

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
COMMITTEE ON PROFESSIONAL ETHICS**

**FORMAL OPINION 2020-4: UNLAWFUL DISCRIMINATION IN THE PRACTICE OF LAW**

**TOPIC:** Unlawful discrimination in the practice of law.

**DIGEST:** New York Rule of Professional Conduct 8.4(g) prohibits a lawyer or law firm from “unlawfully discriminat[ing] in the practice of law.” Rule 8.4(g) requires that a claimant first file a complaint based on discrimination with a tribunal other than an Attorney Grievance Committee, if the complainant can do so within the relevant statute of limitations. Once a complaint has been filed in another tribunal, a claimant may file a grievance prior to fully exhausting the judicial process. However, if the time to file a complaint in another tribunal has elapsed, such that no other tribunal has jurisdiction to hear the complaint, a grievance based on unlawful discrimination may be filed with a Grievance Committee in the first instance.

**RULES:** 8.4(g), 8.4(b), 8.4(d), 8.4(h), 1.0(w)

**QUESTION:** Under what circumstances may a grievance based on unlawful discrimination in the practice of law be filed against an attorney?

**OPINION**

Approximately twenty-seven years ago, New York enacted Rule 8.4(g)<sup>1</sup> as a way to address discriminatory behavior in the legal profession. New York Rule 8.4(g) states that a lawyer or law firm shall not:

(g) unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee,<sup>2</sup> a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding . . .

New York Rule 8.4(g) is relatively narrow and prohibits only “unlawful” discriminatory conduct that occurs “in the practice of law.”<sup>3</sup> In addition, Rule 8.4(g) contains a unique procedural

---

<sup>1</sup> New York Rule 8.4(g) was originally enacted as Disciplinary Rule 1-102(A)(6).

<sup>2</sup> In 2015, the Office of Court Administration issued uniform rules governing attorney discipline. The uniform rules changed the name of the “Departmental Disciplinary Committee” to the “Attorney Grievance Committee,” however, Rule 8.4(g) has not been updated to reflect the Committee’s new name.

<sup>3</sup> See Marjorie E. Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility*, 18 Fordham Urb. L.J. 283, 284 (1991).

requirement: an individual who wishes to file a grievance against an attorney for discrimination must first file a complaint or charge in a tribunal other than a Grievance Committee if the statute of limitations has not run on that complaint or charge.<sup>4</sup>

While the State Bar committees that originally proposed New York Rule 8.4(g) did not recommend any such procedural requirements, the state Appellate Divisions were concerned about turning the Grievance Committee into a “quasi-human rights commission.”<sup>5</sup> Therefore, this procedural prerequisite was added to enable a Grievance Committee to defer action in such matters if the Committee decided that doing so was appropriate under the circumstances of a particular discrimination-based grievance. The Appellate Divisions also added that if such tribunal has entered a finding of unlawful discrimination and all judicial or appellate review has been exhausted, that determination is *prima facie* evidence of professional misconduct.<sup>6</sup>

Although New York’s Rule has been in place for nearly thirty years, discrimination continues to exist and adversely impacts the profession in this state and across the country. This Opinion examines the various components of New York Rule 8.4(g) and explains under what circumstances a grievance arising from unlawful discrimination may be filed against an attorney in New York.<sup>7</sup>

## **I. Unlawful Discrimination in the Practice of Law**

As noted above, under New York Rule 8.4(g), discriminatory conduct by a lawyer or law firm only gives rise to an ethical violation if such conduct is both (i) “unlawful,” and (ii) “in the practice of law.” The Rules do not define “unlawful” or “the practice of law.” However, given the plain meaning of these terms, it is apparent that the Rule prohibits a lawyer from discriminating against another person in a manner that violates a statute, regulation, rule or order—but only if it relates to, or arises out of, the lawyer’s practice. This reading is supported

---

<sup>4</sup> By contrast, ABA Model Rule 8.4(g), which the ABA passed in August 2016, does not contain the limitations set forth in New York’s rule. Instead, it broadly prohibits lawyers from engaging in discrimination or harassment regardless of whether that conduct is deemed unlawful. *See* ABA Model Rule 8.4(g); *see also* ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 493 (2020). Other states have adopted rules similar to ABA Model Rule 8.4(g). *See* [ABA Center for Professional Responsibility Policy Implementation Committee, Variations on the ABA Model Rules of Professional Conduct, Rule 8.4](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.pdf), available at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_8\\_4.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.pdf) (Nov. 9, 2020).

<sup>5</sup> Gross, *supra* note 3, at 294. While the New York State Bar Association may approve amendments to the ethical rules that bind lawyers within the state, they are subject to adoption by New York’s four Appellate Divisions. *Id.* at 284.

<sup>6</sup> Gross, *supra* note 3.

<sup>7</sup> The New York City Bar Association’s Committee on Professional Responsibility recently recommended amending New York Rule 8.4(g) to more closely conform with ABA Model Rule 8.4(g). *See* <https://s3.amazonaws.com/documents.nycbar.org/files/2019576-8.4gProposalProtectedClasses.pdf>. The proposal to amend New York Rule 8.4(g) is currently being considered by the Courts as well as the New York State Bar Association’s Committee on Standards of Attorney Conduct. In the event that New York Rule 8.4(g) is amended, portions of this Opinion may need to be revised or may become moot.

by the example of unlawful discrimination provided in the Rule itself. Specifically, Rule 8.4(g) states that it is unethical to “unlawfully discriminate in the practice of law *including in hiring, promoting or otherwise determining conditions of employment...*” (emphasis added). Thus, New York lawyers may face a disciplinary action for conduct that violates federal laws such as Title VII of the Civil Rights Act of 1964 (*see* 42 U.S.C. § 2000e-2(a) (2012), “Title VII”), the Age Discrimination in Employment Act of 1967 (*see* 29 U.S.C.A. § 621 *et. seq.*, the “ADEA”), and the Americans with Disabilities Act (*see* 42 U.S.C.A. § 12101 *et. seq.*, the “ADA”), to name a few. In addition, in New York, lawyers are subject to the New York State Human Rights Law (*see* N.Y. Exec. Law § 296, “NYSHRL”), and some may also have to comply with the New York City Human Rights Law (*see* N.Y. ADMIN CODE § 8-107, “NYCHRL”). Accordingly, a lawyer or law firm may be subject to discipline if they refuse to hire a paralegal on the basis of an applicant’s race,<sup>8</sup> fail to pay a female associate the same as her male colleagues solely because of her sex,<sup>9</sup> fire a legal assistant as a result of his sexual orientation,<sup>10</sup> or engage in severe or pervasive sexual harassment of a female employee,<sup>11</sup> because in each one of these situations, the conduct is (a) prohibited by law, and (b) arises out of or relates to the attorney’s practice.

Unlawful discrimination covered by Rule 8.4(g) is not limited to employment-based conduct. For example, refusing to represent an individual based on the prospective client’s race or sex, to the extent such conduct violates federal, state or local law, may run afoul of 8.4(g).<sup>12</sup>

---

<sup>8</sup> *E.E.O.C. v. Concrete Applied Const. Techs. Corp.*, 511 F. Supp. 2d 334, 344 (W.D.N.Y. 2007) (African-American operating engineer denied employment in favor of white operators stated a prima facie case for race discrimination under Title VII and NYSHRL).

<sup>9</sup> *See Lavin-McEleney v. Marist Coll.*, 239 F.3d 476 (2d Cir. 2001) (affirming jury verdict for female professor paid less than comparable male professors at her school, and finding that the wage disparity was a violation of Title VII and the Equal Pay Act).

<sup>10</sup> Discrimination based on traits that do not conform with traditional gender norms are prohibited by Title VII, *Price Waterhouse*, 490 U.S. 228, 250-51 (1989), and the Second Circuit has extended this principle to characterize discrimination on the basis of sexual orientation as a subset of such “sex stereotyping.” *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018) (firing gay skydiver solely on the basis of his sexual orientation is actionable under Title VII’s prohibition of employment discrimination on the basis of sex).

<sup>11</sup> Sexual harassment is a form of gender discrimination. *See E.g., Crosby v. Homeowners Assistance Servs. of N.Y.*, No. 14 CV 3459, 2015 WL 3466855, at \*2 (E.D.N.Y. Feb. 18, 2015) (“Sexual harassment that constitutes sex discrimination under Title VII falls within two categories: quid pro quo sexual harassment or hostile work environment.”); *City of New York v. N.Y.S. Div. of Human Rights*, 283 A.D.2d 215, 216 (1st Dep’t 2001) (The award was based on substantial evidence that petitioners’ acts of unlawful discrimination against the claimant, including her immediate supervisor’s sexual harassment over a period of four months, petitioners’ failure to act on the claimant’s formal complaints made to other superiors, including petitioners’ equal opportunity office, and petitioners’ retaliation against the claimant for such complaints by twice disciplining and ultimately terminating her, caused the claimant to suffer emotional distress.”).

<sup>12</sup> *See e.g. Nathanson v. Commonwealth of Massachusetts*, 16 Mass.L.Rptr. 761 (Mass. Super. 2003) (law firm specializing in representing women in dissolution of marriage cases violated antidiscrimination law by refusing to represent prospective male client).

On the other hand, not all discriminatory conduct rises to the level of an 8.4(g) violation. For example, a lawyer who owns an apartment complex as a side business separate from his legal practice is not subject to discipline under 8.4(g) if he refuses to rent one of the apartments due to the applicant's national origin because, even though it may be unlawful, such conduct is not related to the practice of law. Likewise, unless it's "unlawful," a lawyer who makes sexist comments to opposing counsel during a real estate closing may not be subject to discipline under 8.4(g)—although he might face discipline under other Rules for that same conduct.<sup>13</sup>

Finally, although Rule 8.4(g) sets forth nine protected categories (age, race, creed, color, national origin, sex, disability, marital status or sexual orientation), the list is illustrative, not exclusionary (*i.e.* the list follows the word, "including"). Accordingly, a lawyer may be subject to discipline if he discriminates on the basis of a category not specifically listed in the Rule, as long as it amounts to "unlawful" discrimination and takes place "in the practice of law." For example, even though gender identity is not within the list of protected categories, a lawyer who discriminates against a transgender employee violates Rule 8.4(g).<sup>14</sup>

## **II. If Timely, a Complaint Must First Be Filed in a Tribunal other than the Attorney Grievance Commission**

In addition to the substantive components discussed above, New York 8.4(g) outlines certain procedures and limitations relating to the filing of a grievance. In relevant part, it states that, "[w]here there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance." As a result, a person wishing to bring an employment-based discrimination grievance against a lawyer in New York must first file with the EEOC, the New York State Division of Human Rights ("NYSDHR"), or the New York City Human Rights Commission ("NYCHRC"), if the statute of limitations has not yet run on those

---

<sup>13</sup> Although they do not address the "unlawful" prong, several decisions in New York cite to the predecessor of 8.4(g), among other Rules, when sanctioning lawyers for abusive sex or race-based harassment of opposing counsel during a deposition. *See e.g. Laddcap Value Partners LP v. Lowenstein Sandler PC*, 18 Misc.3d 1130(A), 2007 WL 4901555 (N.Y. County Sup. Ct. 2007) (among other Rules, predecessor to Rule 8.4(g) cited when sanctioning attorney for abusive conduct during a deposition directed at opposing counsel's gender and marital status). *Principe v. Assay Partners*, 154 Misc.2d 702, 586 N.Y.S.2d 182 (N.Y. County Sup. Ct. 1992) (same); *In re Monaghan*, 295 A.D.2d 38, 743 N.Y.S.2d 519 (2d Dep't 2002) (predecessor to Rule 8.4(g) cited among other Rules when deciding that attorney should be censured for race-based verbal harassment of opposing counsel during a deposition). In addition, as explained below, even if conduct during a deposition does not violate 8.4(g) as a result of it not being "unlawful", it may still serve as a basis for discipline under other rules, including 8.4(h). *See e.g. In re Teague*, 131 A.D.3d 268, 269, 15 N.Y.S.2d 312, 313 (1st Dep't 2015) (attorney disciplined for directing racist, sexist, and homophobic language to other attorneys).

<sup>14</sup> *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020) (Title VII prohibits discrimination on the basis of sexual orientation and gender identity). New York state law offers protections to individuals on the basis of "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, or domestic violence claimant status" under the NYCHRL. In addition to these protected categories, NYCHRL protects individuals in New York City from discrimination on the basis of "actual or perceived age . . . partnership status, caregiver status, sexual orientation, uniformed service or alienage or citizenship status." The law was recently updated to expand the definitions of "gender" and "sexual orientation" to afford greater protections to, among others, gender non-binary and gender non-conforming individuals.

claims. *See See* N.Y. Exec. Law § 296 (McKinney); N.Y. ADMIN CODE § 8-109. Under the clear language of the rule, a claimant wishing to bring a non-employment-based grievance must first file a claim in a tribunal with jurisdiction other than a Grievance Committee.

### **III. After Filing a Timely Complaint or Charge in another Tribunal, a Claimant Need Not Exhaust All Remedies Before Filing a Grievance**

Although Rule 8.4(g) requires that a complaint be filed in a tribunal other than the Grievance Committee, nothing in the language of the Rule requires that a claimant *exhaust* all judicial remedies before filing a grievance premised on discriminatory conduct. Accordingly, once the complaint is filed in another tribunal, the claimant may file a grievance against the attorney without seeing her case through to the end of the judicial process. At that point, the Grievance Committee can decide whether it will wait for the other tribunal to issue a final ruling, or commence parallel proceedings.

As a practical matter, there may be good reason for a Grievance Committee to wait until the other tribunal issues its final ruling in the underlying case—not the least of which being that a final determination that the lawyer has engaged in unlawful discriminatory practice constitutes *prima facie* evidence of misconduct in the disciplinary proceeding. *See* Rule 8.4(g). This allows a Grievance Committee to preserve its resources and avoid potentially inconsistent results.

However, equally compelling reasons would support a Grievance Committee’s decision to commence proceedings against a lawyer under Rule 8.4(g) without waiting for a final judgment to come from another tribunal. For example, the attorney’s alleged misconduct may be so egregious that, at the very least, the Grievance Committee may want to consider whether interim suspension is appropriate until the matter is fully investigated.<sup>15</sup> Alternatively, a Grievance Committee might also want to quickly dispose of a grievance if it is clear that the allegations do not give rise to a violation of the Rule (*i.e.* the underlying conduct is obviously unrelated to the practice of law). Ultimately, the attorney grievance process in New York has proven to be fully capable of handling complaints of racial, gender and ethnic discrimination by lawyers without first waiting for another tribunal’s findings and we see no basis in the text or history of Rule 8.4(g) to limit a grievance committee’s oversight.<sup>16</sup>

---

<sup>15</sup> In addition, because a complaint based on discrimination will often involve both Rules 8.4(g) and 8.4(h), as a practical matter, the Grievance Committee may think it prudent to initiate its investigation into the underlying conduct before a final ruling in another tribunal. Indeed, it would make little sense for the Grievance Committee to be prohibited from reviewing conduct under 8.4(g) if that same conduct is the subject of disciplinary proceedings addressing 8.4(h) violations.

<sup>16</sup> Attorneys have also been disciplined for discriminatory conduct under Rule 8.4(h), which prohibits a lawyer or law firm from ‘engag[ing] in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.’ For instance, in *In re Kahn*, 16 A.D.3d 7, 8 (1st Dep’t 2005), an attorney on the First Department’s 18-B panel was found to have violated the predecessor to Rule 8.4(h) for engaging in a “pattern of misconduct involving sexually oriented or other offensive comments directed at female attorneys” associated with the Corporation Counsel’s Office. Similarly, in *In re Isaac*, 76 A.D.3d 48 (1st Dep’t 2010), an attorney was found to have violated Rule 8.4(h)’s predecessor when secretly recorded telephone conversations revealed that he made unwelcome sexual advances to his client. And in *In re Teague*, 131 A.D.3d 268, 269 (1st Dep’t 2015), a sole practitioner was found to have violated Rule 8.4(h) for making “patently offensive racial, ethnic, homophobic, sexist, and other derogatory

In addition to its plain meaning, the Committee believes that reading the Rule in any other way would undermine its fundamental purpose, which is to deter and rectify discriminatory misconduct by attorneys. For example, a claimant of unlawful discrimination who has litigated a sexual harassment case for a number of years may not have the desire to file a complaint with the Grievance Committee after having spent years fighting the claim in court.<sup>17</sup>

Accordingly, neither the language nor purpose of 8.4(g) supports barring a claimant from filing a grievance prior to exhausting judicial remedies. At the point of filing, a Grievance Committee can decide to wait until a final judgment in the other tribunal and use that judgment as *prima facie* evidence, or, if the circumstances warrant, decide to open a parallel investigation into the claimant's allegations.

#### **IV. Rule 8.4(g) Does Not Prohibit A Grievance Based on Unlawful Discrimination Where the Statute of Limitations May Have Already Expired**

Unlike timely complaints that can be filed in another tribunal, Rule 8.4(g) does not expressly address the question of whether a claimant forfeits her right to bring a complaint before a Grievance Committee if she fails to commence a proceeding before another tribunal within the statute of limitations period. Notwithstanding that gap in the Rule, we believe that a claimant of unlawful discrimination may file a grievance with the Grievance Committee even if the statute of limitations on her legal claims has expired. We reach this conclusion for several reasons.

First, the requirement that a complaint of discrimination be filed in another tribunal is only triggered if the complaint can be "timely" filed. *See* Rule 8.4(g) ("[w]here there is a tribunal with jurisdiction to hear a complaint, *if timely brought...*") (emphasis added). There is no language in the rule to suggest that a claimant forfeits her right to file a grievance if the statute of limitations on her legal claim has expired, nor is there any language that prohibits a Grievance Committee from reviewing such a grievance. Rather, as explained above, the purpose of this procedural requirement is to avoid inconsistent determinations where another forum still has jurisdiction over the claims. Where a complainant's legal claims may have lapsed, the same concerns do not exist.

Second, precluding a claimant from filing a complaint with a Grievance Committee simply because the statutes of limitations on her legal claims have expired does not serve the ultimate goal of the Rule, and prevents the profession from properly regulating misconduct that is often underreported due, in part, to the trauma that frequently accompanies discrimination and harassment. Such trauma, which may include feelings of shame and humiliation, depression, and fear of retaliation, may cause the claimant to either delay filing a legal claim, or forego filing one

---

remarks to attorneys..." In these cases, the courts relied on 8.4(h), not 8.4(g), as the basis for discipline, presumably because no law or order had been violated.

<sup>17</sup> *See* Beverly Engel, *Why Don't Claimants of Sexual Harassment Come Forward Sooner*, November 16, 2017, [www.psychologytoday.com](http://www.psychologytoday.com) ("Studies have found a link between claimants of sexual harassment and [post-traumatic stress disorder], which causes the claimant to re-live the harassment and avoid situations where it could happen again.").

altogether.<sup>18</sup> Similarly, because discrimination can manifest itself in subtle and imperceptive ways, victims of discrimination are often unaware of the underlying discriminatory conduct until the relevant statute of limitations has already run.<sup>19</sup> Thus, allowing a claimant to file a complaint with the Grievance Committee even though the statute of limitations on her legal claims has expired, is not only consistent with the plain language of the Rule, but it is also consistent with a present-day understanding of the debilitation that often accompanies experiences of discrimination and harassment.

The Committee understands that some may claim that this interpretation of Rule 8.4(g) may lead to “gamesmanship;” that is, some claimants may intentionally avoid timely filing a legal complaint with a tribunal with jurisdiction in order to file a complaint before a Grievance Committee. Inasmuch as a claimant stands nothing to gain monetarily from complaining about a lawyer’s conduct to a grievance committee, we do not consider it likely that the claimant would forego legal action for the purpose of being able to file a disciplinary complaint first. Simply put, there appears to be little to no incentive for a claimant to allow her legal claims to go stale for the sole benefit of being able to file a grievance in the first instance. Moreover, a claimant who has doubts about the legal merits of her action would not gain an advantage by letting the statute of limitations expire because her complaint before the Grievance Committee would still be subject to rigorous scrutiny.

Finally, at least in some instances, the person filing the grievance might be another lawyer who feels obligated under Rule 8.3(a) to report misconduct that “raises a substantial question as to [the other lawyer’s] honesty, trustworthiness or fitness as a lawyer.” We believe that it makes little sense to bar the victim herself from pursuing a grievance simply because the statute of limitations ran on her legal claims, when a third party is permitted to file the same grievance directly with the disciplinary authorities regardless of any statute of limitations. As noted, the plain language of Rule 8.4(g) does not require such a lopsided and unjust result.

Accordingly, we conclude that Rule 8.4(g) permits a person to file a grievance in the first instance even if the statute of limitations has run and she is barred from first filing a complaint in another tribunal.

## **V. Conclusion**

The New York Rules of Professional Conduct prohibit a lawyer from engaging in various forms of unlawful discrimination. Under 8.4(g), a lawyer may be disciplined if he discriminates against another person while engaged in the practice of law to the extent such conduct violates a law, regulation, rule or court order. If the statute of limitations has not run, a claimant alleging discrimination against a lawyer must first file a complaint or charge in a tribunal other than an Attorney Grievance Committee, but need not exhaust judicial remedies before filing the

---

<sup>18</sup> See Engel, *supra*.

<sup>19</sup> For example, prior to the Lilly Ledbetter Fair Pay Act of 2009, victims of pay discrimination were often barred from bringing claims against their employers because they had no way of knowing that they were earning less than their male counterparts before the relevant limitations period had run. See <https://www.congress.gov/bill/111th-congress/senate-bill/181>.

grievance. The Grievance Committee can decide whether to investigate at that time, or defer its investigation until the other tribunal has issued a final decision in the case. If the statute of limitations has run on a person's legal claims, Rule 8.4(g) does not bar a claimant from filing a grievance.