"STILL BROKEN": ALASKA RULE OF PROFESSIONAL CONDUCT 8.4(F) AND (G)'S INSUFFICIENT RESPONSE TO WORKPLACE HARASSMENT BY LAWYERS

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ABSTRACT

A report by Women Lawyers On Guard, entitled "Still Broken," reported the results of a 2019 survey about sexual harassment and misconduct in the legal profession. It concluded that issues relating to sexual harassment and misconduct in the legal profession had not improved in the past thirty years. This Article looks at the Alaska Rules of Professional Conduct's rule regarding harassment and discrimination by lawyers and argues that the rule does not sufficiently address workplace harassment by lawyers.

Alaska Rule of Professional Conduct 8.4(f), enacted in 2021, prohibits harassment or invidious discrimination by a lawyer "in the lawyer's dealings with the lawyers, paralegals, and others working for that lawyer or for that lawyer's firm" only if "the lawyer's conduct results in a final agency or judicial determination of employment misconduct or discrimination." But the nature of employment discrimination law and harassment in the legal profession means that very few instances of workplace harassment will result in formal findings by an agency or court.

The Article therefore recommends Alaska Rule of Professional Conduct 8.4(f) be amended to prohibit harassment or invidious discrimination "in the lawyer's dealings with the lawyers, paralegals, and others working for that lawyer or for that lawyer's firm"—subject to normal bar disciplinary proceedings and without any requirement of findings from an outside agency or a court. The Article also recommends adding a comment to the rule stating that firms, or at least large firms, should have and regularly disseminate an anti-harassment policy.

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I. INTRODUCTION

In August 2019, Women Lawyers On Guard conducted a national survey on sexual harassment and misconduct in the legal profession.[1] The resulting report, entitled "Still Broken," compared survey results to results of a similar survey completed thirty years before. The report concluded that the culture of the legal profession had not improved when it came to harassment, that harassment was still pervasive, and that it affected people at all ages, all career stages, and all roles in the legal system.[2]

While this survey and report were being conducted and prepared, the Alaska legal profession was drafting a new professional conduct rule addressing the subject. That new rule would later become the current Alaska Rule of Professional Conduct 8.4(f) and (g).[3] The adoption of Rule 8.4(f) and (g) marked a significant step for the Alaska legal profession, with the Alaska Bar Association Board of Governors and Alaska Supreme Court formally recognizing the need to prohibit harassment and discrimination in the profession and codifying such a prohibition.[4] The Rule itself, in brief, provdes that it is misconduct for an attorney to engage in harassment of or invidious discrimination against lawyers or support staff of other firms or other people involved in cases and that it is misconduct to engage in harassment of or invidious discrimination against lawyers or support staff from the attorney's firm if a court or outside agency makes a finding of misconduct or discrimination based on the lawyer's actions.

This Article addresses the new Alaska Rule in three parts. After this introduction, Part II examines closely the Rule's language. That examination reveals that the Rule actually prohibits only a small fraction of all harassment by lawyers, and further, that there are generally still no profession-wide consequences for serial acts of harassment by lawyers. This is because the Rule allows for the imposition of professional consequences through the standard disciplinary process only if a lawyer committed harassment or invidious discrimination against people who do not work in the lawyer's firm. Disciplining an attorney for harassing or discriminating against someone within the same firm requires separate

1. *Still Broken: Sexual Harassment and Misconduct in the Legal Profession: A National Study* 8 (2020), WOMEN LAWYERS ON GUARD, https://womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf.

2. *Id.* at 4–11.

3. *See Board Proposes Alaska Rule of Professional Conduct 8.4(f)–(g)*, 40 Alaska Bar Rag 6, 6 (2020) [hereinafter *Board Proposes*].

4. *See id.*

agency or court adjudication, a significant barrier to discipline.

Part III explains how the new rule intersects with federal employment discrimination law and highlights gaps in this patchwork of remedies. A violation of Title VII of the Civil Rights Act of 1964—the federal prohibition on workplace discrimination and harassment—usually will not result in formal findings of misconduct.[5] The primary purpose of Title VII is to prevent the harassment from ever occurring in that workplace, with a secondary purpose of providing compensation to the victims of discrimination and harassment.[6] Under Title VII, only employers can be liable for harassment, while the individuals who actually engage in the harassment cannot be sued.[7] An employer is liable for harassment by one (non-supervisor) coemployee against another coemployee only if the employer is negligent in preventing or remedying the harassment.[8] Even when a supervisor harasses a supervisee, the employer can assert as an affirmative defense that the employer acted reasonably and the supervisee did not.[9] And even if an employer is liable, employment discrimination and harassment cases, as with other types of cases, generally result in a settlement and not in formal findings by an agency or court.[10] This mismatch between Title VII and Rule 8.4(f) can give rise to tension.

Part IV explains why the legal profession requires a profession-wide approach to combatting workplace harassment, especially in light of the existing patchwork approach. A lawyer who is forced out of a firm may continue to engage in these practices at a subsequent firm. Most people on the receiving end of harassment choose not to report, often because they do not believe that reporting will cause their situations to improve.[11] And the legal profession presents multiple risk factors that, if unaddressed, make it a "fertile ground" for harassment.[12]

5. 42 U.S.C. § 2000e.

6. Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998).

7. Fantini v. Salem St. College, 557 F.3d 22, 28–32 (1st Cir. 2009); *see also* Smith v. Amedysis, Inc., 298 F.3d 434, 448 (5th Cir. 2002).

8. Faragher, 524 U.S. at 789; *see also* 29 C.F.R. §§ 1604.11(d), 1606.8(d).

9. Faragher, 524 U.S. at 807; *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

10. *See* Sean Captain, *Workers Win Only 1% of Federal Civil Rights Lawsuits at Trial*, FAST COMPANY (July 31, 2017), https://www.fastcompany.com/40440310/employees-win-very-few-civil-rights-lawsuits; *see also All Statutes (Charges Filed with EEOC) FY 1997 – FY 2022*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/data/all-statutes-charges-filed-eeoc-fy-1997-fy-2022 (last visited Mar. 3, 2024).

11. WOMEN LAWYERS ON GUARD, *supra* note 1, at 24–26.

12. Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*: *Risk Factors for Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace.

A lawyer may continuously harass colleagues, supervisees, and support staff throughout their career without ever finding themself within the crosshairs of Rule 8.4(f) and (g). This result is inconsistent with the goals of the Rules of Professional Conduct and the obligations of the legal field to regulate itself.[13]

In light of these challenges, this Article's final Part recommends that Alaska Rule of Professional Conduct 8.4(f) be amended to allow the normal disciplinary process to address workplace harassment and invidious discrimination by a lawyer. It also recommends adding a statement to the rule's commentary that law firms, or at least large firms, should have, and should regularly disseminate, a policy that addresses harassment and invidious discrimination in the workplace.

II. THE HISTORY AND TEXT OF ALASKA RULE OF PROFESSIONAL CONDUCT 8.4(F) AND (G)

Alaska Rule of Professional Conduct 8.4(f) and (g) is based on Model Rule of Professional Conduct 8.4(g).[14] The model rule provides that it is misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[15] The model rule contains two caveats. First, the model rule "does not limit the ability of a lawyer to accept, decline or withdraw from a representation" and, second, it "does not preclude legitimate advice or advocacy."[16]

The American Bar Association approved Model Rule 8.4(g) in August 2016, and the provision was immediately the subject of fierce opposition.[17] Multiple law review articles argued that the model rule unconstitutionally infringed on free speech, and this position was adopted by multiple state attorneys general and even one state legislature.[18] And although multiple states considered adopting the rule soon after the American Bar Association approved it, only Vermont

13. *See* ALASKA RULES OF PROF'L CONDUCT Preamble: A Lawyer's Responsibilities (Alaska Bar Ass'n 1993).

14. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020). While the Alaska Rule is a binding regulation on members of the Alaska Bar, the Model Rules do not have legal force. They are drafted by the American Bar Association as a template and model for states to adopt, if they so choose.

15. *Id.*

16. *Id.*

17. *See* Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN'S L. REV. 121, 121–23, 144–46 (2021).

18. *Id.* at 122, 145 n.7.

decided to do so.[19] Alaska was one of the states that initially considered and rejected the model rule: the Alaska Rules of Professional Conduct Committee voted against proposing an amendment to the Alaska Rules of Professional Conduct based on the model rule in 2016.[20]

The chief complaint of the model rule's opponents was the breadth of the commentary to the rule.[21] For example, the commentary to the model rule states that discrimination includes "harmful verbal or physical conduct that manifests bias or prejudice towards others" and that harassment includes "derogatory or demeaning verbal or physical conduct."[22] The commentary also states that "conduct related to the practice of law" includes "participating in bar association, business or social activities in connection with the practice of law."[23] Opponents of the model rule worried that the commentary might prohibit lawyers from advocating for unpopular positions or using potentially triggering language, even for an educational purpose, in continuing legal education and law school talks.[24]

19. *Id.* at 144–45 n.117. New Mexico would later adopt the rule in 2019. *Id.*
20. Minutes of the Alaska Rules of Prof'l Conduct Comm. for Nov. 9, 2016.
21. Tarkington, *supra* note 17, at 145–46.
22. MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. (AM. BAR ASS'N 2020).
23. *Id.*
24. Tarkington, *supra* note 17, at 146–47. The commentary to the model rule also stated that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." MODEL RULES OF PROF'L. CONDUCT r. 8.4 cmt (AM. BAR ASS'N 2020). The other language in the commentary is significantly broader and significantly vaguer than the language in antidiscrimination and anti-harassment laws. *See id.* By way of comparison, Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a).

Regulations further elaborate on the definiton of harassment under federal law:

> Verbal or physical conduct relating to a protected class constitutes harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. 29 C.F.R. § 1604.11(a) (guidelines on sexual harassment); *accord id.* 29 C.F.R. § 1606.8(a) (guidelines on national origin harassment); Meritor Sav. Bank

That said, at least some opponents also recognized that a more narrowly defined rule against harassment and discrimination—such as a rule that penalized only "severe or pervasive" conduct that would constitute harassment in other areas of law and that excluded conduct in the "private sphere"—could be beneficial to the legal profession.[25] Public attention would also soon be drawn to the subject with the onset of the #MeToo movement in October 2017 and revelations about sexual harassment by Ninth Circuit Court of Appeals Judge Alex Kozinski in December 2017.[26] In March 2018, Alaska Attorney General Jahna Lindemuth wrote a letter to Bar Counsel Nelson Page relating an instance of sexual harassment experienced by an assistant attorney general and asking whether such conduct was prohibited by the Rules of Professional Conduct.[27] This would lead to the adoption of Alaska Rule of Professional Conduct 8.4(f) and (g) in October 2021.[28]

The new Rule 8.4(f) and (g) differed from the model rule in many respects.[29] First, while the model rule required a mental state of negligence—that the attorney knew or reasonably should have known that the conduct was harassment or discrimination—Alaska's Rule 8.4(f) required a higher mental state.[30] Under the Alaska Rule an attorney needs to act *knowingly* in order to be subject to discipline.[31] The state's Rules of Professional Conduct Committee noted that the rules provide that "[a] person's knowledge may be inferred from circumstances" and therefore that "a simple denial that the attorney did not know the conduct constituted harassment or invidious discrimination will not end the inquiry."[32]

Second, the model rule prohibited discriminatory or harassing

v. Vinson, 477 U.S. 57, 64–67 (1986); U.S. Equal Emp. Opportunity Comm'n, *Harassment*, https://www.eeoc.gov/harassment (last visited Mar. 3, 2024).

25. *See* Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 244, 263–64 (2017) (stating that "Rule 8.4(g)'s drafters were well intentioned" and suggesting changes to the commentary to the model rule).

26. *See generally* Amy Brittain, *Me Too Movement*, BRITANNICA, https://www.britannica.com/topic/Me-Too-movement (last updated Mar. 1, 2024); Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 2017), https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html.

27. *Board Proposes*, *supra* note 3, at 6.

28. *See id.* at 6–7; Alaska Supreme Court Order No. 1964 (effective Oct. 15, 2021).

29. *See Board Proposes*, *supra* note 3, at 6–7; *Comparison of the ABA Model Rule with Alaska Proposed Rule*, 40 Alaska Bar Rag 8 (2020) [hereinafter *Comparison*].

30. *See Board Proposes*, *supra* note 3, at 6; *Comparison*, *supra* note 29, at 8.

31. *Board Proposes*, *supra* note 3, at 6.

32. *Id.*

conduct that was "related to the practice of law," with an apparently expansive understanding of that phrase. The Committee agreed that the model rule might apply to "comments made at Bar functions and social gatherings, or in supporting or opposing legislative steps of court decisions" and that this would present First Amendment issues.[33] Alaska's Rule 8.4(f) was therefore significantly more specific as to when the prohibition on discrimination and harassment applied.[34] The new Rule 8.4(f) contained two separate paragraphs prohibiting discrimination and harassment in different situations.[35] The first paragraph prohibits a lawyer from

> engag[ing] in conduct that the lawyer knows is harassment or invidious discrimination during the lawyer's professional relations with (1) officers or employees of a tribunal; (2) lawyers, paralegals, and others working for other law firms; (3) parties, regardless of whether they are represented by counsel; (4) witnesses; or (5) seated jurors.[36]

The Committee explained that these situtations composed the core concern of the rule, which was "to assure that adversaries have an equal opportunity to present their case, so as to advance the achievement of a just result."[37]

The second paragraph of Alaska Rule of Professional Conduct 8.4(f) prohibits a lawyer from "knowingly engag[ing] in harassment or invidious discrimination in the lawyer's dealings with the lawyers, paralegals, and others working for that lawyer or for that lawyer's firm" but only if "the lawyer's conduct results in a final agency or judicial determination of employment misconduct or discrimination."[38] The Committee included this caveat—that the lawyer's intra-firm conduct must result in findings of an agency or court in order to violate the Rules of Professional Conduct—because it concluded that "Bar Counsel, Area Hearing Committees, and the Disciplinary Board are not fully equipped to be the first decision makers to address the[] complicated substantive legal issues" of workplace harassment and discrimination.[39] This conclusion of the Committee is further explained in the Commentary to Rule 8.4, which acknowledges that "[a] lawyer's harassing or invidiously discriminatory conduct directed to persons working for the lawyer or the

33. *Id.*
34. *See id.*; *Comparison*, *supra* note 29, at 8.
35. ALASKA RULES OF PROF'L CONDUCT r. 8.4(f).
36. *Id.*
37. *Id.* r. 8.4 cmt.
38. *Id.* r. 8.4(f).
39. *Board Proposes*, *supra* note 3, at 7.

lawyer's firm adversely affects the proper administration of justice by undermining confidence in the legal profession" but asserts that "agencies and courts routinely adjudicate disputes arising out of allegations of harassment and invidious discrimination in the workplace."[40] Thus, according to the commentary, "the existence of such misconduct should be determined, in the first instance, by an agency or court before it may be the subject of professional discipline."[41]

The third substantive change that was made to the model rule for Alaska's Rule 8.4(f) related to the protected classes. The model rule had included "socioeconomic background" as a protected class, and this was eliminated because the Committee found it to be vague and was unsure why it was included.[42] That said, based on other protected classes that existed in Alaska and federal antidiscrimination law, the committee added the protected classes of "pregnancy and parenthood" and "veteran status."[43] The committee also divorced the prohibition on harassment from the list of protected classes and banned all harassment regardless of if it was based on a protected class.[44]

The fourth and fifth changes related to the definitions of "harassment" and "invidious discrimination" which appear in Alaska's Rule 8.4(g). The Committee concluded that defining such concepts based on vague statements in commentary was insufficient and that concrete definitions needed to be placed in the Rule itself.[45] The Committee adopted a definition of harassment that mirrored the definition of harassment already employed in antidiscrimination law: "'[h]arassment' means unwelcome conduct, whether verbal or physical, that has no reasonable relation to a legitimate purpose and is so severe or sustained that a reasonable person would consider the conduct intimidating or abusive."[46] And the Committee adopted a definition of "invidious discrimination" that adopted only part of the definition of discrimination in antidiscrimination law—the part that was consistent with the Committee's decision to punish only knowing conduct. Under Rule 8.4(g), "'[i]nvidious discrimination' means unequal treatment of a person because of their membership in a protected class when that unequal treatment has no reasonable relation to a legitimate purpose."[47]

40. ALASKA RULES OF PROF'L CONDUCT r. 8.4 cmt.
41. *Id.*
42. *Board Proposes*, *supra* note **Error! Bookmark not defined.**, at 7.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*; *see also supra* note 24 (stating the definition of harassment under workplace discrimination law, which is almost identical).
47. ALASKA RULES OF PROF'L CONDUCT r. 8.4(g). As explained in note 24, *supra*, Title VII of the Civil Rights Act provides two separate ways that employer action

Thus, as the report of the Committee and Board of Governors explained, Alaska's Rule 8.4(f) and (g) addressed the overbreadth concerns about the model rule by "narrow[ing] the required mental state," "narrow[ing] the scope of conduct covered," "provid[ing] definitions for critical terms," "refin[ing] the scope of protected classes," and "provid[ing] clear notice of what conduct is considered to be professional misconduct."[48] It is with this history, text, and commentary in mind, that this Article now turns to the flaws in the Rule 8.4(f) carveout for workplace discrimination and harassment.

III. THE RELATIONSHIP BETWEEN FEDERAL EMPLOYMENT DISCRIMINATION LAW AND THE ALASKA RULES OF PROFESSIONAL CONDUCT

A. The Different Goals of Federal Employment Law and the Alaska Rules of Professional Conduct

Alaska Rule of Professional Conduct 8.4(f) allows for discipline of a lawyer for "knowingly engag[ing] in harassment or invidious discrimination in the lawyer's dealings with the lawyers, paralegals, and others working for that lawyer or for that lawyer's firm" only if "the lawyer's conduct results in a final agency or judicial determination of employment misconduct or discrimination."[49] According to the commentary to the Rule, "agencies and courts routinely adjudicate disputes arising out of allegations of harassment and invidious discrimination in the workplace," and therefore "the existence of such misconduct should be determined, in the first instance, by an agency or court before it may be the subject of professional discipline."[50] But where do these outside authorities find the legal basis for their findings?

The committee that drafted Rule 8.4(f) and (g) largely based the definitions of discrimination and harassment on the language of Title VII of the Civil Rights Act of 1964, which is the federal law that prohibits workplace discrimination, and the language of guidance for Title VII promulgated by the U.S. Equal Employment Opportunity Commission (EEOC).[51] The statement in the commentary to the Rule that "agencies

can be unlawful. The employer can engage in disparate treatment of an employee, or the employer can enforce seemingly neutral rules or norms that have a disparate impact. Rule 8.4(g)'s definition of "invidious discrimination" embraces only the disparate treatment theory of discrimination.

48. *Board Proposes*, *supra* note 3, at 7.
49. ALASKA RULES OF PROF'L CONDUCT r. 8.4(f).
50. *Id*. r. 8.4 cmt.
51. *See Board Proposes, supra* note 3, at 7; *see also supra* note 24.

and courts routinely adjudicate disputes arising out of allegations of harassment and invidious discrimination in the workplace" appears to be a reference to adjudications under Title VII, or state or municipal law equivalents.[52] Title VII, though, serves a fundamentally different purpose than do the state Rules of Professional Conduct. This mismatch leaves a gap unfilled. According to the United States Supreme Court, the "primary objective" of Title VII "was a prophylactic one"[53]—that is, the "primary objective" was "not to provide redress but to avoid harm."[54] Its secondary purpose was "to make persons whole for injuries suffered on account of unlawful employment discrimination."[55]

The first of these purposes is consistent with the purposes of the Rules of Professional Conduct. The "scope" section of the Rules states that "[t]he Rules simply provide a framework for the ethical practice of law."[56] And it provides three separate ways that the Rules will be applied: "[c]ompliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings."[57] As such, the first two applications of the Alaska rule are fairly consistent with the primary goal of Title VII of avoiding harm. The "scope" section also states that "[t]he Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."[58]

But the secondary purposes of Title VII and the Rules of Professional Conduct diverge. The secondary objective of Title VII is remedial—"to make persons whole for injuries suffered on account of unlawful employment discrimination."[59] The Rules of Professional Conduct, on the other hand, are disciplinary.[60] Compliance is ultimately "enforc[ed] through disciplinary proceedings," with the Rules "provid[ing] a structure for regulating conduct through disciplinary agencies."[61] The

52. ALASKA RULES OF PROF'L CONDUCT r. 8.4 cmt.

53. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975) (citing Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971)).

54. Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

55. *Albermarle*, 422 U.S. at 418; *Faragher*, 424 U.S. at 805 (quoting *Albermarle*, 422 U.S. at 418). This Article examines federal employment discrimination law because of the wealth of authorities on the subject. Alaska employment discrimination law largely tracks federal law.

56. ALASKA RULES OF PROF'L CONDUCT Scope.

57. *Id.*

58. *Id.*

59. *Albermarle*, 422 U.S. at 418; *Faragher*, 424 U.S. at 805 (quoting *Albermarle*, 422 U.S. at 418).

60. *See* ALASKA RULES OF PROF'L CONDUCT Scope.

61. *Id.*

Rules provide for discipline for violating individuals, as opposed to compensation for harmed individuals.

As the preamble to the Rules of Professional Conduct explains, the legal profession's ability to self-govern "helps maintain the legal profession's independence from government domination," which, in turn, allows the profession to be "an important force in preserving government under law."[62] But self-governance also means that "[t]he profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns," and every lawyer has a responsibility to secure observance of the Rules.[63]

The differences in purpose between Title VII and the Rules of Professional Conduct are reflected in their differing view of individuals and entities. Title VII sets out unlawful employment practices for employers, and, as such, only employers are subject to liability.[64] The individual who discriminates or harrasses is not personally liable under the federal statute. Although the definition of "employer" for purposes of Title VII is "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, *and any agent of such a person*," this does not mean that individuals who are agents of their employers are also personally liable.[65] Instead, as one court explained, "[w]hile Title VII's definition of the term employer includes 'any agent' of an employer, Congress's purpose was merely to import *respondeat superior* liability into Title VII."[66] An individual engaging in workplace discrimination or harassment faces consequences only to the extent their employer decides to provide consequences, with the threat of liability to the employer providing an incentive for employers not to allow discrimination and harassment in their workplaces.

The Rules of Professional Conduct, by contrast, are rules that govern individual lawyers. As the preamble to the Rules states, "Every lawyer is responsible for observance of the Rules of Professional Conduct."[67] And the lead into Rule 8.4(a) through (f) states, "It is professional misconduct *for a lawyer* to . . . ."[68] Thus, the Rule's prohibition on harassment and invidious discrimination expressly applies to individual lawyers.

62. ALASKA RULES OF PROF'L CONDUCT Preamble.
63. *Id.*
64. 42 U.S.C. § 2000e-2(a).
65. *Id.* § 2000e(b) (emphasis added).
66. Smith v. Amedysis, Inc., 298 F.3d 434, 448 (5th Cir. 2002); *see also* Fantini v. Salem St. College, 557 F.3d 22, 28-32 (1st Cir. 2009) (collecting cases).
67. ALASKA RULES OF PROF'L CONDUCT Preamble.
68. *Id.* r. 8.4(a)–(f).

Putting this together with the limitation in Rule 8.4(f) for workplace harassment and invidious discrimination yields an interesting result. A lawyer is subject to discipline for workplace harassment or invidious discrimination only if "the lawyer's conduct results in a final agency or judicial determination of employment misconduct or discrimination."[69] But a final determination as to workplace harassment or discrimination cannot be made in an action against the lawyer themselves and instead can only be made in an action against the lawyer's firm.[70]

Rule 8.4(f) does not appear to require that the determination of harassment or discrimination be made in an action against the lawyer.[71] Presumably, a finding of fact that a lawyer engaged in harassment or discrimination made as a result of a legal action against the lawyer's firm would still provide the necessary predicate for discipline under the Rules of Professional Conduct. But, still, the person who would face discipline under the Rules of Professional Conduct if an action were brought and findings resulted is different from the entity that would need to have legal action brought against it for there to be findings. This discrepancy creates many wrinkles—wrinkles that can easily become gaps in the prohibition against lawyers engaging in harassment and invidious discrimination.

B. Employer Negligence Requirement

When Congress enacted Title VII of the Civil Rights Act of 1964, it defined the term "employer" to include "any agent of" the employer.[72] It did so in order to incorporate into civil rights law the principle that a master may be strictly liable for their servants' torts.[73] But when an employee harasses another coemployee and there is no supervisory relationship between the employees, the harassing employee acts "in ways having no apparent object whatever of serving an interest of the employer."[74] The employee's actions are therefore not within the scope of employment.[75] The employer therefore is not strictly liable for the employee's conduct and instead is liable only if it is negligent in preventing or responding to the harassing conduct.

For example, the United States Supreme Court has cited approvingly

69. *Id.* r. 8.4(f).

70. *See Smith*, 298 F.3d at 448 (explaining the claims of harassment cannot be made against the coworker who engaged in the harassment and instead must be brought against the employer); *Fantini*, 557 F.3d at 28-32 (same).

71. ALASKA RULES OF PROF'L CONDUCT r. 8.4(f).

72. 42 U.S.C. § 2000e(b).

73. Faragher v. City of Boca Raton, 524 U.S. 775, 793 (1998) (quoting Restatement (Second) of Torts § 219(1) (Am. Law. Inst. 1965)).

74. *Id.* at 799.

75. *Id.* at 797-98.

decisions of lower courts that "held employers liable on account of actual knowledge by the employer, or high-echelon officials of an employer organization, of sufficiently harassing action by subordinates, which the employer or its informed officers have done nothing to stop."[76] According to the Court, "[i]n such instances, the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy."[77]

Guidelines issued by the EEOC, which enforces Title VII, state, "[w]ith respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."[78] The guidelines provide that "an employer should take all steps necessary to prevent sexual harassment from occurring" and provide as examples "affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned."[79] And EEOC policy guidance states that employers must act promptly to remedy any harassment they learn about:

> When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer

76. *Id.* at 789.

77. *Id.*

78. 29 C.F.R. § 1604.11(d) (2024) (guidelines on sexual harassment); *accord* 29 C.F.R. § 1606.8(d) (2024) (guidelines on national origin harassment).

79. *Id.* § 1604.11(f) (2024). EEOC policy guidance goes even further, providing,

> An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation. EQUAL EMP'T OPPORTUNITY COMM'N, NO. N-915-050, POL'Y GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT, GUIDANCE § C.E.1 (1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment [hereinafter EEOC NO. N-915-050] (quoting Vinson v. Meritor Savings Bank, 477 U.S. 57, 73 (1986)).

> should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.[80]

The policy guidance provides as an example of non-negligent remedial action that absolved an employer of liability a case where, within four days of learning of the harassment, "the employer investigated the charges, reprimanded the guilty employee[,] placed him on probation, and warned him that further misconduct would result in discharge."[81] The policy guidance contrasts this with another case where the employer's response to numerous complaints over nearly four years was just to hold occasional meetings at which the employer reminded employees of the company's anti-harassment policy.[82] In this case, a court held the employer liable.[83]

So what does this mean when a lawyer has knowingly harassed a coemployee in the firm—either another lawyer or a non-lawyer over whom the lawyer has no supervisory authority? If a supervising lawyer in the firm is informed of the harassing conduct shortly after the conduct begins, then a reasonable response might be to reprimand the lawyer engaging in the harassment and warn them that any future harassment will result in serious consequences. Taking serious efforts to nip the harassment in the bud will likely absolve the firm of any liability under Title VII. But, if the firm does this, then there will be no avenue for disciplining the attorney whose conduct is at issue under the Rules of Professional Conduct.

Under Rule 8.4(f), the hypothetical lawyer who harassed a coemployee has not engaged in any misconduct because there must be a formal finding of misconduct for any misconduct to exist under the Rule.[84] The lack of any informal discipline by the Bar means that the lawyer still has a clean record. Later, if the same lawyer is working for a

80. EEOC NO. N-915-050, *supra* note 79, Guidance § C.E.2 (citations omitted).
81. *Id.*
82. *Id.*
83. *Id.*
84. *See* ALASKA RULES OF PROF'L CONDUCT r. 8.4(f) (2022) ("[I]t is professional misconduct if . . . the lawyer's conduct results in a final agency or judicial determination of employment misconduct or discrimination").

different firm and again engages in knowing harassment of a coemployee, then the same process will repeat. And even if the lawyer engages in harassment again and the firm fires them, the firm will still have acted reasonably and will not be subject to liability. At no point, even if this occurs again and again in firm after firm, will there be any consequences for the lawyer under the Rules of Professional Conduct. This situation can occur no matter how severe the lawyer's harassment of the coemployee is, as long as it was reasonable that the law firm that employs the lawyer only learned of the harassment when it did and reasonably addressed the harassment when it learned of it.

C. The Effect of Affirmative Defenses

Supervisor-on-supervisee harassment, unlike coemployee-on-coemployee harassment, does implicate the principle of agency law holding masters strictly liable for their servants' torts.[85] While it can still be said that a supervisor who harasses a supervisee does not act in a way that benefits the employer, the supervisor's ability to harass the supervisee is significantly aided by the power imbalance that comes from the supervisor-supervisee relationship. And, even if a servant is acting outside the scope of their employment, a master will still be strictly liable for the tort of the servant if the servant "was aided in accomplishing the tort by the existence of the agency relation."[86] As the U.S. Supreme Court has explained,

> When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise — [which may be] to hire and fire, and to set work schedules and pay rates — does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion."[87]

85. Faragher v. City of Boca Raton, 524 U.S. 775, 793 (1998) (quoting Restatement (Second) of Torts § 219(1) (Am. Law. Inst. 1965)).

86. *Id.* at 801 (quoting Restatement (Second) of Torts § 219(2)(d)).

87. *Id.* at 803 (quoting Susan Estrich, *Sex at Work*, 43 Stan. L. Rev. 813, 854 (1991)).

But in the Supreme Court's first case explicating the meaning of harassment under Title VII, *Meritor Savings Bank v. Vinson*, the Supreme Court opined that Title VII "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible" and therefore concluded that the Court of Appeals in that case had "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors."[88] In order to square this observation with the broader principle that a master is liable for the torts of their servants, the Supreme Court has created an affirmative defense—a defense that the employer has the burden of proving by a preponderance of the evidence—for employers in certain situations of supervisor-supervisee harassment. This affirmative defense is established if the employer can prove "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[89]

EEOC enforcement guidance states that, in order to establish the first prong of this affirmative defense, "[i]t generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures," although it acknowledges "this 'is not necessary in every instance as a matter of law'" and may not be necessary in small businesses where such prohibition and procedures may effectively be communicated more informally.[90] Such policies and procedures should be provided to every employee and redistributed periodically and should contain

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;

88. 477 U.S. 57, 72 (1986).

89. *Faragher*, 524 U.S. at 807; *accord* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). The affirmative defense is not available if the harassment is done by someone who falls "within that class of an employer organization's officials who may be treated as the organization's proxy," such as a president, owner, partner, or corporate officer or if the harassment results in a "tangible employment action," such as hiring or firing, promotion or failure to promote, demotion, undesirable reassignment, a decision causing a significant change in benefits, a compensation decision, or a work assignment. *Faragher*, 524 U.S. at 789–90; EQUAL EMP'T OPPORTUNITY COMM'N, NO. 915.002, ENF'T GUIDANCE: VICARIOUS LIAB. FOR UNLAWFUL HARASSMENT BY SUPERVISORS § VI (1999), https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors [hereinafter EEOC NO. 915.002].

90. EEOC NO. 915.002, *supra* note 89, § V.C.1; *see also Faragher*, 524 U.S. at 808–09; *Ellerth*, 524 U.S. at 765.

- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.[91]

In addition to establishing, publicizing, and enforcing policies and procedures intended to prevent harassment, EEOC enforcement guidance states that an employer should "instruct[] all of its supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether they are officially designated to take complaints and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures," "correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome," and "keep track of its supervisors' and managers' conduct to make sure that they carry out their responsibilities under the organization's anti-harassment program."[92] Without these steps, an employer will be unlikely to meet the first prong of the affirmative defense.

In order to establish the second prong of the affirmative defense, the employer must show that the employee acted unreasonably in failing to complain or otherwise avoid the harm.[93] An employee might reasonably decide not to complain the first few times harassment occurs in hopes that it will stop.[94] They might also reasonably decide to confront the harasser directly and see if this stops the harassment before reporting if the harassment continues.[95] And, depending on the dynamics of the workplace, an employee might not complain because they reasonably fear that they will be retaliated against, that there will be obstacles to complaining, or that the complaint mechanism will not be effective.[96] The employer has the burden of proving that the employee acted unreasonably.[97]

Even though this affirmative defense is often difficult to establish, it

91. EEOC NO. 915.002, *supra* note 89, § V.C.1.
92. *Id.* § V.C.2.
93. *Faragher*, 524 U.S. at 807–08; EEOC NO. 915.002, *supra* note 89, § V.D.
94. EEOC NO. 915.002, *supra* note 89, § V.D.1.
95. *Id.*
96. *Id.*
97. *Faragher*, 524 U.S. at 807–08.

is yet another example of how the operation of Title VII and the Rules of Professional Conduct diverge. Title VII focuses on the employer and the Rules of Professional Conduct focus on the individual lawyer. Just as with coemployee-on-coemployee harassment, it is possible in the case of supervisor-on-supervisee harassment that a lawyer engages in harassment but there is no viable cause of action against the employer. And, if this is the case, then under Rule 8.4(f) the supervising lawyer who harasses their supervisee will not be subject to the disciplinary process.[98]

D. The Rarity of Formal Findings

Notwithstanding the last two subsections, many instances of harassment by a lawyer will result in liability on the part of the lawyer's employer. But even in these situations, it is still unlikely that there will be formal findings of misconduct because there often will not be significant damages or because parties often settle litigation before a formal finding is made.

Take, for example, the case of supervisor-on-supervisee harassment where it is an affirmative defense for the employer that the employer acted reasonably and the supervisee acted unreasonably. "Thus an employer who exercised reasonable care . . . is not liable for unlawful harassment if the aggrieved employee could have avoided all of the actionable harm."[99] Even if both the employer and the complaining employee act reasonably regarding an instance of supervisor-on-supervisee harassment, the affirmative defense will not be available to the employer and the employee will be entitled to damages. In this situation, the reasonable response of the employer will mitigate damages.[100] In situations where any damages will be fairly minimal, employees who have been harassed may be less likely to bring claims, and both employers and employees will be incentivized to settle disputes, meaning that there will be no findings by a court or outside agency that a lawyer engaged in misconduct.

Damages may also be mitigated even when the employer fails to act reasonably as that term is understood through the lens of EEOC guidance.

98. *See* ALASKA RULES OF PROF'L CONDUCT r. 8.4(f) (2022) ("[I]t is professional misconduct if . . . the lawyer's conduct results in a final agency or judicial determination of employment misconduct or discrimination.").

99. EEOC NO. 915.002, *supra* note 89, § V.D.

100. *See id.* ("If some but not all of the harm could have been avoided, then an award of damages will be mitigated accordingly."); *Faragher*, 524 U.S. at 807 ("If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.").

An employer generally will be able to establish that it acted reasonably for purposes of the affirmative defense in cases of supervisor-on-supervisee conduct only if it has a detailed anti-harassment policy that is regularly distributed and consistently followed. A law firm that fails to do this, and fails to take similar preventative measures, cannot be said to have reasonably acted to prevent harassment and the firm will be liable for damages. But EEOC guidance makes clear that "traditional principles of mitigation of damages apply in these cases."[101] Thus, prompt action after learning of the harassment still would serve to mitigate damages.

The same is true in cases of harassment by a coemployee of another coemployee. Even if the employer was negligent in preventing the harassment or in fully responding to the harassment, an employer that ultimately remedies the problem may not face significant legal exposure. In situations where damages are small, it is less likely that there will be any ultimate formal findings of fact. Would-be plaintiffs will be less likely to bring cases, and all parties will be motivated to settle the case.

Even in situations where the damages are significant, a settlement without attendant findings of fact is likely. As with most types of litigation, almost all employment harassment claims settle outside of court.[102] And it is important to remember that the parties in the case are the employee alleging harassment and the law firm; the alleged harasser is not a party. In such a situation, the law firm will have every incentive to settle. And settlement and a lack of formal findings preclude any violation of the Rules of Professional Conduct.

E. Discrimination Not Based on Protected Status

Alaska Rule of Professional Conduct 8.4(f) and (g) is different in multiple respects from the ABA's model rules.[103] All but one of these changes made the Alaska Rule narrower than the Model Rule. The one place where the protection was expanded affected the definition of harassment.[104]

101. EEOC NO. 915.002, *supra* note 89, § IV.A n.26.

102. *See* Captain, *supra* note 10 (estimating that, of 97,443 charges of workplace discrimination filed with the EEOC in fiscal year 2016, only 7,239 became lawsuits and estimating that, from January 2009 through July 2017, only 54,810 federal employment discrimination lawsuits were filed, of which 42,742 (or 78%) settled); *see also All Statutes*, *supra* note 10 (setting forth data of resolutions of EEOC charges).

103. *See Board Proposes*, *supra* note 3; *Comparison*, *supra* note 29.

104. *See Board Proposes*, *supra* note 3, at 7 ("[T]he Committee has made clear that the prohibition of harassment defined in Proposed Rule 8.4(g)(1) is not linked to any protected class of individuals. The prohibition of invidious discrimination defined in Proposed Rule 8.4(g)(2) is linked to protected classes.").

Model Rule of Professional Conduct 8.4(g) prohibits "harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status."[105] Harassment on other bases is not covered.[106] Alaska rejected this approach, instead proscribing "harassment or invidious discrimination," with "harassment" defined as "unwelcome conduct, whether verbal or physical, that has no reasonable relation to a legitimate purpose and is so severe or sustained that a reasonable person would consider the conduct intimidating or abusive."[107] Harassment is prohibited regardless of the basis of the harassment.[108]

But, as with other types of harassment, the rules only prohibit harassment against "others working for that lawyer or for that lawyer's firm if the lawyer's conduct results in a final agency or judicial determination of employment misconduct or discrimination."[109] Title VII, however, is consistent with the Model Rule and not the Alaska Rule on this point. Title VII does not expressly prohibit harassment; it prohibits only discrimination based on protected class status.[110] Harassment based on protected classes is prohibited only because harassment based on protected classes is discriminatory: conduct that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'" based on a protected class amounts to discriminatory "terms, conditions or privileges of employment" based on the protected class and is therefore prohibited.[111]

Rule of Professional Conduct 8.4(f) and (g) take this concept of severe or persuasive conduct that amounts to abuse and proscribe it regardless of whether it is based on a protected class.[112] But because employment

105. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. LAW. INST. 2016).

106. *Id.*

107. ALASKA RULES OF PROF'L CONDUCT r. 8.4(f), (g) (2022); *see also Board Proposes*, *supra* note 3, at 7.

108. *See* ALASKA RULES OF PROF'L CONDUCT r. 8.4(f), (g); *Board Proposes*, *supra* note 3, at 7.

109. *Id.*

110. *See* 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

111. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986) (alteration in original) (quoting Hensen v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

112. *See* ALASKA RULES OF PROF'L CONDUCT r. 8.4(g)(1) ("'Harassment' means unwelcome conduct, whether verbal or physical, that has no reasonable relation

law does not cover harassment based on non-protected classes, a formal finding of such conduct by a lawyer outside the bar complaint process (which would be required for a lawyer to be deemed to have violated Rule 8.4(f) and (g) if the target of the harassment was someone within the lawyer's firm) cannot come from an employment discrimination lawsuit. Such a finding could likely come about only from a tort action based on intentional or negligent infliction of emotional distress, and it is not clear how the contours of those torts would map onto the contours of the professional conduct rule. It may be the case that conduct will never amount to a violation or Rule 8.4(f) and (g) solely because there is no arbitrator outside the bar discipline system that could make findings on the question.

IV. THE REALITY ON THE GROUND

A. Underreporting in the Legal Profession

All of the above is compounded by the reality on the ground in the legal profession. Most harassment is never reported to employers, let alone to an outside agency or a court.[113] And employees who do report harassment to their employer often receive disappointing results.[114] But Rule 8.4(f)'s requirement of findings from an outside agency or a court inherently requires that a complaint of harassment be filed before any disciplinary action can be taken by the Bar.

According to the "Still Broken" report by Women Lawyers On Guard, 86 percent of incidents of sexual harassment in the legal profession went entirely unreported.[115] That is, in 86 percent of sexual harassment instances, the target of the harassment did not report the harassment within their firm—let alone file a formal complaint with an outside agency or in court. Of those who did not report, 8 percent did not report because they did not know to whom to report; 8 percent because the harasser was the person to whom to report; 3 percent because they were scared for their safety; 25 percent because they thought they would lose their job; 22 percent because they thought their employer would not believe them; 15 percent because they felt the behavior was not serious enough; 15 percent because they thought they could handle it themselves; and 4 percent because colleagues, family, or friends discouraged them

to a legitimate purpose and is so severe or sustained that a reasonable person would consider the conduct intimidating or abusive.").

113. WOMEN LAWYERS ON GUARD, *supra* note 1, at 24.

114. *Id.* at 25.

115. *Id.* at 24.

from reporting.[116]

Additionally, many of the respondents to Women Lawyers On Guard's survey who did report instances of sexual harassment to supervisors, human resources departments, or ombudspersons responded that the people they reported to were either not supportive ("24% of supervisors, 28% of HR, and 22% of ombudspersons") or were harmful ("15% of supervisors, 17% of HR, 17% of ombudspersons").[117] As the report noted, "Overall, there was an even chance that even if the behavior was reported, the person harassed would encounter non-supportive or harmful reactions (41 percent) rather than supportive ones (40 percent) from these reporting channels."[118] These statistics further suggest that formal findings of harassment will be rare, meaning that the attorney disciplinary process rarely will apply to workplace harassment.

B. The Legal Profession & Harrassment Risk Factors

An effective rule addressing harrassment in legal workplaces is all the more important because the history and structure of the legal profession make harassment more likely than in other professions. In June 2016, the co-chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace issued a report that identified "risk factors" for harassment in the workplace.[119] According to the report, "the presence of one or more risk factors suggests that there may be fertile ground for harassment to occur."[120] Many of these risk factors apply to workplaces in the legal profession.

Two risk factors identified by the report were "[h]omogenous workforces" where there is a "[h]istoric lack of diversity in the workplace" and "[w]orkplaces where some employees do not conform to workplace norms," such as "'[r]ough and tumble' or single-sex dominated workplace cultures."[121] The legal field is a traditionally male-dominated field.[122] As of 2023, women made up 39 percent of lawyers nationwide—up from 34 percent in 2013, 27 percent in 2000, 20 percent in 1991, 8 percent in 1980, and 3 percent from 1950 to 1970.[123] In such situations, female workers "can feel isolated and may actually be, or at

116. *Id.* at 25.
117. *Id.*
118. *Id.*
119. FELDBLUM & LIPNIC, *supra* note 12, part 2.E, app. C.
120. *Id.* at part 2.E.
121. *Id.* at part 2.E, app. C.
122. *See* AM. BAR ASS'N, PROFLE OF THE LEGAL PROFESSION 22 (2023), https://www.americanbar.org/content/dam/aba/administrative/news/2023/potlp-2023.pdf.
123. *Id.*

least appear to be, vulnerable to pressure from others."[124] And male workers "might feel threatened by those they perceive as 'different' or 'other'"—"concerned that their jobs are at risk or that the culture of the workplace might change."[125] And, though "rough and tumble" might not be the first description that comes to mind for the office jobs of the legal profession, lawyers and support staff in many fields of law deal in uncomfortable and traumatizing situations.[126] Attempts at dark humor can be the most effective way of avoiding secondhand trauma in these kinds of situations.[127] But "a worker in a 'rough and tumble' environment who for any number of reasons chooses not to participate in 'raunchy' banter" "may engender harassment or ridicule."[128]

Two other risk factors are "[w]orkplaces with 'high value employees'"—such as "the 'rainmaking' partner"—and "[w]orkplaces with significant power disparities"—such as workplaces with "administrative support staff," especially if "most of the low-ranking employees are female."[129] The legal profession is rife with situations where a person who is considered indispensable to the firm is directly supervising someone, often a woman, who is not seen as having nearly the same institutional value. According to the Women Lawyers On Guard report, "in 70 percent of the incidents [where the target of the harassment reported the harassment], there was no consequence to the harasser, or the person harassed was never informed of the consequence leaving the impression that there were no consequences."[130] And the report notes, "Even when the employer does investigate, takes action, and the harasser departs, 'collateral victims' are left behind. These include lawyers who may not have been harassed but lose their jobs when the harasser takes their client base with them and the firm cannot sustain their positions."[131]

The presence of multiple risk factors in the legal profession indicates a risk that legal workplaces will be "fertile ground" for harassment.[132] This underscores the need for systems to be in place and readily accessible in order to protect employees in the legal profession.

124. FELDBLUM & LIPNIC, *supra* note 12, part 2.E.
125. *Id.*
126. *See* Shiloh A. Catanese, *Traumatized by Association: The Risk of Working Sex Crimes*, 74 FED. PROBATION (Sep. 2010), http://www.uscourts.gov/sites/default/files/74_2_9_0.pdf#:~:text=The%20reality%20is%20that%20some,as%20flashbacks%20and%20intrusive%20images.
127. *Id.*
128. *Id.*
129. FELDBLUM & LIPNIC, *supra* note 12, app. C.
130. WOMEN LAWYERS ON GUARD, *supra* note 1, at 31.
131. *Id.* at 21.
132. FELDBLUM & LIPNIC, *supra* note 12, part 2.E.

C. Serial Harrassers in the Law

Mobility in the legal profession can provide a safe harbor for serial harassers, making a profession-wide approach all the more necessary. It is insufficient for each law firm individually to address harassment in the firm, although firms should, of course, be encouraged to address harassment within the firm (and may face legal liability if they do not). Even if individual firms take seriously their obligation to protect employees from harassment, up to and including letting go lawyers who engage in harassment, this will not significantly limit the ability of serially harassing lawyers to continue to harass people at work. The lawyer who is let go may simply find work at a new firm and continue their practice of harassing coworkers. Thus, a profession-wide solution is required.

A recent report from another field where licensed employees regularly switch employers illustrates how a culture of harassment can flourish in a field even when individual employers take action against harassing employees. The National Women's Soccer League (NWSL) and its union recently commissioned a report of harassment perpetrated by head coaches in the league.[133] The report revealed multiple examples where one team fired its head coach due to severe harassment of players but another team then signed the coach to be its head coach and the coach engaged in harassment of players on the new team.[134] One of the recommendations of the report was that the NWSL and NWSL teams coordinate with U.S. Soccer, which is the licensing body for NWSL coaches, and that U.S. Soccer remove coaches' licenses if appropriate.[135] The mobility of lawyers in Alaska suggests the same problem could be occurring and that the same solution should be employed.

V. RECOMMENDATIONS

Given the structure of employment discrimination law and the realities of the legal profession in Alaska, the Bar should provide an opportunity for coworkers of lawyers to complain of harassment in the first instance. Filing a bar complaint is much easier than filing a formal complaint with an agency or court and following that through until there

133. COVINGTON & BURLING LLP & WEIL, GOTSHAL & MANGES LLP, REPORT OF THE NWSL AND NWSLPA JOINT INVESTIGATIVE TEAM (2022), https://www.cov.com/-/media/files/corporate/publications/file_repository/report-of-the-nwsl-and-nwslpa-joint-investigative-team.pdf.

134. *Id.*

135. *Id.* at 119.

are formal findings.[136] And given the politics of law firms, it will often be easier than reporting to a supervisor or human resources department within a firm.[137] Reports to the Bar will also be the most effective way to address the mobility of lawyers and address serial harassment.

I therefore recommend that Rule of Professional Conduct 8.4(f) be amended to include "lawyers, paralegals, or others working for the lawyer or for the lawyer's firm" in the list of people to whom the Rule prohibits lawyers from harassing or discriminating against in their professional relations. That is, I recommend that Rule of Professional Conduct 8.4(f) be amended to read, in full:

> It is professional misconduct for a lawyer to:
> . . . .
> (f) engage in conduct that the lawyer knows is harassment or invidious discrimination during the lawyer's professional relations with (1) officers or employees of a tribunal; (2) lawyers, paralegals, and others working for other law firms; (3) parties, regardless of whether they are represented by counsel; (4) witnesses; (5) seated jurors; *or (6) lawyers, paralegals, or others working for the lawyer or for the lawyer's firm*.

In proposing the current language of Rule of Professional Conduct 8.4(f) and (g), the Rules of Professional Conduct Committee stated that "Bar Counsel, Area Hearing Committees, and the Disciplinary Board are not fully equipped to be the first decision makers to address the[] complicated substantive legal issues" of workplace harassment and discrimination.[138] Even if true, I believe that a centralized reporting system, without any additional hoops to jump through, is necessary for addressing issues of workplace harassment in the legal field. I also question this conclusion. As explained above, workplaces in the legal field are not normal workplaces: lawyers and support staff must regularly deal in uncomfortable situations.[139] Venting and joking about these sensitive topics will often be necessary to mitigate secondhand trauma.[140] But dark humor runs the risk of turning into harassment if the people engaging in it are not careful to respect coworkers' boundaries.[141] Given their familiarity with the unique nature of legal workplaces, Bar Counsel, Area Hearing Committees, and the Disciplinary Board would seem well-suited to determine when attorneys have crossed the line in these

136. *See* WOMEN LAWYERS ON GUARD, *supra* note 1, at 24.
137. *See id.* at 25.
138. *Board Proposes*, *supra* note 3, at 7.
139. *See* Catanese, *supra* note 126.
140. *See id.*
141. *See* FELDBLUM & LIPNIC, *supra* note 12, part 2.E.

situations.

I also make a second recommendation: that a paragraph to the commentary to Rule 8.4 be added that states that law firms, or at least large firms, should have, and should regularly disseminate, a policy that addresses harassment and invidious discrimination in the workplace. As explained above, EEOC guidance provides that, in order for employers to avoid liability for harassment claims, "[i]t generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures,"[142] although the guidance also acknowledges formal policies are "not necessary in every instance as a matter of law" and that formal policies may not be necessary in small businesses where such prohibition and procedures may effectively be communicated more informally.[143] Policies and procedures should be provided to every employee and redistributed periodically and should contain

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.[144]

Rule of Professional Conduct 5.1(a) and (b) requires that a partner or manager in a law firm "make reasonable efforts to ensure that the firm has in effect measures giving a reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct" and that a lawyer supervising another lawyer "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."[145] And the scope section of the Rule of Professional Conduct explains that many comments state that lawyers "should" do something and that these

142. EEOC NO. 915.002, *supra* note 79, § V.C.1.

143. *Id.* §§ V.C.1, V.C.3 ("If it puts into place an effective, informal mechanism to prevent and correct harassment, a small employer could still satisfy the first prong of the affirmative defense to a claim of harassment." (citing Faragher v. City of Boca Raton, 524 U.S. 775, 808–09 (1998)).

144. EEOC NO. 915.002, *supra* note 79, § V.C.1.

145. ALASKA RULES OF PROF'L CONDUCT r. 5.1(a)–(b).

statements in comments "do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."[146] As such, it would be appropriate to add a paragraph to the comment to Rule of Professional Conduct 8.4 stating that law firms, or large law firms, should follow these EEOC guidelines regarding harassment policies. I recommend that the Rules of Professional Conduct Committee consider adding to the comment for Rule 8.4 a recommendation similar to that of the EEOC policy guidance—that is, a recommendation that law firms (or at least law firms with more than a few employees) should adopt policies to prevent harassment and invidious discrimination, that these policies be regularly communicated to all employees of the firm, and that the policies include express procedures for resolving complaints of harassment or invidious discrimination.[147]

VI. CONCLUSION

The preamble to the Rules of Professional Conduct explains, "[t]he legal profession is largely self-governing."[148] "Self-regulation . . . helps maintain the legal profession's independence from government domination," and "[a]n independent legal profession is an important

146. ALASKA RULES OF PROF'L CONDUCT Scope.

147. Rule 8.4(f) is questionable in another respect. The Rule prohibits harassment and invidious discrimination against *seated* jurors. ALASKA RULES OF PROF'L CONDUCT r. 8.4(f). The Commentary to the Rule explains the decision to include only seated jurors, and thereby exclude prospective jurors, as follows:

> The persons who are protected from a lawyer's harassment or invidious discrimination under this rule include seated jurors, that is, jurors who have gone through the selection process and have been sworn to adjudicate a case. Allegations of harassment or invidious discrimination against prospective jurors should be handled by trial judges through the procedures developed under Batson v. Kentucky, 476 U.S. 79 (1986). ALASKA RULES OF PROF'L CONDUCT r. 8.4 cmt.

There are at least two flaws with this approach. First, *Batson* regulates only the decision to use a peremptory challenge against a protected juror based on a protected class. *Batson* does not concern other possible types of discriminatory conduct against prospective jurors or harassment of prospective jurors. Second, the existence of a procedure to remedy the effects of discrimination at trial does not necessarily mean that a lawyer who knowingly discriminates should receive no additional discipline. Virtually all professional misconduct that is connected to litigation can be remedied by the order of the judge presiding over the litigation, but the ability for a judge to remedy any misconduct generally does not preclude a lawyer from receiving discipline from the bar for that same conduct if additional discipline is warranted. I therefore also recommend that Rule 8.4(f)'s exclusion of prospective jurors be revisited. This, however, is not the subject of this Article because I am not aware of any evidence of pervasive harassment and discrimination by lawyers against prospective jurors and this is therefore not a problem that strikes at the heart of the legal community's duty to govern itself.

148. ALASKA RULES OF PROF'L CONDUCT Preamble.

force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."[149] But "[t]he legal profession's relative autonomy carries with it special responsibilities of self-government," and "[n]eglect of these responsibilities compromises the independence of the profession and the public interest which it serves."[150]

Echoing these concerns, the commentary to Rule 8.4 acknowledges that "[a] lawyer's harassing or invidiously discriminatory conduct directed to persons working for the lawyer or the lawyer's firm adversely affects the proper administration of justice by undermining confidence in the legal profession."[151] The responsibilities of self-government demand that the profession have avenues to address such conduct.

I therefore recommend that Rule of Professional Conduct 8.4(f) be amended to include "lawyers, paralegals, or others working for the lawyer or for the lawyer's firm" in the list of people whom the Rule prohibits lawyers from harassing or discriminating against in their professional relations. I further recommend adding to the commentary to the rule a statement that law firms, or at least large firms, should have, and should regularly disseminate, a policy that addresses harassment and invidious discrimination in the workplace.

149. *Id.*
150. *Id.*
151. ALASKA RULES OF PROF'L CONDUCT r. 8.4 cmt.