *Of Time and Independence: After 9-11 and the Business Debacles of Recent History, Our Country Needs Us*, A.B.A. J., Sept. 2002, at 10, 10 (emphasizing the importance of "hold[ing] fast to the core values" of the legal profession); Martha W. Barnett, *Professionalism Pays*, A.B.A. J., Apr. 2001, at 10, 10 (describing how law firms should use the values of "[c]haracter, [c]ompetence and [c]ommitment" to guide their operations); William G. Paul, *ABA—A Home for All Lawyers*, A.B.A. J., Apr. 2000, at 8, 8 ("[A]ll lawyers share core values and professional obligations, and have a duty to do the work of the profession."); William G. Paul, *A Vision for Our Profession*, A.B.A. J., June 2000, at 8, 8 ("[O]ur core values [should] never change because they set us apart as a profession and are critical to the preservation of our free society.").

157. Wells, *supra* note 30, at 9; H. Thomas Wells Jr., *Common Core Values*, BAR LEADER, Sept.–Oct. 2008, at 16, 16.

158. *See* COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PRO., AM. BAR ASS'N, GOAL III REPORT: THE STATE OF RACIAL AND ETHNIC DIVERSITY IN THE AMERICAN BAR ASSOCIATION 1 (2011), https://www.americanbar.org/content/dam/aba/administrative/diversity-portal/2011r_e_goal3_report.pdf [https://perma.cc/5GDW-NWUG] (discussing the history of the ABA's reforming its mission and goals); AM. BAR ASS'N, GOAL III REPORT 2020: THE DEMOGRAPHIC DIVERSITY OF THE ABA'S LEADERSHIP AND MEMBERS 5 (2020), https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/2020_goal_iii_report.pdf [https://perma.cc/D3AV-

to "serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession."[159] The four goals adopted to meet this mission were: serve our members, improve our profession, "[e]liminate [b]ias and [e]nhance [d]iversity," and "[a]dvance the [r]ule of [l]aw."[160] The two objectives of diversity (Goal III) were: "[p]romote full and equal participation in the association, our profession, and the justice system by all persons," and "[e]liminate bias in the legal profession and the justice system."[161]

The extent to which these goals were to inform other decisions of the House of Delegates was uncertain. At the February 2010 ABA Midyear Meeting, the House adopted a recommendation that the ABA examine how third parties (such as U.S. News & World Report) ranked law firms (a new project) and law schools (an old project).[162] The initial recommendation suggested lawyers "consider whether such rankings promote diversity, pro bono activities and other 'core values' of the profession."[163] These particular considerations were dropped from the resolution by a vote of 203–183.[164]

Another measure of the importance of core values language in the ABA was its reaffirmation in 2007 of the core values of *pro bono publico* work and the independence of the bar from the government. In January 2007, a senior Department of Defense official encouraged general counsel at Fortune 500 companies to jettison law firms and lawyers who also represented alleged terrorists and Guantanamo detainees on a pro bono basis.[165] The organized bar and the House of Delegates responded immediately. A group of thirty bar associations and ABA sections and committees proposed five resolutions condemning this attack on lawyers at the ABA's February 2007 meeting.[166] The first resolution affirmed the ABA's "commitment to the

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TBFH] (describing how, "[i]n 2008, the House of Delegates voted to revise the Association's goals to ensure that the rights of other underrepresented groups could be addressed").

159. *ABA Mission and Goals*, *supra* note 31.

160. *Id.*

161. *Id.*

162. *Proceedings of the 2010 Midyear Meeting of the House of Delegates*, 135:1 ANN. REP. A.B.A. 1, 40–44 (2010).

163. Edward A. Adams, *Rankings to Get ABA Review*, A.B.A. J., Mar. 2010, at 66, 66.

164. *Id.*

165. *See* James Podgers, *Engaged from the Start*, A.B.A. J., Sept. 2007, at 64, 66 (commenting on remarks made by a "senior official at the Pentagon" to the corporations); *see* Lawrence J. Fox, *The ABA—A Beacon for Our Clients*, 2007 PRO. LAW. SYMP. ISSUES 9, 15 (2007) (discussing event).

166. *See Report of the New York State Bar Association et al.*, 132:1 ANN. REP. A.B.A. 479, 479–81 (2007) (listing thirty sponsors of the resolutions) [hereinafter *NYSBA Report*].

core values of the legal profession, including commitment to pro bono provision of legal services to those in need and the commitment to the independence of the profession, provided that this does not negate existing ABA policy regarding any governmental obligation to provide counsel."[167] The four other resolutions were also adopted after modest amendments. They included praise for those courageous lawyers willing to "provide pro bono legal services to disfavored individuals and groups."[168] The House also condemned "any governmental attack on the independence of the profession that encourages clients to exert improper influence over their lawyers' choice of other clients, or to penalize lawyers for representing unpopular or controversial clients."[169] As the chair of the ABA Criminal Justice Section reminded his readers: "The unique and important role of an independent bar in protecting and defending liberty is more, not less, important than ever before."[170] Those lawyers fighting "for the rights of the 'worst of the worst[]' . . . demonstrated fidelity to the rule of law, the Constitution of the United States, and fundamental principles of international law."[171]

E. *Ethics 20/20 and Core Values, 2009–2012*

In 2009, Carolyn Lamm followed Wells as ABA president. Like Shestak (and others) before her, she argued a review of the Model Rules of Professional Conduct was necessary to "keep pace with societal change" and with the "accelerating pace of technological innovation."[172] She created an Ethics 20/20 Commission to recommend changes, if any, to the Model Rules.

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167. *Id.* at 480; *Proceedings of the 2007 Midyear Meeting of the House of Delegates*, 132:1 ANN. REP. A.B.A. 1, 22–23 (2007).

168. *NYSBA Report*, *supra* note 166, at 480. *Proceedings of the 2007 Midyear Meeting of the House of Delegates*, *supra* note 167, at 23.

169. *NYSBA Report*, *supra* note 166, at 481.

170. Stephen A. Saltzburg, *The Importance of an Independent Bar*, CRIM. JUST., Winter 2008, at 1, 20.

171. *Id.* at 22.

172. *See* COMM'N ON ETHICS 20/20, AM. BAR ASS'N, PRELIMINARY ISSUES OUTLINE 1–2 (Nov. 19, 2009), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/preliminary_issues_outline.pdf [https://perma.cc/2CCG-VKJF] (indicating "Lamm created the ABA Commission on Ethics 20/20" to assess the Model Rules in light of modern developments); Carolyn Lamm, *Now More than Ever: ABA Will Continue Providing Guidance, Delivering Benefits to Boost the Profession*, A.B.A. J., Sept. 2009, at 9, 9 ("We need to review our system of legal governance and ethical regulations to keep up with a changing world.").

The Ethics 20/20 Commission possessed the authority to undertake a "plenary review and assessment of the Model Rules" in light of these changes.[173] The Commission was to "be guided by three principles: protecting the public [interest], preserving core professional values of the American legal profession [(otherwise left undefined)], and maintaining a strong, independent, and self-regulating profession."[174] Its preliminary outline focused on the impact of state regulation of lawyers engaged in the multijurisdictional practice of law, the effect of changes in technology on the globalization of the practice of law, and ethics issues affected by technology.[175]

In a December 2, 2011 memorandum and report, Ethics 20/20 announced its decision to continue the ban on most types of multidisciplinary practice structures, now referred to as "alternative law practice structures" (ALPS).[176] The Commission left open the possibility of a very "limited form of . . . nonlawyer ownership" in a law firm.[177] The Commission declared this possibility was "more restrictive than" the type of (restrictive) nonlawyer ownership the District of Columbia had permitted for over twenty years.[178] The mere possibility of an ALPS was sufficient to rouse the opposition. The Illinois State Bar Association (ISBA), joined by other associations, filed a resolution asking the House to re-affirm its 2000 decision to ban any form of multidisciplinary practice.[179]

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173. COMM'N ON ETHICS 20/20, *supra* note 172, at 1–2.

174. *Id.* at 2.

175. *See generally id.* (outlining the issues).

176. Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20 to ABA Entities, Courts, Bar Ass'ns (state, loc., specialty & int'l), Law Schools, & Individuals 1–2 (Dec. 2, 2011), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.pdf [https://perma.cc/WCT5-7C6U].

177. *Id.* at 2.

178. *Id.*; *see Commission on Ethics 20/20*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonprofessionalism2/resources/ethics2020hompeage/ [https://perma.cc/ND69-P6LX] ("The Commission already has ruled out certain forms of nonlawyer ownership that currently exist in other countries. In particular, the Commission rejected: (a) publicly traded law firms, (b) outside nonlawyer investment or ownership in law firms, and (c) multidisciplinary practices (i.e., law firms that offer both legal and non-legal services separately in a single entity). This Discussion Draft relates to a very limited form of nonlawyer ownership in a law firm akin to, but more restrictive than, that which has been permitted for 21 years in the District of Columbia.").

179. *See generally* ILL. STATE BAR ASS'N ET AL., REPORT TO THE HOUSE OF DELEGATES (2000), https://www.isba.org/sites/default/files/blog/2012/08/isba-raises-issue-nonlawyer-ownership-law-firms-aba-house-delegates/joint_isba_sr_lawyers_div_resolution%20authcheckdam.pdf [https://per

ISBA President John Thies raised the stakes: "[T]his is about defending the core values of our profession against the encroachment of non-lawyers—to the detriment of clients. It's gratifying that so many other states are lining up behind us, and I expect this to continue as we approach the ABA meeting in August."[180] Even after Ethics 20/20 decided in April to make no proposal permitting lawyers to form any ALPS in which legal services would be provided,[181] the ISBA continued to press its resolution in August. Agreeing were nine general counsel of large corporations. They declared, "allowing any form of non-lawyer ownership of law firms will harm the core values of the American legal profession."[182] These counsel explicitly referred to the core values adopted in 2000.[183] Although the ISBA's resolution was formally postponed rather than adopted, it won. No change was made. And the reason appeared to be the defense of the profession's "core values."[184] Of course, the co-chairs of Ethics 20/20 had pledged to maintain the core values of the profession as one of its principles. Aligning these competing claims of core values was becoming less likely.

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ma.cc/BD7Z-JD2F] (stating the "resolution would reaffirm certain core principles and values of the legal profession" that the House adopted in 2000).

180. Chris Bonjean, *ISBA Submits Resolution Regarding ABA's Ethics 20/20*, ILL. ST. BAR ASS'N (June 20, 2012), https://www.isba.org/barnews/2012/06/20/isba-submits-resolution-regarding-abas-ethics-2020 [https://perma.cc/6QHS-TZBD] (quoting Thies).

181. James Podgers, *Summer Job: Ethics 20/20 Commission Shelves Nonlawyer Ownership, Focuses on Other Proposals*, A.B.A. J., June 2012, at 27, 27, 29; *see* Memorandum from Jamie S. Gorelick & Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20 to ABA Entities, Courts, Bar Ass'ns (state, loc., specialty & int'l), Law Schools, & Individuals 7 (Dec. 28, 2011), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111228_summary_of_ethics_20_20_commission_actions_december_2011_final.pdf [https://perma.cc/Y58H-Y86B] (indicating the Commission rejected such proposals).

182. Email from Mark Chandler, Senior Vice President, Gen. Couns. & Sec'y, Cisco Sys., Inc. et al. to Commission Members, ABA Comm'n on Ethics 20/20, at 1 (Feb. 29, 2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/ninegeneralcounselcomments_alpschoiceoflawinitialdraftproposal.authcheckdam.pdf [https://perma.cc/Q3V5-56TM].

183. *Id.* at 2.

184. *See* James E. Moliterno, *Ethics 20/20 Successfully Achieved Its Mission: It "Protected, Preserved, and Maintained"*, 47 AKRON L. REV. 149, 157–58 (2014) (discussing the controversy and Thies's invocation of the profession's "core values"); *see also Proceedings of the 2012 Annual Meeting of the House of Delegates*, 137:2 ANN. REP. A.B.A. 1, 6 (2012) (postponing consideration of Resolution 10A).

IV. MODEL RULE OF PROFESSIONAL CONDUCT 8.4(G)

A. *History of Anti-Discrimination Ethics Proposals, 1992–2013*

Model Rule 8.4(g) went from idea to adoption in less than two years' time, and from first to final (fifth) version in just over a year. This is quick in ABA policymaking. Its origins, and the interest of many in the ABA to add some type of anti-discrimination provision in the Model Rules, began much earlier.

The 1992 MacCrate Report's second fundamental professional value was to strive "to [p]romote [j]ustice, [f]airness, and [m]orality."[185] In its Commentary on this value, the Report discussed how important it was for lawyers to accord "appropriate dignity and respect to all people with whom one interacts in a professional capacity."[186] More specifically, that duty "necessarily includes refraining from sexual harassment and from any form of discrimination on the basis of gender, race, religion, ethnic origin, sexual orientation, age, or disability, in one's professional interactions with clients, witnesses, support staff, and other individuals."[187] It cited New York and Minnesota lawyer ethics provisions in support of its conclusion; the latter, adopted in 1989, stated, "[i]t is professional misconduct for a lawyer to . . . harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities."[188]

In 1992, the ABA's Task Force on Minorities and the Justice System issued its report, *Achieving Justice in a Diverse America*.[189] One suggestion of the Task Force was that the Committee on Ethics and Professional Responsibility draft a rule of professional conduct making it misconduct to engage in certain types of discriminatory behavior.[190] At the February 1994 Midyear Meeting of the ABA, the Committee recommended adding new paragraph (g) to Model Rule 8.4.[191] Its recommendation made it misconduct for a lawyer, "in the course of representing a client," to

185. MACCRATE REPORT, *supra* note 104, at 140.

186. *Id.* at 214.

187. *Id.*

188. *Id.* (quoting MINN. RULES OF PROF'L CONDUCT R. 8.4 (1989)).

189. TASK FORCE ON MINORITIES & THE JUST. SYS., AM. BAR ASS'N, ACHIEVING JUSTICE IN A DIVERSE AMERICA (1992).

190. *Id.* at 26.

191. *Report No. 3 of the Standing Committee on Ethics and Professional Responsibility*, 119:1 ANN. REP. A.B.A. 106, 106 (1994) [hereinafter *Report No. 3*].

"knowingly manifest by words or conduct . . . bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status."[192] The Committee also proposed a new comment that concluded "[d]iscriminatory conduct . . . generally viewed as unacceptable manifests a lack of respect for the law and undermines a lawyer's professionalism."[193]

The Committee's proposal closely tracked Canon 3B(6) of the ABA's 1990 Model Code of Judicial Conduct. Canon 3B(6) mandated a judge to "require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status," toward any person connected with the litigation.[194] (Canon 3B(5) required the same of the judge in the performance of judicial duties.)[195]

Though the Committee did not appear to break much new ground, given its reliance on language found in an existing Canon of Judicial Conduct, the recommendation was withdrawn before discussion in the hope that a proposal "commanding general support" could be offered the following year.[196] The Young Lawyers Division (YLD) had offered its own paragraph (g) at the same meeting, which was also withdrawn. The YLD proposal was both slightly narrower and significantly broader than the Committee's. Its proposal was narrower in the activities it proscribed. Only those actions that constituted a "discriminatory act prohibited by law" or conduct that harassed a person based on race, gender and other attributes was misconduct.[197] It was broader because it applied to "discrimination or harassment . . . in connection with a lawyer's professional activities," not

192. *Id.*

193. *Id.*; ARTHUR H. GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, at 855 (2013).

194. MODEL CODE OF JUD. CONDUCT Canon 3B(6) (AM. BAR ASS'N 2004); *See Report No. 3*, *supra* note 191, at 109 (quoting Model Code of Judicial Conduct Canon 3B(6): "A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, against parties, witnesses, counsel or others."); Canon 3B(6) is now found, as slightly amended, in MODEL CODE OF JUD. CONDUCT Canon 2.3(C) (AM. BAR ASS'N 2010) (adding "or engaging in harassment, based upon attributes including but not limited to" after "prejudice," and adding ethnicity, marital status, gender, and political affiliation to the list of attributes).

195. Canon 3B(5) used the same language and created the same duty as applied to the judges themselves. MODEL CODE OF JUD. CONDUCT Canon 3B(5).

196. *Proceedings of the 1994 Midyear Meeting of the House of Delegates*, 119:1 ANN. REP. A.B.A. 1, 18 (1994).

197. *Report No. 1 of the Young Lawyers Division*, 119:1 ANN. REP. A.B.A. 353, 353 (1994).

merely when representing a client.[198] It was also broader than the Committee's proposal because it omitted any exceptions. The Committee had included exceptions relating to "a lawyer's confidential communications to a client" and when engaged in "legitimate advocacy."[199]

The hope for a revised paragraph (g) in time for the February 1995 meeting went unrealized, due to a change in view by the Committee.[200] It decided a "policy statement" was preferable to a rule of professional conduct, and this halfway proposition was both acceded to by the YLD and adopted by the House at its August 1995 meeting.[201] The YLD officially proposed a resolution condemning discrimination by lawyers, which it recognized as "aspirational."[202] This policy statement, the ABA Resolution Against Bias and Prejudice, consisted of five parts.[203] The first part meshed the previously withdrawn proposals of the YLD and the Committee on Ethics and Professional Responsibility. As amended, it

> condemns the manifestation by lawyers in the course of their professional activities, by words or conduct, of bias or prejudice against clients, opposing parties and their counsel, other litigants, witnesses, judges and court personnel, jurors and others, based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, unless such words or conduct are otherwise permissible as legitimate advocacy on behalf of a client or a cause.[204]

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198. *Id.*

199. *Compare id.* (providing a draft rule that did not include exceptions), *with Report No. 3*, *supra* note 191, at 106 (providing a draft rule including exceptions).

200. *See Report No. 1 of the Criminal Justice Section*, 123:1 ANN. REP. A.B.A. 207, 210 (1998) [hereinafter *Criminal Justice Section*] (recounting the history of recommended amendments to Model Rule 8.4 and noting "the Standing Committee subsequently shifted its position, instead favoring a policy statement over a rule").

201. *Id.*

202. *Report No. 3 of the Young Lawyers Division*, 120:2 ANN. REP. A.B.A. 445, 445 (1995); *see also Proceedings of the 1995 Annual Meeting of the Assembly*, 120:2 ANN. REP. A.B.A. 2, 61 (1995) (revising and approving the "aspirational" policy statement); GARWIN, *supra* note 193, at 856 (discussing the 1995 policy statement).

203. *See Proceedings of the 1995 Annual Meeting of the Assembly*, *supra* note 202, at 61–62 (providing the text of the resolution).

204. *Id.* at 61. The other provisions condemned 1) "discrimination by lawyers in the management or operation of a law practice," and 2) threatening, harassing, or intimidating others in any setting, not merely doing so with some connection to the practice of law; and 3) discouraged lawyers from joining organizations that engaged in "invidious discrimination" regarding the "aforementioned categories;" and 4) encouraged "affirmative steps such as continuing education . . . to discourage the speech and conduct described above." *Id.* at 61–62.

This policy statement generally accepted the broader reach of both the YLD and Committee's proposals. It followed the Committee in applying to "words or conduct" that demonstrated "bias or prejudice," not merely "a discriminatory act prohibited by law" or harassment.[205] It adopted the broader YLD proposal by condemning acts of lawyers "in the course of their professional activities," not the subset of activities "in the course of representing a client," as the Committee proposed.[206] It was slightly narrower than YLD's 1994 proposal in allowing an exception for "legitimate advocacy" for client or cause, but did not include the Committee's other exception, confidential communications to a client.[207]

Three years later, the Criminal Justice Section proposed adding a paragraph (g) to Model Rule 8.4, consisting of two subsections.[208] This relatively narrow proposal applied only "in the course of representing a client," only to a "verbal or physical discriminatory act, on account of race, ethnicity, or gender," and only when such conduct was directed at those connected with the litigation, such as other litigants and witnesses.[209] The proposal was divided into two sections, applying 1) if the lawyer intended to abuse persons or gain a tactical advantage, or 2) "if such conduct constitutes harassment."[210] The Section also proposed adding five Comments. Its proposed Comment [8] stated:

> [The rule excludes] a lawyer's advocating the racist, sexist, or otherwise discriminatory views of a client, in or out of court, or the lawyer's advocating his own discriminatory view, no matter how offensive, in bar speeches, corporate board meetings, church meetings, published writings, civic association functions, or other avenues of expression in the lawyer's personal life, or in his professional life outside of client representation.[211]

This and the other limitations of the proposed rule (it did not apply to confidential communications or to a lawyer's decision whom to represent), the Section argued, best protected both the constitutional freedom of lawyers and clients to speak and the "fair and efficient workings of the

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205. *Compare id.* at 61 (using broader language), *with Report No. 1 of the Young Lawyers Division*, *supra* note 197, at 353 (using narrower language).

206. *See Report No. 3*, *supra* note 191, at 106 (providing the Committee proposal).

207. *See supra* note 199 (discussing the proposals).

208. *Criminal Justice Section*, *supra* note 200, at 207.

209. *Id.*

210. *Id.*

211. *Id.* at 208.

justice system."[212] The Section's final Comment reminded lawyers that conduct not within this rule would be "inconsistent with what it means to be an officer of the court," and referenced the ABA's 1995 Resolution Against Bias and Prejudice.[213]

In its Report in support of this supplemental provision and commentary, the Criminal Justice Section noted that sixteen states and the District of Columbia had adopted some ethics code provision discouraging or prohibiting "lawyer race, gender, ethnicity, or other category-based discrimination, or lawyer manifestations of bias or prejudice."[214] Those statements varied widely in scope, including some that arguably raised "concerns about free speech and lawyers' ability to earn a living."[215] The Section's goal was to provide, without raising constitutional concerns, "some teeth in the form of a disciplinary rule," for a policy statement was simply ineffective in regulating discrimination on the basis of race, sex, and ethnicity.[216]

The Committee on Ethics and Professional Responsibility was also back that year with a proposal to add a new Comment [2] (later renumbered as Comment [3]) to Rule 8.4.[217] This proposed Comment was nearly identical to Model Code of Judicial Conduct Canon 3B(6), and intentionally so. The Committee believed the language adopted by the House in 1990 "best effectuate[d]" the ABA's Resolution Against Bias and Prejudice.[218] Adopting the language of Canon 3B(6) also meant proposed Comment [2] was nearly identical to the Committee's 1994 proposal, including limiting its scope to behavior in "representing a client."[219] The proposed Comment exempted "legitimate advocacy," but did not include an exception from discipline for confidential communications with clients.[220]

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212. *Id.*
213. *Id.*
214. *Id.* at 209.
215. *Id.*
216. *Id.* at 211.
217. *Report of the Standing Committee on Ethics and Professional Responsibility*, 123:1 ANN. REP. A.B.A. 81, 81 (1998).
218. *Id.* at 82.
219. *Id.* at 81.
220. *Id.*

Both proposals were withdrawn before discussion in the House,[221] but the issue returned in August 1998.[222] The House adopted the Committee's amended addition of new Comment [2].[223] The amendment added the final sentence to protect lawyers in criminal practice.[224] As approved, it stated,

> [2] A lawyer, who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic 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). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.[225]

Comment [2] applied only to instances when the lawyer was acting "in the course of representing a client."[226] It further required the lawyer "knowingly" to manifest bias or prejudice by "words or conduct."[227] The Comment also required a showing that "such actions are prejudicial to the administration of justice."[228] Finally, a lawyer was not subject to discipline solely upon a finding by a court that the lawyer had exercised peremptory challenges on a discriminatory basis.[229]

Neither the Ethics 2000 Commission nor the Ethics 20/20 Commission offered any recommendations to add a Rule 8.4(g). For fifteen years, Comment [2] served as the ABA's statement regarding the discipline of lawyers for discriminatory or harassing behavior. In 2014, a renewed effort to add an anti-discrimination rule began.

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221. *Proceedings of the 1998 Midyear Meeting of the House of Delegates*, 123:1 ANN. REP. A.B.A. 1, 25 (1998).

222. *Report of the Standing Committee on Ethics and Professional Responsibility Presented Jointly with the Criminal Justice Section*, 123:2 ANN. REP. A.B.A. 611, 611 (1998) [hereinafter *Standing Committee*].

223. *Proceedings for the Annual Meeting of the House of Delegates*, 123:2 ANN. REP. A.B.A. 1, 46 (1998).

224. *See Standing Committee*, *supra* note 222, at 611 (exempting discriminatory exercise of peremptory challenges from the Rule's coverage).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*; *see Proceedings for the Annual Meeting of the House of Delegates*, *supra* note 223, at 46 (adopting and reprinting the Comment).

B. *Core Values and Drafting Model Rule 8.4(g)*

1. Rule 8.4(g)

In 2016, with "no debate in the House and few overt signs of opposition," the House of Delegates added Rule 8.4(g) to the ABA's Model Rules of Professional Conduct.[230] If by this statement the authors intended to convey the impression of a near-universal agreement among lawyers that Rule 8.4(g), as written, was now unobjectionable, that would be misleading.[231] As adopted, Model Rule 8.4(g) declares:

> It is professional misconduct for a lawyer to:
>
> . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[232]

Rule 8.4(g) extended the scope of earlier efforts to prohibit harassment and discrimination by lawyers in several ways. First, it sanctioned the use of the attorney disciplinary system as an additional tool to mitigate or eliminate harassment and discrimination. Second, the standard of culpability was whether the lawyer "reasonably should know"; actual knowledge, as required in Comment [2], was no longer the standard.[233] Third, it added

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230. Laird & Podgers, *supra* note 34 at 59; *see also* Dennis Rendleman, *The Crusade Against Model Rule 8.4(g)*, ABA (Oct. 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/ [https://perma.cc/2YGA-D2CK] ("All the issues being raised against Rule 8.4(g) were raised during the three-year development process, and were considered by the drafters, and are accommodated in the balance that Rule 8.4(g) presents. It is worth noting that the amendment passed the 598-member . . . ABA House of Delegates by a unanimous voice vote."). What has happened at the ABA Midyear and Annual Meetings since 2014 must be pieced together from *ABA Journal* reports and online content made available by the ABA, for the most recently published ABA annual report was for the meetings held in February and August 2013.

231. David L. Hudson Jr., *Constitutional Conflict: States Split on Model Rule Limiting Harassing Conduct*, A.B.A. J., Oct. 2017, at 25, 25–26 (highlighting disagreement regarding the constitutionality of Rule 8.4(g)).

232. MODEL RULES OF PROF'L CONDUCT R. 8.4(g) (AM. BAR ASS'N 2020).

233. *Compare id.* (including the language "reasonably should know"), *with Proceedings for the Annual Meeting of the House of Delegates*, *supra* note 223, at 46 (including the standard of actual knowledge).

three attributes—ethnicity, gender identity, and marital status—to the eight categories previously listed.[234] This mostly followed the approach taken by the ABA in 2007 in amending the Model Code of Judicial Conduct. The Judicial "Code's list of improper bases for discrimination" was enlarged to include "the categories of ethnicity, marital status, gender, and political affiliation."[235] The absence of the last category in Rule 8.4(g) indicates the ABA's intention that discrimination or harassment by a lawyer on the basis of political affiliation concerning the practice of law is not professional misconduct subject to discipline. Fourth, paragraph (g) encompassed "conduct related to the practice of law," not merely conduct representing a client.[236] Fifth, it added a client advice exception, but limited that exception to "*legitimate* advice," a perplexing concept.[237]

The House also adopted three Comments that explained the Rule's scope. New Comment [3] declared "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others."[238] Thus, a lawyer who spoke or wrote in a way that manifested "bias or prejudice towards others" engaged in misconduct, if that verbal conduct (sometimes known as a "speech act")[239] was harmful. The Comment did not explain what it meant by "harmful." Rule 2.3(C) of the 2007 Model Code of Judicial Conduct, from which (through its 1990 predecessor) this language was taken, did not include a requirement of showing "harm."[240] Because Comment [3] did not give any examples of what was meant by "verbal . . . conduct that manifests bias or prejudice towards others," and because Comment [2] to Rule 2.3 did,[241] readers could apply a familiar transitive property of interpretation. Examples of manifesting bias or prejudice included "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

234. MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

235. ABA JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUD. CONDUCT, AM. BAR ASS'N, REPORT 4 (2006), http://www.bjs.state.mn.us/file/code-of-judicial-conduct/aba-joint-comm-report-nov-2006.pdf [https://perma.cc/8XXX-W3VL].

236. MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

237. *Id.* (emphasis added).

238. *Id.* at cmt. 3.

239. Classic examples of verbal conduct include saying "I do" at one's wedding or soliciting the listener to kill a third party.

240. MODEL CODE OF JUD. CONDUCT Canon 2.3(C) cmt. 2 (AM. BAR ASS'N 2010).

241. *See id.* at Canon 2.3 cmt. 2 (providing such examples).

characteristics."[242] Further, Comment [3] stated harassment included "sexual harassment and derogatory or demeaning verbal or physical conduct."[243] If a lawyer engaged in "derogatory or demeaning verbal . . . conduct," no showing of harm was required.[244] Comment [3] gave examples of sexual harassment, but did not explain what constituted "derogatory or demeaning" verbal conduct.[245]

Comment [4] defined "[c]onduct related to the practice of law" as extending to "participating in bar association, business or social activities in connection with the practice of law."[246] In fostering ABA Goal III, this Comment also declared not violative of the rule any "conduct undertaken to promote diversity and inclusion," such as "recruiting, hiring, retaining and advancing diverse employees."[247] Implicit within this statement is the use by lawyers of the spoken or written word "to promote diversity and inclusion."

Finally, Comment [5] retained the exemption that a judicial finding that a lawyer made peremptory challenges on a discriminatory basis was, alone, insufficient to violate Rule 8.4(g).[248] It added another exemption by stating a lawyer does not violate the rule by "limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations."[249] The breadth of "scope or subject matter" is unclear. For example, would it permit a lawyer to limit a matrimonial/divorce practice to men in matters against women?[250]

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242. *Id.*

243. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (AM. BAR ASS'N 2020).

244. *Id.*

245. *Id.* The previous Comment [3] (originally Comment [2]) was deleted because its provisions were substantially moved to the rule itself.

246. *Id.* at cmt. 4.

247. *Id.*

248. *Id.* at cmt. 5.

249. *Id.*

250. *Cf.* Stropnicky v. Nathanson, 19 M.D.L.R. 39 (M.C.A.D. 1997), *aff'd*, Nathanson v. Mass. Comm'n Against Discrimination, No. 199901657, 2003 WL 22480688, at *1 (Sept. 16, 2003) (upholding a ruling by the Massachusetts Commission Against Discrimination of gender discrimination by a lawyer for refusing to take the case of a potential male client because she limited her practice to women). *See generally* Michele N. Struffolino, *For Men Only: A Gap in the Rules Allows Sex Discrimination to Avoid Ethical Challenge*, 23 AM. U. J. GENDER SOC. POL'Y & L. 487 (2015) (highlighting a pre-8.4(g) discussion of the ethics of limiting practice to men only); Bradley S. Abramson, *ABA Model Rule 8.4(g): Constitutional and Other Concerns for Matrimonial Lawyers*, 31 J. AM. ACAD. MATRIM. LAWS. 283 (2019) (presenting a post-8.4(g) discussion).

2. Debating and Adopting Rule 8.4(g)

"Diversity, inclusion, and equity, both in the legal profession and in the pursuit of justice, are core values of the American Bar Association . . . ."[251] To aid in reaching Goal III, the ABA created several commissions with particular responsibilities.[252] In May 2014, leaders of four of those commissions wrote encouraging the Committee on Ethics and Professional Responsibility to "draft amendments to the ABA Model Rules of Professional Conduct that would directly address lawyer bias, prejudice, and harassment in the black letter of the Rules."[253] In the view of the Goal III commissions, Comment [3] (formerly 1998 Comment [2], unchanged other than in number) to Rule 8.4 was "not sufficient for this purpose."[254]

The Committee drafted an initial proposal to amend Rule 8.4 in summer 2015; a second was produced at the end of the year.[255] The second version was released for public comment and was the subject of a two-hour hearing at the ABA's February 2016 meeting.[256] Unlike the favorable testimony for the rule at this hearing, written comments on the proposed rule were mixed.[257] One divisive subject was the breadth of the rule's application.

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251. AM. BAR ASS'N, GOAL III REPORT 2020: THE DEMOGRAPHIC DIVERSITY OF THE ABA'S LEADERSHIP AND MEMBERS 3 (2020), https://www.americanbar.org/content/dam/aba/administrative/diversity-inclusion-center/2020_goal_iii_report.pdf [https://perma.cc/J3K5-9YKW].

252. *See id.* (listing the commissions). The Commission on Racial and Ethnic Diversity in the Profession, Commission on Women in the Profession, Commission on Disability Rights, Commission on Sexual Orientation and Gender Identity, and Commission on Hispanic Legal Rights and Responsibilities, as well as several other entities, are housed in the ABA's Diversity and Inclusion Center. *Id.*; *see also Diversity and Inclusion Center*, ABA, https://www.americanbar.org/groups/diversity/ [https://perma.cc/Y5JH-RV57] (providing information about the various commissions).

253. STANDING COMM. ON ETHICS & PRO. RESP., AM. BAR ASS'N, REVISIONS TO MODEL RULE 8.4, at 1 (2015) [hereinafter *Language Choice Narrative*], https://lalegalethics.org/wp-content/uploads/2015-07-16-ABA-Proposed-Amendment-to-Rule-8.4-re-Harassment.pdf [https://perma.cc/S4HJ-6NCQ] (providing a working discussion draft).

254. *See id.* (indicating the text of the letter is found in Appendix A, which is not attached to the document online).

255. *See id.* at 2–3 (presenting the initial draft proposal); Memorandum from Am. Bar Ass'n Standing Comm. on Ethics & Pro. Resp. 2–3 (Dec. 22, 2015) [hereinafter ABA Memorandum on Rule 8.4 Amendment], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2015.authcheckdam.pdf [https://perma.cc/M7MG-5XGT] (proposing a revised draft). The successive versions of paragraph (g) and accompanying Comments are detailed in Halaby & Long, *supra* note 33 at 212–15, 223–31.

256. Halaby & Long, *supra* note 33, at 216. *See generally* Transcript of Hearing on Proposed Amendment to Model Rule 8.4, Am. Bar Ass'n (Feb. 7, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf [https://perma.cc/K2UB-43SW].

257. Halaby & Long, *supra* note 33, at 218–23.

The Goal III Commissions urged the rule be as broadly applicable as possible. That included eliminating the actual knowledge requirement.[258] Other ABA groups were less enthusiastic, and the nearly 500 written comments, most by individuals, were "[o]verwhelmingly . . . negative."[259]

A third version, which omitted any scienter element, was published in spring 2016. This draft also broadly interpreted "conduct related to the practice of law."[260] It was also the first version to include in the comments the exception that conduct (again, implicitly speech as well as actions) intended to promote diversity did not violate the rule.[261] Shortly before the August 2016 meeting, a fourth version was substituted for the third. It added the "reasonably should know" (and actual knowledge) standard and brought back several other exceptions, such as the statement in the comment that a judicial finding that a lawyer made peremptory challenges on a constitutionally discriminatory basis was alone not sufficient to violate the rule.[262] Less than ten days later, a fifth and final version was offered to meet the demands of those ABA entities wavering or opposed to the proposal. This version added the final sentence, "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules."[263] Added at this late hour, what the ABA meant by "legitimate" advice or advocacy was unstated. Further, by including in paragraph (g) that speech in the form of legitimate "advice" did not violate the rule, was the implication of this statement that other types of "speech" could violate the rule? On agreement to this last pre-debate amendment, dissension dissipated, and paragraph (g) passed with no debate and little public opposition in the House of Delegates.

Half of the states had no anti-discrimination rule as of 2016.[264]

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258. *Id.* at 218.

259. *Id.* at 221.

260. *Id.* at 224.

261. *Id.* at 225, 227.

262. *Id.* at 228–30.

263. *Id.* at 230–31. *See* STANDING COMM. ON ETHICS & PRO. RESP. ET AL., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: REVISED RESOLUTION 1 (2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.pdf [https://perma.cc/RSM5-FGQX] (printing a redlined final version of proposed paragraph (g)).

264. *Cf. Language Choice Narrative*, *supra* note 253, at 1 (noting, in 2015, twenty-four jurisdictions had adopted anti-bias or anti-harassment provisions in their lawyer disciplinary rules); Rendleman, *supra* note 230 (noting, in 2018, "more than 25 jurisdictions" had provisions "making it an ethical violation for a lawyer to discriminate or harass another"). An updated comparison to November 2020 is available at CPR POL'Y IMPLEMENTATION COMM., AM. BAR ASS'N, VARIATIONS OF THE ABA

C. *Core Values and Interpreting Rule 8.4(g), 2016–2020*

1. Formal Opinion 493 (2020)

Since the adoption by the ABA of Model Rule 8.4(g), four states—Vermont (2017),[265] Maine (2019),[266] New Mexico (2020),[267] and Pennsylvania (2020)[268]—have adopted some variant of Model Rule 8.4(g).[269] No state appellate court has written an opinion interpreting its version of Rule 8.4(g) in a disciplinary matter since mid-2016.

MODEL RULES OF PROFESSIONAL CONDUCT: RULE 8.4: MISCONDUCT (Nov. 9, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.pdf [https://perma.cc/6UR6-DKGD] (providing comparisons by state as of November 9, 2020).

265. VT. RULES OF PROF'L CONDUCT R. 8.4(g) (2021).

266. ME. RULES OF PROF'L CONDUCT R. 8.4(g) (2021) (stating it is unprofessional conduct for a lawyer to "engage in conduct or communication related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity. (1) 'Discrimination' on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity as used in this section means conduct or communication that a lawyer knows or reasonably should know manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in this paragraph; to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics. (2) 'Harassment' on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity as used in this section means derogatory or demeaning conduct or communication and includes, but is not limited to, unwelcome sexual advances, or other conduct or communication unwelcome due to its implicit or explicit sexual content. (3) 'Related to the practice of law' as used in the section means occurring in the course of representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; or operating or managing a law firm or law practice. (4) Declining representation, limiting one's practice to particular clients or types of clients, and advocacy of policy positions or changes in the law are not regulated by Rule 8.4(g).").

267. New Mexico adopted Rule 8.4(g) effective December 1, 2020. *See* N.M. RULES OF PROF'L CONDUCT R. 16-804(g) (2021) (noting it is professional misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, 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 in accordance with Rule 16-116 NMRA [New Mexico Rules Annotated]. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.").

268. PA. RULES OF PROF'L CONDUCT R. 8.4(g) (2021).

269. *See* CPR POL'Y IMPLEMENTATION COMM., *supra* note 264 (listing adoptions); Kristine A. Kubes et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, ABA (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/ [https://perma.cc/XUB6-Z474] (noting, as of March 2019, Vermont had replaced an earlier version of 8.4(g) with the revised ABA Rule, which was also adopted by the Northern Mariana Islands, the US Virgin Islands, and American Samoa).

On July 15, 2020, the ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 493, offering "guidance on the purpose, scope, and application" of paragraph (g).[270] The opinion began with examples of behavior that "disgrace the entire legal profession."[271] It then noted the breadth of paragraph (g): "[A] single instance of a lawyer making a derogatory sexual comment directed toward another individual in connection with the practice of law would likely not be severe or pervasive enough to violate Title VII, but would violate Rule 8.4(g)."[272] The Committee's example indicates speech (a "single . . . derogatory sexual comment") that does not violate Title VII, and therefore is unlikely to be characterized as verbal conduct, violates paragraph (g).

Though the Opinion does not use the phrase "core values," it explains the justification of paragraph (g) in those terms. For example, it notes: "Preventing sexual harassment is a particular objective of" the rule.[273] This meets an important aspect of Goal III. It seems unexceptional to believe that lawyers who were victims of sexual harassment might reasonably consider leaving and have left the legal profession. Even if such victims eventually decided to remain in the practice of law, such an experience could negatively affect them, and thus, impinge the core value of diversity. Similarly, the Opinion, quoting the Minnesota Supreme Court, discusses the impact of "racially-biased actions" by lawyers: Such actions "not only undermine confidence in our system of justice, but also erode the very foundation upon which justice is based."[274] In addition to the impact on the lawyers and others who are subjected to racially discriminatory actions by lawyers, such actions impair core values of the legal profession: the duties to improve the system of justice, to promote justice, and to contribute to the legal system's capacity to do justice.

The Formal Opinion concludes with five hypothetical instances to which paragraph (g) might apply. Unfortunately, the hypotheticals are simple, possibly simplistic. (In its defense, it appears the Committee was in part

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270. ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 1 (2020) [hereinafter Formal Op. 493].

271. *Id.* at 2 (quoting Mullaney v. Aude, 730 A.2d 759, 767 (Md. Ct. Spec. App. 1999)). The opinion cites cases involving "derogatory, sexual comments," *id.*, and "race-based misconduct," *id.* at 2 n.6.

272. *Id.* at 4.

273. *Id.* at 7.

274. *Id.* at 11 (quoting *In re* Charges of Unprofessional Conduct, 597 N.W.2d 563, 568 (Minn. 1999).

responding to arguments attacking the rule.) The first three outline some of the limits of paragraph (g). The initial hypothetical affirms a lawyer may represent a religious organization challenging, on constitutional grounds, an ordinance requiring gender-neutral bathrooms.[275] This is answered in paragraph (g)'s text. Why the Committee offered a hypothetical so prosaic is unclear. The Opinion then oddly includes this sentence in its "answer": "Though individuals may disagree with the position the lawyer in the hypothetical would be defending, that would not affect the legitimacy of the representation."[276] The American lawyer is steeped in the core values that even the most unpopular person (the "worst of the worst") deserves representation (recall the ABA's swift response to attacks on lawyers representing Guantanamo detainees in 2007) and that the adversary system testing "disagreements" is central to the American system of justice. In a formal opinion to lawyers about the "legitimacy" of representing clients making non-frivolous constitutional claims, to include this sentence is baffling. The second hypothetical is based on an actual argument made by law professor Richard Sander regarding affirmative action.[277] In general, the argument suggests affirmative action may have deleterious consequences for some African-American students, including law students. The hypothetical considers whether making such an argument in a speech to lawyers is subject to discipline.[278] The answer is no. Again, one aspect of its explanation strikes an odd note. The Opinion states, "the lawyer's remarks, without more, would not constitute" a violation of paragraph (g).[279] What constitutes "more" is unstated.[280] It is a deeply unsatisfying answer, for it seems to assume that some aspect of one's opinion might not pass muster. The third hypothetical to which paragraph (g) does not apply is a lawyer's membership in a legal organization that "advocates, on religious grounds, for the ability of private employers to terminate or refuse to employ individuals based on their sexual orientation or gender identity."[281] The answer ends by declaring a lawyer may "express

275. *Id.* at 12.

276. *Id.*

277. RICHARD H. SANDER & STUART TAYLOR JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012).

278. Formal Op. 493, *supra* note 270, at 12.

279. *Id.*

280. *Id.*

281. *Id.* at 13.

the view" that a decision of the Supreme Court is wrong.[282] This is cold comfort. As Justice Robert H. Jackson wrote in 1953 of the Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final."[283] If this were not the case, then doublespeak would be the language of the day.

The final two hypotheticals offer two examples when a lawyer, in the Committee's opinion, has violated paragraph (g).[284] In the first (hypothetical 4), a lawyer and adjunct professor has "made repeated comments about the student's appearance and also made unwelcome, nonconsensual physical contact of a sexual nature with the student."[285] This case presents no interpretive difficulties. Why would the Committee expend any effort on such a simple case?

The last hypothetical offers more food for thought, but it is disappointingly incomplete and possibly misleading. A lawyer-partner is at the office planning a new associate orientation program with "a senior associate." Apparently to this associate, and only this associate, the partner says, "Rule #1 should be never trust a Muslim lawyer. Rule #2 should be never represent a Muslim client. But, of course, we are not allowed to speak the truth around here."[286] This statement is "related to the practice of law," triggering paragraph (g).[287] The Opinion concludes the partner has violated paragraph (g) even if the senior associate is not Muslim and the remarks are not directed to anyone in particular.[288] The Opinion does not state that the associate has family members or intimate friends who are Muslim and are known as Muslim by the partner. This limits the ability of a factfinder to conclude the partner's speech is verbal conduct, something more than simply speech. The Opinion offers no explanation why the speech of this partner to this (non-Muslim) senior associate is verbal conduct. Next, for the partner's remarks to manifest bias or prejudice, the Opinion must assume the partner is not Muslim and is speaking in a deadly earnest and serious tone.[289] Beyond that, the partner is a cipher. What

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282. *Id.*

283. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

284. Formal Op. 493, *supra* note 270, at 13–14.

285. *Id.* at 13.

286. *Id.*

287. *Id.* at 14.

288. *Id.* at 13–14.

289. One assumes a sarcastic comment does not manifest bias or prejudice but is its opposite. If the partner is Muslim, then one might assume the partner is joking or otherwise insincere in making

could possibly possess a partner to consider as "Rule #1" never to trust a Muslim lawyer? The Pew Research Center estimated "about 3.45 million Muslims of all ages" in the United States as of 2017.[290] The estimated number of American lawyers as of 2020 is 1,328,692.[291] The estimated population of the United States in 2019 was 328,239,523,[292] making lawyers approximately 0.4% of the population. If those numbers held (which is a guess), then there are fewer than 14,000 Muslim lawyers in the entire United States and its territories. The senior associate is also an abstraction, so we have no context to understand why the partner would confide in the associate beliefs that the firm has apparently rejected ("But, of course, we are not allowed to speak the truth around here").[293]

The Opinion makes additional assumptions: It declares "[t]he partner's remarks are discriminatory in so far as they are harmful and manifest bias and prejudice against Muslims."[294] The Opinion provides no explanation of how one determines whether harm has occurred. And harmful to what? Or to whom? That is, must a person be harmed, or can one claim such remarks corrode the institutions of the law and thus generate harm? Must that harm be shown through some evidence? If so, what evidence counts? If a new associate in the firm learned of the partner's remarks through hearsay (rather than the partner repeating the remarks to the new associate) and believed the remarks have or will negatively affect the associate's opportunity to succeed in the firm, is that belief sufficient to decide harm has occurred? It may be the Opinion is suggesting this unenlightened comment is necessarily harmful, but that is a mere inference. The closest the Opinion comes to that view is its speculation that the partner's "remarks may influence how similarly-situated firm lawyers treat clients, opposing counsel, and others at the firm who are Muslim."[295] First, that would

these remarks. The speaker's tone is often critical to understanding the remarks, and tone often plays poorly when translated to the written word.

290. Besheer Mohamed, *New Estimates Show U.S. Muslim Population Continues to Grow*, PEW RSCH. CTR. (Jan. 3, 2018), https://www.pewresearch.org/fact-tank/2018/01/03/new-estimates-show-u-s-muslim-population-continues-to-grow/ [https://perma.cc/KTH6-PKFR].

291. AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION: 2020, at 106 (2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf [https://perma.cc/JDQ5-YX3V]. This includes all lawyers, not just the subset of those practicing law.

292. *2019 U.S. Population Estimates Continue to Show the Nation's Growth is Slowing*, U.S. CENSUS BUREAU (Dec. 30, 2019), https://www.census.gov/newsroom/press-releases/2019/popest-nation.html [https://perma.cc/27PW-DBG6].

293. Formal Op. 493, *supra* note 270, at 13.

294. *Id.*

295. *Id.* at 14.

require the remarks to travel to others in the firm, and require the partner's influence to be so great that other lawyers decide simply to follow along in making the factually-free claims that Muslim lawyers are untrustworthy and Muslims should never be clients. Again, that assumption ignores the part of the statement made by the partner, "But, of course, we are not allowed to speak the truth around here." Taken at face value, "we are not allowed" indicates the partner's views are rejected by the firm or some significant group in the firm. Why would any other lawyer in the firm take on a minority (I assume) position when that opinion is generally disapproved by those who wield power? Second, "may influence" suggests no proof of ill-treatment of Muslims is required. It's enough that it might happen. Third, the Opinion assumes a senior associate so under the partner's thumb that the associate's moral agency is lost. Again, the partner's view is (apparently) a minority view, as declared in the hypothetical itself. That strengthens the associate's moral position, including disagreeing with the partner. This argument requires much more to be persuasive. Finally, the associate may simply ignore the comment as a futile rant of a bigoted lawyer and learn to intentionally think about how not to speak in stereotypical, discriminatory fashion.

Is factually related criticism that includes a mention of a listed category sufficient to manifest bias? For example, a lawyer is well known in the community for his assertions regarding the importance of his religious faith in his life and how it informs the manner in which he practices law. He is charged with fraud upon the court, or suborning perjury, or bribing a juror. Opposing counsel says in a comment published in the newspaper, "That lawyer isn't a real Christian, but a servant of his own greed; his dirty tricks were finally uncovered by the court, and I'm going to be the first to throw him to the wolves on the disciplinary committee."

The Opinion also assumes "the partner surely knew or reasonably should have known this."[296] That is not necessarily true. For example, it is no secret that the nations of Pakistan and India are not frenemies, much less allies. It is also no secret that Muslims in India are often the victims of religious discrimination.[297] If the hypothetical partner was a Hindu and emigrant from India who represented Hindu clients, the comments might

296. *Id.* at 13.

297. For two fictional examples, see VIKRAM CHANDRA, SACRED GAMES (2006) (presenting a recurring motif of religious tension and discrimination in India, and offering a gripping interlude of the movement of Muslims from India to newly formed Pakistan) and the Oscar-winning movie SLUMDOG MILLIONAIRE (Warner Bros. Ent. Inc. 2008) (telling the Oscar-winning story of a young Indian man).

"manifest bias and prejudice against Muslims,"[298] but also might manifest a desire to protect the partner's livelihood by hewing ever more tightly to this particular legal practice. Should the lawyer know that these remarks were harmful manifestations of bias or prejudice against Muslims? Is the lawyer's background (born in India, Hindu, represents Hindu clients) evidence for or against possession of knowledge that the remarks manifest bias or prejudice? Would evidence of both motives be sufficient to determine the partner had violated Rule 8.4(g)?

More generally, the manner in which one speaks (or doesn't) to persons who are not intimate family and friends is often guided by a particular and largely tacit cultural understanding. One of the justifications the Committee gave for adopting Rule 8.4(g) was the "need for a cultural shift in understanding the inherent integrity of people regardless of their race [and the other ten listed categories]."[299] In a nation that is as diverse as the United States, with lawyers a part of or with ties to those many diverse communities, it is difficult to understand the language of "a cultural shift." The effect of particular cultural understandings on whether and how one speaks, as well as how one responds to (perceived) discriminatory comments, are not uniform in the United States. The Opinion ignores the many cultures of the United States and its lawyers in pursuit of what it finds to be "a" cultural problem.[300]

2. *Greenberg v. Haggerty* (2020)

In 1995, the Committee on Ethics and Professional Responsibility chose to offer an aspirational "policy statement" condemning discriminatory speech and conduct rather than an ethics rule because, as its chair told the House, "no satisfactory rule could be drawn" that "would not unduly impinge on the First Amendment."[301] In December 2020, five months after the Committee on Ethics and Professional Responsibility issued Formal Opinion 493, a federal district court held unconstitutional, on free speech grounds, Pennsylvania's Rule 8.4(g) in a pre-enforcement lawsuit.[302]

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298. Formal Op. 493, *supra* note 270, at 13.

299. ABA Memorandum on Rule 8.4 Amendment, *supra* note 255, at 1–2 (quoting and adopting, as "eloquently" stated, a statement of the Oregon New Lawyers Division to the YLD).

300. *See generally* CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (1983) (discussing human societies, culture, and cultural symbolism).

301. *Proceedings of the 1995 Annual Meeting of the Assembly*, *supra* note 202, at 61.

302. *See* Greenberg v. Haggerty, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020) (holding Pennsylvania's Rule 8.4(g) unconstitutional on First Amendment viewpoint discrimination grounds).

Pennsylvania Rule of Professional Conduct 8.4(g) is an amalgamation of Model Rule 8.4(g) and the 1998 Comment [2] to Rule 8.4. It declares:

> It is professional misconduct for a lawyer to:
>
> (g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, 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 Rules.[303]

Zachary Greenberg, a Pennsylvania lawyer who "speaks and writes" "on a variety of controversial issues,"[304] sued the chair of the Pennsylvania attorney disciplinary board alleging paragraph (g) was a content-based and viewpoint-based infringement of his free speech rights, as incorporated in the due process clause of the Fourteenth Amendment.[305] Greenberg had not been charged with violating paragraph (g) by the disciplinary board.[306] The court held the rule unconstitutional.[307]

Pennsylvania's paragraph (g) bans "words or conduct [that] knowingly manifest bias or prejudice."[308] Neither the ABA's nor Pennsylvania's Comments to Rule 8.4 offer any examples of what kinds of words or conduct manifest bias or prejudice. However, this language tracks 1998 Comment [2] to Model Rule 8.4.[309] Comment [2] in turn substantially followed Canon 3B(6) of the 1990 Model Code of Judicial Conduct.[310] Canon 3B(6) became Rule 2.3(C) of the 2007 Model Code of Judicial Conduct, unchanged in relevant part.[311] Model Rule 2.3(C) and the

303. *Id.* at 16-17 (quoting PA. RULES OF PROF'L CONDUCT R. 8.4(g) (2020)).

304. *Id.* at 16.

305. *Id.* at 17.

306. *See id.* at 21 (stating there was "no history of past enforcement" of the Amendment).

307. *Id.* at 32.

308. *Id.* at 16.

309. *See Report of the Standing Committee on Ethics and Professional Responsibility*, *supra* note 217, at 81 (including the text of Comment [2]).

310. As discussed above, Comment [2] added the "knowingly" requirement. *See supra* notes 217–19, 227 and accompanying text.

311. *See* MODEL CODE OF JUD. CONDUCT Canon 2.3(C) (AM. BAR ASS'N 2010) (adding the phrase "or engaging in harassment, based upon attributes including but not limited to" after

accompanying Comments were adopted by Pennsylvania in its Code of Judicial Conduct.[312] Those Comments gave examples of words or conduct that manifest bias or prejudice.

The court thus turned to Comment [2], which declared examples of manifesting bias or prejudice "include but are not limited to 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."[313] This Comment has great value in its context. The goal of Rule 2.3 of the Pennsylvania Code of Judicial Conduct is to provide a sense to all who are present that not only is justice being done in the courts, but that it is perceived as being done. Any judge who uses racial, ethnic, or other slurs "in the performance of judicial duties," or who allows a lawyer to do so "in proceedings before the court," fails to act as an unbiased and neutral arbiter, both of which are necessary to do justice.[314] Even if justice is substantively done (however accounted for), a judge who makes demeaning statements and acts in a biased or prejudicial fashion toward anyone while performing the duties of a government official will not be seen to have done justice. Such words or conduct would violate core values of the profession by failing to promote justice, enhance the capacity of law and legal institutions to do justice, and improve the system of justice.

Such offensive and deplorable language made by a person outside of a court proceeding or performing one's judicial duties is not, however, left unprotected by the First Amendment.[315] The court decided that included lawyers. The disciplinary board argued Pennsylvania was permitted to restrict the speech of lawyers on professional speech grounds. The court

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"prejudice," and adding gender, ethnicity, marital status, and political affiliation to the list of attributes regarding which speech and conduct was banned).

312. The only change made by Pennsylvania was to use the phrase "gender identity or expression" instead of the Model Code's "gender." *Compare* PA. CODE OF JUD. CONDUCT Canon 2.3(C) (2014) (including Pennsylvania's change), *with* MODEL CODE OF JUD. CONDUCT Canon 2.3(C) (using only "gender").

313. Greenberg v. Haggerty, 491 F. Supp. 3d 12, 32 (E.D. Pa. 2020). *See* PA. CODE OF JUD. CONDUCT Canon 2.3 cmt. 2 (2014) ("Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.").

314. PA. CODE OF JUD. CONDUCT Canon 2.3(B)–(C) (2014).

315. *See, e.g.*, Matal v. Tam, 582 U.S. ___, 137 S. Ct. 1744, 1764–65 (2017) (discussing the broad reach of First Amendment rights and how a "disparagement clause" violates Free Speech rights).

rejected the argument,[316] and held paragraph (g)'s ban on words that manifest bias or prejudice was impermissible viewpoint discrimination.[317]

The court did not justify its opinion on core values language. It did note, however, that:

> [The] Rule represents the government restricting speech outside of the courtroom, outside of the context of a pending case, and even outside the much broader playing field of "administration of justice." Even if Plaintiff makes a good faith attempt to restrict and self-censor, the Rule leaves Plaintiff with no guidance as to what is in bounds, and what is out, other than to advise Plaintiff to scour every nook and cranny of each ordinance, rule, and law in the Nation.[318]

ABA President Thomas Wells made "independence of the bar and judiciary" one of the four "common core values all lawyers share" in his inaugural message to ABA members.[319] The court implicitly found paragraph (g) a threat to that independence. A lawyer lacking guidance regarding "what is in bounds, and what is out" will engage in self-censorship.[320] Modifying one's speech will reduce the lawyer's, and thus the bar's, independence from the government. The court was also aware of the rule's "beneficent intentions."[321] Those good intentions were to enhance diversity, another of Wells's four goals.[322] As between those core values, the court decided that though Pennsylvania "embarks upon a friendly, favorable tide, this tide sweeps us all along with the admonished, minority viewpoint into the massive currents of suppression . . . ."[323]

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316. *Greenberg*, 491 F. Supp. 3d at 26–30. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. _____, 138 S. Ct. 2361, 2372–73 (2018) (holding "[the] Court's precedents do not recognize such a tradition for a category called 'professional speech[,]'" and noting only two exceptions: 1) when the speech is commercial speech, and 2) when "regulations of professional conduct . . . incidentally burden speech"). The *Greenberg* court concluded, "Rule 8.4(g) does not regulate the specific types of attorney speech or professional speech that the Supreme Court has identified as warranting a deferential review. The speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment." *Greenberg*, 491 F. Supp. 3d at 30.

317. *Greenberg*, 491 F. Supp. 3d at 32–33.

318. *Id.* at 32.

319. Wells, *supra* note 30, at 9.

320. *See Greenberg*, 491 F. Supp. 3d at 31–32 (describing censorship and how Pennsylvania Rule 8.4(g) may lead lawyers to self-censor).

321. *Id.* at 32.

322. Wells, *supra* note 30, at 9.

323. *Greenberg*, 491 F. Supp. 3d at 32.

3. Other Reactions, 2016–2020

In the aftermath of the ABA's adoption of paragraph (g), state attorneys general in Texas, South Carolina, Louisiana, and Tennessee issued opinions concluding Model Rule 8.4(g) was unconstitutional.[324] None of those states had adopted any version of ABA paragraph (g).[325] The state supreme courts in Idaho,[326] Tennessee,[327] and Arizona[328] rejected petitions to add paragraph (g). Neither Idaho nor Arizona has adopted any version of paragraph (g). If *Greenberg* stands, Vermont, Maine, and New Mexico will be the only three states to respond officially to the ABA's 2016 action by the end of 2020.[329] The joiners would make a majority, but the dissenters would comprise a significant minority.

V. CONCLUSION

In these fractured times, it would be unsurprising if state adoption or rejection of paragraph (g) divided largely along political lines. Such a result, even if predictable, would be deleterious to the American legal profession. A division along such lines might make finding common ground over some shared agreements about what lawyers should do, and why they should do it, more difficult. Enhancing diversity and eliminating bias is and should remain a core value of American lawyers. So too should the independence of the bar from an overweening, though well-intentioned government. It may be asking too much for lawyers to agree to some resolution that satisfies those who give primacy to one of these core values at the expense of another. At least, the profession may assist itself by looking more deeply at the tension between these core values. The intractable tension lawyers face in attempting to meet the duties they owe is a story as old as the law itself.

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324. *See* Josh Blackman, *ABA Model Rule 8.4(G) in the States*, 68 CATH. U. L. REV. 629, 630–33 (2019) (summarizing opinions).

325. *See generally* CPR POL'Y IMPLEMENTATION COMM., *supra* note 264 (listing various states' adoptions and rejections). This document does not have page numbers but is nonetheless subdivided by pages in a PDF format. The reader may scroll down until the pertinent state is found alphabetically, scroll down counting the pages, or search using the Find function (CTRL-F on a PC or CMD-F on a Macintosh).

326. *Id.* at 8.

327. *Id.* at 23.

328. *Id.* at 2. The Montana legislature issued a joint resolution opposing adoption of Rule 8.4(g). S.J. Res. 15, 65th Leg., Reg. Sess. (Mont. 2017). Jurisdiction on this lies with the Montana Supreme Court.

329. CPR POL'Y IMPLEMENTATION COMM., *supra* note 264. *See supra* notes 265–69 and accompanying text.

The duties to represent clients zealously, to serve as an officer of the court, and to serve the greater community as a public citizen may often clash, with little likelihood of resolution.

A summer 2018 story on Law360 discussed the ABA's rapidly shrinking membership.[330] The report largely focused on the economic consequences of the membership decline to the organization. The effect of this decline, of course, has a much broader impact. For the ABA, a membership less than half its previous size makes it less likely the ABA will possess the influence to persuade other bar associations and the nation's 1.3 million lawyers they should embrace specific core values. The ABA can promulgate rules or policies as it wishes, but if it is perceived as representing merely a segment of the bar, its persuasive authority will quickly diminish. That would serve as another sign that the fractured profession will be ever present.

The core values problem is likely to intensify in the next decade or so. This is, in significant part, a problem of both definition and order, and is particularly related to the idea of core values that protect society's interests. Can the contending parties reach some agreement on the core values that are the reason lawyers (still) maintain their privileged place in the American democratic experiment? And will lawyers use their rhetorical and persuasive gifts to impress upon each other, as well as the general public, why they should continue to take the problem seriously, as well as humbly?

330. *See generally* Aebra Coe, *ABA Decline: Why Are Fewer Lawyers Joining the Club?*, LAW360 (July 24, 2018, 10:42 AM), https://www.legalmosaic.com/wp-content/uploads/2018/07/ABA-Story.pdf [https://perma.cc/AND3-MPAE] (discussing possible reasons behind the ABA's diminishing member base).