

**Judicial Council of Georgia**  
**Access, Fairness, and Public Trust and Confidence Committee**  
Wednesday, September 14, 2016  
11:30 a.m. – 1:55 p.m.  
Administrative Office of the Courts Training Room  
244 Washington Street, S.W.  
Suite 300  
Atlanta, Georgia 30334

**Conference Call Information**  
**Telephone # 1-877-273-4202**  
**Conference Room Number: 9583294**  
(Please call in at Noon)

Lunch, 11:30 to 12 Noon

(1) **Welcome and Introductions – 5 minutes (beginning promptly at Noon)**  
– Justice Robert Benham and Justice Carol W. Hunstein, Presiding

(2) **Written Reports**

- Summary of May 11, 2016, Meeting
- Future Meeting Dates – Please Mark Your Calendars
  - **November 9, 2016**, 11:30 a.m. to 2:00 p.m.
    - **2017 Meeting Dates will be decided at the November 9, 2016, AFPTCC meeting**
- Upcoming Events – SAVE THE DATE
  - Human Trafficking and the Courts Summit, October 6, 2016, 8:15 a.m. to 5 p.m.
  - Eliminating Barriers to Justice III, October 20, 2016, 10 a.m. to 4 p.m.
  - Georgia Reflections on Ferguson, December 15, 2016, 9 a.m. to 5 p.m.
  - NAWJ Kick-Off Reception, January 6, 2017, 4:30 p.m. to 5:30 p.m.

**Project and Community Updates – 70 minutes**

- (3) ADA Handbook Update – 10 minutes
  - Mike Galifianakis and Stacey Peace
- (4) ADA Handbook – Mental Health & Dev. Disabilities Update – 10 minutes
  - Tracy Johnson
    - Next sub-committee meeting: 09-23-16, 10 a.m., ADA Office
- (5) Human Trafficking and the Courts Summit on 10-6-16 – 10 minutes
  - Michelle Barclay
    - <https://www.eventbrite.com/e/human-trafficking-and-the-courts-summit-judicial-training-tickets-26379223969>
- (6) Georgia Reflections on Ferguson Summit – 10 minutes
  - Judge LaTisha Dear Jackson

- (7) NAWJ Conference – *Access to Justice: Past, Present, and Future* – 10 minutes
  - Justice Hunstein and Judge Sara Doyle
- (8) Court Based Self-Help Programs – 5 minutes
  - Judge Robert Rodatus
- (9) Eliminating Barriers to Justice III CLE – Thursday, October 20, 2016, 10:00 am to 4:00 pm at Georgia State University (GSU) College of Law, 85 Park Place, NE, Atlanta, GA, 30303. This event is being hosted by GSU’s Center for Access to Justice, which is in its inaugural year.
  - Karlise Y. Grier – 5 minutes
- (10) Report from Council of Accountability Courts Training – 5 minutes
  - Karlise Y. Grier
- (11) Report on June 18, 2016, Meeting with diversity bar leaders – 5 minutes
  - Justice Benham and Justice Hunstein
    - Suggested Next Meeting Date: November 9, 2016, 2 pm
      - Presentation on Council of Accountability Court Judges
      - Presentation on ABA Rule 8.4
      - Discussion on possible event with AFPTCC, if approved

### **Committee Decision Items**

- (12) Proposals for New 2017 AFPTC Community Events and Goals – 20 minutes
  - 1. Community Event based on feedback and suggestions received from Diversity Bar Leaders to be held in the First Trimester of the Year (January 2017 to April 2017, depending on the legislative calendar; possibly in Athens, Georgia or at the State Bar of Georgia).
    - \* ADA Handbook highlights (inform the community about this current project);
    - \* Language Access Issues and Consular Services to Foreign Born populations (may be one presentation or two separate presentations). Will also consult with Commissioner Chris Carr on this portion of the program for surging populations
    - \* Court Services to the LGBTQ Community (possible goal: development of sections for court bench books and handbooks, especially as it relates to transgender issues)
    - \* IT Issues and Fairness in the Courts

\* Hidden Bias – Injustice on the Bench: *See*  
[http://www.americanbar.org/news/abanews/aba-news-archives/2016/02/hidden\\_injusticebi.html](http://www.americanbar.org/news/abanews/aba-news-archives/2016/02/hidden_injusticebi.html)

\* Should Georgia’s Judicial Cannon’s have non-discrimination provisions similar to the ABA’s Model Rule 8.4? If yes, is it appropriate for AFPTCC to offer leadership/assistance on this issue related to fairness and public trust and confidence? *See*  
[http://www.abajournal.com/news/article/house\\_of\\_delegates\\_strongly\\_agrees\\_to\\_rule\\_making\\_discrimination\\_and\\_harass/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email)

\* Diversity on the Bench (possible goal: the development of a policy for Judicial Council consideration). *See*  
[http://www.fjc.gov/history/home.nsf/page/judges\\_diversity.html](http://www.fjc.gov/history/home.nsf/page/judges_diversity.html)

<https://apps.americanbar.org/abanet/jd/display/national.cfm>

<http://news.vanderbilt.edu/2016/06/massive-database-shows-state-judges-are-not-representative-of-the-people-they-serve/>

- Why it is important (or Is it important - ?)
- If diversity on the Bench is important, should AFPTCC provide leadership and work with stakeholders to develop a policy on this for the Judicial Council’s consideration?

2. CLE on Transparency in the Courts at the State Bar Annual Meeting

- \* cameras in the courtroom
- \* open access to court records
- \* open access to court administrative meetings

3. Other Suggestions

(13) Old Business – 5 minutes

(14) New Business & Next Meeting – 5 minutes

(15) Adjourn

Judicial Council of Georgia  
Access, Fairness, and Public Trust and Confidence Committee  
September 14, 2016

(2) Written Reports – Summary of May 11, 2016 Meeting

**Judicial Council of Georgia**  
**Access, Fairness, and Public Trust and Confidence Committee**  
Meeting Summary-Wednesday, May 11, 2016  
Ratley Training Room  
244 Washington Street, S.W. Suite 300  
Atlanta, Georgia 30334

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The meeting was called to order at 12:00 p.m. and was adjourned at 1:20 p.m.

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**Access, Fairness, Public Trust and Confidence Committee members present:** Judge Sara L. Doyle; Mr. Will Simmons; Ms. Tracy Johnson; Ms. Cassandra Kirk; Ms. Monica Khant; Mr. Coy Johnson; Judge Sherry Moore (by phone); Judge Gail Tusan (by phone);

**Others Present:** Ms. Karlise Grier, Committee staff person, Contractor for Judicial Council Administrative Office of the Courts (JCAOC); Mr. Mike Galifianakis, State ADA Coordinator's Office; Ms. Stacey Peace, State ADA Coordinator's Office; Ms. Jana Edmonson-Cooper, Georgia Legal Services Program; Ms. Cynthia Clanton, JCAOC; Ms. Michelle Barclay, JCAOC; Ms. Christine Butcher, JCAOC; Ms. Patricia Buonodono JCAOC; Mr. Thomas Rawlings; Ms. Patricia Buonodono; Mr. Bruce Shaw

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**(1) Welcome and Introductions**

Judge Doyle called the meeting to order and stated that due to Justices Benham and Hunstein both having scheduling conflicts, she was asked to chair this meeting.

**(2) Written Reports**

- **Summary of February 10, 2016, Meeting**
- **Future Meeting Dates**
  - **September 14, 2016, 11:30 a.m. to 2:00 p.m.**
  - **November 9, 2016, 11:30 a.m. to 2:00 p.m.**

**Project and Community Updates**

**(3) ADA Handbook Update**

Mr. Mike Galifianakis distributed copies of a draft ADA Handbook to this committee and thanked the Judicial Council/AOC staff for helping to keep the project and for providing input into the project. Mr. Galifianakis asked the committee for direction on how to proceed with reviewing the handbook by members. The only area that needs to be addressed on a substantive level is what accommodations should be made for individuals with mental health and developmental disability issues. Some outreach to other individuals working in the court system who deal with mental illness and developmental disability issues is still needed. Mr. Galifianakis suggested that a companion guide be developed separately on mental health and developmental disability issues.

The committee determined to review the ADA Handbook and have responses back to Mr. Galifianakis and Ms. Peace by July 2<sup>nd</sup> with the intention of having a completed handbook with the exception of the mental health companion piece by the next Access, Fairness, Public Trust and Confidence Committee on September 14.

Monica Khant made a motion to move forward with developing the mental health companion guide to the ADA Handbook, the motion carried unanimously.

#### **(4) Atlanta Consulates Information and Proposed Training**

Mr. Tom Rawlings briefed the committee on his work for the Mexican Consulate and how the consulate works with Mexican citizens who are involved in court-related matters such as immigration, criminal, family, and juvenile law. Mr. Rawlings proposed three areas of opportunity for collaboration for the AFPTCC:

- Contact consulates and invite them to a meeting with appropriate AOC/AFPTC personnel. Use meeting as a springboard for training opportunities for court personnel.
- Invite consulates to prepare materials on consular protection services for distribution in court clerks' offices or via court websites.
- Create spaces at judicial trainings for consular personnel to share services available.

Judge Kirk noted that the Commissioner of the Department of Economic Development, Chris Carr, could be consulted to find out what nationalities are surging in population due to rapid business growth and foreign investment as these businesses often interact with the courts.

Judge Doyle recommended more information to be obtained as to where this project would best fit.

#### **(5) Legislative Update**

Ms. Christine Butcher of the JC/AOC went over some pieces of legislation that passed in the 2015 legislative cycle that are relevant to the AFPTCC. HB 691 coming from the Municipal Court Judges Council that deals with removal with cause for municipal court judges. HR 1113 abolishes the existing Judicial Qualifications Commission (JQC) and HB 808 reestablishes it with a new structure, procedures, and methods of appointment. SB 367 is the Governor's criminal justice reform bill that clarifies procedures for confidentiality of records for first time offenders as well as an offender transition and reentry unit.

#### **(6) VLAN Network Information**

Ms. Monica Khant gave an overview of the grant for the Victim Legal Assistance Network ("VLAN"). The grant is a partnership between Atlanta Legal Aid, AVL, Georgia Legal Services, Georgia Asylum and Immigration Network, and Georgia State University. The group received OVC funding to address the problem of the limited reach of civil legal services. Part 1 of the grant was completed in March and is considered the study phase. Part 2 is currently under way and focuses on providing services.

#### **(7) NAWJ Conference**

Judge Doyle went over the progress for the National Association of Women Judges taking place in October of 2017. A hotel has been selected and the educational piece is currently being developed. Currently in the preplanning stages, Judge Doyle expects the work activity to intensify in 6 months as the date approaches.

### **(8) Human Trafficking Summit Grant Proposal**

Ms. Michelle Barclay stated that a national summit on human trafficking and the courts took place in New York last fall and now the summit will be replicated in Georgia by way of a grant from the State Justice Institute and a match from the Georgia Attorney General's Office. The date is October 6, 2016.

### **(9) GLSP CLE on October 20, 2016 – ADA Title 2 Presentation**

Ms. Jana Edmondson-Cooper stated that the Georgia Legal Services Program over the past 3 years has been conducting an annual CLE program on access to justice issues as it pertains to language access. The 2016 event is titled Eliminating Barriers to Justice. This event will focus on language access as well as access for persons with disabilities. Ms. Edmondson-Cooper requested of this Access, Fairness, Public Trust and Confidence Committee to become supporting sponsors. Ms. Edmondson-Cooper invited Mr. Galifianakis and Ms. Peace to present a session on ADA matters and extended an invitation to serve on a judicial roundtable. The sponsorship does not require a financial commitment. AFPTC would simply be asked to help promote the event.

Judge Tusan made a motion to approve the AFPTCC as a supporting sponsor for the GLSP CLE, Mr. Coy Johnson seconded the motion. The motion carried unanimously.

### **(10) AOC Assistance in Locating Grants for Courts**

Ms. Michelle Barclay stated that Ms. Betty Barnard has been used as a contractor to apply for specific grants and is highly recommended. The AOC currently does not offer assistance in applying for grants, but can provide some limited assistance in helping courts to locate grants. Ms. Barclay said she wanted to make members of this committee aware of the limited assistance the AOC can provide and of the more extensive services that Ms. Betty Barnard can provide to courts at the courts' expense. Ms. Barnard is arranging to teach a 'grant seeking' class for court staff in November which will be livestreamed and archived as part of her contract.

### **(11) Day on the Bench Program for Legislators**

Ms. Michelle Barclay stated that this was a program that was formerly done by the AOC but cut for budgetary reasons. Now it is being brought back by the Communications Division at the AOC. The first event will take place in Augusta and be livestreamed. Legislators and other local decision makers will attend the event with purpose of increasing awareness of the court's daily operations for people who haven't been exposed to the everyday functions going on behind the bench.

## **2016 Goals and sub-committees – Organizational Meetings**

### **(12) 2016 Sub-Committees**

#### **1. Council of Accountability Court Judges Collaboration on training and best practices**

Ms. Karlise Grier stated that Justice Benham and Judge Jason Deal met to talk about the overlapping sections of access and fairness issues and the accountability courts. Justice Benham will be raising awareness of the accountability courts in his various talks with relevant bars and Judge Deal and

Ms. Taylor Jones are committed to ensuring that programming is developed which helps people understand how accountability courts are accessed and the how decisions are made to bring people and cases into these courts.

## **2. Municipal Courts – Best Practices Handbook for Court-Related Personnel**

Ms. Karlise Grier updated the committee on behalf of Judge LaTisha Dear Jackson. A meeting was held to discuss a bench book that deals with Ferguson-related issues and Judge Leslie Spornberger Jones will hold a session about Ferguson-related issues in June at the Municipal Court Judges Conference. This presentation will be used as a building block for a bench book and another event on December 15, 2016.

## **3. Court-Based Self-Help Programs in Family Law Matters**

Ms. Karlise Grier updated the committee on behalf of Judge Rodatus. Phone calls have been held with relevant parties with the intent of developing best practices.

**(13) Old Business**

**(14) New Business & Next Meeting**

The next meeting is scheduled for September 14, 2016.

**(15) Adjourn**

Judicial Council of Georgia  
Access, Fairness, and Public Trust and Confidence Committee  
September 14, 2016

(5) Human Trafficking and the Courts Summit on 10-6-16

Target Attendance -- 270 attendees – open to judges first and then to the general public  
 President's Dining Room, University Center, Mercer University

Open registration by September 15

Master of Ceremonies – To Be Decided

Questions will be received from the audience on index cards, reviewed and read to the panel  
 by the moderator

9 am to 9:50 am	Registration	
9:50 am to 10:00 am	Moderator Welcome and Program Overview	
10 am to 10:05 am	Welcome	<b>Chief Justice Hugh Thompson (confirmed)</b>
10:05 am to 10:10 am	CMCJ President Remarks	Judge Gary Jackson, Atlanta Municipal Court
10:10 am to 11 am	<p>Video in Courts/Open Courtrooms</p> <p>While it is true that many appeals courts at the State level agree that video should be recorded of court proceedings in appeals courts, most seem to agree that trial courts create different concerns.</p> <p>Does the use of video by citizens in court have any open courtrooms dimensions? If it does, what are those dimensions?</p> <p>And, if video is to be allowed, how much should we allow citizens to record what is going on in court?</p> <p>In the not too distant past, few people had access to video cameras, and such cameras were cumbersome. Today, virtually everyone has a smart phone with video capability. Should courts control this use, or is the use of video in court by citizens something we should get comfortable with?</p> <p>The Access and Fairness Committee of the Supreme Court, of course, has looked at this issue, as have some of the Court Councils.</p> <p>In the past, the various court rules have limited video access to the press, but in this day and age of bloggers, tweeters, facebook posters, and snapchat and periscope users, should courts continue to curtail the use of video by private citizens in court?</p> <p>If so, what guiding principles should courts review to determine if video use should be allowed?</p> <p>And, if not, are there any concerns raised by allowing anyone to video at anytime?</p> <p>It might be nice to have a panel including an</p>	<p><b>Jane Hansen – Supreme Court Public Information Officer • Moderator - confirmed</b></p> <p><b>Chief Justice Leah Ward Sears (Ret.), Partner, Schiff Hardin - confirmed</b></p> <p>Hon. Verda Colvin, Judge, Macon Circuit Superior Court (invited)</p> <p>Hollie Manheimer, Executive Director Georgia First Amendment Foundation (invited)</p> <p>Hon. Ashley Wright, District Attorney, Richmond County</p>

	appellate court judge, a superior court judge, a municipal court judge, a member of the press, a prosecutor and a public defender to talk about these issues. Maybe answer 5 questions on point during an hour session on this issue.	
11 am to 11:10 am	Break	
11:10 am to 12 Noon	Presentation on Georgia Criminal Justice Reform Council	Judge Michael Boggs, Georgia Court of Appeals (invited)
12 Noon to 12:50 pm	Presentation on Department of Justice Ferguson Report and Court Reform	<b>Judge Leslie Spornberger Jones, Municipal Court of Athens-Clarke County - confirmed</b>
12:50 am to 2:00 pm	Lunch	Deputy Attorney General Sally Yates (invited)
2:00 pm to 2:50 pm	The Process is the Punishment – A different process in lower level courts <a href="https://www.russellsage.org/publications/process-punishment">https://www.russellsage.org/publications/process-punishment</a>  <a href="https://www.jstor.org/stable/20108780?seq=1#page_scan_tab_contents">https://www.jstor.org/stable/20108780?seq=1#page_scan_tab_contents</a> <a href="https://www.russellsage.org/publications/process-punishment">https://www.russellsage.org/publications/process-punishment</a>	Rusi Patel, Assistant General Counsels, GMA • Moderator (invited)  --southern center for human rights presenter TBD (invited)  <b>Honorable Rebecca Grist – Solicitor General Bibb County and Immediate Past President, Georgia Association of Solicitor Generals - confirmed</b>  A criminal defense attorney is being invited.  Judge Harold McLendon of Dublin (invited)  <b>Attorney and Minister Francys Johnson - confirmed</b>
2:50 pm to 3:00 pm	Break	
3:00 pm to 3:50 pm	The role of the legislative branch, the executive branch (like DOJ), the role of the community, and the role of judges in creating change <a href="http://www.newsweek.com/unconstitutional-jail-poor-cant-pay-bail-492144">http://www.newsweek.com/unconstitutional-jail-poor-cant-pay-bail-492144</a>	Rick Deane – Moderator (invited)  Senator John Flanders Kennedy, Jr. (invited)

		-- Vanita Gupta, Civil Rights Division, DOJ, to potentially speak on what DOJ is doing/DOJ (may be invited)  --Judge Meng Lim, Tallapoosa Circuit, Seventh Judicial District (invited)
3:50 pm to 4:00 pm	Break	
4:00 pm to 4:45 pm	Next Steps and Action Items – Audience Discussion: What will each group do and how do I fit in?	<b>Judge Latisha Dear Jackson (confirmed)</b>
4:45 pm to 5:00 pm	AFPTC Co-Chair Remarks	Justice Robert Benham (invited)  Justice Carol W. Hunstein (invited)
5 pm	Adjourn to Reception at Harriett Tubman Museum	

Reception, Harriett Tubman Museum (Wine and Cheese Reception)

Co-Chairs, Host Committee –

- Ira Foster, Managing Attorney, Georgia Legal Services Program and Past President, Macon Bar Association
- Rebecca Grist, Solicitor General, Bibb County

Judicial Council of Georgia  
Access, Fairness, and Public Trust and Confidence Committee  
September 14, 2016

(6) Georgia Reflections on Ferguson Summit

**Georgia Reflections on Ferguson – The Role of the Courts  
Draft Agenda**

December 15, 2016 (Bill of Rights Day)  
President’s Dining Room, University Center, Mercer University

Target Attendance -- 270 attendees – open to judges first and then to the general public  
President’s Dining Room, University Center, Mercer University

Open registration by September 15

Master of Ceremonies – To Be Decided

Questions will be received from the audience on index cards, reviewed and read to the panel  
by the moderator

9 am to 9:50 am	Registration	
9:50 am to 10:00 am	Moderator Welcome and Program Overview	
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10:10 am to 11 am	<p>Video in Courts/Open Courtrooms</p> <p>While it is true that many appeals courts at the State level agree that video should be recorded of court proceedings in appeals courts, most seem to agree that trial courts create different concerns.</p> <p>Does the use of video by citizens in court have any open courtrooms dimensions? If it does, what are those dimensions?</p> <p>And, if video is to be allowed, how much should we allow citizens to record what is going on in court?</p> <p>In the not too distant past, few people had access to video cameras, and such cameras were cumbersome. Today, virtually everyone has a smart phone with video capability. Should courts control this use, or is the use of video in court by citizens something we should get comfortable with?</p> <p>The Access and Fairness Committee of the Supreme Court, of course, has looked at this issue, as have some of the Court Councils.</p> <p>In the past, the various court rules have limited video access to the press, but in this day and age of bloggers, tweeters, facebook posters, and snapchat and periscope users, should courts continue to curtail the use of video by private citizens in court?</p> <p>If so, what guiding principles should courts review to determine if video use should be allowed?</p>	<p><b>Jane Hansen – Supreme Court Public Information Officer • Moderator - confirmed</b></p> <p><b>Chief Justice Leah Ward Sears (Ret.), Partner, Schiff Harden - confirmed</b></p> <p>Hon. Verda Colvin, Judge, Macon Circuit Superior Court (invited)</p> <p>Hollie Manheimer, Executive Director Georgia First Amendment Foundation (invited)</p> <p>Hon. Ashley Wright, District Attorney, Richmond County</p>

	<p>And, if not, are there any concerns raised by allowing anyone to video at anytime?</p> <p>It might be nice to have a panel including an appellate court judge, a superior court judge, a municipal court judge, a member of the press, a prosecutor and a public defender to talk about these issues. Maybe answer 5 questions on point during an hour session on this issue.</p>	
11 am to 11:10 am	Break	
11:10 am to 12 Noon	Presentation on Georgia Criminal Justice Reform Council	Judge Michael Boggs, Georgia Court of Appeals (invited)
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2:00 pm to 2:50 pm	<p>The Process is the Punishment – A different process in lower level courts</p> <p><a href="https://www.russellsage.org/publications/process-punishment">https://www.russellsage.org/publications/process-punishment</a></p> <p><a href="https://www.jstor.org/stable/20108780?seq=1#page_scan_tab_contents">https://www.jstor.org/stable/20108780?seq=1#page_scan_tab_contents</a></p> <p><a href="https://www.russellsage.org/publications/process-punishment">https://www.russellsage.org/publications/process-punishment</a></p>	<p>Rusi Patel, Assistant General Counsels, GMA • Moderator (invited)</p> <p>--southern center for human rights presenter TBD (invited)</p> <p><b>Honorable Rebecca Grist – Solicitor General Bibb County and Immediate Past President, Georgia Association of Solicitor Generals - confirmed</b></p> <p>A criminal defense attorney is being invited.</p> <p>Judge Harold McLendon of Dublin (invited)</p> <p><b>Attorney and Minister Francys Johnson - confirmed</b></p>
2:50 pm to 3:00 pm	Break	
3:00 pm to 3:50 pm	<p>The role of the legislative branch, the executive branch (like DOJ), the role of the community, and the role of judges in creating change</p> <p><a href="http://www.newsweek.com/unconstitutional-jail-">http://www.newsweek.com/unconstitutional-jail-</a></p>	Rick Deane – Moderator (invited)

	<a href="#">poor-cant-pay-bail-492144</a>	Senator John Flanders Kennedy, Jr. (invited)  -- Vanita Gupta, Civil Rights Division, DOJ, to potentially speak on what DOJ is doing/DOJ (may be invited)  --Judge Meng Lim, Tallapoosa Circuit, Seventh Judicial District (invited)
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5 pm	Adjourn to Reception at Harriett Tubman Museum	

Reception, Harriett Tubman Museum (Wine and Cheese Reception)

Co-Chairs, Host Committee –

- Ira Foster, Managing Attorney, Georgia Legal Services Program and Past President, Macon Bar Association
- Rebecca Grist, Solicitor General, Bibb County

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September 14, 2016

(7) NAWJ Conference –  
*Access to Justice: Past Present, and Future*

**Conference Chairs – Justice Carol W. Hunstein and Chief Judge Sara Doyle**

Education Co-Chairs – Judge Gail Tusan, Judge Kathlene Gosselin, Judge Brenda Weaver  
Friends Committee Co-Chairs – Allegra Lawrence-Hardy and Letitia “Tish” McDonald  
Attorney Reception Co-Chairs – Sharri Edenfield and Shiriki Cavitt

Conference Project Manager – Marie Komisar, NAWJ

**THEME – *Access to Justice: Past, Present, and Future***

The conference theme of ***Access to Justice: Past, Present, and Future*** will allow attendees to:

1. explore historical lessons about justice from the Civil Rights movement;
2. discuss present justice changes such as criminal justice reform
3. envision justice initiatives for years to come

The theme is also flexible and broad enough to encompass ideas from partners such as the ABA and SJI.

Date	Event
<b>Wednesday</b> 10-11-17 Late Afternoon	Board and Committee Meetings  New Judges Welcome Reception International Judges Welcome Reception  Sheraton Hotel
<b>Wednesday</b> 10-11-17 Early Evening	Opening Night Reception at Sheraton Hotel  Suggested: Bard Entertainment
<b>Thursday</b> 10-12-17 Morning	Breakfast Opening Plenary Continuing Judicial Education
<b>Thursday</b> 10-12-17 Lunch	Keynote Speaker: Governor Nathan Deal (invited)
<b>Thursday</b> 10-12-17 Afternoon	Continuing Judicial Education

**Conference Chairs – Justice Carol W. Hunstein and Chief Judge Sara Doyle**

Education Co-Chairs – Judge Gail Tusan, Judge Kathlene Gosselin, Judge Brenda Weaver  
Friends Committee Co-Chairs – Allegra Lawrence-Hardy and Letitia “Tish” McDonald  
Attorney Reception Co-Chairs – Sharri Edenfield and Shiriki Cavitt

Conference Project Manager – Marie Komisar, NAWJ

**THEME – *Access to Justice: Past, Present, and Future***

<b>Thursday</b> 10-12-17 Evening	<b>Reception at the 11<sup>th</sup> Circuit Court of Appeals (confirmed)</b>  Suggested: Bard Entertainment
<b>Friday</b> 10-13-17 Morning	Keynote Breakfast Plenary Continuing Judicial Education
<b>Friday</b> 10-13-17 Lunch	Friday Luncheon
<b>Friday</b> 10-13-17 Afternoon	Continuing Judicial Education
<b>Friday</b> 10-13-17 evening	Attorney Organized Reception for NAWJ at the Center for Civil and Human Rights/Carter Center/State Bar/Other (YLD, Multi-Bar Leadership Council)
<b>Saturday</b> 10-14-17 Morning	Friends Brunch or Luncheon Suggested Speaker, Justice Elena Kagan
<b>Saturday</b> 10-14-17 Afternoon	Free time for shopping or sightseeing
<b>Saturday</b> 10-14-17 Evening	NAWJ Reception and Annual Gala – Sheraton Hotel
<b>Sunday,</b> 10-15-17	Farewell Breakfast

Judicial Council of Georgia  
Access, Fairness, and Public Trust and Confidence Committee  
September 14, 2016

(9) Eliminating Barriers to Justice III CLE  
Thursday , October 20, 2016 at 10:00 am

**\*SAVE THE DATE\***

***Eliminating Barriers to Justice III:  
Language Access, the Americans with Disabilities Act and  
Georgia's Criminal and Civil Justice Systems***

- Who:** (Title Sponsors) Georgia Legal Services Program  
A.B. Olmos & Associates, P.C.  
Chief Justice's Commission on Professionalism
- (Financial Sponsors) Southern Center for Human Rights
- (Supporting Sponsors) Supreme Court of Georgia Commission on Interpreters, Supreme Court of Georgia Access, Fairness, Public Trust and Confidence Committee, State Bar of Georgia Pro Bono Resource Center, State Bar of Georgia Access to Justice Committee, Judicial Council of Georgia/Administrative Office of the Courts
- Hosted By: Georgia State University Center for Access to Justice

**What:** A comprehensive **\*FREE\*** 3.5 hour CLE where access to justice stakeholders, including attorneys and judges, will attend sessions discussing *Access to Georgia's Civil and Criminal Justice Systems for Persons with Disabilities under the American with Disabilities Act* and *Access to Justice for Limited English Proficient (LEP) and Deaf/Hard of Hearing (DHH) Criminal Court Participants: Ethical Considerations for Lawyers and Judges*. The CLE will also include a session on innovative practices by key stakeholders that effectively address access to justice issues in Georgia in addition to a judicial roundtable featuring **Justice Keith Blackwell** (Supreme Court of Georgia/ Chair, Georgia Commission on Interpreters), **Justice Harold Melton** (Supreme Court of Georgia/ Immediate Past Chair, Georgia Commission on Interpreters), **Chief Judge Sara Doyle** (Georgia Court of Appeals / Member, Supreme Court of Georgia Access, Fairness, Public Trust and Confidence Committee), **Judge Horace Johnson** (Superior Court of Newton County / President, Council of Superior Court Judges) and **Chief Magistrate Judge Kristina Hammer Blum** (Magistrate Court of Gwinnett County / President, Council of Magistrate Court Judges).

**When:** Thursday, October 20, 2016  
10:00 am – 4:00 pm

**Where:** Georgia State University College of Law  
85 Park Place, NE, Atlanta, GA 30303

*\* No cost to attend. Lunch will be provided. General, Professionalism and Ethics continuing education credits for attorneys and judges will be applied for. Attendees will be responsible for self-reporting desired CLE credit hours. Additional details, including how to register, will be available October 1, 2016. Questions? Please contact Jana J. Edmondson-Cooper, Eliminating Barriers to Justice III CLE Co-Chair, at [jedmondson-cooper@glsp.org](mailto:jedmondson-cooper@glsp.org).*

Judicial Council of Georgia  
Access, Fairness, and Public Trust and Confidence Committee  
September 14, 2016

(11) Report on June 18, 2016, Meeting with Diversity Bar Leaders

**JUNE 18, 2016, DIVERSITY BAR LEADER MEETING AGENDA**

- I. Introductions
- II. Welcome and Overview of the Access, Fairness, Public Trust, and Confidence Committee  
Justice Robert Benham and Justice Carol Hunstein
- III. Brief Remarks from the State Bar of Georgia Office of General Counsel  
General Counsel for the State Bar of Georgia, Paula Frederick
- IV. Brief Remarks on State Bar of Georgia Involvement  
Past President of the State Bar of Georgia, Patrise Perkins-Hooker and/or
- V. Report of Activities, Interests, and Challenges of Women and Diversity Bar Associations
- VI. Open Discussion
- VII. Adjourn

Justice Benham and Justice Hunstein, presiding

The Justices brought greetings and reminded attendees that they are committed to Access to Justice and inclusiveness in the courts.

Cynthia Clanton gave opening remarks and explained that the Judicial Council is a 27-member policy making body for Georgia Judiciary. It now includes the president of the State Bar of Georgia as a member.

Paula Frederick gave opening remarks and reminded attendees that their voluntary bar groups can do things a mandatory bar cannot do, such as taking positions on political issues and supporting particular candidates in judicial races. She offered to provide more information about restrictions on the mandatory bar and reminded attendees that the 10 lawyers in the Office of the General Counsel are available to speak at voluntary bar meetings around the State; they can provide an Ethics CLE hour for your members. There are a lot of resources at the State Bar you can take advantage of. One of those is the membership database, but the Bar does not keep statics about the race of members. Several years ago the Bar had an optional check off on the dues form where members could check off race. Frederick told those in attendance that if they believe having statistics on race would be helpful, they would need to take the lead on any request to have the Bar gather that information.

Patrise Perkins-Hooker, Past President of the State Bar of Georgia said because you were at the table, the bar leadership has begun to understand the value of having diversity bar associations at the table. The State Bar of Georgia association is your bar association. It is something that you can get involved with and make a difference in. I am turning over the reigns to you guys. I was the first person to put Kathleen [Womack] on the finance committee. You have to keep the pressure on. I have done the struggle and got you all at the table. You have to keep it going it. I am glad that you are continuing the leadership. Thank you for caring for the constituents you represent.

Justice Hunstein:

I started with the Gender Bias Committee in 1989. I went across the state and listened to glaring incidences of gender bias. The report was about 859 pages. We couched our report as not targeting any particular person. No one's name was used, just instances of gender bias. Albany was the murder capitol of the nation. This was because the superior court judge did not want to hear DV cases and the state court followed suit, so the offender was charged with reckless

conduct or disturbing the peace and the offender was out of jail before the woman was out of the hospital. When a rape case came in, the police officer wanted to know if it was a “real” rape (ie stranger on stranger). Men also talked about problems they were having with being treated fairly in custody cases. This committee was followed by a committee on racial and ethnic bias. Justice Benham and I have been trying to bring those issues to the forefront for most of our career. How can we understand what is happening and make improvement. Sometimes it is not the message, but how the message is delivered.

Justice Benham: I want to give you an example of how to attack problems. Once Albany was the murder capitol of the nation. It became apparent that murder just didn't happen. There were typically 5 contacts with law enforcement before the murder, and if you could intervene, you might be able to change the outcome. There was a program to study the problem and then to figure out a plan. In the year that the program was in place, there were no domestic homicides. Justice Hunstein and I were raising the issue of fairness. We believe there are good people in the state, some of who may have taken a bad path. As we discuss things, we hope you will share with us not just the problems, but some things you did that may work. Judge J.L. Davis asked me to come back to Catersville to practice law, and Judge Davis said this is your home. I am sure they have problems in California, but we have problems here. Judge Davis said I can't promise you everyone will be fair with you, I can promise you I will be fair with you. To some extent, we have to pull scabs off of old wounds and kick some dogs that have been sleeping. Judge Davis said you can't complain about snow on someone else's roof, when you have snow on your own.

Attendee Concern/Question: It has been my experience that people are willing to express that diversity is valuable, but in terms of actual practice, they are not inclined to do it. Are superior and state court judges required to participate in seminars and trainings so they can understand the value of diversity. The elephant in the room is the lack of diversity on the bench. The lack of diversity in South Georgia is significant. At one time there were no superior or state court judges, but they would not even act on it, even with the appointment of a juvenile court judge.

Justice Hunstein: As a former superior court judge, I went on the supreme court in 1992. There was some diversity training. 40% of Zell Miller's appointments to the bench were women and minorities. It is easy to say it. It is a different story to actually live it.

Attendee Concern/Question: If state and superior court judges think it is a value, perhaps they can say that to the Governor.

Justice Benham: I remember years ago, my dad gave me some valuable advice. He said people don't have to change, you have to make them want to change. Make people want to make a change. Start from the premise that people are good people. I hope as we do the reports, we will start off with what has been accomplished and what remains to be addressed. What good things we have done and how they can be replicated.

Attendee Concern/Question: I think we are going in the wrong direction. A lot of good people don't put in [for judgeships] because they do not think they have a chance. The people who are interested in diversity are the diverse people.

Attendee Concern/Question: An attendee raised a concern that when judges are asked to think about alternatives to jail, the judges sometimes respond that they are not on the bench to do social work.

Justice Hunstein: As a former trial judge, it is easier to accept the plea rather than try to change someone's life. There has been a huge change. I think the criminal justice reforms that Governor Deal has spearheaded have been instrumental. We were putting people in jail that we were mad at, but who really were not a danger to the community. I am interested in things that are innovative and what will make our system more fair.

Justice Benham: If people are not interested in doing things for reasons of what is just right, then talk about the financial issues. This is what an offender will cost us and what accountability courts [can save taxpayers]. Explain to people how it will save them money.

KYG will send everyone information on the accountability courts and contact information for the accountability courts.

Attendee Concern/Question: Even in Metro area there are problems. Besides Fulton and Dekalb, there are very few minorities. Clayton is changing a little. In Gwinnett and Cobb, the population of Asians and Latinos is large, but they have no real representation on the bench. As a former prosecutor, there is no real representation of prosecutors. Other than judges, if you don't have representation among prosecutors making the decision [then you still have a problem]. There is only 1 Latino superior court judge in the state. We as leaders sitting around the table have tried to be very active. We have been observing the discrepancy. Putting a plan in place to change that is something of interest. Could all the judges in the state get on Board and in one voice say this is important to us?

Justice Hunstein: I ran for an open seat, but I did beat four men. I was 40 years old with 2 small children at home, and I had to brag about being a grandmother. People would ask me, "Why would a pretty thing like you want to be a judge"? If there is an open seat, I encourage you to run.

Attendee Concern/Question: A criminal charge does not get to anyone's courtroom, unless a prosecutor decides there is a charge to be had. I remember once a judge in Griffin gave a boy three years for stealing ice cream from the school. I blamed the prosecutor because the prosecutor charged burglary. We need to get more people to also consider running for the position of District Attorney. We also need to be supportive of people in our smaller jurisdictions.

Justice Benham: Go around the room and you tell us good things and what problems remain to be addressed. We want everyone to express their opinion.

Attendee 1: It would be very difficult for a judge to run and be elected in my area. I also don't see anyone in my area having the connections to get appointed. I am big with advocacy. Look at the issues and then work with folks in the community to deal with the issues. There are a lot of ways you can attack problems. Many years ago, GAAAA filed a lawsuit to make that happen. Gov. Miller didn't just say this is something I am going to do. He reacted to the lawsuit. I am big on coming together and forming coalitions. Minority attorneys were on the ground and took action. If we can't get appointed and we can't get elected then let's form coalitions and make things happen.

Justice Hunstein: I was president of Council of Superior Court Judges when the GAAAA lawsuit occurred. The state prevailed in that case, but Zell Miller in spite of that was committed to appointing women and minorities. The lawsuit perhaps brought attention to the issue.

Attendee 1: If you have a coalition come together, it can speak volumes.

Attendee 2: Stonewall, we are under attack from everyone. From the legal perspective, I think it is the transgender issue. There is a judge in Augusta that refused to grant a name change of a transgender man. There is a lot of education that needs to be done. That is an issue where someone who has not met a transgender individual. I do a lot of work with changes and birth certificate. They achieve justice on that end. Those are the issues we are dealing with.

Attendee 3: To me, it is critical to figure out how to intervene with each other in mental health issues. Outside of Atlanta, people outside of Atlanta get off track and the judges lose trust in them. I never got crosswise with a judge. But if you do get cross-wise with a judge and then you have to go through that judge every day, it is hard. It is not a lot lawyers who can do to dig themselves out of the

whole. You get bar complaints and what started out as one mistake because you are a new lawyer and then you can't practice in the jurisdiction. Voluntary bars can play a big role in getting lawyers back on track. Everyone is not a joiner, but reaching out to people who may not join. We have to figure out how to get to people who don't enjoy stuff like this but need it and people who have gotten a bad reputation because they made a mistake as a baby lawyer. We are losing a lot of good people. We don't have a meaningful relationship with the Lawyer Assistance Program. It is hard out there. They feel like they don't have any support, and this is where the voluntary bars out to help.

Attendee 4: Access to accountability courts. I am in state court, and we have a DUI accountability court. A lot of the minority clients are not in accountability courts in superior courts. Are there any suggestions? It is my understanding that minorities are qualified but not having the opportunity to use accountability courts.

Cynthia Clanton: If there is demographic disparity in accountability courts, we should see it in the numbers and we are keeping track of data. There are about 131 accountability courts in Georgia. Many years ago, there were a handful.

Karlise Yvette Grier advised attendees: "If you are seeing a problem with inclusion in accountability courts, then e-mail Taylor Jones and copy me."

Justice Benham: Judges are getting paid more for inclusion they are sensitized to inclusion.

Attendee 5: If a judge has a predisposition for a specific sentence for a crime then that is a violation of the judicial canons. Attorneys who practice before judges who engage in ethical violations are afraid to complain. They have to practice before the judge day in and day out. We need a committee to go and talk to the judges about things the judge is doing that possibly needs correction.

Attendee 6: GAWL has been focusing on the development of women lawyers. One of our biggest successes this year is looking at where we are in the legal profession. A study by NAWL shows 40% of law school graduates are women but only 20% are partners and 17% are equity partners and only 23-24% are women. We have sent out a survey and gotten a really big response. We have had 15,000 responses. We are still conducting the study. If you know your bar members have not responded, let me know. We want they survey to be diverse. Women lawyers have at least 10 more hours of child care than men lawyers. There are also some income disparities between men and women lawyers.

Attendee 7: What do we do with data, and how do we get it to key stake holders? We need the support of not just GAWL but everyone so we can ensure the

information is getting out. It is not just women leaving the practice but the disparity in pay. We all know this but we still continue our fight. We need to get together as organizations and have a plan and put it in place.

Attendee 8: In my area, we have been trying to pull in the new lawyers. Over the last 5 years we have had an extreme influx of young lawyers. We are trying to raise the awareness of the general community about established Black lawyers. It is receiving a great response. I don't want you to come in and make a mistake when all you had to do is ask for help.

Kathleen Womack: I am chair of the law practice management committee. A lot of times, people don't remember it exists. The State Bar has a lot of resources.

Attendee 9: We get the thing of I am not a joiner, I don't do meetings, etc.

Patrise Perkins-Hooker: The Savannah Bar and the Port City Bar – leverage your relationship with Pat O'Connor. He is a really good man with a really good heart. There is an opportunity because of the new president.

Attendee 10: I am interested in building a relationship between the community and the bar. We did two candidate forums for judicial, solicitor general and district attorney candidates in DeKalb, and judicial and solicitor general candidates in Fulton County. We had over 200 people attend in DeKalb and over 100 people attend in Fulton. All of the candidates who were running participated in the forum. It allowed the community to see who was running. You get to the ballot and don't see who is running. Part of this was the opportunity to educate and to inspire people to be more informed and to educate others. The other thing we have had a great focus on is engaging with the students. We have done a law school tour and worked on strengthening the pipeline. By focusing on students we are trying to make them aware. Whether they are a joiner or not we want to ensure they are aware we are here. One of our more innovative programs this year was a clerkship program with John Marshall and getting people ready. If you want to be a judge you need to be a clerk and how do you build relationship with judges. How do you get involved, what does a campaign look like, etc.

Attendee 11: It is important that we all get on the same page. Another attendee made a comment about forming a coalition to speak to judges who are bullying attorneys. I think it is a great idea. Even if we all get together to receive the information, the only way it will be effective is when the meeting is called in chambers with the judge, it can be bar presidents, it has to be someone like a Justice Benham or a Justice Hunstein to improve the judge's temperament on the bench. If we as bar members are able to organize something like this and if we can translate that into meaningful communication, I think it would be helpful.

Attendee 12: GABWA makes endorsements and we have a judicial and public officer academy. Inclusion and diversity on the bench are issues we were founded on.

Attendee 13: We have found coalition building helpful. We had Sara Doyle and Judge Carla Wong McMillian and had a panel and invited different organizations to participate. We wanted an insiders perspective on running for office and I think the audience felt these judges gave us concrete tips. I think there is a lack of information about what is really involved. What are the necessary steps? You have a younger generation, guns ablaziing, but they don't really understand what is necessary. It is the intangible things we need to emphasize to our members. Until I opened my own law firm, I did not know how invaluable networking is. We need to teach our lawyers intangibles and to have a network of support.

Justice Hunstein: There is an art to campaigning. I did not know but I had a network of people who told me what to do. In the same way when there was the position on the Supreme Court, you had to have a strategy and work toward the goal.

Attendee 14: I represent GABWA. Judge Harris was one of the founders. We were founded to get AA women into the judiciary. GABWA has a PAC. We endorse candidates. We have an endorsement process. It is very interesting. One thing we need to do a better job at is to make sure we look at statewide races. We are concentrated in Atlanta, but we need to do a better job of getting with our regions and looking at the statewide races and make sure we endorse and have info across the state. We have the judicial and public officer academy and we train women interested in running for office. This year we had a meeting with Stonewall Bar. We talked about social issues impacting transgender AA women co-sponsored by Stonewall Bar. Crimes are not being reported by transgender women. We need to ensure the crimes are reported so we can do something about it.. We do programs with Gate City in terms of doing a resume review and training the law students so they can have the knowledge they need to have. It takes a lot of tailoring and business skills. You need to learn how to work the room. I used to feel that the meetings were a lot of work because I tried to talk to everyone. We need to see more people in the outlying communities run for office. We need to talk more about our legislature. Women lawyers would be great.

Attendee 15: The fact is most of us around the table are first generation lawyers. If you don't find someone of like mind who can mentor you, you will go down a road and not be successful. A mentor does not have to look like you. Try to form relationships with both folks who don't look like you as well as those who do.

Michelle West: A lot of you have mentioned new lawyers. I am director of Transition Into Practice. I am trying to take a 10-year program and make it up to date. I am not asking you to pay for the meal, but meet some lawyers at a restaurant and talk to them about issues they have. I am also talking about lawyering and wellness. You try to do an activity they like to do. If you sit in a classroom and start talking to them, they shut down. I am willing to work with you and your organization.

Justice Benham: I think this has been a good meeting. I think you have gotten from this meeting a positive outlook for the future. We build on our success instead of complain about failures. I hope you will keep in contact. Karlise will be available to you to help in working with the projects.

Judicial Council of Georgia  
Access, Fairness, and Public Trust and Confidence Committee  
September 14, 2016

(12) Proposals for New 2017 AFPTC Community Events and Goals

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## Hidden Injustice: Bias on the Bench

As the nation continues to address alleged instances of racially based police violence and other incidents of institutional racism, the American Bar Association has made the elimination of bias in the justice system a top priority. "Hidden Injustice: Bias on the Bench" is the first tool of its kind to raise awareness and provide practical tips for America's judges on the damage caused by implicit bias and the necessary steps to combat it. Featuring the nation's top judges, law professors and experts, the 10-minute training video is the centerpiece of an upcoming toolkit designed by the ABA's recently formed Diversity and Inclusion 360 Commission to help create a fair system of justice for all Americans.

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Speakers in order of appearance:

Jerry Kang  
Vice Chancellor for Equity, Diversity and Inclusion  
UCLA

Vernā Myers  
Diversity and Inclusion Expert  
Vernā Myers Consulting Group

Jeffrey Rachlinski  
Henry Allen Mark Professor of Law  
Cornell Law School

William D Missouri  
Chief Judge (ret.)  
Seventh Judicial Circuit of Maryland

Cheryl Cesario  
Associate Judge (ret.)

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COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION  
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY  
COMMISSION ON WOMEN IN THE PROFESSION

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

1 RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA  
2 Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

3  
4 Rule 8.4: Misconduct

5  
6 It is professional misconduct for a lawyer to:

7  
8 (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or  
9 induce another to do so, or do so through the acts of another;

10  
11 (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness  
12 or fitness as a lawyer in other respects;

13  
14 (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

15  
16 (d) engage in conduct that is prejudicial to the administration of justice;

17  
18 (e) state or imply an ability to influence improperly a government agency or official or to  
19 achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

20  
21 (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable  
22 rules of judicial conduct or other law; or

23  
24 (g) engage in conduct that the lawyer knows or reasonably should know is harassment or  
25 discrimination ~~harass or discriminate~~ on the basis of race, sex, religion, national origin, ethnicity,  
26 disability, age, sexual orientation, gender identity, marital status or socioeconomic status in  
27 conduct related to the practice of law. This ~~Rule paragraph~~ does not limit the ability of a lawyer  
28 to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph  
29 does not preclude legitimate advice or advocacy consistent with these Rules.

30 Comment

31

32 [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of  
33 Professional Conduct, knowingly assist or induce another to do so or do so through the acts of  
34 another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a),  
35 however, does not prohibit a lawyer from advising a client concerning action the client is legally  
36 entitled to take.

37

38 [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses  
39 involving fraud and the offense of willful failure to file an income tax return. However, some kinds  
40 of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses  
41 involving "moral turpitude." That concept can be construed to include offenses concerning some  
42 matters of personal morality, such as adultery and comparable offenses, that have no specific  
43 connection to fitness for the practice of law. Although a lawyer is personally answerable to the  
44 entire criminal law, a lawyer should be professionally answerable only for offenses that indicate  
45 lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty,  
46 breach of trust, or serious interference with the administration of justice are in that category. A  
47 pattern of repeated offenses, even ones of minor significance when considered separately, can  
48 indicate indifference to legal obligation.

49

50 ~~[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct,~~  
51 ~~bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation~~  
52 ~~or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the~~  
53 ~~administration of justice. Legitimate advocacy respecting the foregoing factors does not violate~~  
54 ~~paragraph (d). A trial judge's finding that peremptory challenges were exercised on a~~  
55 ~~discriminatory basis does not alone establish a violation of this rule.~~

56

57 [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence  
58 in the legal profession and the legal system. Such discrimination includes harmful verbal or  
59 physical conduct that manifests bias or prejudice towards others ~~because of their membership or~~  
60 ~~perceived membership in one or more of the groups listed in paragraph (g).~~ Harassment includes  
61 sexual harassment and derogatory or demeaning verbal or physical conduct ~~towards a person who~~  
62 ~~is, or is perceived to be, a member of one of the groups.~~ Sexual harassment includes unwelcome  
63 sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a  
64 sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law  
65 may guide application of paragraph (g).

66

67 [4] Conduct related to the practice of law includes representing clients; interacting with witnesses,  
68 coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or  
69 managing a law firm or law practice; and participating in bar association, business or social  
70 activities in connection with the practice of law. ~~Paragraph (g) does not prohibit conduct~~  
71 ~~undertaken to promote diversity. Lawyers may engage in conduct undertaken to promote diversity~~  
72 ~~and inclusion without violating this Rule by, for example, implementing initiatives aimed at~~

73 [recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student](#)  
74 [organizations.](#)

75  
76 ~~[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or~~  
77 ~~legal issues or arguments in a representation. A trial judge's finding that peremptory challenges~~  
78 ~~were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A~~  
79 ~~lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's~~  
80 ~~practice or by limiting the lawyer's practice to members of underserved populations in~~  
81 ~~accordance with these Rules and other law. A lawyer may charge and collect reasonable fees~~  
82 ~~and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their~~  
83 ~~professional obligations under Rule 6.1 to provide legal services to those who are unable to pay,~~  
84 ~~and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good~~  
85 ~~cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an~~  
86 ~~endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).~~

87  
88 [4] [6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief  
89 that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to  
90 the validity, scope, meaning or application of the law apply to challenges of legal regulation of the  
91 practice of law.

92  
93 [5] [7] Lawyers holding public office assume legal responsibilities going beyond those of other  
94 citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role  
95 of lawyers. The same is true of abuse of positions of private trust such as trustee, executor,  
96 administrator, guardian, agent and officer, director or manager of a corporation or other  
97 organization.

## **REPORT**

*“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 . . . is, and unfortunately continues to be, a problem in our profession and in society. Existing steps have not been enough to end such discrimination and harassment.”*

ABA President Paulette Brown, February 7, 2016 public hearing on amendments to ABA Model Rule 8.4, San Diego, California.

### **I. Introduction and Background**

The American Bar Association has long recognized its responsibility to represent the legal profession and promote the public’s interest in equal justice for all. Since 1983, when the Model Rules of Professional Conduct (“Model Rules”) were first adopted by the Association, they have been an invaluable tool through which the Association has met these dual responsibilities and led the way toward a more just, diverse and fair legal system. Lawyers, judges, law students and the public across the country and around the world look to the ABA for this leadership.

Since 1983, the Association has also spearheaded other efforts to promote diversity and fairness. In 2008 ABA President Bill Neukum led the Association to reformulate its objectives into four major “Goals” that were adopted by the House of Delegates.<sup>1</sup> Goal III is entitled, “Eliminate Bias and Enhance Diversity.” It includes the following two objectives:

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

A year before the adoption of Goal III the Association had already taken steps to address the second Goal III objective. In 2007 the House of Delegates adopted revisions to the Model Code of Judicial Conduct to include Rule 2.3, entitled, “Bias, Prejudice and Harassment.” This rule prohibits judges from speaking or behaving in a way that manifests, “bias or prejudice,” and from engaging in harassment, “based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.” It also calls upon judges to require lawyers to refrain from these activities in proceedings before the court.<sup>2</sup> This current proposal now before the House will further implement the Association’s Goal III objectives by placing a similar provision into the Model Rules for lawyers.

<sup>1</sup> ABA MISSION AND GOALS, [http://www.americanbar.org/about\\_the\\_aba/aba-mission-goals.html](http://www.americanbar.org/about_the_aba/aba-mission-goals.html) (last visited May 9, 2016).

<sup>2</sup> Rule 2.3(C) of the ABA Model Code of Judicial Conduct reads: “A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.”

When the Model Rules were first adopted in 1983 they did not include any mention of or reference to bias, prejudice, harassment or discrimination. An effort was made in 1994 to correct this omission; the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility (SCEPR<sup>3</sup>) each proposed language to add a new paragraph (g) to Rule 8.4, “Professional Misconduct,” to specifically identify bias and prejudice as professional misconduct. However, in the face of opposition these proposals were withdrawn before being voted on in the House. But many members of the Association realized that something needed to be done to address this omission from the Model Rules. Thus, four years later, in February 1998, the Criminal Justice Section and SCEPR developed separate proposals to add a new antidiscrimination provision into the Model Rules. These proposals were then combined into Comment [3] to Model Rule 8.4, which was adopted by the House at the Association’s Annual Meeting in August 1998. This Comment [3] is discussed in more detail below. Hereinafter this Report refers to current Comment [3] to 8.4 as “the current provision.”

It is important to acknowledge that the current provision was a necessary and significant first step to address the issues of bias, prejudice, discrimination and harassment in the Model Rules. But it should not be the last step for the following reasons. It was adopted before the Association adopted Goal III as Association policy and does not fully implement the Association’s Goal III objectives. It was also adopted before the establishment of the Commission on Sexual Orientation and Gender Identity, one of the co-sponsors of this Resolution, and the record does not disclose the participation of any of the other Goal III Commissions—the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, and the Commission on Disability Rights—that are the catalysts for these current amendments to the Model Rules.

Second, Comments are not Rules; they have no authority as such. Authority is found only in the language of the Rules. “The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”<sup>3</sup>

Third, even if the text of the current provision were in a Rule it would be severely limited in scope: It applies (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.” As the Association’s Goal III Commissions noted in their May 2014 letter to SCEPR:

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

In addition, despite the fact that Comments are not Rules, a false perception has developed over the years that the current provision is equivalent to a Rule. In fact, this is the only example in the Model Rules where a Comment is purported to “solve” an ethical issue that otherwise would require resolution through a Rule. Now—thirty-three years after the Model Rules were first

<sup>3</sup> MODEL RULES OF PROF’L CONDUCT, Preamble & Scope [21] (2016).

adopted and eighteen years after the first step was taken to address this issue—it is time to address this concern in the black letter of the Rules themselves. In the words of ABA President Paulette Brown: “The fact is that skin color, gender, age, sexual orientation, various forms of ability and religion still have a huge effect on how people are treated.”<sup>4</sup> As the Recommendation and Report of the Oregon New Lawyers to the Assembly of the Young Lawyers Division at the Annual Meeting 2015 stated: “The current Model Rules of Professional Conduct (the “Model Rules”), however, do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation.”<sup>5</sup> The Association should now correct this omission. It is in the public’s interest. It is in the profession’s interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law.

## II. Process

Over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998. The emphasis has been on open discussion and publishing drafts of proposals to solicit feedback, suggestions and comments. SCEPR painstakingly took that feedback into account in subsequent drafts, until a final proposal was prepared.

This process began on May 13, 2014 when SCEPR received a joint letter from the Association’s four Goal III Commissions: the Commission on Women in the Profession, Commission on Racial and Ethnic Diversity in the Profession, Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identify. The Chairs of these Commissions wrote to the SCEPR asking it to develop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination and to implement Goal III. These Commissions explained that the current provision is insufficient because it “does not facially address bias, discrimination, or harassment and does not thoroughly address the scope of the issue in the legal profession or legal system.”<sup>6</sup>

In the fall of 2014 a Working Group was formed under the auspices of SCEPR and chaired by immediate past SCEPR chair Paula Frederick, chief disciplinary counsel for the State Bar of Georgia. The Working Group members consisted of one representative each from SCEPR, the Association of Professional Responsibility Lawyers (“APRL”), the National Organization of Bar Counsel (“NOBC”) and each of the Goal III Commissions. The Working Group held many teleconference meetings and two in-person meetings. After a year of work Chair Frederick

<sup>4</sup> Paulette Brown, *Inclusion Not Exclusion: Understanding Implicit Bias is Key to Ensuring An Inclusive Profession*, ABA J. (Jan. 1, 2016, 4:00 AM),

[http://www.abajournal.com/magazine/article/inclusion\\_exclusion\\_understanding\\_implicit\\_bias\\_is\\_key\\_to\\_ensuring](http://www.abajournal.com/magazine/article/inclusion_exclusion_understanding_implicit_bias_is_key_to_ensuring).

<sup>5</sup> In August 2015, unaware that the Standing Committee on Ethics and Professional Responsibility was researching this issue at the request of the Goal III Commissions, the Oregon State Bar New Lawyers Division drafted a proposal to amend the Model Rules of Professional Conduct to include an anti-harassment provision in the black letter. They submitted their proposal to the Young Lawyers Division Assembly for consideration. The Young Lawyers Division deferred on the Oregon proposal after learning of the work of the Standing Committee on Ethics and Professional Responsibility and the Goal III Commissions.

<sup>6</sup> Letter to Paula J. Frederick, Chair, ABA Standing Committee on Ethics and Professional Responsibility 2011-2014.

presented a memorandum of the Working Group’s deliberations and conclusions to SCEPR in May 2015. In it, the Working Group concluded that there was a need to amend Model Rule 8.4 to provide a comprehensive antidiscrimination provision that was nonetheless limited to the practice of law, in the black letter of the rule itself, and not just in a Comment.

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

At the Roundtable and in subsequent written communications SCEPR received numerous comments about the Working Discussion Draft. After studying the comments and input from the Roundtable, SCEPR published in December 2015 a revised draft of a proposal to add Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association, including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016.<sup>7</sup> Written comments were also invited.<sup>8</sup> President Brown and past President Laurel Bellows were among those who testified at the hearing in support of adding an antidiscrimination provision to the black letter Rule 8.4.

After further study and consideration SCEPR made substantial and significant changes to its proposal, taking into account the many comments it received on its earlier drafts.

### **III. Need for this Amendment to the Model Rules**

As noted above, in August 1998 the American Bar Association House of Delegates adopted the current provision: Comment [3] to Model Rule of Professional Conduct 8.4, *Misconduct*, which explains that certain conduct may be considered “conduct prejudicial to the administration of justice,” in violation of paragraph (d) to Rule 8.4, including when a lawyer knowingly manifests, by words or conduct, bias or prejudice against certain groups of persons, while in the course of representing a client *but only* when those words or conduct are also “prejudicial to the administration of justice.”

Yet as the Preamble and Scope of the Model Rules makes clear, “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”<sup>9</sup> Thus, the ABA did not squarely and forthrightly address prejudice, bias, discrimination and harassment as would have been the case if this conduct were addressed in the text of a Model Rule. Changing the Comment to a black letter rule makes an important statement to our profession and the public that the profession does not tolerate prejudice, bias, discrimination and harassment. It also clearly puts lawyers on notice that refraining from such conduct is more than an illustration in a comment to a rule about the administration of justice. It is a specific requirement.

<sup>7</sup> *American Bar Association Public Hearing* (Feb. 7, 2016), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_model\\_rule%208.4\\_comments/february\\_2016\\_public\\_hearing\\_transcript.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208.4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf).

<sup>8</sup> MODEL RULE OF PROFESSIONAL CONDUCT 8.4 DEC. 22 DRAFT PROPOSAL COMMENTS RECEIVED, [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8.4.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8.4.html) (last visited May 9, 2016).

<sup>9</sup> MODEL RULES OF PROF’L CONDUCT, Preamble & Scope [14] & [21] (2016).

Therefore, SCEPR, along with its co-sponsors, proposes amending ABA Model Rule of Professional Conduct 8.4 to further implement Goal III by bringing into the black letter of the Rules an antidiscrimination and anti-harassment provision. This action is consistent with other actions taken by the Association to implement Goal III and to eliminate bias in the legal profession and the justice system.

For example, in February 2015, the ABA House of Delegates adopted revised *ABA Standards for Criminal Justice: Prosecution Function and Defense Function*, which now include anti-bias provisions. These provisions appear in Standards 3-1.6 of the Prosecution Function Standards, and Standard 4.16 of the Defense Function Standards.<sup>10</sup> The Standards explain that prosecutors and defense counsel should not, “manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status.” This statement appears in the black letter of the Standards, not in a comment. And, as noted above, one year before the adoption of Goal III, the Association directly addressed prejudice, bias and harassment in the black letter of Model Rule 2.3 in the 2007 Model Code of Judicial Conduct.

Some opponents to bringing an antidiscrimination and anti-harassment provision into the black letter of the Model Rules have suggested that the amendment is not necessary—that the current provision provides the proper level of guidance to lawyers. Evidence from the ABA and around the country suggests otherwise. For example:

- Twenty-five jurisdictions have not waited for the Association to act. They have already concluded that the current Comment to an ABA Model Rule does not adequately address discriminatory or harassing behavior by lawyers. As a result, they have adopted antidiscrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct.<sup>11</sup> By contrast, only thirteen jurisdictions have decided to address this

<sup>10</sup> ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, [http://www.americanbar.org/groups/criminal\\_justice/standards.html](http://www.americanbar.org/groups/criminal_justice/standards.html) (last visited May 9, 2016); ABA FOURTH EDITION CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, [http://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html) (last visited May 9, 2016).

<sup>11</sup> See California Rule of Prof'l Conduct 2-400; Colorado Rule of Prof'l Conduct 8.4(g); Florida Rule of Prof'l Conduct 4-8.4(d); Idaho Rule of Prof'l Conduct 4.4 (a); Illinois Rule of Prof'l Conduct 8.4(j); Indiana Rule of Prof'l Conduct 8.4(g); Iowa Rule of Prof'l Conduct 8.4(g); Maryland Lawyers' Rules of Prof'l Conduct 8.4(e); Massachusetts Rule of Prof'l Conduct 3.4(i); Michigan Rule of Prof'l Conduct 6.5; Minnesota Rule of Prof'l Conduct 8.4(h); Missouri Rule of Prof'l Conduct 4-8.4(g); Nebraska Rule of Prof'l Conduct 8.4(d); New Jersey Rule of Prof'l Conduct 8.4(g); New Mexico Rule of Prof'l Conduct 16-300; New York Rule of Prof'l Conduct 8.4(g); North Dakota Rule of Prof'l Conduct 8.4(f); Ohio Rule of Prof'l Conduct 8.4(g); Oregon Rule of Prof'l Conduct 8.4(a)(7); Rhode Island Rule of Prof'l Conduct 8.4(d); Texas Rule of Prof'l Conduct 5.08; Vermont Rule of Prof'l Conduct 8.4(g); Washington Rule of Prof'l Conduct 8.4(g); Wisconsin Rule of Prof'l Conduct 8.4(i); D.C. Rule of Prof'l Conduct 9.1.

issue in a Comment similar to the current Comment in the Model Rules.<sup>12</sup> Fourteen states do not address this issue at all in their Rules of Professional Conduct.<sup>13</sup>

- As noted above, the ABA has already brought antidiscrimination and anti-harassment provisions into the black letter of other conduct codes like the *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* and the 2007 ABA Model Code of Judicial Conduct, Rule 2.3.
- The Florida Bar’s Young Lawyer’s Division reported this year that in a survey of its female members, 43% of respondents reported they had experienced gender bias in their career.<sup>14</sup>
- The 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. Where appropriate, they are disciplining lawyers for discriminatory and harassing conduct.<sup>15</sup>

#### IV. Summary of Proposed Amendments

##### A. Prohibited Activity

SCEPR’s proposal adds a new paragraph (g) to Rule 8.4, to prohibit conduct by a lawyer related to the practice of law that harasses or discriminates against members of specified groups. New Comment [3] defines the prohibited behavior.

<sup>12</sup> See Arizona Rule of Prof’l Conduct 8.4, cmt.; Arkansas Rule of Prof’l Conduct 8.4, cmt. [3]; Connecticut Rule of Prof’l Conduct 8.4, Commentary; Delaware Lawyers’ Rule of Prof’l Conduct 8.4, cmt. [3]; Idaho Rule of Prof’l Conduct 8.4, cmt. [3]; Maine Rule of Prof’l Conduct 8.4, cmt. [3]; North Carolina Rule of Prof’l Conduct 8.4, cmt. [5]; South Carolina Rule of Prof’l Conduct 8.4, cmt. [3]; South Dakota Rule of Prof’l Conduct 8.4, cmt. [3]; Tennessee Rule of Prof’l Conduct 8.4, cmt. [3]; Utah Rule of Prof’l Conduct 8.4, cmt. [3]; Wyoming Rule of Prof’l Conduct 8.4, cmt. [3]; West Virginia Rule of Prof’l Conduct 8.4, cmt. [3].

<sup>13</sup> The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, Pennsylvania, and Virginia.

<sup>14</sup> The Florida Bar, *Results of the 2015 YLD Survey on Women in the Legal Profession* (Dec. 2015), [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/\\$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/13AC70483401E7C785257F640064CF63/$FILE/RESULTS%20OF%202015%20SURVEY.pdf?OpenElement).

<sup>15</sup> In 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four female clients and one female employee. *In re Moothart*, 860 N.W.2d 598 (2015). The Wisconsin Supreme Court in 2014 disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was “a cool person to know.” On one day, the lawyer sent 19 text messages asking whether the victim was the “kind of girl who likes secret contact with an older married elected DA . . . the riskier the better.” One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a \$350,000 home. *In re Kratz*, 851 N.W.2d 219 (2014). The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student’s appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him. *In re Griffith*, 838 N.W.2d 792 (2013). The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? *In re McGrath*, 280 P.3d 1091 (2012). The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made repeated disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. *In re Campiti*, 937 N.E.2d 340 (2009). The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a “black male” and that such association was placing the children in harm’s way. During a hearing, the lawyer referred to the African-American man as “the black guy” and “the black man.” *In re Thomsen*, 837 N.E.2d 1011 (2005).

Proposed new black letter Rule 8.4(g) does not use the terms “manifests . . . bias or prejudice”<sup>16</sup> that appear in the current provision. Instead, the new rule adopts the terms “harassment and discrimination” that already appear in a large body of substantive law, antidiscrimination and anti-harassment statutes, and case law nationwide and in the Model Judicial Code. For example, in new Comment [3], “harassment” is defined as including “sexual harassment and derogatory or demeaning verbal or physical conduct . . . of a sexual nature.” This definition is based on the language of Rule 2.3(C) of the ABA Model Code of Judicial Conduct and its Comment [4], adopted by the House in 2007 and applicable to lawyers in proceedings before a court.<sup>17</sup>

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

Proposed new Comment [3] also explains, “The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).” This provision makes clear that the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context. Thus, conduct that has a discriminatory impact alone, while possibly dispositive elsewhere, would not necessarily result in discipline under new Rule 8.4(g). But, substantive law regarding discrimination and harassment can also guide a lawyer’s conduct. As the Preamble to the Model Rules explains, “A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”<sup>18</sup>

## **B. Knowledge Requirement**

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

Both “knows” and “reasonably should know” are defined in the Model Rules. Rule 1.0(f) defines “knows” to denote “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” The inference to be made in this situation is not what the lawyer should or might have known, but whether one can infer from the circumstances what the lawyer actually knew. Thus, this is a subjective standard; it depends on ascertaining the lawyer’s actual state of mind. The evidence, or “circumstances,” may or may not support an inference about what the lawyer knew about his or her conduct.

<sup>16</sup> The phrase, “manifestations of bias or prejudice” is utilized in proposed new Comment [3].

<sup>17</sup> ABA Model Code of Judicial Conduct Rule 2.3, Comment [4] reads: “Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.”

<sup>18</sup> MODEL RULES OF PROF’L CONDUCT, Preamble & Scope [5] (2016).

Rule 1.0(j) defines “reasonably should know” when used in reference to a lawyer to denote “that a lawyer of reasonable prudence and competence would ascertain the matter in question.” The test here is whether a lawyer of reasonable prudence and competence would have comprehended the facts in question. Thus, this is an objective standard; it does not depend on the particular lawyer’s actual state of mind. Rather, it asks what a lawyer of reasonable prudence and competence would have comprehended from the circumstances presented.

SCEPR believes that any standard for the conduct to be addressed in Rule 8.4(g) must include as alternatives, both the “knowing” and “reasonably should know” standards as defined in Rule 1.0. As noted, one standard is a subjective and the other is objective. Thus, they do not overlap; and one cannot serve as a substitute for the other. Taken together, these two standards provide a safeguard for lawyers against overaggressive prosecutions for conduct they could not have known was harassment or discrimination, as well as a safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination.

There is also ample precedent for using the “knows or reasonably should know” formulation in proposed Rule 8.4(g). It has been part of the Model Rules since 1983. Currently, it is used in Rule 1.13(f), Rule 2.3(b), Rule 2.4(b), Rule 3.6(a), Rule 4.3 [twice] and Rule 4.4(b).

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

The addition of “knows or reasonably should know” as a part of the standard for the lawyer supports the rule’s focus on conduct and resolves concerns of vagueness or uncertainty about what behavior is expected of the lawyer.

### **C. Scope of the Rule**

Proposed Rule 8.4(g) makes it professional misconduct for a lawyer to harass or discriminate while engaged in “conduct related to the practice of law” when the lawyer knew or reasonably should have known the conduct was harassment or discrimination. The proposed rule is constitutionally limited; it does not seek to regulate harassment or discrimination by a lawyer that occurs outside the scope of the lawyer’s practice of law, nor does it limit a lawyer’s representational role in our legal system. It does not limit the scope of the legal advice a lawyer may render to clients, which is addressed in Model Rule 1.2. It permits legitimate advocacy. It does not change the circumstances under which a lawyer may accept, decline or withdraw from a representation. To the contrary, the proposal makes clear that Model Rule 1.16 addresses such conduct. The proposal also does not limit a lawyer’s ability to charge and collect a reasonable fee for legal services, which remains governed by Rule 1.5.

Note also that while the provision in current Comment [3] limits the scope of Rule 8.4(d) to situations where the lawyer is representing clients, Rule 8.4(d) itself is not so limited. In fact, lawyers have been disciplined under Rule 8.4(d) for conduct that does not involve the representation of clients.<sup>19</sup>

Some commenters expressed concern that the phrase, “conduct related to the practice of law,” is vague. “The definition of the practice of law is established by law and varies from one jurisdiction to another.”<sup>20</sup> The phrase “conduct related to” is elucidated in the proposed new Comments and is consistent with other terms and phrases used in the Rules that have been upheld against vagueness challenges.<sup>21</sup> The proposed scope of Rule 8.4(g) is similar to the scope of existing antidiscrimination provisions in many states.<sup>22</sup>

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

The scope of proposed 8.4(g) is actually narrower and more limited than is the scope of other Model Rules. “[T]here are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity.”<sup>23</sup> For example, paragraph (c) to Rule 8.4 declares that it is professional misconduct for a lawyer to engage in conduct “involving dishonesty, fraud, deceit or misrepresentation.” Such conduct need not be

<sup>19</sup> See, e.g., *Neal v. Clinton*, 2001 WL 34355768 (Ark. Cir. Ct. Jan. 19, 2001).

<sup>20</sup> MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. [2].

<sup>21</sup> See, e.g., *Grievance Adm’r v. Fieger*, 719 N.E.2d 123 (Mich. 2016) (rejecting a vagueness challenge to rules requiring lawyers to “treat with courtesy and respect all person involved in the legal process” and prohibiting “undignified or discourteous conduct toward [a] tribunal”); *Chief Disciplinary Counsel v. Zelotes*, 98 A.3d 852 (Conn. 2014) (rejecting a vagueness challenge to “conduct prejudicial to the administration of justice”); *Florida Bar v. Von Zamft*, 814 So. 2d 385 (2002); *In re Anonymous Member of South Carolina Bar*, 709 S.E.2d 633 (2011) (rejecting a vagueness challenge to the following required civility clause: “To opposing parties and their counsel, I pledge fairness, integrity, and civility . . . .”); *Canatella v. Stovitz*, 365 F.Supp.2d 1064 (N.D. Cal. 2005) (rejecting a vagueness challenge to these terms regulating lawyers in the California Business and Profession Code: “willful,” “moral turpitude,” “dishonesty,” and “corruption”); *Motley v. Virginia State Bar*, 536 S.E.2d 97 (Va. 2000) (rejecting a vagueness challenge to a rule requiring lawyers to keep client’s “reasonably informed about matters in which the lawyer’s services are being rendered”); *In re Disciplinary Proceedings Against Beaver*, 510 N.W.2d 129 (Wis. 1994) (rejecting a vagueness challenge to a rule against “offensive personality”).

<sup>22</sup> See Florida Rule of Professional Conduct 4-8.4(d) which addresses conduct “in connection with the practice of law”; Indiana Rule of Prof’l Conduct 8.4(g) which addresses conduct a lawyer undertakes in the lawyer’s “professional capacity”; Iowa Rule of Prof’l Conduct 8.4(g) which addresses conduct “in the practice of law”; Maryland Lawyers’ Rules of Prof’l Conduct 8.4(e) with the scope of “when acting in a professional capacity”; Minnesota Rule of Prof’l Conduct 8.4(h) addressing conduct “in connection with a lawyer’s professional activities”; New Jersey Rule of Prof’l Conduct 8.4(g) addressing when a lawyer’s conduct is performed “in a professional capacity”; New York Rule of Prof’l Conduct 8.4(g) covering conduct “in the practice of law”; Ohio Rule of Prof’l Conduct 8.4(g) addressing when lawyer “engage, in a professional capacity, in conduct”; Washington Rule of Prof’l Conduct 8.4(g) covering “connection with the lawyer’s professional activities”; and Wisconsin Rule of Prof’l Conduct 8.4(i) with a scope of conduct “in connection with the lawyer’s professional activities.”

<sup>23</sup> MODEL RULES OF PROF’L CONDUCT, Preamble [3].

related to the lawyer's practice of law, but may reflect adversely on the lawyer's fitness to practice law or involve moral turpitude.<sup>24</sup>

However, insofar as proposed Rule 8.4(g) applies to "conduct related to the practice of law," it is broader than the current provision. This change is necessary. The professional roles of lawyers include conduct that goes well beyond the representation of clients before tribunals. Lawyers are also officers of the court, managers of their law practices and public citizens having a special responsibility for the administration justice.<sup>25</sup> Lawyers routinely engage in organized bar-related activities to promote access to the legal system and improvements in the law. Lawyers engage in mentoring and social activities related to the practice of law. And, of course, lawyers are licensed by a jurisdiction's highest court with the privilege of practicing law. The ethics rules should make clear that the profession will not tolerate harassment and discrimination in any conduct related to the practice of law.

Therefore, proposed Comment [4] explains that operating or managing a law firm is conduct related to the practice of law. This includes the terms and conditions of employment. Some commentators objected to the inclusion of workplace harassment and discrimination within the scope of the Rule on the ground that it would bring employment law into the Model Rules. This objection is misplaced. First, in at least two jurisdictions that have adopted an antidiscrimination Rule, the provision is focused entirely on employment and the workplace.<sup>26</sup> Other jurisdictions have also included workplace harassment and discrimination among the conduct prohibited in their Rules.<sup>27</sup> Second, professional misconduct under the Model Rules already applies to substantive areas of the law such as fraud and misrepresentation. Third, that part of the management of a law practice that includes the solicitation of clients and advertising of legal services is already subjects of regulation under the Model Rules.<sup>28</sup> And fourth, this would not be the first time the House of Delegates adopted policy on the terms and conditions of lawyer employment. In 2007, the House of Delegates adopted as ABA policy a recommendation that law firms should discontinue mandatory age-based retirement polices,<sup>29</sup> and earlier, in 1992, the House recognized that "sexual harassment is a serious problem in all types of workplace settings, including the legal profession, and constitutes a discriminatory and unprofessional practice that must not be tolerated in any work

<sup>24</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. [2].

<sup>25</sup> MODEL RULES OF PROF'L CONDUCT, Preamble [1] & [6].

<sup>26</sup> See D.C. Rule of Prof'l Conduct 9.1 & Vermont Rule of Prof'l Conduct 8.4(g). The lawyer population for Washington DC is 52,711 and Vermont is 2,326. Additional lawyer demographic information is available on the American Bar Association website: [http://www.americanbar.org/resources\\_for\\_lawyers/profession\\_statistics.html](http://www.americanbar.org/resources_for_lawyers/profession_statistics.html).

<sup>27</sup> Other jurisdictions have specifically included workplace harassment and discrimination among the conduct prohibited in their Rules. Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require a prior finding of employment discrimination by another tribunal. See California Rule of Prof'l Conduct 2-400 (lawyer population 167,690); Illinois Rule of Prof'l conduct 8.4(j) (lawyer population 63,060); New Jersey Rule of Prof'l Conduct 8.4(g) (lawyer population 41,569); and New York Rule of Prof'l Conduct 8.4(g) (lawyer population 175,195). Some jurisdictions that have included workplace harassment and discrimination as professional misconduct require that the conduct be unlawful. See, e.g., Iowa Rule of Prof'l Conduct 8.4(g) (lawyer population of 7,560); Ohio Rule of Prof'l Conduct 8.4(g) (lawyer population 38,237); and Minnesota Rule of Prof'l Conduct 8.4(h) (lawyer population 24,952). Maryland has included workplace harassment and discrimination as professional misconduct when the conduct is prejudicial to the administration of justice. Maryland Lawyers' Rules of Prof'l Conduct 8.4(e), cmt. [3] (lawyer population 24,142).

<sup>28</sup> See MODEL RULES OF PROFESSIONAL CONDUCT R. 7.1 - 7.6.

<sup>29</sup> ABA HOUSE OF DELEGATES RESOLUTION 10A (Aug. 2007).

environment.”<sup>30</sup> When such conduct is engaged in by lawyers it is appropriate and necessary to identify it for what it is: professional misconduct.

This Rule, however, is not intended to replace employment discrimination law. The many jurisdictions that already have adopted similar rules have not experienced a mass influx of complaints based on employment discrimination or harassment. There is also no evidence from these jurisdictions that disciplinary counsel became the tribunal of first resort for workplace harassment or discrimination claims against lawyers. This Rule would not prohibit disciplinary counsel from deferring action on complaints, pending other investigations or actions.

Equally important, the ABA should not adopt a rule that would apply to lawyers acting outside of their own law firms or law practices but not to lawyers acting within their offices, toward each other and subordinates. Such a dichotomy is unreasonable and unsupported.

As also explained in proposed new Comment [4], conduct related to the practice of law includes activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law. SCEPR was presented with substantial anecdotal information that sexual harassment takes place at such events. “Conduct related to the practice of law” includes these activities.

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

SCEPR has considered and rejected this approach for a number of reasons. Such a requirement is without precedent in the Model Rules. There is no such limitation in the current provision. Legal ethics rules are not dependent upon or limited by statutory or common law claims. The ABA takes pride in the fact that “the legal profession is largely self-governing.”<sup>31</sup> As such, “a lawyer’s failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process,” not the civil legal system.<sup>32</sup> The two systems run on separate tracks.

The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system. In fact, as a self-governing profession we have made it clear that “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.”<sup>33</sup> Thus, legal remedies are available for conduct, such as fraud, deceit or misrepresentation, which also are prohibited by paragraph (c) to Rule 8.4, but a claimant is not required as a condition of filing a grievance based on fraud, deceit or misrepresentation to have brought and won a civil action against the respondent lawyer, or for the lawyer to have been charged with and convicted

<sup>30</sup> ABA HOUSE OF DELEGATES RESOLUTION 117 (Feb. 1992).

<sup>31</sup> MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [10].

<sup>32</sup> MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [19].

<sup>33</sup> MODEL RULES OF PROFESSIONAL CONDUCT, Preamble & Scope [20].

of a crime.<sup>34</sup> To now impose such a requirement, only for claims based on harassment and discrimination, would set a terrible precedent and send the wrong message to the public.

In addition, the Model Rules of Professional Conduct reflect ABA policy. Since 1989, the ABA House of Delegates has adopted policies promoting the equal treatment of all persons regardless of sexual orientation or gender identity.<sup>35</sup> Many states, however, have not extended protection in areas like employment to lesbian, gay, or transgender persons.<sup>36</sup> A Model Rule should not be limited by such restrictions that do not reflect ABA policy. Of course, states and other jurisdictions may adapt ABA policy to meet their individual and particular circumstances.

#### **D. Protected Groups**

New Rule 8.4(g) would retain the groups protected by the current provision.<sup>37</sup> In addition, new 8.4(g) would also include “ethnicity,” “gender identity,” and “marital status.” The antidiscrimination provision in the ABA Model Code of Judicial Conduct, revised and adopted by the House of Delegates in 2007, already requires judges to ensure that lawyers in proceedings before the court refrain from manifesting bias or prejudice and from harassing another based on that person’s marital status and ethnicity. The drafters believe that this same prohibition also should be applicable to lawyers in conduct related to the practice of law not merely to lawyers in proceedings before the court.

“Gender identity” is added as a protected group at the request of the ABA’s Goal III Commissions. As used in the Rule this term includes “gender expression”, which is a form of gender identity. These terms encompass persons whose current gender identity and expression are different from their designations at birth.<sup>38</sup> The Equal Employment Opportunities Commission interprets Title VII as prohibiting discrimination against employees on the basis of sexual orientation and gender identity.<sup>39</sup> In 2015, the ABA House adopted revised Criminal Justice Standards for the Defense Function and the Prosecution Function. Both sets of Standards explains that defense counsel and prosecutors should not manifest bias or prejudice based on another’s gender identity. To ensure notice to lawyers and to make these provisions more parallel, the Goal III Commission on Sexual

<sup>34</sup> *E.g.*, *People v. Odom*, 941 P.2d 919 (Colo. 1997) (lawyer disciplined for committing a crime for which he was never charged).

<sup>35</sup> A list of ABA policies supporting the expansion of civil rights to and protection of persons based on their sexual orientation and gender identity can be found here:

[http://www.americanbar.org/groups/sexual\\_orientation/policy.html](http://www.americanbar.org/groups/sexual_orientation/policy.html).

<sup>36</sup> For a list of states that have not extended protection in areas like employment to LGBT individuals see:

<https://www.aclu.org/map/non-discrimination-laws-state-state-information-map>.

<sup>37</sup> Some commenters advised eliminating references to any specific groups from the Rule. SCEPR concluded that this would risk including within the scope of the Rule appropriate distinctions that are properly made in professional life. For example, a law firm or lawyer may display “geographic bias” by interviewing for employment only persons who have expressed a willingness to relocate to a particular state or city. It was thought preferable to specifically identify the groups to be covered under the Rule.

<sup>38</sup> The U.S. Office of Personnel Management Diversity & Inclusion Reference Materials defines gender identity as “the individual’s internal sense of being male or female. The way an individual expresses his or her gender identity is frequently called ‘gender expression,’ and may or may not conform to social stereotypes associated with a particular gender.” See *Diversity & Inclusion Reference Materials*, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> (last visited May 9, 2016).

<sup>39</sup> [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm)

Orientation and Gender Identity recommended that gender identity be added to the black letter of paragraph (g). New Comment [3] notes that applicable law may be used as a guide to interpreting paragraph (g). Under the Americans with Disabilities Act discrimination against persons with disabilities includes the failure to make the reasonable accommodations necessary for such person to function in a work environment.<sup>40</sup>

Some commenters objected to retaining the term “socioeconomic status” in new paragraph (g). This term is included in the current provision and also is in the Model Code of Judicial Conduct. An Indiana disciplinary case, *In re Campiti*, 937 N.E.2d 340 (2009), provides guidance as to the meaning of the term. In that matter, a lawyer was reprimanded for disparaging references he made at trial about a litigant’s socioeconomic status: the litigant was receiving free legal services. SCEPR has found no instance where this term in an ethics rule has been misused or applied indiscriminately in any jurisdiction. SCEPR concluded that the unintended consequences of removing this group would be more detrimental than the consequences of keeping it in.

Discrimination against persons based on their source of income or acceptance of free or low-cost legal services would be examples of discrimination based on socioeconomic status. However, new Comment [5] makes clear that the Rule does not limit a lawyer’s ability to charge and collect a reasonable fee and reimbursement of expenses, nor does it affect a lawyer’s ability to limit the scope of his or her practice.

SCEPR was concerned, however, that this Rule not be read as undermining a lawyer’s pro bono obligations or duty to accept court-appointed clients. Therefore, proposed Comment [5] does encourage lawyers to be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 to not avoid appointments from a tribunal except for “good cause.”

### **E. Promoting Diversity**

Proposed new Comment [4] to Rule 8.4 makes clear that paragraph (g) does not prohibit conduct undertaken by lawyers to promote diversity. As stated in the first Goal III Objective, the Association is committed to promoting full and equal participation in the Association, our profession and the justice system by all persons. According to the ABA Lawyer Demographics for 2016, the legal profession is 64% male and 36% female.<sup>41</sup> The most recent figures for racial demographics are from the 2010 census showing 88% White, 5% Black, 4% Hispanic, and 3% Asian Pacific American, with all other ethnicities less than one percent.<sup>42</sup> Goal III guides the ABA toward greater diversity in our profession and the justice system, and Rule 8.4(g) seeks to further that goal.

<sup>40</sup>A reasonable accommodation is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. Examples of reasonable accommodations include making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; changing tests, training materials, or policies; providing qualified readers or interpreters; and reassignment to a vacant position.

<sup>41</sup> American Bar Association, *Lawyer Demographics Year 2016* (2016), [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/lawyer-demographics-tables-2016.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2016.authcheckdam.pdf).

<sup>42</sup> *Id.*

## **F. How New Rule 8.4(g) Affects Other Model Rules of Professional Conduct**

When SCEPR released a draft proposal in December 2015 to amend Model Rule 8.4, some commenters expressed concern about how proposed new Rule 8.4(g) would affect other Rules of Professional Conduct. As a result, SCEPR's proposal to create new Rule 8.4(g) now includes a discussion of its effect on certain other Model Rules.

For example, commenters questioned how new Rule 8.4(g) would affect a lawyer's ability to accept, refuse or withdraw from a representation. To make it clear that proposed new Rule 8.4(g) is not intended to change the ethics rules affecting those decisions, the drafters included in paragraph (g) a sentence from Washington State's Rule 8.4(g), which reads: "This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." Rule 1.16 defines when a lawyer shall and when a lawyer may decline or withdraw from a representation. Rule 1.16(a) explains that a lawyer shall not represent a client or must withdraw from representing a client if: "(1) the representation will result in violation of the rules of professional conduct or other law." Examples of a representation that would violate the Rules of Professional Conduct are representing a client when the lawyer does not have the legal competence to do so (*See* Rule 1.1) and representing a client with whom the lawyer has a conflict of interest (*See* Rules 1.7, 1.9, 1.10, 1.11, and 1.12).

To address concerns that this proposal would cause lawyers to reject clients with unpopular views or controversial positions, SCEPR included in proposed new Comment [5] a statement reminding lawyers that a lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities, with a citation to Model Rule 1.2(b). That Rule reads: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

Also, with respect to this rule as with respect to all the ethics Rules, Rule 5.1 provides that a managing or supervisory lawyer shall make reasonable efforts to insure that the lawyer's firm or practice has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Such efforts will build upon efforts already being made to give reasonable assurance that lawyers in a firm conform to current Rule 8.4(d) and Comment [3] and are not manifesting bias or prejudice in the course of representing a client that is prejudicial to the administration of justice.

SCEPR has also agreed to develop a formal Ethics Opinion discussing Model Rule 5.3 and its relationship to the other ethics rules, including this new Rule.

## **G. Legitimate Advocacy**

Paragraph (g) includes the following sentence: "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules." The sentence recognizes the balance in the Rules that exists presently in current Comment [3] to Rule 8.4. It also expands the current sentence in the existing comment by adding the word "advice," as the scope of new Rule 8.4(g) is now not limited to "the course of representing a client" but includes "conduct related to the practice of law."

## **H. Peremptory Challenges**

The following sentence appears in the current provision: “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.” SCEPR and the other cosponsors agreed to retain the sentence in the comments.

## **V. CONCLUSION**

As noted at the beginning of this Report the Association has a responsibility to lead the profession in promoting equal justice under law. This includes working to eliminate bias in the legal profession. In 2007 the Model Judicial Code was amended to do just that. Twenty-five jurisdictions have also acted to amend their rules of professional conduct to address this issue directly. It is time to follow suit and amend the Model Rules. The Association needs to address such an important and substantive issue in a Rule itself, not just in a Comment.

Proposed new paragraph (g) to Rule 8.4 is a reasonable, limited and necessary addition to the Model Rules of Professional Conduct. It will make it clear that it is professional misconduct to engage in conduct that the lawyer knows or reasonably should know constitutes harassment or discrimination while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.

As the premier association of attorneys in the world, the ABA should lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us. Adopting the Resolution will advance this most important goal.

Respectfully submitted,

Myles V. Lynk, Chair  
Standing Committee on Ethics and Professional Responsibility  
August 2016

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ABA ANNUAL MEETING

## Discrimination and harassment will be legal ethics violations under ABA model rule

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BY LORELEI LAIRD ([HTTP://WWW.ABAJOURNAL.COM/AUTHORS/27616/](http://www.abajournal.com/authors/27616/))

*Mark Johnson Roberts, chair of the of the ABA Commission on Sexual Orientation and Gender Identity. Photo by Tony Avelar.*

The ABA's Resolution 109 ([http://www.americanbar.org/news/reporter\\_resources/annual-meeting-2016/house-of-delegates-resolutions/109.html](http://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/109.html)) has attracted a lot of controversy outside the organization. The measure makes it a violation of professional responsibility to discriminate or harass in conduct related to the practice of law. It attracted coverage from the New York Times DealBook blog (<http://www.nytimes.com/2016/08/05/business/dealbook/sexual-harassment-ban-is-on-the-abas-docket.html?smid=fb-nytimes&smtyp=cur>) and condemnation from politically conservative attorneys, some of whom sent a letter (<https://www.scribd.com/document/320478002/Aba-8-4-Ltr-Em-ks>) to ABA House of Delegates Chair Patricia Lee Refo ([https://www.swlaw.com/people/trish\\_refo](https://www.swlaw.com/people/trish_refo)), arguing that the rule harms free speech and religious freedom, and wrote an op-ed in the National Law Journal (<http://www.nationallawjournal.com/id=1202764489288/PC-Politics-Drove-ABAs-Proposed-Rules-Changes?sreturn=20160708103003>) (sub. req.) insisting that the resolution was driven by "PC politics" rather than professional ability.

But at the ABA House of Delegates meeting Monday afternoon, there were no speakers in opposition. And there were so many salmon slips from those wishing to speak in favor—69 altogether—that Refo said she was struggling for a new description of the volume. On a final voice vote, Resolution 109 was not without opposition, but it passed clearly.

The resolution was sponsored by the ABA's Standing Committee on Ethics and Professional Responsibility, the Section of Civil Rights and Social Justice, the Commission on Disability Rights, the Diversity & Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession.

The discussion focused mainly on harassment and discrimination of women, though the amended Model Rule 8.4 ([http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_4\\_misconduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html)) will prohibit behaving in ways the attorney knows or should reasonably 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.

The first speaker in favor, Chair Mark Johnson Roberts (<https://www.linkedin.com/in/markjpdx>) of the ABA Commission on Sexual Orientation and Gender Identity, mentioned that he was passed over by a law firm hiring committee as a new lawyer 28 years ago because he is gay. He focused his remarks, however, on a story about a young, female colleague who was groped by an older male opposing counsel at a holiday party. After she fled the scene, the man followed her and asked "in the crudest possible terms" about what sexual activity she might be planning with her husband that night.

The woman went to her bar association to file a complaint, only to discover that the man's behavior violated no ethics rule—unless he had been convicted of a crime. Despite concerns that she'd never work in her field again if she prosecuted, Roberts said, she filed a police report.

"Now the opposing counsel has a criminal conviction," said Roberts. "So be careful what you wish for when you say [victims] should pursue criminal remedies first."

Two delegates from ABA sections formerly opposed to Resolution 109 spoke about the reasons their sections had changed their minds. Don Bivens ([https://www.swlaw.com/people/don\\_bivens](https://www.swlaw.com/people/don_bivens)), a partner at Snell & Wilmer in Arizona, spoke on behalf of the Section of Litigation, and said that the section had a detailed discussion with the Standing Committee on Ethics and Professional Responsibility about its concerns, which centered on potential penalties for vigorous representation of clients. In response, he said, the committee added provisions saying the conduct is prohibited only if the lawyer knows or reasonably should know it constitutes harassment or discrimination, and explicitly does not preclude legal advice, particularly in regard to otherwise legal behavior in jury selection.



Don Bivens, the ABA Section of Litigation's member of the House of Delegates. Photo by Tony Avelar.

Don Slesnick (<http://www.donslesnick.com/drupal6/>), a delegate from the Section of Labor and Employment Law, observed that his section rarely speaks on the House floor because it requires unanimity, a difficult task for a section that includes employer-side and employee-side labor lawyers. Resolution 109 created an unusual unanimity twice, he said: At first, because the section was wholly opposed. But the Standing Committee was so responsive to their concerns, he said, that the section managed to reach unanimity a second time—in favor.

"We hereby express that support with all our heart and soul," said Slesnick, also a former mayor of Coral Gables, Florida, and former chair of the Fellows of the American Bar Foundation.

A related resolution concerning diversity in the legal profession had an easier time Monday. Resolution 102 ([http://www.americanbar.org/news/reporter\\_resources/annual-meeting-2016/house-of-delegates-resolutions/102.html](http://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/102.html)), sponsored by the National Conference of Federal Trial Judges, Judicial Division, called for more diversity on every part of the federal bench, including magistrate and bankruptcy judges.

Nannette Baker (<http://www.moed.uscourts.gov/Judge-Nannette-A-Baker>) of Missouri, chair of the National Conference of Federal Trial Judges and chief magistrate judge of the U.S. District Court for the Eastern District of Missouri, specially emphasized the importance of diversity among federal magistrates and bankruptcy judges, who are often the first or only jurists seen by many Americans. The measure passed with no opposition.

**Follow along with our full coverage of the 2016 ABA Annual Meeting** (<http://www.abajournal.com/topic/annual+meeting>).

*Updated Aug. 12 to note the ABA entities that sponsored the resolution.*

## Standing Committee on Judicial Independence

### National Database on Judicial Diversity in State Courts

Beginning in May 2004, the ABA Standing Committee on Judicial Independence ("SCJI") commissioned a research project intended to result in a single comprehensive database on judicial diversity in state courts of last resort, appellate level courts, and trial courts of general jurisdiction. Realizing that no such knowledge base had previously existed on a state level, the committee gathered detailed information on state judicial diversity, particularly as it relates to race/ethnicity, gender, methods of selection variables, and state population variables. The SCJI National Database on Judicial Diversity in State Courts represents a compilation of those findings on both a national and individual state level. SCJI modernized the site in 2007, and last updated the judicial data in June, 2010.

#### FREQUENTLY ASKED QUESTIONS

1. Of the judges of color currently serving on state courts, what is the percentage of each racial or ethnic group?
2. Of the judges of color currently serving on state courts, what is the percentage of each racial or ethnic group by gender?
3. In each state, what is the percentage of minority judges by race/ethnicity?
4. Nationwide, what is the percentage of minority judges by type of court?
5. What methods are used most frequently to select minority judges for state courts?
6. Nationwide, what is the geographic basis of selection for minority judges on state courts?

#### 1. Of the judges of color currently serving on state courts, what is the percentage of each racial or ethnic group?

Race/Ethnicity	Number	Percentage
African American	769	53.55%
Asian Pacific Islander	157	10.93%
Hispanic American	408	28.41%
Native American	13	.91%
Other	89	6.2%
<b>Total</b>	<b>1436</b>	<b>100 %</b>

#### 2. Of the judges of color currently serving on state courts, what is the percentage of each racial or ethnic group by gender?

Race/Ethnicity	Male	Female	Total
African American	57.1% (378)	42.9% (284)	46.1002
Asian Pacific Islander	60.71% (85)	39.29% (55)	9.74930
Hispanic American	65.66% (239)	34.34% (125)	25.3481
Native American	75% (9)	25% (3)	.83565
Other	73.75% (59)	26.25% (21)	5.5710
<b>Total</b>	<b>61.8384</b>	<b>38.1615</b>	<b>100% (1436)</b>

#### 3. In each state, what is the percentage of minority judges by race/ethnicity? Click [here](#) for individual state reports or see below for a quick breakdown.

State	African Asian/Pacific Hispanic Native				Other	Total
	American	Islander	American	American		
Alabama	10	0	0	0	0	6% (163)
Alaska	0	1	0	0	0	2% (48)
Arizona	4	5	9	0	0	9% (201)
Arkansas	14	0	0	0	0	10% (139)
California	87	85	121	4	73	23% (1631)
Colorado	6	0	15	0	0	11% (186)
Connecticut	17	2	3	0	0	12% (184)
Delaware	3	0	0	0	0	10% (31)
District of Columbia	47	1	5	0	0	56% (95)
Florida	35	2	51	1	1	13% (668)
Georgia	24	0	0	0	0	11% (221)
Hawaii	0	23	0	0	6	67% (43)
Idaho	0	0	1	0	0	2% (51)

Illinois	102	7	26	0	0	14% (967)
Indiana	17	1	4	0	0	7% (320)
Iowa	5	1	0	0	0	3% (199)
Kansas	5	0	3	0	0	4% (188)
Kentucky	2	0	0	0	0	1% (160)
Louisiana	51	0	0	0	0	18% (291)
Maine	0	0	0	0	0	0% (24)
Maryland	32	0	1	0	0	19% (173)
Massachusetts	9	3	0	0	0	11% (112)
Michigan	21	0	4	0	0	10% (256)
Minnesota	13	3	1	3	1	7% (315)
Mississippi	11	0	0	0	0	16% (70)
Missouri	13	0	3	0	1	5% (373)
Montana	0	0	0	0	0	0% (68)
Nebraska	1	0	0	0	0	1% (143)
Nevada	2	1	2	0	1	8% (71)
New Hampshire	0	0	0	0	0	0% (31)
New Jersey	41	1	24	0	0	14% (483)
New Mexico	4	1	25	0	1	30% (103)
New York	48	5	23	0	0	16% (461)
North Carolina	9	0	0	1	0	8% (131)
North Dakota	0	0	0	0	0	0% (49)
Ohio	19	1	1	0	0	4% (470)
Oklahoma	7	0	0	1	0	3% (277)
Oregon	0	0	1	0	0	1% (191)
Pennsylvania	29	1	2	0	0	7% (470)
Rhode Island	0	0	0	0	0	0% (27)
South Carolina	6	0	0	0	0	9% (67)
South Dakota	0	0	0	1	0	2% (43)
Tennessee	14	0	0	0	0	8% (184)
Texas	23	3	77	1	4	19% (569)
Utah	1	4	1	1	0	8% (83)
Vermont	0	0	0	0	0	0% (34)
Virginia	18	0	0	0	0	11% (168)
Washington	11	5	1	0	1	8% (217)
West Virginia	1	0	0	0	0	3% (37)
Wisconsin	7	1	4	0	0	4% (269)
Wyoming	0	0	0	0	0	0% (29)
<b>Total</b>	<b>769</b>	<b>157</b>	<b>408</b>	<b>13</b>	<b>89</b>	<b>1436</b>

\* The data for West Virginia was researched by the American Bar Association and supplemented by American Judicature Society ("AJS") research.

\* Oregon did not participate in this process. Data for one appellate court justice was provided by AJS.

\* In the District of Columbia, magistrate judges are part of the trial court of general jurisdiction. The magistrates are appointed by the Chief Judge of the trial court, and the process includes a citizen panel.

**4. Nationwide, what is the percentage of minority judges by type of court?**

Type of Court	African American	Asian/Pacific Islander	Hispanic American	Native American	Other	Total
Court of Last Resort	9% (32)	1% (4)	3% (10)	0% (0)	0% (1)	47
Intermediate Appellate Level Court	8% (75)	1% (13)	4% (34)	0% (1)	0% (8)	131
Trial Court of General Jurisdiction	7% (662)	2% (140)	4% (364)	0% (12)	1% (80)	1258
<b>Total</b>	<b>769</b>	<b>157</b>	<b>408</b>	<b>13</b>	<b>89</b>	<b>1436</b>

**5. What methods are used most frequently to select minority judges for state courts?**

Method of Selection	Percent
GA with Commission	9 % (132)
GA with or without Commission or with some form of Legislative Approval	13 % (192)
General Jurisdiction Trial Court Appointment	0 % (2)
Gubernatorial Appointment (GA)	26 % (375)
Legislative Election	2 % (33)
Nonpartisan Election	17 % (244)
Partisan Election	32 % (456)

Supreme Court Appointment 0 % (6)

\* The appointment may be with or without a nominating commission. Therefore the total in this report will be higher than the total number of judges in the database.

**6. Nationwide, what is the geographic basis of selection for minority judges on state courts?**

<b>Geographic Basis of Selection</b>	<b>Percent</b>
Circuit	14% (202)
County	38% (539)
District	23% (329)
Statewide	6% (80)
Subcircuits/Subdistricts	8% (108)



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### **Massive database shows state judges are not representative of the people they serve**

by [Amy Wolf \(http://news.vanderbilt.edu/author/amwolf/\)](http://news.vanderbilt.edu/author/amwolf/) | Jun. 22, 2016, 10:26 AM | *Want more research news? [Subscribe to our weekly newsletter »](#)*  
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## Why State Judges Are Not Representative of The...



State courts handle more than 90 percent of trials and judicial business issues that impact Americans the most—safety, health, finances and family. In the last decade alone roughly a *billion* cases have gone through the state judicial system.

A first-of-its-kind database of more than 10,000 current state judges shows when it comes to race, gender and ethnicity, these courts are not representative of the people they serve.

We need a judiciary that reflects the population and we do not have it right now“We need a judiciary that reflects the population and we do not have it right now,” said database co-creator and study co-author [Tracey George](http://law.vanderbilt.edu/george) (<http://law.vanderbilt.edu/george>), a professor of law and political science at [Vanderbilt University](http://www.vanderbilt.edu). (<http://www.vanderbilt.edu>)

“A state court judge has tremendous power and discretion in resolving cases and there is limited oversight of the work they do. A state court judge is not only the most significant person resolving thousands of legal disputes that directly impact every day Americans, they are often the *only* person. They are the last word in most cases.”

The co-authors believe a truly representative judiciary would have a fair representation of women and minorities on the bench as it does in the population.

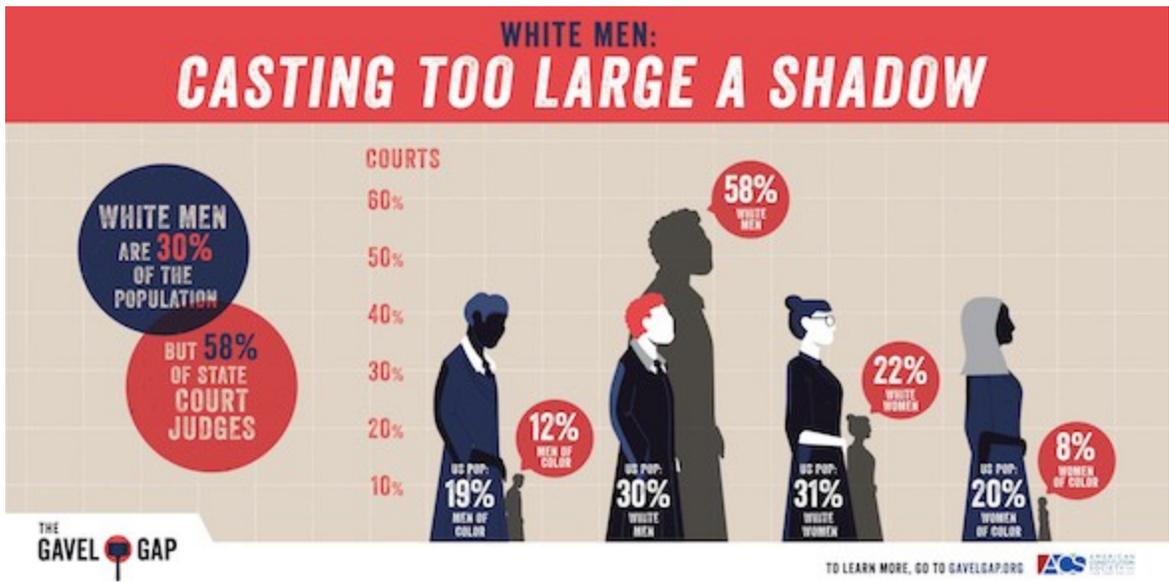
“Our legal system is premised on the idea that judges can understand the circumstances of the community they serve. If we can’t meet that presumption, then we may need to reevaluate the role of courts in our society,” the co-authors write.

The study, “[The Gavel Gap: Who Sits in Judgement on State Courts?](http://gavelgap.org/pdf/gavel-gap-report.pdf)” (<http://gavelgap.org/pdf/gavel-gap-report.pdf>) was written by George and Albert H. Yoon, professor of law and economics at the University of Toronto with support from the [American Constitution Society](https://www.acslaw.org/) (<https://www.acslaw.org/>).

[See how your state ranked on an an interactive map](http://gavelgap.org) (<http://gavelgap.org>)

### Major findings

**More than half of state trial judges and state appellate judges are white men.** White men are the most overrepresented group at nearly double their relative numbers compared to the U.S. population.



<http://news.vanderbilt.edu/files/men-gavelgap.jpeg>

**Women are grossly underrepresented on state courts.** Women are roughly half of the population and half of enrolled law students. But less than one-third of state judges are women. In some states, women are underrepresented by a ratio of one to four. Not a single state has a representative number of female judges to women in that state.

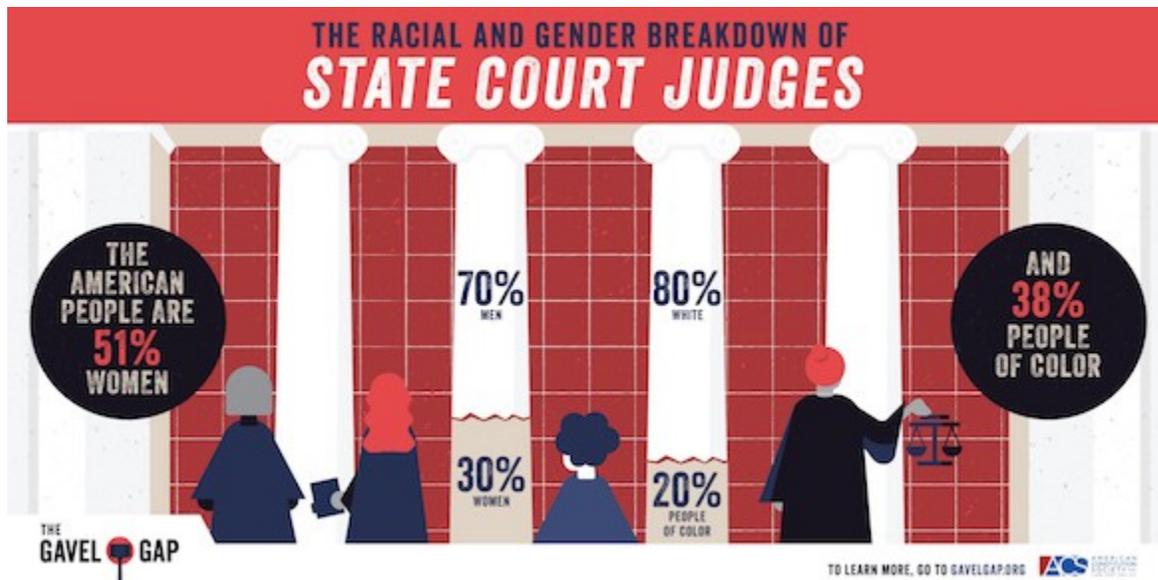


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**People of color make up roughly four in ten people in the country, but fewer than two in ten judges are a racial or ethnic minority.** The story is one of sharp contrasts. In the five best states (considered most representative between judges and residents), minorities are represented at roughly the same rate on state courts as in the general population. But in the five worst, minorities are nearly absent from the judiciary.

**Women of color are the most underrepresented group in state courts** with only 8 percent of national representation on state trial an appellate courts compared to 40 percent of their relative numbers in the general

population.



<http://news.vanderbilt.edu/files/race-gavelgap.jpeg>

## Failing grades for states

The authors ranked each state assigning overall grades that combined the representation of females and minorities on state courts in comparison to the percentage of the population. Forty-one states had a “D” or “F.” This means these states had 69 percent or less parity between women or minorities on the state court bench compared to the representative population. State with an “A” or “B” had 80 percent or better parity.

### Gender

- Twenty-seven states received a failing grade, meaning these states have less than 60 percent parity between women on the state court bench compared to women in the population.
- Worst states in order of rank: West Virginia, Idaho, Mississippi, Utah, Kansas
- Zero states received an excellent grade, meaning not a single state had a representative number of female judges compared to the number of women in that state.
- Best states in order of rank: Oregon, Nevada, Washington, D.C., New Mexico, Minnesota

### Race and ethnicity

- Thirty-two states received a failing grade, meaning less than 60 percent of the judges were a racial or ethnic representation of the population.
- Worst states in order of rank: New Hampshire, Maine, Vermont, North Dakota, Alaska
- Seven states received an excellent score. At least 90 percent of their state judges were racially or ethnically representative of the population.
- Best states: Montana, South Dakota, West Virginia, Hawaii, Wyoming, Nebraska

“Many of the states that fared poorly on the gender score also performed badly on the ethnic representation,” said the researchers.

## Serious consequences



<http://news.vanderbilt.edu/files/TraceyGeorge.jpg>

Tracey George (Vanderbilt University)

State court judicial decisions in civil and criminal cases create precedent, interpret law and even make law. George says arguably the indirect consequences of a state court judge's decisions can be even more significant.

She cites the June 2016 Stanford rape trial as a perfect example.

“When a state court judge decides one case, it affects disputes in any way related to that case. So in the case of the Stanford swimmer convicted of sexual assault, a state court judge, who was also a Stanford graduate and a former athlete at Stanford, decided the student should not receive the standard two-year penalty set by the state legislature in California as the minimum sentence for that crime,” George said. “Instead he gave him no prison time and six months in jail. Not only did the judge decide that dispute, affecting the victim and the defendant, it also means by implication that anytime someone who is convicted of sexual assault is a college student, they don't merit the statutory sentence. So that single sexual assault case has implications for every other sexual assault case on every college campus under that court's jurisdiction.”

## Impact

The researchers hope this database will help inform the current method of identifying and selecting judges to make the selections more representative of the areas they serve. And they want this to lead to a pipeline of women and minorities to serve as judges.

We need diversity in race and gender because it brings to the bench all the experiences of the citizens whom those judges serve. “We need diversity in race and gender because it brings to the bench all the experiences of the citizens whom those judges serve,” said George.

They are also hoping that in states where judges are elected, more women and minorities will run for a judgeship and more voters will be encouraged to elect them.

## Next steps

The next phase of George and Yoon’s research will examine the legal decisions of the judges in this massive database to see if there are signs of influence connected to race, gender and ethnicity.

[Download the full report “The Gavel Gap: Who Sits in Judgement on State Courts?”](http://gavelgap.org/pdf/gavel-gap-report.pdf) (<http://gavelgap.org/pdf/gavel-gap-report.pdf>)

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**Media Inquiries:**

Amy Wolf, (615) 322-NEWS

[amy.wolf@vanderbilt.edu](mailto:amy.wolf@vanderbilt.edu) (<mailto:amy.wolf@vanderbilt.edu>)

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