

Taking #MeToo Seriously in the Legal Profession

KATHERINE YON EBRIGHT*

TABLE OF CONTENTS

| | |
|---|----|
| INTRODUCTION | 58 |
| I. DEFINING MISCONDUCT | 60 |
| A. THE MODEL RULES PROVISIONS. | 60 |
| 1. CRIMINAL ACTS REFLECTING ADVERSELY ON A LAWYER’S FITNESS TO PRACTICE LAW. | 61 |
| 2. CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE. | 64 |
| 3. CONDUCT REASONABLY IDENTIFIABLE AS HARASSMENT ON THE BASIS OF SEX. | 65 |
| B. BEYOND THE MODEL RULES | 66 |
| II. DISCIPLINE, IN PRACTICE | 67 |
| A. TRENDS IN ENFORCEMENT. | 68 |
| 1. SEXUAL MISCONDUCT | 68 |
| 2. DOMESTIC VIOLENCE. | 69 |
| B. POTENTIAL EXPLANATIONS FOR NONENFORCEMENT. | 70 |
| 1. LACK OF CLARITY IN THE RULES | 70 |
| 2. SENSITIVE SUBJECT MATTER. | 71 |
| III. REFORMING THE RULES AND PROCEDURES. | 73 |
| A. CLARIFYING THE RULES. | 73 |
| B. ANONYMOUS REPORTING AND/OR PROTECTIONS AGAINST RETALIATION | 74 |
| C. AMENDMENT TO RULE 8.3 | 74 |
| CONCLUSION. | 75 |

* Law Fellow at the Public International Law & Policy Group. © 2019, Katherine Yon Ebright.

INTRODUCTION

On July 9, 2018, Judge Kavanaugh was nominated to be a Justice of the Supreme Court. He was subsequently accused of numerous counts of sexual assault and was confirmed, notwithstanding the allegations. His confirmation process raised, in the most salient and unavoidable way, the very questions this Article seeks to address. Namely, does perpetration of gender violence bear on an attorney's fitness to practice law, and why might those affected by gender violence refrain from reporting?

A common response to the Kavanaugh allegations was that, even if true, they should not matter. A man's history of committing acts of gender violence should have no bearing on his elevation to the most exalted and influential position in the legal profession. One poll found that fifty-five percent of Republican respondents would not find a "proven" assault disqualifying.¹ Republican Senators who voted in favor of confirmation stated that they found Christine Blasey Ford, the first of Justice Kavanaugh's accusers to come forward, "credible."² One can connect the dots to determine that these Senators simply did not care about Justice Kavanaugh's past conduct.³ Blasey Ford was right to wonder if she would, by speaking out, "just be jumping in front of a train that was headed to where it was headed anyway."⁴

Disregard for the professional significance of gender violence went hand-in-hand with obliviousness of the obstacles to reporting gender violence. Justice Kavanaugh's accusers not only heard that their experiences were immaterial; they also were called liars, part of a "calculated and orchestrated political hit fueled with apparent pent-up anger about President Trump and the 2016 election."⁵ If these women had in fact been assaulted, why did they not report

1. The Economist/*YouGov Poll, Sept. 23–25, 2018—1500 US Adults*, YOU.GOV, https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/m6ng12ro4y/econTabReport.pdf [<https://perma.cc/A3YT-AZZN>].

2. See, e.g., Nina Totenberg, *Emotions Dominate Ford and Kavanaugh Testimony*, NPR (Sept. 28, 2018, 7:05 AM), <https://www.npr.org/2018/09/28/652492679/emotions-dominate-ford-and-kavanaugh-testimony> [<https://perma.cc/4M2S-PN2L>] (quoting Senator Grassley); Alexander Bolton & Jordain Carney, *GOP Senator Calls Ford "Credible"*, THE HILL (Sept. 27, 2018, 2:19 PM), <https://thehill.com/homenews/senate/408789-gop-senator-calls-ford-credible> [<https://perma.cc/242B-KBKN>] (quoting Senator Shelby).

3. See Rebecca Hamilton, *She's Credible, So Long As Her Attacker Is Not Our Guy*, JUST SECURITY (Sept. 28, 2018), <https://www.justsecurity.org/60903/credible-long-attacker-guy-kavanaugh-ford/> [<https://perma.cc/74F2-KEF2>]; see also Thomas Burr, *Nearly Three Decades After Anita Hill Came Forward, Sen. Orrin Hatch Again Sides with the Accused*, THE SALT LAKE TRIBUNE (Sept. 23, 2018), <https://www.sltrib.com/news/politics/2018/09/23/nearly-three-decades/> [<https://perma.cc/S76X-XWB3>] (highlighting Senator Hatch's position that Judge Kavanaugh, even if he did sexually assault his accusers, is a "good man" who should be confirmed).

4. *Supreme Court Nominee Brett Kavanaugh Sexual Assault Hearing, Professor Blasey Ford Testimony*, C-SPAN (Sept. 27, 2018), <https://www.c-span.org/video/?451895-1/professor-blasey-ford-testifies-sexual-assault-allegations-part-1> [<https://perma.cc/JBE9-QTJS>].

5. *Supreme Court Nominee Brett Kavanaugh Sexual Assault Hearing, Judge Kavanaugh Testimony*, C-SPAN (Sept. 27, 2018), <https://www.c-span.org/video/?451895-2/supreme-court-nominee-brett-kavanaugh-sexual-assault-hearing-judge-kavanaugh-testimony> [<https://perma.cc/57XA-WCCJ>].

immediately? This question, posed rhetorically by Justice Kavanaugh's supporters,⁶ has many potential answers that are not predicated on a categorical disbelief of accusers or delayed accusations. In brief, reporting can be very difficult and is generally unrewarding. Until legal structures and cultural norms shift to make reporting safer, more accessible, and more fruitful, those affected by gender violence will continue to make delayed reports, if they report at all.

Of course, not every allegation of gender violence is made against a federal judge or related to a matter as weighty and political as the confirmation of a Supreme Court Justice. The same issues, though—the relevance of acts of gender violence and the limited reporting of such acts—arise in the case of everyday attorneys. And the legal profession's approach to these issues, evident in the way that the legal profession regulates itself, shows that the legal profession does not take gender violence, let alone less overt forms of gender discrimination, seriously. Attorneys are rarely professionally sanctioned for committing rape, sexual assault, sexual harassment, or domestic violence. Indeed, some jurisdictions have interpreted these gendered acts as falling outside the ambit of the rules of professional conduct.⁷ In those jurisdictions, an attorney can be professionally sanctioned for failing to file his tax returns but not for threatening his wife with imminent bodily harm.

With this landscape for professional “ethics,” is it any surprise that one in every five white, female attorneys, and one in every four non-white, female attorneys, has experienced harassment in the workplace?⁸ That the prevalence of sexual harassment contributes to the dearth of women at the highest levels of the legal profession?⁹ That female clients and witnesses also face assault or harassment?¹⁰ It can safely be assumed that this has led to worse outcomes, on average, for female legal professionals, litigants, and victims of criminal activity—that it has created legal regimes that are under-protective of women's rights and wellbeing.

6. German Lopez, *Why Didn't Kavanaugh's Accuser Come Forward Earlier? Police Often Ignore Sexual Assault Allegations*, VOX (Sept. 19, 2018), <https://www.vox.com/policy-and-politics/2018/9/19/17878450/kavanaugh-ford-sexual-assault-rape-accusations-police> [<https://perma.cc/FCB8-7TTP>]; see also Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 21, 2018, 6:14 AM), <https://twitter.com/realDonaldTrump/status/1043126336473055235> [<https://perma.cc/N388-Q9AG>] (“I have no doubt that, if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law Enforcement Authorities by either her or her loving parents.”).

7. See *infra* Part I.A.1.

8. Heather Antecol et al., *Bias in the Legal Profession: Self-Assessed Versus Statistical Measures of Discrimination*, 43 J. LEG. STUD. 323, 332–33 (2014).

9. See generally Amanda J. Albert, *The Use of MacKinnon's Dominance Feminism to Evaluate and Effectuate the Advancement of Women Lawyers as Leaders Within Large Law Firms*, 35 HOFSTRA L. REV. 291 (2006).

10. See, e.g., Iowa Supreme Court Attorney Disciplinary Bd. v. Moothart, 860 N.W.2d 598, 615–16 (Iowa 2015) (enumerating cases in which attorneys were professionally disciplined for harassing or assaulting clients); *In re Disciplinary Proceedings Against Kratz*, 851 N.W.2d 219 (Wis. 2014).

This Article examines how the legal profession has thus far addressed gender violence and harassment, as well as how it might do so in the future. Part I reviews different states' rules of professional conduct and their interpretations with respect to gender violence and harassment. It homes in on state-to-state discrepancies in interpreting certain shared provisions that could be used for disciplining rape, sexual assault, sexual harassment, and domestic violence. Part II then reviews enforcement patterns for states that either do or might professionally sanction gender violence and harassment. Noting that enforcement rates are staggeringly low, Part II identifies deficiencies in the rules of professional conduct that permit abusers to keep practicing without professional sanction. Part III concludes by proposing a series of reforms which would harmonize states' understandings of gender violence and harassment and address, to some extent, the enforcement problem.

I. DEFINING MISCONDUCT

A slight majority of states have published cases or administrative decisions regarding discipline of an attorney for gender violence or harassment, as a violation of contemporary rules of professional conduct. Though most states have nearly identical, if not precisely identical, rules of professional conduct, there exists no consensus on how gender violence or harassment ought to be treated. This Part enumerates the different provisions under which gender violence and harassment have been analyzed by courts and disciplinary boards. It first discusses the relevant provisions included in the American Bar Association ("ABA") *Model Rules of Professional Conduct*. It then discusses relevant provisions beyond the *Model Rules*, adopted by several states to augment the ABA's proposal.

A. THE MODEL RULES PROVISIONS

The ABA *Model Rules* include Rule 8.4 on "Misconduct," generally. Rule 8.4 is meant to serve as a catch-all provision, geared toward "maintaining the integrity of the profession" rather than addressing any particular species of indiscretion.¹¹

Several provisions of Rule 8.4 have been adopted by the vast majority of states. Relevantly, Rule 8.4 states that it is "professional misconduct" for a lawyer to:

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

...

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

...

11. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2016) [hereinafter MODEL RULES].

- (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.¹²

Each of these provisions has been used as a basis for disciplining attorneys who have committed gender violence or harassment.

1. CRIMINAL ACTS REFLECTING ADVERSELY ON A LAWYER'S FITNESS TO PRACTICE LAW

Most cases regarding attorney discipline for gender violence or harassment involve some analysis of Rule 8.4(b).¹³ The ABA comments to Rule 8.4(b) suggest discipline for only certain types of criminal conduct, leaving states to determine individually on which side of the line gender violence and harassment fall.

The ABA comment associated with Rule 8.4(b) provides that “a lawyer is personally answerable to the entire criminal law [but] should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.”¹⁴ The ABA comment proposes that crimes involving “violence . . . or serious interference with the administration of justice” bear on an attorney’s fitness to practice law.¹⁵ Additionally, repeat offenses, even if of “minor significance when considered separately,” might indicate “indifference to legal obligation” and thus bear on an attorney’s fitness to practice law.¹⁶

The ABA comment also specifies that not all crimes involving “moral turpitude” are relevant to law practice.¹⁷ It singles out adultery as one such crime, for which sanction would be inappropriate.¹⁸ The ABA comment provides no further guidance in determining what kind of crimes, or underlying conduct, should fall within the scope of Rule 8.4(b).¹⁹ Accordingly, state courts and disciplinary boards have had to determine, on a case-by-case basis, when an attorney’s criminal conduct implicates his fitness to practice law.

12. MODEL RULES R. 8.4.

13. MODEL RULES R. 8.4.

14. MODEL RULES R. 8.4 cmt. 2.

15. MODEL RULES R. 8.4 cmt. 2.

16. MODEL RULES R. 8.4 cmt. 2.

17. MODEL RULES R. 8.4 cmt. 2.

18. MODEL RULES R. 8.4 cmt. 2.

19. This lack of guidance has long frustrated courts and disciplinary boards. *See, e.g.,* Att’y Grievance Comm’n v. Carpenter, No. 93-261-GA (Mich. Att’y Discipline Bd. Feb. 13, 1993) (“Recently, the Attorney Discipline Board has been faced with several cases involving lawyers who have engaged in offensive conduct not directly related to the practice of law There is no claim that Respondent is not competent. And, his conduct was not related to honesty or trustworthiness. The questions thus become what is meant by the phrase ‘fitness as a lawyer,’ and does the phrase include Respondent’s conduct. *There are no Michigan cases directly on point.* The argument is that because Respondent has committed serious and offensive acts, he is unfit to be a lawyer. *We would welcome guidance on the important questions of what is meant by the phrase ‘fitness as a lawyer,’ and assuming (which we do) that Respondent’s conduct comes within the definition, how to assess discipline in such situations.*”) (emphasis added).

States differ in how broadly they understand attorneys' obligations, which in turn affects their analyses of what conduct implicates attorneys' fitness to practice law. New Jersey, Colorado, Oklahoma, and Delaware, for example, all take a maximalist approach. In New Jersey, "[a]n attorney is obligated to adhere to the high standard of conduct required of every member of the bar, even when the activities do not directly involve the practice of law."²⁰ *In re X*, a 1990 case before the New Jersey Supreme Court, declared that when an attorney commits a crime, he "imperils not only himself, but also the honor and integrity of his profession. He undermines the public trust and confidence in his profession as a whole."²¹ Colorado has adopted a similar approach, recognizing that each attorney has a "duty to maintain his personal integrity."²² When an attorney engages in criminal conduct, he undermines his personal integrity and "damage[s] the public's trust in the legal profession."²³ The Oklahoma Supreme Court has suggested that attorneys must refrain from engaging in conduct "likely to undermine public confidence in and perception of the legal profession as a community of law-abiding practitioners."²⁴ The commission of any crime thereby relates to an attorney's fitness to practice law. The maximalist approach²⁵ is tantamount to saying, as the Delaware Supreme Court has, that "[t]he conduct of a person is always relevant to the question of fitness to practice law."²⁶

Both New Jersey and Colorado, given their maximalist approach, are leaders in addressing attorney-perpetrated gender violence and harassment. The New Jersey Supreme Court has called sexual assault "an offense that brings reproach upon the entire profession."²⁷ Similarly, the Colorado Supreme Court has noted that sexual assault is a "crime of moral turpitude" that "seriously adversely reflects on a lawyer's fitness to practice law."²⁸ New Jersey was one of the first states in which attorneys were disciplined for perpetrating domestic violence.²⁹

20. *In re X*, 120 N.J. 459, 462 (1990).

21. *Id.*

22. *People v. Falco*, No. 15PDJ101, 2016 WL 4442171, at *5 (Colo. O.P.D.J. July 7, 2016).

23. *Id.*

24. *State ex rel. Okla. Bar Ass'n v. Zannotti*, 330 P.3d 11, 15 (Okla. 2014) ("A lawyer's violent acts in the form of domestic abuse demonstrate a lawyer's unfitness to practice law . . . Respondent's acts show a disregard for the laws that he has sworn to uphold and for the rules governing lawyers' conduct.")

25. Massachusetts takes a small step back from the New Jersey, Colorado, and Oklahoma position, focusing specifically on violent criminal conduct rather than criminal conduct, generally. *In re Grella*, 438 Mass. 47, 52 (2002) ("The essence of the conduct of a lawyer is to facilitate the resolution of conflicts without recourse to violence, for law is the alternative to violence. Engaging in violent conduct is antithetical to the privilege of practicing law, and such conduct generally will warrant suspension from the practice of law."). New York and Ohio reach outcomes similar to those reached in New Jersey, Colorado, and Oklahoma, but their statements regarding attorney fitness are conclusory.

26. *In re Tenenbaum*, 918 A.2d 1109 (Del. 2007) (regarding repeated sexual assault and harassment of clients).

27. *In re X*, 120 N.J. 459, 462 (1990).

28. *People v. Benight*, No. 16PDJ032, 2016 WL 7856476, at *4 n.19 (Colo. O.P.D.J. Dec. 8, 2016).

29. *In re Principato*, 139 N.J. 456, 461, 463 (1995); see also *In re Ferguson*, No. BD-2004-055, 2005 WL 5177185, at *10 (Ma. St. Bar. Disp. Bd. Oct. 26, 2005) ("Domestic violence is indeed serious misconduct that

More recently, Colorado's *In re Jacoby* stated, "While respondent may not have engaged in physical aggression in his professional life, it cannot be overemphasized that his abuse of his spouse reflects adversely on his fitness to practice law."³⁰

The maximalist approach largely ignores the ABA comment suggesting that an attorney's fitness to practice law is not implicated by every crime and should not turn on a crime's moral turpitude.³¹ To avoid this criticism, several states require more than an isolated act of gender violence or harassment to sustain a violation of Rule 8.4(b). In *In re Walker*, the Indiana Supreme Court found that Rule 8.4(b) called for a "nexus between the misconduct and the Respondent's duties to his clients, the courts, or the legal system"³² before an attorney could be sanctioned. The Indiana Supreme Court then found such a nexus between the attorney-respondent's act of domestic violence and his particular law practice:

As a part-time prosecutor, Respondent inevitably encounters domestic assaults, and this incident calls into question his ability to zealously prosecute or to effectively work with the victims of such crimes. As a part-time practitioner [in family law], Respondent's effectiveness with his own clients or with adversaries in situations involving issues of domestic violence is compromised by his own contribution to this escalating societal problem.³³

The Iowa Supreme Court has made a similar move to justify disciplining a family law practitioner who had committed domestic violence. It argued that "[a] lawyer engaged in the practice of family law who engages in acts of domestic abuse may be less effective in screening and addressing similar incidents of abuse experienced by clients."³⁴ Impliedly, had the attorney-respondent practiced in a different area of law, he would have evaded professional sanction for assaulting his girlfriend.

adversely reflects on a respondent's fitness to practice law. We find especially compelling the New Jersey Supreme Court's observation that a lawyer's violent acts betray "[t]he essence of the conduct of a lawyer . . . to facilitate the resolution of conflicts without recourse to violence, for law is the alternative to violence." (quoting *In re Magid*, 655 A.2d 916 (N.J. 1995)).

30. *In re Jacoby*, 926 N.Y.S.2d 480, 483 (2011).

31. After all, *People v. Benight*, *supra* note 28, refers to sexual assault as a crime of moral turpitude. On the other hand, the approach adopted by New Jersey, Colorado, and Massachusetts is consistent with the ABA comment's suggestion that crimes involving "violence" bear on attorney fitness.

32. *In re Walker*, 597 N.E.2d 1271, 1272 (Ind. 1992); see also *In re Conduct of White*, 815 P.2d 1257, 1265 (Or. 1991) (en banc) ("To some extent, every criminal act shows lack of support for our laws and diminishes public confidence in lawyers, thereby reflecting adversely on a lawyer's fitness to practice. [The Rules do] not sweep so broadly, however. For example, a misdemeanor assault arising from a private dispute would not, in and of itself, violate that rule. . . . Each case must be decided on its own facts. There must be some rational connection other than the criminality of the act between the conduct and the actor's fitness to practice law.").

33. *Walker*, 597 N.E.2d at 1272.

34. Iowa Supreme Court Attorney Disciplinary Bd. v. Deremiah, 875 N.W.2d 728, 737 (Iowa 2016) (finding that domestic violence by family law practitioners violates 8.4(b) even if domestic violence otherwise does not implicate an attorney's fitness to practice law).

As a result of the nexus requirement, several states have declined to find attorneys in violation of Rule 8.4(b) for committing sexual assault and domestic violence. *Attorney Grievance Commission of Maryland v. Eckel* found that the attorney-respondent violated Rule 8.4(b) based on his conviction for assault in the second degree—but not for his conviction for a sexual offense in the fourth degree.³⁵ *Disciplinary Counsel v. Hanson*, a Connecticut case, suggested that charges of sexual assault in the second degree, unlike charges of “fraud, forgery, larceny . . . of client’s funds and the like,” fall beyond the ambit of Rule 8.4; the Connecticut court declined to suspend the attorney-respondent.³⁶ *In re Disciplinary Action Against Stoneburner*, Minnesota’s first case regarding a disciplinary action for domestic violence, found no violation of Rule 8.4(b), notwithstanding the attorney-respondent’s domestic assault-fear conviction.³⁷ Key to the Minnesota Supreme Court’s decision was the fact that “Stoneburner’s conduct was not related to his practice of law and did not harm any of his clients.”³⁸

2. CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

There no longer is an ABA comment directly associated with Rule 8.4(d), the subsection of Rule 8.4 proscribing conduct “prejudicial to the administration of justice.” Prior to the ABA’s addition of Rule 8.4(g) to the *Model Rules*, there was a comment suggesting that class-based harassment or discrimination committed in the course of a representation was prejudicial to the administration of justice.³⁹ Now, in light of Rule 8.4(g), states must determine for themselves what kind of conduct is prejudicial.

In accordance with the old ABA comment, states generally used Rule 8.4(d) to address workplace harassment. The Kansas Supreme Court found a violation of Rule 8.4(d) when an attorney-respondent “engaged in a pattern of inappropriate sexual conduct with five Administrative Assistants of the Johnson County District Court.”⁴⁰ *In re Brown*, an Indiana case, identified a Rule 8.4(d) violation in the attorney-respondent’s “creation and perpetuation of a work environment infected with inappropriate and unwelcome sexual advances . . . a degraded work atmosphere and a negative impact on the public’s perception of the judiciary.”⁴¹ Rule 8.4(d) has also been used to address sexual harassment in the attorney-client relationship. *Disciplinary Counsel v. Moore*, an Ohio case, found that an

35. *Att’y Grievance Comm’n of Md. v. Eckel*, 115 A.3d 142, 150 (Md. 2015).

36. *Disciplinary Counsel v. Hanson*, No. CV054017144, 2006 WL 2349162, at *4 (Conn. Super. Ct. July 28, 2006).

37. *In re Disciplinary Action Against Stoneburner*, 882 N.W.2d 200, 204–05 (Minn. 2016).

38. *Id.* at 204.

39. Katie Marie Wroten, Note, “G” Is More Than “PC” for Georgia: Why Prospective Adoption of ABA Model Rule 8.4(g) Is a Viable Measure to Combat Discrimination and Harassment, 52 GA. L. REV. 341, 355 (2017) (noting that Rule 8.4(g) “grew out of” the former comment for Rule 8.4(d)).

40. *In re Depew*, 237 P.3d 24, 26 (Kan. 2010).

41. *In re Brown*, 703 N.E.2d 1041, 1044 (Ind. 1998).

attorney-respondent's "unsolicited sexual remarks," which had "shocked and violated" his client, were prejudicial to the administration of justice.⁴²

This is not, however, the only manner in which Rule 8.4(d) has been invoked. Underscoring the legal profession's confusion over how to address gender violence and harassment, some states have used Rule 8.4(d) in a manner akin to how other states use Rule 8.4(b).⁴³ In *Lawyer Disciplinary Bd. v. Albers*, the West Virginia Supreme Court determined that the attorney-respondent violated Rule 8.4(d) when she ignored a domestic violence protective order. Though the attorney-respondent "ha[d] never violated any duty owed to a client," the West Virginia Supreme Court reasoned that her "self-destructive behavior violated duties to both the public and to the legal system."⁴⁴ Maryland, which requires a nexus between Rule 8.4(b) misconduct and law practice, has found that committing domestic violence instead violates Rule 8.4(d). In *Attorney Grievance Commission of Maryland v. Painter*, the Maryland Supreme Court declared that Rule 8.4(d) "delegates or confirms to the courts the power and duty to consider particular conduct of one who is an officer of the court, in relation to the privileges and duties of a public calling that specially invites complete trust and confidence."⁴⁵ Domestic violence, which is "contrary to the policy" of Maryland, violates that trust and confidence.⁴⁶

3. CONDUCT REASONABLY IDENTIFIABLE AS HARASSMENT ON THE BASIS OF SEX

In 2016, the ABA added Rule 8.4(g) to its *Model Rules*. Rule 8.4(g) expressly addresses sexual harassment. The ABA comments on Rule 8.4(g) expound this point, clarifying that "sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature."⁴⁷ They further clarify that the prohibition on harassment applies to a variety of professional and quasi-professional settings, ranging from the representation of clients to participation in bar association, business, or social activities in connection with the practice of law.⁴⁸

The relationship between Rule 8.4(d) and Rule 8.4(g) is as yet unclear. At least one case has found a violation of Rule 8.4(g) without a violation of Rule 8.4(d). *In re Witherspoon*, a New Jersey Supreme Court case, found that the attorney-

42. *Disciplinary Counsel v. Moore*, 804 N.E.2d 423, 424–25 (Ohio 2004).

43. New Mexico does not have reported cases on discipline for gender violence or harassment. In its comments to its Rule 8.4, however, New Mexico provides that, "Sexual misconduct or sexual harassment involving colleagues, clients, or co-workers may violate paragraph (d). This could occur, for example, where coercion or undue influence is used to obtain sexual favor in exploitation of these relationships." N.M. RULES OF PROFESSIONAL CONDUCT R. 16-804 cmt. 1.

44. *Lawyer Disciplinary Bd. v. Albers*, 639 S.E.2d 796, 800 (W. Va. 2006).

45. *Att'y Grievance Comm'n of Md. v. Painter*, 356 Md. 293, 306 (1999).

46. *Id.* at 307. The attorney-respondent in *Painter* had been indicted on a 12-count indictment alleging physical and verbal abuse of his wife and two children. *Id.* at 296.

47. MODEL RULES R. 8.4 cmt. 3.

48. MODEL RULES R. 8.4 cmt. 4.

respondent's sexual harassment of four clients was not prejudicial to the administration of justice because the attorney-respondent did not have the purpose of embarrassing, burdening, or delaying the clients.⁴⁹ This single case might be an outlier. It is not evident that the prohibition on sexual harassment articulated in Rule 8.4(g) was meant to supplant the prohibition on sexual harassment several states had previously identified in Rule 8.4(d).

B. BEYOND THE MODEL RULES

In addition to the varying state practice regarding ABA Model Rule 8.4, several states have their own provisions under which they assess, or could assess, disciplinary actions regarding gender violence or harassment. Most notably, Kansas, Massachusetts, New Mexico, New York, Ohio, and Washington provide, in addition to Rule 8.4(b), that attorneys can be sanctioned for engaging in "any other conduct that adversely reflects on the lawyer's fitness to practice law."⁵⁰ As the Massachusetts comment to its rule suggests, this prohibits conduct "even if [it] does not constitute a criminal . . . act."⁵¹ Thus, if some act of gender violence or harassment did not rise to the level of criminal conduct, that act could still constitute professional misconduct and warrant sanction. In practice, however, violations of these provisions have only been found alongside other violations of Rule 8.4.⁵²

South Carolina, in addition to Rule 8.4(b), has a provision that prohibits any "criminal act involving moral turpitude."⁵³ Texas sets the bar an inch higher, prohibiting any "felony involving moral turpitude."⁵⁴ These provisions inarguably permit discipline even in the absence of a nexus between the misconduct at issue and an attorney's law practice. They reflect a definition of misconduct once endorsed by the ABA but since abandoned on the theory that crimes like adultery, which have no bearing on an attorney's ability to practice law, do not warrant sanction.

Though there are risks in permitting disciplinary boards and courts to decide what conduct involves moral turpitude, e.g. over-enforcement or discriminatory enforcement, one reward is that crimes regarding gender violence and harassment are sanctionable. South Carolina has found that criminal sexual conduct in the

49. See *In re Witherspoon*, 3 A.3d 496 (N.J. 2010). Prior to its addition to the MODEL RULES, Rule 8.4(g) was adopted and applied by a handful of states.

50. KAN. RULES OF PROF'L CONDUCT r. 8.4(g) (2018); MASS. RULES OF PROF'L CONDUCT R. 8.4(h) (2018); N.M. RULES OF PROF'L CONDUCT R. 16-804(B) (2019); N.Y. RULES OF PROF'L CONDUCT R. 8.4(h) (2018); OHIO RULES OF PROF'L CONDUCT r. 8.4(h) (2018); WASH. RULES OF PROF'L CONDUCT R. 8.4(n) (2018) (misconduct includes "engag[ing] in conduct demonstrating unfitness to practice law").

51. MASS. RULES OF PROF'L CONDUCT R. 8.4 cmt. 7 (2018).

52. See, e.g., *In re Depew*, 290 Kan. 1057 (2010) (finding that sexual harassment violates Rule 8.4(d) and Rule 8.4(g)); *In re Joel Pentlurge*, BD-2000-050, 2001 WL 34313037, at *1 (Ma. St. Bar. Bd. Jan. 30, 2011) (finding that rape violates Rule 8.4(b) and Rule 8.4(h)).

53. S.C. RULES OF PROF'L CONDUCT R. 8.4(c) (2018).

54. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.4(a)(2) (2018).

third degree and criminal domestic violence involve moral turpitude and thus warrant sanction.⁵⁵ Indeed, *In re Broome*, which sanctioned an attorney-respondent for criminal sexual conduct in the third degree, did not identify any Rule 8.4(b) violation.⁵⁶ The South Carolina Supreme Court did not have to assess whether the attorney-respondent's criminal activity affected his clients, nor did it have to argue that the attorney-respondent was unfit to practice law by virtue of his private conduct.

Finally, Louisiana has modified Rule 8.4(b) to read: “[i]t is professional misconduct for a lawyer to . . . (b) Commit a criminal act *especially* one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.”⁵⁷ By its plain text, the Louisiana modification renders all criminal conduct professional misconduct. Louisiana has no reported cases regarding gender violence or harassment outside of an attorney's law practice, but language from *In re Ashy*—regarding a sexually exploitative attorney-client relationship—suggests that the Louisiana Supreme Court may not interpret its Rule 8.4(b) as broadly as the text allows. In that case, the Louisiana Supreme Court emphasized that Rule 8.4(b) would reach “instances of criminal sexual misconduct or sexual exploitation *of a nature* that indicates the lawyer is unworthy of the confidence reposed in him or her.”⁵⁸ If the relative clause modifies “criminal sexual misconduct” in addition to “sexual exploitation,” Louisiana's Rule 8.4(b) only reaches crimes that bear on an attorney's fitness to practice law, however interpreted.

II. DISCIPLINE, IN PRACTICE

There are exceedingly few published cases or administrative decisions regarding discipline for gender violence or harassment. Only a slight majority of states have published cases or administrative decisions on rape, sexual assault, sexual harassment, or domestic violence. While this could suggest that attorneys rarely engage in this kind of conduct, it seems more likely that disciplinary actions for this kind of conduct are not being brought. This Part first discusses the kind of misconduct that tends to be the subject of reported gender violence or harassment disciplinary cases. It then considers why other kinds of misconduct seem not to be the subject of discipline.

55. *In re Broome*, 411 S.C. 413 (2015) (sanctioning attorney-respondent for criminal sexual conduct in the third degree); *In re Laquiere*, 366 S.C. 559 (2005) (sanctioning attorney-respondent for his first domestic violence offense).

56. *Broome*, 411 S.C. at 413.

57. LA. RULES OF PROF'L CONDUCT R. 8.4(b) (2019) (emphasis added).

58. See *In re Ashy*, 721 So. 2d 859, 868 (La. 1998) (quoting ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 8.4 commentary at 563 (2015)) (emphasis added).

A. TRENDS IN ENFORCEMENT

1. SEXUAL MISCONDUCT

The most common sexual misconduct cases arising in the professional discipline context involve clients or other persons external to the disciplined attorney's office who are involved in litigation with the disciplined attorney. In *Iowa Supreme Court Attorney Disciplinary Bd. v. Moothart*, an attorney was sanctioned for sexually harassing or assaulting five of his clients.⁵⁹ *In re Ashy* also involved an attorney who sexually harassed one of his clients, suggesting that she could begin a sexual relationship with him in exchange for his legal services.⁶⁰ In *Attorney Grievance Commission of Maryland v. Culver*, the attorney-respondent was disciplined for sexually exploiting a client by making "threats . . . that if she did not accede to his sexual demands, he would deliberately sabotage her case so that she would lose custody of her children."⁶¹ *In re Disciplinary Proceedings Against Kratz* addressed a district attorney's sexual harassment of the key witness in a domestic violence case.⁶² In these cases, the attorneys' misconduct was ventilated either after the end of the legal relationship or upon victims' realization that the legal services provided were and would be inadequate.

Notwithstanding the ABA's addition of Rule 8.4(g) to the *Model Rules*—a step targeted toward eradicating *all* sexual harassment from the workplace⁶³—very few disciplinary actions relating to sexual misconduct by colleagues have been litigated. Indeed, when a colleague-to-colleague misconduct case finally arose in Colorado, the Colorado Supreme Court felt the need to explain: "We do not view a pattern of sexual misconduct with employees by a lawyer to be any less damaging to the legal profession than a lawyer's sexual exploitation of a client."⁶⁴ Before making a similar point in *In re Discipline of Peters*, the Minnesota Supreme Court noted that "discipline is seldom imposed" for colleague-to-colleague sexual misconduct.⁶⁵

Beyond the professional context, the most common sexual misconduct cases arising from attorneys' private conduct involve minors. The Minnesota Supreme Court in *In re Discipline of Peters* even hints at the prevalence of professional discipline for child abuse; it clarifies that child abuse, in fact, is not a "necessary

59. *Iowa Sup. Ct. Att'y Disciplinary Bd. v. Moothart*, 860 N.W.2d 598, 601 (Iowa 2015).

60. *Ashy*, 721 So. 2d at 861.

61. *Att'y Grievance Comm'n of Md. v. Culver*, 849 A.2d 423, 433 (Md. 2004).

62. *In re Disciplinary Proceedings Against Kratz*, 851 N.W.2d 219, 220 (Wis. 2014).

63. See generally ABA Standing Comm. on Ethics and Prof'l Responsibility, Report to the House of Delegates (2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [<https://perma.cc/MGW3-5S3U>].

64. *People v. Lowery*, 894 P.2d 758, 760 (Colo. 1995).

65. *In re Discipline of Peters*, 428 N.W.2d 375, 380–81 (Minn. 1988) ("While it is true that discipline is seldom imposed for sexual misconduct unless the lawyer has been convicted of a crime or the conduct has arisen within the attorney-client relationship, neither conviction for rape or child abuse nor the presence of an attorney-client relationship are necessary elements to a breach of ethical responsibility by reason of misconduct of a sexual nature.").

element[]” of professional misconduct.⁶⁶ Connecticut’s only reported sexual assault case regards statutory rape.⁶⁷ Two of Iowa’s only reported sexual assault cases involve minors.⁶⁸ Washington’s only sex crimes case involves a conviction of first-degree child molestation.⁶⁹ In each of these cases, a parent or guardian learned of and reported the abuse.⁷⁰

The relative prevalence of disciplinary cases regarding assaults of minors might come as a surprise. In 2015, the U.S. Department of Health and Human Services tabulated that 57,000 minors suffered reported sexual assault, including statutory rape.⁷¹ In the same year, the Federal Bureau of Investigation tabulated that 90,000 rape cases, including statutory rape cases, were reported to police.⁷² Reported disciplinary cases hardly account for the high incidence of adult-on-adult rape, let alone other forms of adult-on-adult sexual assault. This suggests that adult victims of attorney-perpetrated sexual assault are disproportionately unlikely to report, that disciplinary boards are more inclined to pursue disciplinary action against attorneys for sexual assault of children than for sexual assault of other adults, or some combination of the two.

2. DOMESTIC VIOLENCE

As the New Jersey Supreme Court noted in *In re Principato*, its first disciplinary case involving domestic violence, “There are few reported attorney ethics cases that involve acts of domestic violence.”⁷³ In the two and a half decades since *In re Principato*, roughly a dozen more states have considered cases regarding attorney discipline for acts of domestic violence.⁷⁴ While this reflects a modicum of progress, a clear majority of states has yet to address attorney discipline for domestic violence. As with adult sexual assault, this might suggest that

66. *Id.*

67. *See* Disciplinary Counsel v. Hanson, No. CV054017144, 2006 WL 2349162 (Conn. Super. Ct. July 28, 2006).

68. *Comm. on Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. Lindaman*, 449 N.W.2d 341, 341 (Iowa 1989); *Iowa Sup. Ct. Bd. of Prof’l Ethics and Conduct v. Blazek*, 590 N.W.2d 501, 502 (Iowa 1999).

69. *See In re Disciplinary Proceeding Against Day*, 173 P.3d 915, 918 (Wash. 2007); *see also In re Christie*, 574 A.2d 845, 848 (Del. 1990) (regarding attorney’s “repeated sexual misconduct” involving minors); *Att’y Grievance Comm’n v. Carpenter*, No. 93-261-GA (Mich. Att’y Discipline Bd. Feb. 13, 1993) (regarding attorney’s “multiple acts of illegal sexual contact with a female child who was seven years old when the acts were initiated and nine when they ended”).

70. *See supra* notes 67–69.

71. CHILDREN’S BUREAU, U.S. DEP’T HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2015 45, 109 (2017).

72. *2015 Crime in the United States: Rape*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/rape> [<https://perma.cc/GUB8-TGDS>].

73. *In re Principato*, 139 N.J. 456, 461 (1995).

74. *See, e.g., Lawyer Disciplinary Bd. v. Plants*, 802 S.E.2d 225 (W. Va. 2017); *In re Disciplinary Proceedings Against Gorokhovskiy*, 840 N.W.2d 126, 131 (Wis. 2013) (“Domestic violence is an undisputedly serious crime that reflects adversely on Attorney Gorokhovskiy’s honesty, trustworthiness, or fitness as a lawyer . . .”).

victims of domestic violence by attorneys are particularly unlikely to report, or it might suggest that disciplinary boards are disinclined to take action regarding domestic violence.

B. POTENTIAL EXPLANATIONS FOR NONENFORCEMENT

1. LACK OF CLARITY IN THE RULES

There exists a series of potential explanations for the non- or under-enforcement of Rule 8.4 against attorneys who commit gender violence or harassment. One key explanation is the lack of clarity in the Rules. As shown in Part I, the states that have addressed attorney discipline for gender violence or harassment disagree on how the different provisions of Rule 8.4 operate and even whether Rule 8.4 covers particular kinds of gender violence and harassment.⁷⁵ States that have not yet interpreted Rule 8.4 in the context of sexual assault may, as an example, determine that sexual assault is insufficiently related to the practice of law to justify professional discipline.

The lack of clarity in the Rules could disincentivize taking disciplinary action against an offending attorney. Disciplinary boards with limited resources may shy away from imposing discipline if they anticipate that litigation over Rule 8.4's interpretation will ensue. It would be easier for disciplinary boards to target conduct they know runs afoul of their state's rules of professional conduct.

The lack of clarity in the rules may also prevent victims of attorney misconduct, or other potential referees, from reporting. Gender violence and harassment, as several states have found, does not *clearly* bear on an attorney's fitness to practice law. It is not *clearly* prejudicial to the administration of justice. Nothing in the ABA comments or in states' comments⁷⁶ to Rule 8.4 suggests that gender violence or harassment, beyond workplace sexual harassment, rises to the level of professional misconduct. To the contrary, Tennessee has adopted a comment stating that isolated offenses "such as a minor assault" do not warrant sanction, unless they concern an attorney's honesty and trustworthiness.⁷⁷ Texas has adopted a comment defining "fitness" to practice law as possession of sufficient "qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients."⁷⁸ Most states have adopted the ABA comment that expressly delinks "personal morality" and notions of moral turpitude from "fitness for the practice of law."⁷⁹ Before investigating the case

75. See *supra* Part I.

76. The State Bar of Arizona is atypical insofar as it has, in an ethics opinion regarding Rule 8.4, said that there is "no difficulty in finding that rape, a criminal act of violence, raises a substantial question as to the offending lawyer's fitness." STATE BAR OF ARIZONA, 90-13: *Reporting Professional Misconduct* (1990), <https://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=608> [<https://perma.cc/4475-KRKJ>].

77. TENN. SUP. CT. R. 8.4 cmt. 2 (2018).

78. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 8.04 cmt. 5 (2018); see also TEX. DISCIPLINARY RULES OF PROF'L CONDUCT terminology (2018) (defining "fitness").

79. MODEL RULES R. 8.4 cmt. 2.

law, victims of attorney misconduct or other potential referees have no reason to believe that sexual assault and domestic violence implicate attorneys' professional responsibilities.

2. SENSITIVE SUBJECT MATTER

Another explanation for non- or under-enforcement is that victims of gender violence or harassment do not report these abuses, whether to the appropriate disciplinary body or to the police. Gender violence and harassment are sensitive and often deeply personal issues. Victims of sexual assault often wait substantial periods of time before coming forward.⁸⁰ Victims of sexual assault may develop post-traumatic stress disorder, experience self-blame, and have lowered self-esteem.⁸¹ Acute distress during the first days, if not weeks, following an assault is “almost a universal reaction.”⁸² Similarly, victims of domestic violence often avoid reporting or wait before coming forward. Victims of domestic violence may face the same psychosocial consequences as victims of sexual assault.⁸³

These psychosocial consequences may be exacerbated or complemented by social and economic circumstances particular to having an attorney as an abuser. The legal profession is both prestigious and remunerative. Class expectations and the likelihood that an abusive attorney is the household breadwinner⁸⁴ or an employer militate against reporting.⁸⁵

Owing to the sensitivity of the subject, crimes involving gender violence and harassment are grossly underreported.⁸⁶ The same applies for workplace sexual harassment. One study of the legal profession found that “well under 10 percent” of female attorneys who face unlawful harassment—“sexual propositions, physical groping, and abusive comments”—make any formal complaint, let alone

80. Sarah Kliff, *A Cop Who's Spent 30 Years Fighting Sexual Assault Explains Why Victims Often Wait to Come Forward*, Vox (Oct. 14, 2016, 7:50 AM), <https://www.vox.com/identities/2016/10/14/13275786/sexual-assault-victims-reporting> [<https://perma.cc/C6JH-FZ7T>] (“‘Victims may wait days, weeks, months, years, decades,’ he says.”).

81. Katrina A. Vickerman & Gayla Margolin, *Rape Treatment Outcome Research: Empirical Findings and State of the Literature*, 29 CLINICAL PSYCHOL. REV. 431, 432 (2009) (reviewing the literature on the psychosocial consequences of sexual assault).

82. *Id.*

83. Enrique Gracia, *Unreported Cases of Domestic Violence Against Women: Towards an Epidemiology of Social Silence, Tolerance, and Inhibition*, 58 J. EPIDEMIOLOGY & CMTY. HEALTH 536, 536 (2004).

84. Michael E. McCabe, Jr., *How Disciplinary Authorities Treat Attorneys Convicted of Domestic Violence*, IP ETHICS (Oct. 1, 2015), <https://www.ipethicslaw.com/how-disciplinary-authorities-treat-attorneys-convicted-of-domestic-violence/> [<https://perma.cc/BE58-YKM8>] (discussing financial fear as a factor in attorney domestic violence cases).

85. Cf. Jeffrey Ackerman & Tony P. Love, *Ethnic Group Differences in Police Notification About Intimate Partner Violence*, 20 VIOLENCE AGAINST WOMEN 162, 177 (2014) (finding that socioeconomic status correlates negatively with reporting of domestic violence; i.e., that well-heeled victims are less likely to report).

86. Gracia, *supra* note 83, at 536–37; see also JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2015 15–16 (2016) (estimating that 432,000 Americans were raped in 2015, as compared to the 90,000 reported rape cases).

litigate.⁸⁷ Female attorneys “fear ridicule and retaliation,” including “informal blacklisting.”⁸⁸

States’ rules of professional conduct do little to accommodate the needs of victims of gender violence and harassment. First, few states, if any, provide for anonymous reporting.⁸⁹ Further, many states which require complainants to identify themselves provide no protections against retaliation for complainants.⁹⁰

Second and perversely, victims of gender violence or harassment who are also attorneys may be themselves subject to professional discipline if they fail to report promptly that they have been abused. ABA Model Rule 8.3 requires attorneys to report other attorneys’ misconduct when they reasonably know that such misconduct has occurred.⁹¹ Every state except California, Georgia, and Washington has adopted Rule 8.3 mandatory reporting. *In re Himmel*, a case before the Illinois Supreme Court, confirmed that failure to report, without any other infraction of the rules of professional conduct, is a sanctionable offense.⁹²

The mandatory reporting regime in effect ensures the long-term silence of attorneys who have been abused by fellow attorneys. As victims of gender violence or harassment, attorneys abused by fellow attorneys may not feel comfortable reporting promptly, as required. Unlike clients, who may feel free to report upon the termination of a representation, attorneys facing colleague-to-colleague abuse may not be able to report while at the same place of employment or while still practicing law. Having missed the mandatory reporting window, an attorney who understands the rules of professional conduct well enough to know that sexual assault or domestic violence can violate Rule 8.4 may fear personal liability under Rule 8.3.

87. DEBORAH L. RHODE, ABA COMM’N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 19–20 (2001).

88. *Id.*

89. See, e.g., *Complaints About Lawyers & Judges*, N.Y.C. BAR, www.nycbar.org/for-the-public/about-lawyers-and-judges/complaints-about-lawyers-and-judges-how [https://perma.cc/TT7N-X7GC] (requiring that the complainant’s name and contact information be provided; unsigned complaints will not be processed); *Filing a Complaint Against an Attorney*, OFFICE OF ATT’Y REGULATION COUNSEL, COLO. SUP. CT., www.coloradosupremecourt.com/Complaints/File_ComplaintAgainstAtty.asp [https://perma.cc/WH2R-DTZA] (“This office will NOT accept anonymous complaints.”); PAUL J. BURGOYNE ET AL., UTAH LAWYER DISCIPLINE SYS. CONSULTATION TEAM, UTAH: REPORT ON THE LAWYER DISCIPLINE SYSTEM 66 (2017) (criticizing Utah’s requirement that complainants be named and that complaints be filed in writing).

90. As an example, Texas allows retaliation against complainants, see, e.g., *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (Tex. 1998), and also requires that all complaints be signed, see *File a Grievance*, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=File_a_Grievance&Template=/CM/HTMLDisplay.cfm&ContentID=29656 [perma.cc/NY2R-QSNE]. A copy of the signed complaint is sent to the attorney named in the complaint. *Id.*

91. MODEL RULES R. 8.3.

92. *In re Himmel*, 533 N.E.2d 790, 794 (Ill. 1989). *Himmel* created real concern in the legal profession that sanctions could flow from failure to report promptly. It led to a nationwide uptick in prompt, attorney-submitted reports of misconduct. Donald Rotunda, *The Lawyer’s Duty to Report Another Lawyer’s Unethical Violations in the Wake of Himmel*, 1988 U. ILL. L. REV. 977, 992 (1988). That real concern, in combination with the sensitive nature and anticipated delays in reporting of acts of gender violence and harassment, could very well lead to chilled reporting.

III. REFORMING THE RULES AND PROCEDURES

There are several simple fixes for the problems identified. This Part discusses, in turn, a proposal for clarifying Rule 8.4, a proposal regarding reporting procedure, and a proposal regarding Rule 8.3 mandatory reporting.

A. CLARIFYING THE RULES

To the extent that Rule 8.4 purports to maintain the integrity of the profession, Rule 8.4 should prohibit gender violence and harassment. It is a stain upon the profession that attorneys indicted with, if not convicted of, some of the most egregious offenses recognized in our society can continue practicing law, without sanction.⁹³ Common sense morality informs us that sexual assault and domestic violence speak more to a person's integrity than does the failure to file tax returns.

First and foremost, the ABA and states should adopt a comment to Rule 8.4 specifying that criminal conduct betraying an attorney's class-based animus, e.g. criminal gender-based violence or harassment, relates to that attorney's "fitness to practice law." The legal profession is evidently committed to equality among its members and for its clients.⁹⁴ When an attorney reveals, even through his private conduct, that he fundamentally lacks respect for women or minority group members, he casts doubt on his ability to adhere to this commitment.

The proposed comment should ensure that rape, sexual assault, criminal sexual harassment, and domestic violence are understood as falling within the ambit of Rule 8.4(b).⁹⁵ Moving away from ad-hoc determinations of moral turpitude, the proposed comment would provide a cogent theory—the incompatibility of acting on class-based animus with practicing law—for why these kinds of conduct⁹⁶

93. See, e.g., *Boston Attorney Charged with Sexual Assault for Fourth Time*, C.B.S. BOSTON (Nov. 23, 2016, 6:39 PM), [boston.cbslocal.com/2016/11/23/gary-zero-la-sexual-assault-charges-boston/](https://www.boston.cbslocal.com/2016/11/23/gary-zero-la-sexual-assault-charges-boston/) [https://perma.cc/TU57-XHD4].

94. This commitment has been shown through, *inter alia*, the ABA's addition of Rule 8.4(g) to the *Model Rules of Professional Conduct* and Rule 3.6 to the *Model Code of Judicial Conduct*. The latter prohibits judges from belonging to or using the facilities of organizations that practice invidious class-based discrimination.

95. For arguments that all gender-based violence reflects gender-based animus, consider Catharine MacKinnon's body of work. See, e.g., Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1301–02 (1991) ("Women are sexually assaulted because they are women: not individually or at random, but on the basis of sex, because of their membership in a group defined by gender Females—adults and children—make up the overwhelming population of victims of sexual assault. The perpetrators are, overwhelmingly, men. Men do this to women and to girls, boys, and other men, in that order. Women hardly ever do this to men Availability for aggressive intimate intrusion and use at will for pleasure by another defines who one is socially taken to be and constitutes an index of social worth. To be a means to the end of the sexual pleasure of one more powerful is, empirically, a degraded status and the female position."); see also Maggie Koerth-Baker, *Science Says Toxic Masculinity—More than Alcohol—Leads to Sexual Assault*, *FIVETHIRTYEIGHT* (Sept. 26, 2018, 6:00 AM), <https://fivethirtyeight.com/features/science-says-toxic-masculinity-more-than-alcohol-leads-to-sexual-assault/> [https://perma.cc/X2YV-RKJN] (curating empirical research showing that committing gender violence and harassment correlates with holding negative attitudes about, if not hostility toward, women).

96. In addition to other forms of private conduct like the commission of racially-motivated hate crimes.

relate to an attorney's fitness to practice law. Ideally it would harmonize states' currently-diffuse interpretations of Rule 8.4, several of which have allowed abusers to evade professional discipline.

B. ANONYMOUS REPORTING AND/OR PROTECTIONS AGAINST RETALIATION

Few states, if any, provide for anonymous reporting of attorney misconduct. This undoubtedly deters victims of gender violence and harassment from reporting. Due process *may* recommend that complainants provide their name and information to the attorney named in a complaint. Note, however, that disciplinary proceedings are not criminal proceedings and that attorneys regularly are disciplined for conduct that is not criminal in nature. The standard of proof in disciplinary proceedings is the production of "clear and convincing" evidence that the attorney engaged in the alleged misconduct.⁹⁷ A Rule 8.4(b) violation can be identified in the absence of prosecution or even if an attorney-respondent is acquitted or pardoned for his conduct.⁹⁸

If reporting cannot be done anonymously, it should at least be possible to report without fear of lawful retaliation. The ABA has promulgated Model Rules for Lawyer Disciplinary Enforcement providing immunity to individuals who file complaints against attorneys.⁹⁹ But the proposed immunities of Model Rule 12 only protect against retaliatory civil suits and criminal suits.¹⁰⁰ While better than nothing, the ABA immunities provide no protections for whistleblowing attorneys who may be fired or otherwise forced out for reporting a colleague's gender violence or harassment.¹⁰¹ A regime in which whistleblowers are unprotected is counterproductive to the notion of the legal profession as self-regulating¹⁰² and to the task of achieving gender equality in the profession. The ABA and states could expand upon the immunities currently provided, in effect undoing *Bohatch v. Butler & Binion*, a Texas case that permitted the retaliatory dismissal of a partner who reported perceived misconduct.¹⁰³

C. AMENDMENT TO RULE 8.3

Finally, there ought to be an exception to Rule 8.3, carved out for victims of another attorney's misconduct. Victims of gender violence or harassment, or any

97. See, e.g., *In re Witherspoon*, 3 A.3d 496, 500 (N.J. 2010) (applying the "clear and convincing" evidentiary standard); *State ex rel. Okla. Bar Ass'n v. Garrett*, 2005 OK 91 (2005) (applying the "clear and convincing" evidentiary standard); *Otis' Case*, 135 N.H. 612 (1992) (applying the "clear and convincing" evidentiary standard).

98. See, e.g., N.C. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2017).

99. See MODEL RULES FOR LAWYER DISCIPLINARY ENF'T R. 12 (Am. Bar Ass'n 2002).

100. *Id.*

101. See generally *id.*

102. See generally Michael Fisher, *Why Does Doing the Right Thing Have to Be So Hard? A Law Firm Partner's Difficult Decision on Whether to Report Suspected Misconduct*, 87 MARQ. L. REV. 1005 (2004).

103. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 546-47 (Tex. 1998).

form of attorney misconduct, should not be subject to discipline for their failure to report that misconduct promptly. Though Rule 8.3 has never been applied to an attorney for failure to report that he or she was assaulted, the applicability of Rule 8.3 to victims, even if in concept but not in practice, adds insult to injury. It also may have a chilling effect on the eventual reporting of attorney-perpetrated gender violence or harassment.

Creating an exception for victims of another attorney's misconduct would not undermine self-regulation of the legal profession—the purported purpose of Rule 8.3. The legal profession evidently is not being self-regulated in this area, despite Rule 8.3. If anything, Rule 8.3 is stymieing self-regulation.

An exception, particularly one highlighting that gender violence and harassment still must be reported by third-party attorneys, might support not only long-term ventilation of abuse but also short-term ventilation. It would remind attorneys who are aware of, but silent about, the abuse suffered by their colleagues that they, in fact, hold the actionable reporting requirement. This is to say, Heidi Bond's male co-clerks, were they barred in a state with Rule 8.3 mandatory reporting, would have carried the burden of reporting Judge Kozinski for sexually harassing their sole female colleague.¹⁰⁴ Their silence, a form of complicity with the harassment, would have been sanctionable, and they would have known it from the text of Rule 8.3 or its comments.

CONCLUSION

With the advent of the #MeToo movement, we have seen unprecedented interest in taking, and real initiatives to take, gender violence and harassment seriously. Actors and directors have been forced out of Hollywood.¹⁰⁵ Conductors have been forced out of their concert halls, chefs out of their kitchens, professors out of the hallowed halls of academia.¹⁰⁶ When will #MeToo reach the legal profession: the partnership and the bench? When will we move beyond an abstract and unimplemented discussion of gender equality?

The first step in taking gender equality seriously is taking gender violence and harassment seriously. This Article has endeavored to show that the legal profession does not, at present, do so. But it can, and it should.

104. See Dahlia Lithwick, *What Has the Judiciary Learned Since Kozinski?*, SLATE (Jan. 29, 2018, 1:41 PM), <https://slate.com/news-and-politics/2018/01/after-kozinski-court-employees-cant-get-clarity-on-how-to-report-judicial-abuse.html> [<https://perma.cc/J4WB-C6XG>].

105. 263 *Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017*, VOX (Jan. 9, 2019), <https://www.vox.com/a/sexual-harassment-assault-allegations-list/> [<https://perma.cc/7ZMQ-6Q22>].

106. *Id.*