



June 9, 2020

Chief Justice Donald W. Beatty  
Justice John W. Kittredge  
Justice Kaye G. Hearn  
Justice John Cannon Few  
Justice George C. James, Jr.  
SOUTH CAROLINA SUPREME COURT  
1231 Gervais Street  
Columbia, SC 29201

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Hon. John W. Kittredge, Chair  
Hon. Aphrodite K. Konduros, Vice Chair  
COMMISSION ON THE PROFESSION  
1231 Gervais Street  
Columbia, SC 29201

**RE: Addressing Discrimination within the SC Bar**

To All:

On June 4, 2020, hundreds of lawyers joined together at the SC Bar Building at the Lawyers Standing Against Racial Injustice Protest, which was bravely organized by five young black women lawyers. Despite statements of commitment to “diversity” in our profession, we know racial prejudice seethes barely below the surface in many law firms and organizations. The young women who organized the protest know that too, and regardless of the professional backlash they knew they could face, they did the hard and emotional work of organizing one of the most powerful events we have attended

Most powerfully, they asked everyone who was able to lie down on the asphalt for eight minutes and forty-six seconds as one woman read George Floyd’s dying words in real time. We challenge each of you go to <https://youtu.be/GUhdqT5VLJg>, lie face down on the floor, and have someone read to you George Floyd’s last words as they appear on the screen. Continue reading our letter when you recompose yourself.

One of the action ideas that came out of the protest was to revive the effort to include a non-discrimination rule in the South Carolina Rules of Professional Responsibility. In

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September 2016, the ABA wrote to Chief Justice Costa Pleicones requesting that South Carolina consider adopting ABA Model Rule 8.4(g) and accompanying rule comments. **(Attachment 1.)**

ABA Model Rule 8.4(g) states:

It is professional misconduct for a lawyer to:

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

The Supreme Court submitted this amendment to the Professional Responsibility Committee. The Professional Responsibility Committee voted to reject this amendment in 2017. The Bar House of Delegates voted to put the issue out for public comment, and we have read some of the comments that were received. We are dismayed to see the names of individuals we know who objected to a simple statement prohibiting discrimination.

But we are even more dismayed to know that consideration of the Model Rule 8.4(g) died a bureaucratic “death by study.” On May 4, 2017, the Commission on Judicial Conduct and the Commission on Lawyer Conduct sent a joint letter<sup>1</sup> to the Supreme Court of South Carolina opposing the adoption of Model Rule 8.4(g). In their letter, they state:

The Commissions are, however, of the opinion that discrimination and lack of diversity within the legal profession are issues that need to be addressed in some fashion. The Commissions are currently engaging in additional study of these issues and would like the opportunity to present the Supreme Court with some recommended alternatives to the adoption of the ABA amendments to Rule 8.4.

Three years ago, on June 20, 2017, the Supreme Court issued its Order 2017-06-20-01, stating its rejection of Model Rule 8.4(g).<sup>2</sup>

However, the Commissions state their respective members are of the opinion that discrimination and lack of diversity within the legal profession are issues that should be addressed in some fashion. The Commissions state they are currently

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<sup>1</sup> A copy of the Commissions’ letter and all of the comments for and against adoption can be found at <https://www.sccourts.org/courtOrders/84publicComments.pdf>.

<sup>2</sup> The Order can be found here. <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01>

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engaging in additional study of those issues, and they request the opportunity to present the Court with alternatives to the adoption of the ABA's proposed amendments to Rule 8.4.

...  
Following review, this Court declines to incorporate the ABA Model Rule within Rule 8.4, RPC, as requested by the ABA. Should the Commissions on Lawyer and Judicial Conduct elect to submit proposed amendments to address problems identified in their letter to the Court, the Court will consider any proposal on its merits.

It is our understanding that the SC Bar did form a Diversity Committee following this effort. However, as far as we can tell, there has been no further public discussion or public study of amending our Rules of Professional Conduct, or taking any other action, to prohibit discrimination in our profession.

Following the lawyers' protest last week, we began to look inward for how we can address racism in ourselves and our institutions. We must get our own house in order. **That is why we are calling on you to take back up consideration of Model Rule 8.4(g).** We recognize that South Carolina's current Rule 8.4 includes comment 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 (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

However, this comment does not go far enough. The Model Rule includes discrimination based on ethnicity, marital status, and gender identity, which are not included in the comment 3. Comment 3 requires a discriminatory act to be done "in the course of representing a client" and it must be found to be "prejudicial to the administration of justice." In contrast, the Model Rule does not contain the "prejudicial to the administration of justice" limitation, but would expand misconduct to include any "conduct related to the practice of law."

The Preamble to the Rules of Professional Conduct specifically states as the very first of a lawyer's responsibilities:

[1] A lawyer, being a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

When any of us in the legal profession commit conduct related to the practice of law that is marked by harassment or discrimination, it demeans the quality of justice for all of society and is not merely prejudicial to the interests of a single client.

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The time to study the issue is up. The time to act is now. We urge you to take back up consideration of Model Rule 8.4(g). Let us restart this necessary conversation and take decisive action to demonstrate that our profession stands against discrimination in any form and that we take seriously our special responsibility to the public for the quality of justice for everyone.

Sincerely,



M. Malissa Burnette



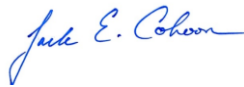
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September 29, 2016

Honorable Costa M. Pleicones  
Chief Justice  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

**Re: Recent Amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct**

Dear Chief Justice Pleicones:

We take this occasion to report to you the recent amendment of Rule 8.4 of the ABA Model Rules of Professional Conduct with the hope that your Court will undertake a review of the changes and consider integrating them into your state's rules of professional conduct. These revisions and additions were the culmination of two years of work by the ABA Standing Committee on Ethics and Professional Responsibility ("Ethics Committee"). [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html)

Amended Model Rule 8.4 contains new paragraph (g) that establishes a black letter rule prohibiting harassment and discrimination in the practice of law. It also contains three new Comments related to paragraph (g).

New paragraph (g) to Model Rule 8.4 is a reasonable, limited, and necessary addition to the Model Rules of Professional Conduct. It makes it clear that it is professional misconduct to engage in conduct that a lawyer knows or reasonably should know constitutes harassment or discrimination while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers. 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 and managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Amended Model Rule 8.4 (g) does not prohibit speech, thought, association, or religious practice. The rule does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with current rules of professional conduct.

Twenty-five jurisdictions have adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules. To properly address this issue, the ABA adopted an anti-discrimination and anti-harassment provision in the black letter of the Model Rules. Studies on the perception of the public about the justice system and

**Center for Professional Responsibility  
Policy Implementation Committee**

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lawyers support the need for the amendment to Model Rule 8.4.

Adopted Revised Resolution 109 and its accompanying Report can be found at: [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/final\\_revised\\_resolution\\_and\\_report\\_109.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf)

The Center for Professional Responsibility Policy Implementation Committee has created a Power Point Presentation to assist courts, rules committees, the legal profession, and the public to understand the amendments to Model Rule

8.4. [https://www.dropbox.com/s/6seu8x1i0m411l6/Model%20Rules%208\\_4%20Presentation\\_Final.wmv?dl=0](https://www.dropbox.com/s/6seu8x1i0m411l6/Model%20Rules%208_4%20Presentation_Final.wmv?dl=0)

We can provide you with electronic copies of Revised Resolution 109 with Report and discussion points if you or the Chair of your state review committee contact John Holtaway, Policy Implementation Counsel, [john.holtaway@americanbar.org](mailto:john.holtaway@americanbar.org), (312) 988-5298. We have sent copies of this letter to your State Bar Association President, State Bar Association Executive Director, State Bar Admissions Director, and Chief Disciplinary Counsel, and ABA State Delegate.

The Center for Professional Responsibility Policy Implementation Committee is available to assist states with the review process. Members of the Committee, including members of the Ethics Committee, are available to meet in person or telephonically with review committees.

The work product of the Ethics Committee reflects the ABA's continued leadership in professional responsibility law. The ABA looks forward to assisting you on this important project.

Respectfully,

A handwritten signature in blue ink that reads "John S. Gleason". The signature is written in a cursive style.

John S. Gleason, Chair  
Center for Professional Responsibility Policy Implementation Committee