

DON'T CALL ME SWEETHEART!
WHY THE ABA'S NEW RULE ADDRESSING HARASSMENT AND
DISCRIMINATION IS SO IMPORTANT FOR WOMEN WORKING IN
THE LEGAL PROFESSION TODAY

by
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Popular culture has recently shone a spotlight on the inequality and discrimination faced by women in many professions. With the "Me Too" and "Time's Up" campaigns in full swing, it is clear that women are ready to fight to be respected and receive equal treatment. Although there are a plethora of news stories highlighting the issues that women are facing today, this Article will focus specifically on the effect of bias, prejudice, harassment, and discrimination against women in the legal profession. This discrimination and marginalization of women finds its way into law firms, courtrooms, and the corporate arena generally, and impacts not only the female attorneys and judges themselves, but also the clients and litigants that these women are serving. The American Bar Association ("ABA"), long committed to diversity and leading the professional legal community regarding "appropriate" conduct, has finally put an anti-discrimination, anti-harassment provision into effect to combat discriminatory behavior on a national level.

This Article argues that although the ABA's adoption of Resolution 109 to amend Rule 8.4 is a necessary first step to remedy the issues that women in the legal profession are currently facing, education and training initiatives must also be established. This training should take the form of Bias Training in law schools (as part of the Professional Responsibility requirements), in law firms, and as mandatory CLE requirements for practicing attorneys. The Article provides an overview of the history of women in the legal profession in the United States, as well as examines the status of women in the profession and judiciary today from a statistical standpoint. The Article goes on to examine how the

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New Rule 8.4 of the ABA Model Rules came to be, the language of the Resolution, and criticisms of the New Rule. Finally, the Article suggests that we, as a community of professionals, institute education and training initiatives as students begin law school and then continue that training throughout a lawyer's career.

“For so long, women were silent, thinking there was nothing you could [do] about it. But now the law is on the side of women or men who encounter harassment, and that’s [a] big thing.”

—Ruth Bader Ginsburg, Supreme Court Justice¹

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¹ John Lynch, *Justice Ruth Bader Ginsburg Praised the #MeToo Movement, and Shared Her Own Experience of Sexual Harassment*, BUS. INSIDER (Jan. 22, 2018), <http://www.businessinsider.com/justice-ruth-bader-ginsburg-praises-the-metoo-movement-at-sundance-2018-1> (quoting Supreme Court Justice Ruth Bader Ginsburg when she praised the #MeToo movement in a talk at the Sundance Film Festival).

I. INTRODUCTION

Popular culture has recently shone a spotlight on the inequality and discrimination faced by women in many professions. With the “Me Too” and “Time’s Up” campaigns in full swing, it is clear that women are ready to fight to be respected and receive equal treatment. It is a new reality that we are bombarded weekly with another high-profile male figure’s face plastered on the news for his sexually inappropriate behavior. As recently as January 20, 2018, the one-year anniversary of President Trump’s inauguration, women are still fighting for their rights, this time in the form of Women’s Marches throughout the country.²

Although there are a plethora of news stories and issues that women are facing today, this Article will focus specifically on the effect of bias, prejudice, harassment, and discrimination against women in the legal profession.³ Although women have “earned a place at the table” to some extent, they are still paid less, harassed, and discriminated against regularly.⁴ Sexual discrimination takes the form of female diminution, where, in a professional setting, women are constantly told that they are not smart enough, strong enough, or good enough to be there, either in the form of outright comment or implication. In the legal profession, this discrimination and marginalization of women finds its way into law firms, courtrooms, and the corporate arena generally, and impacts not only the female attorneys and judges themselves, but also the clients and litigants that these women are serving.

Recently, a prominent federal judge, Alex Kozinski, was called out for his inappropriate sexual conduct and comments.⁵ Despite many accounts detailing his

² Georgett Roberts et al., *Women’s March Descends on NYC on Anniversary of Trump’s Inauguration*, N.Y. POST (Jan. 20, 2018), <https://nypost.com/2018/01/20/womens-march-descends-on-nyc-on-anniversary-of-trumps-inauguration/>.

³ Additionally, it should be noted that although Rule 8.4(g) and associated Comments of the ABA Model Rules of Professional Conduct deals with harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, the focus of the Article will be women.

⁴ *The Wage Gap: The Who, How, Why, and What To Do*, NAT’L WOMEN’S L. CTR (Sept. 19, 2017), <https://nwlc.org/resources/the-wage-gap-the-who-how-why-and-what-to-do/>.

⁵ Nina Totenberg, *Chief Justice Roberts Sends Kozinski Inquiry to Another Judicial Council*, NPR (Dec. 15, 2017), <https://www.npr.org/2017/12/15/571234947/chief-justice-roberts-sends-kozinski-inquiry-to-another-judicial-council>; Matt Zapotosky, *Federal Appeals Judge Announces Immediate Retirement Amid Probe of Sexual Misconduct Allegations*, WASH. POST (Dec. 18, 2017) [hereinafter Zapotosky, *Kozinski Retires*], https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html (listing examples of the inappropriate behavior that Kozinski is accused of, including showing separate women pornographic images and asking if they thought that the image was photoshopped or if it aroused them sexually, touching women inappropriately, and making inappropriate comments and jokes); Matt Zapotosky, *Prominent Appeals Court Judge Alex*

inappropriate behavior, Kozinski was still on the bench until he announced his retirement amid the probe of sexual allegations.⁶ However, for every negative story that we hear, we should feel hope in the fact that there are good stories out there as well. For example, Jack B. Weinstein, a senior federal judge in Brooklyn, has taken the lead to try “to chip away at the traditional old-boy network that has dominated the legal profession for decades.”⁷ “It is common for judges to publish guidance for lawyers who appear in their courtrooms on how to conduct themselves with regard to minor matters like how and when to file motions.”⁸ Judge Weinstein “used this typically mundane process to address an issue of growing concern to many in the legal profession: the lack of female lawyers in leading roles at trials and other court proceedings. Following the lead of a handful of other federal judges, Judge Weinstein issued a court rule urging a more visible and substantive role for young female lawyers working on cases he is hearing.”⁹

The American Bar Association (“ABA”) has long been committed to diversity and has consistently tried to lead the professional legal community regarding “appropriate” conduct. Since the Model Rules of Professional Conduct (“ABA Model Rules”) were first adopted by the ABA in 1983, they have served as a guidepost for outlining how each of us, as members of the legal community, should behave to maintain fairness within the legal system.

In 2018, it would seem like common sense that an attorney should not refer to a colleague as honey, sweetie, or darling, however the ABA has finally put such a rule into effect to combat discriminatory behavior. Although many states have chosen to address this behavior through specific provisions in their Model Rules of Professional Conduct, until this rule went into effect, there was no national statement regarding such discriminatory behavior in the legal profession, other than weak language in a Comment to the Model Rules. Thankfully, when the ABA adopted Resolution 109 to amend Rule 8.4 of the Model Rules to add an anti-discrimination, anti-harassment provision, it took a large step on a national level to begin to remedy the issues that women in the legal profession are currently facing.¹⁰

Kozinski Accused of Sexual Misconduct, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html.

⁶ See Zapotosky, *Kozinski Retires*, *supra* note 5.

⁷ Alan Feuer, *A Judge Wants a Bigger Role for Female Lawyers. So He Made a Rule.*, N.Y. TIMES (Aug. 23, 2017), <https://www.nytimes.com/2017/08/23/nyregion/a-judge-wants-a-bigger-role-for-female-lawyers-so-he-made-a-rule.html>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Additionally, in 2018, the ABA released *Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession*, and, according to the ABA website, the ninety-two-page paperback is: a comprehensive update to the ABA Commission on Women in the Profession’s previous

This Article argues that although the ABA's adoption of Resolution 109 to amend Rule 8.4 of the Model Rules to add an anti-discrimination, anti-harassment provision is a necessary step on a national level to begin to remedy the issues that women in the legal profession are currently facing, education and training initiatives must also be established in law schools, at the start of a lawyer's career, and that training must be continued once attorneys enter the work force in the form of Bias Training in law firms and mandatory CLE requirements.

Section II will provide a brief overview of the history of women in the legal profession in the United States. Section III will provide an overview of women in the profession and judiciary today from a statistical standpoint. Section IV will examine the history of how Resolution 109 amending Rule 8.4 of the ABA Model Rules came to be, and will address the language of the Resolution itself. Section V will examine criticisms of the new rule. Section VI will examine how a sample of states has handled this issue in their own Model Rules. Finally, Section VII will address where we, as a community of professionals, can and should go from here.

II. A HISTORY OF WOMEN IN THE LEGAL PROFESSION IN THE UNITED STATES

Although women today have a foothold in the legal profession, this position only came after an enormous amount of effort on the part of many women fighting for these rights. The presence of female attorneys in the profession of law in the United States has dramatically changed since this country began, as there has been a dramatic progression from non-existence to full integration in the field.¹¹

A. *A Brief History from 1787 to 1960*

In 1638, Margaret Brent arrived in Maryland and claimed a right to land based on orders from Lord Baltimore, as well as "engaged in numerous business ventures, trading in tobacco, indentured servants, and land."¹² In 1648, she appeared before the Maryland Assembly and requested two votes, "one for herself as a landowner

sexual harassment material. The primary goal of this manual is to provide all too necessary tools to legal organizations and victims of harassment and bullying. It strives to enhance the common understanding of workplace abuse and expand it to include non-sexual abusive behavior, while introducing protections for individuals with a range of sexual orientations, genders, and racial and ethnic identities.

Zero Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession, A.B.A. (2018), <https://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=309131379&term=4920050>.

¹¹ Maria Pabón López, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trends*, 19 HASTINGS WOMEN'S L.J. 53, 60 (2008).

¹² Ann Baker, *Margaret Brent*, MD. ST. ARCHIVES (1998), <http://msa.maryland.gov/msa/speccol/sc3500/sc3520/002100/002177/html/brochure.html>.

and one as Lord Baltimore's attorney."¹³ Although Brent made this stand, "[t]he first period in the development of the legal status of women in the United States lasted from 1787 to 1872."¹⁴ As the Founding Fathers did not have women's rights on their minds when they met in Philadelphia in 1787 to draft a new constitution, the period is characterized as one of constitutional neglect.¹⁵

In the 1820s and 1830s, the codification of American law at the state level caused additional changes in the legal status of women.¹⁶ This change continued and made slow strides over the coming years.¹⁷ Even after the end of slavery in the United States, women were still denied the rights and privileges equal to men.¹⁸ The recognition of the right to be treated equally under the Fourteenth Amendment did not occur until the twentieth century.¹⁹

There is a long history of women attempting to join the legal profession, as traditionally, being a lawyer was not recognized as a woman's right and privilege as a citizen of the United States.²⁰ Although there were a handful of women that were able to break through the barriers, it was extremely difficult for women to train for the profession, earn bar membership, and practice.

In 1869, Lemma Barkeloo and Phoebe Couzins became what many believe were the first female law students in the nation at Washington University School of Law in St. Louis.²¹ Their entering class at the law school, which had only opened its doors two years prior, had twenty-one students, two of which were women.²² Lemma Barkeloo attended law school for approximately one year and, prior to completing her degree, chose to take the Missouri bar.²³ The day after passing the rigorous, day-long oral bar exam and receiving the highest marks out of a group of five applicants, Barkeloo took the oath and became the second licensed female attorney in the United States and the first in Missouri.²⁴ In her first few months of practice,

¹³ *Id.*

¹⁴ JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 117 (rev. ed. 1993).

¹⁵ *Id.*

¹⁶ *Id.* at 122.

¹⁷ *See id.* at 123.

¹⁸ PHYLLIS HORN EPSTEIN, WOMEN-AT-LAW: LESSONS LEARNED ALONG THE PATHWAYS TO SUCCESS 10 (2004).

¹⁹ *Id.*

²⁰ *Id.*

²¹ HEDDA GARZA, BARRED FROM THE BAR: A HISTORY OF WOMEN IN THE LEGAL PROFESSION 54 (1996); Karen Tokarz, *Lemma Barkeloo and Phoebe Couzins: Among the Nation's First Women Lawyers and Law School Graduates*, 6 WASH. U.J.L. & POL'Y 181, 181 (2001).

²² Tokarz, *supra* note 21, at 182.

²³ *Id.* at 183; GARZA, *supra* note 21, at 54.

²⁴ Tokarz, *supra* note 21, at 183; GARZA, *supra* note 21, at 54.

she became the first female attorney to try a case in court.²⁵ Shortly thereafter, Barkeloo fell ill with typhoid fever and died.²⁶ Barkeloo's classmate and colleague, Phoebe Couzins, now had the responsibility of "advancing equality for women in the legal profession."²⁷ In 1871, Couzins completed her two years of study and graduated with her degree, becoming the law school's and university's first female graduate.²⁸ Couzins was admitted to the state bars in Missouri, Arkansas, Utah, Kansas, the Dakota Territory, as well as the federal courts.²⁹ In 1887, President Grover Cleveland appointed her the first female U.S. Marshal in the United States.³⁰

Arabella Mansfield was one of the first women admitted to a state bar in 1869 when she was admitted in Iowa.³¹ "She had not studied at a law school but rather had studied in her brother's office for two years before taking the bar examination."³² In her case, she was permitted to practice due to Judge Francis Springer's interpretation of "male gender references in the statute as terms of convenience rather than exclusion."³³

There were some notable "firsts" in 1870. Ada Kepley graduated from Union College of Law in Chicago (now Northwestern College of Law) and became what is believed to be the first woman to graduate from law school in the United States.³⁴

²⁵ Tokarz, *supra* note 21, at 183.

²⁶ *Id.*; GARZA, *supra* note 21, at 54.

²⁷ Tokarz, *supra* note 21, at 184.

²⁸ *Id.* at 185.

²⁹ *Id.* at 186; GARZA, *supra* note 21, at 54; Maggie MacLean, *Phoebe Couzins*, CIVIL WAR WOMEN (Aug. 8, 2017), <https://www.civilwarwomenblog.com/phoebe-couzins/>.

³⁰ GARZA, *supra* note 21, at 54 (indicating that Couzins served as a U.S. Marshal, completing her father's term when he died suddenly); Tokarz, *supra* note 21, at 186; Kimberly Harper, *Phoebe Couzins*, ST. HIST. SOC'Y MO. HISTORIC MISSOURIANS, <https://shsmo.org/historicmissourians/name/c/couzins/> (last visited Sept. 5, 2018).

³¹ EPSTEIN, *supra* note 18, at 11.

³² Kelly Buchanan, *Women in History: Lawyers and Judges*, IN CUSTODIA LEGIS L. LIBR. CONGRESS (Mar. 6, 2015), <https://blogs.loc.gov/law/2015/03/women-in-history-lawyers-and-judges/>.

³³ EPSTEIN, *supra* note 18, at 11; Gwen Hoerr Jordan, *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 NEV. L.J. 580, 604 (2009).

³⁴ EPSTEIN, *supra* note 18, at 11. Ada Kepley was married to Henry B. Kepley who had his own law practice and, at his urging, she attended law school. See Maggie MacLean, *Ada Kepley*, CIVIL WAR WOMEN (July 24, 2014), <https://www.civilwarwomenblog.com/ada-kepley/> ("When Kepley applied for a license to practice law, she was informed that Illinois law did not permit women to enter the learned professions: law, medicine and theology. Henry Kepley helped his wife challenge this ruling by drafting a bill forbidding sex discrimination in the learned professions. Although the bill was passed and became law in 1872, by then Ada's efforts had been diverted to reform issues; most notably women's suffrage and temperance. She did not apply for and receive her license to practice law until 1881, and while she occasionally appeared in court, she had no steady practice.").

In that same year, “Esther Morris was appointed as a justice of the peace in Wyoming Territory—the first woman in the United States appointed to a judicial position.”³⁵

In 1873, in *Bradwell v. Illinois*, the United States Supreme Court “upheld the Illinois bar examiners’ refusal to permit Myra Bradwell to sit for the Illinois bar exam and refused to hold that such a denial violated her right to equal protection under the Fourteenth Amendment to the U.S. Constitution.”³⁶ The Court held that the right to practice law “was not the right and privilege of every citizen in the United States, and individual states could choose to exclude women from their bar associations on the basis of their sex.”³⁷ As a result, the issue was returned to the individual states, which ultimately led judges and state legislatures to have control based on their personal opinions.³⁸ Myra Bradwell was finally admitted to the Illinois bar in 1890, as James Bradwell, Myra’s husband, quietly convinced the Illinois Supreme Court to admit her, dating her admission back to 1869 (the date of her original application).³⁹ Ultimately, Bradwell received her license to practice in front of the United States Supreme Court in 1892.⁴⁰

During this same time, in *Minor v. Happersett*, the United States Supreme Court ruled definitively that the Fourteenth Amendment’s Privileges and Immunities Clause did not have the effect of extending suffrage to woman.⁴¹ The Court noted:

We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power, to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman’s need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.⁴²

Thus, as women were attempting to gain the right to practice law, they still did not have the right to vote. After this case, the women’s suffrage movement focused

³⁵ Buchanan, *supra* note 32; *Esther Hobart Morris*, ARCHITECT CAPITOL (Apr. 29, 2016), <https://www.aoc.gov/art/national-statuary-hall-collection/esther-hobart-morris>.

³⁶ EPSTEIN, *supra* note 18, at 10.

³⁷ *Id.*

³⁸ *Id.*

³⁹ EPSTEIN, *supra* note 18, at 11; GARZA, *supra* note 21, at 33.

⁴⁰ EPSTEIN, *supra* note 18, at 11.

⁴¹ *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874).

⁴² *Id.*

on the revision of voting laws and the ratification of a new amendment to the United States Constitution.⁴³

The ABA was formed in 1878, when seventy-five prominent lawyers from twenty states and the District of Columbia met in Saratoga Springs, New York.⁴⁴ The first president, a male, was elected in the same year.⁴⁵

In 1879, Belva Ann Lockwood was the first woman admitted to the United States Supreme Court bar and was “responsible for lobbying Congress to pass the Lockwood Bill, which gave women lawyers the right to practice before federal courts.”⁴⁶ Prior to her admission to the Supreme Court, in 1873, she graduated from law school and was admitted to the bar of the District of Columbia, however she was not allowed to speak in front of the Supreme Court because of “custom.”⁴⁷ In 1884, Lockwood was the first woman to run a full-fledged campaign for the presidency of the United States as a candidate of the National Equal Rights Party.⁴⁸ She did so a second time in 1888.⁴⁹ Her run for presidency was rooted in her belief that it would bring prominence to women’s rights issues, specifically the right to vote and participate in politics.⁵⁰

On February 1, 1896, two women founded a law school aimed at educating female attorneys, as they realized that the opportunities available to women in the legal profession were limited.⁵¹ Based on the fact that “earnest women year after year were denied the privilege of entering the white schools, these two pioneers realized that out of their experience a service to others was possible and they decided to do what they could to open the door of opportunity in the legal profession to women.”⁵² Ellen Spencer Mussey and Emma Gillett held the first session of the Women’s Law Class, with an enrollment of three women; early on, classes were held

⁴³ *Minor v. Happersett*, ENCYCLOPAEDIA BRITANNICA (Apr. 16, 2014), <https://www.britannica.com/event/Minor-v-Happersett>.

⁴⁴ Howard Kaplan & Tiffany Willey Middleton, *ABA Timeline*, A.B.A. (2015), http://apps.americanbar.org/members/history-timeline/timeline-assets/timeline.html#!date=1876-02-15_23:03:26 [hereinafter *ABA Timeline*].

⁴⁵ *Id.*

⁴⁶ EPSTEIN, *supra* note 18, at 11; Jill Norgren, *Belva Lockwood: Blazing the Trail for Women in Law*, 37:1 PROLOGUE: Q. NAT’L ARCHIVES & REC. ADMIN. 14, 15 (2005), available at <https://www.archives.gov/publications/prologue/2005/spring/belva-lockwood-1.html>.

⁴⁷ *Belva Ann Lockwood*, ENCYCLOPAEDIA BRITANNICA (May 17, 2018), <https://www.britannica.com/biography/Belva-Ann-Lockwood>.

⁴⁸ Norgren, *supra* note 46, at 15; *Belva Ann Lockwood*, *supra* note 47.

⁴⁹ Norgren, *supra* note 46, at 16.

⁵⁰ *Id.* at 15.

⁵¹ *History: Our Founding Mothers*, AM. U. WASH. C.L., <https://www.wcl.american.edu/impact/history/> (last visited Sept. 5, 2018).

⁵² *Id.*

in Mussey's law office.⁵³ Within just a few years, interest grew as more women sought a career in the legal profession.⁵⁴ Thus, in order to meet the demands of their own law practice, yet continue the law school, Mussey and Gillett "obtained the teaching assistance of several prominent Washington attorneys."⁵⁵ When the school began, the women did not intend on creating a full-fledged law school and requested that Columbian College accept the now six women ready to begin their final year of study.⁵⁶ When the school refused, the two women set out to create a law school from which the women could graduate.⁵⁷

Progress continued and women began to enter the academic arena. In 1898, Lutie A. Lytle, one of the first female African-American attorneys, became the first woman law instructor in the world when she joined the faculty of the Central Tennessee College of Law.⁵⁸ In 1919, Barbara Armstrong became the first woman appointed to a tenure-track position at an accredited law school when she joined the faculty of the University of California at Berkeley.⁵⁹

As time progressed, the professional ethics of attorneys became a topic of interest. Thus, in 1908, the ABA adopted the Canons of Professional Ethics to begin to deal with setting a code of behavior within the legal profession and, in 1913, the Standing Committee on Professional Ethics was created.⁶⁰

Although women were entering the legal profession as practicing attorneys and educators, women were still denied the right to vote until 1920 and denied the right to sit on juries in sixteen states until as recently as 1947 (with Alabama holding out until 1966 when it was compelled by judicial intervention to accept female jurors).⁶¹

Moreover, the states and the federal government continued to enact laws permitting sex-based distinction.⁶² Additionally, even after women gained the legal right to practice law and began to enter the profession, their reception into the legal field was not easy, as many schools were reluctant and slow to open their doors to women.⁶³ A few Midwestern state universities were open to women; however, these

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Lutie Lytle*, KAN. HIST. SOC'Y (May 2018), <https://www.kshs.org/kansapedia/lutie-lytle/12136>.

⁵⁹ Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 5 (1991).

⁶⁰ *ABA Timeline*, *supra* note 44.

⁶¹ EPSTEIN, *supra* note 18, at 11.

⁶² EPSTEIN, *supra* note 18, at 14–15.

⁶³ EPSTEIN, *supra* note 18, at 20.

“were exceptions to the rule of not permitting women to study law.”⁶⁴ Many continued to fight for women to be allowed admission to law schools around the country. As women were admitted to law school, many were accused of taking the place of worthier men and wasting the resources of the school, as they were not seen to be intellectually prepared for law school.⁶⁵

Although the federal court system was established in 1789, it took nearly 140 years for the first woman to sit on a federal bench.⁶⁶ In a speech in 1995, Justice Ginsburg stated, “If the first women judges were here today, they would rejoice at this achievement.”⁶⁷ Justice Ginsburg referred to these women judges as “way pavers” and noted that “[t]heir examples made it less difficult for the rest of us to gain appointment or election to the judiciary.”⁶⁸ Nominated by President Calvin Coolidge in 1928, Genevieve Cline became the first female federal judge when she was appointed to the U.S. Customs Court (now known as the Court of International Trade); she ultimately served on the U.S. Customs Court for 25 years.⁶⁹ Prior to becoming a judge, Cline “became the first woman assigned by the U.S. Department of the Treasury to be the appraiser of merchandise at the port of Cleveland, Ohio.”⁷⁰

Florence Allen became the first woman judge in a federal appeals court, when, in 1934, she was appointed by President Franklin D. Roosevelt to the United States Court of Appeals for the Sixth Circuit.⁷¹ Allen had earned her law degree from New York University School of Law in 1913, and began her legal career by establishing her own law practice.⁷² In 1919, she was appointed Assistant Prosecutor of Cuyahoga County, Ohio.⁷³ Allen was then elected as a judge to the Court of Common Pleas, and, in 1922, she earned a seat on the Ohio Supreme Court.⁷⁴ With this accomplishment, Allen was the first woman to serve on Ohio’s highest court and,

⁶⁴ GARZA, *supra* note 21, at 54 (referencing legal education access for women in the late nineteenth century).

⁶⁵ EPSTEIN, *supra* note 18, at 20.

⁶⁶ *Women as ‘Way Pavers’ in the Federal Judiciary*, U.S. CTS. (Feb. 26, 2015), <http://www.uscourts.gov/news/2015/02/26/women-way-pavers-federal-judiciary>.

⁶⁷ Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 *FORDHAM L. REV.* 281, 281, 289 (1995).

⁶⁸ *Id.* at 281.

⁶⁹ *Women as ‘Way Pavers’ in the Federal Judiciary*, *supra* note 66.

⁷⁰ *Id.*

⁷¹ *Florence E. Allen*, OHIO HIST. CENT., http://www.ohiohistorycentral.org/w/Florence_E_Allen (last visited Sept. 4, 2018).

⁷² *Id.*

⁷³ *Id.*; *Florence Ellinwood Allen*, *ENCYCLOPEDIA WORLD BIOGRAPHY* (2004), <http://www.encyclopedia.com/people/history/historians-miscellaneous-biographies/florence-ellinwood-allen>.

⁷⁴ *Florence E. Allen*, *supra* note 71.

even more notably, the first woman to serve on the supreme court of any state.⁷⁵ In 1958, Allen ultimately became chief judge of the United States Court of Appeals for the Sixth Circuit until her retirement in 1959.⁷⁶ Then, in 1949, Burnita Shelton Matthews was appointed to the United States District Court for the District of Columbia.⁷⁷ In the next decade, only one more woman was appointed to the federal bench, such that in 1955, President Dwight Eisenhower nominated Mary Honor Donlon to the United States Customs Court to fill the vacant seat of Genevieve Cline, who had been nominated previously by President Calvin Coolidge.⁷⁸ Donlon earned her LLB (Bachelor of Laws) from Cornell Law School and went on to become the first woman partner at a Wall Street firm.⁷⁹

B. 1960s to 1990s—Civil Rights Act, EEOC, and the Task Forces

Although many women played a key role in the Civil Rights movement during the 1960s, their gender “role” was very much stagnant generally in society as a whole.⁸⁰ The free-thinking attitude associated with the 1960s “raised the consciousness of women,” prompted them to challenge the status quo and, in turn, encouraged them to believe that they could have careers.⁸¹ Women continued to join forces and mobilize to demand equal treatment and equal pay.⁸²

In 1964, the Federal Civil Rights Act was passed, including Title VII, which prohibited employers from discriminating against employees on the basis of sex, race, color, national origin, or religion.⁸³ The Equal Employment Opportunity Commission (EEOC) was created by the Civil Rights Act,⁸⁴ and is responsible for enforcing the Federal Civil Rights Act, including the discrimination provision, as well as other federal statutes.⁸⁵ Additionally, the EEOC is responsible for enforcing laws preventing harassment as well. According to the EEOC’s website:

⁷⁵ *Id.*

⁷⁶ *Id.*; Florence Ellinwood Allen, *supra* note 73.

⁷⁷ Ginsburg & Brill, *supra* note 67, at 284.

⁷⁸ *Women as ‘Way Pavers,’ supra* note 66.

⁷⁹ *Id.*

⁸⁰ GARZA, *supra* note 21, at 153.

⁸¹ EPSTEIN, *supra* note 18, at 17.

⁸² *Id.*

⁸³ 42 U.S.C. § 2000e-2 (2012).

⁸⁴ *Pre 1965: Events Leading to the Creation of EEOC*, EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html> (last visited Sept. 4, 2018).

⁸⁵ *Laws Enforced by EEOC*, EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/statutes/> (last visited Sept. 4, 2018). Additionally, the EEOC is responsible for enforcing The Equal Pay Act of 1963, which “makes it illegal to pay different wages to men and women if they perform equal work in the same workplace. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.” *Id.*

It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex.⁸⁶

By the 1970s, women were entering law school and the profession at higher rates, though still not equal to men, as the number of women law students was only nine percent nationally.⁸⁷ Women were still dealing with expectations of family and society, while trying to make their mark in the professional arena.⁸⁸

In 1978, the Center for Professional Responsibility was established by the ABA, and the Standing Committee on Ethics and Professional Responsibility (formerly known as the Standing Committee on Professional Ethics) was the first entity organized under the Center.⁸⁹

Also in 1971, Ruth Bader Ginsburg, then a law professor at Rutgers and now a Supreme Court Justice, established the ACLU Women's Rights Project.⁹⁰ In the early years, the "Women's Rights Project was the major, and sometimes the only, national legal arm of the growing movement for gender equality, recognized as the spokesperson for women's interests in the Supreme Court, and the 'premier' representative of women's rights interests in that forum."⁹¹

During that same year, the Women's Rights Project challenged the constitutionality of sex discrimination in *Reed v. Reed*, where the Supreme Court ultimately extended "to women equality with men under the equal protection clause of the Fourteenth Amendment."⁹² In *Reed*, the Supreme Court laid out that:

⁸⁶ *Sexual Harassment*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/sexual_harassment.cfm (last visited Sept. 16, 2018).

⁸⁷ GARZA, *supra* note 21, at 160; Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 7 (1996).

⁸⁸ EPSTEIN, *supra* note 18, at 17.

⁸⁹ *ABA Timeline*, *supra* note 44. Per the ABA website, "[t]hrough its coordinating efforts, the Center for Professional Responsibility promotes discussion and resolution of pressing issues of professional responsibility and regulation and fosters communication among diverse bar organizations and the various agencies that supervise and regulate the conduct of lawyers and judges." *Committees & Commissions*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/committees_commissions.html (last visited Oct. 5, 2018). Currently, there are more than 700 ABA entities including the ABA Standing Committees housed within the Center. *Id.*

⁹⁰ *The History of the ACLU Women's Rights Project*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/history-aclu-womens-rights-project> (last visited Sept. 16, 2018).

⁹¹ *Id.*

⁹² EPSTEIN, *supra* note 18, at 15; *Reed v. Reed*, 404 U.S. 71, 77 (1971); *The History of the ACLU*, *supra* note 90.

The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A “classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”⁹³

Despite the fact that women were gaining more statutory rights and case law support for their equal treatment, discrimination was still prevalent in the professional world. In 1980, the National Organization for Women’s Legal Defense and Education Fund established the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP).⁹⁴ The National Association of Women Judges organized in 1979 and co-sponsored the NJEP.⁹⁵ There was now a national focus on gender bias in the profession and, as a result, changes began to occur at an accelerated pace.

In 1981, Sandra Day O’Connor was nominated by President Ronald Reagan as the first woman appointed to the Supreme Court of the United States of America.⁹⁶ At the same time, the first director of the NJEP, sociologist Norma J. Wikler, joined New York lawyer Lunn Hecht Schafran, “to work at a national level on setting the course for judicial education regarding gender bias.”⁹⁷ The women decided to develop state-specific findings and to accomplish this through a task force system.⁹⁸ The “task force idea was that a group of distinguished people in each state would use traditional social science research methods to gather data about that state’s court system. Where the groups discovered problems, they would recommend solving them through judicial education.”⁹⁹

The leaders of the task forces decided to sacrifice efficiency in the national movement in order to make local progress.¹⁰⁰ Thus, the focus was on creating local task forces, rather than keeping the issue on a solely national level. Additionally, Wikler and Schafran published a how-to book in 1986 that advocated “consistency

⁹³ *Reed*, 404 U.S. at 75–76 (citing *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920)).

⁹⁴ Swent, *supra* note 87, at 7; *History of the National Judicial Education Program*, LEGAL MOMENTUM, <https://www.legalmomentum.org/history-national-judicial-education-program> (last visited Sept. 3, 2018).

⁹⁵ CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 193 (3d ed., Quid Pro Books 2012) (1981); Swent, *supra* note 87, at 7.

⁹⁶ *Sandra Day O’Connor, First Woman on the Supreme Court*, SUP. CT. U.S., <https://www.supremecourt.gov/visiting/SandraDayOConnor.aspx> (last visited Sept. 3, 2018).

⁹⁷ Swent, *supra* note 87, at 7.

⁹⁸ *Id.* at 7–8.

⁹⁹ *Id.* at 8.

¹⁰⁰ *Id.*

of philosophy and method across task forces” and urged “organizers in each state to involve the chief justice from the beginning of the task force effort, thus establishing judicial commitment to the project if not to the actual goal of gender equality in the court system.”¹⁰¹

Judge Marilyn Loftus of the Superior Court of New Jersey learned of the preliminary findings of the NJEP of gender bias in state court systems and was moved to take action.¹⁰² She suggested the idea of using a task force to gather data about the New Jersey courts.¹⁰³ Judge Loftus found support for the task force in Chief Justice Robert N. Wilentz, which gave strength to the task force movement.¹⁰⁴ When the New Jersey task force presented its finding at the 1983 New Jersey Juridical College, the reactions were mixed.¹⁰⁵ Furthermore, “[a]lthough the New Jersey study sparked national interest in gender bias initially, the task force idea did not exactly spread to other states like wildfire.”¹⁰⁶ Eventually:

On May 31, 1984, Judge Lawrence H. Cooke, then Chief Judge of the State of New York, announced the creation of a New York State Task Force to “examine the courts and identify gender bias and, if found, to make recommendations for its alleviation.” When Judge Sol Wachtler was appointed Chief Judge in 1985, he communicated to the Task Force his understanding of the urgency of their work, and it was to Judge Wachtler that the Task Force ultimately submitted its final report on April 2, 1986.¹⁰⁷

In the Report of the New York Task Force on Women in the Courts submitted in 1986, “[t]he Task Force concluded that gender bias against women litigants, attorneys, and court employees is a ‘pervasive problem with grave consequences,’ as ‘[w]omen are often denied equal justice, equal treatment, and equal opportunity.’”¹⁰⁸

Additionally, the idea of sexual harassment was formally recognized when, in 1986, a key decision came down highlighting the unequal treatment being suffered

¹⁰¹ *Id.* at 8–9.

¹⁰² *Id.* at 8–10.

¹⁰³ *Id.* at 10.

¹⁰⁴ *Id.* (“[A]ccording to interview participants, Loftus and the state court administrator initially drafted press releases announcing that the New Jersey task force would study ‘whether and if so to what extent gender bias exists in the New Jersey judicial system.’ Wilentz crossed out the phrase ‘whether and if so,’ announcing that the task force would ‘investigate the *extent* to which gender bias exists.’ With this stroke of his pen, he affirmed the task force’s importance and challenged it to move ahead boldly and unapologetically.”).

¹⁰⁵ *Id.* at 10–11.

¹⁰⁶ *Id.* at 12.

¹⁰⁷ Amy Barasch, *Gender Bias Analysis Version 2.0: Shifting the Focus to Outcomes and Legitimacy*, 36 N.Y.U. REV. L. & SOC. CHANGE 529, 531 (2012).

¹⁰⁸ *Id.* at 532.

by women.¹⁰⁹ In *Meritor Savings Bank v. Vinson*, the United States Supreme Court held that sexual harassment creating a hostile or abusive work environment was in violation of Title VII of the Civil Rights Act of 1964.¹¹⁰

In 1987, the ABA created the Commission on Women in the Profession with the purpose of assessing the status of women in the legal profession, identifying barriers to advancement, and recommending to the ABA actions to address problems identified.¹¹¹ Hillary Rodham Clinton served as the first chair of the Commission.¹¹² The Commission issued a:

groundbreaking report in 1988 showing that women lawyers were not advancing at a satisfactory rate. From this report, the Commission found that a variety of discriminatory barriers remained a part of the professional culture, the significant increase in the number of women attorneys would not eliminate these barriers and a thorough reexamination of the attitudes and structures in the legal profession was needed.¹¹³

“At its 1988 annual meeting, the Conference of Chief Justices adopted a resolution urging every Chief Justice to establish a task force ‘Devoted to the study of gender bias in the courts.’”¹¹⁴ Finally, the issue of gender bias was truly gaining steam, and, at the same time, women were entering the political and legal field at a steady pace. Over the next few years, many states formed task forces, whether willingly or after significant push back.¹¹⁵

¹⁰⁹ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–67 (1986).

¹¹⁰ *Id.*

¹¹¹ *Commission on Women in the Profession: About Us*, AM. BAR ASS’N, https://www.americanbar.org/groups/women/about_us.html (last visited Sept. 3, 2018).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *State and Federal Court Task Forces on Gender Bias in the Courts*, LEGAL MOMENTUM, <https://www.legalmomentum.org/state-and-federal-court-task-forces-gender-bias-courts> (last visited Sept. 3, 2018) [hereinafter *State and Federal Court Task Forces*]. Legal Momentum is the Women’s Legal Defense and Education Fund whose “mission is to ensure economic and personal security for all women and girls by advancing equity in education, the workplace, and the courts” and to “provide an expert legal voice to seek justice for women.” *Mission and Vision*, LEGAL MOMENTUM, <https://www.legalmomentum.org/mission-and-vision> (last visited Sept. 3, 2018).

¹¹⁵ Swent, *supra* note 87, at 12, 15–17. (“The story of persuasion in Florida was so complex and riddled with gender bias that a member of the core group has published a law review article about it. Members of the Florida Association of Women Lawyers met with the chief justice in 1985 and urged him to create a gender bias task force. When he discussed their proposal with his male colleagues later, they chose not to include their only female colleague (Florida’s first woman on the supreme court bench) in their colloquy. The chief justice wrote to the core group that the supreme court declined to sponsor the task force because the justices ‘didn’t think there was any gender bias in Florida,’ but he invited them to advise the supreme court ‘if [they] ever got any additional information.’ The letter specifically said that ‘[n]ot one [member of the supreme court] has agreed that a task force or a commission on the matter is necessary at this time.’ This response

In 1991, the first annual Margaret Brent Women Lawyers Achievement Awards were presented to women lawyers who had “influenced other women to pursue legal careers, opened doors for women lawyers, and advanced opportunities for women within a practice area or segment of the legal profession.”¹¹⁶ In the same year, the Senate Confirmation Hearing for Supreme Court nominee Clarence Thomas troubled many American women, as the televised hearing made it blatantly clear that the committee was comprised entirely of white men.¹¹⁷ At this time, there were only two female United States senators and neither of them were on the Judiciary Committee.¹¹⁸ Spurred by the confirmation hearing, numerous women began senate campaigns and four women went on to be elected to the Senate in 1992.¹¹⁹ As American voters elected more women to Congress than ever before, newspapers headlined this as the “The Year of the Woman.”¹²⁰ A female senator responded, “Calling 1992 the Year of the Woman makes it sound like the Year of the Caribou or the Year of the Asparagus. We’re not a fad, a fancy, or a year.”¹²¹

was emblematic of the problem the group sought to address. The core group ‘realized that we were caught in the essence of the gender bias issue—the inability of judges and lawyers to recognize the existence and seriousness of bias as an issue.’ At the suggestion of, and with financial support from the male dean of Florida State University Law School, a woman attorney documented serious gender bias problems in the Florida court system. Armed with this report, the core group asked the Florida Bar Board of Governors to pass a resolution in 1986 supporting a gender bias task force. When the resolution passed, the male president of the group took the resolution back to the supreme court. There was a new chief justice by this time, a man who had opposed the original request for a task force. On this approach, however, he was ‘amenable’ to the proposal. He had just attended the pivotal 1986 Conference of Chief Justices, and besides, as one interview participant noted dryly, the new request ‘carried the imprimatur of . . . the Florida bar, which carried a lot more weight than the Florida Association of Women Lawyers.’ The new chief justice created a steering committee to determine the mandate, composition and budget for a task force. The committee included the women ‘instigators of the whole project,’ a well respected female judge and two respected male bar leaders who, according to one interview participant, ‘would rein in us hysterical women.’ The persuasion phase continued within the steering committee, as the respected bar members came to realize that the ‘instigators’ were not really ‘hysterical,’ but actually well within the normal personality range. Once committed to the project, interview subjects felt that these bar members were ‘quite helpful [and] brought [to the group significant] political sophistication.’” (footnotes omitted).

¹¹⁶ *ABA Timeline*, *supra* note 44.

¹¹⁷ *Year of the Woman*, U.S. SENATE (Nov. 3, 1992) [hereinafter *Year of the Woman U.S. Senate History*], https://www.senate.gov/artandhistory/history/minute/year_of_the_woman.htm; see also *The Year of the Woman, 1992*, U.S. HOUSE REPRESENTATIVES, <http://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays/Assembling-Amplifying-Ascending/Women-Decade/> (last visited Sept. 3, 2018) [hereinafter *Year of the Woman U.S. House History*].

¹¹⁸ *Year of the Woman U.S. Senate History*, *supra* note 117.

¹¹⁹ *Id.*; see also *Year of the Woman U.S. House History*, *supra* note 117.

¹²⁰ *Year of the Woman U.S. Senate History*, *supra* note 117; see also *Year of the Woman U.S. House History*, *supra* note 117.

¹²¹ *Year of the Woman U.S. Senate History*, *supra* note 117.

In 1995, Roberta Cooper Ramo of New Mexico became the first woman to serve as president of the ABA.¹²² As women's rights issues came to the forefront, the task force movement continued and

[i]n 1999, the National Conference on Public Trust and Confidence in the Justice System, attended by teams from every state that included the chief justice, state court administrator and state bar president, voted to make implementing the recommendations of the task forces on gender, race, and ethnic bias in the courts a priority.¹²³

III. CURRENT STATISTICS REGARDING WOMEN IN THE LEGAL PROFESSION: WOMEN IN PRACTICE AND THE JUDICIARY

Although women have been graduating from law school in roughly equal numbers to men for approximately thirty years, there are still huge gaps in salary, leadership positions within law firms and corporations, and representation on the bench compared with their male counterparts.¹²⁴ This Section examines current statistics regarding women in the legal profession, both in practice and the judiciary, to show the stark reality of the effects of discrimination against women.

A. *Women in Practice*

The National Association of Women Lawyers (NAWL) conducts an annual survey aimed at providing "objective statistics regarding the position and advancement of women lawyers in law firms in particular, and the NAWL Survey remains the only national survey that collects this industry benchmarking data in such detail."¹²⁵ Additionally, "[t]he National Association of Women Lawyers ('NAWL')

¹²² *ABA Timeline*, *supra* note 44.

¹²³ *State and Federal Court Task Forces*, *supra* note 114.

¹²⁴ Dana Alvaré, *Vying for Lead in the "Boys' Club"*, TEMPLE U. BEASLEY SCH. L. <https://www2.law.temple.edu/cs/cms/wp-content/uploads/2017/03/Vying-for-Lead-in-the-Boys-Club.pdf> (last visited Sept. 3, 2018); Hilarie Bass, *ABA Will Study, Recommend Steps to Address Issue of Too Many Women Leaving Profession*, ABA J. (Nov. 2017), http://www.abajournal.com/magazine/article/ABA_will_study_recommend_steps_to_address_issue_of_too_many_women_leaving_p/.

¹²⁵ Destiny Peery, *2017 NAWL Annual Survey Report*, NAT'L ASS'N WOMEN LAW. 1–2 (2017), <http://www.nawl.org/p/cm/ld/fid=1163> ("The 2017 NAWL Survey was sent to the top 200 U.S. law firms in February 2017, and responding law firms had until April 30, 2017 to submit their responses. This year, 90 of 200 law firms completed all or significant portions of the survey, an overall response rate of 45 percent. As discussed in more detail in the results below, firms completed questions regarding the demographics of attorneys at various levels, especially women, as well as the structure of the partnership track, compensation and hours, and Women's Initiatives and their programming designed to support women in law firms.") Footnote 4 stated that, additionally, "[a]s noted in more detail in the compensation sub-section, fewer law firms completed questions about compensation and hours, with many declining to provide the data,

issued the One-Third by 2020 Challenge in March 2016,¹²⁶ renewing the call for the legal field to increase its representation of women to one-third of General Counsels of Fortune 1000 companies, of new law firm equity partners, of law firm lateral hires, and law school deans.¹²⁷

To provide an understanding of women in law school and in the profession, according to the 2016-2017 Annual Report of the Section of Legal Education and Admissions to the Bar of the ABA, as of 2016, women made up 50.2% of total JD enrollment.¹²⁸ For the first time ever, women comprised more of the total JD enrollment than men. The section examined attendance in 2015, 2010, and 2000 as well, and the following chart details the attendance of total JD enrollment of women and men during those timeframes.

	Total JD Enrollment (Fall) ¹²⁹			
	2016 (204 schools)	2015 (204 schools)	2010 (200 schools)	2000 (185 schools)
Women	50.20%	49.42%	46.78%	48.44%
Men	49.56%	50.55%	53.22%	51.56%

Additionally, as of 2016, women in private practice in law firms made up 48.7% of summer associates and 45% of associates.¹³⁰

often noting that it's either considered confidential or is not collected in a way that matches the reporting format requested on the survey. As in most survey administrations, very few questions receive 100 percent response rates for various reasons." *Id.*

¹²⁶ Full details of the One-Third by 2020 Challenge are available at *NAWL Challenge*, NAT'L ASS'N WOMEN LAW., <http://www.nawl.org/page/the-nawl-challenge> (last visited Sept. 4, 2018).

¹²⁷ Peery, *supra* note 125, at 2. The "NAWL issued its first NAWL Challenge in 2006, which included a goal to increase women equity partners in law firms to at least 30 percent. The One-Third by 2020 Challenge was issued on the ten-year anniversary of that original NAWL Challenge, demonstrating NAWL's continued commitment to increasing the representation of women and the diversity of the legal profession." *Id.*

¹²⁸ *2016-2017 ABA Legal Education Annual Report*, AM. BAR ASS'N 17 (2017), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/16_17_legal_ed_annual_report_final.authcheckdam.pdf.

¹²⁹ *Id.*

¹³⁰ *A Current Glance at Women in the Law*, AM. BAR ASS'N 2 (Jan. 2017), https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf. The ABA published a report entitled *A Current Glance at Women in the Law* in January 2017 which provides some general statistics of women in the profession in firms, academia, and the corporate world. *Id.* (citing to the *2016 Report on Diversity in U.S. Law Firms*, NAT'L ASS'N FOR L. PLACEMENT (Jan. 2017), www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirms.pdf).

The NAWL Survey, however, showed that, as of 2017, in the 200 largest law firms, women made up only 19% of equity partners.¹³¹ This is a small increase from the 2012 and 2007 surveys showing that women made up 15–16% of equity partners.¹³² Although there is clearly an increase, this very small increase comes nowhere near the 30% goal set by the NAWL back in 2006.¹³³ Furthermore, according to an ABA survey, in law firms generally, as of 2017, women made up approximately 22% of partners,¹³⁴ and women held only 24.8% of the general counsel positions in Fortune 500 corporations and 19.8% of those positions in Fortune 501–1000 corporations.¹³⁵ The NAWL Survey also showed that specifically, in the top 200 law firms, women made up 46% of associates, 30% of non-equity partners, 42% of non-partner-track attorneys (including staff attorney, counsel attorneys, etc.), and 39% of “other” attorneys (including any attorney not captured by the above categories).¹³⁶ Additionally, the NAWL survey asked responding firms to indicate how many partners were promoted to equity partnership in the previous two years.¹³⁷ “On average, 15 individuals were promoted during that period,” and “[o]f those 15 new equity partners, about five (33 percent) were women.”¹³⁸

Thus, despite graduating from law school and attaining entry-level positions (as first year associates) in roughly equal numbers to their male colleagues, many women are never reaching the top positions in those firms. It is clear that even though women have been practicing for years, and should have been able to establish themselves in the profession, women still only make up a small number of those professionals in top positions in law firms and some are leaving the profession altogether.¹³⁹

The NAWL Survey Report went on to state that “[t]he gender pay gap persists across all levels of attorneys, with men out-earning women from associates to equity partners. Women earn 90–94% of what men in the same position earn.”¹⁴⁰ It further noted that “[m]en continue to dominate the top earner spots,” with “97% of firms report[ing] their top earner is a man, and nearly 70% of firms hav[ing] 1 or

¹³¹ Peery, *supra* note 125, at 2.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *A Current Glance at Women in the Law*, *supra* note 130, at 2.

¹³⁵ *Id.* at 3.

¹³⁶ Peery, *supra* note 125, at 2.

¹³⁷ *Id.*

¹³⁸ *Id.* The NAWL Survey Report indicated that “[t]his suggests early success in the strong push from some firms to promote more gender equity in newer classes of equity partners, in line with the One-Third by 2020 Challenge.” *Id.* at 3.

¹³⁹ Bass, *supra* note 124.

¹⁴⁰ Peery, *supra* note 125, at 6.

no women in their top 10 earners.”¹⁴¹ Furthermore, the Report stated that women “make up 25% of firm governance roles, such as serving on the highest governance committee, the compensation committee, or as a managing or practice group partner/leader, nearly doubling in the last decade.”¹⁴² Although this number has doubled, it still shows that men are dominating these top spots.

B. *Women in the Judiciary*

As of 2018, three women sit on the Supreme Court of the United States, with those three women being three (out of only four total women ever) of the 112 justices to sit on the Supreme Court bench.¹⁴³ Sandra Day O'Connor was the first woman appointed to the Supreme Court of the United States of America in 1981,¹⁴⁴ followed by Ruth Bader Ginsburg, appointed in 1993.¹⁴⁵ Two male associate justices were appointed in 1994 and 2006, followed by Sonia Sotomayor in 2009 and Elena Kagan in 2010.¹⁴⁶

Additionally, according to the National Women's Law Center (NWLC) Fact Sheet dated October 2016, “sixty of the 167 active judges currently sitting on the thirteen federal courts of appeal are female,” representing only approximately 36%.¹⁴⁷ Moreover, of the active United States district (or trial) court judges, only 33% are women.¹⁴⁸

“Since 2008, Forster-Long, Inc. and the National Association of Women Judges have partnered to raise awareness of gender representation in American courts” and publish a Gender Ratio Summary, “which is a yearly glance at the distribution of male and female judges throughout the United States in both federal

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Women in the Federal Judiciary: Still a Long Way to Go*, NAT'L WOMEN'S L. CTR. 1 (Oct. 2016), <https://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud10.13.2016.pdf>.

¹⁴⁴ *Sandra Day O'Connor*, *supra* note 96.

¹⁴⁵ *Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 4, 2018).

¹⁴⁶ *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Sept. 4, 2018).

¹⁴⁷ *Women in the Federal Judiciary: Still a Long Way to Go*, *supra* note 142, at 1.

¹⁴⁸ *Id.*

and state judiciaries.¹⁴⁹ In the almost ten years since the information has been gathered, there has been some improvement in the representation of women in the state court systems, though there is still a large gender gap.¹⁵⁰

U.S. State Court Women Judges ¹⁵¹	2016			2008		
	# of Women	Total	Percentage	# of Women	Total	Percentage
State Final Appellate Jurisdiction Courts	122	353	35	106	362	29
State Intermediate Appellate Jurisdiction Courts	344	991	35	264	932	28
State General Jurisdiction Courts	3,502	11,778	30	2,332	10,406	22
State Limited and Special Jurisdiction Courts	1,628	4,884	33	1,477	5,105	29

Additionally, the American Constitution Society for Law and Policy published a report entitled *The Gavel Gap* where it gathered demographics on state court judges in all 50 states, further demonstrating the continued attempt to address the composition of the bench compared to the communities they serve.¹⁵²

Thus, it is clear that although women have made improvements in their representation in the judiciary, there are still great strides to be made to assure equal representation.

¹⁴⁹ *Statistics*, NAT'L ASS'N WOMEN JUDGES, <https://www.nawj.org/statistics> (last visited Sept. 4, 2018).

¹⁵⁰ *Id.* (Click the link for 2008 US State Court Women Judges showing women judges accounted for 25% of state court judges in 2008, and compare to the link for 2018 US State Court Women Judges showing women most recently accounted for 33% of state court judges.).

¹⁵¹ *2016 U.S. State Court Women Judges*, NAT'L ASS'N WOMEN JUDGES, <https://www.nawj.org/statistics/2016-us-state-court-women-judges> (last visited Sept. 4, 2018); *2008 U.S. State Court Women Judges*, NAT'L ASS'N WOMEN JUDGES, <https://www.nawj.org/statistics/2008-us-state-court-women-judges> (last visited Sept. 4, 2018).

¹⁵² *The Gavel Gap*, AM. CONST. SOC'Y FOR L. & POL'Y, <http://gavelgap.org> (last visited Sept. 4, 2018).

IV. RESOLUTION 109 AND THE NEW MODEL RULE 8.4

The ABA Model Rules were first adopted by the Association in 1983 and they have served to help the ABA meet its responsibility of representing the legal profession and promoting the public's interest in justice for all.¹⁵³ Although they served this noteworthy purpose, they made no mention of condemning bias, prejudice, harassment, or discrimination in the legal profession.¹⁵⁴

In August 2016, the ABA adopted Resolution 109 to amend Rule 8.4 of the Model Rules ("New Rule") to add an anti-discrimination, anti-harassment provision.¹⁵⁵ When Resolution 109 was adopted, a Report, General Information Form, and Executive Summary accompanied it. In the Report accompanying Resolution 109, the ABA indicated that it has long been committed to diversity and realizes its importance as a leader in the profession for lawyers, judges, law students, and the public.¹⁵⁶ The information accompanying Resolution 109 provided an overview of how the new Model Rule came to be as a result of the need for change and explained the language and terminology selected to provide a clear understanding of the new rule. Thus, this section examines the process used by the Standing Committee on Ethics and Professional Responsibility to determine the language, prohibited activities, and application of the New Rule.

A. How Model Rule 8.4(g) Came to Be

The Report stated that in February 1994, both the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility proposed resolutions to specifically address anti-discrimination and anti-harassment in the ABA Model Rules, however both resolutions were later withdrawn as a result of opposition to the proposals.¹⁵⁷ In August 1995, the ABA adopted Resolution 116C, submitted by the Young Lawyers Division, which:

condemn[ed] the manifestation by lawyers in the course of their professional activities . . . of bias or prejudice against clients, [opposing parties and their counsel, other litigants, witnesses, judges and court personnel, jurors . . .]; oppose[d] unlawful discrimination by lawyers in the management or operation of a law practice . . . ; . . . condemn[ed any conduct by lawyers that would] threaten[], harass[], intimidat[e] or denigrat[e any other person] . . . ;

¹⁵³ *H.D. Revised Resolution 109 & Report*, AM. BAR ASS'N 1 (Aug. 2016) [hereinafter *Revised Resolution 109 & Report*], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

¹⁵⁴ *Id.* at 2.

¹⁵⁵ *Id.* at 1.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2.

discourage[d] members from belonging to organizations that practice invidious discrimination . . . ; and . . . encourage[d] affirmative steps [such as continuing education, studies, and conferences] to discourage harassing or discriminatory speech and conduct. . . .¹⁵⁸

The Report accompanying the Resolution, signed by the Chair of the Young Lawyers Division, noted that “[t]he immediate impetus for the proposed policy is the continuing debate over proposals to modify the Model Code of Professional Responsibility to prohibit discrimination or harassment by lawyers in the course of their professional activities against individuals based on their sex, race or ethnicity.”¹⁵⁹ Although this was a step in the right direction, it was not enough to adequately address the clear problems of bias, prejudice, discrimination, and harassment against women (and other groups) in the profession.

The General Information Form accompanying Resolution 109 went on to state that a few years later, in August 1998, a joint resolution of the Standing Committee on Ethics and Professional Responsibility and the Criminal Justice Section was submitted and adopted which “created Comment [3] to Rule 8.4 suggesting that it could be misconduct that is prejudicial to the administration of justice when a lawyer, 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 socioeconomic status.”¹⁶⁰ The Report noted that although this was another positive step to address the issue of bias, prejudice, discrimination, and harassment on a grand scale, there was still much work to be done and specifically addressed the fact that that this was merely a Comment within the Rules, not an actual Rule.¹⁶¹ Per the Model Rules of Professional Conduct: Preamble and Scope, as they stand today, specifically paragraph [14] of the Scope section, “Comments do

¹⁵⁸ *H.D. Resolution 116C & Report*, AM. BAR ASS’N (Aug. 8–9, 1995), https://www.americanbar.org/content/dam/aba/directories/policy/1995_am_116c.authcheckdam.pdf.

¹⁵⁹ *Id.*

¹⁶⁰ *H.D. Proposed Resolution 109 & Report*, AM. BAR ASS’N 16 (Aug. 8–9, 2016) [hereinafter *Proposed Resolution 109 & Report*], https://www.americanbar.org/news/reporter_resources/

annual-meeting-2016/house-of-delegates-resolutions/109.html (click on “Proposed Resolution and Report” which will open the document in MS Word format and scroll to the General Information Form). It should be noted that “[i]n February 1998, the Criminal Justice Section recommended that the Model Rules of Professional Conduct include within the black letter an anti-discrimination provision. At the same meeting, the Standing Committee on Ethics and Professional Responsibility submitted a resolution recommending a Comment that included an anti-discrimination provision. Both resolutions were withdrawn.” *Id.* Additionally, the joint provision started out as separate proposals and were eventually combined to create the Comment which was eventually submitted and approved. *Id.*

¹⁶¹ *Revised Resolution 109 & Report*, *supra* note 153, at 4.

not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”¹⁶² Additionally, paragraph [14] of the ABA Model Rules states that:

Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment.¹⁶³

Thus, although language was added to begin addressing the issues of bias, prejudice, discrimination, and harassment, it is clear that Comments serve as guides for behavior, rather than being authoritative.¹⁶⁴

The Report accompanying Resolution 109 went on to state that, in 2007, the ABA adopted revisions to the Model Code of Judicial Conduct to include Rule 2.3, entitled, “Bias, Prejudice and Harassment” which prohibited “judges from speaking or behaving in a way that manifests, ‘bias or prejudice,’ and from engaging in harassment, ‘based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation,’” as well as urged judges to require lawyers to refrain from these activities in proceedings before the court.¹⁶⁵

In 2008, the ABA organized its objectives into four goals adopted by the House of Delegates.¹⁶⁶ Goal III, entitled “Eliminate Bias and Enhance Diversity” states that its objective is as follows:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons.

¹⁶² MODEL RULES OF PROF'L CONDUCT Preamble & Scope (AM. BAR ASS'N 2016). It should be noted that paragraph [14] in the Scope section states that: “No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role. Many of the Comments use the term ‘should.’ Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Revised Resolution 109 & Report, supra* note 153, at 1. Rule 2.3(C) of the ABA Model Code of Judicial Conduct reads: “[a] judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.” ABA MODEL CODE OF JUDICIAL CONDUCT r. 2.3 (AM. BAR ASS'N 2007).

¹⁶⁶ *ABA Mission and Goals*, AM. BAR ASS'N, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Sept. 3, 2018).

2. Eliminate bias in the legal profession and the justice system.¹⁶⁷

After this, the process to amend Rule 8.4 began when, on May 13, 2014, the ABA's Standing Committee on Ethics and Professional Responsibility received a letter from the Chairs of the ABA's four Goal III Commissions, those being the Commission on Women in the Profession, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identity, requesting that the Committee:

[D]evelop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination and to implement Goal III. These Commissions explained that the current provision is insufficient because it "does not facially address bias, discrimination, or harassment and does not thoroughly address the scope of the issue in the legal profession or legal system."¹⁶⁸

According to the Report accompanying Resolution 109, in Fall 2014, a Working Group, chaired by the past SCEPR chair, was formed with the support of the Standing Committee on Ethics and Professional Responsibility, consisting of a representative from each of the Goal III Commissions, the Standing Committee on Ethics and Professional Responsibility, the Association of Professional Responsibility Lawyers, and the National Organization of Bar Counsel.¹⁶⁹ In May 2015, after about a year of work via phone conferences and in-person meetings, the Chair presented a memorandum to the Standing Committee on Ethics and Professional Responsibility concluding that there was a need to amend Model Rule 8.4 "to provide a comprehensive antidiscrimination provision that was nonetheless limited to the practice of law, in the black letter of the rule itself, and not just in a Comment."¹⁷⁰ The Report accompanying Resolution 109 went on to state:

On July 8, 2015, after receipt and consideration of this memorandum, SCEPR prepared, released for comment and posted on its website a Working Discussion Draft of a proposal to amend Model Rule of Professional Conduct 8.4. SCEPR also announced and hosted an open invitation Roundtable discussion on this Draft at the Annual Meeting in Chicago on July 31, 2015.¹⁷¹

Furthermore, the Report stated that at the Roundtable and through written communication, SCEPR received comments regarding the Working Discussion

¹⁶⁷ *Id.*

¹⁶⁸ *Revised Resolution 109 & Report, supra* note 153, at 3 (referencing the Letter to Paula J. Frederick, Chair, Am. Bar Ass'n Standing Comm. on Ethics and Prof'l Responsibility 2011–2014).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 4.

¹⁷¹ *Id.*

Draft, which they studied and, in December 2015, eventually published a revised draft of a proposal to amend Rule 8.4(g), together with proposed new Comments to Rule 8.4.¹⁷² The Report also explained that SCEPR announced that it would host a Public Hearing at the Midyear Meeting in February 2016 and that written comments were also invited.¹⁷³ “After further study and consideration SCEPR made substantial and significant changes to its proposal, taking into account the many comments it received on its earlier drafts.”¹⁷⁴ Finally, in April 2016, the Standing Committee on Ethics and Professional Responsibility approved filing the resolution.¹⁷⁵

B. *Language of the New Rule*

Based on Resolution 109 adopted by the House of Delegates on August 8–9, 2016, Model Rule 8.4 of the ABA Model Rules of Professional Conduct entitled Misconduct was amended and the New Rule now reads as follows:

RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows:

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

¹⁷² *Id.*

¹⁷³ *Id.* (“President Brown and past President Laurel Bellows were among those who testified at the hearing in support of adding an antidiscrimination provision to the black letter Rule 8.4.”).

¹⁷⁴ *Id.*

¹⁷⁵ *Proposed Resolution 109 & Report, supra* note 160, at 16 (General Information Form) (“Co-sponsors, the Civil Rights & Social Justice Section, the Commission on Disability Rights, the Diversity & Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession signed on during the months of April and May 2016. The Commission on Hispanic Legal Rights & Responsibilities and the Center for Racial and Ethnic Diversity voted to support the resolution in May 2016.”).

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.¹⁷⁶

Comments 3, 4 and 5 of the new rule reads as follows:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).¹⁷⁷

¹⁷⁶ *Id.* at 1.

¹⁷⁷ MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3–5 (AM. BAR ASS'N 2016).

Prior to the adoption of Resolution 109, the old 2016 version (hereinafter “old 2016 version”) stated the following:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.¹⁷⁸

Additionally, Comment [3] to Rule 8.4 of the old 2016 version stated as follows:

[3] 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 socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.¹⁷⁹

The Resolution adopted by the House of Delegates on August 8–9, 2016¹⁸⁰ which amended Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct created a new paragraph (g) establishing a clear prohibition of discrimination and harassment, as well as amended Comment [3] which further elaborates on the reasons behind paragraph (g), as well as explains included behavior, and creates new Comments [4] and [5].¹⁸¹

¹⁷⁸ MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2016) (amended 2016).

¹⁷⁹ *Id.* at cmt. 3.

¹⁸⁰ *H.D. Res. 109 Executive Summary*, AM.BAR ASS’N (2016) [hereinafter *Executive Summary*], https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2016_hod_annual_meeting_executive_summaries_index.authcheckdam.pdf.

¹⁸¹ *Id.* at 4.

C. Prohibited Activity Under the New Rule

The Report accompanying Resolution 109 clearly explained the purposeful nature of the language selected. For example, the New Rule does away with the “‘manifests . . . bias or prejudice’ that appear in the current provision. Instead, the New Rule “adopts the terms ‘harassment and discrimination’ that already appear in a large body of substantive law, antidiscrimination and antiharassment statutes, and case law nationwide and in the Model Judicial Code.”¹⁸² The Report stated that:

For example, in new Comment [3], “harassment” is defined as including “sexual harassment and derogatory or demeaning verbal or physical conduct . . . of a sexual nature.” This definition is based on the language of Rule 2.3(C) of the ABA Model Code of Judicial Conduct and its Comment [4], adopted by the House in 2007 and applicable to lawyers in proceedings before a court.¹⁸³

Additionally, the Report noted:

Discrimination is defined in new Comment [3] as “harmful verbal or physical conduct that manifests bias or prejudice towards others.” This is based in part on ABA Model Code of Judicial Conduct, Rule 2.3, Comment [3], which notes that harassment, one form of discrimination, includes “verbal or physical conduct,” and on the current rule, which prohibits lawyers from manifesting bias or prejudice while representing clients.¹⁸⁴

According to the language of Comment [3], “[t]he substantive law of antidiscrimination and antiharassment statutes and case law may guide application of paragraph (g).”¹⁸⁵ The Report accompanying Resolution 109 also explained that:

This provision makes clear that the substantive law on anti-discrimination and anti-harassment is not necessarily dispositive in the disciplinary context. Thus, conduct that has a discriminatory impact alone, while possibly dispositive elsewhere, would not necessarily result in discipline under new Rule 8.4(g). But, substantive law regarding discrimination and harassment can also guide a lawyer’s conduct. As the Preamble to the Model Rules explains, “A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”¹⁸⁶

¹⁸² *Revised Resolution 109 & Report, supra* note 153, at 7.

¹⁸³ *Id.* (citing ABA MODEL CODE OF JUDICIAL CONDUCT r. 2.3 (AM. BAR ASS’N 2007)) (Comment [4] reads: “Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.”).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* (citing MODEL RULES OF PROF’L CONDUCT Preamble & Scope).

D. Where and How Does This Rule Apply?

Paragraph (g) of Rule 8.4 of the ABA Model Rules of Professional Conduct refers to “conduct related to the practice of law” and Comment [4] explains that this includes:

representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.¹⁸⁷

The Report explained that “[s]ome commenters expressed concern that the phrase, ‘conduct related to the practice of law,’ is vague,” however the phrase “conduct related to” is clearly explained in the Comments to the new Rule.¹⁸⁸ Additionally, the Report noted that “[t]he definition of the practice of law is established by law and varies from one jurisdiction to another.”¹⁸⁹

The Report goes on to state that:

Proposed new Comment [4] explains that conduct related to the practice of law includes, “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities *in connection with the practice of law*.” (Emphasis added.) The nexus of the conduct regulated by the rule is that it is

¹⁸⁷ MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS'N 2016).

¹⁸⁸ *Revised Resolution 109 & Report*, *supra* note 153, at 9. Furthermore, the Report notes that the phrase is “consistent with other terms and phrases used in the Rules that have been upheld against vagueness challenges.” *Id.* The Report, in a footnote, cites to the following as examples of other language that were upheld against vagueness challenges. *Id.* at n.21. *See, e.g.*, *Canatella v. Stovitz*, 365 F. Supp. 2d 1064, 1074–1075 (N.D. Cal. 2005) (rejecting a vagueness challenge to these terms regulating lawyers in the California Business and Profession Code: “willful,” “moral turpitude,” “dishonesty,” and “corruption”); *Chief Disciplinary Counsel v. Zelotes*, 98 A.3d 852, 868 (Conn. App. 2014) (rejecting a vagueness challenge to “conduct prejudicial to [the] administration of justice”); *Florida Bar v. Von Zamft*, 814 So.2d 385, 388 (Fla. 2002); *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 128 (Mich. 2006) (rejecting a vagueness challenge to rules requiring lawyers to “treat with courtesy and respect all person involved in the legal process” and prohibiting “undignified or discourteous conduct toward [a] tribunal”); *In re Anonymous Member of S.C. Bar*, 709 S.E.2d 633, 637 (S.C. 2011) (rejecting a vagueness challenge to the following required civility clause: “To opposing parties and their counsel, I pledge fairness, integrity, and civility . . .”); *Motley v. VA State Bar*, 536 S.E.2d 97, 99 (Va. 2000) (rejecting a vagueness challenge to a rule requiring lawyers to keep client’s “reasonably informed about matters in which the lawyer’s services are being rendered”); *In re Disciplinary Proceedings Against Beaver*, 510 N.W.2d 129, 132 (Wis. 1994) (rejecting a vagueness challenge to a rule against “offensive personality”).

¹⁸⁹ *Revised Resolution 109 & Report*, *supra* note 153, at 9 (citing MODEL RULES OF PROF'L CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS'N 2016)).

conduct lawyers are permitted or required to engage in because of their work as a lawyer.¹⁹⁰

The SCEPR indicated that the New Rule 8.4(g) is broader than the current provision, as it applies to conduct related to the practice of law.¹⁹¹ The rationale was that since the role of a lawyer goes beyond representation of a client, such as being a manager of a law firm, officer of the court generally, public citizen, as well as engaging in mentoring, and attending social activities related to the practice of law, and all of these situations can be considered part of the practice of law, the ethics rules should apply to all of these situations.¹⁹²

E. Proposed New Rule 8.4(g) Does Not Use the Term “Knowingly”

According to the Report, SCEPR:

[R]eceived substantial and helpful comment that the absence of a “mens rea” standard in the rule would provide inadequate guidance to lawyers and disciplinary authorities. After consultation with cosponsors, SCEPR concluded that the alternative standards “knows or reasonably should know” should be included in the new rule. Consequently, revised Rule 8.4(g) would make it professional misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination. . . .”¹⁹³

The Model Rules define both “knows” and “reasonably should know.”¹⁹⁴ The Report explained that Rule 1.0(f) of the Model Rules “defines ‘knows’ to denote ‘actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.’”¹⁹⁵ The Report indicated that this is a subjective standard and the inference to be made is “whether one can infer from the circumstances what the lawyer actually knew,” rather than “what the lawyer should or might have known.”¹⁹⁶ The Report also explained that Rule 1.0(j) “defines ‘reasonably should know’ when used in reference to a lawyer to denote ‘that a lawyer of reasonable prudence and competence would ascertain the matter in question.’”¹⁹⁷ Thus, this is an objective standard that “does not depend on a particular lawyer’s actual state of mind,” as the test “is whether a lawyer of reasonable prudence and competence would have comprehended the facts in question.”¹⁹⁸

¹⁹⁰ *Id.* (citing MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 4).

¹⁹¹ *Id.* at 10.

¹⁹² *Id.*

¹⁹³ *Revised Resolution 109 & Report, supra* note 153, at 7.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 8.

¹⁹⁸ *Id.*

The Report confirmed that SCEPR believed that “any standard for the conduct to be addressed in Rule 8.4(g) must include as alternatives, both the ‘knowing’ and ‘reasonably should know’ standards as defined in Rule 1.0,” since “one standard is a subjective and the other is objective,” thus one cannot “serve as a substitute for the other.”¹⁹⁹ The Report clarified that “[t]aken together, these two standards provide a safeguard for lawyer against overaggressive prosecutions for conduct they could not have known was harassment or discrimination, as well as a safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination.”²⁰⁰ The Report also noted that the “knows or reasonably should know” language has been part of the Model Rules since 1983 and, thus, there is “ample precedent for using” it.²⁰¹

Additionally, the Report went on to state that:

“Harassment” and “discrimination” are terms that denote actual conduct. As explained in proposed new Comment [3], both “harassment” and “discrimination” are defined to include verbal and physical conduct against others. The proposed rule would not expand on what would be considered harassment and discrimination under federal and state law. Thus, the terms used in the rule—“harass and discriminate”—by their nature incorporate a measure of intentionality while also setting a minimum standard of acceptable conduct. This does not mean that complainants should have to establish their claims in civil courts before bringing disciplinary claims. Rather, it means that the rule intends that these words have the meaning established at law.²⁰²

Finally, the Report confirmed that “the addition of ‘knows or reasonably should know’ as part of the standard for the lawyer supports the rule’s focus on conduct and resolves concerns of vagueness or uncertainty about what behavior is expected of the lawyer.”²⁰³

V. CRITICISMS OF THE LANGUAGE OF THE NEW RULE

Although the New Rule is clearly necessary to begin to remedy the discriminatory and marginalization issues that women in the legal profession still face, there are critics of the rule. The House of Delegates refers to the critics as minority views.²⁰⁴ Despite being minority views, the House of Delegates still addressed many of the concerns and made edits accordingly prior to the presentation of the final

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Executive Summary, supra* note 180, at 20.

Resolution.²⁰⁵ However, some of the concerns ranged from whether this Rule infringes on legitimate advocacy of attorneys representing their clients, to whether social activities in connection with the practice of law should be more clearly defined, and whether or not conduct inside and outside of a law firm should be distinguished.²⁰⁶

In the Report, The House of Delegates addresses many of the concerns raised by commenters throughout the process. First, the Report discusses how the New Rule clearly permits legitimate advocacy and “does not change the circumstances under which a lawyer may accept, decline or withdraw from a representation. To the contrary, the proposal makes clear that Model Rule 1.16 addresses such conduct.”²⁰⁷

The Report explained that some other critics of the New Rule commented that:

because legal remedies are available for discrimination and harassment in other forums, the bar should not permit an ethics claim to be brought on that basis until the claim has first been presented to a legal tribunal and the tribunal has found the lawyer guilty of or liable for harassment or discrimination.²⁰⁸

The Report noted that SCEPR “considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rules.”²⁰⁹ The Report went on to state that the “[l]egal ethics rules are not dependent upon or limited by statutory or common law claims” and that “[t]he ABA takes pride in the fact that ‘the legal profession is largely self-governing.’”²¹⁰ Thus, the ABA believes that a failure to comply with a Rule is the basis for invoking the disciplinary process, and does not indicate that there is necessarily a cause of action that should be brought in the civil legal system.²¹¹ Moreover, the Report clarified that: “The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system.”²¹²

²⁰⁵ *Id.* at 21.

²⁰⁶ *Id.* at 21-22.

²⁰⁷ *Revised Resolution 109 & Report, supra* note 153, at 8.

²⁰⁸ *Id.* at 11.

²⁰⁹ *Id.*

²¹⁰ *Id.* (citing MODEL RULES OF PROF'L CONDUCT Preamble & Scope).

²¹¹ *Id.*

²¹² *Id.*

VI. WHAT HAVE THE STATES DONE TO COMBAT DISCRIMINATION AND HARASSMENT?

Many states did not wait for the ABA to act and have had provisions in their Model Rules for years. The Report notes that as of the date of the adoption of Resolution 109, twenty-four states, as well as the District of Columbia, have put provisions into their states' Model Rules of Professional Conduct to deal with discriminatory and harassing behavior by lawyers.²¹³ Additionally, fourteen states do not address the issue at all in their Model Rules of Professional Conduct.²¹⁴ The ABA has an entire webpage of materials dedicated to showing how each jurisdiction has modified each of the ABA Model Rules of Professional Conduct.²¹⁵

²¹³ *Id.* at 5 (citing to CAL. RULES OF PROF'L CONDUCT 2-400 (STATE BAR OF CAL. 1994); COLO. RULES OF PROF'L CONDUCT r. 8.4(g) (COLO. BAR ASS'N 2008) (amended 2018); FLA. RULES OF PROF'L CONDUCT r. 4-8.4(d) (FLA. BAR 1994) (amended 2018); IDAHO RULES OF PROF'L CONDUCT r. 4.4 (IDAHO ST. BAR 2007) (amended 2014); ILL. RULES OF PROF'L CONDUCT r. 8.4(j) (ILL. ST. BAR ASS'N 2010); IND. RULES OF PROF'L CONDUCT r. 8.4(g) (IND. BAR 1987) (amended 2005); IOWA RULES OF PROF'L CONDUCT r. 32:8.4(g) (IOWA BAR 2005) (amended 2012); MD. ATTORNEY'S RULES OF PROF'L CONDUCT r. 19-308.4(e) (MD. BAR 2016); MASS. RULES OF PROF'L CONDUCT r. 3.4(i) (MASS. BAR 2015); MICH. RULES OF PROF'L CONDUCT r. 6.5 (ST. BAR MICH. 1993) (amended 2018); MINN. RULES OF PROF'L CONDUCT r. 8.4(h) (MINN. BAR 1990) (amended 2015); MO. RULES OF PROF'L CONDUCT 4-8.4(g) r. (MO. BAR 1986) (amended 2012); NEB. RULES OF PROF'L CONDUCT r. 3-508.4(d) (NEB. 2008) (amended 2016); N.J. RULES OF PROF'L CONDUCT r. 8.4(g) (N.J. 1984) (amended 2004); N.M. RULES OF PROF'L CONDUCT r. 16-300 (N.M. 1994) (amended 2008); N.Y. RULES OF PROF'L CONDUCT r. 8.4 (N.Y. ST. BAR ASS'N 2009) (amended 2017); N.D. RULES OF PROF'L CONDUCT r. 8.4(f) (N.D. ST. BAR ASS'N 2000) (amended 2006); OHIO RULES OF PROF'L CONDUCT r. 8.4(g) (OHIO ST. BAR ASS'N 2007) (amended 2017); OR. RULES OF PROF'L CONDUCT r. 8.4(a)(7) (OR. ST. BAR ASS'N 2005) (amended 2018); R.I. RULES OF PROF'L CONDUCT r. 8.4(d) (R.I. BAR ASS'N 2007) (amended 2017); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 5.08 (TEX. BAR ASS'N 1994) (amended 2018); VT. RULES OF PROF'L CONDUCT r. 8.4(g) (VT. BAR ASS'N 1999) (amended 2009); WASH. RULES OF PROF'L CONDUCT r. 8.4(g) (WASH. ST. BAR ASS'N 1985) (amended 2018); WIS. RULES OF PROF'L CONDUCT r. 8.4(i) (ST. BAR OF WIS. 1987) (amended 2017); D.C. RULES OF PROF'L CONDUCT r. 9.1 (D.C. BAR 2007).

²¹⁴ *Id.* at 6 (The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.).

²¹⁵ *Jurisdictional Rules Comparison Charts*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html (last visited Sept. 4, 2018). Note that California has a page that shows how it has amended the rules, as well as how it proposes to amend the rules, for those that it has not already done so. *Cross Reference Chart Rules of Professional Conduct*, STATE BAR OF CAL. (June 11, 2018), <http://www.calbar.ca.gov/Portals/0/documents/rules/Cross-Reference-Chart-Rules-of-Professional-Conduct.pdf>.

As Florida, Texas, California, and New York are currently the four largest states by population and by number of practicing attorneys,²¹⁶ and are spread geographically across the United States, a brief sampling of how these states have addressed discrimination and harassment up to this point in their state model rules and what impact, if any, the ABA's new rule will have on the states, has been compiled and provided.

As far back as 1994, the Florida Bar implemented a rule addressing harassment and discriminatory conduct.²¹⁷ Florida's current provision, effective since 2006, Rule 4-8.4 Misconduct includes an additional section (d), beyond what the ABA Model Rules include, which states:

engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;²¹⁸

Additionally, it has a fifth comment, which states:

Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by

²¹⁶ *ABA National Lawyer Population Survey*, AM. BAR ASS'N (Dec. 31, 2016), https://www.americanbar.org/content/dam/aba/administrative/market_research/National%20Lawyer%20Population%20by%20State%202017.authcheckdam.pdf; *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2017*, U.S. CENSUS BUREAU: POPULATION DIV. (Dec. 2017), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&src=pt.

²¹⁷ *ABA Provision Makes Harassment and Discrimination 'Professional Misconduct'*, FLA. BAR NEWS (Oct. 1, 2016), <https://www.floridabar.org/news/tfb-news/?durl=%2FDIVCOM%2FJN%2Fjnnews01.nsf%2FArticles%2FC9E285859CC097668525802F00544D9C>.

²¹⁸ FLA. RULES OF PROF'L CONDUCT r. 4-8.4(d).

applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct.²¹⁹

Thus, although the language is similar, it adds the Comment, which further clarifies the individuals and type of behavior that is protected.

Texas has not amended its Texas Disciplinary Rules of Professional Conduct (“Texas Rules of Conduct”) since the ABA has approved Model Rule 8.4(g). Currently in Texas, Rule 5.08 Prohibited Discriminatory Activities has been in effect since 2005 and states that:

- (a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.
- (b) Paragraph (a) does not apply to a lawyer’s decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as confidential information under these rules. See Rule 1.05(a), (b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors out in paragraph (a) if that advocacy:
 - (i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and
 - (ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.²²⁰

Ken Paxton, Attorney General of Texas, wrote an Opinion Letter dated December 20, 2016 on the topic in which he stated that:

[T]he Texas Supreme Court has not adopted Model Rule 8.4(g), and it is not currently part of the Texas Rules. However, if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent.²²¹

Paxton went on to state that he believes a court would likely conclude that Model Rule 8.4(g) infringes upon the free speech rights of members of the State Bar, upon an attorney’s First Amendment right to free exercise of religion, and upon

²¹⁹ FLA. RULES OF PROF’L CONDUCT r. 4-8.4.

²²⁰ TEX. DISCIPLINARY RULES OF PROF’L CONDUCT r. 5.08.

²²¹ Letter from Ken Paxton, Att’y Gen., St. of Tex., to Sen. Charles Perry, Chair, Committee on Agriculture, Water & Rural Affairs (Dec. 20, 2016), <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>.

an attorney's right to freedom of association.²²² He further argued that “[b]ecause Model Rule 8.4(g) attempts to prohibit constitutionally protected activities, a court would likely conclude it is overbroad,” and, when “applied to specific circumstances, a court would likely also conclude that Model Rule 8.4(g) is void for vagueness.”²²³ Additionally, he stated that “[t]he Texas Rules of Disciplinary Conduct sufficiently address attorney misconduct to prohibit unlawful discrimination.”²²⁴

Although Paxton argued that the rule is overly broad, he never directly addressed which language is overly broad. If he was referring to the language “the practice of law,” both New York and California have similar language in their provisions and have not run into any constitutionality concerns.²²⁵ It is unclear how Texas will address this rule or if it will, at some point, move in the direction of the ABA's New Rule.

Paxton's concerns seem unfounded as “[t]he proposed scope of Rule 8.4(g) is similar to the scope of existing antidiscrimination provisions in many states.”²²⁶

For example, New York's Rule 8.4(g)–(h) Misconduct, effective since 2009, state:

A lawyer or law firm shall not:

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Liaquat Ali Khan, *Disciplining Lawyers for Harassment and Discrimination*, HUFF. POST (July 12, 2017), https://www.huffingtonpost.com/entry/disciplining-lawyers-for-harassment-and-discrimination_us_5962c774e4b0cf3c8e8d59d7.

²²⁶ *Revised Resolution 109 & Report*, *supra* note 153, at 9 (citing to FLA. RULES OF PROF'L CONDUCT r. 4-8.4 (FLA. BAR 1994) (amended 2018) (addressing conduct “in connection with the practice of law”); IND. RULES OF PROF'L CONDUCT r. 8.4(g) (IND. BAR 1987) (amended 2005) (addressing conduct a lawyer undertakes in the lawyer's “professional capacity”); IOWA RULES OF PROF'L CONDUCT r. 32:8.4(g) (IOWA BAR 2005) (amended 2012) (addressing conduct “in the practice of law”); MD. ATTORNEY'S RULES OF PROF'L CONDUCT r. 19-308.4(e) (MD. BAR 2016) (discussing “when acting in a professional capacity”); MINN. RULES OF PROF'L CONDUCT r. 8.4(h) (MINN. BAR 1990) (amended 2015) (addressing conduct “in connection with a lawyer's professional activities”); N.J. RULES OF PROF'L CONDUCT r. 8.4(g) (N.J. 1984) (amended 2004) (addressing when a lawyer's conduct is performed “in a professional capacity”); N.Y. RULES OF PROF'L CONDUCT r. 8.4 (N.Y. ST. BAR ASS'N 2009) (amended 2017) (covering conduct “in the practice of law”); OHIO RULES OF PROF'L CONDUCT r. 8.4(g) (OHIO ST. BAR ASS'N 2007) (amended 2017) (addressing when lawyer “engage[s], in a professional capacity, in conduct”); WASH. RULES OF PROF'L CONDUCT r. 8.4(g) (WASH. ST. BAR ASS'N 1985) (amended 2018) (covering “connection with the lawyer's professional activities”); and WIS. RULES OF PROF'L CONDUCT r. 8.4(i) (ST. BAR OF WIS. 1987) (amended 2017) (covering conduct “in connection with the lawyer's professional activities.”).

orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.²²⁷

Comment [5A] states that it is “[u]nlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (g).”²²⁸

Additionally, California's proposed Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation, which was adopted by the Board on March 9, 2017, states the following:

(a) In representing a client, or in terminating or refusing to accept the representation of any client, a lawyer shall not:

(1) unlawfully harass or unlawfully discriminate against persons on the basis of any protected characteristic; or

(2) unlawfully retaliate against persons.

(b) In relation to a law firm's operations, a lawyer shall not:

(1) on the basis of any protected characteristic,

(i) unlawfully discriminate or knowingly permit unlawful discrimination;

(ii) unlawfully harass or knowingly permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract; or

(iii) unlawfully refuse to hire or employ a person, or refuse to select a person for a training program leading to employment, or bar or discharge a person from employment or from a training program leading to employment, or discriminate against a person in compensation or in terms, conditions, or privileges of employment; or

(2) unlawfully retaliate against persons.

(c) For purposes of this rule:

²²⁷ N.Y. RULES OF PROF'L CONDUCT r. 8.4(g)-(h).

²²⁸ N.Y. RULES OF PROF'L CONDUCT r. 8.4 cmt. [5A].

(1) “protected characteristic” means race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, sexual orientation, age, military and veteran status, or other category of discrimination prohibited by applicable law, whether the category is actual or perceived;

(2) “knowingly permit” means to fail to advocate corrective action where the lawyer knows of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);

(3) “unlawfully” and “unlawful” shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and

(4) “retaliate” means to take adverse action against a person because that person has (i) opposed, or (ii) pursued, participated in, or assisted any action alleging, any conduct prohibited by paragraphs (a)(1) or (b)(1) of this rule.²²⁹

In neither New York nor California has the similar “practice of law” language that the ABA has incorporated caused an influx of discrimination and/or harassment complaints as some of the critics have suggested.

VII. WHERE DO WE GO FROM HERE?

In order to ensure that the progress that women have made, and are currently making, does not slow down or stop entirely, it is necessary to not only put rules into effect banning the discriminatory or harassing behavior, but also to establish education and training initiatives in law school, at the start of a lawyer’s career, and to continue that training once attorneys enter the work force through firm training and CLE requirements. This continuation of training is necessary because although including the training in law schools is a positive start, training is necessary at all levels since some of the offenders are already practicing attorneys or sitting judges. This training will need to take the form of bias, discrimination, and harassment training, such that those practicing in the field of law are made aware of issues facing females in today’s legal environment and learn how to combat behaviors that are direct and indirect bias, harassment, and discrimination. For the purposes of this discussion, such training will be referred to as Bias Training.

²²⁹ CAL. RULES OF PROF’L CONDUCT r. 8.4.1 (STATE BAR OF CAL. 1994) (amended 2018) (footnotes omitted).

A. Require Bias Training in Law Schools as Part of the Professional Responsibility Requirements for Graduation

Although many law schools have professional responsibility requirements for graduation, they do not require that students receive training and/or education specifically in the areas of discrimination and harassment. In order to ensure that the new crop of attorneys entering the profession are as prepared as possible, it would seem to be a logical step to require students to receive Bias Training as part of their law school education. Such training could occur during 1L orientation, be a required seminar that all students must attend prior to graduation, and/or be included as a component of the Professional Responsibility course that all students are required to take prior to graduation.

At the University of California Berkeley School of Law, a 2L spearheaded a student-led initiative to bring implicit bias training to the student body and faculty.²³⁰ Additionally, in January 2018, the Human Rights Law Society at Duke Law School held an Implicit Bias Training Workshop conducted by Dr. Benjamin Reese, Vice President of the Office for Institutional Equity at Duke University and Duke University Health System, “geared towards understanding the impact of biases in the workplace generally and in the legal professions specifically, focusing in particular on issues of social justice and human rights.”²³¹ Dr. Reese’s office “oversees diversity, inclusion, affirmative action/equal opportunity activities and harassment/discrimination prevention for the university.”²³²

Although these examples show a promising start to educating law school students, aka soon-to-be practitioners, about bias in the profession, these trainings have only begun to creep into schools slowly and are not yet the norm at law schools across the country. Moreover, despite this positive beginning, it should be noted that much of the training currently being offered deals specifically with implicit bias generally and not necessarily specifically with harassment and discrimination against women. Thus, I would argue that law schools need to require training that includes a component dealing with bias, harassment, and discrimination faced by women.

B. Require Bias Training in All Law Firms

Law firms have increasingly realized the importance of women’s initiatives aimed at educating members of the profession and increasing women’s participation in the governance aspects of law firms. According to the NAWL 2017 Survey Report

²³⁰ Nicole Israel, *Training Students to be Aware of Implicit Bias*, BEFORE BAR (Nov. 1, 2014), <https://abaforlawstudents.com/2014/11/01/fourteenth-circuit-cindy-dinh-training-students-aware-implicit-bias/>.

²³¹ *Implicit Bias Training Workshop with Dr. Benjamin Reese*, DUKE L. EVENTS (Jan. 25, 2018), <https://law.duke.edu/events/implicit-bias-training-workshop-dr-benjamin-reese/>.

²³² *Id.*

on Promotion and Retention of Women in Law Firms, which surveyed the top 200 law firms in the United States, “[e]ssentially all responding firms (99 percent) reported having a Women’s Initiative[.]”²³³ Additionally, “95 percent of firms report that their Women’s Initiatives are established to mature, and 31 percent reported that although their initiative is established, they’re still actively growing.”²³⁴

The survey results suggest that there is widespread participation with women partners and partner-track associates being the most active participants, with “91 percent of firms reporting that at least half of their women partners participate in Women’s Initiative events and programs and 87 percent of firms reporting that at least half of their women associates participate.”²³⁵ Additionally, it was reported that “72 percent of women non-partner track attorneys (e.g., staff attorneys, counsel attorneys) also participate in the programming.”²³⁶ Although women are participating in great numbers, only “85 percent of firms report that at least *some* men participate in the Women’s Initiative events and programming,” which is not particularly encouraging.²³⁷ Although women will logically lead the fight, men can and must understand and join the fight to create positive change, as diversity and bias initiatives are most successful when they are comprehensive in their composition. According to the study, “[w]hile most firms left the leadership of their initiatives to women, 45 percent of firms report that they have men who participate in the leadership roles of the Initiatives (e.g., serving on the planning committee).”²³⁸ Moreover, it is encouraging to note:

Most firms report having support from men in the law firm for both the Women’s Initiative and their female colleagues in the firm: 98 percent of firms report that there are men in the firm who advocate for the Women’s Initiative specifically, and on a more interpersonal level, 99 percent of firms

²³³ Peery, *supra* note 125, at 9.

²³⁴ *Id.* at 9-10. The Survey went on to note that “[m]ost (91 percent) firms reported that they had mission statements specifically for their Women’s Initiatives, up from 75 percent in the 2012 NAWL WI Survey Report. Further, 87 percent reported that their Women’s Initiative is part of the strategic plan of the firm, up from 47 percent in 2012. In addition to Women’s Initiatives being incorporated into the strategic vision of the law firm, essentially all firms also reported that they had specific objectives for their Initiatives. Finally, 100 percent of firms reported that their Women’s Initiative is part of the firm’s diversity plan, up from 85 percent in 2012.” Additionally, “[i]n terms of resources, 87.5 percent of firms reported that they had specific budgets for their Women’s Initiatives, and a few firms indicated that their Women’s Initiative budgets fall under the umbrella of their broader diversity budgets.” *Id.* at 10.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* (emphasis added).

²³⁸ *Id.*

report that there are men who advocate on behalf of women in the firm, including by serving as mentors and sponsors.²³⁹

Additionally, according to the survey results, nearly all of the firms reported that they attempt to monitor the outcomes of their initiatives and look at the career trajectories of women in their firm, as well as the business development, relationship development, and representation of women in leadership positions within the firm.²⁴⁰ Along those lines, of the firms surveyed, “firms who reported having established to mature Women’s Initiatives” had a higher percentage (18-19%) of women equity partners compared to firms with newer initiatives.²⁴¹

In addition, the pay gap between women and men equity partners was smaller in firms with more established to mature initiatives than those with newer initiatives (the median woman equity partner is earning 94 percent of what the median male equity partner makes in firms with more established initiatives compared to 82 percent in the handful of firm [sic] reporting relatively new initiatives).²⁴²

Finally, although many of the firms responded indicating that they have a Women’s Initiative, most firms reported “offering programming and events focused on business development training, soft skills training, and development in topic areas like negotiation, navigating the law firm world, and management and leadership training.”²⁴³ Although this training is beneficial to women trying to advance their careers, it does not attack the issue of harassment and discrimination plaguing women in the legal profession. Some of the firms who responded to the survey indicated that they also participate in training outside of the Women’s Initiatives such as offering implicit bias training and diversity and inclusion training.²⁴⁴ Again, although this is beneficial, if the training is not specifically focused on anti-harassment and anti-discrimination against women, then it is not directly addressing the issue.

My suggestion is that training which focuses on direct and indirect forms of harassment and discrimination be instituted at all firms. Training should occur for any and all attorneys currently with the firm. This training should take the form of annual or semiannual sessions and should be mandatory for all practicing attorneys, regardless of the attorney’s years of practice, to ensure consistency across the firm. Additionally, any summer associate and legal interns at the firm should be required to participate in the training as well.

²³⁹ *Id.*

²⁴⁰ *Id.* at 6.

²⁴¹ *Id.* at 11.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

C. Require Bias Training As Part Of the CLE Requirements

Many, if not all, states have a professional responsibility component in their Continued Learning Education (CLE) requirements for members of the bar in the state, however some have taken it a step further to require bias and inclusion training as part of the CLE requirements.

In both New York and California, for example, individuals are required to complete both a professionalism and bias training component during their reporting cycle. In New York, experienced members of the bar,²⁴⁵ those who have been admitted to the New York Bar for more than two years, must complete a total of 24 accredited CLE credit hours during each biennial reporting cycle (the two-year period between attorney registrations) and at least four of the credit hours be in the Ethics and Professionalism category,²⁴⁶ and, effective July 1, 2018, at least one of the credit hours must be in the Diversity, Inclusion and Elimination of Bias category, with the remaining credit hours being in any category of credit.²⁴⁷ The new rule, as of January 1, 2018, provides Categories of CLE Credit as Defined in the Program Rules 22 NYCRR 1500.2(c)-(g) and states the following:

(g) Diversity, Inclusion and Elimination of Bias courses, programs and activities must relate to the practice of law and may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to

²⁴⁵ *Continuing Legal Education: FAQs for Newly Admitted Lawyers*, N.Y. COURTS, https://www.nycourts.gov/attorneys/cle/newattorney_faqs.shtml#s1_q3 (last visited Sept. 3, 2018). Newly admitted attorneys (those in their first two years of practice) in New York have different requirements than experienced attorneys and must complete at least 16 transitional CLE credit hours in *each* of the first two years of admission to the Bar as follows: 3 credits in Ethics and Professionalism, 6 credits in Skills, and 7 credits in Law Practice Management and/or Areas of Professional Practice. *Id.*

²⁴⁶ *CLE Program Rules*, N.Y. ST. CLE BOARD 1-2 (Jan. 1, 2018), <https://www.nycourts.gov/attorneys/cle/programrules.pdf>. New York has Categories of CLE Credit as Defined in the Program Rules 22 NYCRR 1500.2(c)-(g), which states that “Ethics and Professionalism may include, among other things, the following: the norms relating to lawyers’ professional obligations to clients (including the obligation to provide legal assistance to those in need, confidentiality, competence, conflicts of interest, the allocation of decision making, and zealous advocacy and its limits); the norms relating to lawyers’ professional relations with prospective clients, courts and other legal institutions, and third parties (including the lawyers’ fiduciary, accounting and record-keeping obligations when entrusted with law client and escrow monies, as well as the norms relating to civility); the sources of lawyers’ professional obligations (including disciplinary rules, judicial decisions, and relevant constitutional and statutory provisions); recognition and resolution of ethical dilemmas; the mechanisms for enforcing professional norms; substance abuse control; and professional values (including professional development, improving the profession, and the promotion of fairness, justice and morality).”

²⁴⁷ *Id.* at 3.

cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel.²⁴⁸

This new requirement is directly in line with the ABA's New Rule and shows New York's clear charge to ensure that its attorneys understand the harassment and discrimination issues currently plaguing the legal system.

Additionally, the California rules regarding CLE requirements are as follows:

Rule 2.72 Requirements

(A) Unless these rules indicate otherwise, a member who has been active throughout a thirty-six-month compliance period must complete twenty-five credit hours of MCLE activities. No more than twelve and a half credit hours may be self-study. Total hours must include no less than 6 hours as follows:

- (1) at least four hours of legal ethics;
- (2) at least one hour dealing with the recognition and elimination of bias in the legal profession and society by reason of, but not limited to, sex, color, race, religion, ancestry, national origin, physical disability, age, or sexual orientation; and
- (3) at least one hour of education addressing substance abuse or other mental or physical issues that impair a member's ability to perform legal services with competence.²⁴⁹

Again, based on the language of 2.72(A)(2), it is clear that California is trying to educate its attorneys on discrimination and harassment issues within the profession.

In Florida, each member of the bar must complete "a minimum of 33 credit hours of approved continuing legal education activity every 3 years. Five of the 33 credit hours must be in approved legal ethics, professionalism, bias elimination, substance abuse, or mental illness awareness programs . . ."²⁵⁰ Although this rule is a solid first step towards including harassment and discrimination training, since

²⁴⁸ *Id.*

²⁴⁹ *Rights and Responsibilities of Members Minimum Continuing Legal Education*, ST. BAR CAL. 4-5 (Jul. 1, 2014), https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title2_Div4-MCLE_pending.pdf (footnotes omitted).

²⁵⁰ *CLE and Basic Skills Course Requirements*, FLA. BAR, <https://www.floridabar.org/member/cle/bscr-req/> (last visited Sept. 3, 2018). Newly admitted attorneys also have a Basic Skills Course requirement. See *Frequently Asked Questions About Basic Skills Requirements*, FLA. BAR, <https://www.floridabar.org/member/cle/bscr-faq/> (last visited Sept. 3, 2018) ("Practicing with Professionalism must be completed no sooner than 12 months prior to or no later than 12 months following admission to The Florida Bar. The 21 hours of basic substantive CLE programs sponsored by the Young Lawyers Division of The Florida Bar must be completed by the end of the members' initial continuing legal education requirement reporting cycle.").

members of the bar can choose to attend substance abuse or mental illness awareness programs, for example, instead of the bias-g geared courses, Florida attorneys are not required to have any continued learning and training in the area of harassment and discrimination.

Some states, however, appear to have no requirement at all specifically aimed at bias education and training. For example, in Texas, attorneys are required to complete fifteen total hours of continuing legal education during each compliance year and a minimum of three of the credit hours must be completed in legal ethics and/or professional responsibility.²⁵¹ Although there are required ethics credits, the Texas CLE rules do not appear to provide a description of specifically what the ethics requirement covers, thus it appears that there is no push towards educating its attorneys on bias issues.²⁵²

Thus, my suggestion is that all states should include a CLE requirement that a certain number of CLE credit hours be taken in the area of Bias Training, harassment, and discrimination. Through the years, states have amended their CLE requirements to deal with issues that are important at the time. For example, in Florida as of January 2017, each member of the bar must ensure that three of the 33 credit hours completed are in approved technology programs, which are included in, not in addition to, the regular 33 credit hours requirement.²⁵³ In September 2016, the Florida Supreme Court approved a rule requiring state lawyers to take technology-related CLE courses and held that “[i]n order to maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including an understanding of the risks and benefits associated with the use of technology.”²⁵⁴ As the court noted that a lawyer should engage in continuing study to understand the importance of technology, based on our ever-changing world, it would seem only logical that a bias training CLE requirement would be equally, if not more, important.

Although not all states require Bias Training, some practicing attorneys realize the importance of such training and have put together CLE programs specifically on this topic. For example, in January 2017, Stanford Law School alumni held an MCLE Workshop entitled *Implicit Bias for Lawyers*, which was designed for attor-

²⁵¹ *Definition of MCLE Credit*, ST. BAR TEX., https://www.texasbar.com/AM/Template.cfm?Section=Definition_of_MCLE_Credit&Template=/CM/HTMLDisplay.cfm&ContentID=29187 (last visited Feb. 27, 2018).

²⁵² *Texas Minimum Continuing Legal Education Rules*, ST. BAR TEX. (June 13, 2017), https://www.texasbar.com/AM/Template.cfm?Section=MCLE_Rules1&Template=/CM/ContentDisplay.cfm&ContentID=31722.

²⁵³ *CLE and Basic Skills Course Requirements*, *supra* note 250.

²⁵⁴ Victor Li, *Florida Supreme Court Approves Mandatory Tech CLE Classes for Lawyers*, ABA J. (Sept. 30, 2016), http://www.abajournal.com/news/article/florida_supreme_court_approves_mandatory_tech_cles_for_lawyers.

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neys “to become educated on the concept of implicit bias, to recognize the importance of bias as it relates to their professional and personal lives and to reduce bias in order to make better decisions.”²⁵⁵ Thus, some practitioners realize the importance of such training and the benefits that will transpire as a result.

VIII. CONCLUSION

The ABA’s addition of anti-harassment and anti-discrimination language in the Model Rules of Professional Conduct makes it clear that the self-governing legal profession will not tolerate such conduct among its members. This monumental progress on a national level is only a beginning step towards finding a solution to end the harassment and discrimination that women in the legal profession face daily. As members of the legal profession, we need to remedy these harassment and discrimination issues through education and training initiatives in law schools and that training must be continued once attorneys enter the work force in the form of Bias Training in law firms and mandatory CLE requirements.

²⁵⁵ *Implicit Bias for Lawyers MCLE Workshop*, STAN. L. SCH., <https://law.stanford.edu/event/implicit-bias-for-lawyers-mcle-workshop/> (last visited Sept. 3, 2018).