ETHICS OF AUTHENTICITY

FACULTY:

Genesis Fisher, Esq. – Mediator at JAMS (Moderator)

Robin H. Gise, Esq. – Mediator & Arbitrator at JAMS (Panelist)

Professor Meredith R. Miller, Esq. – Professor at Touro University, Jacob D. Fuchsberg Law Center (Panelist)

Hon. James (Jim) E. Snyder (Ret.) – Mediator & Arbitrator at JAMS

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The Ethics of Authenticity

Presented by the LGBT Bar Association of Greater New York
Hosted and sponsored by JAMS

October 29, 2024 | **6:30-7:30 p.m.** | **New York, NY**

Description

This program will focus on the unique ethical considerations neutrals and practitioners face as members of communities historically excluded from the practice of law, including, but not limited to, LGBTQ+ people.

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Agenda

1. **What is an attorney's individual duty to prohibit discrimination – who is protected and when?** – 20 minutes
    a. ABA Model Rule 8.4(g)
    b. NY Ethics Rule 8.4
2. **Institutional/organizational duties** – 15 minutes
    a. Legal challenges DEI program and practices are on the rise. How can Organizations and Practitioners promote Fairness, Justice, and the Improvement of the Profession in light of the recent decisions challenging affirmative action (*Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. UNC)*, and the *rescission of Chevron deference*?
3. **How can an attorney or neutral share their identities in an appropriate manner?** – 15 minutes
    a. Pride Flag Displays and Impartiality
        i. NY Judicial Ethics Opinion 23-147
    b. Professional Norms of Building Rapport with Neutrals and Colleagues
    c. Proper Use of Pronouns and Professional Obligations to Clients
        i. NY Judicial Ethics Opinion 21-09
4. **Conclusion / Q&A** – 10 minutes

Genesis Fisher, Esq. (she/her)
Mediator at JAMS

Genesis Fisher, Esq., is a seasoned mediator who is highly adept at guiding corporations, organizations, entrepreneurs, and families through the resolution of matters that are often emotionally sensitive and highly contentious. At JAMS, she mediates matters in multiple practice areas including, but not limited to, employment and labor, civil rights, family disputes in pre- and post-litigation stages, and business and commercial matters.

She is the former director of the Mediation Clinic at New York Law School and, as an adjunct professor since 2014, has taught more than a dozen courses on negotiation and legal writing skills at New York Law School, Rutgers Law School, and John Jay College. She is certified by the New York State Unified Court System to teach a 24-Hour Initial Mediation training for those seeking to mediate within the state court system. At JAMS, she is a member of a professional team that provides ADR skills training to JAMS neutrals on a year-round basis.

Ms. Fisher also provides early intervention support to help businesses and NGOs deal with tough issues. Her workshops and facilitated dialogues have helped over 3000 people in six countries communicate better and create effective solutions.

She is a member of the Eastern District of New York Mediation Panel. She also serves on the Inaugural Advisory Committee for the Center for Creative Conflict Resolution, which provides conflict resolution services for over 70 New York City agencies. She was a FINRA Arbitrator, and Immediate Past President of the Board of Directors for the Association for Conflict Resolution, Greater New York.

Ms. Fisher is a sought-after speaker who has addressed conflict resolution, mediation techniques, and other legal topics before the New York State Bar Association, American Bar Association, Labor and Employment Relations Association (LERA), Academy of Professional Family Mediators, Federal Bar Association, National Employment Lawyers Association, New York (NELA-NY), and the Association for Conflict Resolution (ACR-GNY), among other professional associations. She has also lectured on the topics of mediation, negotiation and dispute resolution at New York University School of Law, Columbia School of Law, Fordham Law School, Cardozo Law School, Brooklyn Law School, New York Law School, and Howard Law School

Prior to her career in dispute resolution, Ms. Fisher spent a decade as a criminal defense trial attorney where she represented thousands of clients in high stakes litigation. She began her legal career at the Southern Poverty Law Center working on national civil rights issues and advocating for the improvement of jail conditions and state women's prison reform. Ms. Fisher graduated from Smith College and New York University School of Law.

Robin H. Gise, Esq. (she/her)
Mediator & Arbitrator at JAMS

Robin H. Gise is a skilled mediator and arbitrator on the JAMS panel who is known for her extensive experience resolving employment disputes. She has mediated and arbitrated hundreds of employment disputes involving Fortune 500 companies, government agencies, and small to mid-sized businesses.

Ms. Gise has handled virtually every type of employment dispute, including discrimination claims (age, gender, race, religion, national origin, disability, sexual orientation, and pregnancy), hostile work environment, sexual assault and sexual harassment, wrongful termination and retaliation, whistleblower claims, executive compensation, and Fair Labor Standard Act (FLSA)/wage and hour claims, including class and collective actions. In addition, Ms. Gise regularly mediates business and commercial matters, disputes under the New York Adult Survivors Act and civil rights and accessibility matters.

Ms. Gise is highly respected for her breadth of knowledge and her ability to grasp the elements of complex disputes with ease. She is a skilled communicator who is particularly attentive to the personal, financial, and practical concerns of parties. She is especially adept at handling emotionally charged conflicts with empathy and sensitivity. She has a well-deserved reputation for persistence, objectivity, the ability to foster trust and confidence in parties.

Ms. Gise is an Adjunct Professor of Law at Columbia Law School and Cardozo Law School where she teaches negotiation. A sought-after writer and speaker in the ADR field, Ms. Gise's articles have been published in the *New York Law Journal*, *Bloomberg BNA*, the *ABA Dispute Resolution Magazine*, and many other publications. She has also been featured on JAMS podcasts discussing mediation and neurodiversity in the workplace. Her speaking engagements include presentations before the Practising Law Institute (PLI), the New York State Bar Association's Commercial & Federal Litigation Section, the Labor and Employment Relations Association (LERA), the New York City Bar Association's Employment Law Institute, and the National Employment Lawyers Association in New York (NELA-NY). She is a member of the Eastern District of New York's ADR Advisory Council and regularly mentors new mediators.

Prior to becoming a neutral, Ms. Gise was a litigator practicing labor and employment law at Cohen, Weiss and Simon LLP and Kaiser, Saurborn & Mair, P.C. She graduated from Oberlin College and obtained her law degree from Fordham University School of Law.

For Ms. Gise's official biography, please see https://www.jamsadr.com/gise/

Professor Meredith R. Miller, Esq. (she/her)

Professor at Touro University, Jacob D. Fuchsberg Law Center

Meredith R. Miller joined the Touro University, Jacob D. Fuchsberg Law Center faculty in Fall 2006 after serving as an Honorable Abraham L. Freedman Fellow and Lecturer in Law at Temple University School of Law in Philadelphia. Professor Miller teaches Contracts I, Contracts II, Business Organizations I, Business Organizations II, Employment Law and Workplace Law in Global Context. Her teaching has twice been recognized by her students with a "Professor of the Year" award.

Prior to teaching, Professor Miller served as a law clerk to the New York Court of Appeals. She also worked as an associate at Proskauer Rose LLP in New York City, where she litigated commercial and pro bono matters and served as a pro bono advisor to first year associates. Professor Miller continues to consult and co-counsel with other attorneys on complex litigation, arbitration and appeals in corporate, commercial and employment matters. She is trained as a mediator and serves as an arbitrator for FINRA. She also provides transactional representation to employees, freelancers and emerging and established businesses.

Professor Miller is a past president of LeGaL, the LGBT Bar Association of Greater New York, where she served on the board for a decade. She is also a past president of the Network of Bar Leaders, where she continues to serve on its Leadership Advisory Council. By appointment of the Chief Judge of the New York Court of Appeals, she is a member of the Richard C. Failla LGBTQ Commission of the New York State Courts.

She received her J.D., cum laude, from Brooklyn Law School, where she was an Executive Articles and Research Editor of the Brooklyn Law Review, an Edward V. Sparer Public Interest Fellow and a Richardson Merit Scholar. She earned an LL.M. in Legal Education from Temple University Law School.

Professor Miller's scholarly writing focuses on contract doctrine and theory, employment law and closely-held business law. Her scholarship has helped shape the path of the law, and has been cited in leading Contracts casebooks and by a number of courts, including the Maryland Supreme Court and the Supreme Judicial Court of Massachusetts.

Hon. James (Jim) E. Snyder (Ret.) (he/him)

Mediator & Arbitrator at JAMS

Hon. James E. Snyder (Ret.) served for 16 years as an Associate Judge of the Circuit Court of Cook County, Illinois.

Prior to retirement in 2023, Judge Snyder presided over a Circuit Court of Cook County, Law Division commercial litigation calendar including bench and jury proceedings in matters involving employment, construction, government and whistleblower claims, *qui tam* and statutory false claims, professional negligence including attorney-client and accountancy, contract, lending and debt.

He served as the Supervising Judge of the Circuit Court of Cook County, Law Division Mandatory Arbitration program and as Supervising Judge of the Circuit Court's Municipal Jury Trial section.

James E. Snyder has been a licensed attorney in the State of Illinois since 1988. In 2007 he was appointed to Circuit Court of Cook County by the Illinois Supreme Court.

He is a graduate of the Northern Illinois College of Law (1988) and was awarded their Distinguished Service Award in the year 2000 and 2021. He presented the college's Francis X. Reilly Lecture on Professionalism in 2023.

He has a Bachelor of Arts in History from Northern Illinois University (1987) and has been recognized with the College of Liberal Arts Distinguished Alumni Award.

He served as the General Counsel of the Illinois Human Rights Commission (June 2000 – March 2007).

He served as a founding member and General Counsel of the Chicago Area Gay and Lesbian Chamber of Commerce and the AIDS Care housing initiative and chairperson of the Fair Illinois ballot initiative defensive.

He has served as a member of the Illinois Supreme Court's Committee on Judicial Education, Committee on Judicial Performance Evaluation, Committee on Judicial Mentoring Program and as Chair of the Illinois Supreme Court Advanced Judicial Academy.

Judge Snyder is a former president of the Illinois Judges Association of the Alliance of LGBTQ Judges. He has been awarded the Illinois Judges Association Lifetime Achievement Award and has been awarded the Chicago Bar Association John Paul Stevens Award for public service.

Judge Snyder works with JAMS alternative dispute resolution services as an Arbitrator, Mediator and Special Master.

He currently serves on the faculty of the National Judicial College. He is a member of the Board of Directors of the Legal Council for Health Justice and the Rules Committee of the Democratic National Committee.

The Ethics of Authenticity

Rules as a Basis of Ethical Opportunity

October 29, 2024

I. The "Old Rule" 2006

> (g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance.[4] A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding;

II. ABA 2016 Model

Model adopted by several states, including New York.

Discussions and controversies.

III. New York Rule 8.4(g) 2024

N.Y. Comp. Codes R. & Regs. Tit. 22 § 1200.8.4
Rules of Professional Conduct
June 1, 2024

8.4 (g) (A lawyer shall not) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:

(1) **unlawful** discrimination, or
(2) **harassment,** whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, **gender identity, gender expression**, marital status, status as a member of the military, or status as a military veteran.
(3) "Harassment" for purposes of this Rule, means physical contact, verbal conduct, and/or nonverbal conduct such as gestures or facial expressions that is:
a. directed at an individual or specific individuals; and
b. derogatory or demeaning.

Conduct that a reasonable person would consider as petty slights or trivial inconveniences does not rise to the level of harassment under this Rule.

(4) This Rule does not limit the ability of a lawyer or law firm to, consistent with these Rules:

a. accept, decline, or withdraw from a representation;

b. express views on matters of public concern in the context of teaching, public speeches, continuing legal education programs, or other forms of public advocacy or education, **or in any other form of written or oral speech protected** by the United States Constitution or the New York State Constitution; or c. provide advice, assistance, or advocacy to clients.

(5) "Conduct in the practice of law" includes:

a. representing clients;

b. interacting with witnesses, coworkers, court personnel, lawyers, and others while engaging in the practice of law; and

c. operating or managing a law firm or law practice; or

New York Rule 8.4(h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

IV. **7 Bold Points**

Terms or ideas where New York has varied from ABA.

V. **Affirmative Duty**

8.4(g) Old Rule: “A lawyer shall not”…

8.4(g) 2024: “It is professional misconduct for a lawyer to”…

2025 “A lawyer shall”?

Opinion 23-147

December 14, 2023

Digest: A judge may wear a rainbow pin or flag on the judge's personal clothing, and display like pins, flags or signs in the judge's chambers.

Rules: 22 NYCRR 100.2; 100.2(A); 100.3(A); 100.3(B)(1); 100.3(B)(4)-(5); 100.3(B)(8); 100.4(A)(1)-(3); Opinions 23-133; 20-101; 19-50; 05-101.

Opinion:

The inquiring judge is a member of an association of LGBTQ+ judges. The judge asks if it is ethically permissible to (1) wear the judicial association's pins or generic rainbow pins on the judge's "personal clothing" and (2) display rainbow flags or LGBTQ+ pins or signs in the judge's chambers.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and promote public confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2[A]). A judge's duties take precedence over all their other activities (*see* 22 NYCRR 100.3[A]). Thus, all extra-judicial activities must be compatible with judicial office and must not (1) cast reasonable doubt on their capacity to act impartially as a judicial official; (2) detract from the dignity of judicial office; or (3) interfere with the performance of judicial duties (*see* 22 NYCRR 100.4[A][1]-[3]). Further, a judge must diligently discharge official duties "without bias or prejudice against or in favor of any person" (22 NYCRR 100.3[B][4]). The prohibition includes "words or conduct" manifesting "bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socioeconomic status" (*id.*). A judge must not be swayed by partisan interests, public clamor or fear of criticism (*see* 22 NYCRR 100.3[B][1]), must avoid impermissible comment on pending or impending matters in any court of the United States or its territories (*see* 22 NYCRR 100.3[B][8]), and must not demonstrate a predisposition to deciding cases in a specific way (*see* 22 NYCRR 100.2[A]).

In Opinion 19-50, we advised that a judge may not display a rainbow flag or rainbow heart sticker "on the bench or in the courtroom." We stated that consistent with Sections 100.3(B)(4)-(5), the courthouse and courtroom "must convey to the public that everyone who appears before the court will be treated fairly and impartially." While we recognized the "good intentions" underlying the judge's proposal to convey "assurances of welcome or acceptance to historically marginalized or disadvantaged groups" by displaying their symbols in the courtroom, we nevertheless concluded that "giving symbolic assurances for

particular groups in the courtroom will not promote public confidence in the judiciary's impartiality" (*id.*).

That opinion, however, only addressed displays in a courtroom, which we characterized as "a uniquely public place in which cases are adjudicated" (*id.* at fn 1). We expressly refrained from comment on similar displays in a judge's "private chambers" or on a judge's "personal adornment" (*id.*). We do so now.

1. Personal Adornment

Our court system's mission is "to deliver equal justice under the law and to achieve the just, fair and timely resolution of all matters that come before the courts" (https://www.nycourts.gov/whatsnew/mission.shtml). In turn, the court system's Richard C. Failla LGBTQ Commission is dedicated to promoting "equal participation and access throughout the court system by all persons regardless of sexual orientation, gender identity, or gender expression" (https://ww2.nycourts.gov/ip/LGBTQ/mission.shtml). A review of the LGBTQ+ judicial association's website suggests that its mission is consistent with these objectives.

In our view, a judge's decision to display on their personal clothing a pin with the judicial association's logo or a pin with a rainbow flag in no way detracts from the dignity of judicial office (*see* 22 NYCRR 100.4[A][2]). Nor does such a display cast reasonable doubt on the judge's capacity to act impartially (*see* 22 NYCRR 100.4[A][1]). It does not manifest bias or prejudice based on age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability or marital status, nor does it suggest a predisposition to decide cases in a specific way. In short, we can see no appearance of impropriety.

Inasmuch as displaying a rainbow pin on the judge's personal clothing does not violate any applicable rules of ethics, we conclude it is ethically permissible (*cf.* Opinion 23-133 [quasi-judicial official may wear a lapel pin displaying flags of one or more nations at non-court events]).

2. Judge's Chambers

In our view, display of rainbow flags and symbols in a courtroom or on the bench calls for a different ethical analysis than a display in a judge's personal chambers. In contrast to a courtroom, where cases are adjudicated and there is a presumption of public access, chambers may for some purposes "be considered generic in nature," like an office, "rather than representing a specifically judicial location" (Opinion 05-101). We have thus said judges may display photographs and other memorabilia of current or former elected officials in chambers, although the

judge must "carefully consider the content, context and circumstances under which [they] are to be displayed" (Opinion 20-101).

Given our conclusion that it is ethically permissible to display a rainbow pin on the judge's personal clothing, we likewise see no ethical prohibition on displaying rainbow pins, flags or signs in the judge's personal chambers (*cf.* Opinion 23-133 [quasi-judicial official may display another sovereign nation's flag at their residence]).

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GOING BEYOND RULE 8.4(G): A SHIFT TO ACTIVE AND CONSCIOUS EFFORTS TO DISMANTLE BIAS

Meredith R. Miller[*]

During the summer of 2020, the United States appeared to be at an inflection point in confronting its history of anti-black racism and white supremacy. After George Floyd's brutal murder by police, millions of Black Lives Matters protestors took to the streets across the United States.[1] These protests, and the media coverage they received, called for a national conversation about race in the United States. There were, and continue to be, many lessons from the Black Lives Matter protests, but one significant takeaway was the popularization of the concept of *anti-racism*.[2] A resonant and repeated theme emerged: it is not enough to passively claim to *not be a racist*.[3] To sincerely commit to dismantling the systems perpetuating racial inequality, one must be an *anti-racist*.[4]

This shift away from passive neutrality has transformative potential. Professor Robert J. Patterson told *Business Insider*: "Anti-racism is an active and conscious effort to work against multidimensional aspects of racism."[5] Professor Ibram X. Kendi, who popularized the concept in his 2019 best-selling book *How to Be an Antiracist*, describes anti-racism as a shift from passive and unconscious action to intentional, overt action.[6] Malini Ranganthan, a faculty team lead at the Antiracist Research and Policy Center, explained that anti-racism involves "taking stock of and eradicating policies that are racist, that have racist outcomes. . . and making sure

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[*] Professor of Law, Jacob D. Fuchsberg Law Center, Touro College; principal, Miller Law, PLLC.
[1] Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (Jul. 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.
[2] *See* Anna North, *What it means to be anti-racist*, VOX (Jun. 3, 2020), https://www.vox.com/2020/6/3/21278245/antiracist-racism-race-books-resources-antiracism.
[3] *Id.*
[4] *Id.*
[5] Hillary Hoffower, *What it really means to be an anti-racist and why it's not the same thing as being an ally*, BUSINESS INSIDER (June 8, 2020), https://www.businessinsider.com/what-is-anti-racism-how-to-be-anti-racist-2020-6.
[6] IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 23 (One World 2019) ("To be an antiracist is a radical choice in the face of human history, requiring a radical reorientation of our consciousness.").

that ultimately, we're working towards a much more egalitarian, emancipatory society."[7]

This conversation, and the changing frame of reference, illuminates a path forward for the legal profession as it strives for racial justice and gender equality. Frankly, it teaches that the current approach – one thought by opponents to go too far – actually misses the mark by not going far enough.

In 2016, the American Bar Association ("ABA") revised the Model Rules of Professional Conduct (the "Model Rules") to add subsection (g) to Rule 8.4. Rule 8.4(g) (the "Rule") provides that it is professional misconduct for a lawyer to engage in harassment or discrimination based upon, among other things, race and/or sex, in the practice of law.[8] Rule 8.4(g) has sparked significant opposition, and has only been adopted in its entirety by three states.[9]

Now, about five years later, the battle over Rule 8.4(g) seems quaint. The Rule is ill-equipped to meet the demands of the current moment, which teaches that the focus on prohibiting individual instances of discrimination does not address the structural biases that plague the profession and the justice system. Indeed, nobody debating the Rule has argued that they are "for discrimination." The debate has mostly centered around the Rule's constitutionality and whether it imposes a so-called "national speech code for lawyers."[10]

Rule 8.4(g) is explained as a step towards ensuring "public confidence" in the legal profession and the legal system.[11] The profession and the legal system is facing a crisis of confidence. Legal institutions are built upon years of overt discrimination and exclusion and, even though those formal structures are no longer in place, the institutions are not neutral. Outcomes at various vantage points evidence that covert forms of discrimination – implicit and institutional bias – persist.

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[7] *See* North, *supra* note 2.
[8] MRPC R. 8.4(g) (AM. BAR ASS'N 2016).
[9] SIMON'S NY RULES OF PROF. CONDUCT § 8.4:47, *The ABA's broad prohibition of discrimination and harassment* ("Only three jurisdictions, Vermont (2017), New Mexico (2019), and Pennsylvania (2020), have expressly adopted the ABA rule since 2016 (although other jurisdictions, including Florida, Maryland, and Minnesota already had versions of Rule 8.4(g) similar to the ABA Model Rule). In contrast, multiple jurisdictions (Arizona, Idaho, Illinois, Louisiana, Montana, South Carolina, South Dakota and Tennessee) have formally rejected ABA Model Rule 8.4(g), the Nevada Bar retracted its petition asking the Nevada Supreme Court to adopt Rule 8.4(g), and North Carolina has deferred action.")
[10] *Eugene Volokh: A Nationwide Speech Code for Lawyers?* (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA.
[11] MRPC R. 8.4(g), Comment 3 (AM. BAR ASS'N 2016).

Within the profession, the outcomes are stark. According to a 2019 National Association for Law Placement ("NALP") report, in the ranks of the most prestigious U.S. law firms, among equity partners, 80.4% were men, 19.6% were women and 6.6% were racial/ethnic minorities.[12] Among non-equity partners, the respective figures were 69.5% men, 30.5% women, and 10.7% racial/ethnic minorities.[13] A recent survey by a legal consulting firm found that female law partners face a 53% gap in pay at top United States law firms.[14] A 2019 report from The Center for American Progress found that more than 73% of sitting federal judges are men and 80% are white.[15] Hispanic judges comprise just 6% of the federal bench and judges who self-identify as LGBTQ make up fewer than 1% of the bench.[16]

Disparities begin in law school. For example, in 2019, "about 62% of law students were white, roughly in line with the overall American population. However, ethnic minorities except Asian-Americans were underrepresented. [17] The law student population last year was 12.7% Hispanic, 7.8% Black and 6.3% Asian, with the number describing themselves as biracial or multiracial steadily increasing to nearly 4%."[18] Further, law school attrition data reveals that "historically underrepresented law students—those identifying as American Indian, Asian, Black, Hispanic, Native Hawaiian, and two or more races—are disproportionately represented among students who do not persist beyond the first year."[19]

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[12] *Representation of Women and Minority Equity Partners Among Partnership Little Changed in Recent Years*, NALP BULLETIN (Apr. 2019), https://www.nalp.org/0419research.
[13] *Id.*
[14] Elizabeth Olson, *Female Law Partners Face 53 Percent Pay Gap, Survey Finds*, BLOOMBERG L. (Dec. 6, 2018), https://news.bloomberglaw.com/business-and-practice/female-law-partners-face-53-percent-pay-gap-survey-finds [https://perma.cc/CEY4-9VMY].
[15] Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CENTER FOR AMERICAN PROGRESS (Oct. 3, 2019), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/.
[16] *Id.*
[17] Gabriel Kuris, *What Underrepresented Law School Applicants Should Know*, U.S. NEWS (Jun. 8, 2020), https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/what-underrepresented-law-school-applicants-should-know#:~:text=The%20law%20student%20population%20last,These%20ratios%20are%20shifting%20rapidly.
[18] *Id.*
[19] Kylie Thomas & Tiffane Cochran, *ABA Data Reveals Minority Students Are Disproportionately Represented in Attrition Figures*, ACCESSLEX INST. (Sept. 18, 2018), https://www.accesslex.org/xblog/aba-data-reveals-minority-students-are-disproportionately-represented-in-attrition-figures.

Focusing on the impacts on the lives of those who have contact with the justice system, the data is profoundly discouraging. The Black population in the U.S. is estimated at approximately 14.6%[20] but, according to Federal Bureau of Prisons statistics, 38.6% of currently incarcerated inmates are Black.[21] Black and Latinx individuals account for over 50% of the Death Row population in the U.S.[22] According to a National Academy of Sciences study, Black men are two-and-a-half times more likely to be killed by law enforcement over their lifetime than white men, and the same study indicated that, over the course of their lives, approximately one in every 1,000 Black men can expect to be killed by police.[23] Beyond the criminal justice system, a study of employment discrimination litigation revealed that "[m]inority plaintiffs, especially African Americans, are much less likely than white plaintiffs to have lawyers."[24]

Against these select data points (there are, no doubt, countless other examples), the blunt instrument of threatening attorneys with misconduct charges based upon individual acts of overt bias is, at best, an underwhelming statement of policy. It does not go far enough in the effort to dismantle the systems perpetuating racial and gender bias. The Model Rules are inherently aspirational. They cannot remain neutral or leave anything to implication. Borrowing from one of the lessons from the Black Lives Matter protests about anti-racism, this essay takes the position the Model Rules should, additionally, commit the profession to active and conscious efforts to eliminate all forms of bias. Inspired by the calls for a shift from passive claims of neutrality, this essay proposes to include language in the Preamble to the Model Rules that affirms and encourages active and conscious efforts by *all members of the profession* to dismantle implicit and institutional bias.

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[20] Census Data, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045219 (last visited May 5, 2021).
[21] Inmate Race Statistics, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last visited May 5, 2021).
[22] Racial Demographics, Current U.S. Death Row Population by Race, DEATH PENALTY INFO https://deathpenaltyinfo.org/death-row/overview/demographics(last visited May 5, 2021).
[23] Frank Edwards, Hedwig Lee, & Michael Esposito, *Risk of being killed by police use of force in the United States by age, race–ethnicity, and sex* (Aug. 5, 2019), https://www.pnas.org/content/116/34/16793.
[24] Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 LEGIS. & PUB. POL'Y 705, 757 (2012).

I. BACKGROUND OF RULE 8.4(G)

The legal profession has a history rooted in discrimination and exclusion of women, people of color and religious minorities.[25] "The exclusion of these groups no longer exists formally, but they have yet to achieve full representation within many areas of the legal profession"[26] In light of this history and the current reality, the ABA has "spent countless hours in an attempt to lessen the amount of discrimination within the bar and promote greater diversity and inclusion efforts."[27] Prof. Veronica Root Martinez recounts that the ABA "has created departments, founded commissions, held conferences, published papers, and promoted research" all in an effort of fostering diversity and inclusion in the profession and beyond.[28] Nevertheless, Prof. Martinez aptly describes these efforts to combat bias, which culminated in 2016 with the adoption of Rule 8.4(g), as "unremarkable."[29]

A. ABA Adoption of Rule 8.4(g)

By way of brief background, the ABA first adopted the Model Rules on August 2, 1983.[30] In its original text, Rule 8.4 provided that it is professional misconduct for a lawyer to:

> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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[25] Veronica Root Martinez, *Combatting Silence in the Profession*, 105 VA. L. REV. 805, 807, 815-817 (2019) (hereinafter "MARTINEZ").
[26] *Id.* at 807.
[27] *Id.* at 808.
[28] *Id.*
[29] *Id.*
[30] Kristine A. Kubes, Cara D. Davis & Mary E. Schwind, *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination and Harassment in the Practice of Law*, 20 UNDER CONSTRUCTION NO. 3 (Mar. 12, 2019) (ABA publication), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/.

> (d) engage in conduct that is prejudicial to the administration of justice;
> (e) state or imply an ability to influence improperly a government agency or official; or
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.[31]

In defining misconduct as "conduct prejudicial to the administration of justice" in Rule 8.4(d), the Rule did not define the word "prejudicial."[32] After failed efforts in 1994 and 1998 to persuade the ABA to adopt a rule that addressed discrimination and harassment, a Comment 2 to Rule 8.4 was added to address bias.[33] In 1998, that Comment was added to provide:

> A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on 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.[34]

In 2016, Rule 8.4 was revised to add a section (g), which specifically states that 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."[35] The Rule is explicit that it "does not

[31] MRPC R 8.4 (AM. BAR ASS'N 1983).
[32] *Id.*
[33] SIMON'S NY RULES OF PROF. CONDUCT § 8.4:47*, The ABA's broad prohibition of discrimination and harassment*.
[34] MRPC R 8.4, Comt. 2 (AM. BAR ASS'N 1998) (later renumbered in 2001 to Comment 3).
[35] MRPC R. 8.4(g) (AM. BAR ASS'N 2016).

limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16."[36]

The addition of subsection (g) specifies that discriminatory or harassing conduct "related to the practice of law" is prohibited.[37] The change essentially moves the prohibition against discrimination from the Comment to the Rule text. More specifically, the amendment: (1) adds a state of mind by prohibiting conduct that a lawyer "knows or reasonably should know" is harassment or discrimination; (2) explicitly includes ethnicity, gender identity, and marital status in the list of protected groups; and (3) expands its scope from conduct affecting the "administration of justice" to that "related to the practice of law."[38] The Comment to the new section of the Rule states that "[d]iscrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system."[39] The ABA explained that moving the language from a comment to the Rule "puts lawyers on notice that refraining from such conduct is more than an illustration in a comment to a rule about the administration of justice."[40] It was explained as making "an important statement to our profession and the public that

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[36] *Id.*

[37] *Id.*

[38] MRPC R. 8.4(g), Comment 4 explains what is "related to the practice of law":

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

See also ABA Formal Opinion 493 (Jul. 15, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf (clarifying scope of the Rule).

[39] MRPC R. 8.4(g), Comment 3 (2016). Comment 3 provides:

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

[40] Wendy N. Hess, *Promoting Civility by Addressing Discrimination and Harassment: The Case for Rule 8.4(G) in* South Dakota, 65 S.D. L. REV. 233, 252 (2020) (hereinafter "HESS").

the profession does not tolerate prejudice, bias, discrimination, and harassment."[41]

B. Rule 8.4(g)'s Reception by the States

At the time that paragraph (g) was adopted in 2016, twenty States already had some variation on these prohibitions in their own rules of professional conduct.[42] Nevertheless, since 2016, only three states have adopted Rule 8.4(g) in its entirety – Vermont, New Mexico and Pennsylvania.[43] (Though, Pennsylvania's version of the Rule was recently declared unconstitutional by a district court).[44] By contrast, many states (Arizona, Idaho, Illinois, Louisiana, Montana, South Carolina, South Dakota and Tennessee) have formally rejected the Rule, the Nevada Bar retracted its petition asking the Nevada Supreme Court to adopt the Rule, and North Carolina has deferred action.[45] That said, there has apparently been a more recent push in more states to adopt Rule 8.4(g).[46]

Some of the opposition initially came from members of the bar who argued that there had been "no demonstrated need" for the Rule.[47] This could not be farther from reality – that is to say, there is certainly plenty of evidence of both overt and covert discrimination in the profession and the justice system. Another, joint comment expressed concern that Rule 8.4 would "subject attorneys to discipline for engaging in conduct that neither adversely

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[41] *Id.*
[42] ABA CENTER FOR PROFESSIONAL RESPONSIBILITY POLICY IMPLEMENTATION COMMITTEE, Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct (as of Oct. 18, 2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.pdf.
[43] SIMON'S NY RULES OF PROF. CONDUCT § 8.4:47*, The ABA's broad prohibition of discrimination and harassment*.
[44] Greenberg v. Haggerty, No. 20-cv-3822, 2020 WL 7227251, __ F.Supp.3d ___ (E.D. Pa. Dec. 8, 2020) (holding that Pennsylvania's version of 8.4(g) was unconstitutional).
[45] SIMON'S NY RULES OF PROF. CONDUCT § 8.4:47*, The ABA's broad prohibition of discrimination and harassment*.
[46] Tessa Mears, *States are Starting to Take Direction on Controversial Model Rule 8.4(g)*, LEGAL ETHICS IN MOTION (Jan. 18, 2020), https://www.legalethicsinmotion.com/2020/01/states-are-starting-to-take-direction-on-controversial-model-rule-8-4g/.
[47] *See* La. Att'y Gen. Op. No. 17-00114 at 9 (Sept. 8, 2017), at 9, https://perma.cc/9TWR-8GY9 (stating that "[t]here has been no demonstration that there is a need for" the Rule); Joint Comment Regarding Proposed Changes to ABA Model Rule of Processional Conduct 8.4., at 24, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/joint_comment_52_member_attys_1_19_16.authcheckdam.pdf (arguing no demonstrated need for Rule).

affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system."[48] It is hard to understand how an attorney is fit to practice law if they engage in discriminatory or harassing behavior, and there is no doubt that this behavior undermines the operation and credibility of the justice system. This is, perhaps, why these comments in opposition were not often cited or widely expressed.

The most prominent opposition to the Rule that has gained the most traction is the argument that the Rule is unconstitutional. Vocal and well-placed opponents have argued that the Rule is overbroad and violates the First Amendment by restricting the speech rights of lawyers.[49] Other equally well-placed and vocal proponents have argued that Rule does not violate the First Amendment.[50] It has been observed that there are two general themes in this opposition to Rule 8.4(g):

> First, are the opponents who object on the grounds of "religious liberty." However, the evidence indicates that the primary philosophy underlying that opposition is objection to legal equality for LGBTQ. Second is the academic/libertarian opposition that appears more oriented from legal scholarship or political philosophy than from religious zealotry.[51]

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[48] *See* Joint Comment Regarding Proposed Changes to ABA Model Rule of Processional Conduct 8.4., at 7, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/joint_comment_52_member_attys_1_19_16.authcheckdam.pdf.

[49] *See generally* George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 N.D. J.L. ETHICS.& PUB. POL'Y 135 (2018); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(G)*, 30 GEO. J. LEGAL ETHICS, 241 (2017); Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. U. L. REV. 629 (2019); Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward,* St. John's Law Review, Forthcoming, Indiana University Robert H. McKinney School of Law Research Paper No. 2020-20 (Aug. 1, 2020), https://ssrn.com/abstract=3741815.

[50] *See generally* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195 (2017); Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(G)*, 19 U. PA. J. CONST. L. ONLINE 1 (2017); Robert N. Weiner, *"Nothing to See Here": Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J. L. & PUB. POL'Y 125 (2018); Rebecca Aviel, *Rule 8.4(G) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31 (2018).

[51] Dennis Rendlemen, *The Crusade Against Model Rule 8.4(g)*, ETHICS IN VIEW (Oct. 2018) (ABA publication), https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/#:~:text=(g)%20engage%20in%20conduct%20that,to%20the%20practice%20of%20law.

While there has been an active debate about the Rule's constitutionality, this essay does not wade into that discussion, focusing instead on other approaches to combatting discrimination and harassment.

Indeed, Prof. Hernandez notes that, in the debate over Rule 8.4(g), very little has been said about its potential effectiveness.[52] A fair and accurate critique is that the Rule does not address covert forms of discrimination, such as structural discrimination and implicit bias, which are the main obstacles to achieving equality in the profession.[53] Given this limitation, the Rule is unlikely to achieve its stated goal of "eliminating bias in the profession and the justice system."[54] Further, toward the goal of engendering public confidence, the messaging should move beyond what will or will not be "tolerated," [55] to encourage conscious actions to dismantle bias.

II. THE RULE IS ASPIRATIONAL AND LARGELY SYMBOLIC

"Rule 8.4(g) serves both aspirational and concrete aims."[56] By defining "misconduct" to include discrimination and harassment, the Rule provides an avenue to discipline individual, overt acts and signals that "that the legal profession will not tolerate unfair and abusive treatment, particularly when that conduct targets a person's racial, religious, gender, or other status."[57] It is also aspirational because it purports to "demonstrate the legal profession's commitment to treating others – such as clients, litigants, opposing counsel, judges, law firm employees, and law students-with dignity and respect."[58] This is evidenced by the Comments to the Rule, which recognize that discrimination and harassment by lawyers "undermine confidence in the legal profession and the legal system."[59]

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[52] MARTINEZ, *supra* note 26, at 813.
[53] *Id.* at 813, 835.
[54] *Id.* at 813.
[55] HESS, *supra* note 41, at 335.
[56] *Id*.
[57] *Id.*
[58] *Id.*
[59] MRPC R. 8.4(g), Comment 3 (2016).

Indeed, the Rule has been described as a "largely symbolic gesture."[60] That is not to say that discrimination and harassment do not occur – they obviously do. But the Rule is rarely invoked to mete out discipline. Evidence of this fact is that, even in states that have long had an analogue to Rule 8.4(g), there are very few cases of discipline against a lawyer for discrimination or harassment.[61] It appears that only one case has led to an attorneys' disbarment, and it involved egregious instances of sexual misconduct with two employees who were also former clients.[62] Many of the handful of cases involved suspensions ranging from 30 days to 18 months,[63] with one outlier of a 3-year suspension for, among other things, anti-Semitic remarks.[64] The remainder involved either public censure[65] or private admonition.[66]

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[60] Professor Deborah Rhode described Rule 8.4(g) as "largely a symbolic gesture" in a debate hosted by the Federalist Society. *See* Aviel, 31 GEO. J. LEGAL ETHICS, at n. 213.

[61] *See* 8.4 MISCONDUCT, ANN. MOD. RULES PROF. COND. § 8.4 (collecting cases).

[62] In re Robinson, No. 2018-112, 2019 WL 850501 (Vt. Feb. 22, 2019).

[63] *See* In re Barker, 993 N.E.2d 1138 (Ind. 2013) (30-day suspension for letter to opposing counsel accusing opposing party of being "illegal alien"); In re McCarthy, 938 N.E.2d 698 (Ind. 2010) (30-day suspension for e-mail containing racist insult); Iowa Supreme Court Att'y Disciplinary Bd. v. Moothart, 860 N.W.2d 598 (Iowa 2015) (30-month suspension for sexually harassing clients and employee); In re Igbanugo, 863 N.W.2d 751 (Minn. 2015) (90-day suspension for sending threatening letters to former client, referring to client's religion and stating client must "answer to God" for nonpayment of fees and report to disciplinary authorities); In re McGrath, 280 P.3d 1091 (Wash. 2012) (18-month suspension when lawyer sent two ex parte communications to judge disparaging opposing party on basis of national origin and immigration status); In re Baratki, 902 N.W.2d 250 (Wis. 2017) (6-month suspension for sexually harassing client, through text messages and physical contact*);* In re Isaacson, 860 N.W.2d 490 (Wis. 2015) (1-year suspension for lawyer serving as officer of corporate entities involved in litigation who executed documents containing religious slurs directed at judges, other counsel, and others, then directed other counsel to file them with federal courts in three states); In re Kratz, 851 N.W.2d 219 (Wis. 2014) (4-month suspension for prosecutor who sent sexually harassing text messages to domestic abuse victim and made sexually harassing comments to witness in another case); In re Williams, 414 N.W.2d 394 (Minn. 1987) (6-month suspension for lawyer who made anti-Semitic remark to opposing counsel at deposition); In re Teague, 15 N.Y.S.3d 312 (App. Div. 2015) (3-month suspension and order to attend anger management for lawyer who made derogatory racial, ethnic, homophobic, and sexist remarks to other attorneys).

[64] In re Dempsey, 986 N.E.2d 816 (Ind. 2013) (3-year suspension for anti-Semitic statements and accusations of mental impairment).

[65] *See* In re Kelley, 925 N.E.2d 1279 (Ind. 2010) (public reprimand for ridiculing man with feminine-sounding voice by asking if he was "gay" or "sweet"); In re Campiti, 937 N.E.2d 340 (Ind. 2009) (public reprimand for disparaging references to opposing party's status as noncitizen receiving free legal services); United States v. Kouri-Perez, 8 F. Supp. 2d 133 (D.P.R. 1998) (public reprimand and monetary fine for lawyer who, in a motion, accused prosecutor of hiding her true identity as granddaughter of former Dominican Republic dictator Rafael Trujillo); In re Monaghan, 743 N.Y.S.2d 519 (App. Div. 2002) (lawyer censured for repeatedly harangued opposing counsel at deposition for mispronouncing words; court found conduct to be racially motivated).

[66] *See* In re Charges of Unprof'l Conduct Contained in Panel Case No. *15976*, 653 N.W.2d 452 (Minn. 2002) (private admonition against lawyer for plaintiff in personal injury case who brought motion for new trial, objecting to presence of paralyzed court clerk in courtroom; lawyer intended to argue that client, who was less disabled than clerk, was unable to work); In re Charges of Unprof'l Conduct Contained in Panel File 98-26, 597 N.W.2d 563 (Minn. 1999) (private admonition where prosecutor brought motion in limine to prohibit

Given that, in states where some version of the Rule exists, it is rarely invoked, the Rule serves largely as an embodiment of the aspirations of the profession. To the extent Rule 8.4(g)'s aims are largely aspirational, the Model Rules should shift from a negative approach that threatens to sanction individual instances of misconduct to a positive approach -- one that inspires action by the profession.

III. THE MODEL RULES SHOULD ENCOURAGE ACTIVE AND CONSCIOUS EFFORTS TO DISMANTLE IMPLICIT AND INSTITUTIONAL BIAS

This essay proposes to include language in the Preamble to the Model Rules that affirms and encourages active and conscious efforts by *all members of the profession* to dismantle implicit and institutional bias. To be clear, this does not mean there is no role for current Rule 8.4(g). But it, alone, simply does not meet the moment, which calls upon everyone in the profession to work actively to improve legal institutions and the quality of justice.

The Preamble to the Model Rules captures broadly the values and obligations of the profession and the role of lawyers in society, especially in the context of a system of self-regulation. The Preamble is the height of the Model Rule's aspirations. It does not set forth any specifics, which it leaves to the Rules. Rather, the Preamble discusses lawyers as "public citizens" having "special responsibility for the quality of justice" and as playing a "vital role in the preservation of society."[67] The ideals of anti-bias action belong in the Preamble.[68] For example, the following (in ALL CAPS) could be added to existing Preamble paragraph 6:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. RECOGNIZING THAT THE QUALITY OF

public defender from "hav[ing] a person of color as co-counsel for the sole purpose of playing upon the emotions of the jury").

[67] Preamble, MRPC (2016).

[68] *See* Angela Morris, *Bar Committee Nixes Anti-Discrimination Disciplinary Rule, but Idea Could Find Place in Aspirational Creed*, TEX. LAWYER (Jan. 22, 2021), https://www.law.com/texaslawyer/2021/01/22/bar-committee-nixes-anti-discrimination-disciplinary-rule-but-idea-could-find-place-in-aspirational-creed/ (attorney that was against adopting the Rule because of constitutional concerns advocated for adding anti-discrimination principles into aspirational creed).

> JUSTICE AND THE CONFIDENCE OF THE PUBLIC IN THE ADMINISTRATION OF JUSTICE DEPENDS UPON THE SYSTEM BEING FREE OF OVERT AND COVERT FORMS OF A BIAS, A LAWYER SHOULD MAKE ACTIVE AND CONSCIOUS EFFORTS TO DISMANTLE INSTITUTIONAL DISCRIMINATION AND IMPLICIT BIAS ON THE BASIS OF RACE, SEX, RELIGION, NATIONAL ORIGIN, ETHNICITY, DISABILITY, AGE, SEXUAL ORIENTATION, GENDER IDENTITY, MARITAL STATUS OR SOCIOECONOMIC STATUS. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Certainly, language to this effect could be added elsewhere, or as a separate paragraph. Dismantling covert forms of bias is the obligation of the profession and cannot be severed from improving the quality of justice – let alone the public confidence in the system of justice. The profession and its members cannot remain passively "not bias" but must take conscious steps to dismantle the structures that perpetuate bias.

IV. CONCLUSION

The pathway to making an active and conscious effort to dismantle bias necessarily requires self-awareness.[69] A powerful article in the American Lawyer advised aspiring allies in the fight against racial injustice to:

> Survey your sources of privilege and use them to help others. Awareness begins with ourselves, and that self-inventory is not easy. Ask yourself: What sacrifices are you making to progress those who are disadvantaged by bias? Who are you shielding from consistently being overlooked for career-defining work assignments, leadership opportunities, or promotions? For whom are you stepping aside so they can take center stage on a pitch for new business or an important meeting with a client? Are you only providing access to the same homogeneous groups?[70]

A culture shift in the profession to active and conscious efforts has the potential to transform our profession and our institutions. Here is an example: A 2017 New York State Bar Association ("NYSBA") report that found "that female lawyers appear in court less frequently and that when they do, they are less likely to have a prominent role."[71] Judge Shira A. Scheindlin, one of the authors of the NYSBA report, wrote of her more than twenty years on the bench, "[t]he talking was almost always done by white men."[72] She continued, "Women often sat at counsel table, but were usually junior and silent. It was a rare day when a woman had a lead role — even though

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[69] *See* North, *supra* note 2.
[70] Maja Hazell, *The Crippling Impact of Anti-Black Racism, and How Allies Can Act Against It*, AM. LAWYER (Jun. 18, 2020), https://www.law.com/americanlawyer/2020/06/18/the-crippling-impact-of-anti-black-racism-and-how-allies-can-act-against-it/?cmp_share=share_facebook&fbclid=IwAR0CqaLoccD0aEPOFCiF4r2srXe2GZDZbRn7A4fARWaFSZESLGqhIRRE1rg.
[71] Alan Feuer, *A Judge Wants a Bigger Role for Female Lawyers. So He Made a Rule.*, N.Y. TIMES (Aug. 23, 2017), https://www.nytimes.com/2017/08/23/nyregion/a-judge-wants-a-bigger-role-for-female-lawyers-so-he-made-a-rule.html; *see also* Report of the New York State Bar Association Commercial and Federal Litigation Section: The Time is Now: Achieving Equality for Women Attorneys in the Courtroom and in ADR (2020) (update on 2017 report).
[72] Shira A. Scheindlin, *Female Lawyers Can Talk, Too*, N.Y. TIMES (Aug. 8, 2017), https://www.nytimes.com/2017/08/08/opinion/female-lawyers-women-judges.html.

women have made up about half of law school graduates since the early 1990s."[73]

In response, the late Judge Jack B. Weinstein of the District Court for the Eastern District of New York, at that time 96 years old, revised his individual rules to invite junior members of legal teams "to argue motions they have helped prepare and to question witnesses with whom they have worked."[74] His rules specified that he took this action after reading "studies of underrepresentation of female attorneys and minorities."[75]

Another example of a conscious approach to dismantling bias occurred when, in 2020, Chief Judge Janet DiFiore commissioned an independent evaluation of racial bias in the New York court system, prepared by former U.S. Secretary of Homeland Security Jeh Johnson.[76] After conducting several hundred interviews with various stakeholders in the New York Court system – including judges, court personnel, attorneys and bar associations – the resulting report described, in vivid detail, "an under-resourced, over-burdened court system" where "existing institutions addressing racial bias are inadequate, opaque or unknown."[77] The report culminated in recommendations to address bias in the court system, centering on operational issues and changes that can be implemented administratively.[78] The report is a blunt and candid look at the state of racial bias in the New York Courts. The conscious decision by Chief Judge DiFiore to enlist an independent evaluator is an example of the type of work that needs to be undertaken, and a reminder that dismantling bias begins with self-awareness.

Rule 8.4(g) is well-intentioned, but it alone cannot do the heavy lifting to achieve its stated goals of eliminating bias and fostering public confidence in the profession and the justice system. The work ahead to achieve racial justice and gender equality is daunting, but the profession should strive to take conscious and active efforts, such as those mentioned above, to reform institutions and practices that

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[73] *Id.*
[74] Feuer, *supra* note 72.
[75] *Id.*
[76] Press Release, New York State Unified Court System, Independent Review of Court System Policies, Practices and Programs Yields Recommendations Aimed at Advancing Equal Justice in the New York Courts (Oct. 15, 2020), http://nycourts.gov/LegacyPDFS/press/pdfs/PR20_44.pdf.
[77] Report from the Special Adviser on Equal Justice in the New York State Courts (Oct. 1, 2020), 54-78, http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.
[78] *Id.*

perpetuate bias. The Model Rules should expressly and unambiguously reflect this ambition and encourage the profession to rise to meet the challenges.

Opinion 21-09

January 28, 2021

Digest: Where a party or attorney has advised the court that their preferred gender pronoun is "they," a judge may not require them to instead use "he" or "she."

Rules: 22 NYCRR 100.2; 100.2(A); 100.3(B)(4)-(5); Opinion 19-50.

Opinion:

A judge asks if they may "require a singular pronoun be used for a singular person" in order to "keep order in the courtroom, and to have a clear record." That is, when a party expresses a preference for gender-neutral plural pronouns (they/them), the judge wishes to require them to instead choose a singular pronoun, he/him or she/her. The judge is concerned that the use of "they" could create confusion in the record as to the number of persons to whom a speaker is referring.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always act in a manner to promote public confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2[A]). A judge must "perform judicial duties without bias or prejudice against or in favor of any person" (22 NYCRR 100.3[B][4]). For example, a judge must not, "by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon ... sexual orientation, gender identity [or] gender expression" (*id.*). A judge "shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct" (*id.*). The judge's responsibility for curbing such manifestations of bias and prejudice in the courtroom even extends to "lawyers in proceedings before the judge" (22 NYCRR 100.3[B][5]).

The "courthouse and courtroom must convey to the public that everyone who appears before the court will be treated fairly and impartially" (Opinion 19-50). While a judge may take reasonable steps to ensure the clarity of the record, including courteously referring to an individual by surname and/or their role in the proceeding as appropriate, a judge must be careful to avoid any appearance of hostility to an individual's gender identity or gender expression. We can see no reason for a judge to pre-emptively adopt a policy barring all court participants, in all circumstances, from being referred to by singular "they," which is one of three personal pronouns in the English language. That is, "they" has been recognized as a grammatically correct use for an individual (*see e.g.* Merriam-Webster, *2019 Word of the Year: They*, https://www.merriam-webster.com/words-at-play/word-of-the-year-2019-they/they).

Adopting and announcing the sort of rigid policy proposed here could result in transgender, nonbinary or genderfluid individuals feeling pressured to choose between the ill-fitting gender pronouns of "he" or "she." This could not only make them feel unwelcome but also distract from the adjudicative process. Thus, as an ethical matter, we believe the described policy, if adopted, could undermine public confidence in the judiciary's impartiality.

In sum, we conclude that, where a person before the court has advised the court that their preferred gender pronoun is "they," the inquiring judge may not require them to use instead "he" or "she" in the proceeding. We trust judges to handle an expressed preference for the use of singular "they" on a case-by-case basis, adopting reasonable procedures in their discretion to ensure the clarity of the record as needed. We also note that there is no ethical impropriety in

making adjustments over the course of a proceeding, if a judge finds that an initial approach was unsuccessful or confusing.

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[1] Of course, the rule "does not preclude legitimate advocacy" by attorneys when sexual orientation or other similar factors "are issues in the proceeding" (22 NYCRR 100.3[B][5]).

Rule 8.4: Misconduct

Share:

Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

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

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

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N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.8.4

Section 1200.8.4 - Misconduct

A lawyer or law firm shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability:
(1) to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official; or

(2) to achieve results using means that violate these Rules or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
(g) engage in conduct in the practice of law that the lawyer or law firm knows or reasonably should know constitutes:
(1) unlawful discrimination, or

(2) harassment, whether or not unlawful, on the basis of one or more of the following protected categories: race, color, sex, pregnancy, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, status as a member of the military, or status as a military veteran.

(3) "Harassment" for purposes of this Rule, means physical contact, verbal conduct, and/or nonverbal conduct such as gestures or facial expressions that is:
a. directed at an individual or specific individuals; and

b. derogatory or demeaning.
Conduct that a reasonable person would consider as petty slights or trivial inconveniences does not rise to the level of harassment under this Rule.

(4) This Rule does not limit the ability of a lawyer or law firm to, consistent with these Rules:
a. accept, decline, or withdraw from a representation;

b. express views on matters of public concern in the context of teaching, public speeches, continuing legal education programs, or other forms of public advocacy or education, or in any other form of written or oral speech protected by the United States Constitution or the New York State Constitution; or c. provide advice, assistance, or advocacy to clients.

(5) "Conduct in the practice of law" includes:

a. representing clients;

b. interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging in the practice of law; and

c. operating or managing a law firm or law practice; or

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

N.Y. Comp. Codes R. & Regs. Tit. 22 § 1200.8.4

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