

Discrimination and Harassment Become Legal Ethics Violations¹

The first time it happens, it will be quite a shock. The chairman of a major law firm opens an envelope from the Disciplinary Board to find himself named in a charge of unethical conduct. It alleges that the chairman knowingly failed to establish and enforce a policy to prevent and remedy sexual harassment, as a result of which a paralegal has experienced a hostile work environment. Or more directly, perhaps the charge will be that the chairman overlooked the shocking indiscretions of a rainmaking partner for economic reasons. What was a potential discrimination charge against the firm just became intensely personal.

General Counsel of a public company may open a similar envelope to find herself charged with approving the discriminatory performance evaluation of an older in-house attorney, allegedly knowing that others in the department were not being judged against the same standards. What was a single individual unhappy with a raise having little risk of litigation and low damage potential has suddenly disrupted the professional life of the General Counsel and quite possibly the operation of the legal department.

Could this happen? Yes. A recent modification of the American Bar Association's Model Rules of Professional Conduct now being considered by the Pennsylvania Supreme Court could make these scenarios possible. It could even happen under the more limited version of the rule that the Disciplinary Board has recommended to the court.

Amendment to ABA Model Rule of Professional Conduct 8.4

On August 8, 2016, after spirited debate, the American Bar Association added a new rule to the Model Rules of Professional Conduct, Rule 8.4(g), based on a proposal by the Standing

¹ © Michael J. Leech 2017. The author may be reached at (215) 642-8776 or mleech@talk-sense.com.

Committee on Ethics and Professional Responsibility². It makes it professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or should reasonably know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law³.

“[T]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application” of the prohibition, according to Comment [3].

The laudable purpose of the proposed revision is to bring about a “cultural shift” that ensures respect for the inherent human dignity of all who are involved in the legal process. Draft Proposal Memorandum, at 1-2. Application of the prohibition to the operation of legal organizations is justified, the committee found, because “one simply cannot demand one level of professional behavior for lawyers that is external to their own law practice while allowing a lesser standard of behavior inside one’s own office.” *Id.*, at 2-3. The fact that there are other legal remedies was not deemed a persuasive argument against this change because the same is equally true of ethics restrictions on fraud and deceit. *Id.*, at 3.

Even a casual reader of the published stories of shameful behavior by attorneys can understand the impetus for this change, *see, e.g.*, <http://abovethelaw.com/2016/01/the-pink-ghetto-shocking-stories-about-sexual-harassment-at-law-firms/>. There are plenty of examples of attorneys engaged in behavior that is boorish and even criminal, both in the treatment of opposing

² The draft proposal and memorandum explaining the draft proposal may be found at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2015.authcheckdam.pdf. (referred to herein as “Draft Proposal Memorandum”).

³ The rule contains a number of specific limitations on this broad prohibition. It “does not limit the ability of a lawyer to accept, decline or withdraw from representation in accordance with Rule 1.16.” It “does not preclude legitimate advice or advocacy consistent with these rules.” Comment [5] provides that a judge’s determination that peremptory challenges were exercised in a discriminatory manner does not in and of itself establish a violation. It also provides that limiting the scope or subject matter of a lawyer’s practice in accordance with the Rules is not a violation.

lawyers and clients and particularly in the treatment of other members of the legal organization. Permitting such behavior by attorneys does bring the profession into disrepute.

The Pennsylvania RPC on Discrimination Proposed by the Disciplinary Board

A more limited rule is being proposed in Pennsylvania. That proposal, based on the current Illinois rule on attorney discriminatory actions, contains some important qualifications that limit its scope. The proposed Pennsylvania rule provides that it is professional misconduct for a lawyer to:

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

The rule condemns much of the same conduct as the new Model Rule⁴ but conditions enforcement of the prohibition on an additional finding that the conduct “reflects adversely on the lawyer’s fitness as a lawyer.” This “discrimination-plus” requirement demands that the lawyer’s impropriety be of a sufficiently serious nature as to call into question the lawyer’s “fitness as a lawyer.” The second qualification is procedural: where there is another forum available for a complaint, a charge for violation of this prohibition may be brought only after a final determination

⁴ Unlike the Model Rule, the first sentence of the proposed Pennsylvania rule makes no specific mention of “harassment.” This omission should make no substantive difference because from its inception in *Meritor State Bank v. Vinson*, 477 U.S. 57 (1986), liability under Title VII for harassment has been deemed to be nothing more than a form of “discrimination.”

by a tribunal charged with adjudicating the question of unlawful discrimination. The drafters of the new ABA Model Rule specifically rejected this approach.

Taken together, the limitations establish a two-stage process. First, if available, an underlying proceeding⁵ must result in a judgment that includes a finding that the lawyer engaged in the prohibited conduct. Second, *after* this proceeding is concluded, a charge of unethical conduct may be filed in which the question of whether the conduct reflects on the lawyer's fitness to be a lawyer is adjudicated by the Disciplinary Board.

In explaining this proposal, the Disciplinary Board indicated a concern with the administrative impact of the rule proposed by the ABA. The rule it has proposed "will establish sufficient guidelines for the regulators charges with enforcement [the Disciplinary Board] ... and will eliminate the potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers." The Board also referred to "resource-strapped disciplinary authorities"

While these two qualifications limit the circumstances in which a lawyer may be found to have engaged in unethical conduct, they do not entirely remove the personal risk of disciplinary action against for a lawyer charged with discriminatory behavior. They do, however, provide the accused attorney with a get-out-of-jail-free card: settlement of the underlying discrimination proceeding can prevent the rule from ever being applied. And since most litigation does not reach trial due to settlement or pretrial dismissal, the rule's incentives are limited. In Illinois, only five out of 5,090 consumer charges against attorneys in 2015 were based on alleged discriminatory acts.

⁵ This will typically, but not always, be a civil proceeding initiated by the victim of discrimination or harassment or an administrative agency like the U.S. Equal Employment Opportunity Commission. The text of the rule could be satisfied, for instance, by a prosecution for sexual assault or a hate crime.

Impact on Settlement Decisions

Since the civil action must be litigated to judgment before a disciplinary complaint can even be filed, disciplinary charges do not enter the picture until the time for settlement has passed. Thus, the availability of a disciplinary complaint only affects settlement discussions if the alleged wrongdoer anticipates the possibility of a disciplinary complaint⁶.

Attorneys who practice labor & employment law must recognize that *every* charge of discrimination or demand letter that is based on the conduct of an attorney presents the eventual risk of disciplinary proceedings against the allegedly discriminating lawyer. The particulars of the conduct complained of will affect the extent of that risk, of course. But given the propensity of such claims sometimes to become much more serious than they appear to be at the outset of the case, management counsel cannot dismiss the potential as far-fetched.

Conflict of Interest Concerns

Conflict of interest issues similar to those often arising in sexual harassment cases may develop. The attorney retained to represent the entity, whether law firm or corporate employer, has one more risk to the interests of the alleged individual attorney wrongdoer to consider. The potential for disciplinary action and the benefit of settlement represents a concern of the individual accused attorney that could cause his or her interest to diverge from those of the firm or corporate employer.

⁶ Under Pennsylvania Rule of Professional Conduct 4.4(a), it is professional misconduct for counsel for the complaining party to “use means that have no substantial purpose other than to embarrass ... a third person.” Prudent counsel may avoid bringing up the subject altogether to avoid the risk that focusing on this issue will be seen as a threat to embarrass the accused lawyer by bringing ethics charges, particularly when the predicate for their being brought, a judgment in the discrimination case, has not yet even occurred. This is especially true where counsel knows that the law firm or legal department regards the charge as fabricated or frivolous, which is common in such cases.

I. How is the Proposed Pennsylvania Rule Different From The ABA Model Rule?

ABA Model Rules changes are presented regularly to the State Supreme Courts of each State after being adopted. The Pennsylvania Supreme Court's Disciplinary Board advocates *not* adopting the new ABA Model Rule as written, preferring to propose the existing Illinois formulation of the rule⁷. This does not necessarily rule out consideration of the new ABA Model Rule as written, either now or in the future, by the Pennsylvania Supreme Court, as has been urged by the Philadelphia Bar Association.

As mentioned above, the two-stage approach of the proposed Pennsylvania rule described above was rejected by the Standing Committee on Ethics and Professional Responsibility before the Model Rule was first proposed. Draft Proposal Memorandum, at 3-4. The committee noted that it was seventeen years ago, in 1998, when words or conduct manifesting bias and prejudice first became an ethical violation in certain limited circumstances. *Id.*, at 1. The enforcement of the new ethics limitation would certainly be weakened, it concluded, if a judgment finding discrimination or retaliation was required to assert an ethics violation, since so few such disputes actually complete the litigation process.

Ethics Violation Where Discrimination is Not a Violation of Law. The rule proposed by the Disciplinary Board also would not apply unless there was a prohibition on a particular form of

⁷ In introducing the proposed rule, the Board cited to four other States that it said require a prior, final determination of discrimination or harassment by a court or administrative agency. Of these, the Illinois rule is closest to the rule the Board has proposed. The current Washington Rule does not actually require that any other charge or legal proceedings be brought. The New York rule requires that such a charge be brought, but does not say directly that disciplinary proceedings must await the outcome; rather, it says that "[a] certified copy of a determination by such a tribunal, which has become final...finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding." Minnesota's rule contains a "discrimination-plus" standard requiring that the discriminatory reflect adversely on the lawyer's fitness as a lawyer, but on requirement of a prior determination through other proceedings. Ironically, the Illinois Supreme Court is presently considering adoption of the ABA Model Rule in place of its existing rule.

discrimination (such as LGBTQ discrimination) in the applicable jurisdiction. The proposed Pennsylvania rule does contemplate that where there is no available forum in which to bring a complaint of discrimination, conduct prohibited by the rule can be adjudicated by the Disciplinary Board. No examples of prohibitions on discrimination lacking in enforcement mechanisms are provided, if there are any. The new ABA Model Rule contains no limitation where there is an alternative forum for a discrimination complaint.

Ethics Proceedings Independent of Civil Actions. Under the new ABA Model Rule, there will be no automatic delay in filing of Disciplinary Board charges while civil proceedings are pending and no get-out-of-jail-free card of settlement before a decision in an underlying legal proceeding. Settlement and even successful resolution of the underlying complaint will not necessarily result in dismissal of Disciplinary Board proceedings⁸.

Parallel Proceedings. Disciplinary proceedings could run on a parallel track with civil proceedings under the ABA Model Rule, with all the problems attendant to having the same controversy being heard simultaneously in two *fora*. One interesting question would be whether a finding *against* the accused attorney in court or arbitration would be conclusive in ethics proceedings. Even if not, the psychological impact of such a decision would be substantial.

Personal Impact of Ethics Proceedings. The defendant, for federal claims, is the legal entity, not an individual alleged wrongdoer. The consequences are usually strictly monetary. A charge of discrimination can take years to wend its way through administrative and judicial proceedings. Civil claims by an alleged victim can be subject to being shunted off into arbitration, may be limited by damage defenses and routinely become the subject of dispositive motions.

⁸ Even favorable resolution of the merits will likely not have *res judicata* effect, although it would likely lead the Disciplinary Board to reconsider an ethics charge if one had been made. A procedural victory, such as dismissal based on the Statute of Limitations, is unlikely to have any effect at all.

An ethics charge, by contrast, is personal to the individual named. The individual charged is at risk for the personal stigma associated with being disciplined, and disciplinary decisions are published once they become final. The attorney or firm may not be able to look to an insurer to help fund the defense of the ethics charge even if there is Employment Practices Liability Insurance. Failure to correct an ethical violation can be an aggravating factor, so the recipient of such a charge would have an incentive to take prompt steps to remediate the discrimination or harassment.

Different Finder of Fact and Law. The decision on an ethics charge under the new ABA Model Rule would not be made by an administrative agency, federal judge or arbitrator deeply familiar with all the defenses available in discrimination and harassment cases, but by an agency staff used to attorney discipline cases and then by a tribunal focused strictly on deciding disputes over professional ethics. This, in addition to a concern about the burden such additional cases might pose, likely influenced the Disciplinary Board's proposal.

II. State of Mind Required By Proposed Pennsylvania Rule and New ABA Model Rule

The Illinois rule proposed by the Disciplinary Rule is focused on lawyers who commit discriminatory acts. While it prohibits a *lawyer* from violating the antidiscrimination laws, the federal law has generally been interpreted to focus on the actions of employers, which are typically legal entities distinct from the individuals who manage them.⁹ In all probability, though, the rule will be interpreted to impose discipline on an attorney who causes the entity to commit a violation of such laws.

Comment [3] to the Illinois rule is plainly to this effect. It describes a lawyer who “manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin,

⁹ *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1077-78 (3rd Cir. 1996).

discipline, age, sexual orientation or socioeconomic status...when such actions are prejudicial to the administration of justice.” This language strongly suggests that a finding of bias by the individual attorney must be established for a violation of the rule to be found.

With respect to the state of mind required for a violation of the new ABA Model Rule, the proposed rule change was explained this way:

The terms ‘harassment’ and ‘discrimination’ are defined terms under the law; they refer to the adverse, negative consequences that manifests bias or prejudice.
...

The Ethics committee therefore decided to use the terms ‘harassment—which is understood to include the creation of a hostile work environment—and ‘knowing discrimination’ which is understood to include conduct that a person engaging in such conduct knows will result in a person or persons being treated in a different and harmful way because of membership or perceived membership in one or more of the categories listed in the rule. The word ‘knowing’ was retained when applied to discrimination because the Ethics Committee concluded that conduct that had a non-discriminatory intent, such as hiring decisions based on class rank or the willingness of the applicant to relocate to a particular jurisdiction, should not be the basis for a finding of professional misconduct. In addition, ‘knows’ is a defined term in the Model Rules of Professional Conduct. The rules define ‘knows’ as ‘actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.’

Draft Proposal Memorandum, at 4.

Thus, under both rules, the offending lawyer’s wrongful state of mind is essential to showing an ethics violation.

III. Ethics Obligations of Managing Partners and Supervising Attorneys

There is yet another important change that adoption of the new ABA model rule would bring about. It creates a new class of lawyers who could be subject to discipline in discrimination and harassment cases—managing partners and supervising attorneys. This is also likely true, though it will be a less common problem, under the rule proposed by the Disciplinary Board.

Comment [4] to the new ABA Model Rule describes the types of activity to which it applies. These include representation of clients and interaction with witnesses, other attorneys and

court personnel, but also extends to “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.” The risk for those who manage attorneys in a legal organization is significant, because the rules already recognize a legal obligation to exercise supervisory authority and impose responsibility for preventing and remedying ethics violations committed by others in the legal organization. This would now include the new ABA Model Rule’s general prohibition on discrimination and harassment. The Illinois rule proposed by the Disciplinary Board does not address this issue, but as discussed below, there is no reason to believe it would exempt managing partners and supervisory attorneys from their usual level of responsibility with respect to violations of disciplinary rules by subordinate attorneys.

To be clear, neither the new ABA Model Rule nor the rule proposed by the Disciplinary Board imposes vicarious responsibility on managing partners and supervising attorneys. But there is substantial risk of ethical responsibility for both classes of attorney *without any wrongful state of mind concerning, or participation in, discrimination or harassment*. That is because the rule governing their responsibilities contains no requirement that they actually approve of, or participate in, ethical violations by subordinate attorneys to be held ethically responsible.

Managing Partner Responsibility for Violation of the New Model Rule

A law firm managerial partner or other lawyer with managerial responsibility is required to make reasonable efforts to ensure that “the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” RPC 5.1(a) Thus, if one law firm partner or associate engages in sexual harassment or racial discrimination (or any of the other behavior prohibited by the new rule), managing partners can be deemed to be in violation of RPC 5.1(a) if they have not put into effect measures “giving reasonable assurance”

that no attorney in the firm is able to engage in harassment or discrimination. In the context of the proposed new rule, this would require adopting and enforcing policies against discrimination and harassment, including having policies against them and maintaining effective internal systems to accept reports and complaints of discrimination and harassment, to investigate them and to remedy harassment and discrimination found in such investigations.

These same policies and procedures are also important, of course, as they may provide defenses against vicarious liability of the law firm or corporation under Title VII for certain violations, *Faragher v. City of Boca Raton*, 524 U.S. 775, 777-78 (1998)(limiting vicarious employer liability for hostile work environment caused by subordinate employees where the employer has maintained and followed an investigation and remedy system) and for punitive damages, *Kolstad v. American Dental Association*, 527 U.S. 526, 542-46 (1999)(limiting vicarious employer liability for punitive damages where the employer has engaged in good faith efforts to comply with Title VII). But under the new ABA Model Rule, failure to adopt such policies and have effective investigation and remedy systems could constitute professional misconduct by the managing partner.

Supervising Partner’s Responsibility for Discrimination or Harassment

Responsibility for another lawyer’s violations of the rules extends as well to law firm partners with direct supervisory responsibility over other attorneys if they are found to have ratified misconduct when they have knowledge of it or if they “[know] of the conduct at a time when its consequences can be avoided or mitigated but [fail] to take reasonable remedial action.” RPC 5.1(c).

In the context of the new rule, this provision means that an attorney in such a role must take prompt action upon discovering that a supervised attorney has engaged in harassment or

discrimination. A failure to take any action at all after notice of such behavior could well constitute ratification of the behavior. In addition, it would not stop continuation or future repetition of the behavior and thus would not be “reasonable remedial action” under RPC 5.1(c)(2). Applied to this situation, this would likely require the supervising attorney to report promptly the discriminatory or harassing conduct to the firm’s management and to invoke the investigatory and remedial systems the firm has in place, on pain of being ethically responsible for the conduct. RPC 5.2(b) provides that a “subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.” The direct supervisory attorney would likely be deemed to be subordinate to the firm management in this context.

The supervising attorney could thus be insulated from ethical responsibility by referring the complaint to an internal law firm or legal department investigative and remedial procedure unless the process did not yield a reasonable resolution. Since the supervising attorney must ensure that a reasonable resolution results, it may be necessary for the law firm’s or corporate legal department’s process to provide the supervising attorney with information on the investigation and remedy, even though such processes ordinarily are kept strictly confidential.

Where the firm has no investigatory or remedial system in place, however, the supervising attorney would appear to have a personal responsibility to investigate and take remedial action, on pain of being ethically responsible for the discrimination or harassment by a subordinate attorney.

Managing Partner & Supervising Attorney Ethical Responsibility Under Disciplinary Board’s Proposed Rule

While there is no statement in the proposal by the Disciplinary Board about this subject, there is no reason why the above ethical responsibility would not apply where a law firm or legal

department's managing attorney and supervisory attorneys failed to take steps already required by the rule with respect to disciplinary violations by subordinate lawyers.

The rule against discrimination that the Disciplinary Board proposes requires (1) a violation of an independent legal prohibition on discrimination; (2) that the violation be sufficiently serious as to reflect adversely on the lawyer's fitness to practice law; and (3) an adjudication of liability by the administrative agency or court hearing a complaint concerning the discrimination. While violations under the Disciplinary Board's proposed rule are likely to be rare,¹⁰ there are likely to be some instances in which violations will be found. When all of the requirements for a violation have been met, it would not be surprising for the Disciplinary Board to find an ethical violation where the managing partner or general counsel had not established and maintained policies against, and remedial mechanisms for, discrimination within the law firm or legal department. Nor would it be surprising for the Board to find a supervising attorney responsible for the violation where the supervising attorney took no action to disavow and correct the discrimination.

One circumstance makes it all the more likely that such ethical responsibility would attach. Only in the case of the most serious violations will the requirements for an ethical violation be met. In such cases, the inaction of higher level attorneys in the face of what will appear to be reprehensible conduct will seem all the more culpable than if, for instance, the violation was a failure to comply with technical requirements for handling client funds.

The concern for attorneys at these managerial levels is that things sometimes look very different once the facts are found by an outsider (court and Disciplinary Board) than they appeared

¹⁰ In 2014, there were seven charges of violations of the Illinois rule, for instance. In previous years there were varying numbers of charges in that vicinity, including none at all in one year.

to the managerial attorneys when the events actually occurred. This is especially the case where the violation is one where the state of mind of the accused attorney is at stake, and state of mind is essential to liability in most discrimination cases. Managerial attorneys could be found guilty of ethics violations because they mistakenly believed a less-than-credible story by the accused attorney.

IV. Practical Implications of the ABA Model Rule & Disciplinary Board Proposed Rule

Factual disputes are almost inevitable in discrimination and harassment cases. Disputes over the correct interpretation of the facts are also to be expected. As a result of this and of the applicable legal formulations for proof of discriminatory intent, most discrimination and harassment cases are resolved based on circumstantial evidence.

The necessary consequence of this phenomenon is that there is a significant potential for decisional error, and in both directions. While there is overlap between the analysis employed by judge and jury, extraneous factors can have an impact on the outcome if summary judgment is denied. For example,

- long-term employees who bring suit tend to be treated more sympathetically by juries than short-term employees;
- the presence of multiple complaints, which are occasionally contrived, makes a jury finding of harassment claimed by an employee much more likely;
- the extent of pre-termination progressive discipline and the quality of employer documentation of alleged problems with the complaining employee (which can be a defense) impact the probability of a favorable outcome for the employee, although neither is legally required;
- the quality of both the individual claiming discrimination and the alleged wrongdoer as witnesses can profoundly affect the jury's judgments;
- any of a host of missteps within the litigation process can make a weak case strong or vice-versa; it's common, for example, for a weak discrimination to morph into a strong retaliation claim as events unfold.

This risk of decisional error is likely to find its way into ethics decisions that have a profound impact on the professional life of the alleged wrongdoer. There will surely be cases where guilty attorneys are exonerated and cases where innocent attorneys are branded as guilty of discrimination or harassment. The risk counsels caution and reliance on expert legal advice from the earliest moment that a problem arises. This risk should also prompt law firms and corporate legal departments to be vigilant and pro-active about discrimination and harassment, something that the ABA Model Rule was specifically designed to encourage.

V. Considerations in Deciding Whether To Submit an Ethics Charge

Under the Rules of Professional Conduct, violation of the new ABA Model Rule could constitute the kind of “misconduct” an attorney is *required* to report under Rule of Professional Conduct 8.3¹¹. Where reporting is not required, attorneys representing discrimination and harassment claimants will have to weigh a host of considerations in deciding whether to submit a charge of unethical conduct. Among the factors weighing in this decision will be things like:

- The presence (or absence) of a pattern of discrimination or harassment requiring immediate and vigorous action to prevent repetition of the wrongful behavior against new victims;
- The possibility that the ethical dimension may affect how seriously the firm or company treats the complaint, perhaps triggering more careful investigation and perhaps a swift effort to remediate the discrimination or harassment;
- The need to ensure that the law firm, corporate law department or lawyer consult with competent ethics counsel to become educated about this new legal ethics dimension of discrimination and harassment;
- The possibility that the firm or company will have a hostile reaction and refuse to consider settlement;

¹¹ Rule 8.3(a) requires reporting by attorneys of known violations by other lawyers that raise a substantial question as to that lawyer’s fitness as a lawyer. Thus, it may be that egregious cases of discrimination by a lawyer would require reporting by an attorney obtaining knowledge of it that was not privileged.

- The possibility that submitting an ethics charge will poison the relationship between the firm and the attorney representing the claimed victim;
- The possibility that the firm or company will defend the case in a more thorough, well-prepared manner because it perceives the stakes to be higher;
- The risk of triggering an escalating emotional response to the dispute, which can make both litigation and settlement more difficult;
- The loss of control resulting from the potential entry of Disciplinary Board and its staff into the dispute;
- The differences in how the particular claim of harassment or discrimination is likely to be evaluated in ethics proceedings as opposed to in court or arbitration, and the potential impact those differences may have on achievement of the client's objectives;
- The possibility of, and possible impact of, an adverse determination by the Disciplinary Board or its staff;
- The client's preferences with respect to making an accusation personal to those who are claimed to have caused the discrimination or harassment;
- The potential reaction of a judge, jury or arbitrator to the decision to submit an ethics charge, or to a failure to submit an ethics charge.

If the new ABA Model Rule is adopted, this problem will confront employee's counsel in every discrimination or harassment claim involving allegations against an attorney, law firm or legal organization. The only exception would be where the client has already taken the step of submitting an ethics charge before engaging counsel or insists that no such charge should be filed. If the Supreme Court adopts the Illinois rule proposed by the Disciplinary Board, these considerations would not arise, since final judgment against the accused attorney (ending the case) will be required before ethics charges may be filed.

VI. The Risk of Counter-Charges

The provision in ABA Rule of Professional Conduct 4.4(a) that “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person” creates the possibility that charges of ethical violations may be made on both sides of these controversies. It is possible in particular cases that a Disciplinary Board charge could be made against employee’s counsel or a lawyer-employee in response to a charge claimed to be based on knowingly false claims of harassment or discrimination. This could also happen where a non-attorney claiming to be a victim of harassment or discrimination makes communications about filing an Disciplinary Board charge to the firm or company, suggesting that intimidation is the only real purpose of the charge.

Pennsylvania has followed the ABA in dropping the more stringent limit on threatening to file ethics charges to obtain an advantage in a civil matter. But one rationale for so doing was the limitation imposed by RPC 4.4(a). There is thus still somewhat ethically risky for an attorney to communicate about the possibility of an ethics complaint in advance of bringing such a charge.

VII. Conclusion

The handling of discrimination and harassment disputes within law firms and corporate legal departments would be significantly affected if the Pennsylvania Supreme Court adopts the proposed ABA’s new Model Rule 8.4(g). The ABA committee that drafted the new Model Rule attached to its recommendation a three-page listing of other professional organizations where similar prohibitions apply: doctors, dentists, university professors, therapists, architects, CPA’s, teachers and even retailers. Draft Proposal Memorandum, Appendix at 1-3. Yet it seems likely that the legal ethics enforcement mechanism will be more frequently invoked, with much more robust enforcement, than the ethics enforcement processes of most of these other professions.

On the other hand, there are *many* restrictions on behavior that apply to lawyers that no other profession enforces with vigilance, including conflict of interest restrictions, mandates of candor both generally and with courts and prohibitions on fee splitting and on anti-competitive restrictions. Turing Pharmaceuticals caused a public outcry and Congressional investigation when it increased the price of the drug Daraprim by 5000%, but was able to do so because there is no legal mandate that prescription drugs be priced reasonably. By contrast, Rule of Professional Conduct 1.5 prohibits all lawyers from charging or collecting anything more from their clients than *reasonable* attorney's fees.

The Illinois rule proposed by the Disciplinary Board would cause much more limited changes, although there would be changes in some limited instances. But that rule's restrictions limit its effectiveness in preventing discrimination and harassment by attorneys, ensuring that more embarrassing stories about lawyers that bring the profession into disrepute will occur. The rule is all the more problematic because it allows wrongdoers to buy their way out of ethics charges through settlement with their victims.

So perhaps it is time to add a general prohibition on discriminatory behavior, together with the process "teeth" to make violation problematic. One can hope that if the new Model Rule is adopted by the Supreme Court, it effectively deters and remedies harassment and discrimination without an undue intrusive effect on ordinary employment decision-making in law firms and corporate law departments.