

## COMBATING SILENCE IN THE PROFESSION

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*Members of the legal profession have recently taken a public stance against a wave of oppressive policies and practices. From helping immigrants stranded in airports to protesting in the face of white nationalists, lawyers are advocating for equality within and throughout American society each and every day. Yet as these lawyers go out into the world on behalf of others, they do so while their very profession continues to struggle with its own discriminatory past.*

*For decades, the legal profession purposefully excluded women, religious minorities, and people of color from its ranks, while instilling a select group of individuals with the privilege of power and prestige. And while the profession often attempts to take concrete steps to address its history of exclusionary conduct—most recently through the passage of Model Rule 8.4(g)—the vestiges of its discriminatory past continue to affect all corners of the profession, particularly for communities of color. When one looks at the partnership ranks of large law firms, the clerks who work for Supreme Court Justices, the faculties that educate law students, and even the members of law review editorial boards, the continued challenge of creating an inclusive and diverse profession remains apparent. These challenges, at least in part, are related to the covert discrimination that confronts women and people of color each and every day both within and outside the legal profession.*

*And yet, there are steps that the profession can take to address the most insidious forms of discrimination that remain within its ranks today. Drawing on scholarship from the fields of professional responsibility,*

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*employment discrimination, and organizational behavior and management, this Article argues that members of the legal profession should adopt policies and practices that (i) address covert discrimination throughout the profession and (ii) encourage individual attorneys to stop remaining silent and instead give voice to their experiences of discrimination, harassment, and bias. Research suggests that traditionally unrepresented groups within the profession often exist within a shroud of silence. They are often forced to silence themselves, their opinions, their views, and their experiences for fear of being labeled angry, troublesome, sensitive, or unwilling to be a “team player.” That silence, it turns out, is quite damaging. As such, the profession should adopt policies targeted at “Combating Silence in the Profession” that will encourage underrepresented groups to voice their concerns and experiences, so that a more inclusive profession finally comes into being.*

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#### INTRODUCTION

How does one create a more diverse, inclusive, and tolerant environment? This question confounds leaders in all types of organizations. The steps needed to promote greater demographic diversity within institu-

tions, memberships, and society are, at best, vague and, at worst, perpetually elusive.<sup>1</sup> And yet, time after time, organizational leaders continue to attempt to find solutions that will result in policies likely to create environments where ideals of diversity and inclusion thrive.

When it comes time to craft strategies aimed at creating more diverse and inclusive organizations, lawyers are often consulted and relied upon to provide advice and good counsel. Members of the legal profession are perceived within American society as particularly well-suited to assist in efforts to combat discrimination, because they are associated with a profession that is supposed to pursue justice and equality for all. For example, when faced with an unprecedented executive order banning individuals from Muslim countries, thousands of lawyers stepped forward to represent individuals impacted.<sup>2</sup> And when white supremacist activity resulted in injury and harm in Charlottesville, Virginia, lawyers took concrete action in an attempt to hold the leaders of the group responsible.<sup>3</sup> The decision by lawyers to represent vulnerable individuals is consistent with the idea that a lawyer is “a public citizen having special responsibility for the quality of justice.”<sup>4</sup>

But the legal profession has its own discriminatory roots, which have proven quite difficult to vanquish. For decades, the American legal profession explicitly excluded women, persons of color, and religious minorities from bar membership.<sup>5</sup> The exclusion of these groups no longer exists formally, but they have yet to achieve full representation within many areas of the legal profession. Recognizing this reality, members of the American Bar Association (“ABA”) have spent countless hours in an attempt to lessen the amount of discrimination within the bar and promote

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<sup>1</sup> See, e.g., Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 *Geo. J. Legal Ethics* 1079, 1083 (2011) (explaining that “analysis of diversity approaches across legal arenas reveals inconsistent, even competing, definitions”).

<sup>2</sup> Lucy Westcott, *Thousands of Lawyers Descend on U.S. Airports to Fight Trump’s Immigrant Ban*, *Newsweek* (Jan. 29, 2017, 2:11 PM), <http://www.newsweek.com/lawyers-volunteer-us-airports-trump-ban-549830> [<http://perma.cc/5XKH-8LPC>].

<sup>3</sup> Dahlia Lithwick, *Lawyers vs. White Supremacists*, *Slate* (Oct. 12, 2017, 5:49 PM), <https://slate.com/news-and-politics/2017/10/two-new-lawsuits-against-the-organizers-of-charlottesville-unite-the-right-rally.html> [<https://perma.cc/G5K5-R6JE>].

<sup>4</sup> Model Rules of Prof’l Conduct Pmb. at 1 (Am. Bar Ass’n 2017).

<sup>5</sup> See *infra* Section I.A.

greater diversity and inclusion efforts. The ABA has created departments,<sup>6</sup> founded commissions,<sup>7</sup> held conferences,<sup>8</sup> published papers,<sup>9</sup> and promoted research<sup>10</sup> all in an effort to bring greater tolerance and respect within the ranks of its membership and ultimately society at large.

It has, however, been criticized for not doing enough,<sup>11</sup> even as it has engaged in a variety of efforts meant to bring concrete change. This criticism is possible, in part, because there remains so much notable disparity amongst demographic groups within the bar. The reality, however, is that the legal profession's struggle to combat discrimination is unremarkable. Indeed, leaders within all types of organizations routinely struggle to implement effective diversity strategies.

For example, in 2010 the Securities and Exchange Commission ("SEC") began to require public companies to "reveal whether and how they consider diversity in identifying director nominees."<sup>12</sup> The purported goal of the rule was to provide information to "investors who are interested . . . in the racial, ethnic and gender diversity of boards."<sup>13</sup> The implied goal, however, was to use the disclosure requirement as a mechanism for encouraging an increase of demographic diversity within the

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<sup>6</sup> See, e.g., Diversity and Inclusion Center, Am. Bar Ass'n, <http://www.americanbar.org/groups/diversity/> [<https://perma.cc/6S32-JRTS>] (last visited Feb. 22, 2018).

<sup>7</sup> See, e.g., Commission on Racial and Ethnic Diversity in the Profession, Am. Bar Ass'n, <https://www.americanbar.org/groups/diversity/DiversityCommission/> [<https://perma.cc/PN4J-2PAM>] (last visited Feb. 22, 2018).

<sup>8</sup> See, e.g., Video Highlights: Fortune 500 GCs Present the Business Case for Diversity and Inclusion, Am. Bar Ass'n (Aug. 8, 2016), [https://www.americanbar.org/news/abanews/abanews-archives/2016/08/video\\_highlightsfo/](https://www.americanbar.org/news/abanews/abanews-archives/2016/08/video_highlightsfo/) [<https://perma.cc/2EQX-MAX5>].

<sup>9</sup> See, e.g., Am. Bar Ass'n Ctr. for Racial & Ethnic Diversity, *The Diversity & Inclusion Showcase* (2015), <http://www.americanbar.org/content/dam/aba/administrative/diversity/2015Showcase.authcheckdam.pdf> [<https://perma.cc/JTV8-4YN5>].

<sup>10</sup> See, e.g., ABA Comm'n on Women in the Prof., *From Visible Invisibility to Visibly Successful* (2008), <https://www.americanbar.org/content/dam/aba/migrated/women/woc/VisiblySuccessful.pdf> [<https://perma.cc/DDU5-4SB7>].

<sup>11</sup> Wald, *supra* note 1, at 1092 ("[T]he organized bar has essentially limited itself to lofty rhetoric and making recommendations to other constituencies, and has done little to directly foster diversity itself.").

<sup>12</sup> Molly Petrilla, *The SEC Wants New Rules for Board Diversity—Here's Why That Matters*, *Fortune* (Jan. 29, 2016), <http://fortune.com/2016/01/29/sec-rules-board-diversity/> [<https://perma.cc/JY4U-84SC>].

<sup>13</sup> *Id.*

ranks of corporate directors.<sup>14</sup> The SEC disclosure rule, however, failed to achieve either goal.

The disclosure rule adopted by the SEC “did not define diversity and the adopting release made clear that there was no single way required to define the term. Instead, the determination was left to companies.”<sup>15</sup> As a result, “many companies include such characteristics as relevant knowledge, skills and experience when defining diversity,” but do not provide reporting regarding the demographic profile of a board nominee.<sup>16</sup> Indeed, a study assessing the impact of the SEC disclosure rule on gender diversity found that “[i]n filling open board seats, only 10.20% of directors named to boards in the three years after the SEC’s rule were women, a decrease from the 12.39% rate observed in the three years before.”<sup>17</sup> Additionally, the SEC’s diversity disclosure requirement, particularly among smaller firms, “has not been effective in increasing board gender diversity.”<sup>18</sup>

Unsurprisingly, investors and stakeholders began to question “the usefulness of information companies provide in response to [the] SEC’s board diversity disclosure requirements.”<sup>19</sup> Thus, in 2016, six years after the disclosure rule went into effect, the SEC began to review the disclosure rule and began to consider an amendment to the rule that would “require companies to include, in their proxy statements, more meaningful board diversity disclosures.”<sup>20</sup> Specifically, investors requested that the SEC disclosure rule require firms to provide information “on board directors’ gender, race, and ethnicity.”<sup>21</sup>

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<sup>14</sup> Joe Mont, SEC Will Revisit Board Diversity Disclosures, *Compliance Week* (June 28, 2016), <https://www.complianceweek.com/blogs/the-filing-cabinet/sec-will-revisit-board-diversity-disclosures#.XECazlxKjIV> [<https://perma.cc/DN6G-MY7W>] (“I have seen first-hand what the research is telling us—boards with diverse members function better and are correlated with better company performance. This is precisely why investors have—and should have—an interest in diversity disclosure about board members and nominees.”).

<sup>15</sup> *Id.*

<sup>16</sup> Petrilla, *supra* note 12.

<sup>17</sup> Tom Wilson, The Effectiveness of the SEC’s Diversity Disclosure Requirement: The Case of Women Directors, 3 *J. Interdisc. Bus. Stud.* 1, 1, <https://nebula.wsimg.com/74e7c0ea-561f59a18ccefd446452f4c?AccessKeyId=909EC00257A61B2D298D&disposition=0&all-oworigin=1> [<https://perma.cc/F9BK-GJLH>].

<sup>18</sup> *Id.*

<sup>19</sup> U.S. Gov’t Accountability Office, GAO-16-30, *Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements, What GAO Found* (2015) [hereinafter U.S. Gov’t Accountability Office].

<sup>20</sup> Mont, *supra* note 14.

<sup>21</sup> U.S. Gov’t Accountability Office, *supra* note 19, *What GAO Found*.

The upshot is that the SEC, with the best of intentions, adopted a rule that was meant to provide information to investors regarding board demographic diversity, but because the rule was not structured effectively, it failed. Recognizing this, the leadership at the SEC did not continue to go along with the ineffective rule; instead, it implemented a review of its policy,<sup>22</sup> commissioned a report from the Government Accountability Office,<sup>23</sup> and began to take concrete steps to remedy the deficiencies with the existing rule.<sup>24</sup> Yet despite the SEC's efforts, it took six years to recognize the errors with its original rule, which means the agency lost six years when it could have focused on crafting strategies that would change the structure of corporate boards across the nation.

The challenges the SEC faced with its disclosure rule demonstrate that getting the rule right is just as important as getting a rule at all. Leaders charged with adopting strategies aimed at improving diversity face a difficult task, because there are no guaranteed steps for success when attempting to improve demographic diversity and inclusion within organizations. Despite this, it appears that the SEC's rule failed, in part, because the text of the rule was not as comprehensive, clear, and precise as the goal it was meant to achieve. A rule passed by the ABA in 2016 may suffer from similar flaws.

In 2008, the ABA adopted a set of priorities that included a goal to "Eliminate Bias and Enhance Diversity."<sup>25</sup> The goal's stated objectives are to: 1) "Promote full and equal participation in the association, our profession, and the justice system by all persons"; and 2) "Eliminate bias in the legal profession and the justice system."<sup>26</sup> Various ABA committees and initiatives were implemented to pursue these objectives, culminating most recently in the passage of a new Model Rule in 2016, which the bar

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<sup>22</sup> Mont, *supra* note 14.

<sup>23</sup> U.S. Gov't Accountability Office, *supra* note 19, *Why GAO Did This Study*.

<sup>24</sup> Mont, *supra* note 14. On February 6, 2019, the SEC Staff made changes to certain reporting requirements that could impact the reporting of demographic information. Additionally, on February 6, 2019, "companion bills were introduced into both the U.S. House of Representatives and Senate" that would require public companies to, amongst other things, disclose "data regarding the racial, ethnic and gender composition of its board of directors, director nominees, and executive officers." Howard Dicker, Ade Heyliger & Aabha Sharma, D.C. Speaks Up: A Push for Board Diversity from the SEC and Congress, *Harv. L. Sch. F. on Corp. Gov. & Fin. Reg.* (Feb. 25, 2019), <https://corpgov.law.harvard.edu/2019/02/25/d-c-speaks-up-a-push-for-board-diversity-from-the-sec-and-congress/> [<https://perma.cc/4PEX-YWPL>].

<sup>25</sup> Am. Bar Ass'n, *Annual Meeting, Report 109*, at 1 (2016) [hereinafter *ABA Report*].

<sup>26</sup> *Id.*

stated would serve to implement the ABA's objectives concerning bias and diversity.<sup>27</sup>

The new Model Rule 8.4(g) garnered broad-based support at the time of its passage and was sponsored by many groups within the ABA, including the Standing Committee on Ethics and Professional Responsibility, the Section of Civil Rights and Social Justice, the Diversity & Inclusion 360 Commission, the Commission on Disability Rights, the Commission on Sexual Orientation and Gender Identity, the Commission on Women in the Profession, and the Commission on Racial and Ethnic Diversity in the Profession.<sup>28</sup> Specifically, it states:

It is professional misconduct for a lawyer to: . . .

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.<sup>29</sup>

For many, the passage of the rule was the culmination of an effort that began over twenty years prior.

The ABA Model Rules of Professional Conduct were first adopted in 1983, and the first effort to formally adopt rules that “specifically identify bias and prejudice as professional misconduct” was made in 1994.<sup>30</sup> The 1994 attempt, however, failed,<sup>31</sup> making the successful passage of Model Rule 8.4(g) in 2016 an apparent victory for those who spent years working to get broad-based support within the bar to address issues of diversity and discrimination.

The response within the legal profession has, however, been quite mixed.<sup>32</sup> States have adopted the rule, adopted a less aggressive version

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<sup>27</sup> *Id.* at 1–2.

<sup>28</sup> Am. Bar Ass'n, Annual Meeting, Revised Resolution 109, at 1 (2016) [hereinafter ABA Resolution].

<sup>29</sup> Model Rules of Prof'l Conduct r. 8.4(g) (Am. Bar Ass'n 2017).

<sup>30</sup> ABA Report, *supra* note 25, at 2.

<sup>31</sup> *Id.*

<sup>32</sup> For an excellent overview of the responses to Model Rule 8.4(g) and a discussion of its constitutionality, see Margaret Tarkington, *Voice of Justice: Reclaiming the First Amendment Rights of Lawyers* 243–78 (2018).

of the rule, and formally rejected the rule.<sup>33</sup> The state attorneys general from Texas, South Carolina, and Louisiana have issued opinions arguing that Model Rule 8.4(g) is an unconstitutional violation of attorneys' rights to freedom of speech, association, and religion.<sup>34</sup> Similarly, a robust debate is ongoing amongst legal scholars about the constitutionality of the rule.<sup>35</sup> And yet, with all of the commentary published regarding Model Rule 8.4(g)—in legal scholarship, blog posts, and formal opinions—no one has assessed whether the rule is likely to be effective at achieving the ABA's stated goals.

Whether the rule is likely to be effective is incredibly important. As demonstrated by the SEC disclosure example, the import and potential effectiveness of a rule should not be assumed just because it has been

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<sup>33</sup> See Am. Bar Ass'n Ctr. for Prof. Responsibility Policy Implementation Comm., *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (2018), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chart\\_adopt\\_8\\_4\\_g.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.pdf) [<https://perma.cc/ZC5F-VBFW>].

<sup>34</sup> See Op. La. Att'y Gen. No. 17-0114 (Sept. 8, 2017); Op. S.C. Att'y Gen. (May 1, 2017); Op. Tex. Att'y Gen. No. KP-0123 (Dec. 20, 2016).

<sup>35</sup> Compare Tarkington, *supra* note 32 (detailing the positions of various scholars and state actors on this question); Josh Blackman, Reply: A Pause for State Courts Considering Model Rule 8.4(g), 30 *Geo. J. Legal Ethics* 241, 248 (2017) (quoting a December 2015 draft of Model Rule 8.4(g) which addressed potential conflict with the First Amendment); George W. Dent, Jr., Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political, 32 *Notre Dame J.L. Ethics & Pub. Pol'y* 135, 161–67 (2018) (finding Rule 8.4(g) to be viewpoint discrimination in violation of the First Amendment); Eugene Volokh & Keith Swisher, Point-Counterpoint: A Speech Code for Lawyers?, 101 *Judicature*, (Spring 2017), at 70, 74 (statements of Eugene Volokh) (arguing that Rule 8.4(g) is inconsistent with First Amendment case law); and Eugene Volokh, A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities?, *Wash. Post* (May 5, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/05/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities/?utm\\_term=.a0b32b0-6a43b](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/05/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities/?utm_term=.a0b32b0-6a43b) [<https://perma.cc/WL4F-9MYQ>] (arguing that Rule 8.4(g) is viewpoint discrimination), with Rebecca Aviel, Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech, 31 *Geo. J. Legal Ethics* 31, 41–50 (2018) (asserting that Rule 8.4(g) is not overbroad and analogizing to Title VII protections, which are constitutional); 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, 234–35 (2017) (arguing that the speech covered by Rule 8.4(g) is not protected by the First Amendment); 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, 21 (2017) (finding Rule 8.4(g) constitutional if narrowly confined to only address legal practice); and L. Ali Khan, Disciplining Lawyers for Harassment and Discrimination: A Time for Change, *Jurist* (July 11, 2017), <https://www.jurist.org/commentary/2017/07/ali-kahn-aba-rule-change/> [<https://perma.cc/VR-64-2Q95>] (encouraging policymakers to adopt Rule 8.4(g) on a statewide level and reject First Amendment concerns).

passed and implemented. Sorely lacking from the legal scholarship to date regarding Model Rule 8.4(g) is a robust assessment of the rule's potential effectiveness. This Article begins that effort and finds the rule to be lacking.

One constraint with Model Rule 8.4(g) as drafted comes from its focus on only overt discrimination and harassment, and its failure to address covert discrimination. While there was a time when a prohibition against overt discrimination likely would have made a great deal of difference to members of the legal profession, many of today's most pernicious forms of discrimination appear to be more covert in nature. Thus, any effort to address the profession's challenge with achieving a more diverse and inclusive environment must include a strategy for combating covert discrimination.

Scholars who research issues of diversity within the legal profession, and discrimination more generally, have long determined that the most difficult challenges facing efforts to achieve equality, diversity, and inclusion within organizations today are tied to structural discrimination and implicit bias,<sup>36</sup> which are covert forms of discrimination. Those advocating the passage of Model Rule 8.4(g), however, purposefully crafted the rule in a manner that does not address covert discrimination.<sup>37</sup> As a result, Model Rule 8.4(g) is unlikely to achieve the ABA's stated goal of "[e]liminat[ing] bias in the legal profession and justice system,"<sup>38</sup> because it expressly fails to consider one of the most prevalent forms of discrimination found within organizations today.<sup>39</sup>

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<sup>36</sup> See, e.g., Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 *Geo. J. Legal Ethics* 1041, 1056 (2011); Veronica Root, *Retaining Color*, 47 *U. Mich. J.L. Reform* 575, 606–10 (2014); Wald, *supra* note 1, at 1111; see also *infra* Section III.A. (addressing how structural discrimination and implicit bias manifest themselves in the legal profession).

<sup>37</sup> Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 *J. Legal Prof.* 201, 250 (2017) (explaining that the rule was stripped of language that would have prohibited engaging in behavior that "manifest[ed] bias or prejudice," because "while it could be argued that we each have a right to 'manifest' (express) bias or prejudice against others, we do not have a similar right to harass others or discriminate against others").

<sup>38</sup> ABA Report, *supra* note 25, at 1.

<sup>39</sup> David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 *Calif. L. Rev.* 493, 510 (1996) (noting "the widely accepted fact that overt racist attitudes are on the decline, particularly among highly educated and economically successful whites").

This Article proceeds as follows. Part I provides a brief history of the profession's history of overt discrimination and exclusion. It then describes the state of diversity within the profession today, demonstrating the lack of equality apparent throughout the profession for certain demographic groups. Part II recounts how Model Rule 8.4(g) came to be, and then utilizes several methods of assessment to test the rule's potential effectiveness. Importantly, Part II demonstrates how Model Rule 8.4(g) is based upon state rules that failed to have much practical effect in combating discrimination and bias. Part III, drawing on research from the fields of employment discrimination and organizational behavior and management, presents this Article's thesis: the legal profession should adopt strategies that (i) address covert discrimination throughout the profession and (ii) encourage individual attorneys to stop remaining silent and instead give voice to their experiences of discrimination, harassment, and bias. Part IV discusses benefits to the approach put forth in Part III and addresses some additional concerns raised by the Article.

#### I. THE PROFESSION'S DISCRIMINATORY PAST

*“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. Discrimination and harassment . . . continue[] to be[] a problem in our profession and in society. Existing steps have not been enough . . . .”*

—ABA President Paulette Brown<sup>40</sup>

The words of then ABA President Paulette Brown appeared uncontroversial when spoken in 2016, but that would not always have been the case. The ABA and American legal profession have a long history of discrimination against individuals on the basis of their race, sex, religion, and other factors. It took decades and a great deal of time and effort on the part of multiple individuals to get to a point in history where Brown's words were accepted without considerable dissent or debate. This Part begins by providing a brief account of the American legal profession's

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<sup>40</sup> ABA Report, *supra* note 25, at 1.

history of exclusion. The Part then highlights some examples that demonstrate the pervasive inequity that remains within many areas of the profession today.

### *A. History of Exclusion*

There were not always formal requirements making the right to practice law an exclusive one.<sup>41</sup> The existence of lawyers dates “back to antiquity,” but the actual professionalism of the practice of law came much later.<sup>42</sup> This professionalism had many benefits. Lawyers were perceived as individuals who could “help preserve fairness, justice, and progress.”<sup>43</sup> And lawyers performed these functions by serving as “intermediaries between the interests of the state and society.”<sup>44</sup> The professionalization of the legal field in America, however, also came with certain ills.<sup>45</sup>

The legal profession, as with so many institutions in America, has a history rooted in exclusion and overt discrimination.<sup>46</sup> The discrimination started against immigrants from Southern and Eastern Europe with ethnic, cultural, and religious backgrounds that were different from the existing American populace, which overwhelmingly came from Northern Europe.<sup>47</sup> But it quickly spread to suppress the ability of women and persons of color from practicing law.<sup>48</sup> Part of this exclusion was to protect the

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<sup>41</sup> Richard L. Abel, *American Lawyers* 40 (1989); Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 108 (1976).

<sup>42</sup> Dana A. Remus, *Reconstructing Professionalism*, 51 *Ga. L. Rev.* 807, 835 (2017).

<sup>43</sup> Rebecca Roiphe, *The Decline of Professionalism*, 29 *Geo. J. Legal Ethics* 649, 650 (2016).

<sup>44</sup> Veronica Root, *Constraining Monitors*, 85 *Fordham L. Rev.* 2227, 2236 (2017).

<sup>45</sup> Several legal scholars have diligently documented the different ways the profession subordinated particular groups of individuals. See Abel, *supra* note 41; Auerbach, *supra* note 41; Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 *Am. J. Legal Hist.* 1, 3–13 (2005).

<sup>46</sup> Scholars have demonstrated that attempts to restrict the diversification of legal practice took a variety of forms. For example, top law schools began requiring a college degree as a prerequisite for attending law school when the custom at the time was to require a high school diploma only. Abel, *supra* note 41, at 48; see also Auerbach, *supra* note 41, at 27 (“The Anglo-Saxon Protestant retreat to corporate enclaves was facilitated by changing patterns of legal education, which enabled corporate firms to camouflage their prejudices under the cover of academic achievement.”).

<sup>47</sup> Abel, *supra* note 41, at 6; Maria Chávez, *Everyday Injustice: Latino Professionals and Racism* 58–59 (2011).

<sup>48</sup> See Auerbach, *supra* note 41, at 295.

monopoly held by a select group of individuals over entrance to the profession,<sup>49</sup> but this overt and purposeful exclusion of certain groups was also sometimes rooted in pervasive beliefs regarding their innate inferiority.

For example, in 1873, the United States Supreme Court upheld the exclusion of a woman from the Illinois state bar, because “women’s ‘natural and proper timidity and delicacy’ made them unfit for many vocations, including legal practice.”<sup>50</sup> The exclusion of certain groups was an effort to limit access to the legal profession and the benefits professionalism availed. If outright denial could not be achieved in particular instances, concrete steps were taken to limit the ability of underrepresented groups to enter the profession en masse. For example, the first black lawyer was admitted to the Supreme Court bar in 1865, shortly after the death of Chief Justice Roger B. Taney, the author of the infamous *Dred Scott*<sup>51</sup> decision,<sup>52</sup> but the admission was an anomaly and racial discrimination within the bar persisted.

Yet despite efforts to the contrary, the demographics of the bar did begin to change from the 1880s to the 1920s. The “[w]hite Protestant elite of the bar often did not respond positively to this diversity.”<sup>53</sup> Through the 1940s, there were many states where an attorney would not be admitted to the state bar if he was not of a white, Anglo-Saxon, Protestant background.<sup>54</sup> As a result of these discriminatory policies and rules, in 1960, women accounted for less than three percent of lawyers and attorneys of color “accounted for only 1 percent of the profession.”<sup>55</sup> Indeed, “[n]ot until 1964 did all accredited law schools formally abolish discrimination on the basis of race in admissions, and the last gender barriers did not fall

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<sup>49</sup> Abel, *supra* note 41, at 85–87.

<sup>50</sup> Deborah L. Rhode, *Lawyers as Leaders* 130 (2013) (quoting *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring)).

<sup>51</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 403, 406 (1857) (holding that “a negro, whose ancestors were imported into this country, and sold as slaves, [could not] become a member of the political community formed and brought into existence by the Constitution of the United States”).

<sup>52</sup> Richard L. Nygaard, *Cracking the High Court*, in *Law Day Stories* 34, 37 (Am. Bar Ass’n Special Comm. on Youth Educ. for Citizenship ed., 1995).

<sup>53</sup> Russell G. Pearce & Pam Jenoff, *Nothing New Under the Sun: How the Legal Profession’s Twenty-First Century Challenges Resemble Those of the Turn of the Twentieth Century*, 40 *Fordham Urb. L.J.* 481, 498 (2012).

<sup>54</sup> Chávez, *supra* note 47, at 59.

<sup>55</sup> Rhode, *supra* note 50, at 130.

until 1972.”<sup>56</sup> And “with only rare exceptions prior to the late 1960s . . . there were neither black corporate lawyers nor true black law firms.”<sup>57</sup> Instead, black lawyers were more likely to practice as solo practitioners, which resulted in black lawyers “[lagg[ing] significantly behind white lawyers in both income and prestige.”<sup>58</sup>

The repeated attempts by privileged groups to subordinate certain populations within the legal profession is notable, in part, because professionals are traditionally understood as groups whose primary interest is to “maximize the public good.”<sup>59</sup> Indeed, some once believed that “the profession of the law [had] more potential for good than any other profession, excepting the Christian ministry, and in some respects more powerful [sic] for good than even that high profession.”<sup>60</sup> It is, perhaps, ironic that a group meant to bring about the public good, instead, purposefully relegated women, religious minorities, and persons of color to reside within an inferior status for decades.<sup>61</sup> And even once members within the profession began to embrace antidiscrimination norms, significant barriers to entry remained when underrepresented groups attempted to “break[] into the upper echelons of the elite bar.”<sup>62</sup> Thus, the history of overt, systematic discrimination, racism, and misogyny throughout the American legal profession remains undisputed, and its impact continues to resound in the lives of lawyers today.

### *B. Exclusion Today*

For some, the legal profession’s history of exclusion may seem unsurprising or even anticlimactic. One might argue that a profession that existed within a society plagued with discriminatory customs and practices, like that found in the United States, would necessarily reflect that society’s values, preferences, and norms. What is perhaps more striking is the continued underrepresentation of groups today that were the original victims of overt discrimination by the bar decades ago.

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<sup>56</sup> *Id.*

<sup>57</sup> David B. Wilkins, “If You Can’t Join ’Em, Beat ’Em!”: The Rise and Fall of the Black Corporate Law Firm, 60 *Stan. L. Rev.* 1733, 1740 (2008) (emphasis omitted).

<sup>58</sup> *Id.*

<sup>59</sup> Pearce & Jenoff, *supra* note 53, at 483.

<sup>60</sup> *Id.* at 489 (quoting a speech by Henry St. George Tucker).

<sup>61</sup> Abel, *supra* note 41, at 108–11.

<sup>62</sup> Wilkins & Gulati, *supra* note 39, at 497.

For example, the disparities within the legal profession continue to start at the point of entry—law school. In particular, numerous articles discuss the lack of blacks and Hispanics within top law schools.<sup>63</sup> In the past two years, major news headlines covered the election of the first black editor-in-chief to the Michigan Law Review<sup>64</sup> and the first black, female editor-in-chief to the Harvard Law Review.<sup>65</sup> And after law school, the most prestigious of opportunities—a Supreme Court clerkship—remains dominated by white men.<sup>66</sup>

The disparities continue when one evaluates lawyers currently engaged in the practice of law. For example, one area with significant research and scholarly discussion is the state of diversity within elite, large law firms. It is common knowledge that women enter legal practice at the same rate as men, but are much less likely to advance to the most senior and elite positions within firms.<sup>67</sup> Additionally, the status of lawyers of color within the profession is similarly bleak, as they are “underrepresented at both the entry and partnership levels” within law firms.<sup>68</sup> These disparities amongst demographic groups at elite, large law firms are tied directly to the profession’s history of granting privilege to some groups while exercising discriminatory policies towards others, which has led to the current subordination and exclusion of women and persons of color from the most revered areas of the profession.<sup>69</sup>

Finally, attorneys with an intersectional status like, for example, women of color, face special challenges navigating successful careers

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<sup>63</sup> See, e.g., Debra Cassens Weiss, *Law School Diversity Improves, But Not at Most Prestigious Schools*, ABA J. (Feb. 12, 2015, 5:45 AM), [http://www.abajournal.com/news/article/law\\_school\\_diversity\\_improves\\_but\\_not\\_at\\_most\\_prestigious\\_schools](http://www.abajournal.com/news/article/law_school_diversity_improves_but_not_at_most_prestigious_schools) [<https://perma.cc/4WW7-7ZZG>].

<sup>64</sup> Sayali Amin, *Michigan Law Student Becomes First Black Editor-in-Chief of 116-Year-Old Law Review*, The Michigan Daily (Jan. 28, 2018, 5:01 PM), <https://www.michigan-daily.com/section/academics/michigan-law-student-becomes-first-black-editor-chief-law-review> [<https://perma.cc/4KKN-2WL7>].

<sup>65</sup> Katharine Q. Seelye, *After 130 Years, Harvard Law Review Elects a Black Woman President*, N.Y. Times (Feb. 27, 2017), <https://www.nytimes.com/2017/02/27/us/after-130-years-harvard-law-review-elects-a-black-woman-president.html> [<https://perma.cc/Y8A4-UB7T>].

<sup>66</sup> See, e.g., Tony Mauro, *Mostly White and Male: Diversity Still Lags Among SCOTUS Law Clerks*, Nat’l L.J. (Dec. 11, 2017, 4:00 AM), <https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/12/11/mostly-white-and-male-diversity-still-lags-among-scotus-law-clerks> [<https://perma.cc/BMY8-X6J9>].

<sup>67</sup> Alex B. Long, *Employment Discrimination in the Legal Profession: A Question of Ethics?*, 2016 U. Ill. L. Rev. 445, 447.

<sup>68</sup> *Id.*

<sup>69</sup> See Rhode, *supra* note 36; Root, *supra* note 36; see also *infra* Section III.A.

within the bar.<sup>70</sup> These attorneys are discriminated against because they are women, but they are also discriminated against because they are persons of color. Preconceived notions about a woman's commitment to practice when confronted with life events like childrearing converge with competency concerns raised because of her race, which interact to create significant barriers to developing and maintaining a successful legal career. This discrimination as a result of intersectional status has led to significant disparities for women of color within the profession. For instance, in October 2016, a black woman's appearance arguing a case before the Supreme Court was deemed newsworthy, because it was the first time a black woman had argued before the Court in three years.<sup>71</sup> Arguing before the Supreme Court is a rarified experience reserved for those within the bar that come from traditionally privileged demographic groups, which do not include women, persons of color, and most certainly not women of color.<sup>72</sup> In part, this is because the experiences and mentorship needed to rise to the most elite levels of the legal profession have been, and in many instances continue to be, reserved for those who have traditionally been granted a large amount of privilege within the profession,<sup>73</sup> which has resulted in tangible disparities amongst demographic groups.

The above are just a few examples of the continued disparities found throughout the legal profession between communities that were initially granted a great deal of privilege and those that were purposefully excluded from the profession's ranks. These disparities have prompted many within the legal profession and leaders within the ABA to look for strategies they can implement to improve the parity amongst demographic groups within the bar. These strategies, even when well-meaning, must be assessed rigorously and completely to determine whether they are likely to contribute to significant change within the profession.

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<sup>70</sup> Rhode, *supra* note 36, at 1041; see also Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 *Iowa L. Rev.* 2017, 2017 (2017) (explaining "how the intersectional nature of Black women's identities triggers a particularized stereotype or trope of the 'Angry Black Woman'").

<sup>71</sup> Stephanie Mencimer, *A Black Woman Is Arguing a Big Supreme Court Case Today. That Shouldn't Be Unusual. But It Is.*, *Mother Jones* (Oct. 5, 2016, 10:00 AM), <http://www.motherjones.com/politics/2016/10/buck-v-davis-christina-swarns> [<https://perma.cc/A792-MR8P>].

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., Root, *supra* note 36, at 611–13, 617–18, 625 (explaining how a lack of mentorship has caused demographic disparities within elite large law firms).

## II. AN ATTEMPT AT REFORM

The legal profession, through the ABA and other groups, has spent a great deal of time attempting to address the legal profession's history of discrimination with varying degrees of success. The ABA and others have put forth a good faith effort to adopt policies, procedures, and rules that will lead to greater equality and inclusion throughout the legal profession. This Part discusses the ABA's most recent attempt, the adoption of Model Rule of Professional Conduct 8.4(g), which demonstrates how actions undertaken with the best of intentions may sometimes not be effective at achieving one's goals.

*A. Obtaining Model Rule 8.4(g)*

The legal profession's discriminatory past and present has caused many of its members to think critically about its future. In part, this is because "[l]awyers' discriminatory words or conduct undermines public confidence in and respect for the judicial process as a whole by demonstrating that officers of the court do not take seriously the notions of equal treatment on which the legal system is based."<sup>74</sup> Recognizing this, leaders of the bar have made a variety of attempts to formally address the problem of discrimination in the profession, but have often fallen short of achieving their goal. This is particularly true in the area of attorney regulation.

The ABA adopted the Model Rules of Professional Conduct ("Model Rules") in 1983, which serve as a baseline of lawyer conduct within America.<sup>75</sup> While technically not authoritative, the Model Rules serve as a template for most binding, state-based rules of professional conduct, which form the basis of the attorney regulation apparatus. Because the ABA's Model Rules are the foundation for all states' regulation regimes, the actions taken by the ABA have particular importance throughout the profession.

Recognizing the influence of the Model Rules, leaders within the bar attempted to obtain the adoption of a formal anti-discrimination provision in the early 1990s. But "in 1992 and 1998, the ABA rejected attempts to amend [Model] Rule 8.4 to explicitly prohibit discrimination, citing inability to reach a consensus about the relevant language . . . ."<sup>76</sup> Despite the conflict within the ABA regarding the adoption of a formal rule, other

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<sup>74</sup> Long, *supra* note 67, at 448.

<sup>75</sup> ABA Report, *supra* note 25, at 1.

<sup>76</sup> Wald, *supra* note 1, at 1113.

important steps were being taken within the legal profession to address discriminatory conduct. For example, California adopted an anti-discrimination rule in 1994.<sup>77</sup> While there was difficulty obtaining national consensus for an antidiscrimination rule in the mid-1990s, there were pockets within the legal profession, as evidenced by the actions in California and other states, willing to adopt such rules at the time.

And in 1998, leaders within the bar eventually obtained a compromise that led to the creation of a comment to Model Rule 8.4.<sup>78</sup> Comment [3] to Model Rule 8.4 stated:

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.<sup>79</sup>

Because there was a fair amount of pushback when attempts to adopt formal anti-discrimination rules were pursued initially, adopting original Comment [3] allowed for members on both sides of the issue to find common ground. However, many within the profession did not see a comment alone as a sufficient intervention.

As noted, in the ABA report supporting the adoption of new Model Rule 8.4(g), “[i]t is important to acknowledge that [original Comment [3]] was a necessary and significant first step to address the issues of bias,

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<sup>77</sup> See Cal. Rules of Prof'l Conduct r. 2-400 (2014) (indicating the Rule's adoption in 1994), amended and recodified as r. 8.4.1 in 2018; see also Mo. Rules of Prof'l Conduct r. 4-8.4(g) (1996); N.J. Rules of Prof'l Conduct r. 8.4(g) (1994); Tex. Rules of Prof'l Conduct r. 5.08(a) (1994); N.M. Rules of Prof'l Conduct r. 16-300 (1994); Iowa Code of Prof'l Resp. D.R. 1-102(A)(7) (1993); Fla. Rules of Prof'l Conduct r. 4-8.4 (1993); Mich. Rules of Prof'l Conduct r. 6.5 (1993); Minn. Rules of Prof'l Conduct r. 8.4(g), (h) (1992); D.C. Rules of Prof'l Conduct r. 9.1 (1991); N.Y. Lawyer's Code of Prof'l Resp. DR 1-102(A)(6) (1990). Please note, because each state tracks changes to their rules of professional conduct a bit differently, with some having more exacting histories than others, the dates of the original adoptions of an antidiscrimination provision were at times inferred based on text from a later rule or a scholarly publication. These citations reflect the earliest dates the author could identify where an antidiscrimination provision existed in each state.

<sup>78</sup> ABA Report, *supra* note 25, at 2.

<sup>79</sup> Model Rules of Prof'l Conduct r. 8.4 cmt. [3] (Am. Bar Ass'n 2015).

prejudice, discrimination and harassment in the Model Rules.”<sup>80</sup> Practically, however, “Comments are not Rules; they have no authority as such,” making the original Comment [3] less instructive and persuasive than a formal rule.<sup>81</sup> Additionally, the comment text that was agreed upon in 1998 was limited in scope, because it “applie[d] (i) only to conduct by a lawyer that occurs in the course of representing a client, and (ii) *only* if such conduct is also determined to be ‘prejudicial to the administration of justice.’”<sup>82</sup> Thus, while passage of Comment [3] was considered as a positive step, it was seen by many as an insufficient response to the calls for a formal antidiscrimination rule.

Over the next two decades, however, additional changes occurred within the profession. In 2008, the ABA adopted a new platform, which included four overarching “Goals.” Goal III is entitled, “Eliminate Bias and Enhance Diversity,” and includes two very specific objectives.<sup>83</sup> First, to “[p]romote full and equal participation in the association, [the] profession, and the justice system by all persons.”<sup>84</sup> Second, to “[e]liminate bias in the legal profession and the justice system.”<sup>85</sup> The adoption of Goal III provided a new sense of purpose and focus for the ABA’s efforts to deter discriminatory conduct and promote greater diversity within the profession. Additionally, four commissions were created to support and advance Goal III: the Commission on Women in the Profession, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identity.<sup>86</sup> Third, several additional jurisdictions adopted anti-discrimination rules prior to 2014.<sup>87</sup> The efforts undertaken

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<sup>80</sup> ABA Report, *supra* note 25, at 2.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 3.

<sup>87</sup> See, e.g., Ill. Rules of Prof’l Conduct r. 8.4(j) (2010); Colo. Rules of Prof’l Conduct r. 8.4(g) (2008); Neb. Rules of Prof’l Conduct r. 3-508.4(d) (2008); R.I. Rules of Prof’l Conduct r. 8.4 (2007); Idaho Rules of Prof’l Conduct r. 4.4 (2004); Ind. Rules of Prof’l Conduct r. 8.4(g) (2002); Wash. Rules of Prof’l Conduct r. 8.4(g), (h) (2002); N.D. Rules of Prof’l Conduct r. 8.4(d) (2000); Mass. Rules of Prof’l Conduct r. 3.4(i) (1998). Again, please note, because each state tracks changes to their rules of professional conduct a bit differently, with some having more exacting histories than others, the dates of the original adoptions of an antidiscrimination provision were at times inferred based on text from a later rule or a scholarly publication. These citations reflect the earliest dates the author was able to identify where an antidiscrimination provision existed in each state. Additionally, several of these provisions

by the states, ABA, and commissions eventually changed the landscape within the ABA sufficiently to make a formal anti-discrimination rule a reality.

In May 2014, the four commissions sent a joint letter to the ABA's Standing Committee on Ethics and Professional Responsibility "asking it to develop a proposal to amend the Model Rules . . . to better address issues of harassment and discrimination and to implement Goal III."<sup>88</sup> From Fall 2014 to May 2015, a working group was formed to evaluate the feasibility of amending the Model Rules, which presented its findings to the Standing Committee on Ethics and Professional Responsibility. Specifically, "the [w]orking [g]roup concluded that there was a need to amend Model Rule 8.4 to provide a comprehensive anti-discrimination provision that was nonetheless limited to the practice of law, in the black letter of the rule itself, and not just in a Comment."<sup>89</sup> Over the next several months, the Standing Committee on Ethics and Professional Responsibility issued draft rules and invited discussion and commentary from the ABA's membership regarding the appropriate language and scope of a new Model Rule. After much "study and consideration [the Standing Committee on Ethics and Professional Responsibility] made substantial and significant changes to its [proposed Rule], taking into account the many comments it received on its earlier drafts."<sup>90</sup>

In August 2016, the ABA formally adopted Model Rule 8.4(g) at the ABA Annual Meeting in San Francisco.<sup>91</sup> In passing Rule 8.4(g), the supporting ABA report noted that there remained "[s]ome opponents to bringing an anti-discrimination and anti-harassment provision into the black letter of the Model Rules."<sup>92</sup> In response, the report put forth a strong federalism argument and explained that twenty-four states and the District of Columbia had anti-discrimination rules in place because

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have been modified over time, including since the adoption of Model Rule 8.4(g) in 2016. As such, the coding project comparing the state provisions to Model Rule 8.4(g) was based on the online rules from each state in the fall of 2016.

<sup>88</sup> Am. Bar Ass'n, *supra* note 25, at 3.

<sup>89</sup> *Id.* at 3–4.

<sup>90</sup> *Id.* at 4.

<sup>91</sup> Peter Geraghty, ABA Adopts New Anti-Discrimination Rule 8.4(g) at Annual Meeting in San Francisco, *YourABA Newsl.* (Sept. 2016), <https://www.americanbar.org/news/aba-news/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g-at-annual-meeting-in-/> [<https://perma.cc/98Y7-A9KJ>].

<sup>92</sup> Am. Bar Ass'n, *supra* note 25, at 5.

“[t]hey already concluded that [original Comment [3]] does not adequately address discriminatory or harassing behavior by lawyers.”<sup>93</sup> To the surprise of many,<sup>94</sup> when the voice vote was taken regarding the passage of Model Rule 8.4(g), it passed unanimously without any expression of dissent, leading many to believe that a new, more inclusive era was on the horizon for the American legal profession.

*B. Model Rule 8.4(g)*

Model Rule 8.4(g) falls within the general “Misconduct” section of the Model Rules. The provisions within Model Rule 8.4 are meant to “maintain[] the integrity of the profession,” and prohibit seven broad categories that are deemed “professional misconduct.”<sup>95</sup> Specifically, Rule 8.4(g) makes it professional misconduct for a lawyer to:

[E]ngage 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.<sup>96</sup>

Thus, Model Rule 8.4(g) serves primarily as a formal antidiscrimination provision within the Model Rules.

The basic text of Model Rule 8.4(g) looks quite similar to the prohibitions found in several of the state anti-discrimination rules.<sup>97</sup> Twenty-two of these twenty-five jurisdictions (88%) prevent discrimination, prejudice, or bias, and eight (32%) prohibit harassment.<sup>98</sup> Every jurisdiction with a provision prohibits discrimination, prejudice, bias, or harassment

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<sup>93</sup> *Id.* at 5.

<sup>94</sup> On two separate occasions after presenting this paper, I have been approached by individuals who were present on the day Model Rule 8.4(g) was passed. Both conveyed their belief that (i) delegates were not sure it would pass, (ii) attendees were surprised it passed unanimously, and (iii) the passage was the result of some last-minute negotiations.

<sup>95</sup> Model Rules of Professional Conduct r. 8.4 (Am. Bar. Ass’n 2017).

<sup>96</sup> *Id.* r. 8.4(g).

<sup>97</sup> When coding for language in each state, I included information that was found either in the text of the state’s rule or its explanatory comment. I did this to capture the entire scope of conduct each state’s rule was meant to prohibit. See Statistical Analysis on File with Author.

<sup>98</sup> *Id.*

on the basis of race or sex, and the majority of jurisdictions prohibit discrimination, prejudice, bias, or harassment on the basis of religion, national origin, disability, age, and sexual orientation.<sup>99</sup> Nearly half of the jurisdictions prohibit discrimination, prejudice, bias, or harassment on the basis of socioeconomic status, eight do so on the basis of marital status, two on the basis of ethnicity, and one on the basis of gender identity.<sup>100</sup> A slight majority of the jurisdictions limit their antidiscrimination rules to conduct related to the practice of law.<sup>101</sup> As such, the adoption of Model Rule 8.4(g) appears to be closely in line with the jurisdictions with antidiscrimination provisions, and the passage of the formal rule would, for many, seem to be a logical next step since broad-based consensus was reached in such a large number of jurisdictions.

At the same time that Model Rule 8.4(g) was adopted, the ABA also adopted new Comments [3]–[4], which provide additional information and guidance regarding how Model Rule 8.4(g)'s antidiscrimination and anti-harassment provisions should function and be understood.<sup>102</sup>

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

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

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> ABA Resolution, *supra* note 28, at 2–3. A new Comment [5] was also added to discuss peremptory challenges and other representation concerns, but a discussion of this comment is beyond the scope of this Article.

at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.<sup>103</sup>

The text of the comments appears to broaden the scope of Model Rule 8.4(g) in a manner that might not be clear on the facial text of the rule and, importantly, the additional explanatory language contained in Comments [3]–[4] is largely absent in the jurisdictions that have passed formal antidiscrimination rules.

Specifically as to new Comment [3]’s guidance regarding the antidiscrimination and anti-harassment provisions found in Model Rule 8.4(g), only one clause—the clause explaining that harassment includes sexual harassment—was found in four jurisdictions.<sup>104</sup> The other explanatory clauses in the new Comment [3] are found, at most, in only one to two jurisdictions.<sup>105</sup> With regard to new Comment [4], a majority of jurisdictions (64%) include “representing clients” as “conduct related to the practice of law.”<sup>106</sup> Nine (36%) include “interacting with witnesses” and eight (32%) include “interacting with court personnel” as conduct related to the practice of law.<sup>107</sup> Just eight jurisdictions (28%) include “interacting with lawyers” or “interacting with counsel,” and four jurisdictions (16%) include “interacting with others” or “other person” as conduct related to the practice of law.<sup>108</sup> Only one jurisdiction includes “interacting with coworkers” and “participating in bar association” activities as conduct related to the practice of law.<sup>109</sup> Finally, no jurisdictions include “operating or managing a law firm or practice,” “participating in business activities,” or “participating in social activities” as conduct related to the practice of law.<sup>110</sup>

The text of Model Rule 8.4(g) provides the formal antidiscrimination rule that leaders within the ABA spent decades fighting for in response to the bar’s history of overt discriminatory conduct and exclusionary practices. The text of the rule itself looks to be consistent with what is found in the twenty-five jurisdictions that previously passed antidiscrimination provisions. The comments, however, make clear that Model Rule 8.4(g)

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<sup>103</sup> Id.

<sup>104</sup> See Statistical Analysis on File with Author.

<sup>105</sup> Id.

<sup>106</sup> Id.

<sup>107</sup> Id.

<sup>108</sup> Id.

<sup>109</sup> Id.

<sup>110</sup> Id.

is in some ways more expansive as to the situations when the rule is applicable. The question remains, however, whether Model Rule 8.4(g) is likely to effectuate Goal III's objectives at eliminating bias and enhancing diversity within the legal profession.

### *C. Effectiveness of Model Rule 8.4(g)*

In determining whether Model Rule 8.4(g) is formulated in a manner likely to be successful, one must start with the purpose it is supposed to serve. At a minimum, a satisfactory antidiscrimination rule would likely need to effectuate the ABA's stated goals and objectives. Specifically, a new antidiscrimination rule should work to "[e]liminate [b]ias and [e]nhance [d]iversity" by (i) "Promot[ing] full and equal participation in the association, [the] profession, and the justice system by all persons" and (ii) "Eliminat[ing] bias in the legal profession and the justice system."<sup>111</sup> Thus, the question is whether Model Rule 8.4(g) is likely to achieve these precise objectives, as is claimed in the supporting report to the resolution.<sup>112</sup> As explained below, Model Rule 8.4(g) appears unlikely to meet the objectives laid out by the ABA. Thus, Model Rule 8.4(g) appears, much like the SEC disclosure rule, to be a rule that looks potentially effective on its face, but, upon close inspection, it lacks the substance and depth necessary to prompt concrete change within and throughout the profession.

#### *1. State Versions Garnered Little Practical Success*

One of the primary rationales put forward in support of the adoption of Model Rule 8.4(g) was a federalism argument based on similar rules adopted by twenty-four states and the District of Columbia. Thus, in assessing whether Model Rule 8.4(g) is likely to accomplish the objectives of Goal III, one relevant inquiry is whether previously adopted antidiscrimination provisions resulted in notable changes within their respective jurisdictions. It appears that they have not.

First, scholarship assessing the effectiveness of antidiscrimination provisions adopted in various jurisdictions has determined that their impact has been limited. For example, the use of antidiscrimination provisions to deter employment discrimination within the practice of law was found

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<sup>111</sup> ABA Report, *supra* note 25, at 1.

<sup>112</sup> *Id.* ("This current proposal now before the House will further implement the Association's Goal III objectives.").

wanting despite the fact that twelve states had adopted antidiscrimination rules that prohibit employment discrimination.<sup>113</sup> Interestingly, research demonstrated that “professional discipline for engaging in employment discrimination is rare” and that “[d]iscipline involving one lawyer engaging in employment discrimination against another is rarer still.”<sup>114</sup> Indeed, analysis of antidiscrimination rules passed in state jurisdictions have in many instances found that “[t]here are almost no reported decisions,” providing further evidence that the use of these antidiscrimination rules at the state level has not been significant.<sup>115</sup>

Second, it appears that the few disciplinary actions that have been brought as a result of state-based antidiscrimination provisions appear to have punished conduct that would have resulted in action from disciplinary authorities even without the existence of an antidiscrimination rule.<sup>116</sup> Specifically, there are several instances of lawyer discipline arising out of state-based antidiscrimination provisions where another professional misconduct prohibition or law might be equally applicable.

For example, a lawyer might fabricate a story regarding the participation of a fictional, black man in an automobile accident that was related to the consumption of alcohol in an effort to avoid criminal charges.<sup>117</sup> Or a lawyer might, in the midst of representing a client in a business dispute, send “ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen?”<sup>118</sup> It may be appropriate for conduct of this nature to trigger a disciplinary sanction under Model Rule 8.4(g), but it also may be just as appropriate to bring a claim under 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.”<sup>119</sup>

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<sup>113</sup> Long, *supra* note 67, at 449.

<sup>114</sup> *Id.* at 461.

<sup>115</sup> *Id.* at 458.

<sup>116</sup> See, e.g., Latonia Haney Keith, *Cultural Competency in a Post-Model Rule 8.4(g) World*, 25 *Duke J. Gender L. & Pol’y* 1, 32–35 (2017).

<sup>117</sup> Complaint at 2–3, 5, *In re Wilsey*, No. 16-032, (Ohio Aug. 3, 2016), <http://www.sc.ohio.gov/Boards/BOC/certifiedCases/augustSept2016/2016-032.pdf> [<https://perma.cc/3YC3-U6Q2>].

<sup>118</sup> ABA Report, *supra* note 25, at 6 n.15 (citing *In re McGrath*, 280 P.3d 1091, 1093, 1099 (Wash. 2012)).

<sup>119</sup> Model Rules of Prof’l Conduct r. 8.4(d) (Am. Bar. Ass’n 2017).

Additionally, when representing a husband in a divorce action, a lawyer might attempt to sway the proceedings by referring to the wife as “being seen around town in the presence of a ‘black male’ and that such association was placing the [couple’s] children in harm’s way.”<sup>120</sup> A lawyer might also argue that a mother should not be considered for a modification in a child support amount, because the mother is “not a U.S. citizen.”<sup>121</sup> In doing so, the lawyer may have committed professional misconduct by “knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law,”<sup>122</sup> even though Model Rule 8.4(g) may also be applicable.

There are also instances where lawyer discipline arising out of anti-harassment provisions would have also been improper under other professional misconduct categories. For example, in the course of prosecuting someone for engaging in domestic violence, a prosecutor might proposition the victim by telling her that she is pretty and beautiful and asking whether she “was the ‘kind of girl who likes secret contact with an older married elected DA . . . the riskier the better.’”<sup>123</sup> Or a lawyer serving as a professor to law students might “ma[ke] unwelcome comments about [a] student’s appearance; engage[] in unwelcome physical contact of a sexual nature with the student; and attempt[] to convince the student to recant complaints she ha[s] made to authorities about [the law professor].”<sup>124</sup> While this type of conduct by a lawyer would certainly violate Model Rule 8.4(g), it would likely also violate Model Rule 8.4(b), because it is professional misconduct to “commit a criminal act,” like soliciting sex or initiating a sexual assault, “that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>125</sup> Indeed, the use of another professional misconduct rule was utilized in Colorado where there was no antidiscrimination or anti-harassment provision when “a lawyer who engaged in a pattern of sexual harassment of

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<sup>120</sup> ABA Report, *supra* note 25, at 6 n.15 (citing *In re Thomsen*, 837 N.E.2d 1011, 1011–12 (Ind. 2005)).

<sup>121</sup> *Id.* (citing *In re Campiti*, 937 N.E.2d 340, 340 (Ind. 2009)).

<sup>122</sup> Model Rules of Prof’l Conduct r. 8.4(f) (Am. Bar. Ass’n 2017).

<sup>123</sup> ABA Report, *supra* note 25, at 6 n.15 (quoting *In re Kratz*, 851 N.W.2d 219, 221 (Wis. 2014)).

<sup>124</sup> *Id.* (citing *In re Griffith*, 838 N.W.2d 792, 792 (Minn. 2013)).

<sup>125</sup> Model Rules of Prof’l Conduct r. 8.4(b) (Am. Bar. Ass’n 2017).

employees was suspended for violating a rule of professional conduct prohibiting conduct that reflects adversely on the lawyer's fitness to practice law."<sup>126</sup>

Finally, in an effort to placate individuals who objected to the passage of Model Rule 8.4(g), the ABA's report supporting its adoption noted 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."<sup>127</sup> The report concluded by explaining that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."<sup>128</sup> Thus, even in adopting Model Rule 8.4(g), the ABA acknowledged that similar anti-discrimination provisions resulted in a limited number of disciplinary actions. This acknowledgement was likely meant to be a comfort to some who feared that an antidiscrimination provision might be misused by either complainants or bar counsel, but it also demonstrates that similar provisions appeared to have very little practical impact.

While it made intuitive and political sense for the ABA to base Model Rule 8.4(g) on antidiscrimination provisions that were already in place, it is not at all clear that those underlying provisions have proven to be particularly helpful at eliminating discrimination and enhancing diversity. The type of behavior that has arisen before disciplinary authorities under antidiscrimination or anti-harassment provisions is egregious, outrageous, and undeniably worthy of professional discipline, but each of the above examples had an element of some other type of misconduct beyond the discriminatory behavior. To obtain the goal of eliminating discrimination and enhancing diversity within the legal profession, bar leaders must also be willing to address behavior of a purely discriminatory nature. And it is unclear whether Model Rule 8.4(g) is the type of rule that is likely to encompass the most common types of discriminatory behavior impacting the legal profession today, because it fails to address covert instances of discrimination.

## 2. *Vulnerable to Constitutional Critique*

Another method of assessing the potential effectiveness of Model Rule 8.4(g) is an inquiry focused on the type of response the rule has received.

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<sup>126</sup> Long, *supra* note 67, at 461.

<sup>127</sup> ABA Report, *supra* note 25, at 6.

<sup>128</sup> *Id.* at 15.

A rule with broad-based support may ultimately be effective. And even rules that spark robust debate may sometimes be effective by challenging preconceived notions and assumptions. Unfortunately, Model Rule 8.4(g) has engendered responses that appear to be noisy distractions from the ABA's goals and objectives.

The majority of the critiques levied against Model Rule 8.4(g) thus far have focused on whether a state's adoption of the rule as written would violate the First Amendment.<sup>129</sup> These critiques are fleshed out in pieces of legal scholarship, opinion letters, and blog posts, as well as through other means.<sup>130</sup> And these objections are relatively unsurprising, because they were articulated in advance of the ABA's adoption of the provision.<sup>131</sup>

The discussions about the constitutionality of Model Rule 8.4(g) are problematic in three respects. First, several states have expressed hesitancy to pass Model Rule 8.4(g) as written, because they are concerned that to do so would be an unconstitutional restriction on speech.<sup>132</sup> A rule's effectiveness is potentially limited if it goes unpassed. Second, many of the concerns expressed regarding Model Rule 8.4(g)'s constitutionality could have been avoided if less expansive accompanying comments had been adopted. As explained above, new Comments [3]–[4] depart from what was found in the rules of the twenty-five jurisdictions that had adopted antidiscrimination provisions prior to the adoption of Model Rule 8.4(g). While Model Rule 8.4(g) itself is quite narrow, the Comments opened the door to significant and potentially devastating critiques.<sup>133</sup> Third, and most importantly, by opening the door to constitutional critiques the drafters of Model Rule 8.4(g) created a situation where

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<sup>129</sup> See *supra* notes 34–35.

<sup>130</sup> *Id.*

<sup>131</sup> The ABA can technically propose rules without concerning itself with constitutional ramifications, because their rules are advisory and nonbinding upon individual attorneys. When states adopt rules of professional conduct, however, they must limit their actions to ensure they do not violate the constitutional rights of their citizenry. Thus, technically, concerns regarding the constitutionality of the ABA Model Rules are misplaced.

<sup>132</sup> See, e.g., Lorelei Laird, *Montana Legislature Says ABA Model Rule on Discrimination and Harassment Violates First Amendment*, *ABA J.* (Apr. 13, 2017, 4:58 PM), [http://www.abajournal.com/news/article/montana\\_legislature\\_says\\_aba\\_model\\_rule\\_on\\_discrimination\\_and\\_harassment\\_vi/](http://www.abajournal.com/news/article/montana_legislature_says_aba_model_rule_on_discrimination_and_harassment_vi/) [<https://perma.cc/WX5N-5VG7>].

<sup>133</sup> Broad ethics provisions are not new, although in this case the breadth is found in the commentary as opposed to the text of the rule itself. That said, courts have recognized the need for attorney regulation to at times include broad pronouncements, because “it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an

debates discussing Model Rule 8.4(g) are focused on its constitutionality instead of on the ABA's stated goals.

The membership of the legal profession includes individuals from different backgrounds, political persuasions, and various viewpoints. As such, the ABA is never going to pass a rule about the elimination of discrimination, harassment, and bias and the promotion of diversity and inclusion that achieves uniform consensus from members of the profession. But by adopting a version that is so patently vulnerable to constitutional critique, the ABA allowed off-topic commentary to enter into a debate that was supposed to be centered on how to achieve greater diversity, inclusion, and equality within and throughout the profession. Instead of having a robust debate about the mechanisms that are necessary to achieve the ABA's goal to eliminate bias and enhance diversity, people from traditionally privileged groups are issuing opinions and writing blog posts arguing that the ABA is engaged in an unconstitutional suppression of individuals' First Amendment rights. That "noise" has circumvented the ABA's goals, and it has done so while being clothed in the text of the Constitution. By passing such expansive commentary to the rule, the ABA created an opening for individuals from traditionally privileged groups to legitimately dodge the substance of the relevant debate about diversity within the profession.

### *3. Failure to Protect Against Retaliation*

Model Rule 8.4(g)'s effectiveness can also be assessed by its adherence to norms surrounding the implementation of antidiscrimination provisions. Model Rule 8.4(g) fails in at least one important respect, because it fails to protect potential complainants against retaliation.

It is widely accepted within employment and labor law scholarship that anti-retaliation provisions are a necessary component of laws that require action on the part of employees to initiate a proceeding. While an imperfect protection, it provides some sort of assurance that if the complainant is successful he will have recourse if his employer retaliates against him. And as explained by one legal scholar:

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attorney or counselor ought to be removed." See Samuel J. Levine, Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework, 77 Tul. L. Rev. 527, 538 & n.48 (2003) (quoting *In re Holtzman*, 577 N.E.2d 30, 33 (N.Y. 1991)) (internal quotation marks omitted).

Title VII and the other major anti-discrimination statutes *all* contain provisions prohibiting employers from retaliating against employees who oppose unlawful discrimination or who participate in proceedings to remedy discrimination. The inclusion of these provisions reflects a recognition of the fact that fear of employer retaliation is one of the primary reasons why employees do not report discrimination.<sup>134</sup>

The lawyer disciplinary system relies upon complaints to learn of inappropriate conduct by attorneys, and sanctions arising under Model Rule 8.4(g) would depend, at least in part, on complaints to disciplinary authorities. As such, an anti-retaliation provision should have been considered when adopting Model Rule 8.4(g).

An anti-retaliation provision is important, in part, because “statutory anti-retaliation provisions typically protect not only the victims of discrimination but also those who voluntarily report discrimination or participate in internal or formal proceedings.”<sup>135</sup> An attorney who reasonably believes, but is not certain, that a discriminatory event has occurred will be more likely to report a violation with an anti-retaliation provision in place. Without the anti-retaliation provision, attorneys will likely avoid reporting potential misconduct unless it is undeniably clear that a violation of Model Rule 8.4(g) has occurred, which will likely skew the reported cases to those with only the most egregious and outrageous conduct. And as has already been noted within legal scholarship, “[t]his is potentially significant, because if discrimination amounts to professional misconduct that raises a substantial question as to a lawyer’s fitness to practice as a lawyer, another lawyer who knows of the misconduct has a professional obligation to report it.”<sup>136</sup> Yet without an anti-retaliation provision, the attorney will be forced to choose between his professional obligations and his innate instinct to protect himself and his career.

Anti-retaliation provisions are, admittedly, imperfect. This Article is not arguing that the addition of an anti-retaliation provision would be a definitive solution to Model Rule 8.4(g)’s current limitations. But the inclusion of an anti-retaliation provision in the rule or comment would have been a modest addition to the ABA’s effort. Scholarship demonstrates that “[t]he success of employment law depends on workers voicing com-

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<sup>134</sup> Long, *supra* note 67, at 466 (emphasis added) (footnote omitted).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

plaints, but a weak bargaining position and a fear of retaliation hold workers back from complaining.”<sup>137</sup> Therefore, the failure of the ABA to adopt an anti-retaliation provision greatly impairs the potential effectiveness of Model Rule 8.4(g).

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This Part assesses one example of a policy the ABA has adopted in an effort to achieve a more diverse and inclusive profession and finds it lacking. The question, then, is whether the ABA should double down and continue its decades-long fight to fix the rule or attempt another strategy. In Part III, this Article argues in favor of the latter position, but it does present an option for preserving the spirit of Model Rule 8.4(g) in Part IV.

### III. COMBATING SILENCE

*“Without a diverse bench and bar, the rule of law is weakened as the people see and come to distrust their exclusion from the mechanisms of justice.”*<sup>138</sup>

The reality is that all organizations that attempt to tackle the challenge of creating diverse and inclusive environments stumble. There are no easy answers to questions that are rooted in America’s history of oppression, exclusion, and subordination of certain demographic groups for no other reason than their demographic status. Thus, the legal profession’s struggle to eliminate bias and enhance diversity within its own ranks is in many ways understandable.

And yet, there are actions the ABA and state bar associations can take that might chip away at certain discriminatory practices that are alive and well within the profession. There is longstanding research within legal scholarship and other scholarly disciplines that can assist the ABA and state bar associations in charting a way forward. Relying on scholarship from the fields of employment discrimination and organizational behavior and management, this Part puts forth the thesis of this Article. The legal profession should adopt strategies that (i) address covert discrimination throughout the profession and (ii) encourage individual attorneys to stop remaining silent and instead give voice to their experiences of discrimination, harassment, and bias.

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<sup>137</sup> Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 *Ala. L. Rev.* 605, 609 (2017).

<sup>138</sup> ABA Presidential Diversity Initiative, *Diversity in the Legal Profession: The Next Steps* 9 (2010).

This Part begins by discussing the harms created by covert discrimination, particularly structural discrimination and implicit bias. Part B then discusses the danger of silence to institutions and individuals. Part C concludes by outlining one proposal the ABA could adopt to give voice to attorneys who have experienced discriminatory conduct as members of the legal profession.

#### *A. The Dangers of Covert Discrimination*

As is explained above, the measure of whether Model Rule 8.4(g) is pragmatically helpful must start with whether it effectuates the stated goals and objectives as outlined by the ABA. Thus, a new antidiscrimination rule should work to “[e]liminate [b]ias and [e]nhance [d]iversity” by (i) “Promot[ing] full and equal participation in the association, [the] profession, and the justice system by all persons” and (ii) “Eliminat[ing] bias in the legal profession and the justice system.”<sup>139</sup> Model Rule 8.4(g) makes it professional misconduct to knowingly engage in conduct that is discriminatory or harassing on the basis of one’s protected status like race, sex, disability, or gender identity, which amounts to a prohibition against engaging in overt discriminatory behavior. The ABA’s goals and objectives, however, do not appear to be limited to or even primarily concerned with stopping overtly discriminatory behavior. Instead, the goals and objectives are aimed at achieving true inclusion and acceptance of all peoples within the profession, which, as has been well-documented within legal scholarship for at least fifteen years, requires a strategy that combats covert discrimination as well as overt discrimination.<sup>140</sup>

The idea that overt discrimination is no longer the principal barrier to achieving equality and inclusion is not new. Indeed, in as early as 2001 a framework for understanding the differences between what is termed first and second generation discrimination was put forth.<sup>141</sup> First generation

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<sup>139</sup> ABA Report, supra note 25, at 1.

<sup>140</sup> See generally Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* 458, 466, 468 (2001) (explaining the shift from first generation discrimination, which “revolved around deliberate exclusion or subordination based on race or gender,” to second generation discrimination, “a subtle and complex form of bias” that frequently involves “patterns of interaction among groups within the workplace that, over time, exclude nondominant groups”).

<sup>141</sup> While her theoretical account applied specifically to workplaces, the ideas she laid out appear equally applicable to other types of organizations, particularly ones “with flexible, decentralized governance structures that require [members] to participate more actively in decisionmaking concerning work assignments, leadership, advancement, pay, and evaluation.” *Id.*

discrimination is characterized by organizations that engage in “overt exclusion, segregation of job opportunity, and conscious stereotyping.”<sup>142</sup> For example, “[d]ominant individuals and groups deliberately excluded or subordinated women and people of color.”<sup>143</sup> The origins of the legal profession in America were, as outlined in Section I.A., first generation discrimination. The legal response to first generation discrimination was to adopt formal rules, like Title VII, which expressly prohibited overtly discriminatory activities.<sup>144</sup> Unfortunately, research has demonstrated that “discrimination *adapts* to the legal and social environment by mutating to evade prohibitions against intentional discrimination.”<sup>145</sup>

In contrast, second generation discrimination “refers to a subtle and complex form of bias,” which “involve[s] patterns of interaction among groups within [an organization] that, over time, exclude nondominant groups.”<sup>146</sup> Second generation discrimination, the most common form of discrimination today, “typically involves more subtle, less detectable forms of discrimination.”<sup>147</sup> In particular, second generation discrimination includes structural discrimination, which can occur with “decisions that are formally fair but functionally biased in favor of the dominant group by using criteria that advantage one group over another for arbitrary reasons.”<sup>148</sup> Additionally, it includes implicit bias, which includes “underlying unconscious negative feelings and beliefs (i.e., implicit attitudes and stereotypes)” regarding particular groups.<sup>149</sup>

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at 460–61. Because the legal profession is a self-regulating organization, its members take an active role in the way in which the ABA functions. Wald, *supra* note 1, at 1112 (explaining that self-regulation occurs when the “lay public grants the profession a monopoly over the provision of legal services and the right to self-regulate, and in return the profession guarantees the quality of legal services by effectively enforcing rules of conduct against its members”). Additionally, legal workplaces also tend to be organizations where lawyers maintain strong levels of autonomy and control.

<sup>142</sup> Sturm, *supra* note 140, at 465.

<sup>143</sup> *Id.* at 465–66.

<sup>144</sup> *Id.*

<sup>145</sup> Elise C. Boddie, Adaptive Discrimination, 94 N.C. L. Rev. 1235, 1239 (2016).

<sup>146</sup> Sturm, *supra* note 140, at 468.

<sup>147</sup> Long, *supra* note 67, at 469.

<sup>148</sup> Sturm, *supra* note 140, at 473.

<sup>149</sup> Root, *supra* note 36, at 609 (quoting John F. Dovidio & Samuel L. Gaertner, New Directions in Aversive Racism Research: Persistence and Pervasiveness, *in* Motivational Aspects of Prejudice and Racism 43, 53 (Cynthia Willis-Esqueda ed., 2008)). In recent history, implicit bias has become more widely known within the general public, because of the attempt to create a test that would measure implicit bias within individuals. These efforts to test implicit bias have garnered a fair amount of debate and criticism, but as noted recently by one legal scholar, the question of

*1. Structural Discrimination*

Structural discrimination or bias occurs when an organization adopts particular structural policies and procedures that are not discriminatory on their face, but have the effect of producing inequities between groups. This would include “[s]tructures of decision making, patterns of interaction, and cultural norms[, which] often produce ‘second generation’ inequalities that are not immediately discernible at the level of the individual.”<sup>150</sup> Evidence of structural discrimination within the legal profession has persisted for over a decade.<sup>151</sup>

As was explained in 2002, “[s]tudies involving thousands of lawyers have found that men are at least twice as likely as similarly qualified women to obtain partnership” in law firms.<sup>152</sup> Potential reasons for this disparity abound, and many of them support structural discrimination arguments. For example, within law firms “[b]illable hour requirements have risen significantly over the last quarter century, and technological innovations that make it possible for lawyers to work at home make it increasingly impossible *not* to work at home.”<sup>153</sup> On its face, these factors are not necessarily discriminatory, but research suggests that these costs are “disproportionately born by women, because . . . they are disproportionately likely to assume primary caretaking responsibilities.”<sup>154</sup> Thus, the billable hours requirement adopted by firms is not facially discriminatory, but its effect is to create disparities between male and female attorneys due to the realities of caretaking responsibilities in the United States.

More recent examples of structural discrimination within the legal profession are also relatively easy to identify. In 2016, a survey indicated that

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whether or not [the test] is a good measure is a different question from whether or not implicit or unconscious bias exists. . . . [T]here is all sorts of evidence, independent of the [test], that supports the conclusion that unconscious bias is real and significant in the world. Unfortunately, some commentators have conflated the two questions.

Samuel R. Bagenstos, *Implicit Bias's Failure*, Berkeley J. of Emp. & Lab. L. (forthcoming) (manuscript at 4), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015031](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015031) [<https://perma.cc/WW5S-D6HX>].

<sup>150</sup> Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 Wis. L. Rev. 277, 286.

<sup>151</sup> See Wald, *supra* note 1, at 1120 (discussing persistence of structural discrimination at large law firms).

<sup>152</sup> Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 Hofstra L. Rev. 1001, 1003 (2002).

<sup>153</sup> Rhode, *supra* note 36, at 1056.

<sup>154</sup> *Id.*

there “is a 44 percent difference in pay between female partners and their male colleagues” in law firms.<sup>155</sup> The explanation for the differential was that male partners were more likely to have a greater number of cases where they received origination credit, or “credit for bringing a legal matter to the firm.”<sup>156</sup> On its face, the origination disparity is not necessarily something that suggests a discriminatory source, because it is an objective measure for calculating compensation that is unrelated to gender or demographic status. But when one looks deeper, it is apparent that elements of structural discrimination are at play.

When a person first makes partner, whether male or female, she or he “begin[s] with negligible origination credits,” but “by the end of the third or fourth post-election year [to partner status] a sizable difference has opened up.”<sup>157</sup> Recent research has determined “that women tend to grow their book incrementally and often through the (obviously harder) process of developing clients who are brand new to the firm, whereas men tend to ‘inherit’ institutional clients—either as the sole or co-lead partner on major accounts.”<sup>158</sup> Origination credit is meant to reward partners for bringing business to the law firm and serves as a powerful incentive to engage in client-generation activities. In reality, however, the manner in which origination credit is calculated allows men to benefit more than women, because they are more likely to inherit clients from retiring partners, which creates a situation where the use of origination credit to determine salary is infected by structural discrimination. Firms’ systems of compensation could just as easily discount the impact of origination credit for inherited clients or increase the impact of origination credit for partner-generated clients. The decision to treat all types of origination credit equally results in gender pay disparities, which are emblematic of structural discrimination.

Despite the well-documented existence and history of structural discrimination within the legal profession, Model Rule 8.4(g) does nothing

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<sup>155</sup> Elizabeth Olson, *A 44% Pay Divide for Female and Male Law Partners, Survey Says*, N.Y. Times: DealBook (Oct. 12, 2016), [http://www.nytimes.com/2016/10/13/business/deal-book/female-law-partners-earn-44-less-than-the-men-survey-shows.html?\\_r=0](http://www.nytimes.com/2016/10/13/business/deal-book/female-law-partners-earn-44-less-than-the-men-survey-shows.html?_r=0) [<https://perma.cc/2CUW-PAHS>].

<sup>156</sup> *Id.*

<sup>157</sup> Heidi Gardner, *Harvard Study: On Gender and Origination in the Legal Profession (Perspective)*, Bloomberg Law: Big Law Business (Nov. 3, 2016), <https://biglawbusiness.com/harvard-study-on-gender-and-origination-in-the-legal-profession-perspective> [<https://perma.cc/F6NU-A9RP>].

<sup>158</sup> *Id.*

to address this phenomenon. To be sure, second generation discrimination is difficult to cure via “a fixed code of specific rules or commands that establishes clear boundaries governing conduct,”<sup>159</sup> but that does not mean that bar leaders are absolved of prioritizing strategies that can and will address structural discrimination. As was explained in 2001, “[a]n effective system of external accountability . . . would encourage organizations to identify and correct these [second generation] problems . . . and to learn from other organizations that have engaged in similar efforts.”<sup>160</sup>

## 2. *Implicit Bias*

Combating implicit bias has proven to be particularly challenging.<sup>161</sup> “Implicit bias includes automatic biases in how a person thinks about, feels toward, and treats members of other groups.”<sup>162</sup> Social science research has determined “that people can possess attitudes, stereotypes, and prejudices in the absence of intention, awareness, deliberation, or effort.”<sup>163</sup> As a result, research has determined that “[u]nequal treatment may result from cognitive or unconscious bias, rather than deliberate, intentional exclusion.”<sup>164</sup> This unequal treatment affects real-world outcomes like “the rate of callback interviews,” and “whether people feel that they are being treated fairly or courteously.”<sup>165</sup>

And just as structural discrimination can be found throughout the legal profession, implicit bias is just as insidious a culprit in the source of disparity between demographic groups within the bar.<sup>166</sup> For example, a survey of thirty black associates hired by one large New York City-based law firm from 1989–96 found that there was “a subtle yet pervasive tendency by almost exclusively white partners to favor those who looked

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<sup>159</sup> Sturm, *supra* note 140, at 475.

<sup>160</sup> *Id.*

<sup>161</sup> See generally Nicole E. Negowetti, *Implicit Bias and the Legal Profession’s “Diversity Crisis”: A Call for Self-Reflection*, 15 Nev. L.J. 930, 935–49 (2015) (providing a more thorough, but brief, overview of implicit bias and its impact in the legal profession).

<sup>162</sup> Root, *supra* note 36, at 610.

<sup>163</sup> John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 Res. Org’al Behav. 39, 42–43 (2009).

<sup>164</sup> Sturm, *supra* note 140, at 460.

<sup>165</sup> Negowetti, *supra* note 161, at 941.

<sup>166</sup> See generally Root, *supra* note 36, at 609–10 (discussing unconscious bias as a barrier to achieving equity in the workplace).

similar to themselves.”<sup>167</sup> The firm failed to retain any of the black associates it worked so hard to recruit and hire.<sup>168</sup>

Importantly, implicit bias sometimes works in tandem with structural discrimination to create barriers to success for certain demographic groups within the legal profession. The above example regarding disparities between male and female partners in garnering origination credit can also be explained by the impact of implicit bias. Research has shown that “when male partners have strong ties to a partner who then retires . . . that male is likely to become the new lead partner,” but female partners “earn zero to negative returns for investing in inheritance.”<sup>169</sup> Indeed, engaging in similar conduct to their male counterparts actually made it “less likely [the female partners would] inherit the account.”<sup>170</sup> Thus, the inheritance disparity is one that is particularly difficult for women to overcome. And as was noted by the chair of the ABA Commission on Women in the Profession, the core concerns regarding these issues do not “suggest[] that there’s an outright conscious decision to treat someone in a discriminatory way.”<sup>171</sup> Instead, the problem is one of implicit or unconscious bias.

And again, Model Rule 8.4(g) does nothing to combat the problem of implicit bias. Indeed, the rule and comments do not even allude to the existence of implicit or unconscious bias, which means bar leaders, at a minimum, lost an opportunity to raise awareness of the issue and the way in which it might work to create discriminatory environments. As a result, one scholar has argued that the knowledge requirement contained in Model Rule 8.4(g) should be removed in light of the data on implicit bias, which might help bring the attorney professional standards in line with those of other professions.<sup>172</sup> Another argument put forth suggests that the

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<sup>167</sup> Luis J. Diaz & Patrick C. Dunican Jr., *Ending the Revolving Door Syndrome in Law*, 41 *Seton Hall L. Rev.* 947, 977 (2011).

<sup>168</sup> *Id.*

<sup>169</sup> Gardner, *supra* note 157.

<sup>170</sup> *Id.* (citing Forrest Briscoe & Andrew von Nordenflycht, *Which Path to Power? Workplace Networks and the Relative Effectiveness of Inheritance and Rainmaking Strategies for Professional Partners*, 1 *J. Profs. & Org.* 33, 38 (2014)).

<sup>171</sup> Lizzy McLellan, *Law Firms a ‘Petri Dish’ for Bias, Gender Inequity*, *Law.com* (Oct. 26, 2016), <https://advance.lexis.com/search?crd=bf9c0f3-bea9-4ac7-b41d-c1150e43b0b3&pd-searchterms=LNSDUID-ALM-NYLAWJ-1202770812810&pdbyypasscitatordocs=False&pd-mfid=1000516&pdisurlapi=true&cbe=0>.

<sup>172</sup> Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 *N.Y.U. Rev. L. & Soc. Change* 364, 397–400 (2017).

ABA require law schools to implement implicit bias training as a mechanism to combat the phenomenon within the legal profession.<sup>173</sup>

Because the ABA has stated that it wants to enhance diversity and eliminate bias within the profession, it is significant that the rule it adopted to effectuate Goal III's objectives fails to account for issues of covert discrimination like structural discrimination and implicit bias. If Model Rule 8.4(g) had been passed when leaders in the bar originally tried to obtain passage of an antidiscrimination rule over twenty years ago, the concerns presented here regarding the role of covert discrimination likely would have been less significant. But the potential effectiveness of Model Rule 8.4(g) must be assessed by its ability to achieve results for today's discrimination and diversity problems, and the rule's potential effect appears to be quite limited due to its failure to address covert discrimination.

### *B. Encourage Attorneys to Exercise Voice*

When a member of an organization encounters a discriminatory event, they have a minimum of two choices: they can exercise voice and acknowledge the event or they can choose silence. If exercising voice, the member can communicate "ideas, suggestions, concerns, information about problems, or opinions . . . to persons who might be able to take appropriate action, with the intent to bring about improvement or change."<sup>174</sup> By engaging in this "extrarole upward communication" the member "challenges and seeks to alter the status quo" within his organization.<sup>175</sup> If choosing silence, the member withholds "potentially important input or . . . fails to share what is on his or her mind."<sup>176</sup> Importantly, silence is not "merely a lack of speech, as not speaking can occur for many reasons . . . . Rather, silence refers to not speaking up when one has a suggestion, concern, information about a problem, or a divergent point of view that could be useful or relevant to share."<sup>177</sup>

Attorneys within the legal profession, particularly those on the receiving end of discriminatory events, have often chosen silence over the exercise of voice. The reasons for this are well-documented. For example,

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<sup>173</sup> Ashley Hart, Note, Sexism "Related to the Practice of Law": The ABA Model Rule 8.4(g) Controversy, 51 *Ind. L. Rev.* 525, 553 (2018).

<sup>174</sup> Elizabeth W. Morrison, Employee Voice and Silence, 1 *Ann. Rev. Org'l Psychol. & Org'l Behav.* 173, 174 (2014).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

in 1996, it was explained that associates of color within large law firms were unlikely to complain about their work environments. This was because there were so many individuals willing to take their jobs and exacerbated by the more general reality that “any hint that they [we]re leaving their firm on anything less than the best of terms w[ould] have a devastating effect on their future employment prospects.”<sup>178</sup> In 2011, the considerable impact of exercising one’s voice with regards to discrimination and diversity issues was again made painfully clear:

A final obstacle to diversity and gender equity initiatives involves backlash; the concern is that raising these issues or addressing them forcefully might add more to the problem than the solution. Women and minorities who experience bias are often reluctant to complain about it publicly. They don’t want to “rock the boat,” seem “too aggressive” or “confrontational,” look like a “bitch,” or be typecast as an “angry black.” When lawyers do express concerns, the consequences are frequently negative, so many are advised to: “[L]et bygones be bygones,” or just “move on.” Channels for candid dialogue are all too rare . . . . The message in many law firm cultures is that “complaining never gets you anywhere . . . . [You are perceived as] not being a team player.”<sup>179</sup>

Thus, attorneys who are members of demographic groups that have traditionally been excluded from the legal profession appear to have valid reasons for choosing silence over the exercise of voice.

Diversity research more broadly also serves to explain why a member of the legal profession may choose silence over the exercise of voice. For example, in 2016, a study found that “women and nonwhite executives are judged negatively when they engage in ‘diversity-valuing behavior,’ such as hiring diverse employees.”<sup>180</sup> Concerningly, “[w]omen and nonwhite corporate executives who promoted diversity were given ‘much worse’ competence and performance ratings than were their counterparts who didn’t promote diversity.”<sup>181</sup>

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<sup>178</sup> See Wilkins & Gulati, *supra* note 39, at 534.

<sup>179</sup> Rhode, *supra* note 36, at 1058–59 (alteration in original) (footnotes omitted).

<sup>180</sup> Melissa Heelan Stanzione, *Are Diverse Partners Punished for Advocating Diversity?*, *Bloomberg Law* (Oct. 2, 2016), <https://www.bna.com/diverse-partners-punished-n5798207-7840/> [<https://perma.cc/PL66-UG4G>].

<sup>181</sup> *Id.*

To be fair, the reluctance of organizational members to exercise voice is widespread and has been documented in a variety of contexts beyond cases of discrimination. For example, a 2010 study surveying “439 employees working in different organizations . . . found that 42% reported withholding information when they felt they had nothing to gain, or something to lose, by sharing it. This withholding included not just information about illegal or unethical activities, but also suggestions for addressing routine problems or for making improvements.”<sup>182</sup> A 2008 study on whistleblowing “suggests that only about half of the people who observe wrongdoing at work blow the whistle on that activity.”<sup>183</sup> Additionally, a 2003 study interviewed “40 young professional employees and found that 85% reported that they had, on at least one occasion, felt unable to raise an issue of concern and that only 51% indicated that they generally felt comfortable speaking to their boss or to management about problems or issues that concerned them.”<sup>184</sup>

The impediments to exercising one’s voice are, therefore, vast and deeply ingrained in a variety of organizational settings. In part, this is because “the failure to engage in voice does not always reflect a cognitive or deliberate decision process.”<sup>185</sup> A variety of “contextual factors, including the behavior of supervisors and leaders, may create structural, interpersonal, and psychological barriers to voice.”<sup>186</sup>

These barriers to voice appear especially unfortunate when one considers the potential benefits to the exercise of voice, particularly for those striving to create more diverse and inclusive environments. Without the exercise of voice explaining and alerting others to discriminatory actions and events, bar leaders are left unable to properly assess and address the full breadth of discriminatory conduct within the profession. For example, Model Rule 8.4(g) prohibits discriminatory and harassing conduct, but disciplinary authorities depend upon complaints to trigger an investigation.<sup>187</sup> If bar members are unable or unwilling to file complaints, the new rule is unlikely to function well, if at all.<sup>188</sup> Additionally, the complexities

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<sup>182</sup> Morrison, *supra* note 174, at 178.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 175.

<sup>186</sup> *Id.*

<sup>187</sup> See Model Rules of Prof’l Conduct r. 8.4(g) (Am. Bar Ass’n 2017).

<sup>188</sup> This concern is further cemented by the failure to protect against retaliation for those filing complaints under Model Rule 8.4(g).

of achieving greater diversity within organizations often requires the input of a variety of voices that represent different experiences and backgrounds. But if, for example, attorneys of color choose silence over voicing concerns regarding a lack of mentorship or training, it is unlikely that legal workplaces will see a significant increase in their demographic diversity.<sup>189</sup>

Thus, one problem-solving strategy that bar leaders can utilize in efforts to meet their goal to eliminate discrimination and enhance diversity is to attempt to adopt rules and policies that encourage bar members to exercise voice.<sup>190</sup> This strategy is relevant for ensuring that formal rules function properly, but it is also particularly important for combating instances of discrimination that are more covert in nature. Part of what makes second generation discrimination so difficult to address is that it is not easy to see and detect; if the individuals most able to observe covert discrimination choose silence, solutions will be hard to implement as the true scope of the problem will remain elusive. The upshot is that it is imperative that bar leaders find mechanisms for incentivizing bar members to exercise voice instead of choosing silence if leaders want to achieve their goal of eliminating discrimination and enhancing diversity within the profession.<sup>191</sup>

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<sup>189</sup> See Root, *supra* note 36, at 615–19 (discussing the effect of silence on mentoring relationships and, in turn, firm retention and diversity).

<sup>190</sup> See Keith A. Bender, John S. Heywood & Michael P. Kidd, *Claims of Employment Discrimination and Worker Voice*, 48 *Indus. Rel. J.* 133, 151 (2017) (“[V]oice is particularly associated with lower claims of discrimination in situations where differences in race or sex [between an employee and supervisor] occur.”).

<sup>191</sup> For example, a study conducted by economics professors Keith A. Bender, John S. Heywood, and Michael P. Kidd found that there is a negative correlation between supervisors utilizing voice measures and discrimination claims for workers and supervisors of different genders and races. Specifically, they found that the coefficients between discrimination and the three voice measures—seeking information, communication and support, and autonomy—were “-0.034, -0.028 and -0.017 for White workers and -0.134, -0.172 and -0.008 for non-White workers, with all being statistically significant at the 5 per cent level, except for the final coefficient estimate.” *Id.* at 142–43. For gender, the coefficients between the three voice measures, seeking information, communication and support, and autonomy, and discrimination claims for females were -0.095, -0.105 and -0.043, respectively. *Id.* at 145. These negative correlations between the voice measures and discrimination claims remained true even when controlling for life satisfaction and wage differential. *Id.* at 145–48. This demonstrates the importance of encouraging bar members to exercise voice.

*C. A Proposal*

The theoretical account described above regarding the power of voice and the deleterious effects of silence have been played out quite publicly in the recent #MeToo movement.<sup>192</sup> After the New York Times published an investigative report “detailing decades of sexual harassment allegations against the Hollywood producer Harvey Weinstein,” social media platforms were utilized by women across the globe to discuss their experiences of sexual harassment and assault.<sup>193</sup> Many of the women who were inspired to come forward about their own experiences expressed a renewed sense of empowerment and peace as a result.<sup>194</sup> This reaction tracks with the literature outlined in Section III.B. regarding the interplay of voice and silence. The theoretical has, it seems, a practical application.

The question, therefore, is what concrete steps could the legal profession take to encourage its members who have faced harassment, discrimination, and bias to reject silence and choose to voice their concerns and experiences? There are likely many steps the ABA could take,<sup>195</sup> but this section will propose just one: an online survey.

When members of the profession suggest that the ABA or state bar associations take on a new task or oversight responsibility, a “resources” objection is quickly made. Because the ABA and state bar associations have very limited resources with which to oversee members of the profession, creating additional duties is often seen as impracticable. But as was seen with the #MeToo movement, encouraging the exercise of voice does not have to require a significant outlay of resources or the development of complicated adjudicative regimes. Sometimes all that is required is a medium for expressing one’s concerns. One such medium that the ABA or state bar associations may be able to create and implement with a minimal outlay of resources is an online survey.

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<sup>192</sup> See, e.g., Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *Person of the Year 2017: The Silence Breakers*, *Time*, Dec. 18, 2017, at 34–70.

<sup>193</sup> Anna Codrea-Rado, *#MeToo Floods Social Media with Stories of Harassment and Assault*, *N.Y. Times* (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/technology/metoo-twitter-facebook.html> [<https://perma.cc/3HK4-73CZ>].

<sup>194</sup> Kelly Wallace, *After #MeToo, More Women Feeling Empowered*, *CNN* (Dec. 27, 2017), <https://www.cnn.com/2017/12/27/health/sexual-harassment-women-empowerment/index.html> [<https://perma.cc/9CHD-8YLS>].

<sup>195</sup> See, e.g., Root, *supra* note 36, at 638–41 (recommending proposals for reform that could be adopted by the ABA).

The ABA or state bar associations could develop and implement a short, online survey for the purpose of gathering information about attorneys' experiences with or observations of (i) overt discrimination, (ii) overt harassment, (iii) covert discrimination, (iv) policies resulting in structural discrimination, or (v) action or inaction impacted by implicit bias within the practice of law. Indeed, some state bar associations might be able to add a few questions during their attorney registration processes similar to questions regarding whether attorneys engaged in pro bono work within the last twelve months. After collecting the survey responses, the ABA or state bar association could aggregate the responses by question, and then publish the anonymized results online. This would provide a medium for voicing one's concerns, with minimal resource commitment.

If more resources could be dedicated to the project, like through the research arm of the American Bar Foundation<sup>196</sup> or from dedicated volunteers within a state bar association,<sup>197</sup> instead of simply publishing the results, the survey might be analyzed into groupings so that responses were published based on type and size of legal employer. This would allow researchers, policymakers, and members of the profession to see whether there are trends within particular areas of the profession regarding incidents of discrimination, harassment, or bias. This would again provide a medium for voicing one's concerns, and it would have the added benefit of some analysis and context for the bar's membership.

Currently, there are surveys that go to certain sets of lawyers. For example, the American Lawyer sends surveys to mid-level associates at the nation's largest law firms.<sup>198</sup> These surveys often include discussions regarding diversity within firms, and eventually the survey results become rankings that result in splashy headlines for the firms that top the lists.<sup>199</sup> These types of surveys are ill-suited to serve as a medium for exercising voice regarding incidents of discrimination, harassment, and bias. First,

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<sup>196</sup> See Mission, Am. Bar Found., <http://www.americanbarfoundation.org/about/mission.html> [<https://perma.cc/3GE5-5WBY>] (last visited Feb. 20, 2018) ("The American Bar Foundation (ABF) seeks to expand knowledge and advance justice through innovative, interdisciplinary, and rigorous empirical research on law, legal processes, and legal institutions.").

<sup>197</sup> See, e.g., Diversity Leadership Council, Ill. State Bar Ass'n, <https://www.isba.org/committees/diversityleadershipcouncil> [<https://perma.cc/XSU4-HGAC>] (last visited Feb. 20, 2018).

<sup>198</sup> Lizzy McLellan, *Associates Survey 2017: Gainful Employment*, *Am. Law.*, Sept. 2017, at 21.

<sup>199</sup> See *id.*

the surveys are conducted and evaluated by firms, so if a firm has a low number of women or attorneys of color, their responses are in effect not anonymized. Because recipients are aware that their responses may be quoted in a subsequent publication, many have a strong disincentive to provide candid feedback.<sup>200</sup> Second, these surveys are conducted for the purpose of providing detailed feedback about particular firms.<sup>201</sup> A survey recipient who has had negative experiences, but who overall enjoys working at her firm, will likely be unwilling to cast her employer in a negative light. Third, firms are aware that these surveys are used to create rankings and engage in pointed discussions about the “best” and “worst” firms,<sup>202</sup> therefore some may coach their attorneys against providing negative responses.

In contrast, the ABA, American Bar Foundation, or state bar associations would be collecting the survey responses for the sole purpose of providing a medium for attorneys to exercise their voice; not to single out, praise, or chastise a particular employer or group of attorneys. By aggregating the data and maintaining anonymity, recipients would be freer to provide candid responses, which would provide a trove of information that could be mined for trends, anomalies, or areas of concern. It would assist the profession in better understanding the experiences of its most vulnerable members, and it would assist the members by providing an outlet for them to exercise their voices and regain a sense of empowerment.

This suggestion is modest. Purposefully so. It outlines a low-cost mechanism for creating a medium for attorneys to voice their concerns regarding discrimination, harassment, and bias while engaged in the practice of law. Over time, however, that information alone may be helpful to the larger effort of changing the landscape of opportunity and diversity within the profession.

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<sup>200</sup> See *id.* The American Lawyer, of course, maintains survey anonymity and claims high degrees of candor, but the emphasis placed on these surveys by firms in combination with the recognition of being quoted in a major publication criticizing one’s employer, even anonymously, likely renders the American Lawyer survey a deeply flawed way for associates to exercise voice.

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

## IV. POTENTIAL BENEFITS AND ADDITIONAL CONCERNS

This Article argues that leaders within the legal profession should adopt strategies that (i) address covert discrimination throughout the profession and (ii) encourage individual attorneys to stop remaining silent and instead give voice to their experiences of discrimination, harassment, and bias. This Part begins by addressing some potential benefits to this Article's proposal. It then turns to addressing some additional concerns relevant to the suggestions and arguments put forth above.

*A. Potential Benefits*

If leaders within the legal profession refocus their efforts toward combating covert discrimination by encouraging attorneys to exercise voice when experiencing bias, discrimination, or harassment, it could have a variety of benefits for the profession and its members. This Section discusses five such benefits, but there are others.

*1. Instills a Sense of Power and Control for Those Exercising Voice*

One of the most troubling aspects of the bar's history of exclusion and discrimination is that it created a culture where the opinions, beliefs, and experiences of certain bar members were discounted. As a result, these members were treated as second-class citizens in the profession they worked so hard to join, and these inequities continue to exist today. For example, a recent report examining the state of women in the legal profession found numerous disparities between the trajectory and success of female attorneys as compared to male attorneys.<sup>203</sup> In particular, women were less likely to attend the most competitive law schools in the country and most likely to attend the "bottom 'unranked' quarter of law schools."<sup>204</sup> This differential is important, because it means that women do not "have the same job prospects as men,"<sup>205</sup> and likely helps explain

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<sup>203</sup> Deborah Jones Merritt & Kyle McEntee, *The Leaky Pipeline for Women Entering the Legal Profession*, Law School Transparency Radio (Nov. 2016), [http://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary\\_Nov-2016.pdf](http://www.lstradio.com/women/documents/MerrittAndMcEnteeResearchSummary_Nov-2016.pdf) [<https://perma.cc/P6EE-A42D>].

<sup>204</sup> *Id.* at 2.

<sup>205</sup> Elizabeth Olson, *More Law Degrees for Women, but Fewer Good Jobs*, N.Y. Times: DealBook (Nov. 30, 2016), <http://www.nytimes.com/2016/11/30/business/dealbook/more-law-degrees-for-women-but-fewer-good-jobs.html?smprod=nytcare-iphone&smid=nytcare-iphone-share> [<https://perma.cc/YNW8-KVPX>].

at least part of why there are so many fewer women within what are considered elite legal positions.

For the women that are able to break through and obtain elite positions, they are often members of a minority and may be less willing to exercise voice for fear of retaliation and a host of other potential harms. But if leaders within the profession pursue a strategy that expressly focuses on encouraging the voices of marginalized groups, it has the potential to have several tangible benefits. For example, “studies have found a relationship between voice and efficacy-related cognitions such as personal control, influence, and empowerment.”<sup>206</sup> This means that a change in strategy by bar leaders can have an actual effect on whether women feel in control of their career, believe that they have the ability to influence the profession, and have a sense of empowerment when negotiating their roles in the profession. Encouraging the exercise of voice, and its attendant results, may be just the sort of change the bar needs to usher in a new era of diversity and inclusion within the profession.

## *2. Exercising Voice Also Combats Overt Discrimination*

While this Article argues in favor of a greater focus by leaders within the profession on covert discrimination, the theoretical research set out in Section III.B. and the proposal suggested in Section III.C. applies equally to both covert and overt discrimination. The proposed method for providing a medium for attorneys who have experienced or observed instances of discrimination, bias, or harassment—an online survey—will work as a mechanism for giving voice to attorneys who have experienced overt or covert discrimination while engaged in the practice of law. For those who have experienced overt discrimination, a medium to voice their concerns may be particularly attractive.

When overt discrimination occurs within the legal profession, it may trigger an opportunity for the attorney to bring a formal complaint or legal action. But the attorney may not want to pursue formal action for a whole host of reasons. Maybe the attorney enjoys his current employment situation and does not want to trigger a complaint that would upset his work life. Maybe the attorney is worried that if she files a formal complaint she

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<sup>206</sup> Morrison, *supra* note 174, at 181; see also Bender, Heywood & Kidd, *supra* note 190, at 140–45 (discussing the negative correlation between voice measures and discrimination claims for different gender workers and supervisors and different race workers and supervisors).

will be labeled a “troublemaker” at her current employer and potentially with future employers. Whatever the reason, people decide not to pursue formal legal action every day, but they might still benefit from an avenue to voice their experiences in a productive manner. A decision not to pursue a formal response to a discriminatory event does not have to require a person to adopt a stance of silence. There are mechanisms that the profession can put in place to allow individuals to express their concerns without risking certain stigmatizing labels as a result.

### *3. Builds a Supportive Network for Those Exercising Voice*

Members of the legal profession are colleagues in a joint enterprise, even when they practice in divergent legal areas. Like coworkers in an employment setting, bar membership often becomes “a source of social bonds, which generate behaviors more consistent with the protocols of the family than the market.”<sup>207</sup> The support one receives from his or her colleagues “is key, not only for work-related well-being but also for well-being more generally.”<sup>208</sup>

Because members of the bar are members of a profession, the interconnectedness of those relationships can be particularly strong and important. And with regard to issues of diversity, finding a sense of compatriotism in one’s fellow bar members has the potential to significantly impact the success of diversity efforts within the profession by changing the social norms regarding discrimination and diversity. As has been noted, “[c]oworkers, and their supportive behaviors, buoy the exercise of worker voice that is essential for protections under both labor law and employment law.”<sup>209</sup>

As the diversity ideal becomes more normalized within the profession, attorneys should become more comfortable exercising their voice and suggesting reforms within their own workplaces and immediate professional settings. As attorneys voice their concerns regarding discrimination and diversity, it will provide an opportunity for their coworkers and colleagues to express support for diversity efforts, which could prove to be an invaluable step towards achieving greater diversity and inclusion within the profession. This is important, in part, because coworkers often

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<sup>207</sup> Schoenbaum, *supra* note 137, at 612.

<sup>208</sup> *Id.* at 614.

<sup>209</sup> *Id.* at 615; see also Bender, Heywood & Kidd, *supra* note 190, at 140–45 (discussing the negative correlation between supervisors’ supportive communications and employees’ claims of discrimination).

“provide critical instrumental support by participating” in their colleagues’ antidiscrimination efforts, as well as by “provid[ing] moral support.”<sup>210</sup>

If the exercise of voice begins to assist in efforts to build consensus within organizations looking for ways to address challenges like structural discrimination and implicit bias, it may help incentivize even the most recalcitrant legal employer to change its policies and procedures. For example, “[w]hen a group of employees complains, it is harder for the employer to pin the blame on any individual worker, and the employer may be unable to terminate or otherwise retaliate against a large swath of workers while keeping its business running.”<sup>211</sup>

The upshot is that by focusing on diversity efforts that incentivize attorneys to use their voice, leaders within the profession can begin to encourage a change in social norms that could lead to more supportive networks within the legal profession. As diversity efforts receive buy-in from a larger group of bar members, it will become harder for well-known sources of covert, and overt, discrimination to continue unabated.

#### *4. Makes Pro Forma Actions Less Palatable*

When the ABA adopted Model Rule 8.4(g), the hope was that state jurisdictions would adopt similar rules. As is explained above, the Model Rule is broad in the scope of conduct it seeks to prohibit, but many states with antidiscrimination provisions prior to the ABA’s adoption of Model Rule 8.4(g) had rules with a much narrower scope. The common theme, however, between the broad and narrow antidiscrimination provisions was that they prohibited some sort of overt discrimination, which allowed rather diverse permutations of an antidiscrimination rule to be grouped together.

As states begin to consider whether to adopt Model Rule 8.4(g), its focus on overt discrimination appears to be a weakness, as it allows states to adopt rather *pro forma* rules instead of rules that are likely to effectively address discrimination within the bar. For example, in December 2016, when considering adoption of Model Rule 8.4(g), The Disciplinary Board of the Supreme Court of Pennsylvania (“Pennsylvania Disciplinary Board”) expressly advocated for a more narrow version of the rule, which prohibits discriminatory conduct only if a federal, state, or local statute or

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<sup>210</sup> Schoenbaum, *supra* note 137, at 623–24.

<sup>211</sup> *Id.* at 624.

ordinance is first violated.<sup>212</sup> The stated reason for encouraging the adoption of a more narrow rule is that “the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities” and that “Pennsylvania’s proposed amendments . . . will eliminate the potential for Pennsylvania’s lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers.”<sup>213</sup>

While the concerns articulated by the Pennsylvania Disciplinary Board are undoubtedly valid, their proposed actions are *pro forma*, because it is expressly disclaiming any authority to sanction attorneys for discriminatory conduct unless another legal regime has already completed an adjudication on other legal grounds. And yet, because the Pennsylvania Disciplinary Board has technically encouraged the adoption of an antidiscrimination rule that prohibits lawyers from engaging in overt discrimination, it is still able to claim that it has taken concrete actions to combat discriminatory activity by lawyers in its jurisdiction.

Because the ABA focused on passing an antidiscrimination rule instead of on adopting a strategy aimed at eliminating bias and enhancing diversity within the profession, states will be able to adopt rules that look similar to the ABA rule without actually engaging in activities that are likely to have a significant impact on improving diversity within the legal profession. If, however, leaders within the profession were to adopt a strategy aimed at encouraging lawyers to exercise their voices, it would be more difficult for state jurisdictions to adopt *pro forma* rules and still contend that they are acting towards eliminating bias and enhancing diversity within the profession.

##### 5. Effectuates Legal Profession’s Duty to Pursue Diversity

It is widely believed that lawyers should not focus only upon their individual needs, but instead should be leaders within the citizenry.<sup>214</sup> Lawyers should, in theory, be servants of the public good who represent the

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<sup>212</sup> Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct, 46 Pa. B. 7519 (Dec. 3, 2016), <http://www.pabulletin.com/secure/data/vol46/46-49/2062.html> [<https://perma.cc/K6U7-AJSE>] (noting that the version of the rule it adopted was similar to rules adopted in other states prior to the passage of Model Rule 8.4(g)).

<sup>213</sup> *Id.*

<sup>214</sup> See generally Pearce & Jenoff, *supra* note 53, at 483–91 (exploring the historical tensions within the legal profession between pursuing business objectives and public good); Remus, *supra* note 42, at 812–14 (critiquing the ability of the market-exchange model of lawyering to

very best of society. This aspirational notion makes sense when one remembers that lawyers are the “occupation most responsible for producing America[n] leaders.”<sup>215</sup> These lawyer-leaders have included individuals like Abraham Lincoln, who is responsible for ending American slavery, Thurgood Marshall, who is credited for his contributions to the end of American segregationist practices, and countless others who have used their professional status to fight against oppression and discrimination within American society.<sup>216</sup> And yet, the legal profession has failed to effectively lead on efforts of diversity and inclusion.

Many scholars, lawyers, and members of the public believe that “[t]he legal profession has a duty to pursue . . . diversity,”<sup>217</sup> because it is a profession formed to serve the public good:

[B]ecause the profession self-regulates and resists attempts by others to regulate it, it falls to the profession to battle discrimination and underrepresentation and to pursue diversity within its ranks. If only because it continues to fight against external regulation, the legal profession must lead in the fight for diversity and equality.<sup>218</sup>

Thus, it would be extremely difficult for an outside organization or influence to impact the way in which the legal profession pursues diversity efforts today.

By adopting priorities and policies that focus on encouraging attorneys to exercise voice, the profession can begin to fulfill its duty to pursue diversity. The evidence of lawyer-silence is well-documented, which means leaders within the bar cannot claim ignorance of its impact on the profession and the profession’s pursuit of becoming more diverse and inclusive. Over fifty years ago, the profession began its first efforts to diversify when it began letting people of color and women enter the bar in earnest. Today, the profession should fully empower attorneys from marginalized and underrepresented groups by implementing policies that encourage them to fully and completely express the scope of their experiences.

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balance private interests with public good); Roiphe, *supra* note 43, at 650–51 (discussing shifts in professionalism in lawyering and the increased framing of lawyering in market terms).

<sup>215</sup> Rhode, *supra* note 50, at 1.

<sup>216</sup> *Id.*; Abraham Lincoln, White House, <https://www.whitehouse.gov/1600/presidents/abrahamlincoln> [<https://perma.cc/69P3-YYVL>] (last visited Nov. 7, 2016); Thurgood Marshall, Oyez, [https://www.oyez.org/justices/thurgood\\_marshall](https://www.oyez.org/justices/thurgood_marshall) [<https://perma.cc/X6VD-H3J7>] (last visited Nov. 7, 2016).

<sup>217</sup> Wald, *supra* note 1, at 1112.

<sup>218</sup> *Id.* at 1113.

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At its simplest, the benefit of focusing on ways to encourage the exercise of voice is that it allows leaders within the profession to refocus their problem-solving strategies to more comprehensively address issues of discrimination and diversity within the legal profession. The threat of silence is one that stifles diversity efforts, but it also has the potential to discourage and alienate members of the profession. Silence should be acknowledged and fought by employing strategies that encourage attorneys to exercise voice against bias, discrimination, and harassment in favor of diversity, inclusion, and equality.

### *B. Additional Concerns*

As was acknowledged at the outset of this Article, finding effective mechanisms for improving diversity within organizations is tricky. “The range of approaches to diversity employed by various legal actors and institutions shows the complexity and richness of the notion . . . .”<sup>219</sup> Because of the challenges associated with creating more diverse and inclusive organizations, there are likely some concerns raised by the suggestions and arguments in Parts I–III. This Part attempts to address some of these additional concerns.

#### *1. Can Model Rule 8.4(g) Serve a Purpose?*

Given the shortcomings with Model Rule 8.4(g) addressed in Part II, and the strategy advocated in Part III, a natural question is whether Model Rule 8.4(g) should be abandoned or revised to serve a purpose. One strategy the ABA could adopt that would allow the rule to serve a purpose would be to modify the rule to take an aspirational form similar to what is found in Model Rule 6.1, which outlines an aspirational requirement for lawyers to provide pro bono service. There are three primary benefits to modifying Model Rule 8.4(g) from an antidiscrimination rule into a more aspirational rule.

First, if an aspirational version of Model Rule 8.4(g) were adopted, it would definitively put an end to the constitutional concerns that many from privileged communities within the profession have articulated. When discussing certain constitutional concerns prior to the passage of

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<sup>219</sup> *Id.* at 1092.

the rule, the Chair of the Standing Committee on Ethics and Professional Responsibility explained:

[O]ne reason why [the Standing Committee] moved away from “manifest bias or prejudice” as the conduct to be proscribed, and focused instead on the terms harassment and discrimination, [is] because while it could be argued that we each have a right to “manifest” (express) bias or prejudice against others, we do not have a similar right to harass others or discriminate against others.<sup>220</sup>

And yet after making this compromise, the ABA has still been criticized in a variety of forums for passing a rule that violates the First Amendment. If, however, the ABA were to adopt an aspirational version of the rule, it could not be seen as an unconstitutional infringement on the First Amendment rights of lawyers and those arguments would no longer maintain legitimacy or relevance.

Second, by adopting an aspirational version of the rule, it may prove beneficial by serving an expressive function. It is commonly accepted that law can have an expressive function, which is “the function of law in ‘making statements’ as opposed to controlling behavior directly.”<sup>221</sup> These statements can have a variety of effects, one of the most important being a mechanism for encouraging a change of social norms.<sup>222</sup> “A society might, for example, insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups.”<sup>223</sup> Similar to formal laws, rules of professional conduct can also serve an expressive function. “[P]rofessional codes can properly include provisions that the drafters anticipate will be enforced only rarely; legal ethics regulation typically implements a variety of functions, some of which are well-served by hortatory rules.”<sup>224</sup> Indeed, some scholars argue that “[t]he lawyer disciplinary process serves multiple functions, including the dissemination of the profession’s values both within the profession and to the public.”<sup>225</sup>

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<sup>220</sup> Halaby & Long, *supra* note 37, at 250.

<sup>221</sup> Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2024 (1996).

<sup>222</sup> *Id.* at 2024–25.

<sup>223</sup> *Id.* at 2027–28.

<sup>224</sup> Fred C. Zacharias, *What Lawyers Do When Nobody’s Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 Iowa L. Rev. 971, 974 (2002).

<sup>225</sup> Long, *supra* note 67, at 472.

For example, Model Rule 6.1 serves an expressive function by encouraging members of the bar to engage in voluntary pro bono public service.<sup>226</sup> The rule is not mandatory; it is aspirational. It explains that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay” and encourages lawyers to provide fifty hours of pro bono service per year.<sup>227</sup> The rule goes on to provide specific objectives that lawyers should attempt to reach in the course of their pro bono service. Lawyers are not sanctioned or disciplined for failing to provide pro bono activities, but the passage of Model Rule 6.1 sent a clear, specific message to members of the bar in a manner that was meant to change social norms within the legal profession. While the effect of this purely voluntary admonition on the actual amount of pro bono work completed by lawyers is debated,<sup>228</sup> the rule may still serve an expressive function in that it sends a strong signal to members of the bar that pro bono service is expected and encouraged.<sup>229</sup>

Prior to the passage of Model Rule 8.4(g), scholars were critical of the Model Rules due to their silence on issues of diversity and discrimination. Some argued that “by remaining silent about fostering diversity and combating discrimination in its most significant role—attorney regulation—the organized bar sends an implicit message of ambivalence regarding diversity legitimatizing inaction by other legal constituencies.”<sup>230</sup> As a result, the lack of expression in support of diversity and against discriminatory effects within the Model Rules was seen as serving a sort of permissive stance for those within the bar who were not inclined to prioritize those issues.

Thus, even if Model Rule 8.4(g) were to take an aspirational form it would likely respond to many of the concerns previously articulated about the need for the Model Rules to address discrimination and diversity. If Model Rule 8.4(g) were modified to take on an aspirational form, it could

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<sup>226</sup> Model Rules of Prof'l Conduct r. 6.1 (Am. Bar Ass'n 2017).

<sup>227</sup> *Id.*

<sup>228</sup> See generally Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. Rev.* 1, 31–33 (2004) (discussing the origin of Model Rule 6.1 and the persistent resistance within the ABA to making pro bono mandatory).

<sup>229</sup> The ABA could have adopted an aspirational rule if it were concerned with developing a rule that was meant to change norms. In doing so, the ABA could have kept certain language that was in the draft text of the rule that would have addressed bias and concerns regarding diversity head-on. Indeed, one legal scholar previously proposed rule text: “Lawyers should aspire to further the principles of elimination of bias, equality of opportunity, equal access to the courts and its institutions, and diversity.” Long, *supra* note 67, at 480.

<sup>230</sup> Wald, *supra* note 1, at 1092.

serve an expressive function meant to change social norms within the legal profession. Social norms are valuable, in part, because they “solve . . . problems by imposing social sanctions on defectors. When defection violates norms, defectors will probably feel shame, an important motivational force.”<sup>231</sup> Thus, Model Rule 8.4(g) in aspirational form would have real legitimacy even if it lacked a concrete, practical effect on controlling behavior.

Third, if an aspirational rule were adopted for the purpose of serving an expressive function, it would free the ABA to adopt an even more expansive rule. Leaders within the bar could have drafted Model Rule 8.4(g) in a manner that, in addition to providing a clear antidiscrimination rule, also admonished attorneys to embrace diversity and inclusion efforts. Scholars have called for this type of policy adoption by the bar for several years, so the idea of specifically promoting notions of diversity and removing covert barriers to parity within the bar were not new concepts when the ABA adopted Model Rule 8.4(g).<sup>232</sup> As explained above, the ABA narrowed Model Rule 8.4(g) in an effort to placate objections from certain members of the profession. If, however, an aspirational rule was adopted, many of the concerns raised regarding Model Rule 8.4(g) would diminish. If it were modified to take an aspirational form, the ABA would be free to adopt a broad, sweeping set of aspirational goals for its members.

There are, however, scholars who believe unenforceable ethics rules, like Model Rule 6.1, actually cause harm.<sup>233</sup> If the Model Rules are not a set of formal rules, but are instead a set of rules and goals, it may undermine the authority and gravitas of the bar to regulate members’ conduct. For example, if the Model Rules leave lawyers with a great deal of discretion or if they are without enforcement authority from the bar, there is little to no incentive for lawyers to comply.<sup>234</sup> If lawyers feel as if they are empowered to choose not to comply with certain rules, it may work to diminish the bar’s ability to obtain compliance with more strident rules. These concerns are valid. But the ABA has gone through quite a bit of

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<sup>231</sup> Sunstein, *supra* note 221, at 2029–30 (emphasis omitted) (footnote omitted).

<sup>232</sup> See, e.g., Long, *supra* note 67, at 480–85; Wald, *supra* note 1, at 1113–15.

<sup>233</sup> Samuel J. Levine, Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics, 57 *Cath. U. L. Rev.* 165, 181 (2007).

<sup>234</sup> *Id.* at 168.

effort to implement Model Rule 8.4(g) and it appears vulnerable to a variety of constitutional critiques. Converting the rule to a more aspirational form would allow the ABA to maintain its work while neutralizing the constitutional debates surrounding the rule. This path is an admittedly imperfect one, but it may be more preferable than a wholesale elimination of the rule and the ABA's work.

*2. Do Resource and Evidentiary Constraints of State Bar Associations Explain Their Adoption of Imperfect Antidiscrimination Provisions?*

Part II criticizes Model Rule 8.4(g), in part, because the rule text is similar to state-based antidiscrimination provisions that were not significantly utilized. The reality, however, is that state disciplinary authorities are plagued by significant resource constraints. Given these resource constraints, it may be that adopting a narrow, specific rule that will be utilized only when egregious conduct occurs is completely rational and, possibly, even prudent. It is widely known that “[s]ome rules of professional conduct [already] go unenforced or under-enforced due to budgetary constraints. Constrained by limited resources, disciplinary authorities, as rational actors, can be expected to focus their attention on what they deem to be the most significant rule violations.”<sup>235</sup>

While it is true that disciplinary authorities have scarce resources, if issues of discrimination and diversity are not prioritized by these authorities it is unlikely that significant change within the legal profession will be achieved. All enforcement authorities, whether it is the state disciplinary authority or the Department of Justice, must decide what sorts of claims and conduct they are going to prioritize in their enforcement efforts. Leaders within the bar can, however, influence the state-level priorities through the enactment of policies, programs, and rules that are important to bar members throughout the nation. Given the importance of achieving equity and parity for all demographic groups within the bar, the leaders within the legal profession should make highlighting the need for greater diversity a priority.

This Article puts forth one potential low-cost proposal for encouraging attorneys to voice their concerns and experiences regarding discrimination, bias, and harassment within the profession, but there are certainly other strategies that could be employed. The important takeaway is that

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<sup>235</sup> Long, *supra* note 67, at 463 (footnote omitted).

leaders within the bar should adopt strategies that (i) address covert discrimination and (ii) encourage attorneys to voice their experiences. If jurisdictions are willing to experiment with different mechanisms for achieving those goals, that would appear to be a positive development for the profession and its members.

### *3. Is It Actually Problematic to Sanction Conduct That Is Already Professional Misconduct?*

Part II of this Article suggests that it is not clear that Model Rule 8.4(g) will have significant impact, because many of the claims that have been brought as improper under antidiscrimination provisions were already improper under other professional misconduct categories. While this is true, that does not necessarily suggest that allowing another mechanism to bring a claim of professional misconduct is unwarranted. When lawyers engage in discriminatory and harassing behavior it necessarily erodes the confidence the public has in their ability to act as servants of the public good. Thus, it makes sense for the bar to attempt to find mechanisms for specifically stopping lawyers from engaging in discriminatory conduct. This is particularly true because lawyers are considered “professionals” who have both formal and informal responsibilities to the body politic, and it seems reasonable to hold them to a higher standard than members of the general public.

To be clear, this Article is not arguing that it is inappropriate to sanction attorneys under Model Rule 8.4(g) when another rule of professional conduct would apply. Instead, the Article is questioning the effectiveness of an antidiscrimination provision that primarily appears to result in discipline for only the most egregious instances of overt discrimination when research has repeatedly shown that the most insidious form of discrimination facing the legal profession today is of a more subtle and covert nature. It certainly makes sense for the bar to step in and sanction attorneys engaged in inappropriate conduct, but it is imperative that leaders within the profession make clear that other more common forms of discriminatory behavior are subject to, and will receive, appropriate discipline.

### *4. Are Rules Prohibiting Overt Discrimination Needed in Conjunction with Covert Discrimination Efforts?*

In Part III, the Article argues that leaders within the bar should focus their efforts on pursuing strategies that encourage attorneys to exercise

their voice as opposed to choosing silence, suggesting that this strategy would create a framework that could be beneficial to addressing covert discrimination within the legal profession. But might it be that what is truly needed is a two-part strategy that addresses both overt and covert discrimination? Is there likely to be any significant progress in the bar's quest to eliminate discrimination and enhance bias without a provision that concretely prohibits overt discrimination?

Employment law literature is mixed on whether there continues to be a need for formal antidiscrimination laws. For example, one strand of research states that:

Antidiscrimination jurisprudence assumes that most discrimination is intentional, that legal rights provide an effective mechanism for redress of discrimination, and that employers respond rationally to legal sanctions. In contrast, the empirical sociolegal and critical race literatures show that racism and sexism tend to be hidden within social structures, that there are many obstacles to the successful mobilization of legal rights, and that organizational response to law is characterized by symbolic compliance that is often ineffective.<sup>236</sup>

In contrast, another strand of scholarship utilizes experimental research findings and determines that when “inclusion efforts [are] grounded in antidiscrimination law . . . [they] are the most likely to curb widely held biases and promote equitable behavior.”<sup>237</sup> Importantly, the study “challenge[s] emerging scholarship that suggests legal justifications for integration are no longer effective.”<sup>238</sup>

Regardless of the outcome of this scholarly debate, the problem with Model Rule 8.4(g) is not that it prohibits overt discrimination—it is that it prohibits overt discrimination while purporting to be fulfilling the purpose of the ABA Goal III objectives<sup>239</sup> and failing to address issues of covert discrimination or promote diversity. As written, Model Rule 8.4(g) is unlikely to achieve the goals the ABA set out for itself in 2008, which creates a legitimate concern regarding the efficacy of the rule as adopted.

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<sup>236</sup> Lauren B. Edelman, Aaron C. Smyth & Asad Rahim, *Legal Discrimination: Empirical Sociolegal and Critical Race Perspectives on Antidiscrimination Law*, 12 *Ann. Rev. L. Soc. Sci.* 395, 395 (2016).

<sup>237</sup> Jamillah Bowman Williams, *Breaking Down Bias: Legal Mandates vs. Corporate Interests*, 92 *Wash. L. Rev.* 1473, 1473 (2017).

<sup>238</sup> *Id.*

<sup>239</sup> ABA Report, *supra* note 25, at 1 (explaining that Model Rule 8.4(g) “will further implement the Association’s Goal III objectives”).

This Article is not claiming that efforts to prohibit overt discrimination are baseless; it is, instead, arguing that the ABA is in danger of pursuing a path similar to that of the SEC's disclosure rule.

*5. Will Diversity Fatigue Stall Efforts to Obtain a Model Rule That Addresses Covert Discrimination?*

The journey to obtain Model Rule 8.4(g) was an arduous one. It does seem a bit incredulous that obtaining a provision banning overt discrimination and harassment took more than *twenty* years. For those who carried the mantle of this effort, one can only imagine that finally achieving passage of Model Rule 8.4(g) was bittersweet. It might be seen as a bit of hubris to suggest to these leaders within the bar that their work is incomplete, necessitating them to immediately begin new efforts aimed at addressing issues of covert discrimination. This may be a particularly troubling notion, because those who strive for years to achieve greater diversity and inclusion within organizations sometimes begin to suffer from what has been termed “diversity fatigue.” Diversity fatigue refers:

to the weariness felt by those who bear the responsibility for leading diversity initiatives, those who are the supposed beneficiaries of diversity measures, those who believe they pay the price and experience the negative consequences of diversity, and even those who are but bystanders to the diversity debates. Diversity fatigue may be explained in part by the fact that efforts to diversify institutions are difficult in that they are costly and may be seen by some as a threat to existing structures, and in that progress is bound to be incremental, costly, and slow.<sup>240</sup>

As a result, bar leaders may not want to turn immediately to battling for the adoption of strategies that will address covert discrimination and promote attorneys to voice their concerns.<sup>241</sup>

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<sup>240</sup> Wald, *supra* note 1, at 1110 (footnotes omitted).

<sup>241</sup> In response to a concern of this nature, I feel I must stray slightly from the purely academic exercise. I admit that my personal views regarding diversity within the legal profession have the benefit of a sense of entitlement that is in place only because of the achievements of generations of bar leaders who fought fights against discrimination and exclusion long before I applied to law school. As a result of their efforts, I, a black woman, was able to take for granted that I could apply to and attend any law school of my choosing without fear of exclusionary policies and practices. I remember my first attempts at becoming familiar with a body of scholarly literature upon entering academia. I began with the works of Deborah Rhode and David Wilkins, and I remember feeling a sense of astonishment, disappointment, impatience,

And yet, despite the fact that progress on these issues “is bound to be incremental, costly, and slow,” it is imperative that leaders within the bar press on. As servants of the public good, lawyers have a duty to maintain fights against injustice even when difficult, tiring, or frustrating. The ills of covert discrimination are well-documented, and are currently impacting the full participation and fulfillment of several demographic groups within the profession.

Additionally, the need to develop mechanisms that encourage attorneys to exercise voice are imperative to achieving an inclusive profession.

A central theme in the [management] literature is that voice is often perceived to be risky. An employee may fear that by speaking up in a way that challenges current practices or past decisions or that highlights a serious problem, he or she will be viewed as a troublemaker or complainer, lose respect or support from others, receive a negative performance review, get assigned to undesirable projects, not be considered for promotion, or even get fired.<sup>242</sup>

As a result, “studies have found employees to be more likely to engage in voice when they have a greater sense of psychological safety and more likely to remain silent when they perceive voice to be unsafe.”<sup>243</sup> It is, therefore, important for bar leaders to consider the adoption of strategies that will provide their members with an objective assurance that their decision to exercise voice is safe.

#### CONCLUSION

As recounted in Part I, the legal profession has a long history of exclusion. As a result, leaders within the profession have engaged in a variety of efforts in an attempt to create a more diverse and inclusive profession. Unfortunately, these efforts sometimes fail. Part II outlines one such failure, the adoption of an antidiscrimination provision within the ABA Model Rules of Professional Conduct in 2016.

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and awe at realizing articles that were written in 1982 or 1996 were still completely relevant in 2012. So yes, the admonition of this Article that obtaining a ban on overt discrimination is not enough does have an element of hubris. A hubris that I am able to have only because of the efforts of those I have criticized in the course of writing this Article. To the extent that this Article suggests otherwise, I am deeply grateful to leaders within the bar for their work to date.

<sup>242</sup> Morrison, *supra* note 174, at 181.

<sup>243</sup> *Id.*

And yet, this Article argues that there are concrete actions leaders within the profession can take to effectively respond to discrimination, harassment, and bias within the profession in an effort to create a more diverse and inclusive environment. In particular, this Article makes a contribution to the scholarly literature by taking insights from organizational behavior and management and applying it to the profession's diversity problem. Specifically, members of the legal profession can contribute towards the effort of obtaining a more diverse and inclusive profession by adopting policies and practices that (i) address covert discrimination throughout the profession and (ii) encourage individual attorneys to stop remaining silent and instead give voice to their experiences of discrimination, harassment, and bias. By doing so, the profession may finally live up to the ideals so many within American society imagine when they think of the role lawyers are meant to serve.