

Cultural Competency in a Post-Model Rule 8.4(g) World

LATONIA HANEY KEITH*

“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.”¹

INTRODUCTION.....	2
I.MODEL RULE 8.4 – ITS HISTORY & APPLICATION.....	4
II.BIAS IN THE LEGAL PROFESSION & THE JUDICIAL SYSTEM.....	9
A. Bias in the Courtroom.....	10
B. Bias in the Legal Profession	17
III.THE REASONABLE CULTURALLY COMPETENT LAWYER	22
A. The Reasonable Lawyer v. The Reasonable Victim	23
B. A Middle Ground.....	25
IV.IS THE INSTITUTION OF A RULE ENOUGH?	27
V.A CULTURAL COMPETENCY INFRASTRUCTURE.....	35
A. Cultural Competency in Legal Education.....	36
B. Cultural Competency as a Bar Licensure Requirement	37
C. A Fair & Impartial Judiciary	39
VI.CONCLUSION.....	41

Copyright © 2017 by Latonia Haney Keith

* Director of Clinical Education, Assistant Professor of Law, Concordia University School of Law; J.D., Harvard Law School; Member, American Bar Association Standing Committee on Pro Bono and Public Service; Former Firm-Wide Pro Bono Counsel, McDermott Will & Emery LLP; Former President, Association of Pro Bono Counsel (APBCo). I am grateful to David A. DeRoin for his invaluable assistance and to Professor Jodi Nafzger for her unwavering support.

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

INTRODUCTION

In the wake of a turbulent presidential election, the resurgence of the Black Lives Matter movement, and stark backlash over same-sex marriage, immigration reform and transgender bathrooms, our country is no stranger to the concepts of bias and discrimination. Likewise, our justice system faces scrutiny with claims of prevalent bias and prejudice within its midst. Though our legal system is heralded as having been founded on the principles of fairness and equity, statistical and anecdotal evidence show that our courtrooms are rife with bias and discrimination.² Moreover, despite the diversity of law school classes, our legal profession is homogenous, dominated by a single race and gender.³ In recently evaluating this issue, American Bar Association Immediate Past President Paulette Brown stated that “[d]iscrimination and harassment on the basis of gender, race, ethnicity, sexual orientation, disability, marital and socioeconomic status is, and unfortunately continues to be, a problem in our profession and in society.”⁴ She further noted that “[e]xisting steps have not been enough to end such discrimination and harassment” in the judicial system.⁵

In response, on August 8, 2016, the American Bar Association (ABA) House of Delegates approved Resolution 109, which proposed an amendment to Model Rule 8.4 to incorporate an anti-harassment and anti-discrimination provision into the black letter rules governing the professional conduct of lawyers.⁶ Resolution 109 sought to strengthen ethics protections for protected classes and advance the ABA’s goal of eliminating bias, harassment and discrimination in the legal profession.⁷

Prior to the passage of Resolution 109, discrimination was addressed through Model Rule 8.4(d), which makes it professional misconduct for a lawyer “to engage in conduct that is prejudicial to the administration of justice.”⁸ However, the prior rule provided insufficient protection against discrimination and harassment for at least three reasons. First, as articulated in Comment 3 of the rule, bias or prejudice by an attorney only rose to the level of misconduct if the discriminatory behavior occurred “in the course of representing a client” and only if the conduct met the high standard of being “*prejudicial* to the administration of justice.”⁹ Second, this anti-discrimination provision was absent from the black

2. See *infra* Part II(A).

3. See *infra* Part II(B).

4. Transcript of American Bar Association Public Hearing at 6 (Feb. 7, 2016) (transcribing ABA Immediate Past President Paulette Brown’s address at the American Bar Association Public Hearing on Resolution 109), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authckdam.pdf.

5. *Id.*

6. See *Annual Meeting 2016: ABA Amends Model Rules to Add Anti-Discrimination, Anti-Harassment Provision*, AMER. BAR ASS’N, http://www.americanbar.org/news/abanews/aba-news-archives/2016/08/annual_meeting_20161.html (last visited Feb. 25, 2017); see also AMER. BAR ASS’N, RESOLUTION 109 (ADOPTED AS REVISED) (2016).

7. See AMER. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES: REVISED RESOLUTION 2 (2016).

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

9. MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 1998) (emphasis added).

letter rules—it was only mentioned in the comments to the rule, which are advisory and not adopted by every state.¹⁰ Finally, the prior rule failed to address harassment at all.

Resolution 109 added a new paragraph (g) to Model Rule 8.4 explicitly addressing discrimination and harassment in the black letter rules and expanding the bounds of conduct that may give rise to disciplinary action to “conduct *related* to the practice of law.”¹¹ Though advisory, the new Comment 3 clarifies that discriminatory conduct “includes harmful verbal or physical conduct that manifests bias or prejudice towards others.”¹² Moreover, the new Comment 4 expands the breadth of interactions or conduct that could result in a violation, including “interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law” and “participating in bar association, business or social activities in connection with the practice of law.”¹³

Despite the incredible strides made because of Resolution 109, Model Rule 8.4(g) leaves open a critical issue with implementation. The new rule states that it is professional misconduct if a lawyer engages in conduct that the lawyer “knows or reasonably should know” is discrimination.¹⁴ This begs the question whether the rule obligates lawyers to become culturally competent or whether it encourages lawyers to blind themselves to bias present in the practice of law to avoid being subject to this rule. In other words, how culturally competent is the “reasonable lawyer”? Does the “reasonable lawyer” have no or limited training on cultural competency? Or does the “reasonable lawyer” purposefully attempt to be culturally aware and mindful? Though adoption of Model Rule 8.4(g) is a necessary step toward forestalling bias and discrimination in the judicial system, it will not sufficiently do so without the implementation of additional safeguards and a cultural shift within the legal profession.

This Article first provides the history of Model Rule 8.4 and the concepts of bias and discrimination in the legal profession. Next, this Article argues that it should no longer be acceptable for lawyers to turn a blind eye and insulate themselves and the legal profession from the obligation to make cultural competency a core aspect of legal education and practice. It will first focus on legal education, urging the ABA to revise its accreditation standards to require cultural competency coursework. It will then focus on the legal profession, urging states to take three steps—adopt Model Rule 8.4(g), revise, where applicable, its continuing legal education requirements to require cultural competency education, and hold lawyers accountable for violating the rule. Finally, this Article proposes a revision to the Model Code of Judicial Conduct to ensure that the judiciary is able to “perform the duties of judicial office . . . without bias or

10. See MODEL RULES OF PROF'L CONDUCT, Preamble & Scope [14] (AM. BAR ASS'N 2016) (“Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”); *id.* at Preamble & Scope [21] (“The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”).

11. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2016) (emphasis added).

12. *Id.* at r. 8.4 cmt. 3.

13. *Id.* at r. 8.4 cmt. 4.

14. *Id.* at r. 8.4(g).

prejudice.”¹⁵ Removing, as much as practical, bias and discrimination from our legal profession will encourage all lawyers and judges to become more self-aware. This, in turn, will ensure the fair and equitable treatment of all individuals partaking or engaged in our justice system.

I. MODEL RULE 8.4 – ITS HISTORY & APPLICATION

In 1983, the American Bar Association’s House of Delegates adopted the Model Rules of Professional Conduct, which prescribe baseline standards of legal ethics and professional responsibility for attorneys in the United States.¹⁶ With the assistance of the ABA Center for Professional Responsibility’s Policy Implementation Committee, each state, with the exception of California, has adopted rules of professional conduct that follow the format of or closely align with the Model Rules.¹⁷

When the Model Rules were first adopted, they did not directly or indirectly address bias, discrimination, prejudice or harassment. Eleven years later, the ABA Standing Committee on Ethics and Professional Responsibility (SCEPR) and the ABA Young Lawyers Division launched an effort to correct this omission, each proposing a new paragraph (g) to Model Rule 8.4.¹⁸ However, the initiative faced such strong opposition that the proposals were withdrawn before the House of Delegates could vote.¹⁹

In 1998, the SCEPR and the ABA Criminal Justice Section reignited the initiative, each proposing new language to add an anti-discrimination provision into the Model Rules. Rather than modifying the black letter rules, the separate proposals were combined into the preexisting Comment 3 to Model Rule 8.4, and adopted by the House of Delegates at the ABA’s Annual Meeting in August 1998.²⁰ This read:

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.²¹

15. MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS’N 2010).

16. *Model Rules of Professional Conduct*, AM. BAR ASS’N CTR. FOR PROF’L RESP., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Feb. 25, 2017). Prior to the adoption of the Model Rules, the ABA’s standards of professional responsibility for lawyers were governed under the Model Code of Professional Responsibility, *see* MODEL CODE OF PROF’L RESP. (AM. BAR ASS’N 1980), and prior to the Model Code, governed under the Canons of Professional Ethics, *see* CANONS OF PROF’L ETHICS (AM. BAR ASS’N 1956).

17. *Model Rules of Professional Conduct*, *supra* note 16.

18. *See* AMER. BAR ASS’N, *supra* note 7, at 2.

19. *See id.*

20. *See id.*

21. MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 1998).

As noted by Myles V. Lynk, Chair of the SCEPR, the House of Delegates' adoption of the preexisting Comment 3 to Model Rule 8.4 marked "*the first and only time* that a substantive provision in the rules was not added to a rule itself but was placed in a comment."²²

A decade later, former ABA President Bill Neukum led an initiative to reformulate the ABA's objectives into four goals adopted by the House of Delegates in 2008.²³ Goal III, entitled "Eliminate Bias and Enhance Diversity," includes two objectives: (i) "[p]romote full and equal participation in the association, our profession, and the justice system by all persons"; and (ii) "[e]liminate bias in the legal profession and the justice system."²⁴ In 2014, the ABA Commission on Women in the Profession, the ABA Commission on Racial and Ethnic Diversity in the Profession, the ABA Commission on Disability Rights, and the ABA Commission on Sexual Orientation and Gender Identity (collectively, the "Goal III Commissions") sent a joint letter to the SCEPR, requesting that the Model Rules incorporate an anti-discrimination and anti-harassment provision. In the letter, the Goal III Commissions noted that Model Rule 8.4(d) was insufficient to fulfill Goal III because it "[did] not facially address bias, discrimination, or harassment and [did] not thoroughly address the scope of the issue in the legal profession or legal system."²⁵ The Goal III Commissions further argued that the preexisting Comment 3:

[A]ddresse[d] bias and prejudice only within the scope of legal representation and only when it [was] prejudicial to the administration of justice. This limitation fail[ed] to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms). The comment also [did] not address harassment at all, even though the judicial rules do so.²⁶

The Goal III Commissions' letter sparked an investigation by the SCEPR to determine whether and how the Model Rules should be amended to address discrimination, harassment and bias in the practice of law. After forming a working group consisting of representatives from the SCEPR, the Association of Professional Responsibility Lawyers, the National Organization of Bar Counsel and each of the Goal III Commissions, the SCEPR engaged in deliberations for over a year. On July 8, 2015, the SCEPR released a draft proposal for comment to amend

22. Myles V. Lynk, Chair of the ABA Standing Comm'n on Ethics and Prof'l Resp., Remarks at the ABA House of Delegates Annual Meeting 2016 7:45-7:55 (Aug. 8, 2016) (emphasis added), http://www.americanbar.org/news/abanews/aba-news-archives/2016/08/annual_meeting_20161.html.

23. See AMER. BAR ASS'N, *supra* note 7, at 1.

24. See *ABA Mission and Goals*, AMER. BAR ASS'N, http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Feb. 25, 2017).

25. AMER. BAR ASS'N, *supra* note 7, at 3 (citing Letter from Goal III Commissions to Paula J. Frederick, Chair, ABA Standing Committee on Ethics and Professional Responsibility 2011-2014); see also AMER. BAR ASS'N STANDING COMM. ON ETHICS AND PROF'L RESP., WORKING DISCUSSION DRAFT – REVISIONS TO MODEL RULE 8.4: LANGUAGE CHOICE NARRATIVE 1 (2015) (likewise acknowledging the limitation of Model Rule 8.4(d)).

26. AMER. BAR ASS'N, *supra* note 7, at 2 (citing Letter from Goal III Commissions to Paula J. Frederick, Chair, ABA Standing Committee on Ethics and Professional Responsibility 2011-2014).

Model Rule 8.4.²⁷ Later that month, the SCEPR also hosted an open invitation roundtable discussion of the proposal at the ABA's Annual Meeting.²⁸ After receiving and evaluating numerous comments, the SCEPR published a revised draft of the proposal on December 22, 2015, invited written comments, and hosted a public hearing at the ABA Midyear Meeting in February 2016.²⁹

On May 31, 2016, the SCEPR filed its initial Resolution 109 and an accompanying report with the House of Delegates,³⁰ which sparked significant controversy.³¹ Opponents raised several concerns regarding the implementation of the new rule. First, opponents argued that historically, Model Rule 8.4 has been solely concerned with regulating attorney conduct that might adversely affect an attorney's ability to practice law and with preserving the integrity of the judicial system. The new rule, they argued, addresses neither of those issues.³² Second, Model Rule 8.4(d) and the preexisting Comment 3 provides the proper level of guidance to lawyers, making inclusion of an anti-discrimination and anti-harassment provision in the black letter of the rules unnecessary.³³ Third, "attorneys may be subject to professional discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject or withdraw from certain cases because attorneys will be forced to

27. See *id.* at 4.

28. See *id.*

29. AMER. BAR ASS'N STANDING COMM. ON ETHICS AND PROF'L RESP., NOTICE OF PUBLIC HEARING (2015); see also AMER. BAR ASS'N, *supra* note 7, at 4; *Comments to Model Rule of Professional Conduct 8.4*, AMER. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html (last visited Feb. 25, 2017).

30. See AMER. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION (2016).

31. See Lorelei Laird, *Discrimination and Harassment Will Be Legal Ethics Violations Under ABA Model Rule*, ABA J., Aug. 8, 2016, http://www.abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass (noting that Resolution 109 attracted "condemnation from politically conservative attorneys, some of whom sent a letter to ABA House of Delegates Chair Patricia Lee Refo, arguing that the rule harms free speech and religious freedom, and wrote an op-ed in the National Law Journal (sub. req.) insisting that the resolution was driven by 'PC politics' rather than professional ability").

32. See Ronald Rotunda, *The ABA's Control Over What Lawyers Say Around the Water Cooler*, HARV. L. REC. (Oct. 4, 2016), <http://hlrecord.org/2016/10/the-abas-control-over-what-lawyers-say-around-the-water-cooler/> ("Is it the best use of scarce Bar resources to discipline lawyers who may violate a vague rule that prohibits some speech because the speech relates to conduct that does not violate state or federal law but does violate the new Rule 8.4(g)? It's not as if the disciplinary authorities are looking for things to do. There are plenty of lawyers who are incompetent, commingle trust funds, or cheat third parties."); Herbert W. Titus & William J. Olson, *'PC' Politics Drove ABA's Proposed Rules Changes*, NAT'L L. J. (Aug. 8, 2016), <http://www.nationallawjournal.com/id=1202764489288/PC-Politics-Drove-ABAs-Proposed-Rules-Changes?slreturn=20170027005211> (quoting Ben Strauss, past president of the Delaware State Bar Association, as stating that "the purpose of the rules delimiting ethical misconduct is 'one that goes to the character that impacts on the person's ability to deliver legal services,' not one 'regulating social behavior,'" and arguing that "[l]egal ethics should be predicated on preserving the integrity of the lawyers and the tribunals before which they practice," not on "violating today's notion of 'political correctness'").

33. AMER. BAR ASS'N, *supra* note 7, at 5.

take cases or clients they might have otherwise declined.”³⁴ Fourth, the new rule conflicts with the well-known practices of jury selection often grounded on the notions of bias and stereotypes.³⁵ And, finally, attorneys may be sanctioned for expression that is protected by the First Amendment.³⁶

In preparation for the House of Delegates meeting, the SCEPR filed a revised version of Resolution 109 and its accompanying report on August 3, 2016,³⁷ addressing or responding to several of the opponents’ concerns. In response to arguments concerning the necessity of Resolution 109, the SCEPR noted that twenty-five jurisdictions had already concluded that Model Rule 8.4(d) and the preexisting Comment 3 were insufficient to protect against bias, prejudice and harassment in the legal profession and had therefore adopted anti-discrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct.³⁸ It further noted that only thirteen jurisdictions addressed

34. Sarah C. Haan & Dominic Lovotti, *Eliminating Bias, Harassment, and Discrimination in the Legal Profession: Proposed Changes to Model Rule 8.4*, 59 *ADVOCATE* 23, 24 (2016).

35. See Email from Steven A. Weiss, Chair, ABA Section of Litigation, to Myles V. Lynk, Chair, ABA Standing Committee on Ethics and Professional Responsibility (Jun. 20, 2016, 12:04 CST), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_section_of_litigation_comment.authcheckdam.pdf (referencing and enclosing prior letters expressing concern regarding the interplay between jury selection and the proposed change to the model rule).

36. See Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express “Bias,” Including in Law-Related Social Activities*, *WASH. POST*, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.05fb9926c273 (“So say that some lawyers put on a Continuing Legal Education event that included a debate on same-sex marriage, or on whether there should be limits on immigration from Muslim countries, or on whether people should be allowed to use the bathrooms that correspond to their gender identify rather than their biological sex. In the process, unsurprisingly, the debater on one side said something that was critical of gays, Muslims or transgender people. If the rule is adopted, the debater could well be disciplined by the state bar.”); Letter from First Liberty to Patricia Lee Refo, Chair, ABA House of Delegates 1 (Aug. 5, 2016), <https://www.scribd.com/document/320478002/Aba-8-4-Ltr-Em-ks> (stating that the proposed change to Model Rule 8.4 “is a clear and extraordinary threat to free speech and religious liberty, and if adopted with the force of law by any bar, would be an unprecedented violation of the First Amendment”). Relatedly, opponents raised the concern that religious organizations or attorneys affiliated with religious organizations will not be able to be selective about clientele or hiring practices. See Letter from Office of the General Counsel, United States Conference of Catholic Bishops, to American Bar Association Standing Committee on Ethics and Professional Responsibility 7-8 (Mar. 10, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/amoses_3_11_16.authcheckdam.pdf (arguing that the proposed text of the Model Rule should make plain that the “rule against discrimination based on religion does not apply to lawyers employed by or representing a religious organization . . . [or] where application of the rule would impede the organization’s right to adopt and enforce religiously-based employee conduct standards”).

37. See *Revised Resolution 109 Adopted by ABA HOD*, AMER. BAR ASS’N, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html (last visited Feb. 25, 2017).

38. AMER. BAR ASS’N, *supra* note 7, at 5 (citing CAL. RULES OF PROF’L CONDUCT r. 2-400 (2015); COLO. RULES OF PROF’L CONDUCT r. 8.4(g) (2016); FLA. RULES OF PROF’L CONDUCT r. 4-8.4(d) (2017); IDAHO RULES OF PROF’L CONDUCT r. 4.4(a) (2014); ILL. RULES OF PROF’L CONDUCT r. 8.4(j) (2016); IND.

the issue by adopting the existing Comment 3 into their rules³⁹; while fourteen jurisdictions do not address the issue in their rules at all.⁴⁰ The SCEPR argued that Resolution 109 aligned the Model Rules with the anti-discrimination and anti-harassment provisions present in the black letter of other codes of conduct, including the Model Code of Judicial Conduct and the ABA Standards for Criminal Justice: Prosecution Function and Defense Function.⁴¹ It also pointed to ample evidence that bias and discrimination is prevalent in the practice of law.⁴²

The SCEPR added the following language in the black letter rule to address concerns regarding a lawyer's ability to make decisions as to whether or not to take on a particular case or client: "This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16."⁴³ It also added the following language to Comment 5 of the rule: "A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice"⁴⁴; and "[a] lawyer may charge and collect reasonable fees and expenses for a representation."⁴⁵ To address concerns that lawyers would be unable to vigorously represent their clients or would be required to reject clients with unpopular views or controversial positions, the SCEPR added the following language: "This paragraph does not preclude legitimate advice or advocacy

RULES OF PROF'L CONDUCT r. 8.4(g) (2016); IOWA RULES OF PROF'L CONDUCT r. 8.4(g) (2012); MD. LAWYERS' RULES OF PROF'L CONDUCT r. 8.4(e) (2016); MASS. RULES OF PROF'L CONDUCT r. 3.4(i) (2016); MICH. RULES OF PROF'L CONDUCT r. 6.5 (2015); MINN. RULES OF PROF'L CONDUCT r. 8.4(g), (h) (2015); MO. RULES OF PROF'L CONDUCT r. 4-8.4(g) (2012); NEB. RULES OF PROF'L CONDUCT r. 8.4(d) (2008); N.J. RULES OF PROF'L CONDUCT r. 8.4(g) (2015); N.M. RULES OF PROF'L CONDUCT r. 16-300 (2016); N.Y. RULES OF PROF'L CONDUCT r. 8.4(g) (2013); N.D. RULES OF PROF'L CONDUCT r. 8.4(f) (2006); OHIO RULES OF PROF'L CONDUCT r. 8.4(g) (2016); OR. RULES OF PROF'L CONDUCT r. 8.4(a)(7) (2015); R.I. RULES OF PROF'L CONDUCT r. 8.4(d) (2007); TEX. RULES OF PROF'L CONDUCT r. 5.08 (2016); VT. RULES OF PROF'L CONDUCT r. 8.4(g) (2009); WASH. RULES OF PROF'L CONDUCT r. 8.4(g) (2015); WIS. RULES OF PROF'L CONDUCT r. 8.4(i) (2017); D.C. RULES OF PROF'L CONDUCT r. 9.1) (2017)).

39. *Id.* at 5-6 (citing ARIZ. RULES OF PROF'L CONDUCT r. 8.4 cmt. (2004); ARK. RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (2014); CONN. RULES OF PROF'L CONDUCT r. 8.4, commentary (2007); DEL. LAWYERS' RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (2010); IDAHO RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (2014); ME. RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (2014); N.C. RULES OF PROF'L CONDUCT r. 8.4 cmt. 5 (2003); S.C. RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (2017); S.D. RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (2004); TENN. RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (2011); UTAH RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (2015); W. VA. RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (2015); WYO. RULES OF PROF'L CONDUCT r. 8.4 cmt. 3) (2014)).

40. *Id.* at 6 (noting that Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania and Virginia do not address the issues of bias, discrimination or harassment in their rules of professional conduct).

41. *Id.*

42. *Id.* (highlighting a 2015 survey by the Florida Bar's Young Lawyer's Division of its female members where 43 percent of respondents reported experiencing gender bias and 17 percent reported experiencing harassment in their career (citing THE FLORIDA BAR, RESULTS OF THE 2015 YLD SURVEY ON WOMEN IN THE LEGAL PROFESSION 9 (2015)).

43. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016); *see also* AMER. BAR ASS'N, *supra* note 7, at 14.

44. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 5 (AM. BAR ASS'N 2016).

45. *Id.* at r. 8.4(g) cmt. 5 (citing Model Rule 1.5(a)).

consistent with these Rules.”⁴⁶ It also included the following language to Comment 5 of the rule: “A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities.”⁴⁷ Responding to concerns regarding jury selection, the SCEPR inserted the following language into Comment 5 of the rule (commonly referred to as the “Batson Sentence”⁴⁸): “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).”⁴⁹ And, finally, in response to concerns of overreach and violations of protected speech or religious liberty, the SCEPR stated:

Proposed new paragraph (g) to Rule 8.4 is a reasonable, limited and necessary addition to the Model Rules of Professional Conduct. It will make it clear that it is professional misconduct to engage in conduct that the 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.⁵⁰

During the House of Delegates meeting, there were no speakers in opposition, and 69 delegates indicated their desire to speak in favor of the resolution.⁵¹ On a final voice vote, Resolution 109 passed.⁵² It is now in the hands of the states to determine whether to adopt Model Rule 8.4(g) and its accompanying comments or to modify their existing rules of professional conduct in response to this change.

II. BIAS IN THE LEGAL PROFESSION & THE JUDICIAL SYSTEM

Though the effort to revise Model Rule 8.4 began over two years prior to approval, Resolution 109 was submitted to the ABA House of Delegates during a turbulent time in our country’s history. With society fractured over issues such as women’s rights, minority rights, immigrant rights and LGBTQ rights, a spotlight has been placed on the concepts of bias and discrimination.⁵³ Our legal system

46. *Id.* at r. 8.4(g); *see also* AMER. BAR ASS’N, *supra* note 7, at 14.

47. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 5 (AM. BAR ASS’N 2016) (citing Model Rule 1.2(b)); *see also* AMER. BAR ASS’N, *supra* note 7, at 14.

48. *See* Peter Geraghty, *ABA Adopts New Anti-Discrimination Rule 8.4(g)*, YOUR ABA, (Sept. 2016), <http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g—at-annual-meeting-in-.html> (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

49. MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 5 (AM. BAR ASS’N 2016); *see also* AMER. BAR ASS’N, *supra* note 7, at 15.

50. AMER. BAR ASS’N, *supra* note 7, at 15.

51. During the House of Delegates meeting to consider Resolution 109, Patricia Lee Refo, Chair of the House of Delegates, announced that 69 salmon slips were submitted to the House of Delegates in favor of Resolution 109, and no salmon slips were submitted in opposition. AMER. BAR ASS’N, *supra* note 22, at 23:15-23:35. A salmon slip is “[a] simple, salmon-colored form, indicating that [a member of the House of Delegates] wish[es] to speak for or against a resolution.” AMER. BAR ASS’N, QUESTIONS AND ANSWERS FOR THE NEW MEMBERS OF THE ABA HOUSE OF DELEGATES (2011).

52. AMER. BAR ASS’N, *supra* note 22, at 26:21-26:32; *see also* Laird, *supra* note 31.

53. *See e.g.*, Emma Brown, *Yale Study Suggests Racial Bias Among Preschool Teachers*, WASH. POST (Sept. 27, 2016), https://www.washingtonpost.com/news/education/wp/2016/09/27/yale-study-suggests-racial-bias-among-preschool-teachers/?utm_term=.bfaf2cc2b819; Susan Chira & Jonathan

likewise faces scrutiny with claims of prevalent bias and discrimination – both in the courtroom and within the make-up of the profession itself.

A. Bias in the Courtroom

On October 11, 2016, the United States Supreme Court heard oral argument in the case of *Peña-Rodriguez v. Colorado*⁵⁴, which garnered media attention to racial bias in jury deliberations.⁵⁵ Peña-Rodriguez, a horse trainer at a racetrack in Colorado, was arrested and charged with one felony count and three misdemeanor counts of sexual assault or contact and harassment of two teenage sisters, daughters of a jockey, who testified that he groped them in a restroom at a barn.⁵⁶ At trial, the prosecution's case rested on the victims' identification of Peña-Rodriguez.⁵⁷ The defense noted the short time the victims saw their attacker and the suggestibility of the identification procedures as the victims identified Peña-Rodriguez through the window of a police cruiser at night on the roadside where

Martin, *After Success of Women's March, a Question Remains: What's Next?*, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/us/after-success-of-womens-march-a-question-remains-whats-next.html>; Alison Leigh Cowan, *Some Same-Sex Couples Are Rushing to Say Their Vows. Just in Case . . .*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/fashion/weddings/same-sex-marriage-gay-couples-donald-trump.html>; Christine Hauser, *Black Doctor Says Delta Flight Attendant Rejected Her; Sought 'Actual Physician,'* N.Y. TIMES (Oct. 14, 2016), https://www.nytimes.com/2016/10/15/us/black-doctor-says-delta-flight-attendant-brushed-her-aside-in-search-of-an-actual-physician.html?_r=0; Eric Lichtblau, *Hate Crimes Against American Muslims Most Since Post-9/11 Era*, N.Y. TIMES (Sept. 17, 2016), <https://www.nytimes.com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html>; Adam Liptak, *Supreme Court to Rule in Transgender Access Case*, N.Y. TIMES (Oct. 28, 2016), <https://www.nytimes.com/2016/10/29/us/politics/supreme-court-to-rule-in-transgender-access-case.html>; Wesley Lowery & Sarah Kaplan, *Black Lives Matter: What's Next*, WASH. POST (July 22, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/07/22/blm-whats-next/?utm_term=.1b9b3a4d22ce; Richard A. Opiel, Jr., Sheryl Gay Stolberg & Matt Apuzzo, *Justice Department to Release Blistering Report of Racial Bias by Baltimore Police*, N.Y. TIMES (Aug. 9, 2016), <https://www.nytimes.com/2016/08/10/us/justice-department-to-release-blistering-report-of-racial-bias-by-baltimore-police.html>; John A. Powell, *Implicit Bias in The Presidential Debate*, HUFFINGTON POST (Sept. 28, 2016), http://www.huffingtonpost.com/john-a-powell/implicit-bias-in-the-pres_b_12226968.html; Liz Robbins, *Even Before Trump Acts on Immigration, New Yorkers Protest*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/nyregion/new-york-protest-trump-immigration-orders.html>; Michael Schwitz et al., *The Scourge of Racial Bias in New York State's Prisons*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html>.

54. Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

55. See Jess Braven, *Supreme Court Weighs Juror Racial Bias Against Candid Deliberations*, WALL ST. J. (Oct. 11, 2016), <http://www.wsj.com/articles/supreme-court-weighs-juror-racial-bias-against-candid-deliberations-1476228224>; Adam Liptak, *Supreme Court Weighs Bias and Secrecy in Jury Deliberations*, N.Y. TIMES (Oct. 11, 2016), <http://www.nytimes.com/2016/10/12/us/politics/supreme-court-bias-jury-deliberations.html>; Nina Totenberg, *Supreme Court Hears Case on Racial Bias in Jury Deliberations*, NPR (Oct. 11, 2016), <http://www.npr.org/2016/10/11/497196091/top-court-hears-case-on-racial-bias-in-jury-deliberations>; see also Turner v. Stime, 222 P.3d 1243, 1249 (Wash. App. 2009) (affirming the grant of a new trial on the grounds that the jury had engaged in misconduct by making explicitly biased comments about the Asian American attorney representing the plaintiffs in a medical malpractice suit).

56. Petition for a Writ of Certiorari at 2-3, Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017) (No. 15-606).

57. *Id.* at 3.

he was detained.⁵⁸ The defense also presented an alibi witness, who testified that Peña-Rodriguez was with him in a different barn when the attack occurred.⁵⁹ Though the jurors initially deadlocked, the judge sent them back into deliberations, informing them that it was their duty to reach a verdict.⁶⁰ After twelve hours of deliberation, the jurors found Peña-Rodriguez guilty on the three misdemeanor charges.⁶¹

After the verdict, defense counsel, consistent with the practice in Colorado and other jurisdictions, spoke to two jurors who revealed that during deliberations another juror expressed bias toward Peña-Rodriguez and his alibi witness because they are Hispanic.⁶² With the trial judge's permission, defense counsel procured affidavits from the jurors, in which they alleged that Juror H.C. stated that he knew the defendant was guilty "because he's Mexican" and because in Juror H.C.'s experience as an ex-policeman, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls."⁶³ The jurors further alleged that Juror H.C. stated that "the alibi witness [wasn't] credible because, among other things, he was 'an illegal.'"⁶⁴

During oral argument, Jeffrey Fisher, Peña-Rodriguez's attorney, argued that racial bias "is a stain on the entire judicial system and the integrity that it's built upon."⁶⁵ Justice Sonia Sotomayor agreed, stating, "I always thought the most pernicious and odious discrimination in our law is based on race."⁶⁶ Justice Elena Kagan, referring to precedents concerning jury selection and race, said "there need to be special rules to address this prevalent and toxic problem in our criminal justice system. . . ."⁶⁷

Justice Kagan's comments⁶⁸ appear to refer in part to *Foster v. Chatman*⁶⁹, a case term in which the Supreme Court in a 7-1 decision recently ruled in favor of a death row inmate in a case concerning racial discrimination in jury selection. Foster, a poor, black teenager with limited mental abilities was found guilty of murder by an all-white jury and spent thirty years on death row.⁷⁰ The State used

58. *Id.*

59. *Id.*

60. *Id.* at 4.

61. *Id.*

62. *Id.*

63. *Id.* at 4-5.

64. *Id.* at 5.

65. Oral Argument Transcript at 14, Peña-Rodriguez v. Colo., No. 15-606, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-606_5iel.pdf.

66. *Id.* at 6.

67. *Id.* at 44.

68. *Id.* ("[I]t seems there are two lines of cases which—in which we've recognized that racial bias in a jury room is an especially important problem, and that there need to be special rules to address that problem. And the first line of cases is the ones that on voir dire say that a lawyer who wants to ask about racial bias on voir dire has to be able to ask about racial bias, and that we've applied to nothing else except for racial bias. And the second is the Batson line of cases where we've said we're going to prevent lawyers from doing what we otherwise allow them to do when striking jurors will lead to—may lead to race bias in the jury room.").

69. *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

70. *Id.* at 1743.

peremptory challenges to strike all prospective black jurors.⁷¹ The Court held that the State's justifications were pre-textual—the reasons for striking two black jurors had equally applied to non-black jurors, who were not struck, tending to provide compelling evidence of “purposeful discrimination.”⁷² It further held that the State's arguments were contradicted by evidence in the record.⁷³ A copy of the prosecutors' files contained, among other documents: (i) a venire list on which all prospective black jurors' names were highlighted with a legend indicating that they “represent[ed] Blacks”; (ii) notes identifying prospective black jurors as “B# 1,” “B# 2,” etc., and with the notation “N” (for “no”) next to each name; (iii) a list titled “definite NO's” containing six names, including all five prospective black jurors; (iv) a document entitled “Church of Christ” with a notation that read “NO. No *Black* Church”; and (v) jury questionnaires by the prospective black jurors on which their race had been circled.⁷⁴ “[T]he shifting explanations, the misrepresentations of the record, and the persistent focus on race in the prosecution's file” established that the strikes of the prospective black jurors “were motivated in substantial part by discriminatory intent.”⁷⁵

But the issue of bias in jury selection has not only arisen with respect to race or ethnicity or in the context of the criminal justice system. In *SmithKline Beecham Corporation v. Abbott Laboratories*, for example, the Ninth Circuit recently held in an antitrust action involving the licensing and pricing of HIV medications that peremptory strikes on the basis of sexual orientation during jury selection violate equal protection.⁷⁶ During jury selection, Abbott Laboratories used its first peremptory strike against the only self-identified gay prospective member of the jury.⁷⁷ The prospective juror referred to his partner three times by the masculine pronoun “he” during voir dire and revealed that he had friends with HIV.⁷⁸ Abbott Laboratories' counsel briefly asked the prospective juror five questions about the drug at issue, but did not ask any questions as to whether he could decide the case fairly and impartially.⁷⁹ Abbott Laboratories' counsel did not provide any justification for his strike when given the opportunity, which provided a strong inference of intentional discrimination, and his subsequent justification was found by the court to not be supported by the record and not credible.⁸⁰

71. *Id.*

72. *Id.* at 1754.

73. *Id.* at 1755.

74. *Id.* at 1743–44.

75. *Id.* at 1754 (internal quotation marks omitted).

76. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 474 (9th Cir. 2014); *see also* *J.E.B. v. Alabama*, 511 U.S. 127, 130–31 (1994) (holding in a paternity and child support action that equal protection forbids intentional discrimination on the basis of gender, particularly where “the discrimination serves to ratify and perpetuate invidious, archaic, and overboard stereotypes about the relative abilities of men and women.”).

77. *SmithKline Beecham Corp.*, 740 F.3d at 474.

78. *Id.*

79. *Id.* at 474–75.

80. *Id.* at 477–78.

The above examples illustrate explicit bias in the courtroom; but studies and recent cases reveal that our courtroom is likewise rife with implicit bias.⁸¹ Leveraging the Implicit Association Test methodology created by Project Implicit, a non-profit organization founded in 1998 by three scientists interested in implicit social cognition,⁸² researchers tested whether law students harbor implicit gender biases related to legal careers and to leadership positions in the legal setting.⁸³ The study found that law students hold implicit associations correlating men and judges and women and paralegals as well as associating men with the workplace and women with the home and family.⁸⁴ Studies further confirm gender bias surrounding courtroom decorum, style and persona⁸⁵; while others highlight entrenched gender stereotypes, such as being mistaken for a secretary or paralegal,

81. “[I]mplicit bias is grounded in a basic human tendency to divide the social world into groups. In other words, what may appear as an example of tacit racism may actually be a manifestation of a broader propensity to think in terms of ‘us versus them’ — a prejudice that can apply, say, to fans of a different sports team.” Daniel A. Yudkin & Jay Van Bavel, *The Roots of Implicit Bias*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/opinion/sunday/the-roots-of-implicit-bias.html>; see also Saleem Reshamwala, *Who, Me? Biased?*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/video/who-me-biased> (describing implicit bias in our society and strategies to de-bias).

82. See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998); PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/> (last visited Feb. 25, 2017) (offering thirteen implicit association tests on topics such as race, weight, disability, gender, skin-tone, sexuality, mental health and even presidential candidates).

83. Justin P. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POLICY 1, 3–4 (2010).

84. *Id.* at 28–29; see also Ed Yong, *6-Year-Old Girls Already Have Gendered Beliefs About Intelligence*, THE ATLANTIC (Jan. 26, 2017), https://www.theatlantic.com/science/archive/2017/01/six-year-old-girls-already-have-gendered-beliefs-about-intelligence/514340/?utm_source=fbia (revealing the results of a study in which Lin Bian, a University of Illinois psychologist, read a story to children aged five to seven about a person who is “really, really smart” and then asked the children to match pictures of four unfamiliar adults—two men and two women—to attributes such as “smart” or “nice” and noting that “[t]he stereotypes that brilliance and genius are male traits is common among adults. In various surveys, men rate their intelligence more favorably than women, and in a recent study of biology undergraduates, men overrated the abilities of male students above equally talented and outspoken women. But Bian’s study shows that the seeds of this pernicious bias are planted at a very early age. Even by the age of 6, boys and girls are already diverging in who they think is smart.”).

85. See DEF. RESEARCH INST., *A CAREER IN THE COURTROOM: A DIFFERENT MODEL FOR THE SUCCESS OF WOMEN WHO TRY CASES*, 10–11 (2004) (revealing in a survey of the judiciary that several judges viewed women who raised their voice in the courtroom as “shrill,” while men were viewed as simply being aggressive, and noting that judges identified one of their biggest challenges was dealing with entrenched biases against women when they exhibit aggressive behavior); Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 LAW & HUMAN BEHAVIOR 533, 549 (1996) (examining the effects of aggressive versus passive speech and finding that women were less successful than men when adopting an aggressive demeanor in securing a “not guilty” verdict from mock jurors for their client); see also Deborah L. Rhode & Barbara Kellerman, *Women and Leadership: The State of Play*, in *WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 1* (Barbara Kellerman & Deborah L. Rhodes eds., 2006) (noting that female litigators must strike a balance between societal stereotypes regarding feminine and masculine traits in order to be perceived favorably in the courtroom; for example, if she is soft-spoken and compassionate, she may be perceived as weak, but if she is too forceful or aggressive, she may be labeled as abrasive).

being called a “term of endearment,” or being treated in a condescending manner.⁸⁶

With respect to implicit bias on the basis of race or ethnicity, another study revealed that potential jurors implicitly associate white males with traits commonly used to depict successful litigators, such as eloquent, charismatic, and verbal.⁸⁷ The study examined whether bias (explicit or implicit) in favor of white lawyers and against Asian American lawyers would alter how people evaluate identical lawyering, simply because of the race or ethnicity of the lawyer.⁸⁸ The researchers intentionally did not examine the effect of race or ethnicity for women attorneys, noting:

Our strategy was not to ignore gender, but to control for it, based on past evidence showing that lawyers are expected to be men rather than women As such, we expected that implicit and explicit stereotypes about ideal lawyers would activate thoughts of White men more than Asian men, but would not much activate thoughts of women of either race.⁸⁹

Relatedly, the Court of Appeals of Idaho recently held that a prosecutorial remark with implicit racial overtones improperly infused race into a criminal trial, violating the defendant’s constitutional rights to due process and equal protection.⁹⁰ In *State v. Kirk*, four white juvenile females ran away from a group home and encountered James D. Kirk, an African-American male, outside of a motel.⁹¹ Kirk invited the girls to spend the night there.⁹² Later the next day, when

86. See DEF. RESEARCH INST., *supra* note 85, at 10–11 (reporting that 70.4 percent of survey participants experienced gender bias in the courtroom); Bibianne Fell, *Gender in the Courtroom: Part 1 – Is Lady Justice at a Disadvantage in the Courtroom?*, NAT’L INST. FOR TRIAL ADVOC.: THE LEGAL ADVOCATE (Mar. 19, 2013), <http://blog.nita.org/2013/03/gender-in-the-courtroom-part-1-is-lady-justice-at-a-disadvantage-in-the-courtroom/> (highlighting a 2005 survey by the State Bar of California Center for Access and Fairness that found that 54 percent of participating female attorneys in California reported experiencing gender bias in the courtroom and a 2004 survey by the Texas State Bar reporting that nine out of ten participating female attorneys report being the target of at least one incident of gender discrimination in the courtroom); see also Kat McFarlane, *Motion to Dismiss: From Catcalls to Kisses, Gender Bias in the Courtroom*, OBSERVER (Jul. 10, 2013), <http://observer.com/2013/07/women-lawyers-sexism-nyc/> (“My adversaries, civil rights attorneys representing plaintiffs in federal court, were overwhelmingly male, and they loved to yell at me, both over the phone and in person. When they didn’t like my strategy, they called my motions ‘stupid.’ When I made a cogent argument that I refused to back down from, I was ‘too sensitive.’”); Elizabeth Olson, *Bar Association Considers Striking “Honeys” From the Courtroom*, N.Y. TIMES, (Aug. 5, 2016) at B1, <https://www.nytimes.com/2016/08/05/business/dealbook/sexual-harassment-ban-is-on-the-abas-docket.html> (“When Lori Rifkin asked the opposing lawyer to stop interrupting her while she questioned a potential witness, he replied: ‘Don’t raise your voice at me. It’s not becoming of a woman.’ The remark drew a rebuke and [a \$250] fine in January [2016] from a federal magistrate who declared that the lawyer had ‘endorsed the stereotype that women are subject to a different standard of behavior than their fellow attorneys.’”).

87. Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myths of Colorblindness*, 7 J. EMPIRICAL LEGAL STUDIES 886, 902 (2010).

88. *Id.* at 912.

89. *Id.* at 893 (internal citations omitted).

90. *State v. Kirk*, 339 P.3d 1213, 1219 (Idaho Ct. App. 2014).

91. *Id.* at 1214.

92. *Id.*

two of the girls were apprehended by police, they told police that they had had sex with Kirk.⁹³ When the other two girls turned themselves in to police a few days later, they stated that they observed Kirk and the two girls having sex.⁹⁴ When Kirk was arrested, he admitted that the girls had been in his motel room, but denied any sexual conduct.⁹⁵ Kirk was charged with lewd conduct with and sexual battery of a minor child.⁹⁶ At trial, the prosecution's case relied primarily on the girls' testimony.⁹⁷ As such, during closing argument, defense counsel focused on the weaknesses of the State's case, namely the lack of physical evidence corroborating the girls' testimony.⁹⁸ In her rebuttal closing argument, the prosecutor sang or recited the lines from "Dixie," stating:

Ladies and gentleman, when I was a kid we used to like to sing songs a lot. I always think of this one song. Some people know it. It's the Dixie song. Right? Oh, I wish I was in the land of cotton. Good times not forgotten. Look away. Look away. Look away. And isn't that really what you've kind of been asked to do? Look away from the two eyewitnesses. Look away from the two victims. Look away from the nurse in her medical opinion. Look away. Look away. Look away.⁹⁹

Defense counsel did not object, and the jury found Kirk guilty on both charges.¹⁰⁰ On appeal, the court noted that "'Dixie' was an anthem of the Confederacy, an ode to the Old South, which references with praise a time and place of the most pernicious racism."¹⁰¹ While the court agreed that the prosecutor's comment may have been innocently made and not intended to appeal to racial bias, the court stated that "a prosecutor's mental state, however innocent, does not determine the message received by the jurors or their individual responses to it. An invocation of race by a prosecutor, *even if subtle and oblique*, may be violative of due process or equal protection."¹⁰²

93. *Id.* at 1214–15.

94. *Id.* at 1215.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1216.

102. *Id.* (emphasis added); *see also* State v. Monday, 257 P.3d 551, 556–58 (Wash. 2011) (finding constitutional infringement where the prosecutor appealed to racial stereotypes or racial bias by pronouncing several times "police" as "po-leese" while conducting examination of African-American witnesses and suggesting that there existed an anti-snitch code among African-Americans); State v. Cabrera, 700 N.W.2d 469, 475 (Minn. 2005) (finding that the prosecutor committed misconduct by wrongfully accusing defense counsel of asserting a racist defense, stating "[a]ffirming this conviction would undermine our strong commitment to rooting out bias, no matter how subtle, indirect, or veiled.").

In February 2017, in another high profile case,¹⁰³ the Supreme Court, in an opinion written by Chief Justice John Roberts, overturned a death-penalty sentence after an expert witness testified that the defendant was likely to commit future crimes because of the color of his skin.¹⁰⁴ During the sentencing phase of a capital murder case, Duane Buck's attorney called Dr. Walter Quijano, a psychologist appointed by the presiding judge to conduct a psychological evaluation of Buck, to elaborate on the seven "statistical factors"—one of which was "race"—he evaluated to determine whether Buck was likely to commit acts of violence in the future.¹⁰⁵ Dr. Quijano's report read, in relevant part: "4. **Race. Black: Increased probability.** There is an overrepresentation of Blacks among the violent offenders."¹⁰⁶ Despite knowing Dr. Quijano's views regarding a correlation between Buck's race and an increased probability of future violence, Buck's attorney successfully admitted Dr. Quijano's report into evidence.¹⁰⁷

During cross-examination, the prosecutor likewise focused on the report, questioning Dr. Quijano about his statistical factors of sex and race: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" Dr. Quijano replied, "Yes."¹⁰⁸ During closing argument, the prosecution stressed this point, stating, "You heard from Dr. Quijano, . . . who told you that . . . the probability did exist that [Buck] would be a continuing threat to society."¹⁰⁹ After two days of deliberations and after requesting to view the "psychology reports" admitted into evidence, the jury returned a sentence of death.¹¹⁰

On appeal, the Supreme Court noted that "Dr. Quijano took the stand as a medical expert bearing the court's imprimatur" and rendered an opinion that "coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing"—would Buck commit terrible acts of violence again?¹¹¹ In answering that question, the jury was asked to engage in a speculative inquiry, and Dr. Quijano appeared to present "hard statistical evidence" to guide their answer.¹¹²

But one thing would never change: the color of Buck's skin. Buck would always be black. And according to Dr. Quijano, that immutable characteristic carried with

103. Matt Ford, 'Some Toxins Can Be Deadly in Small Doses,' THE ATLANTIC (Feb. 22, 2017) <https://www.theatlantic.com/politics/archive/2017/02/supreme-court-duane-buck/517542/>; Adam Liptak, *Citing Racist Testimony, Justices Call for New Sentencing in a Death Penalty Case*, N.Y. TIMES, Feb. 23, 2017; David Savage, *Supreme Court Rejects Use of 'Racial Stereotypes' in Death Penalty Cases*, L.A. TIMES (Feb. 22, 2017), <http://www.latimes.com/politics/washington/la-na-essential-washington-updates-supreme-court-rejects-use-of-racial-1487777756-htmlstory.html>.

104. Buck v. Davis, 137 S. Ct. 759, 767 (2017).

105. *Id.* at 768.

106. *Id.* (emphasis in original).

107. *Id.* at 768–69.

108. *Id.* (internal citations omitted).

109. *Id.* (internal quotations omitted).

110. *Id.*

111. *Id.* at 776–77.

112. *Id.* at 776.

it an “[i]ncreased probability” of future violence. . . . And it was potent evidence. Dr. Quijano’s testimony appealed to a powerful racial stereotype—that of black men as “violence prone.”¹¹³

In holding that Buck demonstrated both ineffective assistance of counsel and entitlement to a reopening of the judgment, the Court noted that “Dr. Quijano’s report said, in effect, that the color of Buck’s skin made him more deserving of execution,” and “[n]o competent defense attorney would introduce such evidence about his own client.”¹¹⁴ Moreover, in acknowledging the dangers of implicit bias in the judicial system, the Court stated that “[i]t would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race.”¹¹⁵

B. Bias in the Legal Profession

As Wendi S. Lazar, Chair of the ABA Commission on Women in the Profession, stated during her presentation on Resolution 109 before the House of Delegates:

[In] our profession, our record [of supporting women and minorities] is . . . abysmal. We have few women equity partners, and fewer minority partners. And in terms of diversity and inclusion, our record is poor. We are losing the war on retention, allowing women and minorities to leave the profession because they feel unprotected and undervalued.¹¹⁶

Despite the fact that women have comprised almost half of the law school graduating class for approximately 20 years,¹¹⁷ women currently represent only 36 percent of the legal profession.¹¹⁸ Relatedly, within private practice law firms, “the representation of women, after making steady incremental progress post-recession, has essentially stalled. . . .”¹¹⁹ In 2015, though women comprised 48 percent of law firm summer associate classes, the percentage of women among the associate ranks now sits at roughly 45 percent, the lowest level since 2006.¹²⁰ Though a small gain over prior years, women now represent just over 21 percent

113. *Id.* (internal citations omitted).

114. *Id.* at 775.

115. *Id.*; see also Arusha Gordon, *Sentenced to Death for Being Black? A Look at Buck v. Davis*, ALLIANCE FOR JUSTICE (Oct. 6, 2016), <http://www.afj.org/blog/sentenced-to-death-for-being-black-a-look-at-buck-v-davis> (noting that the amicus brief filed by the Lawyers’ Committee for Civil Rights Under Law and international law firm Jones Day in support of Buck “provides a summary of research on implicit bias and argues that unconscious stereotypes can be brought to the fore by exposure to racially-tinged triggers, a process known as ‘priming.’ In addition, the brief argues that, because we are psychologically geared to give greater credence to authority figures, implicit biases and priming have a particularly profound impact when invoked by an expert witness.”).

116. *House of Delegates: Rule Against Harassment and Discrimination*, *supra* note 22, at 18:24-18:50.

117. *NALP Diversity Infographic: Women*, NALP (citing NALP, 2015-2016 NALP DIRECTORY OF LEGAL EMPLOYERS (2016)), http://www.nalp.org/nalpdiversityinfographic_women (last visited Feb. 25, 2017).

118. AMER. BAR ASS’N, *LAWYER DEMOGRAPHICS YEAR 2016* (2016) (citing AMER. BAR ASS’N, 2016 NATIONAL LAWYER POPULATION SURVEY (2016)).

119. *NALP Diversity Infographic: Women*, *supra* note 117.

120. *Id.*

of law firm partners.¹²¹ Similarly, women represent just shy of 25 percent of general counsels at Fortune 500 companies.¹²² Among non-equity law firm partners, women represent almost 29 percent; however, only 17.4 percent of equity partners are women,¹²³ and women represent only roughly 5.5 percent of law firm managing partners in the AmLaw 200, the largest law firms in the country.¹²⁴

According to the National Association of Women Lawyers' (NAWL) Ninth Annual Survey on Retention and Promotion of Women in Law Firms:

Men continue to be promoted to non-equity partner status in significantly higher numbers than women. Among the non-equity partners who graduated from law school in 2004 and later, 38 percent were women and 62 percent were men. This data remain vexing in light of the longstanding pipeline of women, as women have been graduating from law school in nearly equal numbers for decades.¹²⁵

Moreover, the gender gap at the leadership levels is striking. "[R]oughly one in five firms still has no woman on their top governing committee."¹²⁶ And, of those firms with female representation on their governance committees, women typically comprise only 22 percent of committee members.¹²⁷

"At the root of retention and advancement disparities, say experts, is the subtle bias that plays out in compensation decisions."¹²⁸ And, it appears that for women the compensation gender gap is widening. In response to NAWL's Ninth Annual Survey, not a single responding law firm reported having a woman as its highest earner.¹²⁹ Rather, the data reflects that female equity partners typically earn 80 percent of what their male counterparts earn¹³⁰ and that men continue to

121. *Id.*; see also Julie Triedman, *A Few Good Women*, AM. LAWYER, Jun. 2015, at 41 ("As more firms expand their nonequity tier, women appear to be getting stuck in what some people call a 'pink ghetto.' That's a major problem: On average, nonequity or income partners may expect to make a third what their equity-tier peers are earning; leadership positions are generally not within their grasp.").

122. See Lydia Lum, *Breaking Barriers, One Person at a Time: MCCA's 17th Annual General Counsel Survey*, DIVERSITY & THE BAR, Nov./Dec. 2016, at 21 (highlighting the increase of four female general counsels over the prior year and noting that Jean Lee, MCCA's president and CEO "considers any growth—even at a modest pace—positive, but pointed out that because women make up more than one-third of the legal profession, there should be no shortage of female job candidates").

123. *NALP Diversity Infographic: Women*, *supra* note 117.

124. Triedman, *supra* note 121, at 46; see also Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues: Report of the Ninth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms*, NAT'L ASS'N OF WOMEN LAWYERS, at 10 (2015) ("Of the 25 firms that reported having a single managing partner, 82 percent were men and only 18 percent were women."); Jake Simpson, *Only 12 BigLaw Firms Have Women Running the Show*, LAW360, Apr. 21, 2015, <http://www.law360.com/articles/645840/only-12-biglaw-firms-have-women-running-the-show> ("Of the 143 firmwide chair and managing partner positions at the top 100 firms in the Law360 400, only 15 are held by women.").

125. NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 124, at 3.

126. Triedman, *supra* note 121, at 38.

127. NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 124, at 10.

128. Triedman, *supra* note 121, at 41.

129. NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 124, at 3.

130. *Id.* at 3; see also Triedman, *supra* note 121, at 41 ("[A]ccording to a survey of more than 2,000 large law firm partners last year by Major, Lindsey & Africa, compensation for male partners was 32 percent higher than that of their female colleagues.").

outpace women in client origination or rainmaking credit¹³¹ and billable rates.¹³² Furthermore, as articulated in an empirical study of the participation of women as lead counsel and trial attorneys in civil and criminal litigation, “women are consistently underrepresented in lead counsel positions and in the role of trial attorney for all but a few types of cases.”¹³³

The statistics are far worse when looking at racial and ethnic bias. According to the 2010 Census, the most recent statistics on racial and ethnic demographics, the legal profession is homogenous, with 88 percent of lawyers identifying as White, 5 percent identifying as Black, 4 percent as Hispanic, 3 percent as Asian Pacific American and less than one percent identifying as all other races or ethnicities.¹³⁴

Despite the fact that minorities comprised almost 27 percent of law school graduates in the class of 2014, minorities are less likely to be employed full-time after graduation than non-minorities and the representation of minorities among lawyers at large law firms in 2015 was less than 14 percent.¹³⁵ On a positive note, though, minority representation among the law firm summer associate ranks is fairly favorable with minorities comprising 31 percent of summer associates in 2015. Minorities now comprise roughly 22 percent of associates at large law firms, which is largely attributable to an increase in the number of lawyers of Asian descent, who now make up nearly 11 percent of all law firm associates.¹³⁶ Representation of African-American associates has declined steadily since 2010, leading to associates of Hispanic origin to slightly outnumber African-American

131. NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 124, at 7–9 (noting that among the responding law firms, 88 percent of the top ten earners were men and 12 percent were women); *see also* Jennifer Smith, *Female Lawyers Still Battle Gender Bias*, WALL ST. J. (May 4, 2014), <http://www.wsj.com/articles/SB10001424052702303948104579537814028747376> (“[T]he problem often occurs . . . among female partners who may bill thousands of hours a year but aren’t regarded as rainmakers—even if their skill, time and energy has helped land a client or significantly expanded that relationship. ‘They are not getting the credit for what they do,’ [Patricia K. Gillette] said, or opportunities to inherit big clients, which at some firms she said ‘tend to get handed down to men.’”).

132. Smith, *supra* note 131 (“[F]emale law-firm partners continue to lag behind their male counterparts when it comes to billing rates, commanding on average 10% less for their services, according to a new analysis of \$3.4 billion in legal work.”).

133. Michele Coleman Mayes, *First Chairs at Trial: More Women Need Seats at the Table*, AMER. BAR FOUND. & AMER. BAR ASS'N COMMISSION ON WOMEN IN THE PROF., at 4 (2015); *see id.* at 13-14 (finding that (i) “[i]n civil cases, men are three times more likely to appear in lead roles than women,” (ii) “women are more likely to be lead counsel representing civil defendants rather than civil plaintiffs,” and (iii) “only a minority of attorneys appearing in criminal cases are women,” and when they do appear, “[w]omen lead counsel in criminal cases represent the government more than twice as often as they represent criminal defendants”).

134. AMER. BAR ASS'N, *supra* note 118 (citing 2010 U.S. CENSUS) (noting that the U.S. Census considers “Hispanic” an ethnicity, and therefore, persons of Hispanic origin can be of any race).

135. NALP *Diversity Infographic: Minorities*, NALP (citing NALP, 2015-2016 NALP DIRECTORY OF LEGAL EMPLOYERS (2016)), http://www.nalp.org/nalpdiversityinfographic_minorities (noting that of the 31 percent of minority summer associates, “17 percent are minority women and 14 percent are minority men”).

136. *Id.*

associates at 4.28 percent.¹³⁷ Minorities represent only 7.52 percent of large law firm partners with minority women representing only 2.5 percent.¹³⁸ Among non-equity law firm partners, minorities represent almost 9.5 percent; however, just over 5.5 percent of equity partners are minorities.¹³⁹

According to NAWL's Ninth Annual Survey:

The typical firm has 105 white male equity partners and seven minority male equity partners, and 20 white female equity partners and two minority female equity partners. Women comprise only 24 percent of Hispanic equity partners, 33 percent of black equity partners, and 29 percent of Asian equity partners. So few Native American and Asian Pacific equity partners were identified that the median reported for both men and women was zero.¹⁴⁰

Moreover, "minorities still represent a tiny percentage of Fortune 500 leaders."¹⁴¹ According to the Minority Corporate Counsel Association's 17th Annual General Counsel Survey, minorities represent just over 11 percent of general counsels, with women of color representing just 4.4 percent.¹⁴² "Women of color are scarce every year in the *MCCA General Counsel Survey*. Typically, three or fewer are newcomer GCs at Fortune® 500 employers, resulting in glaring disparities between these women and their nonminority peers. Nothing indicates the 5-to-1 gap in hiring, promotion and representation will disappear soon."¹⁴³

As a means of understanding bias and inequity in the workplace, the ABA Commission on Women in the Profession, through its Women of Color Research Initiative, surveyed more than 1,000 current and former Fortune 500 in-house attorneys of both genders and all racial and ethnic backgrounds.¹⁴⁴ The survey responses confirmed that "female attorneys of color in the corporate sector face many of the same issues and obstacles as their women of color counterparts in law firms, including the negative impact of bias and stereotypes on their careers."¹⁴⁵ When asked to rate the level of bias they experienced in their careers, 26 percent of respondents "[e]xperienced demeaning comments or other types of harassment" on the basis of gender, while approximately 9 percent experienced such behavior on the basis of race or ethnicity.¹⁴⁶ Respondents reacted similarly to questions on whether they (i) "[e]xperienced one or more forms of discrimination" (26 percent on the basis of gender and 10 percent on the basis of race or ethnicity),

137. *Id.* (noting that Hispanic representation among law firm associate ranks has increased only by one half of one percent since 2009).

138. *Id.*

139. *Id.*

140. NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 124, at 6.

141. Thomas Threlkeld, *Measuring the Progress of the Nation's Legal Leaders: MCCA's 13th Annual General Counsel Survey*, DIVERSITY & THE BAR, Sept./Oct. 2012, at 30.

142. Lum, *supra* note 122, at 20 (noting that the roster of the 56 minority general counsel consists of 34 men and 22 women, and is racially comprised of 28 African-Americans, 13 Hispanic Americans and 15 Asian-Pacific Americans, one of whom is South Asian).

143. *Id.* at 16.

144. ABA COMM'N ON WOMEN IN THE PROF., *VISIBLE INVISIBILITY: WOMEN OF COLOR IN FORTUNE 500 LEGAL DEPARTMENTS VI* (2012).

145. *Id.* at VII.

146. *Id.* at XI (Table I).

(ii) were treated differently than their peers (24 percent on the basis of gender and 9 percent on the basis of race or ethnicity) and (iii) lacked access to informal or formal networking opportunities (27 percent on the basis of gender and 9 percent on the basis of race or ethnicity).¹⁴⁷ With respect to opportunities for advancement, 19 percent of respondents noted that they were denied promotion or advancement and/or missed out on desirable assignments on the basis of gender, while 7 percent were denied an advancement opportunity and 6 percent failed to receive ideal assignments on account of their race or ethnicity.¹⁴⁸

Relatedly, in a study by a leadership consulting firm, sixty lawyers from twenty-two law firms were shown the same research memorandum allegedly from a third-year law student (in actuality, it was written with the help of five law firm partners).¹⁴⁹ Half of the lawyers were told that the memorandum was written by an African-American male student, while the other half were informed that the writer was a Caucasian male.¹⁵⁰ When scoring the memorandum on a five point scale, the lawyers awarded the Caucasian writer a score of 4.1, while the African-American writer was awarded a score of 3.2.¹⁵¹ Moreover, when providing comments, “[t]he white [student] was praised for his potential and good analytical skills, while the black [student] was criticized as average at best and needing a lot of work.”¹⁵²

According to NALP, compared with the general population, our legal profession boasts very few lesbian, gay, bisexual or transgender (LGBT) lawyers. In 2014, NALP collected for the first time data on the sexual orientation of law school graduates, garnering a 38 percent response rate.¹⁵³ Of those self-reporting their sexual orientation, only 4 percent identified as lesbian, gay or bisexual (the number of law school graduates identifying as transgender was too nominal to evaluate separately).¹⁵⁴ “Of these graduates, more than half were male” and only a fourth were lawyers of color.¹⁵⁵ Within large law firms, 5 percent of the 2014

147. *Id.*

148. *Id.*

149. See Debra Cassens Weiss, *Partners in Study Gave Legal Memo a Lower Rating When Told Author Wasn't White*, ABA J. (Apr. 21, 2014), http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases.

150. See *id.*

151. See *id.*

152. *Id.*; see also Dolly Chugh et al., *Professors Are Prejudiced, Too*, N.Y. TIMES (May 9, 2014), <https://www.nytimes.com/2014/05/11/opinion/sunday/professors-are-prejudiced-too.html> (revealing the results of a study through which identical emails, “written in impeccable English, varying only the name of the student sender,” were sent to 6,500 randomly selected professors from 259 American universities from a fictional prospective student seeking guidance about the university’s Ph.D. program, and finding that by sending the messages “from students with names like Meredith Roberts, Lamar Washington, Juanita Martinez, Raj Singh and Chang Huang, names that earlier research participants consistently perceived as belonging to either a white, black, Hispanic, Indian or Chinese student,” “[p]rofessors were more responsive to white male students than to female, black, Hispanic, Indian or Chinese students in almost every discipline and across all types of universities”).

153. NALP *Diversity Infographic: LGBT*, NALP, http://www.nalp.org/nalpdiversityinfographic_lgbt (citing NALP, 2015-2016 NALP DIRECTORY OF LEGAL EMPLOYERS (2016)).

154. *Id.*

155. *Id.*

summer associate class identified as LGBT,¹⁵⁶ and LGBT lawyers comprise only 2 percent of large law firm equity partners.¹⁵⁷ At law firms of 100 or fewer attorneys, LGBT representation in the partnership ranks has notably increased from 0.63 percent in 2009 to over 2 percent in 2015.¹⁵⁸ However, within corporations, representation of LGBT lawyers is unclear as the Minority Corporate Counsel Association has yet to include LGBT individuals as part of its annual general counsel survey.¹⁵⁹

Similarly, less than 2 percent of law school graduates self-identified as having a disability.¹⁶⁰ Graduates with a disability are the least likely to be employed following graduation as compared to men, women, minorities or graduates identifying as lesbian, gay or bisexual.¹⁶¹ Within large law firms, individuals with disabilities account for just over 0.39 percent of associates and 0.30 percent of partners.¹⁶²

III. THE REASONABLE CULTURALLY COMPETENT LAWYER

During the comment period for Resolution 109, the SCEPR received substantial comment regarding the lack of a *mens rea* standard within the initially proposed language.¹⁶³ As a result, the SCEPR revised the final language of the rule, making it professional misconduct if a lawyer engages in conduct that the

156. *Id.*

157. See NAT'L ASS'N OF WOMEN LAWYERS, *supra* note 124, at 6 ("According to the data provided by 56 firms, only 2 percent of female and 1 percent of male equity partners are LGBT."); see also J. Dalton Courson, *Reality Check: Combating Implicit Bias*, ABA SECTION OF LITIGATION LGBT LITIGATOR (Dec. 21, 2012), <http://apps.americanbar.org/litigation/committees/lgbt/articles/fall2012-1212-reality-check-combating-implicit-bias.html> ("Over the course of a career, the effects of implicit decision-making can lead to significant, detrimental consequences for the careers of LGBT lawyers. For example, in a law-firm setting, straight partners handing out choice assignments may subconsciously feel more comfortable working with straight associates and thus seek their assistance first, leading to fewer billable hours and less challenging work for LGBT lawyers. Because LGBT attorneys are less likely to choose traditional, opposite-sex family arrangements, LGBT lawyers and their straight counterparts can have social differences that might reinforce implicit biases in some settings. Or a referral source may have a subconscious concern that an LGBT colleague might be perceived negatively by the client or in a courtroom, and choose to pass the case along to a straight colleague.").

158. NALP, *supra* note 153.

159. Lum, *supra* note 122, at 27 (noting existing efforts to expand the MCCA's annual general counsel survey in future years to include LGBT general counsel).

160. NALP *Diversity Infographic: Disabilities*, NALP, http://www.nalp.org/nalpdiversityinfo-graphic_disabilities (citing NALP, 2015-2016 NALP DIRECTORY OF LEGAL EMPLOYERS (2016)); see also Mark Hansen, *Left Behind: ABA Says Make Disabilities Part of Diversity Mix on Federal Bench*, ABA J. (Apr. 1, 2012), http://www.abajournal.com/magazine/article/left_behind_aba_says_make_disabilities_part_of_diversity_mix_on_federal_ben (highlighting that ABA members who identify themselves as having a disability dropped from 6.87 percent to 4.56 percent).

161. NALP *Diversity Infographic: Disabilities*, *supra* note 159; see also ABA COMM'N ON MENTAL AND PHYSICAL DISABILITY LAW, ABA DISABILITY STATISTICS REPORT 2 (2011) (noting that in a 2009 NALP study law school graduates with disabilities reported earning a mean salary of \$84,018 and a median salary of \$62,973, compared to a mean salary of \$93,454 and a median salary of \$72,000 for male and female graduates of all races and ethnicities).

162. NALP *Diversity Infographic: Disabilities*, *supra* note 159.

163. AMER. BAR ASS'N, *supra* note 7, at 7.

lawyer “knows or reasonably should know” is discrimination or harassment.¹⁶⁴ As both “knows” and “reasonably should know” are defined under Model Rule 1.0(f)¹⁶⁵ and 1.0(j),¹⁶⁶ respectively, the SCEPR, in making this revision, argued that the rule now incorporates a subjective standard that requires ascertaining the lawyer’s actual state of mind (“knows”) and an objective standard that “asks what a lawyer of *reasonable prudence and competence* would have comprehended from the circumstances presented” (“reasonably should know”).¹⁶⁷

Despite the incredible strides made by virtue of Resolution 109, Model Rule 8.4(g) leaves open a critical issue with respect to implementation. The SCEPR claims that the insertion of the *mens rea* standard “supports the rule’s focus on conduct and resolves concerns of vagueness or uncertainty about what behavior is expected of the lawyer.”¹⁶⁸ But the rule does not answer whether lawyers are obligated to become culturally competent or whether it is simply permissible for lawyers to blind themselves to bias and prejudice present in our legal profession to avoid being subject to disciplinary action. In other words, how culturally competent is the “reasonable lawyer”?

A. The Reasonable Lawyer v. The Reasonable Victim

The “reasonable person” is one of the longest-established creations “among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively.”¹⁶⁹ Its application though is not without criticism and controversy.¹⁷⁰ Throughout its history, scholars and the courts have grappled with whether reasonableness should be a normative or positive notion,¹⁷¹ whether the reasonable person should

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

165. *Id.* at r. 1.0(f) (defining “knows” as “denot[ing] actual knowledge of the fact in question” and noting that “[a] person’s knowledge may be inferred from circumstances”).

166. *Id.* at r. 1.0(j) (defining “reasonably should know” “when used in reference to a lawyer [as] denot[ing] that a lawyer of reasonable prudence and competence would ascertain the matter in question”).

167. AMER. BAR ASS’N, *supra* note 7, at 7-8 (emphasis added) (noting the ample precedent for the insertion of a *mens rea* standard, which is currently used in Model Rules 1.13(f), 2.3(b), 2.4(b), 3.6(a), 4.3 (twice) and 4.4(b)).

168. *Id.* at 8.

169. Helow v. Advoc. Gen. for Scot., SC 967, 968 (Scot. 2008); *see also* Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the “Reasonable Woman” Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 775 (1993) (“[T]he ‘reasonable person’ standard has long been accepted by most courts as the correct measure for evaluating allegedly culpable conduct, most notably in negligence cases.”).

170. *See* Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, 14 LEWIS & CLARK L. REV. 1435, 1442-49 (2010) (discussing the controversial and complex nature of court decisions as to whether the reasonable person takes on personal characteristics of the defendant in criminal law cases); Adler & Peirce, *supra* note 168, at 775 (highlighting the controversy surrounding the applicability of the reasonable person standard to sexual harassment cases).

171. *See* Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 NYU L. REV. 323, 324 (2012) (evaluating whether the reasonable person should be “defined in accordance with a particular normative ethical commitment, be it welfare maximization, equal freedom, ethic of care, and so forth, or in accordance with an empirically observed practice or perception”).

be imbued with the characteristics of the defendant in criminal cases or the negligent party in civil cases,¹⁷² or whether reasonableness should be evaluated through the perspective of the victim.¹⁷³ With respect to evaluating the “reasonable person” standard in the context of attorney discipline under Model Rule 8.4(g), the author favors reasonableness as a positive notion—defining the reasonable person “in accordance with an empirically observed practice or perception”¹⁷⁴—and is intrigued by the notion of imbuing characteristics of the victim into the evaluation of reasonableness.

In Professors Robert S. Adler and Ellen R. Peirce’s analysis of the development of the “reasonable woman” standard in connection with sexual harassment cases, they highlighted a dilemma that is likewise prevalent in determining whether an attorney has engaged in harassment or discrimination under the rules of professional conduct. Following the Supreme Court’s decision in *Meritor Savings Bank v. Vinson*,¹⁷⁵ which aimed to provide clarity surrounding the appropriate standard of review for evaluating a “hostile environment” in sexual harassment cases, courts were required to assess whether the allegedly harassing conduct was “both unwelcome and so severe or pervasive that it altered the plaintiff’s working environment.”¹⁷⁶ The question arose, however, from whose perspective—“that of the particular victim, a reasonable person undifferentiated by sex, or a reasonable woman”?¹⁷⁷ Just as with discrimination and harassment governing attorney conduct, Professors Adler and Peirce noted, “[s]ome see it . . . some won’t.”¹⁷⁸

In answering the question, Professors Adler and Peirce point to policy guidance issued by the Equal Employment Opportunity Commission (EEOC) emphasizing that when undertaking the hostile environment analysis “the harasser’s conduct should be evaluated from the objective standpoint of a ‘reasonable person’” and that “Title VII should not serve as a ‘vehicle for vindicating the petty slights suffered by the hypersensitive.’”¹⁷⁹ The EEOC noted

172. See Vitiello, *supra* note 169, at 1447 (arguing that in self-defense cases “courts have not reached consistent positions on drawing the line when faced with a request for an instruction that individualizes the reasonable person”); *but see* MODEL PENAL CODE § 2.02 cmt. at 242 (“But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity.”).

173. See Adler & Peirce, *supra* note 168, at 776 (“While a number of courts adhere to the traditional ‘reasonable person’ standard, others modify the reasonable person standard through a two-step ‘subjective/objective’ approach that explicitly considers the perspective both of the victim and of a reasonable person.”).

174. Miller & Perry, *supra* note 170, at 324.

175. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67-68 (1986).

176. Adler & Peirce, *supra* note 168, at 773-74.

177. *Id.* at 774.

178. *Id.* (internal quotation marks and citations omitted); *see also id.* at 775 (“A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a ‘great figure’ or ‘nice legs.’ The female subordinate, however, may find such comments offensive. Such a situation presents a dilemma for both the man and the woman: the man may not realize that his comments are offensive, and the woman may be fearful of criticizing her supervisor.”) (citing *Lipsett v. Uniy. of Puerto Rico*, 842 F.2d 881, 898 (1st Cir. 1988)).

179. *Id.* at 774 (quoting U.S. Equal Emp’t Opportunity Comm’n, Policy Guidance on Current Issues

though that the reasonable person standard should take into consideration “the victim’s perspective and not stereotyped notions of acceptable behavior.”¹⁸⁰ In line with this guidance and as a result of research suggesting that men and women differ in their judgments of what particular behavior and comments constitute sexual harassment, courts across the country have concluded that the differing social experiences of men and women warrant the application of a “reasonable woman” standard in sexual harassment cases.¹⁸¹

In advocating for the “reasonable women” standard in sexual harassment cases, Professors Adler and Peirce acknowledge a few concerns that are relevant to whether a similar standard should apply to attorney discipline cases. First, as with Model Rule 8.4(g), Title VII bars discriminatory behavior based not only on sex, but on other enumerated protected classifications. Professors Adler and Peirce therefore posed the question: “If the courts are to apply a ‘reasonable woman’ standard in sexual harassment cases, does this suggest that a ‘reasonable victim’ standard will apply in other hostile environment cases?”¹⁸² Professors Adler and Peirce saw no basis for refusing to extend the standard to cases involving other protected classes under Title VII.¹⁸³ And, from a perspective of fairness and consistency, it is only appropriate that courts adopt a similar standard in cases involving, for example, race, sexual orientation, national origin, disability and religion.

However, doing so raises other concerns regarding corporate compliance and individual fairness. As Professors Adler and Peirce note, “[t]ailoring the workplace to avoid offending ‘reasonable Haitians,’ ‘reasonable blacks,’ ‘reasonable Asians,’ reasonable Rastafarians,’ ‘reasonable Muslims,’ as well as ‘reasonable women,’ may prove to be an insuperable task.”¹⁸⁴ Moreover, as articulated in the sexual harassment context, “[t]he adoption of a ‘sex-specific’ standard raises . . . [the question] of whether it is fair to hold males to a standard that, because they are males, they may be unable to appreciate or understand fully.”¹⁸⁵

B. A Middle Ground

Under the traditional “reasonable person” standard, when evaluating attorney discipline cases under Model Rule 8.4(g), it is the author’s contention that

of Sexual Harassment, N-915-050 (BNA) 89 (Mar. 19, 1990)).

180. *Id.*

181. See Adler & Peirce, *supra* note 168, at 777 n.23; Jacquelynne M. Jordan, *Little Red Reasonable Woman and the Big Bad Bully: Expansion of Title VII and the Larger Problem of Workplace Abuse*, 13 WM. & MARY J. OF WOMEN & L. 621, 630-31 (2007); Elizabeth L. Shoenfelt et al., *Reasonable Person versus Reasonable Woman: Does It Matter?*, 10 AM. U.J. GENDER, SOC. POL’Y & L. 633, 634-38 (2002).

182. Adler & Peirce, *supra* note 168, at 822-23.

183. *Id.* at 823 (referencing the extension by the court in *Harris v. Int’l Paper Co.*, 765 F. Supp. 1509 (D. Me. 1991), *vacated in part for other reasons*, 765 F. Supp. 1529 (D. Me. 1991), in its adoption of the “reasonable black person” in determining whether a hostile environment existed in a racial discrimination case).

184. *Id.* at 823-24.

185. *Id.* at 777.

we will fall prey to the concerns raised by the Ninth Circuit in *Ellison v. Brady*.¹⁸⁶ In its rejection of the “reasonable person” standard in favor of the “reasonable woman” standard, the Ninth Circuit stated that “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”¹⁸⁷ As noted above, our legal profession is homogenous, dominated by Caucasian, straight, financially-stable, fully-abled men. As a result, when evaluating whether an attorney has run afoul of the protections established under Model Rule 8.4(g), it is not unreasonable to assume that individual biases may creep into those decisions or that those decisions may be colored by the “stereotyped notions of acceptable behavior” noted by the EEOC.

On the flip side, and from a practical perspective, it appears untenable to apply a “reasonable victim” standard when evaluating the potential discriminatory or harassing behavior of attorneys. Practically speaking, concerns regarding the stifling of free speech, quelling of open debate and forcing of political correctness are not unfounded. These concerns harken back to concerns addressed by the EEOC and the courts regarding hypersensitive victims.

But, as noted above, bias and discrimination are prevalent in our judicial system and legal profession. And, as discussed in further detail below, attorneys are rarely disciplined for discriminatory behavior, unless such behavior is clearly blatant. So, is there some middle ground?

As a profession, we are no strangers to being held to a higher standard of ethics, morality and integrity as compared to the layperson and other professions. “Lawyers have a unique position in society as professionals responsible for making our society better. Our rules of professional conduct require more than mere compliance with the law. Because of our unique position as licensed professionals and the power that it brings, we are the standard by which all should aspire.”¹⁸⁸

Given the unique privilege and power of our legal profession, it is incumbent upon us to take strides to be culturally aware and mindful in the practice of law. As evidenced by the statistical and anecdotal information on bias in the profession, it should no longer be acceptable for lawyers to turn a blind eye and insulate themselves from the obligation to eliminate, as much as feasible, bias, discrimination and prejudice from our legal profession. As such, when evaluating complaints filed under Model Rule 8.4(g) or equivalent state rules, rather than applying a traditional “reasonable lawyer” standard or imbuing the myriad of individual characteristics into a reasonableness analysis under a “reasonable victim” standard, bar counsel and the courts should apply a “reasonable culturally competent lawyer” standard.

Under a “reasonable victim” standard, it is understandably challenging for lawyers to understand the various topics, comments or conduct that may be offensive to each protected category of person. But by applying an overlay of cultural competence, we remove the concerns that disciplinary actions are viewed through the lens of the homogeneous makeup of our profession.¹⁸⁹ At the same

186. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

187. *Id.* at 879.

188. Transcript of American Bar Association Public Hearing, *supra* note 4, at 5-6.

189. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary*

time, we also remove the concerns that lawyers are expected to understand all facets of all cultures and social groups or be subject to disciplinary action. As such, when evaluating whether conduct or comment by an attorney rises to the level of discrimination or harassment under the rules of professional conduct, the “reasonable culturally competent lawyer” standard offers a more balanced approach.

In applying this standard, the question arises as to what characteristics compose the reasonable culturally competent lawyer. As with the application of the reasonableness standard across all aspects of the law, those admittedly difficult decisions shall be left to the wisdom of bar counsel and the courts. However, as a means of addressing arguments of unfairness in applying the proposed “reasonable culturally competent lawyer” standard (i.e., concerns that behavior considered to be innocent by reasonable homogenous lawyers may now give rise to disciplinary action), it is critical, as discussed further below, that we make cultural competency a core aspect of our legal education and practice.

IV. IS THE INSTITUTION OF A RULE ENOUGH?

Despite concerns about the perfectness or eloquence of the language of the rule¹⁹⁰, as a means of fulfilling our obligations as a profession to eliminate bias and discrimination in the judicial system, it is critically important that states adopt Model Rule 8.4(g) or modify their existing rules of professional conduct to comport with the prominence and breadth of the Model Rule. It is the author’s contention though, that merely adopting Model Rule 8.4(g) is not sufficient to rid our legal profession (as much as is practicable) of bias and discrimination.

The history of the Model Code of Judicial Conduct is illustrative of this point. The Model Code of Judicial Conduct was adopted by the House of Delegates on August 7, 1990—just seven years after the first adoption of the Model Rules of Professional Conduct.¹⁹¹ Canon 3B(5) originally required judges to perform their duties “without bias or prejudice.”¹⁹² It also prohibited judges, in the course of their judicial duties, or those subject to the judge’s direction from speaking or behaving in a way that “manifest[s] bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.”¹⁹³ Canon 3B(6) also called upon

Negrophobes, 46 STAN. L. REV. 781, 787-88 (1994) (articulating the construct of the “reasonable racist” in the context of criminal law, noting: “For even if the ‘typical’ American believes that blacks’ ‘propensity’ toward violence justifies a quicker and more forceful response when a suspected assailant is black, this fact is legally significant only if the law defines *reasonable* beliefs as *typical* beliefs. The reasonableness inquiry, however, extends beyond typicality to consider the social interests implicated in a given situation. Hence not all ‘typical’ beliefs are per se reasonable”).

190. Andrew Strickler, *ABA Bias Rule Push Begins Amid Signs of Resistance*, LAW360 (Oct. 11, 2016), <http://www.law360.com/articles/849450?sidebar=true> (highlighting Dane Ciolino’s, a professor at Loyola University New Orleans College of Law, criticisms of Model Rule 8.4(g) on the grounds of “just odd rule drafting” and “sloppy draftsmanship” as reasons states will be slow to adopt the rule).

191. MODEL CODE OF JUD. CONDUCT (AM. BAR ASS’N 1990).

192. *Id.* at Canon 3B(5).

193. *Id.*

judges to require lawyers to refrain from this behavior in “proceedings before the judge.”¹⁹⁴

In 2007, the House of Delegates overhauled the Model Code of Judicial Conduct, creating Rule 2.3 entitled “Bias, Prejudice and Harassment.”¹⁹⁵ This rule incorporated the prior language under the 1990 Model Code concerning bias and discrimination with a few distinct revisions. It retained the requirement that judges must perform their duties “without bias or prejudice,” but clarified that this requirement extended to a judge’s “administrative duties.”¹⁹⁶ It also retained the provision prohibiting judges, and those subject to their direction, from “manifest[ing] bias or prejudice,” including, but not limited to, bias or prejudice on the basis of an illustrative list of protected classes.¹⁹⁷ But it also remedied a significant flaw in Canon 3B(5) by incorporating to the black letter of the rule a prohibition against harassment, which was previously relegated to a discussion in the comments to the Model Code and limited to only sexual harassment.¹⁹⁸ Rule 2.3 also expanded the illustrative list of protected classes to include gender, ethnicity, marital status and political affiliation.¹⁹⁹ Moreover, Rule 2.3 maintained its call upon judges to require lawyers to refrain from bias, discrimination and harassment; however, it included a subtle tweak to the language, clarifying that such behavior shall be monitored in “proceedings before the court.”²⁰⁰

Despite the excellent safeguards to bias, discrimination and harassment in the language of the Model Code,²⁰¹ recent studies show that “people [including judges] can’t help but see the world through the lens of their own experiences.”²⁰²

194. *Id.* at Canon 3B(6).

195. MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS’N 2010).

196. *Id.* at r. 2.3(A).

197. *Id.* at r. 2.3(B).

198. *Id.*; see also ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUD. CONDUCT, REPORT TO THE HOUSE OF DELEGATES 49 (2006) (noting that “[t]he Commission agreed that harassment was a form of bias or prejudice that the Rules proscribed but wanted to expand it beyond sexual harassment to reach other forms of harassment as well”).

199. MODEL CODE OF JUD. CONDUCT r. 2.3(B) (AM. BAR ASS’N 2010); see also ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUD. CONDUCT, *supra* note 197 (describing the Commission’s rationale for adding four new illustrative protected classes).

200. MODEL CODE OF JUD. CONDUCT r. 2.3(C) (AM. BAR ASS’N 2010).

201. See also *id.* at Canon 1 (“A judge shall act at all times in a manner that promotes public confidence in the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”); 28 U.S.C. § 453 (2012) (“Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: ‘I, ____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as __ under the Constitution and laws of the United States. So help me God.’”).

202. Jeff Guo, *Researchers Have Discovered a New and Surprising Racial Bias in the Criminal Justice System*, WASH. POST (Feb. 24, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/24/researchers-have-discovered-a-surprising-racial-bias-in-the-criminal-justice-system/?utm_term=.17afb7d6de30; see also Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 314-15 (2012) (“[D]uring the Senate Judiciary Committee hearing on the nomination of then-nominee, now-Justice Sonia Sotomayor, Senator Jeff Sessions challenged her prior representations that she could be an impartial

In 2012, two sociologists issued the results of their empirical analysis examining “the issues of whether judges are, or can be, ‘impartial’ and whether empathy is compatible with judicial reasoning.”²⁰³ Using a comprehensive dataset on federal employment civil rights cases, the study found that federal judges with different identity characteristics make systematically different decisions; namely, that even when taking “into account pro se status—believing that the economic and legal resources may influence the viability of a claim—white judges tend to dismiss cases involving minority plaintiffs at a much higher rate than cases involving white plaintiffs.”²⁰⁴ Based on another empirical study of federal workplace harassment cases over a twenty-year period, white judges are half as likely as black federal judges to rule in favor of people alleging racial harassment in the workplace.²⁰⁵ Conversely, a 2016 study revealed the existence of negative in-group bias (preferential treatment of one’s own group) in our judicial system leading to harsher punishments toward group members.²⁰⁶ The study evaluated juvenile court cases in Louisiana between 1996 and 2012, and found that, all else being equal, black juveniles who are randomly assigned to black judges, and white juveniles who are randomly assigned to white judges, are five percent more likely to get incarcerated (as opposed to being placed on probation) and receive longer sentences (approximately 14 percent longer).²⁰⁷

Additional studies similarly highlight ways in which bias and discrimination creep into our judicial process.²⁰⁸ In 2014, three political scientists examined 4,519

judge by quoting remarks she made the day before: ‘You have repeatedly made this statement: ‘I accept the proposition that a difference there will be by the presence of women and people of color on the bench, and that my experiences affect the facts I choose to see as a judge.’’ Without hesitation, Sotomayor responded, ‘the point that I was making was that our life experiences do permit us to see some facts and understand them more easily than others.’” (citing Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary, 111th Cong. 84 (2009)).

203. Weinberg & Nielsen, *supra* note 201, at 315; *see also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816-21 (2001) (finding after surveying 167 federal magistrate judges that judges were as susceptible to cognitive illusions that produce systemic errors in judgment as lay decision makers).

204. Weinberg & Nielsen, *supra* note 201, at 346.

205. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1141 (2009); *see also* J. J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (concluding after completing an implicit association test on race with 133 judges that judges, just like all other lay persons, showed a moderate-to-large degree of implicit racial bias, which can potentially lead to racially disparate decisions and outcomes).

206. Briggs Depew, Ozkan Eren and Naci Mocan, *Judges, Juveniles and In-Group Bias*, NAT’L BUREAU OF ECON. RES. 4 (2016).

207. *Id.*

208. Relatedly, research from the University of Virginia School of Medicine and Sam Houston State University has revealed that forensic psychologists and psychiatrists, who like judges are ethically bound to be impartial when performing evaluations or providing expert opinions in court, may actually be influenced by which party is issuing their paycheck. *Bias in the Courtroom: Study Finds Impartial Experts not so Impartial*, UVA TODAY (Apr. 12, 2013), <https://news.virginia.edu/content/bias-courtroom-study-finds-impartial-experts-not-so-impartial> (“In a real-world experiment, experts who

votes in 516 First Amendment cases resolved by the Supreme Court from 1953 to 2010 to determine whether “justices defend the speech they hate.”²⁰⁹ Based on the study’s findings, it appears they do so rarely. Rather, “Supreme Court justices are opportunistic supporters of free speech. That is, liberal (conservative) justices are supportive of free speech when the speaker is liberal (conservative).”²¹⁰ In other words, both liberal and conservative justices are more likely to vote in support of a speaker if the speaker shares their ideology. In recognizing the importance of the study, Erwin Chemerinsky, dean of the University of California, Irvine School of Law, said, “[I]t offers an explanation for justices’ behavior in First Amendment cases and shows how much justices’ ideology influences the speech they are willing to protect.”²¹¹

A recent study by Professor Maya Sen of the John F. Kennedy School of Government at Harvard University revealed that on average black federal district court judges have a roughly 10 percent greater likelihood of being reversed by the federal appellate courts compared to the reversal rate for their white colleagues.²¹² Professor Sen analyzed the reversal rate for 1,054 federal district court judges from 2000 to 2012 and controlled for “previous professional and judicial experience, educational background, qualification ratings assigned by the American Bar Association, and differences in appellate panel composition.”²¹³ Professor Sen found that “[c]lose to 3,000 federal court decisions would have been upheld if black judges were overturned” at the same rate as white judges.²¹⁴ An explanation for the study’s results is that “appeals panels somehow implicitly rely on the race of the lower-court judge in reaching decisions.”²¹⁵

In its study on bias in California Supreme Court cases, the State of California Commission on Judicial Performance highlighted twenty-four instances from 1970 through 2011 in which a California Supreme Court judge was publically admonished, reprimanded or removed from office for engaging in bias, discrimination or harassment on the basis of race, ethnicity and/or national origin.²¹⁶ As an example, the study noted a 2011 case in which a judge was publically admonished for remarking in open court in a criminal case involving African-American defendants that “the only thing that would make the

believed they were working for prosecutors tended to conclude that sexually violent offenders were at greater risk of re-offending than did experts who thought they were working for the defense.”);

209. Lee Epstein et al., *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment*, 1, 7 (2014) (unpublished manuscript), <http://epstein.wustl.edu/research/InGroupBias.pdf>.

210. *Id.* at abstract.

211. Adam Liptak, *For Justices, Free Speech Often Means ‘Speech I Agree With’*, N.Y. TIMES (May 6, 2014), at A15, https://www.nytimes.com/2014/05/06/us/politics/in-justices-votes-free-speech-often-means-speech-i-agree-with.html?_r=1.

212. Maya Sen, *Is Justice Really Blind? Race and Reversal in US Courts*, 44 J. OF LEGAL STUD. S187, S188 (2015).

213. *Id.* at S187.

214. *Id.* at S221.

215. *Id.* at S217.

216. STATE OF CAL. COMM’N ON JUD. PERFORMANCE, JUDICIAL MISCONDUCT INVOLVING BIAS: ETHNICITY, NATIONALITY, RACE, GENDER AND SEXUAL ORIENTATION 2–5 (2015).

defendants plead was for him to come out in a white sheet and pointy hat.”²¹⁷ The study also outlined fifteen instances from 1973 through 2012 in which a California Supreme Court judge was disciplined for engaging in sexual harassment or gender bias,²¹⁸ and two instances of bias based on sexual orientation, including a case in which a judge chastised a minor’s parent in open court and in the presence of the minor, blaming the parent’s sexual orientation as the cause of the minor’s misbehavior.²¹⁹

Similarly, several appellate courts have found bias by immigration law judges on the basis of ethnicity or national origin. Such bias manifested in the manner in which the judge treated the immigrant, for example, speaking “in an argumentative, sarcastic, and sometimes arguably insulting manner, engag[ing] in bullying until the petitioner was ground to bits, appear[ing] unseemly, intemperate, and even mocking or [taking] on the role of a prosecutor anxious to pick holes in the petitioner’s story.”²²⁰ So, notwithstanding almost thirty years of our judiciary being governed by a model code with strong language to safeguard against bias and discrimination, such behavior is still prevalent among our judiciary.

When evaluating attorney discipline cases, it likewise appears that a mere rule is not sufficient to bring about pronounced change. As noted above, twenty-five jurisdictions have already adopted into the black letter of their rules of professional conduct provisions to protect against bias, discrimination and/or harassment in the legal profession.²²¹ Moreover, the rules of professional conduct in thirteen jurisdictions have incorporated an anti-discrimination provision by tracking the language under Model Rule 8.4(d) and its preexisting Comment 3.²²² Though such jurisdictions are disciplining attorneys for discriminating and harassing conduct,²²³ in comparison to the statistical and anecdotal information

217. *Id.* at 2.

218. *Id.* at 5–7.

219. *Id.* at 7.

220. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 424 (2011) (internal quotation marks and citations omitted); *see also id.* at 420–21 (highlighting examples of explicit bias within the immigration court system where immigration law judges have been rebuked by appellate courts for “launch[ing] into a diatribe against Chinese immigrants lying on the witness stand, spanning twelve pages of transcript, telling an asylum applicant, the whole world does not revolve around you and the other Indonesians that just want to live here because they enjoy the United States, or, without any explanation, labeling asylum applicants as religious zealots whose exercise of religion was offensive to a majority” (internal quotation marks and citations omitted)).

221. *See supra* note 38.

222. *See supra* note 39.

223. *See e.g., Iowa Sup. Ct. Att’y Disciplinary Bd. v. Moothart*, 860 N.W.2d 598 (Iowa 2015) (disciplining a lawyer for sexually harassing four female clients and one female employee); *In re Kratz*, 851 N.W.2d 219 (Wis. 2014) (disciplining a district attorney for sending over 25 texts of a sexual nature to a victim of domestic violence); *In re Griffith*, 838 N.W.2d 792 (Minn. 2013) (disciplining a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made sexual advances to students); *In re McGrath*, 280 P.3d 1091 (Wash. 2012) (disciplining a lawyer for sending two ex parte communications to the trial judge inquiring as to whether he was going to believe an alien (the opposing party was Canadian) or a U.S. citizen (his client was his wife)).

regarding bias and discrimination in the profession, they are doing so only in a limited number of instances.

Unfortunately, a comprehensive analysis of the number of complaints filed under the anti-discrimination and anti-harassment provisions in every state, and if relevant, the resulting disciplinary action remains elusive. Many states do not maintain public records of the complaints filed, but rather only publish the records of those cases leading to disciplinary action.²²⁴ Relatedly, many states retain their disciplinary records in a manner that is challenging to search – whether manually due to paper filing systems or request procedures²²⁵ or electronically due to limited search criteria or cumbersome search mechanisms via online portals.²²⁶

Regardless, the disciplinary records from several states prove instructive. When evaluating attorney discipline records and cases in Illinois over the last ten years,²²⁷ only three disciplinary actions and sanctions have been brought against

224. See e.g., *Grievance Decisions by Name*, STATE OF CONN. JUD. BRANCH, <https://www.jud.ct.gov/sgcdecisions/> (last visited Feb. 25, 2017) (providing access only to disciplinary decisions); but see, e.g., *Annual Reports*, MINN. LAWYERS PROF'L RESPON. BD., <http://lprb.mncourts.gov/AboutUs/Pages/AnnualReports.aspx> (last visited Feb. 25, 2017) (providing links to annual reports from 1999 to 2016 that include statistics on the number of complaints filed and closed each year).

225. In attempting to secure the disciplinary records pertaining to the anti-discrimination and/or anti-harassment provisions in each state, Alabama, Alaska, Nevada, Rhode Island and South Dakota do not retain their disciplinary records in an electronic format accessible to the public and therefore require the submission of records requests, which often necessitate labor-intensive manual searches by the relevant entity to locate the disciplinary actions responsive to the records requests.

226. See e.g., *Orders and Opinions Regarding Final Resolution in Attorney Disciplinary Cases*, JUD. BRANCH OF IND., <http://www.in.gov/judiciary/4730.htm> (last visited Feb. 25, 2017) (requiring users to search by year and then click on links for each decision issued that year to determine whether a decision pertains to a particular disciplinary rule); MINN. LAWYERS PROF'L RESPON. BD., *supra* note 223 (providing links to annual reports from 1999 to 2016 that provide a limited overview of the disciplinary process, including a chart of "Areas of Misconduct" that is challenging to decipher whether any "areas" apply to disciplinary actions under the anti-discrimination and anti-harassment provisions articulated in Rules 8.4(g) or (h) of the Minnesota Rules of Professional Conduct); *Public Orders Imposed Against Nebraska Attorneys*, STATE OF NEB. JUD. BRANCH, <https://supremecourt.nebraska.gov/attorney-sanctions> (last visited Feb. 25, 2017) (requiring users to search exclusively by the last name of the disciplined Nebraska attorney); *Disciplinary Quarterly Reports*, THE DISCIPLINARY BD. OF THE N.M. SUP. CT., <https://www.nmdisboard.org/QuarterlyReport.aspx> (last visited Feb. 25, 2017) (providing links to quarterly reports from 2007 to 2016 that contain brief summaries of certain disciplinary actions, but no easy mechanism for identifying cases that that violate this aspect of the rule); *Annual Reports on the Committee on Professional Discipline*, N.Y. STATE BAR ASS'N, <http://www.nysba.org/copdannualreports/> (last visited Feb. 25, 2017) (providing links to annual professional discipline reports from 2002 to 2015 that provide only high level statistics of discipline cases with no information regarding the number of cases violating a particular rule of conduct); *OPC History of Annual Reports*, UTAH STATE BAR, <http://www.utahbar.org/opc/opc-history-of-annual-reports/> (last visited Feb. 25, 2017) (providing links to annual reports that provide a high level summary of the number of cases and disciplinary decisions, but no relevant information regarding the number of cases violating a particular professional rule of conduct).

227. When using the Attorney Registration & Disciplinary Commission's online portal, the author inputted the following separate search terms: (i) "8.4(j)"; (ii) "'8.4(d)' & 'bias'"; (iii) "'8.4(d)' & 'race' OR 'sex' OR 'religion' OR 'national origin' OR 'disability' OR 'age' OR 'sexual orientation' OR 'socioeconomic status'"; (iv) "'8.4(a)(5)' & 'discriminatory'"; and (v) "'8.4(a)(9)(A)'." See *Disciplinary Reports and Decisions Search*, SUP. CT. OF ILL., https://www.iardc.org/rd_database/rulesdecisions.html

attorneys for discrimination or harassment under the current Illinois Rules of Professional Conduct 8.4(d) and 8.4(j) as well as their predecessors Illinois Rules of Professional Conduct 8.4(a)(5) and 8.4(a)(9)(A).²²⁸ Similarly, within the last ten years, only four Indiana attorneys have been subject to disciplinary action for discriminatory conduct in violation Rule 8.4(g) of the Indiana Rules of Professional Conduct.²²⁹ In Connecticut, only one attorney has been disciplined for violating Rule 8.4(4) of the Connecticut Rules of Professional Conduct.²³⁰ Moreover, not a

(last visited Feb. 25, 2017). Illinois Rule of Professional Conduct 8.4(d) and its Comment 3 tracks the language of Model Rule 8.4(d) and its preexisting Comment 3. ILL. RULE OF PROF'L CONDUCT r. 8.4(d), cmt. 3 (2017). Illinois Rule of Professional Conduct 8.4(j) makes it professional misconduct to:

[V]iolate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

Id. at r. 8.4(j). Illinois Rules of Professional Conduct 8.4(a)(5) and 8.4(a)(9)(A) were the predecessors to Rules 8.4(d) and 8.4(j), which were adopted in 2009. See ILL. RULE OF PROF'L CONDUCT r. 8.4(a)(5), 8.4(a)(9)(A) (2008).

228. *In re Contee Jones, Jr.*, M.R. 26769, 2014PR00045 (Ill. Att'y Registration and Disciplinary Comm'n Sept. 12, 2014) (disbarring an attorney for sexually exploiting two associates, one legal assistant and one assistant office manager employed by his law firm over whom he had supervisory authority); *In re Garnati*, M.R. 26733, 2013PR00124 (Ill. Att'y Registration and Disciplinary Comm'n Sept. 12, 2014) (disciplining a prosecutor for making improper and racially-based arguments during the prosecution of a murder case where both the defendant and the victim were black); *In re Hoffman*, No. 08 SH 65 (Ill. Att'y Registration and Disciplinary Comm'n Jun. 23, 2010) (disciplining an attorney for making a derogatory comment to opposing counsel based on his religion).

229. *In re Barker*, 993 N.E.2d 1138 (Ind. 2013) (suspending an attorney for accusing a mother in a dissolution action of being in the country illegally); *In re Kelley*, 925 N.E.2d 1279 (Ind. 2010) (publically reprimanded an attorney for making gratuitous comments about a company representative's sexual orientation); *In re McCarthy*, 938 N.E.2d 698 (Ind. 2010) (suspending an attorney for inappropriately using the word "nigger" in an email to his client); *In re Campiti*, 937 N.E.2d 340 (Ind. 2009) (disciplining a lawyer who at a child support modification hearing made disparaging references to the fact that the mother was not a U.S. citizen). As noted above, see *supra* note 225, Indiana's online portal requires users to search by year and then click on individual links for each decision issued that year to determine the nature of the disciplinary action. As such a methodology is time consuming and inefficient, the author completed a Westlaw search to locate the above-referenced disciplinary actions under Rule 8.4(g). Rule 8.4(g) provides that it is professional misconduct for an Indiana lawyer to:

[E]ngage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

IND. RULE OF PROF'L CONDUCT r. 8.4(g) (2017).

230. *In re Mayo*, No. 08-0767 (Conn. Statewide Grievance Comm. Sept. 18, 2009) (disciplining an attorney for failing to steer his practice away from the representation of women in domestic relations matters to protect them from unwanted and inappropriate sexual advances). Rule 8.4(4) of the

single attorney has been sanctioned for discrimination or harassment in the last seven years under Rule 8.4(d) of the Maine Rules of Professional Conduct,²³¹ nor within the last decade under Rule 8.4(d) of the Arkansas Rules of Professional Conduct²³², Rule 8.4(g) of the Washington Rules of Professional Conduct²³³ or Rule 8.4(i) of the Wisconsin Rules of Professional Conduct.²³⁴

Connecticut Rules of Professional Conduct and its commentary tracks the language of Model Rule 8.4(d) and its preexisting Comment 3. CONN. RULE OF PROF'L CONDUCT r. 8.4(4), commentary (2017). Using Connecticut's online portal, the author conducted a Boolean search using the terms "8.4(4)" and "bias," "prejudice," "harass," "race," "sex," "religion," "disability," "national origin" and "socioeconomic." STATE OF CONN. JUD. BRANCH, *supra* note 223.

231. Rule 8.4(d) of the Maine Rules of Professional Conduct and its commentary tracks the language of Model Rule 8.4(d) and its preexisting Comment 3. ME. RULE OF PROF'L CONDUCT r. 8.4(d), cmt. 3 (2017). In searching Maine's disciplinary records, the author used the search term "8.4(d)" and reviewed all resulting disciplinary files. *Court and Grievance Decisions*, STATE OF ME. BD. OF OVERSEERS OF THE BAR, <http://www.mebaroverseers.org/tools/whatsnew/index.php> (last visited Feb. 25, 2017).

232. Rule 8.4(d) of the Arkansas Rules of Professional Conduct tracks the language of Model Rule 8.4(d). ARK. RULE OF PROF'L CONDUCT r. 8.4 (2017). Its Comment 3 however 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 discriminatory conduct, when directed towards litigants, jurors, witnesses, other lawyers, or the court, including race, sex, religion, national origin, or any other similar factors, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. 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. This subdivision does not prohibit a lawyer from representing a client accused of committing discriminatory conduct.

Id. at cmt. 3. In searching for disciplinary actions under Rule 8.4(d), the author reviewed the annual reports issued by the Arkansas Supreme Court's Committee on Professional Conduct and Office of Professional Conduct from 2006 to 2015. *Professional Conduct Forms*, ARK. JUD., <https://courts.arkansas.gov/administration/professional-conduct/annual-reports> (last visited Feb. 25, 2017).

233. Rule 8.4(g) of the Washington Rules of Professional Conduct makes it professional misconduct for a lawyer to:

[C]ommit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, or marital status. This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16.

WASH. RULE OF PROF'L CONDUCT r. 8.4(g) (2017). Using Washington's Discipline Notice Search online portal to search for disciplinary actions under Rule 8.4(g), the author, in the dropdown menu for "RPC Code," selected "8.4 (g) – Commit a Discriminatory Act" and received the following result message: "Your search returned no results. Please try again." *Discipline Notice Search*, WASH. STATE BAR ASS'N, <https://www.mywsba.org/DisciplineNotice.aspx> (last visited Feb. 25, 2017).

234. Rule 8.4(i) of the Wisconsin Rules of Professional Conduct for Attorneys makes it professional misconduct for a lawyer to "harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i)." 20 WIS. STAT. ANN. § 8.4 (West 2017). In searching for violations of Rule 8.4(i) by Wisconsin attorneys, the author reviewed all documentation generated when searching for "8.4" through Wisconsin's online portal.

Though it is possible that the adoption of Model Rule 8.4(g) or similar revisions to equivalent state rules of professional conduct will lead to a surge of disciplinary actions, it is unlikely. With a homogenous legal profession coupled with a lack of infrastructure for cultural competency training, the likelihood of holding attorneys accountable for bias and discriminatory behavior that is less than blatant is nil. Even the SCEPR in its revised report on Resolution 109 to the House of Delegates admitted that “[t]he supreme courts of the jurisdictions that have black letter rules with antidiscrimination and anti-harassment provisions have not seen a surge in complaints based on these provisions.”²³⁵ As a result, though the adoption of the anti-discrimination and anti-harassment provisions as laid out in Model Rule 8.4(g) was (and is) a necessary step, it is insufficient alone to lead to marked change within our legal profession. In short, it is incumbent upon our profession to become more culturally competent and, therefore, it is critical that we develop the necessary infrastructure to facilitate cultural competency education.

V. A CULTURAL COMPETENCY INFRASTRUCTURE

In light of the evidence of bias and discrimination in our legal profession, it should no longer be tolerated for lawyers to ignore and insulate themselves and our profession from the obligation to make cultural competency a core aspect of our legal education and practice. It is also imperative that members of our legal profession, bar counsel and the courts hold lawyers (and judges) accountable for violating the rules. As “the legal profession is largely self-governing,”²³⁶ it is incumbent upon us to remedy our system where it is flawed—and a lack of a cultural competency infrastructure is a glaring flaw in need of a remedy. This Article therefore focuses on three key reforms: the revision of the ABA’s law school accreditation standards; the implementation of continuing legal education requirements; and the inclusion of language in the Model Code of Judicial Conduct requiring cultural competency education.

Wisconsin Attorneys’ Professional Discipline Compendium, WIS. CT. SYS., <https://compendium.wicourts.gov/app/search> (last visited Feb. 25, 2017).

235. AMER. BAR ASS’N, *supra* note 7, at 6. According to Wendi S. Lazar, Chair of the ABA Commission on Women in the Profession, the lack of complaints is also attributable to fear of retaliation by victims of discrimination and harassment:

Many of my clients have experienced harassment and discrimination. Some of them have been victim to behaviors that are unspeakable here today. Others have been asked to leave firms because they have complained about sexual harassment and have been retaliated against because they have complained about race discrimination. What they all have in common is that they knew that complaining or suing in court would not give them justice—not in our profession, sadly. The barriers to justice are just too costly for those starting out in their careers or those deeply invested. Rather they would be further victimized, asked politely, or not so politely, to leave the firm, sign a release, receive a severance payment or less, or worse be forced to leave without a trace maybe because they just wouldn’t have sex with the senior partner at their firm. She leaves, he stays. Business as usual.

House of Delegates: Rule Against Harassment and Discrimination, *supra* note 22, at 15:50-16:55.

236. MODEL RULES OF PROF’L CONDUCT, AM. BAR ASS’N, Preamble & Scope [10] (2016).

A. Cultural Competency in Legal Education

While the author applauds the ABA for its efforts in passing Model Rule 8.4(g), the author urges the ABA to go one step further and revise its accreditation standards to require law schools to offer, and law students to complete, cultural competency coursework. Under Standard 302 of the ABA's Standards and Rules of Procedures for Approval of Law Schools:

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following:

- (a) Knowledge and understanding of substantive and procedural law;
- (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- (d) Other professional skills needed for the competent and ethical participation as a member of the legal profession.²³⁷

Interpretation 302-1 provides additional guidance regarding Standard 302(d), stating that "other professional skills are determined by the law school and may include skills such as, interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation."²³⁸ As a result, law schools may, but are not required to, ensure that their law students receive cultural competency education prior to graduation.

This is incongruous with the ABA's mandate under Goal III to "[e]liminate bias in the legal profession and the justice system."²³⁹ Education on bias—both explicit and implicit—and ways in which to de-bias²⁴⁰ are critical to ensuring that

237. AMER. BAR ASS'N, SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015-2016 15 (2015).

238. *Id.* at 16.

239. ABA *Mission and Goals*, *supra* note 24.

240. A variety of different strategies exist for attempting to de-bias, including educating oneself on becoming more self-aware and mindful, exposing oneself to a variety of individuals from diverse backgrounds and social groups to break down any stereotypes or preconceived notions about those individuals, attempting to step into the shoes of individuals from diverse backgrounds and social groups to see the world from their perspective, undertaking a self-audit of one's social networks and social media choices and changing one's approach to the way one interacts with people by reducing one's cognitive load and consciously thinking through why one is making certain decisions or reacting a certain way towards certain individuals. See Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY AND LAW 47 (Kimberly Holt Barrett & William H. George eds., 2005); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); *Building Community Trust: Improving Cross-Cultural Communication in the Criminal Justice System*, AM. BAR ASS'N CRIM. JUSTICE SECTION, http://www.americanbar.org/groups/criminal_justice/pages/buildingcommunity.html (last visited Feb. 25, 2017). The New York Times video series entitled *Who, Me? Biased?* highlights, as an example, criticism that because orchestras were heavily male-dominated, bias existed in the audition selection process. Reshamwala, *supra* note 81. In response, orchestras put up a screen to attempt to hide the gender of the individual auditioning. *Id.* At first, placing screen between the musician and the selection committee did not alter

we, as lawyers and legal professionals, are able to eradicate, to the extent possible, discrimination and prejudice from our profession. And, such education should begin when an individual matriculates into a law school.

As such, the ABA should propose to the House of Delegates a revision to the accreditation standards that adds a new paragraph to Standard 302. Though the exact language of the new paragraph may require further study, the language would require law schools to establish learning outcomes that include competency in the knowledge and understanding of behaviors, attitudes and policies that enable the legal profession to work (or prevent the legal profession from working) effectively in cross-cultural situations. In other words, the requirement would obligate law schools to ensure that law students develop “the ability to adapt, work and manage successfully in new and unfamiliar cultural settings”²⁴¹ and to create effective working relationships with clients from different backgrounds or social groups.²⁴²

B. Cultural Competency as a Bar Licensure Requirement

“Attaining cultural competence is an ongoing process requiring a long term educational commitment. One does not ‘become competent’ at any one point. Instead, he or she becomes more knowledgeable, aware and sensitive in an attempt to reach competence.”²⁴³ As such, continual cultural competency education is necessary to manifest a cultural shift within our profession.

Under the ABA’s existing Model Rule for Continuing Legal Education (CLE), a comment encourages participation in CLEs covering bias and discrimination:

Regulatory systems should require that lawyers, as part of their mandatory continuing legal education either through a separate credit or through existing ethics and professionalism credits, complete programs related to the promotion of

much the percentage of men and women hired by orchestras. *Id.* That is until it became apparent that before some of the auditions, there was a “click, click, clicking” sound of high heels. *Id.* Once orchestras asked those auditioning to remove their shoes, however, the percentage of men and women hired became almost equal. *Id.*; see also *id.* (encouraging individuals to de-bias by completing a self-audit to detect implicit bias by asking a friend to observe their behavior or by taking stock of the cultural groups their friends either fall into or self-identify with).

241. Sylvia Stevens, *Cultural Competency: Is There an Ethical Duty?*, OR. STATE BAR BULLETIN, Jan. 2009, <https://www.osbar.org/publications/bulletin/09jan/barcounsel.html>.

242. The manner in which law schools undertake to comply with this requirement will of course vary across law schools, however, law schools may choose to develop a series of courses addressing cultural competence, infuse cultural competence into existing courses and clinics or develop a mandatory seminar, akin to the mandatory ethics courses at many law schools. See e.g., Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. REV. DISC. 140, 149–56 (2014) (proposing the basic structure of a seminar on cultural competence and the incorporation of Professors Susan Bryant and Jean Koh Peters’ Five Habits); Cynthia M. Ward & Nelson P. Miller, *The Role of Law Schools in Shaping Culturally Competent Lawyers*, MICH. BAR J., Sept. 2011, at 4 (describing a scenario in which faculty could incorporate cultural competency training into a doctrinal course by noting “[c]ontracts professors could encourage students to consider whether the ‘meeting of the minds’ and ‘contract formation’ analyses change when you have parties of different culture.”).

243. POVERTY, HEALTH AND LAW: READINGS AND CASES FOR MEDICAL-LEGAL PARTNERSHIP 144 (Elizabeth T. Tyler et al. eds., 2011).

racial and ethnic diversity in the legal profession, the promotion of full and equal participation in the profession of women and persons with disabilities, and the elimination of all forms of bias in the profession. Lawyers who practice in states and territories that do not require mandatory continuing legal education are encouraged to complete such programs as part of their continuing legal education.²⁴⁴

However, currently, only California, Minnesota and Oregon require specific “elimination of bias” programming for attorneys to maintain their bar licenses within those states,²⁴⁵ while Hawaii, Kansas, Illinois, Maine, Nebraska, Washington and West Virginia allow such programming to count towards attorneys’ ethics and professionalism requirements.²⁴⁶

On December 21, 2016, after two years of discussion and drafting, the ABA Standing Committee on Continuing Legal Education (SCOCLE) announced its decision to propose a new Mandatory CLE (MCLE) Model Rule and submit a resolution and report for the 2017 Midyear Meeting of the ABA House of Delegates.²⁴⁷ In the proposal, the SCOCLE overhauled the rule and provided more specific guidance on continuing education on bias and diversity in the black letter of the rule. The new Section 3, entitled MCLE Requirements and Exemptions, requires under part (A):

- (2) As part of the required Credit Hours referenced in Section 3(A)(1), lawyers must earn Credit Hours in each of the following areas:
- (a) Ethics and Professionalism Programming (an average of at least one Credit Hour per year);
 - (b) Mental Health and Substance Use Disorders Programming (at least one Credit Hour every three years); and

244. MODEL RULES FOR CONTINUING LEGAL EDUC. § 2 cmt. (AM. BAR ASS’N 2004).

245. AMER. BAR ASS’N, STANDING COMM. ON CONTINUING LEGAL EDUC., COMM’N ON LAWYER ASSISTANCE PROGRAMS, LAW PRACTICE DIVISION, REPORT TO THE HOUSE OF DELEGATES 9 n.12 (2017); *see also* CAL. RULES FOR MINIMUM CONTINUING LEGAL EDUC. r. 2.72(A)(2) (2014) (requiring California bar members to complete one hour every three years of continuing legal education that “deal[s] 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”); MINN. RULES OF THE BD. OF CONTINUING LEGAL EDUC. r. 2(G), 6(B), 9(B)(2) (2016) (requiring Minnesota bar members to complete every three years at least two hours of “elimination of bias” courses, which it defines as “a course directly related to the practice of law that is designed to educate attorneys to identify and eliminate from the legal profession and from the practice of law biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation.”); OR. MINIMUM CONTINUING LEGAL EDUC. RULES AND REGULATIONS r. 3.2(d), 5.15(c) (2017) (requiring Oregon bar members to complete in alternate reporting period at least three hours of “access to justice” courses, which it defines as an activity “directly related to the practice of law and designed to educate attorneys to identify and eliminate from the legal profession and from the practice of law barriers to access to justice arising from biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation”).

246. AMER. BAR ASS’N, *supra* note 244, at 9 n.12.

247. *See Proposed MCLE Model Rule*, AMER. BAR ASS’N, https://americanbar.qualtrics.com/jfe/form/SV_9MioUUDJCatwy5D (posting a notification on December 21, 2016, welcoming comments and questions to the proposed model rule).

- (c) Diversity and Inclusion Programming (at least one Credit Hour every three years).²⁴⁸

As part of its rationale, the SCOCLE noted that “Diversity and Inclusion Programming” will “educate lawyers about implicit bias, the needs of specific diverse populations, and ways to increase diversity in the legal profession.”²⁴⁹ In February 2016, the ABA House of Delegates recognized the importance of such programming when it adopted Resolution 107, which encourages jurisdictions with MCLE requirements to “include as a separate credit programs regarding diversity and inclusion in the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias.”²⁵⁰ The new MCLE Model Rule requires the implementation of a stand-alone credit requirement²⁵¹; however, under Comment 4 of the new Section 3, the SCOCLE recognized that some jurisdictions may prefer to require and accredit such programs under their ethics and professionalism requirement.²⁵² The SCOCLE noted though that “it is extremely unlikely that one hundred percent of lawyers will elect to take Diversity and Inclusion Programming if it is not specifically required, which is why [the new] Model Rule recommends a stand-alone requirement.”²⁵³

In February 2017, the House of Delegates approved the proposed new MCLE Model Rule, which was another bold and necessary step towards the elimination of bias and discrimination in our profession. The author therefore urges states to adopt the new rule or modify their existing CLE requirements for attorneys to maintain their legal license to comport with the recommendations of the new rule with respect to mandating through a stand-alone requirement training on bias, diversity and cultural competency.

C. A Fair & Impartial Judiciary

With respect to the judiciary, Rule 2.3 of the Model Code of Judicial Conduct already provides significant protections against bias, prejudice and discrimination. It requires that a judge must perform the duties of the judicial office “without bias or prejudice.”²⁵⁴ It further requires that a judge, in the performance of judicial duties, shall not, nor shall those subject to the judge’s direction, speak or behave in a way that “manifest[s] bias or prejudice” or engage in “harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. . . .”²⁵⁵ It also calls upon judges to require lawyers to refrain from this

248. MODEL RULE FOR MINIMUM CONTINUING LEGAL EDUC. § 3, 3(A)(2) (AM. BAR ASS’N 2017).

249. AMER. BAR ASS’N, *supra* note 244 at 8.

250. AMER. BAR ASS’N, RESOLUTION 107 (ADOPTED) (2016).

251. MODEL RULE FOR MINIMUM CONTINUING LEGAL EDUC. § 3 (AM. BAR ASS’N 2017).

252. *Id.* at cmt. 4.

253. AMER. BAR ASS’N, *supra* note 244 at 9 n.12.

254. MODEL CODE OF JUD. CONDUCT r. 2.3(A) (AM. BAR ASS’N 2010).

255. *Id.* at r. 2.3(B).

behavior in “proceedings before the court. . . .”²⁵⁶ The comments to the rule also provide critical guidance, noting that:

Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.²⁵⁷

But as the preamble to the Model Code of Judicial Conduct articulates:

An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law.²⁵⁸

It is therefore the author’s opinion that the judiciary should be held to the highest standard of care possible. Despite the comprehensiveness of the language of the Model Code, plenty of evidence exists to suggest that the judiciary is not living up to the standard of care articulated within the code.²⁵⁹ As Judge Bernice B. Donald, a federal judge for the United States Court of Appeals for the Sixth Circuit, stated, “We view our job functions through the lens of our experiences, and all of us are impacted by biases and stereotypes and other cognitive functions that enable us to take shortcuts in what we do.”²⁶⁰

[J]udges, like the rest of us, carry implicit biases [T]hese implicit biases can affect judges’ judgment, at least in contexts where judges are unaware of a need to monitor their decisions [C]onversely, when judges are aware of a need to monitor their own responses for the influence of implicit [] biases, and are motivated to suppress that bias, they appear able to do so.²⁶¹

As such, with a minor tweak to the black letter of the Model Code requiring the judiciary to engage in regular and frequent cultural competency training,

256. *Id.* at r. 2.3(C).

257. *Id.* at r. 2.3 cmt. 2.

258. *Id.* at preamble ¶ 1.

259. *See supra* Part IV.

260. Terry Carter, *Implicit Bias is a Challenge Even for Judges*, ABA J. (Aug. 5, 2016), http://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges.

261. Rachlinski, *supra* note 187, at 1221; *see also* Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 THE JUDGES’ J. 20 (Fall 2015) (acknowledging as an immigration judge and president of the National Association of Immigration Judges that “we must accept that we are all the product of environmental factors that imbue some degree of implicit bias and do our best to counteract its destructive effects,” stressing that “[i]t is important that judges address the dilemma of implicit bias vigorously” and advocating for “structural support, which means more time off the bench through adjustment of dockets and reduced distractions. . .to ensure that [judges] have sufficient time on their dockets to address the constant fight against implicit bias.”).

which in turn will help them become more conscious of monitoring their own biases, and with a conscious effort by the profession to hold judges accountable under Rule 2.3, it is feasible that judges will be able to more readily fulfill this high standard.²⁶²

VI. CONCLUSION

In the face of a legal profession and judicial system replete with bias, discrimination and harassment, the American Bar Association is to be commended for tackling a controversial topic and successfully inserting an anti-discrimination and anti-harassment provision into the black letter of our rules of professional conduct. But, we must not now become complacent and believe our work is done. Though a vital step, adoption of Model Rule 8.4(g) alone is insufficient to spark the much-needed cultural shift within our legal profession.

It is now time to ensure that the states not only adopt Model Rule 8.4(g) or revise their existing rules of professional conduct to comport with the breadth and depth of conduct governed by the rule; but also hold members of the profession accountable for violating the rule. In doing so, it is imperative that bar counsel and the courts avoid evaluating attorney discipline complaints under Model Rule 8.4(g) through the lens of the “reasonable lawyer,” which is unfortunately a homogenous being capable of infusing bias into such decisions. Rather, when evaluating the *mens rea* standard in attorney discipline cases, the relevant decision makers should invoke the “reasonably culturally competent lawyer,” a mindful, self-aware lawyer of “reasonable prudence and [cultural] competence.”

Moreover, it is time for us to critically evaluate our cultural competency infrastructure—or lack thereof—and raise the bar of attorney and judicial conduct. The proposed reforms—the revision of law school accreditation standards, the implementation of continuing legal education requirements and the inclusion of mandatory cultural competency training for the judiciary—will, if implemented, encourage all lawyers and judges to become more self-aware and mindful and ignite the necessary cultural shift in our profession. But most importantly, the proposed reforms will remove, as much as practical, bias, prejudice, discrimination and harassment from our legal profession and judicial system, helping to fulfill our promise that “justice is blind.”

262. See Carter, *supra* note 259 (“Judges are tasked with being the most impartial members of the legal profession. [At the ABA Annual Meeting], more than 50 of them discussed how this isn’t so easy to do—and perhaps even impossible when it comes to implicit bias. But working to overcome biases we don’t recognize is a job that is as necessary as it is worth doing.”).