

Catching Unfitness

JON J. LEE*

ABSTRACT

How can the legal profession effectively regulate the multitude of ways in which an attorney may commit misconduct, given our evolving understanding of what it means to be “fit” to practice law? As the ABA’s adoption of an ethical provision to proscribe harassment and discriminatory acts (Model Rule 8.4(g)) has shown, it is nearly impossible to craft a specific rule that is simultaneously effective at capturing the relevant misconduct and immune from attack that it goes too far.

If disciplinary authorities had a general catchall rule, they could regulate the ever-changing ways in which misconduct is manifested. In fact, the ABA once promulgated just such a rule, the fitness-to-practice provision, but it was eliminated due to concerns about vagueness, overbreadth, and duplication.

This Article is the first to present an empirical study of how disciplinary authorities regulate general lawyer misconduct, with a focus on the fitness-to-practice provision. Through the use of a variety of analytical methods, the study identifies how the seven states that have retained the fitness-to-practice provision use it to regulate misconduct. When properly administered, the fitness-to-practice provision can effectively regulate otherwise elusive lawyer misconduct that is not fully captured by other rules or that falls within the gaps between the rules—including abusive conduct, discrimination, harassment, sexual misconduct, and breaches of trust.

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INTRODUCTION

The regulation of lawyer impropriety is a persistent critical challenge facing the profession. Prominent instances of lawyer misconduct frequently capture national attention. Both Richard Nixon¹ and Bill Clinton² were sanctioned by disciplinary authorities as a result of the misconduct that occurred during their presidencies. Michel Cohen, President Trump’s personal lawyer, was automatically disbarred in New York after pleading guilty to making a false statement to the U.S. Congress amid speculation that he had also paid money to several women who had engaged in affairs with Trump.³ Samuel Kent unceremoniously resigned from his post as a federal district court judge after pleading guilty to committing sexual assault against two female court employees and being impeached by the U.S. House of Representatives.⁴

In recent years, it is this latter type of misconduct that has received increased public scrutiny, including the accusations of sexual assault made against then-U.S. Supreme Court Justice nominee Brett Kavanaugh and the contentious investigation that ensued.⁵ Irrespective of one’s opinion of Kavanaugh’s culpability, his confirmation hearings called attention to a pervasive problem in the legal profession.⁶

But these headline-grabbing stories do not even begin to capture the depth or breadth of the crisis. A quick search of published opinions regarding lawyer discipline brings up not only cases in which lawyers committed the “expected” types of misconduct—failing to communicate with clients, neglecting matters, or mishandling funds—but also cases in which lawyers committed acts that defy imagination. While meeting with a prospective client who was seeking a divorce, an

1. Tom Goldstein, *New York Court Disbars Nixon for Watergate Acts*, N.Y. TIMES (July 9, 1976), <https://www.nytimes.com/1976/07/09/archives/new-york-court-disbars-nixon-for-watergate-acts-nixon-disbarred-by.html> [<https://perma.cc/4FKD-9BK9>].

2. Duncan Campbell, *Lewinsky Scandal Ends as Clinton is Disbarred*, GUARDIAN (Oct. 1, 2001), <https://www.theguardian.com/world/2001/oct/02/duncancampbell> [<https://perma.cc/DLB4-RLVF>].

3. Kevin Johnson, *Michael Cohen, President Trump’s Former Lawyer, Disbarred Because of His Felony Convictions*, USA TODAY (Feb. 26, 2019), <https://www.usatoday.com/story/news/politics/2019/02/26/michael-cohen-disbarred-felony-convictions-prompt-removal/2995414002/> [<https://perma.cc/TUN4-YG6P>]. See generally Brian Sheppard, *The Ethics Resistance*, 32 GEO. J. LEGAL ETHICS 235 (2019) (discussing and analyzing the legal ethics complaints brought against members of the Trump Administration).

4. S.A. Miller, *Impeached Judge Samuel B. Kent Tenders His Resignation*, WASHINGTON TIMES (June 27, 2009), <https://www.washingtontimes.com/news/2009/jun/27/impeached-judge-tenders-his-resignation/> [<https://perma.cc/K4LT-SNLP>].

5. See Christine Hauser, *The Women Who Have Accused Brett Kavanaugh*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/brett-kavanaugh-accusers-women.html> [<https://perma.cc/HNT8-KREX>] (describing the allegations and the women involved).

6. See generally Katherine Yon Ebright, *Taking #MeToo Seriously in the Legal Profession*, 32 GEO. J. LEGAL ETHICS 57, 58 (2019) (examining the investigation of claims of gender violence and harassment in the legal profession); INT’L BAR ASS’N, US TOO? BULLYING AND SEXUAL HARASSMENT IN THE LEGAL PROFESSION 11 (May 2019) (summarizing a survey finding that one in three women in the legal profession had faced sexual harassment).

Alabama attorney took multiple pictures of the woman in various poses, claiming that he needed them “for his files.”⁷ After the consultation, the attorney asked the woman if she would like to “make quick, easy money by posing nude” and handed her a business card.⁸ In Ohio, an attorney engaged in relentless verbal abuse and harassment of his paralegal for more than two years.⁹ On one occasion, the attorney told the paralegal and another female employee that they “should give him road head so that he could rate their performances on a scale from one to ten.”¹⁰ On another occasion, the same attorney told an African-American client that the paralegal “did not like [B]lack people,” leaving the paralegal to defend herself against his accusation.¹¹ In New York, an attorney became belligerent after being discharged by a client and sought revenge by notifying officers about the former client’s immigration status—even going so far as to provide officers with information to assist in the former client’s deportation.¹²

The primary method by which the legal profession regulates these and other misdeeds is the promulgation of ethical rules and the imposition of discipline against attorneys who violate them. While there is variation among states in their codes of professional conduct,¹³ all are modeled after and largely replicate the American Bar Association’s (ABA) Model Rules of Professional Conduct (*Model Rules*).¹⁴ The early professional codes were written as broad aims to which lawyers should aspire, but the codes progressively have become both denser and more specific, now serving as a method of sanctioning attorneys who fail to meet their demands.¹⁵

With regard to the regulation of discrimination and harassment, it took the ABA over two decades to adopt Model Rule 8.4(g), a provision that explicitly proscribes such misconduct. Despite the fact that twenty states already had some

7. *Disciplinary Notices*, ALA. LAW., Jan. 2015, at 77, https://www.alabar.org/assets/2014/08/The_Alabama_Lawyer_01-2015.pdf [https://perma.cc/TY2H-YP3F].

8. *Id.*

9. *Disciplinary Counsel v. Skolnick*, 104 N.E.3d 775, 775 (Ohio 2018).

10. *Id.* at 776 (internal quotations omitted).

11. *Id.*

12. *In re Gonzalez*, 132 A.D.3d 1, 4-5 (N.Y. App. Div. 2015).

13. *Jurisdictional Rules Comparison Charts*, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ [https://perma.cc/G93N-QM3W] (last visited March 25, 2021).

14. *See Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/M6TP-9D9C] (last updated Mar. 28, 2018) (listing the dates of state adoption of the *Model Rules*). California became the last state to adopt the *Model Rules* on November 1, 2018. Lorelei Laird, *California Approves Major Revision to Attorney Ethics Rules, Hewing Closer to ABA Model Rules*, A.B.A. J. (Oct. 2, 2018), https://www.abajournal.com/news/article/california_approves_major_revision_to_attorney_ethics_rules_hewing_closer_t [https://perma.cc/6FCE-YPVZ].

15. *See, e.g.*, LaRue T. Hosmer & Daniel C. Powell, *Schafer’s Dilemma: Client Confidentiality vs. Judicial Integrity—A Very Different Proposal for the Revision of Model Rule 1.6*, 49 LOY. L. REV. 405, 435 (2003) (describing ethics rules as proceeding along a vector from “discretionary guides” in the beginning, to “categorical rules” in the present).

version of an anti-bias¹⁶ provision in effect at the time of its 2016 adoption, Rule 8.4(g) was met with vociferous opposition by a number of states and several legal scholars.¹⁷ While two states adopted Rule 8.4(g) in the ensuing three years, at least six others considered but declined to adopt the provision, often citing constitutional concerns.¹⁸ These challenges raise the question of whether there is another way, in addition to the adoption of a specific ethics provision, for disciplinary authorities to regulate these types of misconduct.

In fact, there is another way. Included within the *Model Rules* are several general provisions that proscribe misconduct that extends beyond traditional lawyering tasks, including “conduct involving dishonesty, fraud, deceit or misrepresentation” and “conduct that is prejudicial to the administration of justice.”¹⁹ These so-called “catchall provisions” first appeared in the ABA Model Code of Professional Responsibility (*Model Code*), the precursor to the *Model Rules*.²⁰ Some ethics scholars, including Samuel J. Levine, have touted the value of having broad provisions like the catchall provisions to regulate misconduct that does not neatly fit within existing rules.²¹

The most general of these catchall provisions was the fitness-to-practice (FTP) provision, which prohibited an attorney from “[e]ngag[ing] in any other conduct that adversely reflects on [the attorney’s] fitness to practice law.”²² Indeed, the FTP provision was used to sanction each of the attorneys who committed the misdeeds in Alabama, Ohio, and New York described above. The ABA eliminated the FTP provision—but not its catchall counterparts—during the transition from

16. This Article uses the phrase “anti-bias provision” to collectively refer to disciplinary provisions that proscribe bias, prejudice, harassment, and/or discrimination. Although this phrase is an imprecise one, it is impossible to adequately capture the variation in such provisions.

17. See, e.g., Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 243 (2017) (contending that states should proceed with caution before adopting Rule 8.4(g) on account of First Amendment concerns); George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y 135, 135 (2018) (arguing that Rule 8.4(g) violates a lawyer’s constitutional rights and could be leveraged as a political weapon).

18. Debra Cassens Weiss, *Second State Adopts ABA Model Rule Barring Discrimination and Harassment by Lawyers*, A.B.A. J. (June 13, 2019), <https://www.abajournal.com/news/article/second-state-adopts-aba-model-rule-barring-discrimination-by-lawyers> [<https://perma.cc/2CWY-VS4D>] (noting that Maine and Vermont had enacted a version of Rule 8.4(g) by June 2019, approximately three years after the ABA’s adoption); Kristine A. Kubes, Cara D. Davis & Mary E. Schwind, *The Evolution of Model Rule 8.4 (g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AM. BAR ASS’N (Mar. 12, 2019), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/ [<https://perma.cc/3EB2-NHTL>].

19. MODEL RULES OF PROF’L CONDUCT R. 8.4(c)–(d) (2018) [hereinafter MODEL RULES]; see also Jerry Cohen, *Appropriate Dispositions in Cases of Lawyer Misconduct*, 82 MASS. L. REV. 295, 300-01 (1997) (discussing the use of catchall provisions to regulate lawyer misconduct).

20. See *infra* Part I.A (describing the inclusion of the catchall provisions in the *Model Code*).

21. See generally Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TULANE L. REV. 527 (2003) (arguing that broad ethics provisions, including the fitness-to-practice provision, should be included in ethics codes in order to regulate misconduct that does not fit within specific rules).

22. MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(6) (1980) [hereinafter MODEL CODE].

the *Model Code* to the *Model Rules*.²³ In advocating for its removal, detractors mentioned the risk that the provision could duplicate other existing rules as well as the risk that the provision could be wielded in an overly broad fashion.²⁴ Yet no evidence was put forward that either of these risks had or would come to fruition. Even more importantly, there was no consideration of the effect that the elimination of the FTP provision would have on the ability to regulate the ever-changing ways in which an attorney may commit misconduct.

This Article is the first to comprehensively study the FTP provision, and it concludes that the provision can be an effective tool to regulate elusive attorney misconduct. Despite the fact that the FTP provision was eliminated during the transition from the *Model Code* to the *Model Rules*, seven states—Alabama, Colorado, Kansas, Massachusetts, New York, Ohio, and Washington—retained the provision,²⁵ and all of these states maintain their records in such a way as to permit examination.²⁶ Through the use of several different types of analytical techniques, this empirical study identifies the ways in which these seven states have administered the FTP provision. When used properly, the FTP provision enables disciplinary authorities to sanction particularly egregious misconduct that violates an existing rule as well as to regulate misconduct that falls outside the current rules. Through the implementation of best practices, the benefits of the FTP provision can be fully realized while concerns about its reach can be mitigated. Therefore, the ABA and all states should adopt the FTP provision and implement the best practices for its effective administration.

Part I summarizes the history of attorney disciplinary codes in the United States, focusing on the ways that general types of misconduct have been regulated. Part II examines the current controversy surrounding Model Rule 8.4(g), which regulates discrimination and harassment, and puts it in the context of the broader debate over catchall provisions such as the FTP provision. Part III provides a theoretical framework for understanding attorney discipline, including the first scholarly contribution identifying a set of guiding principles to use when evaluating the effectiveness of an ethical rule. Part IV presents the results of a groundbreaking empirical study of all publicly-available disciplinary actions in seven states over eight years—more than 2,700 actions in total—focusing on the FTP provision. Part V evaluates these results in light of the purposes to be served by adopting the FTP provision and concerns about its use. It concludes that the FTP provision has value, both in sanctioning particularly egregious conduct and in regulating misconduct that falls in the gaps between existing rules.

23. See *infra* Part I.B.

24. See, e.g., ABA House of Delegates, Tr. of Proceedings Concerning Model Rules of Professional Conduct, Tape 12, Feb. 8, 1983 (testimony of Mike Frank).

25. CPR Policy Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct: Rule 8.4: Misconduct*, AM. BAR ASS'N (Dec. 11, 2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_4.pdf [<https://perma.cc/9VYQ-QXTT>].

26. See *infra* Part IV.B (describing how the seven states maintain disciplinary records).

I. REGULATING MISCONDUCT: THE HISTORICAL CONTEXT

Despite the fact that adherence to a code of professional conduct is now accepted as an integral part of one's obligations as a legal practitioner, lawyer codes are of a relatively recent vintage. This Part describes the evolution of the ABA model codes, from the 1908 Canons of Professional Ethics to the current ABA Model Rules of Professional Conduct. In particular, this Part examines how these codes have addressed the regulation of general types of misconduct that bear on an attorney's ability to carry out responsibilities ethically and effectively.

A. FROM THE *CANONS* TO THE *MODEL CODE*

There were a few instances of state bar associations adopting individual rules related to professional conduct during the nineteenth century, but the first comprehensive state code was adopted in Alabama in 1887.²⁷ The Alabama Code became the model for ten other states before the promulgation of the 1908 Canons of Professional Ethics (*Canons*),²⁸ and the Alabama Code likewise was extremely influential in the drafting of the *Canons*.²⁹

Considerable scholarly attention and criticism have been devoted to the *Canons*, which have at times been cast as too specific and at other times as too vague.³⁰ According to Geoffrey Hazard, "[t]he *Canons* presupposed that right-thinking lawyers knew the proper thing to do and that most lawyers were right-thinking," which limited their practical effect.³¹ Perhaps for these reasons, the *Canons* did not directly proscribe misconduct bearing on a lawyer's fitness to practice law or other general misconduct. The closest references appeared in the Preamble and in the final canon. The Preamble exhorted that the maintenance of justice requires that "the conduct and the motives of the members of our profession are such as to merit the approval of all just men."³² Canon 32, entitled "The Lawyer's Duty in Its Last Analysis," concluded with the following sentence: "But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."³³

27. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1434–35 (2004) (detailing the history of lawyer codes, both in the United States and around the world).

28. See Walter Burgwyn Jones, *First Legal Code of Ethics Adopted in the United States*, 8 A.B.A. J. 111 (1922) (describing how the Alabama code was "adopted almost totidem verbis in . . . Georgia, Virginia, Michigan, Colorado, North Carolina, Wisconsin, West Virginia, Maryland, Kentucky and Missouri").

29. See generally James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395 (2003) (providing a comprehensive history of the adoption of the *Canons*).

30. *Id.* at 2442.

31. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1250 (1991); see also Fred C. Zacharias, *The Quest for a Perfect Code*, 11 GEO. J. LEGAL ETHICS 787, 790–91 (1998) (describing the *Canons* as consisting almost entirely of "aspirational principles that guide and inspire" rather than providing concrete rules).

32. CANONS OF PROF'L ETHICS pmbl. (1908) [hereinafter 1908 CANONS].

33. 1908 CANONS Canon 32.

Despite the fact that the *Canons* did not have the force of law in any state, they initially met with great success in regard to their adoption and acceptance. By 1910, twenty-two states had adopted the *Canons* outright, and a number of other jurisdictions relied upon them in setting their ethical norms.³⁴ But the criticism quickly mounted. As early as 1924, the ABA had created four committees to work on a redesign of the *Canons*.³⁵ Sixteen canons were added and several existing canons were amended during the next forty years,³⁶ but those modifications could not shore up the structural defects of the *Canons*.

In 1969, the ABA eschewed the *Canons* and adopted the ABA Model Code of Professional Responsibility.³⁷ The *Model Code* was organized into three parts: (1) canons, which were “axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers”; (2) ethical considerations, which were aspirational statements of the “objectives toward which every member of the profession should strive”; and (3) disciplinary rules, which identified “the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.”³⁸ While lawyers were obligated to conform their conduct only to the disciplinary rules, the canons and ethical considerations could be used to interpret the rules’ meanings.³⁹

The *Model Code* expanded upon the *Canons* in three major ways. First, it was considerably more comprehensive in the types of misconduct addressed.⁴⁰ Second, it was far more detailed, particularly with regard to its disciplinary rules.⁴¹ Third, it clearly delineated the distinction between those parts that were aspirational (canons and ethical considerations) and those that could be the subject of disciplinary enforcement (disciplinary rules).⁴²

34. Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 918 (1994).

35. John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 61 (2013).

36. See John M. Tyson, *A Short History of the American Bar Association’s Canons of Professional Ethics, Code of Professional Responsibility, and Model Rules of Professional Responsibility*, 1 CHARLOTTE L. REV. 9, 13 (2008) (“From 1908 to 1969, new canons were adopted and added, and other canons were amended on three occasions.”).

37. See *id.*; see also Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 3-4 (1970) (describing the adoption of the *Model Code* and the weaknesses with the *Canons*).

38. MODEL CODE Preliminary Statement.

39. See MODEL CODE Preliminary Statement.

40. See Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 436 (2005) (“[T]he [Model] Code is the ABA’s first explicit division between ‘professionalism’ and minimum [r]ules.”).

41. See Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 CASE W. RES. L. REV. 381, 426 (2012) (detailing the development of legal ethics rules and describing the *Model Code* as “longer and more complex” in its prescriptions than the *Canons*).

42. MODEL CODE Preliminary Statement; see Andrews, *supra* note 41, at 426–27 (describing the three parts).

Furthermore, the *Model Code* explicitly proscribed general types of attorney misconduct. They were included in the first canon, entitled “A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.”⁴³ The relevant ethical consideration, EC 1-5, provided that a lawyer “should maintain high standards of professional conduct,” “be temperate and dignified,” and “refrain from all illegal and morally reprehensible conduct.”⁴⁴

The *Model Code* included a single disciplinary rule associated with EC 1-5, “Misconduct” (DR 1-102). The rule contained six subsections, including (3) “engag[ing] in illegal conduct involving moral turpitude” (the “crime provision”), (4) “engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation” (the “fraud provision”), (5) “engag[ing] in conduct that is prejudicial to the administration of justice” (the “administration-of-justice provision”), and (6) “engag[ing] in any other conduct that adversely reflects on [the attorney’s] fitness to practice law”⁴⁵ (the “fitness-to-practice provision” or “FTP provision”). The phrase “catchall provisions” appears to have originated with the Textual and Historical Notes for DR 1-102, which acknowledged that the drafting committee had been “apparent[ly] indecisive[]” in the precise wording for these provisions.⁴⁶

The commentary to DR 1-102 similarly illustrates the tension in the enforcement of catchall provisions. On one hand, it is clear that the catchall provisions were intended to apply quite broadly, including to lawyers’ actions outside their professional capacities.⁴⁷ On the other hand, the commentary noted that each of the catchall provisions had been criticized on the grounds of being overbroad and ambiguous, with the potential to proscribe conduct that has “no obvious connection with professional skills and responsibility.”⁴⁸

Interestingly, the commentary paid considerably less attention to the FTP provision than the other catchall provisions, each of which had been the subject of extensive debate and dissension.⁴⁹ The commentary merely noted that a single court had suggested that the FTP provision might be constitutionally suspect but found that it was not unconstitutionally vague as applied to the specific conduct in the case before it.⁵⁰

The reaction at the time was similarly mixed among ethics scholars. While noting the improvements over the *Canons* as a general matter, Donald Weckstein suggested that the inclusion of general misconduct provisions, especially at the

43. MODEL CODE Canon 1.

44. MODEL CODE EC 1-5.

45. MODEL CODE DR 1-102.

46. AM. BAR FOUND., ANNOTATED CODE OF PROF’L RESPONSIBILITY 12 (1979).

47. See *id.* at 18-19; see also ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 336 (1974) (addressing the extent to which the misconduct rule applies to activities outside of a lawyer’s professional duties).

48. AM. BAR FOUND., *supra* note 46, at 21.

49. See *id.* at 14-18.

50. See *id.* at 18 (citing *Disciplinary Counsel v. Campbell*, 345 A.2d 616 (Pa. 1975)).

beginning of the *Model Code*, might be “overkill.”⁵¹ With regard to the FTP provision itself, he was “uncertain” what would be included within its prohibition, musing that it could include “social drinking, growing a beard, or owning a night club jointly with a football player.”⁵² However, he declined to recommend its removal “unless it proves to be unnecessary or unless a more acceptable substitute can be found.”⁵³

B. THE *MODEL RULES* AND DISAPPEARANCE OF THE FITNESS-TO-PRACTICE PROVISION

The *Model Code* received an even more widespread reception than did the *Canons* among state disciplinary authorities, as it was quickly adopted in some form in every state.⁵⁴ But the “legalization” of the disciplinary rules in the *Model Code* brought controversy along with it, as their enforcement highlighted their shortcomings.⁵⁵ In 1977, the ABA appointed a commission to study the continued vitality of the *Model Code*. Ultimately, the commission concluded that the *Model Code* should be not amended but rather replaced with a new code of professional conduct.⁵⁶

The result, the ABA Model Rules of Professional Conduct, departed considerably from the *Model Code* that had preceded it. The *Model Rules* eliminated the norm-based canons as an organizing and unifying principle and instead organized professional responsibilities around rules that are binding obligations.⁵⁷ Although the rules included comments that could inform the interpretation of a provision or otherwise provide guidance on how lawyers may ethically conduct themselves, the Scope of the *Model Rules* made it clear that “the text of each [r]ule is authoritative.”⁵⁸

The *Model Rules* have been adopted in large part by all state disciplinary authorities.⁵⁹ Although the ABA has made significant amendments to the *Model Rules*, including in the areas of law firm practice, advertising, technology, and globalization, there has not been a concerted effort to replace the *Model Rules* as was done with the prior professional codes.⁶⁰

51. See Donald T. Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 280 (1970).

52. *Id.* at 276.

53. *Id.*

54. See Hazard, *supra* note 31, at 1251.

55. See Andrews, *supra* note 27, at 1448.

56. See Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689, 700 (2016) (describing the Kutak Commission as responding to “widespread apprehension over the effectiveness of the current Code and its utility”).

57. See Hazard, *supra* note 31, at 1251.

58. MODEL RULES scope para. 21.

59. See *supra* note 14 and accompanying text.

60. See ABA Comm’n on Ethics 20/20, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/aba-commission-on-ethics-20-20/ [https://perma.cc/7P28-UMDT] (last visited Apr. 4, 2021).

Nevertheless, the paradigm shift from the *Model Code* to the *Model Rules* had an adverse impact on the general misconduct rule. The 1980 Discussion Draft of the *Model Rules* (Discussion Draft), which was widely circulated for notice and comment, placed the misconduct provision at the very end rather than at the beginning, where it had been located in the *Model Code*, and it eliminated the fraud and administration-of-justice provisions.⁶¹ The crime provision and FTP provision were somewhat combined into a single provision, prohibiting an attorney from “commit[ing] a crime or other deliberately wrongful act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness in other respects to practice law.”⁶²

The Discussion Draft received comments from fifty-eight legal organizations and fifty-one individuals.⁶³ Of these comments, only three touched on the combined provision or on the removal of the standalone FTP provision. One comment recommended that the FTP provision be retained rather than combined with the crime provision;⁶⁴ one noted that its members were indecisive on whether the combined provision should be adopted or whether even more general language, such as “conduct unbecoming a lawyer,” should be adopted instead;⁶⁵ and one recommended removing the language “fitness in other respects to practice law” from the combined provision because the commenter believed the language was “vague and indefinite.”⁶⁶

The proposed revisions to the general misconduct rule remained largely intact until the February 1983 Midyear meeting,⁶⁷ at which the Iowa State Bar Association proposed amendments that restored the fraud and administration-of-justice provisions⁶⁸ and further restricted the combined provision so that it only proscribed acts deemed criminal under substantive law; in effect, returning the combined provision to a version of the crime provision.⁶⁹ The commission did not oppose these amendments, and they were adopted without any discussion from the ABA House of Delegates.⁷⁰

61. MODEL RULES OF PROFESSIONAL CONDUCT, R. 10.4 (AM. BAR ASS’N, Discussion Draft 1980) [hereinafter DRAFT RULES].

62. DRAFT RULES R. 10.4(b).

63. See generally COMPILATION OF COMMENTS ON THE MODEL RULES OF PROFESSIONAL CONDUCT (Geoffrey C. Hazard, Jr. ed., 1980) [hereinafter DISCUSSION DRAFT] (compiling all comments on Discussion Draft).

64. *Id.* at O-34 (comment of ABA Section of Corp., Banking, and Bus. L.).

65. *Id.* at O-49 (comment of Minn. St. Bar Ass’n).

66. *Id.* at O-54 (comment of Omaha Bar Ass’n).

67. At the August 1982 Annual Meeting, the combined provision had changed to “commit[ing] a criminal or fraudulent act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 850 (Art Garwin ed., 2013) [hereinafter LEGISLATIVE HISTORY] (emphasis added).

68. *Id.* at 851 (adding “(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation” and “(d) engage in conduct that is prejudicial to the administration of justice”).

69. *Id.* (striking “or fraudulent [act]” from the combined provision).

70. See ABA House of Delegates, *supra* note 24, at Tape 12.

The Florida Bar recommended amendments substantially similar to Iowa's and also proposed the retention of the FTP provision.⁷¹ In response, one delegate remarked that the provision "is so vague and some courts have so held, because it provides absolutely no guidance to the lawyer who wants to stay out of disciplinary difficulty as to what may get him into it."⁷² In response to this criticism, the Florida Bar representative noted that they had "strange things happening from time to time," such as lawyers who had attempted to extract sexual favors in lieu of monetary payment and other similar activities that were "hard to fit in a little category."⁷³ But without any further discussion on the matter, besides noting that other provisions such as the administration-of-justice provision might sufficiently regulate the misconduct, the proposal to retain the FTP provision was rejected by a voice vote of the ABA House of Delegates.⁷⁴

Other than the inclusion of provisions related to governmental agencies and judges, the final version of the general misconduct rule (Rule 8.4) in the *Model Rules* was substantially similar to its *Model Code* predecessor—that is, with the exception of the elimination of the FTP provision.⁷⁵ It is striking that there was relatively little explanation given for its exclusion, in contrast to the extensive attention and debate afforded to other instances in which the *Model Rules* deviated from the *Model Code*.⁷⁶

Although there is variation among states in relation to the adoption of Rule 8.4, several generalities can be made. First, all states have adopted versions of the crime (Rule 8.4(b)) and fraud (Rule 8.4(c)) provisions.⁷⁷ Second, forty-three states

71. See LEGISLATIVE HISTORY, *supra* note 67, at 852 (proposing to add "engage in any other conduct that adversely reflects on the lawyer's fitness to practice law").

72. ABA House of Delegates, *supra* note 24, at Tape 12 (testimony of Mike Frank).

73. *Id.* (testimony of Rep. Dittmar).

74. *Id.* (statement of Chair); see LEGISLATIVE HISTORY, *supra* note 67, at 852 (noting the defeat of the Florida Bar Amendment by voice vote).

75. Compare MODEL CODE DR 1-102, with MODEL RULES R. 8.4. The only other difference between the two is in relation to the crime provision, since the *Model Code* prohibited "illegal conduct involving moral turpitude" and the *Model Rules* prohibit "criminal act[s] that reflect[] adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Compare MODEL CODE DR 1-102(3), with MODEL RULES R. 8.4(b). Although the *Model Rules* version does include "fitness as a lawyer" in it, it is narrower than the combined provision in the Discussion Draft because it requires that the conduct be "criminal" rather than merely "wrongful." See DRAFT RULES R. 10.4(b).

76. See generally DISCUSSION DRAFT, *supra* note 63 (containing dozens of comments on changes to the conflict of interest provisions).

77. See CPR Policy Implementation Comm., *supra* note 25.

have adopted a version of the administration-of-justice provision (Rule 8.4(d)).⁷⁸ Third, seven states have retained a version of the FTP provision despite its elimination in the *Model Rules*: Alabama, Colorado, Kansas, Massachusetts, New York, Ohio, and Washington. These seven states provide a unique opportunity to examine the FTP provision, to determine whether it can be a mechanism to effectively regulate elusive attorney misconduct—including that of attorneys who engage in discrimination or harassment.

II. THE STRUGGLE TO REGULATE DISCRIMINATION AND HARASSMENT: MODEL RULE 8.4(G) AND ITS AFTERMATH

In sharp contrast with the lack of discussion concerning the ABA's elimination of the FTP provision, substantial attention was paid to the ABA's adoption of an anti-bias provision—a process that began after the promulgation of the *Model Rules* and lasted for decades. In the interim, both the legal landscape and societal norms shifted considerably, underlining the need for the profession to regulate discrimination and harassment. But despite the apparent consensus among those in the ABA House of Delegates at the time of its adoption, Model Rule 8.4(g) has not been well received by states that have considered whether to amend their own codes to include it.

This Part explains the genesis of Rule 8.4(g) and presents the concerns related to state adoption. It highlights the struggle that a regulatory body faces in drafting a provision that fairly and constitutionally proscribes behavior that does not comport with our evolving understanding of ethical conduct, and it shows that having more specific language does not necessarily make it immune from criticism.

A. EARLY ATTEMPTS TO REGULATE DISCRIMINATION AND HARASSMENT

It is not surprising that there was no concerted effort to include an anti-bias provision in the *Model Rules* at the time of their initial adoption in 1983. Though the prevalence of discrimination and harassment in the legal profession has been well documented, those within the profession have been slow (and, at times, reluctant) to acknowledge their existence.⁷⁹ In fact, the only mention of such misconduct was in relation to the elimination of the FTP provision.⁸⁰ At that time, it was unquestionably assumed that in the event such “unusual” misconduct were to

78. See *id.* The seven states that have not adopted the administration-of-justice provision are Alaska, Georgia, Hawaii, Kentucky, New Hampshire, Virginia, and Wisconsin. *Id.* Although the ABA's compiled information is unclear on whether Ohio has adopted the administration-of-justice provision, it appears as Rule 8.4(d) in the Ohio Rules of Professional Conduct. OHIO RULES OF PROF'L CONDUCT R. 8.4(d) (OHIO ST. BAR ASS'N 2021) [hereinafter OHIO RULES OF PROF'L CONDUCT].

79. See generally Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805 (2019) (recounting the legal profession's history of overt discrimination and describing the genesis of Rule 8.4(g)).

80. See Katie Marie Wroten, “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, 347 (2017).

occur, other provisions, such as the administration-of-justice provision, would be broad enough to cover it.⁸¹

In 1992, the ABA Task Force on Minorities in the Justice System issued its report, entitled “Achieving Justice in a Diverse America,” specifically urging the adoption of an anti-bias provision in the *Model Rules*.⁸² This report influenced the drafting of two proposals.⁸³ The first, recommended by the ABA Young Lawyer’s Division (YLD), would have prohibited “discrimination or harassment committed in connection with a lawyer’s professional activities.”⁸⁴ The second, recommended by the ABA Standing Committee on Ethics and Professional Responsibility (SCEPR), would have made it professional misconduct to “knowingly manifest by words or conduct, in the course of representing a client, bias or prejudice.”⁸⁵ While the two proposals shared several features, they differed in key ways, including: the categories of misconduct that would be prohibited, whether there would be a requisite mental state, and whether the conduct had to occur while representing a client.⁸⁶

Given the differences between these two proposals, one might have expected there to have been a robust discussion of them. There was not, however, because both proposals were withdrawn before any consideration of them by the ABA House of Delegates.⁸⁷ Although the two groups agreed at the time to work together to reconcile their differences and bring a joint proposal forward the following year, they were unable to do so—apparently because they concluded that they could not draft an anti-bias provision that would survive First Amendment scrutiny.⁸⁸

In 1998, momentum built once again to incorporate an anti-bias provision into the *Model Rules*.⁸⁹ Although the ABA Criminal Justice Section and SCEPR both

81. See *supra* notes 70–74 and accompanying text.

82. AM. BAR ASS’N, TASK FORCE ON MINORITIES AND THE JUSTICE SYSTEM, *ACHIEVING JUSTICE IN A DIVERSE AMERICA* 28 (1992) (asserting that “[n]o lawyer should intentionally engage in racially or ethnically discriminatory acts in the practice of his or her profession” and that “[t]he Task Force recommends that the ABA consider amending its Model Rules of Professional Conduct to make acts of racial and ethnic discrimination while acting in one’s professional capacity sanctionable and unprofessional conduct”).

83. LEGISLATIVE HISTORY, *supra* note 67, at 854–86; see also Latonia Haney Keith, *Cultural Competency in a Post-Model Rule 8.4(g) World*, 25 DUKE J. GENDER L. & POL’Y 1, 4–5 (2017) (discussing the dual proposals).

84. LEGISLATIVE HISTORY, *supra* note 67, at 854.

85. *Id.* at 855.

86. Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 203–04 (2017); see also Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201, 206–07 (2017) (detailing the language of the SCEPR and YLD proposals).

87. Gillers, *supra* note 86, at 203.

88. See *id.* at 204.

89. See Michael William Fires, *Regulating Conduct: A Model Rule Against Discrimination and the Importance of Legitimate Advocacy*, 30 GEO. J. LEGAL ETHICS 735, 736 (2017) (discussing the adoption of Comment [3]).

had recommended proposals to adopt new rules, a compromise resulted in the adoption of a new comment (Comment [3]) to Rule 8.4(d), the administration-of-justice provision.⁹⁰ Comment [3] provided that “[a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates [8.4](d) when such actions are prejudicial to the administration of justice.”⁹¹

While in some respects the adoption of Comment [3] marked a significant step toward the proscription of discrimination and harassment,⁹² its impact was lessened by the fact that comments do not carry any authoritative weight.⁹³ Furthermore, the comment was limited to conduct made “in the course of representing a client” that was simultaneously “prejudicial to the administration of justice.”⁹⁴ Taken together, these limitations meant that even if states were to adopt this comment, it would not add anything new to their ability to regulate attorney misconduct. Presumably, states could have already regulated such misconduct under Rule 8.4(d) because the misconduct was—by definition—prejudicial to the administration of justice. In fact, the comment was even narrower than Rule 8.4(d) itself, since the comment required that the conduct be done “knowingly”; Rule 8.4(d) does not have a requisite mental state.⁹⁵

B. THE ADOPTION OF RULE 8.4(g): A TRIUMPH?

Another ten years passed between the adoption of Comment [3] and the ABA’s next attempt to address discrimination and harassment in the profession. In 2008, the ABA adopted a number of goals as part of its Mission Statement.⁹⁶ Goal III, “Eliminate Bias and Enhance Diversity,” acknowledged that there was still much work to do on these fronts.⁹⁷ Although this goal included a number of facets beyond changes to the rules, there was a recognition that Comment [3] did not adequately regulate the ways in which lawyers may engage in discrimination or harassment.⁹⁸

90. Although this comment was originally adopted as Comment [2], it became known as Comment [3] due to a renumbering of the provisions. See LEGISLATIVE HISTORY, *supra* note 67, at 860, 862–63.

91. MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. 3 (2013) [hereinafter 2013 MODEL RULES]. For purposes of this Article, this comment will be referred to as Comment [3] to Rule 8.4(d) because it related to the administration-of-justice provision. In fact, the comments are not linked to subsections but rules (in this case, Rule 8.4).

92. Martinez, *supra* note 79, at 821–22 (quoting ABA literature that describes Comment [3] as “a necessary and significant first step to address the issues of bias”).

93. See MODEL RULES scope para. 14.

94. See 2013 MODEL RULES R. 8.4 cmt. 3; Wroten, *supra* note 80, at 350 (identifying the restricted scope of Comment [3]).

95. See Gillers, *supra* note 86, at 207 (discussing the limited impact of Comment [3]).

96. *Id.* at 201–02.

97. See Haila Garrido Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, 4 COLUM. J. RACE & L. 1, 5 (2013) (describing Goal III as building on a series of resolutions and goals indicating continued attention to an ongoing problem of discrimination in the profession).

98. Martinez, *supra* note 79, at 824 (quoting ABA literature admitting Comment [3] “does not adequately address discriminatory or harassing behavior by lawyers”).

The stage was set for the adoption of Rule 8.4(g). In 2014, several ABA commissions that had been formed in connection with Goal III recommended the adoption of a new rule to address discrimination and harassment. Accordingly, several draft rules and comments were produced over the following two years.⁹⁹ While a complete discussion of these drafts is beyond the scope of this Article, there are three relevant issues that inform an understanding of the mixed reception of Rule 8.4(g) among legal scholars and state authorities. First, there were differences among drafts with regard to whether the misconduct must occur “while engaged in the practice of law” or be “related to the practice of law.”¹⁰⁰ The latter, broader language was eventually adopted, and it includes activities such as “operating or managing a law firm” and “participating in bar association, business or social activities in connection with the practice of law.”¹⁰¹

Second, the proposed rule initially included a comment clarifying that it “does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment.”¹⁰² The Memorandum accompanying the proposal suggested that the clarification was included “[t]o avoid ambiguity” and to “make [it] clear that a lawyer does retain a ‘private sphere’ where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to the Rule.”¹⁰³ Eventually, this clarification was removed and replaced with language describing the types of discrimination and harassment that would subject a lawyer to discipline.¹⁰⁴

Third, there were differences among drafts regarding the requisite mental state. While the initial draft required that the lawyer’s conduct be done “knowingly,” similar to its Comment [3] predecessor, later drafts and the final rule expanded the conduct to that which a lawyer “knows or reasonably should know” is discrimination or harassment.¹⁰⁵ Although this change represented an expansion of

99. Gillers, *supra* note 86, at 211–13.

100. *Id.* at 211–12.

101. See MODEL RULES R. 8.4 cmt. 4.

102. Halaby, *supra* note 86, at 215–16 (identifying and discussing the inclusion of the First Amendment clarification).

103. ABA Standing Comm. on Ethics and Prof’l Responsibility, Memorandum on Draft Proposal to Amend Model Rule 8.4 5 (Dec. 22, 2015), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2015.authcheckdam.pdf [<https://perma.cc/M682-2VFD>].

104. See MODEL RULES R. 8.4 cmt. 3 (“Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.”); see also Bill Olson & Herb Titus, *The ABA Plan to Politically Purify the Legal Profession*, THE FEDERALIST SOCIETY (Aug. 2, 2016), <https://fedsoc.org/commentary/fedsoc-blog/the-aba-plan-to-politically-purify-the-legal-profession> [<https://perma.cc/58R2-TULY>] (discussing the removal of the First Amendment clarification from the proposed comment to Rule 8.4).

105. See Gillers, *supra* note 86, at 211–12 (discussing the state of mind requirement).

liability in relation to its predecessor, there were some involved in the process who advocated for there to be no requisite mental state at all.¹⁰⁶

By and large, all of the changes in Rule 8.4(g) from the initial draft to the final rule and comments served to expand its reach.¹⁰⁷ Indeed, it has been lauded by scholars such as Steven Gillers for going further than any of its state counterparts in regulating discrimination and harassment in the profession.¹⁰⁸ Perhaps most astonishingly, the meeting at which it was adopted was more reminiscent of a celebration than a heated discussion. After the resolution was put forward for discussion, dozens of members spoke in favor of the resolution, many telling their personal stories of experiencing discrimination or harassment.¹⁰⁹ No one spoke in opposition, and the resolution for its adoption passed by voice vote with almost no audible dissent.¹¹⁰

C. THE OPPOSITION AGAINST STATE ADOPTION OF RULE 8.4(g)

Despite the fact that Rule 8.4(g) appeared to garner overwhelming support by the ABA House of Delegates, its passage has not brought about the sea change that proponents had hoped for or expected. Only a few states have adopted Rule 8.4(g), whereas several other states expressly have declined to adopt it.¹¹¹ Likewise, there has been considerable discussion and dissension in the scholarly community about the legal and normative implications of state adoption.¹¹² This section identifies the primary arguments, as they serve to frame the issues that arise in fashioning a provision that fairly and equitably regulates misconduct that is difficult to define.

1. OVERBREADTH AND VAGUENESS

The first set of concerns, raised by Josh Blackman among others, is that Rule 8.4(g) and associated comments are unconstitutionally overbroad and vague.¹¹³ There are two aspects to these concerns; the first relates to the scope of the phrase “conduct related to the practice of law” used in Rule 8.4(g). Because Comment [4]

106. Wroten, *supra* note 80, at 357 (noting that the YLD had proposed a version without a requisite mental state).

107. See generally Halaby, *supra* note 86 (describing the passage of Rule 8.4(g) in detail and raising questions about its utility and fairness in light of the broad language adopted).

108. See Gillers, *supra* note 86, at 230.

109. See Samson Habte, *ABA Delegates Overwhelmingly Approve Anti-Bias Rule*, BLOOMBERG (Aug. 10, 2016), <https://news.bloomberglaw.com/business-and-practice/aba-delegates-overwhelmingly-approve-anti-bias-rule> [<https://perma.cc/89KD-F5TV>].

110. Martinez, *supra* note 79, at 824 (recounting that the provision “passed unanimously without any expression of dissent”).

111. See Kubes, *supra* note 18 (discussing state adoption of Rule 8.4(g)).

112. See, e.g., Convention, *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, 31 REGENT U.L. REV. 31 (2019) (roundtable discussion among professional responsibility scholars about Rule 8.4(g)).

113. See Blackman, *supra* note 17, at 255; see also Convention, *supra* note 112, at 38–44 (statements of Prof. Ronald Rotunda).

to Rule 8.4 defines the phrase to include “participating in bar association, business or social activities in connection with the practice of law,” among other activities, critics have suggested that it might include statements made during a dinner with a client, at continuing legal education (CLE) events, in op-eds or blog posts, in a law school classroom, or in academic scholarship.¹¹⁴ Presumably, these forums would be ones in which the state would not have the ability to sanction conduct that might otherwise fall within the prohibitions of Rule 8.4(g).¹¹⁵

The second aspect to these concerns, which is connected with the first, relates to the phrase “harassment or discrimination” used to identify the two types of prohibited conduct.¹¹⁶ A comment to Rule 8.4 refers to the types of conduct “include[d]” in these terms; for discrimination, it is “harmful verbal or physical conduct that manifests bias or prejudice toward others,” and for harassment, it is “sexual harassment and derogatory or demeaning verbal or physical conduct.”¹¹⁷ Critics take issue with the definition of harassment in particular, positing that “derogatory or demeaning” verbal conduct could include a speaker at a CLE event stating that the Fourteenth Amendment does not restrict the use of classifications on the basis of sexual orientation.¹¹⁸

The responses to these two sets of concerns are largely based on how similar challenges to disciplinary rules and laws that restrict lawyer speech have been rejected in the past.¹¹⁹ There are dozens of lawyer disciplinary rules that regulate lawyer speech; Rule 1.6 (confidentiality), Rule 3.6 (trial publicity), and Rule 3.4(e) (statements during trial) all regulate lawyer speech in the context of client representation, and no facial constitutional challenges have ever been successful.¹²⁰ That is because a facial challenge on the ground of overbreadth will succeed only when “(i) it is ‘substantially overbroad’—that is, its illegitimate applications are too numerous ‘judged in relation to the statute’s plainly legitimate sweep,’ and (ii) no constitutionally adequate narrowing construction suggests itself.”¹²¹ According to those who believe that Rule 8.4(g) is not unconstitutionally overbroad or vague, the critics’ identification of isolated instances in which

114. Dent, *supra* note 17, at 142–43.

115. See Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 HARV. J.L. & PUB. POL’Y 173, 215 (2017) (recounting a Montana resolution characterizing Rule 8.4(g) as “exceeding judicial authority ‘to regulate the speech and conduct of attorneys’”).

116. Dent, *supra* note 17, at 135, 141–42 (identifying the phrase and raising concerns about its meaning).

117. MODEL RULES R. 8.4 cmt. 3. Comment [3] has been revised in conjunction with the adoption of Rule 8.4(g); the previous version addressed the circumstances in which bias and prejudice would violate the administration-of-justice provision. See 2013 MODEL RULES R. 8.4 cmt. 3.

118. Blackman, *supra* note 17, at 245–46.

119. See generally Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31 (2018) (identifying and analyzing the primary First Amendment speech arguments).

120. See *id.* at 36–37.

121. Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863 (1991); see also Aviel, *supra* note 119, at 43 (discussing Fallon’s contribution).

Rule 8.4(g) arguably could be used to regulate constitutionally-protected conduct pale in comparison to the instances in which it could be used to regulate unprotected speech and conduct.¹²²

Between these two extremes, several scholars have noted that the attempt to expand the reach of Rule 8.4(g) through its comments created colorable constitutional claims that have provided fuel for critics to latch onto to dissuade state authorities from adopting Rule 8.4(g).¹²³ Some scholars have suggested narrowing the scope of the comments¹²⁴ or eliminating portions of them altogether.¹²⁵

2. CONTENT AND VIEWPOINT DISCRIMINATION

The second set of concerns, raised most prominently by Eugene Volokh,¹²⁶ is that the language of Rule 8.4(g) violates the First Amendment by permitting state disciplinary authorities to engage in content and viewpoint discrimination. The tenor of this argument is that although the rule purports to regulate discrimination and harassment, disciplinary authorities will use it to sanction attorneys expressing viewpoints with which they disagree.¹²⁷ In fact, critics suggest that Comment [4] to Rule 8.4 is not viewpoint neutral on its face, since it exempts “conduct undertaken to promote diversity and inclusion . . . [such as] implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.” This exemption, according to some, suggests that the rule will be applied against those who hold conservative viewpoints on divisive issues such as affirmative action and the constitutional rights of people who are members of a minority related to sex or gender.¹²⁸

A related argument against state adoption of Rule 8.4(g) is that the rule will have a chilling effect on lawyer speech. In some ways, this argument dovetails with the arguments discussed previously. But in other respects, the argument is grounded in the signal that Rule 8.4(g) sends to those who hold anti-establishment

122. See Aviel, *supra* note 119, at 44–45.

123. See Martinez, *supra* note 79, at 831–32.

124. See Aviel, *supra* note 119, at 57–58 (suggesting it could be limited to conduct against persons).

125. See Blackman, *supra* note 17, at 263 (suggesting several changes, including the elimination of language in Comment [4] to Rule 8.4). *But see* Wendy N. Hess, *Addressing Sexual Harassment in the Legal Profession: The Opportunity to Use Model Rule 8.4(g) to Protect Women From Harassment*, 96 U. DET. MERCY L. REV. 579, 597–98 (2019) (suggesting that, if anything, the comments to Rule 8.4(g) unnecessarily limit its scope).

126. See, e.g., Eugene Volokh, *Opinion, Montana Legislature Expresses Opposition to ABA-Proposed Lawyer Speech Code*, WASH. POST (Apr. 12, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/12/montana-legislature-expresses-opposition-to-aba-proposed-lawyer-speech-code/> [<https://perma.cc/DTB3-XF7L>].

127. *Id.*; see also McGinniss, *supra* note 115, at 206 (identifying the concern). At least one federal court has strongly suggested that this argument has merit, granting a preliminary injunction preventing enforcement of Pennsylvania’s version of Rule 8.4(g). *Greenberg v. Haggerty*, Civil Action No. 20-3822 (E.D. Pa. Dec. 7, 2020).

128. Blackman, *supra* note 17, at 259–60.

viewpoints.¹²⁹ Critics point to the ABA's decision to eliminate the proposed clarification that the rule "does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment."¹³⁰ While on the one hand it could be argued that such a clarification is unnecessary—of course, no discipline could be imposed that would violate an attorney's First Amendment rights—its removal could be construed as a signal that such rights are subjugated to the eradication of conduct that is proscribed by Rule 8.4(g).¹³¹

The responses to these criticisms have been more pragmatic in nature. Proponents of Rule 8.4(g) point to the paradigmatic cases in which states have sanctioned an attorney based on discriminatory or harassing conduct, implicitly suggesting that the rule will be applied only in such cases.¹³² One of the most frequently cited examples, *In re Schiff*, is especially pertinent to this Article. In that case, a New York lawyer received a public censure after he referred to opposing counsel, a woman, as "b*tch," called her a "c**t," and an "ss," and told her to "go home and have babies."¹³³ Notably, the lawyer was disciplined for violating New York's FTP provision. In affirming the disciplinary committee's imposition of discipline, the Appellate Division noted that the lawyer "was unduly intimidating and abusive toward the defendant's counsel, and he directed vulgar, obscene and sexist epithets toward her anatomy and gender," which "reflects adversely on his fitness to practice law."¹³⁴

Another common response references disciplinary self-restraint. At the time of its adoption, proponents of Rule 8.4(g) highlighted the fact that the adoption of other anti-bias provisions in states had not led to an influx of disciplinary actions based on those provisions.¹³⁵ Likewise, the late Deborah Rhode suggested that disciplinary authorities do not have the inclination, time, or resources to sanction attorneys based on ideological differences, calling this criticism "wildly out of touch with reality."¹³⁶

129. See Olson, *supra* note 104 (framing Rule 8.4(g) as a plan to "'purify' politically the legal profession").

130. Blackman, *supra* note 17, at 248–49 (quoting the original proposed language and criticizing its removal).

131. McGinniss, *supra* note 115, at 213.

132. See, e.g., Gillers, *supra* note 86, at 216–17 (discussing instances in which lawyers have been sanctioned based on more "imprecise" language than that found in Rule 8.4(g)).

133. *In re Schiff*, No. HP 22/92 (Departmental Disc. Comm. N.Y. Sup. Ct. Feb. 2, 1993).

134. See *In re Schiff*, 190 A.D.2d 293, 294 (N.Y. 1993) (affirming the disciplinary board's recommendation of a public censure for FTP-provision violation).

135. AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES: REVISED RESOLUTION 6 (2016) (discussing the low number of complaints in states that had adopted an anti-bias provision); see also Keith, *supra* note 83, at 32–35 (compiling data on the use of state anti-bias provisions).

136. See The Federalist Society, *Ninth Annual Rosenkratz Debate: Hostile Environment Law and the First Amendment*, YOUTUBE (Nov. 20, 2016), <https://youtu.be/MYsNkMw32Eg> [<https://perma.cc/WB7T-SXEF>] (comments of Prof. Deborah Rhode).

3. EXPANSION OF REQUISITE MENTAL STATE

A third concern relates to the expansion of the requisite mental state beyond conduct that a lawyer “knows” is harassment or discrimination to conduct that a lawyer “reasonably should know” is harassment or discrimination.¹³⁷ George Dent, in particular, argues that a negligence-like standard has never been used in an anti-bias provision in a disciplinary context.¹³⁸ Indeed, the precursor to Rule 8.4(g), Comment [3] to Rule 8.4(d), prohibited an attorney from “knowingly manifest[ing]” bias or prejudice.¹³⁹ Scholars on both sides of the debate have posited that the inclusion of the “reasonably should know” language could capture conduct that is the result of unconscious bias, such as microaggressions.¹⁴⁰

Interestingly, less attention has been devoted to explaining or justifying the inclusion of the “reasonably should know” modifier in Rule 8.4(g). On one hand, the ABA has frequently adopted general misconduct provisions that contain no express mental state. For example, Rule 8.4(d) proscribes “engag[ing] in conduct that is prejudicial to the administration to justice.”¹⁴¹ And, more pertinent to this Article, the FTP provision had prohibited “[e]ngaging in any other conduct that adversely reflects on [the attorney’s] fitness to practice law.”¹⁴² On the other hand, even the staunchest of proponents of Rule 8.4(g) has suggested that a plausible reading of the rule could allow the sanctioning of an attorney who engaged in unintentional discrimination—a result that seems contrary to the spirit of the rule.¹⁴³

D. LESSONS LEARNED

A number of insights that can be gleaned from the struggle to adopt Rule 8.4(g) and the ensuing controversy can inform the way that the legal profession approaches the regulation of misconduct that does not fit within an existing rule. Indeed, these insights have prompted this Article’s reexamination of the FTP provision as a promising addition.

First, the process for amending the rules is a long and difficult one—and even more so when it comes to regulating areas that extend beyond the traditional client-lawyer relationship. Rule 8.4(g) represents the first major change to the

137. Dent, *supra* note 17, at 143–44.

138. *Id.*

139. 2013 MODEL RULES R. 8.4 cmt. 3; *see also* Convention, *supra* note 112, at 59–60 (exchange between Prof. Rotunda and audience member about shift in culpability requirement).

140. Compare Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 367, 402–03 (2017) (stating that she “would have supported the elimination of the word ‘knowingly’ from” Rule 8.4(g), and asserting that lawyers should be required by professional conduct standards “to refrain from manifestations of bias, whether those manifestations come from their conscious or unconscious bias”), with Dent, *supra* note 17, at 144 (expressing the concern that the “reasonably should know” language could lead to the sanctioning of microaggressions).

141. MODEL RULES R. 8.4(d).

142. MODEL CODE DR 1-102(6).

143. Gillers, *supra* note 86, at 218–19 (raising possible concerns about the language but not condemning its inclusion).

general misconduct rule since the adoption of the *Model Rules* in 1983. From the time that the first proposal was put forward, it took more than two decades for the ABA to adopt such a provision in its black-letter rules. In the meantime, the ABA made a number of significant changes to its rules to account for advances in technology, changes in how law firms operate, and the impact of globalization.¹⁴⁴

Second, the ABA's attempt to more specifically identify the types of settings in which Rule 8.4(g) would apply invariably led to concerns about its constitutionality. Specifically, the use of the phrase "conduct related to the practice of law" along with a nonexclusive list of activities led some to argue that it could be applied in settings that should be off-limits for professional regulation.¹⁴⁵ Importantly, several critics of Rule 8.4(g) suggested that the inclusion of language tying the conduct to an attorney's "fitness to practice" would be more justifiable and preferable.¹⁴⁶

Third, any attempt to regulate general misconduct will give rise to assertions of unconstitutional overbreadth and vagueness. Concerns that phrases such as "harassment or discrimination" and "related to" could potentially sweep in otherwise constitutionally-protected conduct are reminiscent of Donald Weckstein's criticism of the *Model Code's* inclusion of the FTP provision, which he posited could include "social drinking, growing a beard, or owning a night club jointly with a football player."¹⁴⁷ Yet again the FTP provision figures prominently in this debate—albeit from the standpoint of proponents of Rule 8.4(g). They point out that challenges on grounds of overbreadth and vagueness have routinely been rebuffed in connection with "more general" and "more elusive" provisions such as the FTP provision.¹⁴⁸ The seminal case in this regard is *In re Holtzman*, in which the New York Court of Appeals stated—in connection with its use of the FTP provision to sanction an attorney in a case of first impression—that "[b]road standards governing professional conduct are permissible and indeed often necessary."¹⁴⁹ That is because "it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney ought to be removed."¹⁵⁰

144. See *ABA Comm'n on Ethics 20/20*, *supra* note 60 (describing the work of the ABA Commission on Ethics 20/20, which led to a number of changes in the *Model Rules*).

145. See ABA Comm. on Ethics and Prof'l Responsibility, Joint Comment Regarding Proposed Changes to ABA Model Rule of Professional Conduct 8.4.6 (Dec. 2015), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/joint_comment_52_member_attys_1_19_16.authcheckdam.pdf [<https://perma.cc/3LS4-7T24>] ("[F]or the first time, the new rule . . . subject[s] attorneys to discipline for engaging in conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system.").

146. See Blackman, *supra* note 17, at 257.

147. Weckstein, *supra* note 51, at 276.

148. Gillers, *supra* note 86, at 216 ("more general"); Wroten, *supra* note 80, at 372 ("more elusive"); see also Aviel, *supra* note 119, at 64–65 (discussing the use of the FTP provision to sanction such misconduct).

149. *In re Holtzman*, 577 N.E.2d 30, 33 (N.Y. 1991).

150. *Id.* (quoting *Ex parte Secombe*, 60 U.S. 9, 14 (1856)); see also Gillers, *supra* note 86, at 216 n.80 (discussing cases in which New York found an FTP-provision violation).

Fourth, despite the fact that Rule 8.4(g) went even further than the state anti-bias provision counterparts that were in existence at the time, it still fails to fully address the myriad ways in which attorney misconduct of this type may arise now and in the future. The litany of cases and actions cited in support of the adoption of Rule 8.4(g) shows that it is nearly impossible to circumscribe the proscribed conduct and its settings, circumstances, and context.¹⁵¹ Some have argued that a reference in the comments to substantive anti-harassment and anti-discrimination laws will unnecessarily narrow the rule's application to only those actions that violate one of those statutes.¹⁵² Relatedly, it has been argued that explicitly modeling Rule 8.4(g) after anti-discrimination laws will limit its application to egregious instances of overt discrimination rather than the more pervasive yet subtle ways in which discrimination, harassment, and other types of abuse of authority undermine the profession.¹⁵³ Indeed, the statistics cited by the ABA in support of its contention that Rule 8.4(g) would not open the floodgates to disciplinary actions are the same ones used to suggest that the adoption of any single anti-bias provision will not produce any real change in the profession.¹⁵⁴

Perhaps in response to the continuing controversy around state adoption of Rule 8.4(g), the ABA issued a formal ethics opinion on July 15, 2020, providing guidance on its import and application.¹⁵⁵ The opinion provided additional explanation on the terms "harassment" and "discrimination," rejected the argument that Rule 8.4(g) is unconstitutional by referencing similar rules that have withstood constitutional scrutiny, clarified that the rule applies only to harmful conduct, and provided five hypotheticals to illustrate its application.¹⁵⁶ Although the opinion suggests that conduct violating Rule 8.4(g) "will often be intentional," it reiterates that the standard is one of "objective reasonableness."¹⁵⁷ Given the recency of the issuance of the opinion, it is unclear whether it will assuage the concerns of those critical of Rule 8.4(g).

The foregoing discussion about the limits of Rule 8.4(g) should not be construed as a recommendation against state adoption. However, it does highlight the need for additional mechanisms, beyond the adoption of any single anti-bias

151. See Habte, *supra* note 109 (recounting the experiences of some attorneys who spoke up in favor of adopting Rule 8.4(g)).

152. See, e.g., Hess, *supra* note 125, at 604 (advocating for states to reject incorporating state anti-harassment and anti-discrimination jurisprudence into their interpretations of Rule 8.4(g)).

153. See, e.g., Martinez, *supra* note 79, at 829–30 (cautioning that Rule 8.4(g) is likely to have a limited effect).

154. See Ebright, *supra* note 6, at 67–73 (discussing the lack of disciplinary actions and the possible explanations for that circumstance).

155. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 493 (2020).

156. See *id.*; see also David L Hudson, Jr., *New Formal Ethics Opinion Gives Additional Guidance on Harassment and Discrimination*, A.B.A. J. (July 15, 2020), <https://www.abajournal.com/news/article/new-formal-ethics-opinion-gives-additional-guidance-on-harassment-and-discrimination#> [<https://perma.cc/9YKN-D72V>] (providing a summary on the key features of the opinion).

157. ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 155, at 14.

provision, to effectively regulate discrimination, harassment, and related misconduct in the profession.

III. EFFECTUATING THE PURPOSES OF LAWYER DISCIPLINE: A THEORETICAL FRAMEWORK

Because this Article identifies the ways in which the FTP provision has been used by state disciplinary authorities and evaluates its utility as a tool to curb lawyer misconduct, it is important to provide a theoretical framework for understanding and evaluating ethical rules. This is a difficult task, both because disciplinary authorities rarely discuss their objectives in creating ethical codes¹⁵⁸ and because relatively little scholarly attention has been given to the subject.¹⁵⁹ This Part begins to fill that gap, as it is the first to identify guiding principles that can be used to systematically evaluate the extent to which a particular ethics rule effectively promotes the purposes for which it was adopted.

A. PURPOSES OF LAWYER DISCIPLINE

The purposes of lawyer discipline are inextricably tied to the profession's tradition of self-regulation. As public scrutiny of attorneys increased in the early twentieth century, those within the profession turned their attention to the development of ethical codes to preserve the profession's stature and to resist calls for external regulation.¹⁶⁰ Almost invariably, disciplinary authorities identify four interrelated purposes of lawyer discipline: (1) protecting the public, (2) promoting the administration of justice, (3) maintaining the integrity and high standards associated with the profession, and (4) instilling and preserving public confidence in the profession.¹⁶¹ Each of these purposes will be discussed in turn.

1. PROTECTING THE PUBLIC

Because lawyers interact with a number of constituents whose legal rights and livelihoods might be affected by misconduct, one of the central goals of lawyer

158. See generally Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675 (2003) (noting that courts and disciplinary authorities do not specifically identify the purposes of lawyer discipline but advocating that they do so).

159. For a scholarly discussion of these issues, see generally Jon J. Lee, *Double Standards: An Empirical Study of Patent and Trademark Discipline*, 61 B.C.L. REV. 1613 (2020) (exploring purposes of lawyer discipline and sanctions and applying them in the context of the work of the U.S. Patent and Trademark Office).

160. See Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1162 (2009) (arguing that attorneys cling on to a myth of self-regulation that is not based in the reality of the other types of regulation on attorney misconduct and simultaneously creates a sense among the public that attorney misconduct is not being properly regulated).

161. See Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 934–37 (1994) (identifying how courts have described the purposes of lawyer discipline); Stephen G. Bené, Note, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907, 912–13 (1991) (identifying purposes of lawyer discipline and arguing that there is consistency among reported bar discipline cases in citing one or more of these purposes).

discipline is to protect the public against lawyers who cannot be entrusted with such a responsibility.¹⁶² While the term “public” is subject to both narrow and broad interpretations, disciplinary authorities often do not identify how they conceive of the term when they use it as a justification for sanctioning an attorney.¹⁶³ While the term certainly encompasses those clients who have been directly affected by the misconduct that is the subject of the disciplinary action, it necessarily extends beyond those clients—most of whom have already terminated their relationship with the attorney—to the attorney’s other clients and future clients.¹⁶⁴

But even this conception of “public” is somewhat narrow, since it focuses on the immediate client-lawyer relationship and does not consider others who might be harmed. Broadly conceived, the public would include people who might be adversely affected were this attorney to repeat this misconduct (or commit other misconduct) in the future.¹⁶⁵ Such persons could be connected with the subject of the lawyer’s representation (such as an opposing party or opposing party’s counsel), but they could also be those with whom the lawyer interacts in the course of performing the lawyer’s duties (such as other attorneys or court personnel).¹⁶⁶ Moreover, if it is assumed that disciplining one attorney has a deterrent effect on other attorneys, the “public” could extend even further to those persons who would have been adversely affected by other attorneys’ misconduct had those attorneys not been deterred from engaging in it.¹⁶⁷

2. PROMOTING THE ADMINISTRATION OF JUSTICE

Because the legal profession has been accused by some of being overly client-centered, disciplinary authorities have recognized the need to ensure that lawyers are not advocating for their clients at the expense of the administration of justice. This purpose is highlighted at the beginning of the Preamble to the *Model Rules*, which states that the lawyer is “an officer of the legal system and a public citizen having special responsibility for the quality of justice.”¹⁶⁸ It is expressly regulated through Rule 8.4(d), which proscribes “engag[ing] in conduct that is prejudicial to the administration of justice.”¹⁶⁹

162. See Zacharias, *supra* note 158, at 678; see also Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 50 (2007) (suggesting that protection of the public should be paramount among the goals).

163. See Lee, *supra* note 159, at 1648.

164. See Janine C. Ogando, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 GEO. J. LEGAL ETHICS 459, 462 (1991).

165. Lee, *supra* note 159, at 1648.

166. See *id.*

167. Cf. Bené, *supra* note 161, at 924–25 (suggesting that lawyer sanctions may have a broad deterrent effect, while arguing that economic penalties might create an even greater incentive).

168. MODEL RULES pmbl. para. 1.

169. MODEL RULES R. 8.4(d); see also Leslie C. Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 17 & n. 78 (1998) (identifying the administration of justice as one of the purposes of discipline and exploring its meaning).

While there are a number of specific rules that address activities that may have an adverse impact on adjudications,¹⁷⁰ the types of activities that may be prejudicial to the administration of justice extend beyond a court setting.¹⁷¹ Indeed, the predecessor to Rule 8.4(g) appeared as a comment in connection with Rule 8.4(d), suggesting that a lawyer who exhibits bias or prejudice could be engaging in conduct prejudicial to the administration of justice under certain circumstances.¹⁷²

3. MAINTAINING THE INTEGRITY AND HIGH STANDARDS ASSOCIATED WITH THE PROFESSION

The third purpose of lawyer discipline, maintaining the integrity and high standards associated with the profession, stems from the notion that an effective disciplinary system will not only successfully curb misconduct but also promote ethical conduct in areas in which disciplinary enforcement may be difficult or impossible.¹⁷³ For this reason, lawyer disciplinary codes have always included aspirational provisions; though initially included within canons, they now appear interspersed within the rules and comments and identify best practices for lawyer conduct.¹⁷⁴ Although there is no expectation that these aspirational provisions will themselves lead to discipline—indeed, the *Model Rules* explicitly prohibit it—they “provide guidance for practicing in compliance with the Rules.”¹⁷⁵

At the same time, there is a general consensus among disciplinary authorities that maintaining the integrity of the profession includes the regulation of at least some misconduct that occurs outside the strict confines of the practice of law.¹⁷⁶ What falls within this category—e.g., commission of violent crimes or failure to pay taxes—is vigorously debated.¹⁷⁷ According to Steven Gillers, this “rest[s] on

170. See, e.g., MODEL RULES R. 3.1–3.9 (disciplinary rules proscribing misconduct involving a tribunal).

171. Lee, *supra* note 159, at 1649 (“[T]his purpose [the administration of justice] pervades the ABA Rules and provides a lens through which they should be understood.”).

172. See *supra* Part II.A (discussing the regulation of bias and prejudice through Comment [3] to Rule 8.4(d)).

173. See Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 644–45 (1981) (noting that ethics rules are only beneficial where they differ from prevailing law and morality and hold members to a higher standard of conduct than would otherwise be required of them). See generally David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (linking effective professional regulation to lawyer independence).

174. See, e.g., MODEL RULES R. 1.5(b) (providing what lawyers should do with regard to the communication of fees); see also Fred C. Zacharias, *What Lawyers Do When Nobody’s Watching: Legal Advertising as a Case Study of the Impact of Unenforced Professional Rules*, 87 IOWA L. REV. 971, 1012–13 (2002) (explaining the differences between unenforceable and unenforced professional rules).

175. MODEL RULES scope para. 14.

176. See Stephen Gillers, *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 485, 495 (2014).

177. See *id.* at 517–27 (describing disparities in New York regarding the sanctioning of misconduct falling outside the practice of law); see also C. Lorene Brown, *Other Misconduct Warranting Discipline*, 17 J. LEGAL PROF. 199, 205 (1992) (identifying a test adopted by some courts that there must be “a nexus between the lawyer’s conduct and those characteristics relevant to the practice of law”).

the proposition that the [discipline] is needed to tell the public that some conduct renders a person unfit to be a licensed lawyer regardless of how she would behave in practice.”¹⁷⁸ Fittingly, the ABA’s general misconduct rule that contains the catchall provisions, Rule 8.4, lies within the section entitled “Maintaining The Integrity Of The Profession.”¹⁷⁹

4. INSTILLING AND PRESERVING PUBLIC CONFIDENCE IN THE PROFESSION

The legal profession has a public perception problem. To be sure, this problem has been fueled by highly publicized incidents of lawyer misconduct such as the ones included in the Introduction.¹⁸⁰ It is also maintained by the profession’s insistence on self-regulation, which leads some to claim that the disciplinary system is overly protective of lawyers at the expense of those who might be affected by their actions.¹⁸¹ This skepticism is compounded by the fact that most disciplinary adjudications are conducted in secret, leading some to argue for increased transparency and public involvement in the process.¹⁸²

There is much more that could be done, but states have begun posting disciplinary statistics and detailed information about individual lawyer discipline on public-facing websites.¹⁸³ Furthermore, some states have undertaken efforts to promote more consistency and uniformity in the imposition of discipline and sanctions imposed.¹⁸⁴ Increasingly, state authorities are methodically applying the ABA Model Rules for Lawyer Disciplinary Enforcement and ABA Standards for Imposing Lawyer Sanctions in determining appropriate sanctions and considering the discipline imposed in prior cases to be binding or persuasive authority.¹⁸⁵

B. EVALUATING DISCIPLINARY RULES: GUIDING PRINCIPLES

Although several scholars have criticized the promulgation of disciplinary rules and their administration on the grounds of regulator inaction, ineffective

178. Gillers, *supra* note 176, at 495.

179. MODEL RULES R. 8.4.

180. See *supra* notes 1–6 and accompanying text.

181. See Allen Blumenthal, *Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession*, 3 KAN. J.L. & PUB. POL’Y, 6, 7–8 (Winter 1993/1994); Zacharias, *supra* note 160, at 1185–86.

182. See, e.g., Levin, *supra* note 162, at 49–50 (recommending transparency for a number of reasons, including public perception).

183. See *id.* at 20–21 (noting the strides made in some states but arguing that more can be done to make details of discipline more widely available).

184. See Gillers, *supra* note 176, at 493–94 (noting that some states have begun using the ABA Standards for Imposing Lawyer Sanctions but New York has not, which might explain its lack of consistency in sanctions).

185. See, e.g., OHIO BD. OF PROF’L CONDUCT, DISCIPLINARY HANDBOOK: VOLUME XIII (2019), https://544c0861-b216-4524-b3df-27c05c4d0e47.filesusr.com/ugd/c6a571_7123a39663ba4b09922a2b6aa646d5a6.pdf [<https://perma.cc/JS4C-75CT>] (compiling and categorizing Ohio disciplinary sanctions imposed in 2019, in which each decision lists the relevant aggravating and mitigating factors as well as the relevant cases upon which the sanction was based).

rule drafting, and inconsistently-imposed discipline,¹⁸⁶ there has been no comprehensive discussion in the scholarly literature of what makes a “good” ethical rule. In some respects this is not surprising because it is difficult to evaluate the operation of an ethical rule without making a normative judgment on the wisdom of the rule itself.¹⁸⁷ Nevertheless, this undertaking is a valuable one for law reform efforts, because it can provide a mechanism for deciding whether a current rule is fulfilling its purpose or determining whether a proposed rule should be adopted.

This Article identifies six guiding principles for evaluating a disciplinary rule. This list does not purport to be exhaustive, but it is a starting point for future work in this area.

1. PRINCIPLE #1: WHETHER THE RULE FURTHERS REGULATORY OBJECTIVES

In some ways, it is self-evident that an effective rule is one that fulfills its regulatory objectives. Unfortunately, disciplinary authorities historically have neglected to explicitly identify their objectives or prioritize among competing objectives, which hinders the effective administration and enforcement of adopted rules.¹⁸⁸ Commonly, disciplinary authorities merely restate some combination of the four purposes of lawyer discipline discussed in Part III.A—protecting the public, promoting the administration of justice, maintaining the integrity of the profession, and instilling public confidence in the profession—without providing additional detail on what those phrases mean or how they might apply in the context of a specific rule.¹⁸⁹ Nevertheless, to the extent that disciplinary authorities do identify a specific regulatory objective, a good rule would both regulate conduct that undercuts that objective and affirmatively promote conduct that furthers it.¹⁹⁰

2. PRINCIPLE #2: WHETHER THE RULE PROMOTES RELEVANT CONSTITUENT INTERESTS

Rules may be directed at one or more constituents: a lawyer’s current or future clients, other people who might be affected by a lawyer’s conduct, legal systems such as tribunals and legislatures, or the legal profession and those who regulate it.¹⁹¹ In considering whether different types of lawyer misconduct should be regulated by disciplinary authorities versus other enforcement systems, David Wilkins has

186. See, e.g., Abel, *supra* note 173 (taking to task the effectiveness of the *Model Rules* in regulating lawyer misconduct and promoting ethical behavior).

187. Cf. Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (And Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 5 (2000) (discussing the criteria for evaluating a criminal code and noting the need to avoid normative judgments).

188. See Zacharias, *supra* note 158, at 744–75 (noting this deficiency and proposing that disciplinary authorities should clearly identify objectives in order to more effectively promulgate and administer rules).

189. See *id.* at 677–78 & n.1 (compiling court opinions that restate one or more of these broad rationales).

190. See Dzienkowski, *supra* note 35, at 85 (“The design of an effective system for regulating lawyers must take into account the justifications for and objectives of such regulation.”).

191. See *id.* at 85–87.

argued persuasively that such a decision should be made in light of the relevant interests at stake and how such interests would be most effectively vindicated.¹⁹² Likewise, the effectiveness of an existing or proposed rule may be judged according to how well it promotes the interests of those constituents it purports to protect.¹⁹³

3. PRINCIPLE #3: WHETHER THE RULE FILLS A REGULATORY GAP

Disciplinary enforcement is just one of many ways in which lawyer misconduct may be regulated and sanctioned. There are a host of other ways, from informal court admonishments and Rule 11 sanctions, to legal malpractice actions and criminal prosecutions.¹⁹⁴ The ABA, for its part, has included among its mitigating factors for sanctions the “imposition of other penalties or sanctions,” which suggests that the administration of professional discipline should take into account the existence of other regulatory mechanisms.¹⁹⁵

There are two consequences of this recognition. First, certain regulatory mechanisms are best suited to handle different types of misconduct.¹⁹⁶ For example, an informal court admonishment regulates a single instance of a lawyer making an off-hand inflammatory remark during a trial more efficiently than would a disciplinary proceeding. On the other hand, a disciplinary proceeding may regulate a lawyer who has neglected the cases of several clients more effectively than would a civil lawsuit, given the higher costs and burdens associated with malpractice actions.¹⁹⁷

Second, ethics rules should be setting standards of conduct that are higher than those set for members of the general public, rather than merely setting the same—or lower—standards.¹⁹⁸ The legal profession comes under fire in this regard because of the perception that its ethics codes are the product of self-serving behavior and often do not proscribe conduct that the public would consider unethical.¹⁹⁹

4. PRINCIPLE #4: WHETHER THE RULE SERVES A DISTINCT FUNCTION

Whereas the third principle concerns whether an ethics rule is an appropriate mechanism for regulating a particular type of misconduct, the fourth principle concerns whether the rule serves a distinct function in relation to other ethics rules. This principle is a corollary of the rule against surplusage, a widely-

192. See Wilkins, *supra* note 173, at 815–18.

193. See Dzienkowski, *supra* note 35, at 100.

194. Cf. Zacharias, *supra* note 160, at 1181–82 (positing that the perpetuation of the myth of self-regulation leads disciplinary authorities to not fully consider alternative mechanisms for regulating misconduct).

195. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10 cmt. (AM. BAR ASS’N 2020) [hereinafter DISCIPLINARY ENFORCEMENT].

196. See Wilkins, *supra* note 173, at 847–49 (discussing the advantages and limitations of different enforcement mechanisms).

197. See Dzienkowski, *supra* note 35, at 100–01.

198. Abel, *supra* note 173, at 644–45.

199. See Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 260–62 (1985) (characterizing several provisions of the *Model Rules* as self-serving).

followed canon of statutory interpretation that provides that “[i]f possible, every word and every provision is to be given effect.”²⁰⁰ It follows that an ethics rule should not be duplicative of another rule (or set of rules), for such duplication could lead those administering the subject rule to erroneously assume that it must have a different meaning than the other rule or rules.²⁰¹ Indeed, the ABA House of Delegates has appeared to apply this principle at times when deciding whether to adopt or eliminate a provision—including when it declined to retain the FTP provision in the transition to the *Model Rules*.²⁰²

At the same time, lawyer misconduct may violate multiple rules. For that reason, it must be clear how a particular rule relates to other, related rules so that lawyers have adequate notice of what conduct is proscribed and to ensure that disciplinary authorities can effectively administer the rule.²⁰³

5. PRINCIPLE #5: WHETHER THE RULE CAN BE APPLIED CONSISTENTLY

One of the biggest criticisms of lawyer discipline is that it is not applied in a consistent manner; that is, that the same types of misconduct are treated differently by the same disciplinary authority.²⁰⁴ While the ABA has promulgated its Model Rules for Lawyer Disciplinary Enforcement and related guidance to promote uniformity and consistency in the imposition of sanctions, those standards are written at a high level of generality and do not fully address the concerns that arise in trying to administer discipline.²⁰⁵ But consistency is critical to ensure that lawyers are on notice of the types of actions that are proscribed so they can conduct themselves accordingly.²⁰⁶ This is especially true when it comes to ethics rules such as the catchall provisions, which are necessarily written in a more general fashion; a disciplinary authority may choose not to enforce a rule or—perhaps even worse—enforce it in instances when it is not warranted.²⁰⁷

Consequently, a good ethical rule is one that can be consistently applied, either based on the language of the rule itself or in combination with comments, formal ethics opinions, or similar guidance on its reach.

200. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012).

201. *Cf.* Robinson, *supra* note 187, at 11 (explaining the concept in the context of criminal codes).

202. *See supra* note 74 and accompanying text.

203. *Cf.* Robinson, *supra* note 187, at 11 (discussing the problems that may arise when there is ambiguity in criminal codes).

204. *See, e.g.*, Gillers, *supra* note 176, at 503–15 (discussing the differences among the New York departments in sanctioning attorneys).

205. *See* DISCIPLINARY ENFORCEMENT R. 10 (containing a laundry list of relevant considerations, but not put in the context of particular rules or factual scenarios).

206. Dzienkowski, *supra* note 35, at 85 (identifying consistency as an important goal in rule design so that lawyers can make consistent decisions when confronted with ethical dilemmas).

207. *Cf.* Zacharias, *supra* note 174, at 1012–14 (discussing the problems of the underenforcement or selective enforcement of ethics rules).

6. PRINCIPLE #6: WHETHER THE RULE IS EFFECTIVELY TAILORED

The final principle, whether an ethics rule is effectively tailored, has two complementary aspects. On one hand, a rule should not sweep in conduct that should not be the subject of a disciplinary action.²⁰⁸ Although one can argue that a disciplinary authority would likely decline to prosecute such a case were it to arise, the mere threat of such an action can itself undermine the rule's effectiveness—as has been seen in the controversy over Rule 8.4(g).²⁰⁹ There might be a variety of reasons that particular conduct should not be the subject of a disciplinary action; for example, it may be constitutionally protected or unconnected to the lawyer's ability to practice law.

On the other hand, a rule should not be written so that it allows an unscrupulous attorney to evade its reach despite having engaged in unethical conduct.²¹⁰ An apt example is Rule 1.8(b), which regulates an attorney's use of information learned in the course of representing a client. Under the provision, an attorney can use confidential information without the client's informed consent provided that the use does not "disadvantage" the client.²¹¹ Such uses may even include taking advantage of (and profiting from) a business opportunity that was learned of during the representation, at least when the client had already decided against taking the opportunity.²¹² Nevertheless, an attorney who acts in such a manner, irrespective of the rules, breaches the client's trust and confidence.²¹³

Rules may enable evasive behavior because they have been written in a self-interested manner, as has Rule 1.8(b), or because they fail to keep up with the changing nature of the legal profession or our evolving understanding of the types of conduct that are antithetical to the ethical practice of law.

IV. EMPIRICAL STUDY OF THE FITNESS-TO-PRACTICE PROVISION

With this theoretical framework in place, this Article turns to the question of whether the FTP provision can be used to effectively regulate misconduct that falls outside the traditional ethical rules—including, but not limited to, the regulation of discrimination and harassment. To answer this question, the author undertook a comprehensive study of the seven states that have retained a version of the FTP provision, analyzing all publicly-available disciplinary actions in those states between January 1, 2012, and December 31, 2019.

This Part begins with a discussion of the scope of the study, including the identification of the relevant provisions in each state and how they are situated

208. See Zacharias, *supra* note 158, at 730–32 (explaining that rule-makers should refrain from drafting rules that could be applied to regulate conduct that was not intended to be subject to a disciplinary action, or at least make it clear that such use was not intended).

209. See *supra* Part II.C.

210. Abel, *supra* note 173, at 642–43 (claiming that this activity is quite common).

211. MODEL RULES R. 1.8(b).

212. MODEL RULES R. 1.8(b) cmt. 5.

213. See Sande Buhai, *Lawyers as Fiduciaries*, 53 ST. LOUIS U. L.J. 553, 580 (2009) (arguing that Rule 1.8(b) prevents only egregious attorney misconduct that harms clients and does not adequately promote loyalty to clients).

within the corresponding disciplinary codes. It then explains the methodology employed, including the strategic coding and analytical decisions made to facilitate analysis across states. Next, the results are presented along with the inferences that may be drawn about how the FTP provision is being used by disciplinary authorities. Violations of the FTP provision fall into one or more of nine categories, which are described and analyzed in greater detail.

A. STUDY SCOPE

Seven states have retained some version of the FTP provision in their professional codes. The relevant provision for each state is included in [Table 1](#).

TABLE 1: STATES THAT HAVE RETAINED THE FTP PROVISION

State	FTP-Provision Language
Alabama	8.4(g): engage in any other conduct that adversely reflects on his fitness to practice law ²¹⁴
Colorado	8.4(h): engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer’s fitness to practice law ²¹⁵
Kansas	8.4(g): engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law ²¹⁶
Massachusetts	8.4(h): engage in any other conduct that adversely reflects on his or her fitness to practice law ²¹⁷
New York	8.4(h): engage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer ²¹⁸
Ohio	8.4(h): engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law ²¹⁹
Washington	8.4(n): engage in conduct demonstrating unfitness to practice law ²²⁰

214. ALA. RULES OF PROF’L CONDUCT R. 8.4(g) (ALA. ST. BAR 2020) [hereinafter ALA. RULES OF PROF’L CONDUCT].

215. COLO. RULES OF PROF’L CONDUCT R. 8.4(h) (COLO. BAR ASS’N 2020) [hereinafter COLO. RULES OF PROF’L CONDUCT].

216. KAN. RULES OF PROF’L CONDUCT R. 8.4(g) (KAN. BAR ASS’N 2020).

217. MASS. RULES OF PROF’L CONDUCT R. 8.4(h) (MASS. BAR ASS’N 2020) [hereinafter MASS. RULES OF PROF’L CONDUCT].

218. N.Y. RULES OF PROF’L CONDUCT R. 8.4(h) (N.Y. ST. BAR ASS’N 2020).

219. OHIO RULES OF PROF’L CONDUCT R. 8.4(h).

220. WASH. RULES OF PROF’L CONDUCT R. 8.4(n) (WASH. ST. BAR ASS’N 2020) [hereinafter WASH. RULES OF PROF’L CONDUCT].

Two preliminary issues arise in the administration of the FTP provision. The first issue is whether the relevant conduct must also be proscribed by another rule. This issue warrants consideration because some believe that catchall provisions should not “pile on” disciplinary rule violations, but rather should operate only when there is a gap in the specific rules.²²¹ On the other hand, others believe that catchall provisions should apply only when more specific rules also proscribe the misconduct at issue to ensure that the lawyer is on notice that the behavior may be sanctionable.²²² The second issue is whether there must be a showing that the lawyer had a particular mental state in performing the conduct. As evidenced by the debate over Rule 8.4(g), some believe that these types of rules should apply only to conduct that was done intentionally or knowingly, rather than merely negligently or without showing any particular mental state.²²³

The FTP provisions themselves shed little light on these issues. The versions adopted in five of the states—Alabama, Kansas, Massachusetts, New York, and Ohio—are substantially the same. They do not make mention of a requisite mental state. Based on their similarities, one might expect disciplinary authorities to administer them similarly. The Washington version omits the word “other” as a modifier of “conduct demonstrating unfitness to practice law.”²²⁴ This omission strongly suggests that in Washington the conduct at issue may also violate another specific provision of its code. Colorado’s FTP provision is the most distinct, in that it requires that the conduct “directly, intentionally, and wrongfully harm[] others.”²²⁵ This language both limits the application of the provision to intentionally harmful conduct and requires a showing of harm to another person, which will necessarily exclude a wide variety of lawyer misconduct that might adversely reflect on a lawyer’s fitness to practice but that did not result in harm to another person.

Neither disciplinary administrators nor courts in most states have provided much clarity on these issues. In Alabama, New York, and Washington, there has been no substantive discussion of the FTP provision outside its application in particular disciplinary matters. A Kansas Supreme Court decision indicates that misconduct in its state “may” violate both the FTP provision and other disciplinary rules simultaneously, but the decision does not suggest that it must do so.²²⁶ One Massachusetts decision discusses the state’s FTP provision in depth, in support of

221. See Hal R. Lieberman & Harvey Prager, *New York’s Catch-All Rule: Is It Needed? Part 1*, NYLER Archive, N.Y. LEGAL ETHICS REPORTER, <http://www.newyorklegaethics.com/new-yorks-catch-all-rule-is-it-needed-part-1/> [<https://perma.cc/SE84-7X9Q>] (last visited Apr. 19, 2021) (discussing New York’s frequently cumulative use of FTP provision and positing that it should be eliminated).

222. See *In re The Matter of the Discipline of an Attorney*, No. BD-2012-043, at 4 (Mass. 2012) (Spina J., single justice), available at <https://bbopublic.blob.core.windows.net/web/f/bd12-043.pdf> [<https://perma.cc/VR3N-VY76>] (expressing concerns in finding an FTP-provision violation where there was not a violation of another ethics rule or similar rule or policy).

223. See generally Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1 (2010) (framing the debate over whether lawyer rules without a specified mental state nevertheless should require proof of a particular mental state).

224. WASH. RULES OF PROF’L CONDUCT R. 8.4(n).

225. COLO. RULES OF PROF’L CONDUCT R. 8.4(h).

226. See *In re Carson*, 991 P.2d 896, 900–01 (Kan. 1999).

its dismissal of a petition for discipline that had been based on a single violation of the FTP provision.²²⁷ In the opinion, the judge expresses “reluctan[ce] to find a violation of [the FTP provision] unless the respondent can be fairly said to have been on notice that her conduct was wrong.”²²⁸ Although the opinion does not require that another ethics rule be violated for there to be a violation of the FTP provision, it posits that there would need to be either the violation of another ethics rule or a violation of a similar type of rule or policy, such as a consistently-enforced law firm policy.²²⁹

Colorado and Ohio provide the clearest guidance on the application and limits of their versions of the FTP provision. The Supreme Court of Colorado has stated that its provision covers only conduct that is not subject to another ethics rule.²³⁰ This means that although a lawyer could be sanctioned in Colorado based on violations of multiple rules, the lawyer will violate the FTP provision only if some part of the misconduct is not proscribed by another rule.²³¹ In Ohio, by contrast, lawyers can violate the FTP provision in two types of circumstances:

- (1) situations in which a lawyer’s conduct in violation of other more specific rules is so egregious that it adversely reflects on [the lawyer’s] fitness to practice law and (2) cases in which there is no specific provision prohibiting a lawyer’s conduct, yet . . . it adversely reflects on the lawyer’s fitness to practice.²³²

The Supreme Court of Ohio articulated this standard in its 2013 decision *Disciplinary Counsel v. Bricker*, rejecting an argument that the FTP provision could be violated automatically by virtue of other rule violations.²³³

Finally, it is necessary to situate the FTP provision in each state within the broader context of the state’s other catchall provisions. All of the states in this study have versions of the crime provision, fraud provision, and administration-of-justice provision.²³⁴ Furthermore, three states have additional catchall provisions of consequence. Ohio maintains a provision proscribing, while in a “professional capacity[,] discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability.”²³⁵ Colorado has a somewhat similar provision; while it is limited to conduct occurring during the “representation of a client,” the provision does not require that the misconduct be prohibited

227. See *In re The Matter of the Discipline of an Attorney*, No. BD-2012-043, at 4–5 (Mass. 2012) (Spina J., single justice).

228. *Id.* at 4.

229. See *id.* at 4–5.

230. See *In re Thompson*, 991 P.2d 820, 822 n. 1 (Colo. 1999) (stating that “[w]hen a lawyer violates a rule other than 8.4(h), it is not necessary or, in a strict sense, proper to charge a violation of 8.4(h)”).

231. See *id.* (assuming there was no separate violation of Rule 8.4(h) but concluding that any such error was harmless because the lawyer had violated other rules that led to the imposed sanction).

232. *Disciplinary Counsel v. Bricker*, 997 N.E.2d 500, 505-06 (Ohio 2013).

233. See *id.*

234. See *supra* notes 77–78 and accompanying text.

235. OHIO RULES OF PROF’L CONDUCT R. 8.4(g).

by law.²³⁶ After the ABA's adoption of Rule 8.4(g), Colorado adopted a provision proscribing "conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities."²³⁷ Because this provision was not adopted until September 2019, there are no disciplinary cases in this study that include a violation of that provision.

Washington's catchall provisions are unique. Along with the traditional catchall provisions and the FTP provision, Washington has six additional catchall provisions. They proscribe, among other things, engaging in discriminatory acts or manifesting bias or prejudice on the basis of one of several protected classifications; willfully disobeying or violating court orders; committing acts, whether criminal in nature or not, involving moral turpitude or corruption or that "reflect[] disregard for the rule of law"; and committing acts that "violate[] his or her oath as an attorney."²³⁸ In addition to examining the use of the FTP provision, this study tracks the administration of state-specific catchall provisions in order to understand their relationship to the FTP provision.

B. METHODOLOGY

After identifying the relevant states and provisions, the next task was to establish the parameters for the study and compile all available disciplinary actions for the time period of interest. Other than New York, which organizes its discipline by department,²³⁹ each state maintains a single central online repository of its disciplinary actions.²⁴⁰ However, the states vary considerably regarding the types of sanctions that are publicly accessible and the level of detail provided. Of the

236. COLO. RULES OF PROF'L CONDUCT R. 8.4(g).

237. COLO. RULES OF PROF'L CONDUCT R. 8.4(i); see also Jessica Yates, *Sexual Harassment and the Rules of Professional Conduct*, COLO. SUP. CT. OFF. OF ATT'Y REG. COUNSEL, [http://coloradosupremecourt.com/Newsletters/March2019/Proposed%20Rule%208.4\(i\).htm](http://coloradosupremecourt.com/Newsletters/March2019/Proposed%20Rule%208.4(i).htm) [https://perma.cc/QXJ3-PKPC] (last visited June 16, 2020) (discussing Colorado's then-proposed rule).

238. See WASH. RULES OF PROF'L CONDUCT R. 8.4.

239. See *Complaints About Attorneys*, N.Y. APP. DIV., FIRST JUD. DEP'T, <http://ww2.nycourts.gov/attorneys/grievance/complaints.shtml> [https://perma.cc/VGD2-CNAD] (last visited June 16, 2020) (explaining that discipline is administered by department rather than by the N.Y. Unified State Court System and providing links to each department); see also, e.g., *First Judicial Department, Attorney Grievance Committee*, N.Y. APP. DIV., FIR JUD. DEP'T, <https://www.nycourts.gov/courts/ad1/Committees&Programs/DDC/index.shtml> [https://perma.cc/YJW6-KQRG] (last visited June 16, 2020); *Fourth Judicial Department, Fourth Department Decisions*, N.Y. UNIFIED ST. CT. SYS, <https://www.nycourts.gov/courts/ad4/Clerk/Decisions/> [https://perma.cc/TQJ7-ES7B] (last visited June 16, 2020).

240. *Disciplinary Decisions*, MASS. BD. BAR OVERSEERS, <https://www.massbbo.org/Decisions> [https://perma.cc/8WML-6CF4] (last visited June 16, 2020); *Disciplinary History*, ALA. ST. BAR, <https://www.alabar.org/office-of-general-counsel/disciplinary-history/> (last visited June 16, 2020); *Discipline Notices*, MYWSBA, <https://www.mywsba.org/personifyebusiness/DisciplineNoticeDirectory.aspx> [https://perma.cc/6HDN-L92H] (last visited June 16, 2020); *Office of the Presiding Disciplinary Judge*, COLO. SUP. CT., https://www.coloradosupremecourt.com/PDJ/PDJ_Decisions.asp [https://perma.cc/N43P-PBHU] (last visited June 16, 2020); *Ohio Disciplinary Decisions*, OHIO BD. PROF'L CONDUCT, <https://www.bpc.ohio.gov/ohio-disciplinary-decisions> [https://perma.cc/9UXY-5GKH] (last visited June 16, 2020); *Published Attorney Discipline Cases*, Kan. Jud. Branch, <https://www.kscourts.org/Attorneys/Published-Attorney-Discipline-Cases> [https://perma.cc/XAR7-C9ZN] (last visited June 16, 2020).

seven states, only Alabama and Massachusetts include publicly-accessible information about the bases of privately-imposed sanctions.²⁴¹ Whereas Alabama provides only a short summary of a lawyer's misconduct and identifies what rules were violated in aggregate, Ohio compiles extensive information about each public sanction, including detailed summaries of the lawyer's misconduct, explanations of which specific aspects of the lawyer's conduct violated particular rules, and findings regarding aggravating and mitigating factors.²⁴² To address these disparities, this study identified common data points across the disciplinary opinions in all states but also compiled additional data (such as on aggravating and mitigating factors) from those states that routinely included it.

To isolate the disciplinary actions for this study, the first step was to identify the appropriate timeframe for consideration. The study's objectives and the integrity of the data militated in favor of the eight-year time period between January 1, 2012, and December 31, 2019. Because this study would be examining how the FTP provision is currently used by state authorities, the time frame had to be long enough to permit a robust analysis for each state but not extend back so far that it would reflect outdated practices. Moreover, in many states, data was missing or suspect before 2012 and/or after 2019, further supporting the use of the eight-year timeframe.²⁴³

The next step was to determine what types of disciplinary actions to include. Because the study focuses on the FTP provision and its relation to other rules, disciplinary actions were included only if they identify one or more rules that provided the basis of the sanction. This excluded a number of disciplinary actions from New York, for example, which automatically disbars attorneys convicted of felonies and implements a different procedure for disciplining attorneys convicted of other serious crimes.²⁴⁴ Nevertheless, this delineation is a logical one given the nature of the study, for it would have been impossible to predict what rules a disciplinary authority would have cited in those actions. The study also excluded decisions that imposed reciprocal discipline, which is discipline in a subject state based on the lawyer having been disciplined by another authority. The study excluded such decisions because they were often based on the rules that the other authority had cited in its disciplinary opinion, rather than on what rules the subject state would have used had the investigation originated there.

241. Both state websites include a dropdown to select the type of discipline imposed, which includes private sanctions. See ALA. ST. BAR, *supra* note 240; MASS. BD. BAR OVERSEERS, *supra* note 240.

242. See, e.g., OHIO BD. OF PROF'L CONDUCT, *supra* note 185 (compiling and categorizing Ohio disciplinary sanctions imposed in 2019).

243. For example, Alabama had 91 publicly-available disciplinary actions in 2012, but only 11 in 2011 and 3 in 2010. See ALA. ST. BAR, *supra* note 240.

244. See N.Y. JUD. LAW § 90(4)(a) (McKinney 2013) (providing that lawyers "who shall be convicted of a felony... shall upon such conviction, cease to be an attorney"); see also Lazar Emanuel, *Felonies & Serious Crimes in Lawyer Discipline*, N.Y. LEGAL ETHICS REP. (Aug. 2002), <http://www.newyorklegalethics.com/felonies-serious-crimes-in-lawyer-discipline/> [<https://perma.cc/NP55-UE8T>] (discussing the procedures governing attorneys convicted of felonies and serious crimes).

Table 2 identifies the numbers of disciplinary actions in this study. In total, the study examines 2,706 actions, 2,294 of which imposed public sanctions and 412 of which imposed private sanctions. The only apparent outlier state was New York, in which there were 140 disciplinary actions. There are two explanations for this low number. As noted, New York’s approach toward felonies and serious crimes necessarily excludes a large number of actions from consideration. Second, only two of its four departments—the First and Fourth departments—make their disciplinary actions widely accessible.²⁴⁵ Accordingly, this study can draw definitive conclusions on the workings of only those departments. Nevertheless, the study did not find significant differences in disciplinary patterns between the First and Fourth departments, and it is reasonable to believe that similar patterns would appear in the Second and Third departments.

TABLE 2: NUMBER OF DISCIPLINARY ACTIONS ANALYZED

State	Public Sanctions
Alabama	225
Colorado	412
Kansas	98
Massachusetts	537
New York	140
Ohio	447
Washington	435
Total	2,294
State	Private Sanctions
Alabama	197
Massachusetts	215
Total	412

245. As of May 28, 2020, neither the Second Department nor the Third Department provided information on specific disciplinary actions. See *Attorney Grievance Committee*, N.Y. APP. DIV., THIRD JUD. DEP’T, <http://www.nycourts.gov/ad3/AGC/Index.html> [https://perma.cc/7W85-4UTP] (including placeholder links to committee decisions) (last visited June 16, 2020); *Attorney Matters*, N.Y. APP. DIVISION, SECOND JUD. DEP’T, http://www.courts.state.ny.us/courts/ad2/attorneymatters_ComplaintAboutaLawyer.shtml#Grievance_Committees [https://perma.cc/J92D-D22S] (last visited June 16, 2020).

After collecting and scrubbing the data, each disciplinary action was reviewed and coded according to the state rendering the decision, year of decision, disciplinary rule(s) violated, sanction type, and sanction length (if applicable). When the general misconduct rule, Rule 8.4, was violated, the specific catchall provisions were also noted. Finally, a summary of the relevant misconduct was created so that commonly occurring fact patterns could be identified.

The study employed additional measures to facilitate comparisons among states. With regard to sanctions, all states use at least one type of public expressive (i.e. non-incapacitating) sanction, whether it be labeled an admonition, reprimand, or censure. For analysis purposes, the study characterized each of these sanctions as “expressive,” irrespective of the differences in terminology. Kansas and Washington have two categories of expressive sanctions, rather than one. Although the two categories were combined for all cross-state comparisons, they were disaggregated when conducting state-specific analyses. Suspensions that were for one year or less were categorized as “short,” while suspensions that exceeded one year were categorized as “long.”

C. OVERALL RESULTS

As an initial matter, the study calculated the incidence rates of FTP-provision violations for all publicly-imposed sanctions in each state. As Figure 1 illustrates, there is a vast discrepancy among states in how often the FTP provision is cited as a basis for discipline. Although the average rate among all states is 36.2%, it ranges from a nearly non-existent rate of 1.0% in Colorado to a nearly ubiquitous rate of 91.4% in New York.

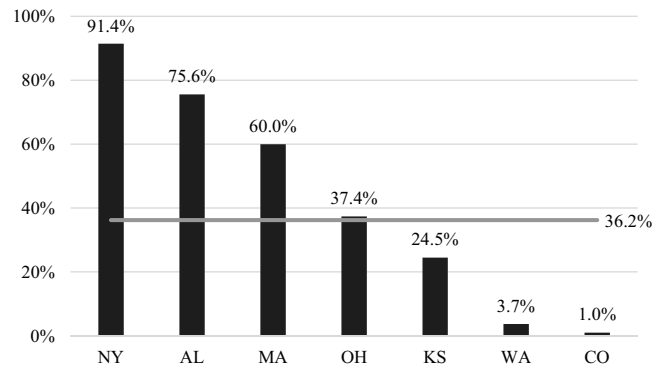


FIGURE 1: Incidence rates of FTP violations in publicly-imposed discipline.

Based on these data alone, there are four natural groupings according to how often disciplinary authorities cite the FTP provision: (1) nearly all the time (New York), (2) a majority of the time (Alabama and Massachusetts), (3) some of the time (Ohio and Kansas), and (4) almost never (Washington and Colorado). Only the rate in Colorado appears to be explainable based on what is known about how

state disciplinary authorities administer the FTP provision. As discussed in Part IV.A, Colorado authorities are permitted to find an FTP violation only where the conduct at issue does not simultaneously violate another rule.²⁴⁶ Consequently, one would expect far fewer violations in Colorado than in other states, where disciplinary authorities ostensibly may find violations of both the FTP provision and other disciplinary rules based on the same misconduct.

Even though there was less accessible information on private sanctions, Alabama and Massachusetts provided enough detail on such sanctions to permit analysis of them. As Figure 2 indicates, both states cite FTP-provision violations in the majority of their publicly-imposed sanctions (solid bars), but there is a great disparity between the two with regard to their privately-imposed sanctions (dashed bars).

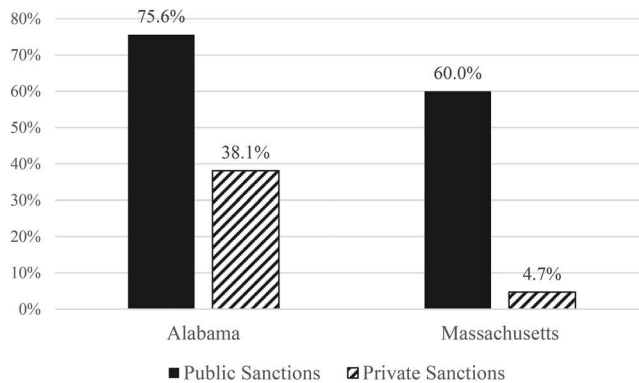


FIGURE 2: Incidence rates of FTP violations in Alabama and Massachusetts.

Although the incidence rates of FTP-provision violations are lower for privately-imposed sanctions in both states, the significantly higher rate in Alabama (38.1% vs. 4.7%) is counterintuitive given the nature of the FTP provision. Because the relevant misconduct should “reflect[] adversely on [the attorney’s] fitness to practice law,”²⁴⁷ one would expect that it would almost invariably result in a publicly-imposed sanction of some type. Public discipline alerts members of the public about the conduct at issue so they can make decisions about representation or, at the very least, watch for signs that the conduct may recur.²⁴⁸

246. See *supra* Part IV.A (discussing the differences between Colorado and other states in this regard).

247. ALA. RULES OF PROF’L CONDUCT R. 8.4(g).

248. See Levin, *supra* note 162, at 49–50 (discussing benefits to the public of having increased transparency in disciplinary actions).

Next, the study calculated the incidence rates of FTP-provision violations for each state over time. For the most part, no clear trends emerged in the longitudinal data.²⁴⁹ However, there was a sharp decline in FTP-provision violations in Ohio, as depicted in Figure 3.²⁵⁰

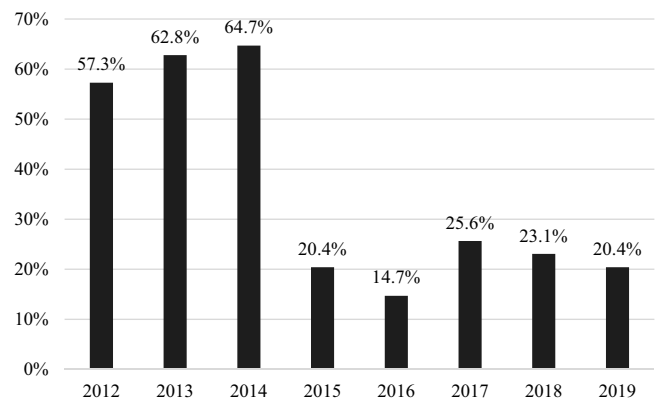


FIGURE 3: Incidence rates of FTP violations in Ohio over time.

Examining the content of the Ohio disciplinary opinions themselves, no clear explanation appeared for the dramatic decline after 2014. However, the precipitous drop may have resulted from the issuance of the *Bricker* decision in late 2013, in which the Supreme Court of Ohio delineated the two types of conduct that may give rise to a FTP-provision violation: conduct that is particularly egregious and conduct that does not give rise to another rule violation.²⁵¹ Although the *Bricker* opinion did not suggest that disciplinary authorities had been improperly sanctioning attorneys for violations of the FTP provision, it is rational to suppose that the opinion led to a change in the investigatory and disciplinary processes. This likely would not fully show up until 2015, given the time required for such changes to be implemented.²⁵²

Table 3 provides information on how often states cited the FTP provision as the sole basis of discipline, which will be referred to as “single FTP violations.”

249. Other than in Ohio, there were no statistically significant correlations between the age of the disciplinary action and the likelihood that it would include a violation of the state’s FTP provision.

250. See *infra* Figure 3.

251. See *Disciplinary Counsel v. Bricker*, 997 N.E.2d 500, 505-06 (Ohio 2013).

252. See *Lawyer Ethics & Discipline*, OHIO ST. BAR ASS’N, <https://www.ohiobar.org/public-resources/about-attorneys/lawyer-ethics-discipline/> [<https://perma.cc/D3LM-XSP6>] (last visited June 16, 2020) (discussing the steps involved in the disciplinary process in Ohio).

Only Ohio and Alabama have more than ten such disciplinary actions, and even in those states they comprise a relatively small percentage of the total number of FTP-provision violations.²⁵³

TABLE 3: FREQUENCY OF SINGLE FTP VIOLATIONS

State	Single FTP Violations	All FTP Violations	Percent
Alabama	11	245	4.5%
Colorado	1	4	25.0%
Kansas	1	24	4.2%
Massachusetts	2	332	0.6%
New York	1	128	0.8%
Ohio	13	167	7.8%
Washington	0	16	0.0%
Total	29	916	3.2%

While at first glance these results might suggest that the FTP provision is of marginal significance, limitations in the data likely affect these results. As discussed in the methodology section, several states do not identify precisely which aspects of a lawyer’s conduct violate particular rules; instead, they summarize the misconduct and provide an aggregate list of violated rules.²⁵⁴ As explored later in this Article, it is common for the FTP provision to be the sole rule violated in connection with one or more aspects of a lawyer’s conduct, but for there to be other aspects of the lawyer’s conduct that violated other rules.

Although the frequency of FTP-provision violations provides some insight into its use, it does not provide a complete picture. Table 4 compares the incidence rates for several of the most commonly cited disciplinary rules, along with the incidence rates for the FTP provision and the other catchall provisions. When a rule is among the five most cited in a state, that

253. See *infra* Table 3.
254. See *supra* Part IV.B.

cell is shaded and its ranking is included in parentheses.²⁵⁵ The final row contains the average incidence rate among all rules cited as a basis for discipline.

TABLE 4: INCIDENCE RATES FOR FTP PROVISION AND OTHER RULES

Rule	Description	AL	CO	KS	MA	NY	OH	WA
1.1	Competence	15%	13%	22%	36%	8%	13%	5%
1.3	Diligence	38% (3)	30% (4)	45% (2-T)	42% (4-T)	40% (4)	36% (4)	34% (4-T)
1.4	Communication	43% (2)	37% (2)	45% (2-T)	37%	22%	38% (2)	42% (3)
1.5	Fees	12%	23%	15%	18%	12%	22%	26%
1.15	Safekeeping Property	35% (4)	34% (3)	26%	45% (3)	32% (5)	35% (5)	48% (1-T)
1.16	Proper Termination	16%	27% (5)	29% (5)	20%	12%	15%	26%
8.1	Bar Cooperation	22%	10%	23%	14%	0%	25%	9%
8.4(b)	Crime	6%	23%	12%	11%	12%	16%	20%
8.4(c)	Fraud	28% (5)	42% (1)	42% (4)	50% (2)	58% (2)	38% (1)	34% (4-T)
8.4(d)	Admin. of Justice	22%	21%	49% (1)	42% (4-T)	56% (3)	31%	24%
Catchall	Other Catchall	0%	0%	0%	16%	0%	0%	48% (1-T)
FTP	Fitness to Practice	76% (1)	1%	24%	60% (1)	91% (1)	37% (3)	4%
Mean	Average Rule	10%	5%	13%	12%	11%	10%	9%

Several patterns emerge. First, some rules rank among the five most frequently cited rules in all or most states. These rules—diligence, communication, safekeeping client property, and the prohibition on committing acts that are fraudulent or deceitful—form the bedrock of lawyer norms and regularly comprise the

255. Where there are ties between the incidence rates of two or more rules, they are denoted by placing a “-T” after the ranking.

basis for disciplinary actions.²⁵⁶ Even in states in which these rules are not among the top five, they are still well above the average incidence rate.²⁵⁷

Second, incidence rates for several of the catchall provisions vary considerably, including the crime provision (e.g., 6% in Alabama versus 23% in Colorado) and the administration-of-justice provision (e.g., 21% in Colorado versus 49% in Kansas).²⁵⁸ The other-catchall category is also especially noteworthy because of its prevalence in Washington as a basis for discipline. Whereas most of the other catchall provisions in other states have negligible incidence rates—including the anti-bias provisions adopted in Ohio and Colorado—48% of Washington's disciplinary actions include a violation of one of its six other catchall provisions.²⁵⁹ Massachusetts is the only other state having a modest percentage of disciplinary actions in which a state-specific catchall provision was cited; that statistic is due to the fact that Massachusetts has a catchall provision that proscribes failing to cooperate with bar counsel or disciplinary authorities.²⁶⁰ The sheer number of catchall provisions in Washington, along with the frequency with which they are being cited, may explain why the FTP provision is so infrequently used there.²⁶¹ In examining the relevant disciplinary actions, it appears that misconduct that would violate another state's FTP provision is instead being regulated by one or more of Washington's six other catchall provisions.²⁶²

Third, the highest degree of variation in incidence rates among states is in the FTP provision itself. Whereas in New York, Alabama, and Massachusetts the FTP provision is overwhelmingly the most-frequently cited provision,²⁶³ it is cited considerably less frequently in Ohio and Kansas and its citation rate is well below average in Washington and Colorado.²⁶⁴ While some of this variation may be explained by the existence of additional catchall provisions, such as in Washington, or the limitations imposed in Colorado and Ohio, these circumstances

256. See, e.g., Stephanie Francis Ward, *Top 10 Ethics Traps*, A.B.A. J. (Nov. 1, 2007), https://www.abajournal.com/magazine/article/top_10_ethics_traps [<https://perma.cc/6E5V-G7S4>] (describing the top ethics traps and how to avoid them, which include issues related to communication, diligence, safeguarding property, and misrepresentation); Debra Cassens Weiss, *These Common Mistakes Can Lead to Lawyer Ethics Complaints*, A.B.A. J. (Feb. 10, 2016), https://www.abajournal.com/news/article/these_common_mistakes_can_lead_to_lawyer_ethics_complaints [<https://perma.cc/XF3V-VYWC>] (identifying five of the most common ethics complaints, which include communication issues, trust account problems, and false notarizations).

257. See *supra* Table 4.

258. See *supra* Table 4.

259. No violations were found in Ohio for the time period of interest, and two violations were found in Colorado (representing less than 1% of all actions in the state).

260. MASS. RULES OF PROF'L CONDUCT R. 8.4(g) ("[F]ail without good cause to cooperate with the Bar Counsel or the Board of Bar Overseers.").

261. See *supra* Table 4.

262. See, e.g., *In re Konat*, No. 13#00008 (Wash. St. Bar Ass'n Disciplinary Bd Dec. 12, 2014), available at <https://www.mywsba.org/WebFiles/CusDocs/000000016082-0/0561.pdf> [<https://perma.cc/7SU9-DHSH>] (issuing a public reprimand to prosecutor who used racially charged language during trial).

263. *Supra* Table 4.

264. *Supra* Table 4.

do not fully explain the differences. To the contrary, this high degree of variation suggests that the FTP provision serves different purposes among the states and is potentially regulating different types of misconduct. It is to these issues that this Article turns.

D. RELATIONSHIP BETWEEN FTP PROVISION AND SANCTIONS

This section explores the role that the FTP provision plays in the public sanctions that are imposed. Figure 4 displays the distribution of public sanctions in each state for disciplinary actions in which there was a violation of the FTP provision, either by itself or in conjunction with other rules. Because there were only four disciplinary actions in Colorado that included an FTP violation, that state has been excluded from this part of the analysis. The distributions in Figure 4 suggest that FTP-provision violations are associated with more punitive sanctions in several states, especially Washington and Ohio.²⁶⁵

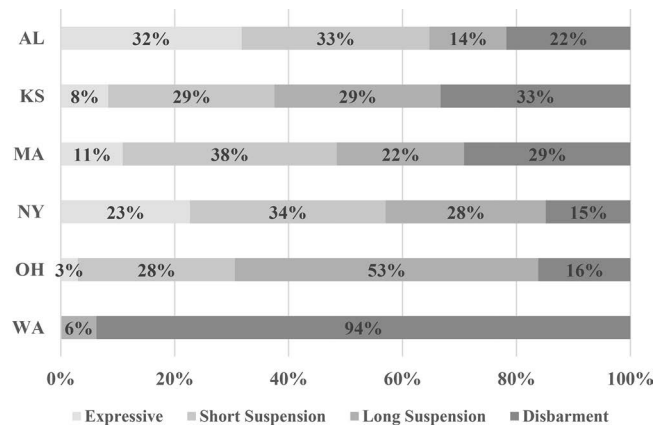


FIGURE 4: Distribution of sanctions involving FTP violation.

Nearly all of Washington’s disciplinary actions that included a violation of the FTP provision resulted in disbarment (94%), indicating that the underlying misconduct was among the most egregious.²⁶⁶ Likewise, 69% of Ohio’s disciplinary actions resulted in a long suspension or disbarment, while only 3% resulted in an expressive sanction.²⁶⁷ But in order to more accurately assess the relationship between the FTP provision and sanctions, additional context is required.

Table 5 presents the distributions of each type of public sanction according to whether the state authority had cited the FTP provision as at least one of the bases

265. See *infra* Figure 4.
266. See *supra* Figure 4.
267. See *supra* Figure 4.

for discipline. The “Percent Difference” column shows the percentage change in the imposition of a particular sanction when the disciplinary authority had cited the FTP provision; a positive percentage indicates that the sanction had been imposed more frequently, and a negative percentage indicates that the sanction had been imposed less frequently. Overall, Table 5 demonstrates that FTP-provision violations have an even stronger relationship with more severe sanctions than Figure 4 suggested.²⁶⁸

TABLE 5: EFFECT OF FTP VIOLATION ON IMPOSED SANCTION

	Expressive				Short Suspension		
State	No FTP	FTP	Percent Difference		No FTP	FTP	Percent Difference
AL	40%	32%	−21%		53%	33%	−38%
KS	11%	8%	−23%		26%	29%	14%
MA	48%	11%	−78%		34%	38%	9%
NY	42%	23%	−46%		33%	34%	3%
OH	22%	3%	−86%		40%	28%	−31%
WA	26%	0%	−100%		22%	0%	−100%
	Long Suspension				Disbarment		
State	No FTP	FTP	Percent Difference		No FTP	FTP	Percent Difference
AL	5%	14%	148%		2%	22%	1097%
KS	41%	29%	−28%		23%	33%	45%
MA	8%	22%	167%		9%	29%	230%
NY	25%	28%	13%		0%	15%	Infinite
OH	34%	53%	59%		4%	16%	277%
WA	15%	6%	−58%		37%	94%	152%

268. See *infra* Table 5.

Table 5 indicates that, in every state, having an FTP-provision violation significantly increases the likelihood that the sanctioned lawyer will be disbarred.²⁶⁹ In New York it seems to be a prerequisite, since all disbarments during the time period included an FTP violation.²⁷⁰ A similar trend appears for the imposition of long suspensions, except in Kansas and Washington.²⁷¹ At the other end of the spectrum, violating the FTP provision in any state substantially reduces the likelihood that the sanctioned attorney will receive an expressive sanction (ranging from -21% to -100%).²⁷² As was discussed with regard to the imposition of private sanctions, the very nature of the FTP provision suggests that it should be more strongly associated with incapacitating sanctions than with private sanctions or even public expressive sanctions.

Nevertheless, it could still be the case that there are other differences in the disciplinary actions themselves that explain the observed variations in sanctions. To test this hypothesis, ordinal regression models were constructed for the three states in which there were at least 200 disciplinary actions and a 5% incidence rate for FTP-provision violations: Alabama, Massachusetts, and Ohio.²⁷³ Although the FTP provision was not an independently significant predictor of the imposed sanctions in Alabama, it was independently predictive of the imposed sanctions in both Massachusetts and Ohio.²⁷⁴ This result remained true for both models when accounting for the other individual rules and the total number of rules that were violated.²⁷⁵ The Ohio model was even more robust, because the disciplinary actions included information on aggravating and mitigating factors and data about the disciplinary process. Nevertheless, the FTP provision remained a strong independent predictor of the type of sanction imposed, even when these variables were accounted for.²⁷⁶ These findings further support the proposition that the FTP provision is a meaningful predictor of the severity of imposed sanctions, rather than merely being duplicative of the other disciplinary rules or of the aggravating and mitigating factors.

269. See *supra* Table 5.

270. See *supra* Table 5.

271. See *supra* Table 5.

272. See *supra* Table 5.

273. These criteria were used to ensure robust data modeling.

274. The Pseudo R-Squares for the Massachusetts model were as follows: Cox and Snell (.543), Nagelkerke (.568), and McFadden (.251). The FTP provision was a significant predictor at the 99.5% confidence level. The Pseudo R-Squares for the Ohio model were as follows: Cox and Snell (.599), Nagelkerke (.654), and McFadden (.370). The FTP provision was a significant predictor at the 99.5% confidence level.

275. Other independent predictors in the Massachusetts model included Rule 1.15 (safeguarding property), Rule 8.4(b) (crime provision), Rule 8.4(c) (fraud provision), and the total rules violated. Other independent predictors in the Ohio model included Rule 8.4(b), Rule 8.4(c), and the total rules violated.

276. The aggravating and mitigating factors were input into the model in various ways. The final model included a numerical value representing the difference between the number of aggravating factors and mitigating factors, because it had the strongest predictive power.

E. TAXONOMY FOR FTP-PROVISION VIOLATIONS

Having established a relationship between FTP-provision violations and resultant sanctions, this analysis shifts to identifying and understanding what types of misconduct fall within the FTP provision. As a preliminary step toward developing a working taxonomy for FTP-provision violations, Pearson correlation coefficients were calculated for violations of the FTP provision and the commonly cited ethics rules. Table 6 presents these results, with statistically significant correlations denoted by one star (significant at .05 level) or two stars (significant at .01 level, also in bold).

TABLE 6: CORRELATIONS BETWEEN FTP PROVISION AND OTHER RULES

Rule	Description	AL	KS	MA	NY	OH	WA
1.1	Competence	.124	.035	.019	−.005	−.060	.127**
1.3	Diligence	.102	−.085	−.055	.042	−.194**	.040
1.4	Communication	.036	−.180	−.038	.040	−.214**	.033
1.5	Fees	.083	.087	−.082*	−.042	−.104*	.021
1.15	Safeguarding Property	.045	−.116	.214**	.101	.030	−.067
1.16	Proper Termination	.029	−.150	.081*	−.121	−.043	−.003
8.1	Bar Cooperation	.205**	−.035	.208**	N/A	.113*	.175**
8.4(b)	Crime	.141*	.077	.298**	−.111	.100*	.119*
8.4(c)	Fraud	.263**	−.050	.554**	.152	.248**	.178**
8.4(d)	Admin. of Justice	.155*	.107	.448**	.087	.280**	.120*
Bar	Bar Catchall	.000	N/A	.189**	.000	N/A	.154**
Other	Other Catchall	.000	.000	.000	.000	.000	.107*

These statistics give rise to several inferences. First, some of the highest correlations appeared in Massachusetts, which may be explained in part by the apparent reluctance in the state to find a violation of the FTP provision without a violation of another provision.²⁷⁷ Indeed, the correlation between the FTP provision and fraud provision in Massachusetts was extremely high at .554.²⁷⁸ Second, in three states there were significant positive correlations between the FTP provision and the fraud

277. See *supra* notes 227–29 and accompanying text.

278. *Supra* Table 6.

and bar-related provisions. There were also significant positive correlations with the administration-of-justice provision (two states), crime provision (one state), and Rule 1.15, the safeguarding-property rule (one state).²⁷⁹ Third, in Ohio, there were significant negative correlations between the FTP provision and two rules that correspond to traditional lawyering tasks (diligence and communication).²⁸⁰ This finding suggests that, at least in Ohio, the FTP provision may be used to sanction misconduct that falls outside the traditional client-lawyer relationship.

With these insights in mind, this study reviewed every disciplinary opinion citing a violation of the FTP provision and grouped them according to the types of misconduct that pertained to the violation. Where authorities disciplined a lawyer based on violations of multiple rules, the grouping was based on the specific aspect(s) of the misconduct that were identified as an FTP-provision violation rather than on the lawyer's entire course of conduct, if such information was available. This Article identifies nine categories of misconduct that gave rise to FTP-provision violations: (1) abusive conduct, including discrimination and harassment; (2) sexual misconduct; (3) breach of trust; (4) untruthfulness; (5) inept lawyering; (6) bar missteps; (7) financial improprieties; (8) ordinary crimes; and (9) other misfeasance. Each category, together with its prevalence, is described in further detail below.

1. ABUSIVE CONDUCT, INCLUDING DISCRIMINATION AND HARASSMENT (4.3% OF ALL FTP VIOLATIONS, 27.6% OF SINGLE FTP VIOLATIONS)

Given the discussions connected with the ABA's adoption of Rule 8.4(g), it was not surprising to find that a number of the FTP-provision violations involved lawyers who engaged in abusive conduct, including discrimination and harassment.²⁸¹ Indeed, some of the most prominent examples cited by proponents of Rule 8.4(g) were taken from disciplinary actions in which a state had found an FTP-provision violation. In one such case, an Ohio attorney received a one-year suspension after he sent a third-year law student several sexually explicit and inappropriate messages, conditioning her future employment with his firm on her agreeing to engage in sexual acts with him.²⁸² Indeed, the three attorneys mentioned in the Introduction were sanctioned for violations of the FTP provision based on conduct that fit in this category.

To be sure, some cases in this category could be covered by Rule 8.4(g) had it been in effect in the jurisdiction because a fair reading of the fact patterns would suggest that the conduct constituted "harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity,

279. *Supra* Table 6.

280. *See supra* Table 6.

281. *See supra* Part II.B.

282. *Lake Cty. Bar Ass'n v. Mismas*, 11 N.E.3d 1180, 1185–86 (Ohio 2014); *see* Matt Skrajner, *Willoughby Lawyer Suspended for Demanding Sexual Favors from Student He Then Hired*, NEWS-HERALD (June 12, 2014), <https://www.news-herald.com/news/ohio/willoughby-lawyer-suspended-for-demanding-sexual-favors-from-student-he-then-hired/> [<https://perma.cc/8MPJ-84LD>] (discussing the case).

marital status or socioeconomic status.”²⁸³ Sixteen of these cases involved sexual harassment in the form of unwelcome sexual advances or requests for sexual favors (e.g., sex in lieu of monetary fees), directed toward current or prospective clients,²⁸⁴ law firm employees,²⁸⁵ or third parties in connection with the lawyer’s professional obligations.²⁸⁶ In fact, three of the four FTP-provision violations in Colorado involved sexual harassment, capturing misconduct that otherwise might have gone unregulated before the state’s recent adoption of a specific sexual harassment provision.²⁸⁷ It is worth noting that only four disciplinary actions in the entire study involved discrimination or harassment based on other protected classes, such as race, national origin, or disability. These findings confirm that sexual harassment is an ongoing problem in the profession while also calling into question whether other forms of discrimination and harassment are occurring but not resulting in professional discipline.

Nevertheless, this category is broader than conduct covered by Rule 8.4(g). It also includes disciplinary actions in which an attorney engaged in abusive conduct not involving a protected class. For example, an Alabama lawyer received a private reprimand for his aggressive behavior and comments toward an Alabama State Trooper in a courtroom: he called the trooper a “dog” and “the kind of cop to shoot first and ask questions later” and committed other acts of intimidation.²⁸⁸ In other instances, the misconduct included misuse of the legal system; an example is an attorney who filed a number of meritless lawsuits as part of a “decade-long campaign of harassment against his ex-wife and other family members, her attorneys, and the judge presiding in [the] divorce action.”²⁸⁹ A number of cases involved verbal abuse of other attorneys or court personnel, but the motivation or basis for these actions was unclear.²⁹⁰ Without more information, these actions would not violate Rule 8.4(g).

283. MODEL RULES R. 8.4(g).

284. *People v. Berman*, 2012 Colo. Discipl. LEXIS 24, at *1, 2012 WL 1795074 (Colo. May 11, 2012) (offensively touching client and making unwelcome comment about client’s appearance), available at <https://www.coloradosupremecourt.com/pdj/Decisions/Berman,%20Conditional%20Admission,%2011PDJ078,5-11-12.pdf> [<https://perma.cc/Y26G-PQDJ>].

285. *Disciplinary Counsel v. Skolnick*, 104 N.E.3d 775, 776 (Ohio 2018) (repeated verbal abuse of paralegal, calling her “stupid, dumb, fat, whorey, and b*tch”), available at <https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-2990.pdf> [<https://perma.cc/J624-TFD6>].

286. *In re J. Bryan Carney*, NO. BD-2016-018 (Mass. 2016) (Lowy J., single justice), available at <https://bbopublic.blob.core.windows.net/web/f/bd16-018.pdf> [<https://perma.cc/DJB7-EEQZ>] (sending sexually explicit text messages to client’s spouse).

287. See Yates, *supra* note 237 (discussing Colorado’s proposed rule and gap that had previously existed).

288. ALA. ST. BAR, *supra* note 240 (private reprimand on Sept. 11, 2015, finding a single violation of the state’s FTP provision).

289. DEPARTMENTAL DISCIPLINARY COMM. OF THE N.Y. APP. DIV., FIRST JUD. DEPT., 2013 ANNUAL REPORT 40 (2013), <http://www.courts.state.ny.us/courts/AD1/Committees&Programs/DDC/2013%20Annual%20Report.pdf> (summarizing the misconduct); see also *In re Davey*, 111 A.D.3d 207, 208–10 (N.Y. App. Div. 2013) (detailing the misconduct).

290. See, e.g., ALA. ST. BAR, *supra* note 240 (private reprimand on Dec. 5, 2017 for threatening legal action and “ma[king] other inappropriate statements involving the city attorney’s possible employment issues, bar license and his representation of the city”).

In fact, conduct in almost half (49%) of the thirty-nine disciplinary actions in this category likely would not violate Rule 8.4(g) as it is currently written. This demonstrates that, even were a state to adopt Rule 8.4(g), the FTP provision would still be needed to regulate other abusive conduct. It is worth noting that for all actions in this category the disciplinary authority could have found that the attorney had acted knowingly, if not purposefully, in committing the conduct that was the subject of the FTP-provision violation.

2. SEXUAL MISCONDUCT (2.1% OF ALL FTP VIOLATIONS, 6.9% OF SINGLE FTP VIOLATIONS)

The sexual misconduct category includes instances of both nonconsensual and consensual sexual contact. Whereas all instances of nonconsensual sexual contact are included in this category, the two types of ostensibly consensual sexual contact included are those in which the attorney is either (1) exploiting the client-lawyer relationship in order to receive sexual gratification, or (2) engaging in additional inappropriate behavior in connection with the sexual relationship.²⁹¹

The prototypical example of the first type is a lawyer who exchanges legal services for sex.²⁹² There are other examples as well, such as the lawyer who engaged in sexual relations with a client's spouse while the client was incarcerated and the lawyer was representing the client on criminal charges.²⁹³

The second type includes lawyers who engage in lengthy "sexting" or other inappropriate written or photographic exchanges with clients after engaging in sexual intercourse.²⁹⁴ When these exchanges are unwelcome, the lawyer's misconduct will also fall into the abusive-conduct category. But even when they are not unwelcome, they fall within the sexual misconduct category.

In another highly publicized case implicating this second type, an Ohio attorney engaged in an extended sexual relationship with his client during which the two exchanged a number of texts and explicit photographs. Although they had agreed to immediately delete the exchanges, the attorney nevertheless retained some of the pictures on his computer. A few months later, they were caught on video engaging in prolonged sexual contact in a courthouse conference room. Once caught, the lawyer misrepresented the nature of their relationship and

291. MODEL RULE R. 1.8(j) proscribes consensual sexual relations between a lawyer and a client. Those circumstances, without more, do not fit in this category.

292. See, e.g., *Disciplinary Counsel v. Bunstine*, 995 N.E.2d 184, 185 (Ohio 2013) (offering to make "other arrangements" in exchange for legal work on a child custody matter); Catherine Candisky, *Court Suspends Lawyer Who Asked Client for Sex*, COLUMBUS DISPATCH (Aug. 29, 2013), <https://www.dispatch.com/content/stories/public/2013/08/28/Lawyer-suspended-for-soliciting-sex-from-client.html> [<https://perma.cc/7AS9-9QR9>] (describing the case).

293. *Disciplinary Counsel v. Owen*, 30 N.E.3d 910, 917–18 (Ohio 2014).

294. See, e.g., *In re Scudieri*, 174 A.D.3d 168, 171–74 (N.Y. App. Div. 2019) (exchanging sexually explicit photographs with a client after engaging in a consensual sexual relationship).

denied engaging in inappropriate conduct in the courthouse. Authorities suspended him for two years.²⁹⁵

Of the nineteen disciplinary actions that involved sexual misconduct, 42% were nonconsensual and 58% were ostensibly consensual but otherwise exploitative or inappropriate. This finding is a notable one, given the relative inattention professional responsibility scholars and rulemakers have paid to ostensibly consensual sexual contact.²⁹⁶

3. BREACH OF TRUST (6.1% OF ALL FTP VIOLATIONS, 13.8% OF SINGLE FTP VIOLATIONS)

By virtue of their positions, lawyers are entrusted to act in the best interests of their clients and constituents. Beyond the all-too-common mismanagement of client funds, which is captured by the financial-improprieties category, lawyers sometimes take advantage of this trust and use it to serve their own personal ends. That type of misconduct comprises the breach-of-trust category.

Because government attorneys and private attorneys have differing responsibilities, the types of misconduct constituting a breach of trust are similarly varied. Public officials, i.e., those who hold public office or who have similar responsibilities, may abuse their position of trust for financial or similar gain. For instance, Marc Dann, the Ohio Attorney General, received a six-month suspension for providing two aides with free rental housing and benefits, paid for out of his political campaign fund.²⁹⁷ In upholding his suspension, the Supreme Court of Ohio highlighted “the unique harm to the legal profession and to public confidence in our government when the attorney general . . . engages in misconduct.”²⁹⁸

For other government attorneys, breach-of-trust violations often involve the use of lawful tools and resources for improper purposes. An Ohio lawyer who had access to confidential information for law enforcement purposes received a public reprimand after she used it to research four people whom she or her friends were dating.²⁹⁹ Similarly, authorities suspended the chief legal counsel for a state administrative department for six months after he used his authority to intercept a number of confidential emails, including those related to ongoing criminal and ethical investigations.³⁰⁰

For private attorneys, breach-of-trust violations frequently involve the exploitation of especially vulnerable clients. These clients may suffer from physical or

295. Disciplinary Counsel v. Benbow, 106 N.E.3d 57, 58-60 (Ohio 2018); see also Randy Ludlow, *Lawyer Suspended for Sex Act with Client Caught on Video in Courthouse*, COLUMBUS DISPATCH (July 12, 2018), <https://www.dispatch.com/news/20180712/lawyer-suspended-for-sex-act-with-client-caught-on-video-in-courthouse> [<https://perma.cc/P8PV-SMWD>] (discussing the incident and sanction).

296. See, e.g., Craig D. Feiser, *Strange Bedfellows: The Effectiveness of Per Se Bans on Attorney-Client Sexual Relations*, 33 J. LEGAL PROF. 53, 55 (2008) (arguing that per se bans on consensual sexual relations between attorneys and clients are unnecessary).

297. Disciplinary Counsel v. Dann, 979 N.E.2d 1263, 1265-66 (Ohio. 2012).

298. *Id.* at 1267.

299. Disciplinary Counsel v. Rosen, 41 N.E.3d 383, 383-84 (Ohio 2015).

300. Disciplinary Counsel v. Engel, 969 N.E.2d 1178, 1179 (Ohio 2012).

mental infirmities,³⁰¹ face language barriers,³⁰² or be acutely in need of legal services,³⁰³ causing them to put even greater trust in their attorneys as fiduciaries. In Alabama, an attorney began assisting an elderly client with his finances and property following the death of the client's wife. Thereafter, the lawyer ousted the client from his own home, sold the home without the client's knowledge, was appointed the beneficiary of the client's trust, and filed a lawsuit on the client's behalf using trust funds without the client's knowledge.³⁰⁴ Ultimately, the attorney was disbarred for this and other related misconduct.³⁰⁵ Another common occurrence arises when attorneys threaten to withdraw from representation unless the client agrees to their demands, sometimes including demands not to file disciplinary complaints against them.³⁰⁶

Although the improprieties of government attorneys, especially public officials, more frequently make the headlines,³⁰⁷ they represented only 25% of the fifty-six disciplinary actions in this category; the other 75% concerned private attorneys.

4. UNTRUTHFULNESS (17.7% OF ALL FTP VIOLATIONS, 13.8% OF SINGLE FTP VIOLATIONS)

Whereas the first three categories may contain misconduct that does not fall under a state's other ethics rules, all misconduct in the untruthfulness category should in theory fall under the fraud provision, which proscribes "conduct involving dishonesty, fraud, deceit or misrepresentation."³⁰⁸ It might also violate a more specific provision such as Rule 3.3(a), which prohibits the making of false statements or presenting false evidence to a tribunal.³⁰⁹ Indeed, 97.5% of the 162

301. *In re Gillis*, No. BD-2016-052 (Mass. 2019) (Gaziano, J., single justice), available at <https://bbopublic.blob.core.windows.net/web/f/bd16-052-2.pdf> [<https://perma.cc/39QH-67AE>] (misappropriating funds held for disabled brother-in-law).

302. *See, e.g., In re Donaldson*, No. BD-2012-045 (Mass. 2012) (Lenk J., single justice), available at <https://bbopublic.blob.core.windows.net/web/f/bd12-045.pdf> [<https://perma.cc/RUF7-W687>] (committing several unethical actions toward client who did not speak English).

303. *See, e.g., Disciplinary Notices*, ALA. LAW., Jan. 2013, at 67–68, https://www.alabar.org/assets/2014/08/The_Alabama_Lawyer_01-2013.pdf [<https://perma.cc/MN2Y-9GB8>] (committing numerous actions that facilitated the defrauding of inmates).

304. *Disciplinary Notices*, ALA. LAW., Mar. 2014, at 134, https://www.alabar.org/assets/2014/08/The_Alabama_Lawyer_03-2014.pdf [<https://perma.cc/2VB8-8PXD>].

305. *Id.*

306. *See, e.g., In re Freyleue*, No. BD-2013-088 (Mass. 2013) (Lenk J., single justice), available at <https://bbopublic.blob.core.windows.net/web/f/bd13-088.pdf> [<https://perma.cc/4HF8-45BG>] (eighteen-month suspension, in part based on requiring clients to withdraw bar complaint as condition of settlement).

307. *See, e.g., Mary Moore, Former Massachusetts Prosecutor Indicted for Allegedly Trading Information for Oxycodone Pills*, BOS. BUS. J. (Jan. 8, 2015), <https://www.bizjournals.com/boston/news/2015/01/08/former-massachusetts-prosecutor-indicted-for.html> [<https://perma.cc/VF88-BPJE>] (discussing indictment of prosecutor who was indefinitely suspended for sharing confidential information with drug suppliers).

308. MODEL RULES R. 8.4(c).

309. MODEL RULES R. 3.3(a).

disciplinary actions in this category cite multiple rule violations as the basis for discipline.

In attempting to ascertain why these disciplinary actions also included a violation of the FTP provision, it was discovered that one of three circumstances typically was present: (1) the lawyer had made affirmative false statements to clients;³¹⁰ (2) the lawyer had forged a signature on a legal document, often the signature of a client, opposing party, or legal official;³¹¹ or (3) the lawyer had made a false statement to a tribunal or other governmental authority, such as the IRS.³¹² Given these themes, the FTP-provision violation appears to capture more egregious instances of lawyer untruthfulness—precisely the types that would seriously call into question a lawyer’s fitness to practice.

5. INEPT LAWYERING (35.0% OF ALL FTP VIOLATIONS, 10.3% OF SINGLE FTP VIOLATIONS)

The inept-lawyering category consists of legal services that fail to meet the standard expected of a lawyer representing a client or in a similar governmental role. These types of misconduct often lead to bar complaints: failing to take timely action, lack of communication, and shoddy legal work, among others.³¹³ As with the untruthfulness category, conduct constituting inept lawyering almost invariably violates more specific rules—99.1% of the 321 disciplinary actions in this category included violations of other rules in addition to the FTP provision.

Because of the lack of detail in many disciplinary actions, it is sometimes unclear why the authority found a violation of the FTP provision along with more specific rules. But in a state such as Ohio, which now requires that misconduct violating another rule be sufficiently egregious, the opinions note the aspects of the misconduct that met that threshold. These may include repeated instances of misconduct concerning a single client or similar misconduct affecting multiple clients.³¹⁴ The latter was involved when authorities suspended an Ohio attorney for two years after he filed nearly identical briefs in thirty-one of thirty-five criminal appeals that he was appointed to handle over a four-year period.³¹⁵

310. See, e.g., *In re Barry*, No. BD-2012-022 (Mass. 2012) (Duffy J., single justice), available at <https://bbopublic.blob.core.windows.net/web/f/bd12-022.pdf> [<https://perma.cc/XN3D-SZB5>] (misrepresenting to client the status of litigation and the suspension of his bar license).

311. See, e.g., *Warren Cty. Bar Ass’n v. Vardiman*, 51 N.E.3d 587, 590 (Ohio 2016) (forging opposing party’s signature on legal documents submitted to tribunal).

312. See, e.g., *In re Breines*, No. BD-2016-084 (Mass. 2017) (Lowy J., single justice), available at <https://bbopublic.blob.core.windows.net/web/f/bd16-084.pdf> [<https://perma.cc/QJF7-AAX6>] (providing forged and falsified documents to FBI).

313. See *supra* note 256 and accompanying text.

314. See, e.g., *Disciplinary Counsel v. Holmes*, 120 N.E.3d 820, 822 (Ohio 2018) (asserting that “the board specifically found that because Holmes and Kerr had improperly disclosed confidential client information over an almost two-year period, their conduct was sufficiently egregious to constitute a separate [FTP] violation”); *Disciplinary Counsel v. Milhoan*, 29 N.E.3d 898, 899 (Ohio 2014) (finding FTP-provision violation for providing incompetent representation to thirty-one criminal defendants).

315. *Milhoan*, 29 N.E.3d at 899.

Apparently each client matter had been billed as though the attorney had done independent work on it and, to make matters worse, the recycled template brief reflected substandard work.³¹⁶ In addition, there were a number of instances of lawyers failing to complete relatively simple legal matters in a timely fashion (or at all)—such as a New York lawyer who was censured for failing to finalize a divorce action for sixteen years.³¹⁷

6. FINANCIAL IMPROPRIETIES (33.6% OF ALL FTP VIOLATIONS, 6.9% OF SINGLE FTP VIOLATIONS)

Disciplinary authorities frequently say that the surest way for a lawyer to lose a bar license is to commit financial misconduct.³¹⁸ Therefore, it is not surprising that financial improprieties appear quite prominently as the basis of FTP-provision violations; mishandling and converting client funds certainly call into question the ability to ethically practice law. Initially, misconduct in this category was put into the inept-lawyering category because it relates to one of the central responsibilities of a lawyer. However, given its frequent appearance in the disciplinary actions under study—over one-third of the actions reviewed—it was isolated for separate consideration in its own category.

As with the inept-lawyering category, nearly all disciplinary actions in the financial-improprieties category included a violation of at least one other rule, frequently Rule 1.15, which governs the safeguarding of client property, or the crime provision. In order to avoid excessive overlap between the financial-improprieties and inept-lawyering categories, the former includes only instances in which the lawyer mishandled or converted funds. It does not include instances in which a lawyer neglected to refund fees in a timely fashion or charged an excessive fee, unless it appeared that the conduct was committed repeatedly or had been done with a financial motive. This is because those actions often indicate a lack of diligence or competence in connection with a particular client matter rather than financial impropriety.

7. BAR MISSTEPS (17.7% OF ALL FTP VIOLATIONS, 0.0% OF SINGLE FTP VIOLATIONS)

FTP-provision violations often were correlated with violations of Rule 8.1, which governs bar admission and disciplinary matters, as well as with two state-specific bar catchall provisions.³¹⁹ Furthermore, there were even more disciplinary opinions that had not cited a violation of one of those other rules in

316. *Id.* at 899–900.

317. *In re Thomas*, 159 A.D.3d 35, 36–37 (N.Y. App. Div. 2018).

318. *See, e.g.*, Martin A. Cole, *55 Ways to Lose Your License*, 66 BENCH & B. MINN. 14, 14 (2009), <http://lprb.mncourts.gov/articles/Articles/55%20Ways%20to%20Lose%20your%20License.pdf> [<https://perma.cc/LT6H-RW6U>] (asserting that “[i]t should come as no surprise that various forms of financial misconduct top the list of ways to lose your license”).

319. *See supra* Table 6.

conjunction with the FTP provision yet involved a similar type of misconduct.³²⁰ In total, four types of conduct emerged: (1) failing to comply with requirements for maintaining a law license (e.g., continuing legal education or payment of fees);³²¹ (2) failing to respond to disciplinary authorities;³²² (3) making false representations to disciplinary authorities;³²³ and (4) failing to abide by decisions of disciplinary authorities.³²⁴

The fourth type of conduct included a number of attorneys who continued to practice law while suspended from practice. In some instances, the attorney also committed other misconduct, such as failing to competently and diligently pursue client matters. In such a case, the disciplinary action was categorized under both the inept-lawyering and bar-missteps categories.³²⁵ In others, there was no proof of deficient representation, but the fact that the attorney contravened an order to cease practicing law resulted in the action being placed into the bar-missteps category.³²⁶

8. ORDINARY CRIMES (10.0% OF ALL FTP VIOLATIONS, 27.6% OF SINGLE FTP VIOLATIONS)

All states in this study have adopted a version of Rule 8.4(b), which proscribes “commit[ing] a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”³²⁷ Nevertheless, all states other than Colorado cited the FTP provision as the disciplinary basis for the commission of some so-called “ordinary” crimes; that is, criminal conduct not directly connected with the attorney’s legal practice. The types of crimes varied considerably; they included crimes of violence,³²⁸ possession of child pornography,³²⁹ tax evasion or underreporting,³³⁰ possession or distribution of controlled

320. See, e.g., *In re Roper*, No. BD-2016-055 (Mass. 2016) (Cordy J., single justice), available at <https://bbopublic.blob.core.windows.net/web/f/bd16-055.pdf> [<https://perma.cc/33RA-BHL7>] (failing to notify Board of Bar Overseers that her insurance had lapsed).

321. See, e.g., *id.*

322. See, e.g., *In re Falk*, 138 A.D.3d 25, 27-28 (N.Y. App. Div. 2016).

323. See, e.g., *In re Williams*, 362 P.3d 816, 819-20 (Kan. 2015) (detailing multiple false representations to disciplinary administrator).

324. See, e.g., *Disciplinary Notices*, ALA. LAW., May 2019, at 207, https://www.alabar.org/assets/2019/05/2019-May-AL-Lawyer_05-2013.pdf [<https://perma.cc/S3QC-T5AR>] (violating disciplinary order by practicing law while suspended).

325. See, e.g., *In re Shaw*, 180 A.D.3d 1, 2-3 (N.Y. App. Div. 2019) (detailing an example of neglect of a client matter while suspended).

326. See, e.g., *Disciplinary Notices*, *supra* note 324, at 207.

327. MODEL RULES R. 8.4(b); see note 77 and accompanying text.

328. See, e.g., *Disciplinary Notices*, ALA. LAW., May 2013, at 198, https://www.alabar.org/assets/2014/08/The_Alabama_Lawyer_05-2013.pdf [<https://perma.cc/6X3B-3GB5>] (assault).

329. See, e.g., *Dayton Bar Ass’n v. Ballato*, 34 N.E.3d 858, 858-59 (Ohio 2014).

330. See, e.g., *Cleveland Metro. Bar Ass’n v. Toohig*, 979 N.E.2d 332, 333-34 (Ohio 2012) (income tax evasion).

substances,³³¹ operating a motor vehicle while under the influence of alcohol,³³² failing to pay court-ordered obligations,³³³ and fleeing the scene of an accident.³³⁴

Most of the time, the commission of a single crime appeared to be the reason for the FTP violation. However, a few opinions specifically identified the repetition of unlawful conduct or its connection to legal processes as the basis for discipline. This was especially true in Ohio following the *Bricker* decision because of the requirement that the conduct be sufficiently egregious to warrant the additional finding of an FTP violation.³³⁵

9. OTHER MISFEASANCE (2.3% OF ALL FTP VIOLATIONS, 6.9% OF SINGLE FTP VIOLATIONS)

As the “catchall category” for a catchall provision, the other-misfeasance category contains misconduct not occurring often enough to merit a separate category but that reflects adversely on a lawyer’s fitness to practice. Although one might worry that an “other” category might sweep in conduct that should not be regulated—whether because of constitutional concerns or fears of overreaching—a review of these disciplinary actions indicates that disciplinary authorities have not been administering the FTP provision in that way.

By and large, the misconduct at issue was analogous to misconduct falling under other categories. For example, there were several disciplinary actions in which lawyers demanded or traded controlled substances (rather than sexual favors) in connection with their representation of clients.³³⁶ For example, a New York attorney was suspended for a year for “his purchase of heroin from a client on multiple occasions while representing him on a drug possession and sale case.”³³⁷ While the attorney’s conduct was undoubtedly criminal, it had an additional facet of impropriety given its connection with a client matter and the nature of the legal representation. In other disciplinary actions, lawyers had committed assaults on current adversaries or former colleagues.³³⁸

But there were other disciplinary actions that defied categorization elsewhere. An Ohio lawyer allowed a law firm with which he was associated to use his

331. See, e.g., ALA. ST. BAR, *supra* note 240 (private reprimand on Apr. 4, 2014 for marijuana possession and possession of drug paraphernalia).

332. See, e.g., *In re Meyer*, 362 P.3d 598, 601–03 (Kan. 2015).

333. See, e.g., *In re Florez*, 316 P.3d 755, 759–61 (Kan. 2014) (failure to pay child support).

334. See, e.g., *Stark Cty. Bar Ass’n v. Zimmer*, 989 N.E.2d 51, 53 (Ohio 2013).

335. See, e.g., *Columbus Bar Ass’n v. Lindner*, 81 N.E.3d 453, 455 (Ohio 2017) (basing FTP-provision violation on “volume, seriousness, recklessness, and repetitiveness of [attorney’s] unremitting lawless behavior”).

336. See, e.g., *People v. Athanasiou*, 2012 Colo. Discpl. LEXIS 51, *1, 2012 WL 4163234 (Colo. Sept. 20, 2012), available at <https://www.coloradosupremecourt.com/pdj/Decisions/Athanasiou,%20Conditional%20Admission%20of%20Misconduct,%2012PDJ069,%20%2009-20-12.pdf> [<https://perma.cc/FRK2-MTFG>] (accepting cocaine as legal fees).

337. *In re Linn*, 163 A.D.3d 120, 121 (N.Y. App. Div. 2018).

338. See, e.g., *Stipulation to Disbarment, In re Graeff*, No. 18#00485, 1–3 (Wash. St. Bar Ass’n Disciplinary Bd. Aug. 22, 2019), available at <https://www.mywsba.org/WebFiles/CusDocs/000000048235-0/013.pdf> (discharging weapon after disagreement with lawyer with whom respondent had worked).

attorney number and electronic signature but failed to monitor its use, which led to the firm entering into a number of client contracts without his knowledge.³³⁹ A New York lawyer failed to make timely payments of his state and federal income taxes over a twenty-eight year period; even though his actions were not criminal or prejudicial to the administration of justice, he was publicly censured for violating the FTP provision.³⁴⁰ There was even a Kansas attorney who, while representing a client in a capital case, called his client a “professional drug dealer” and “shooter of people,” and told the jury during the sentencing phase that his client should be executed.³⁴¹ This conduct goes beyond anything included in the inept-lawyering or breach-of-trust categories, striking at the very heart of the client-lawyer relationship.

F. RESULTS BY CATEGORY

Figure 5 displays the distribution of FTP-provision violations by category.³⁴² The solid bars represent the distribution among all disciplinary actions that contain an FTP-provision violation, and the dashed bars represent the distribution for disciplinary actions in which the FTP provision was the sole basis for discipline. Taken together, these sets of bars show that the FTP provision often is being used to regulate different types of misconduct when it is the sole source of a disciplinary action.

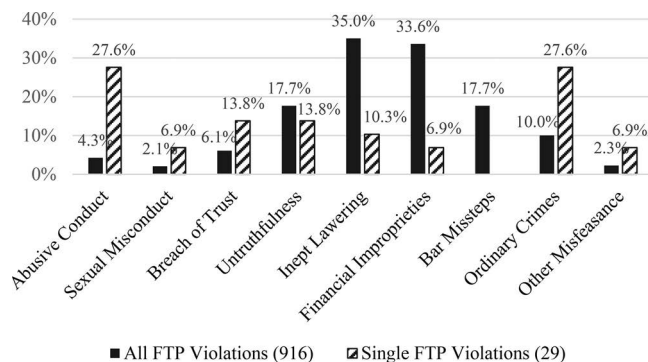


FIGURE 5: Categorical distribution of FTP violations.

Unsurprisingly, when the FTP provision is one of multiple rule violations in a disciplinary action, the misconduct is more likely to be related to inept lawyering (35.0%), financial improprieties (33.6%), untruthfulness (17.7%), or bar missteps (17.7%)—the categories associated with other frequently-violated rules. However,

339. *Disciplinary Counsel v. Lorenzon*, 978 N.E.2d 183, 185-87 (Ohio 2012).

340. *In re Rogoff*, 147 A.D.3d 13, 14 (N.Y. App. Div. 2016).

341. *In re Hawver*, 339 P.3d 573, 585 (Kan. 2014).

342. The vast majority of disciplinary actions (97.4%) fell into a single category (72.5%) or two categories (24.9%).

when the FTP provision is the sole source of discipline, there is a large percentage increase in the abusive-conduct (+542%), sexual-misconduct (+229%), breach-of-trust (+126%), and other-misfeasance (+200%) categories. These increases are generally coupled with decreases in the categories associated with other frequently-violated rules. The only apparent outlier is the ordinary-crimes category, which was implicated in 10.0% of all actions citing an FTP-provision violation and 27.6% of actions citing only an FTP-provision violation. Upon closer inspection, many of these latter disciplinary actions involved lawyers who had been arrested for a crime but who had not been convicted or who had pled guilty to another minor offense. These circumstances could explain why the disciplinary authorities cited the FTP provision rather than the crime provision.³⁴³

While these results suggest that the FTP provision is used in different ways, they do not indicate whether and how these results differ by state. Figures 6-A and 6-B address these issues, depicting the categorical distribution of all FTP-provision violations by state.³⁴⁴ Figure 6-A depicts the “traditional” categories that are associated with other frequently-violated rules.

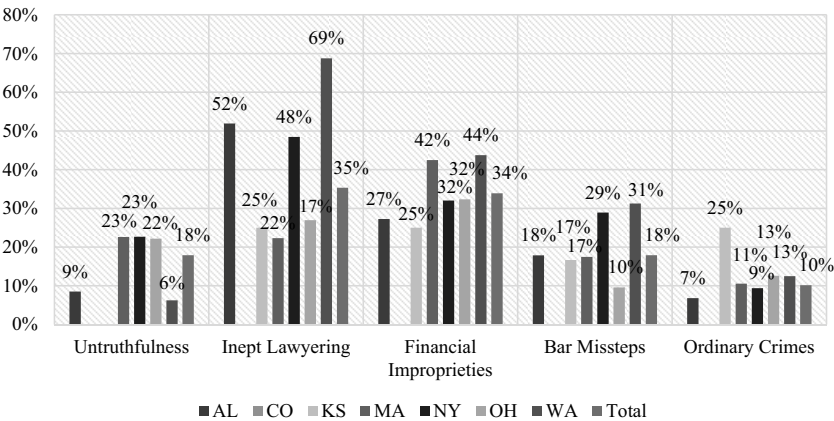


FIGURE 6-A: Distribution by state—traditional categories.

Some states, including Alabama, New York, and Washington, use the FTP provision more frequently in connection with these traditional categories. In Alabama and New York, this is likely because authorities in both states frequently cite the FTP provision as a basis for their disciplinary actions (75.6% and

343. See, e.g., ALA. ST. BAR, *supra* note 240 (private reprimand on May 10, 2012 for public intoxication on university campus).

344. Given the low number of disciplinary actions in which the FTP provision was the sole source of discipline (29), it was impossible to provide a meaningful distribution for those actions by state.

91.4% of all actions, respectively)³⁴⁵ and do not appear to have any specified criteria for its use. In Washington, the FTP provision is cited infrequently (4% of all actions),³⁴⁶ but it is almost exclusively used in cases of disbarment—cases where, by their nature, the attorney likely has committed a number of improprieties that have prompted the imposition of such a severe sanction.³⁴⁷ While Massachusetts frequently cites violations of the FTP provision (60% of all actions),³⁴⁸ the state deploys it more frequently for the commission of financial improprieties (42%) than for other types of misconduct. By contrast, Kansas uses the FTP provision more often for ordinary crimes (25%) and—astonishingly—never uses it for misconduct that would fall into the untruthfulness category.³⁴⁹

Figure 6-B displays the distribution by state of the nontraditional categories that are not clearly associated with other existing rules. A different set of states are prominent in this figure, most notably Colorado, Kansas, and Ohio.

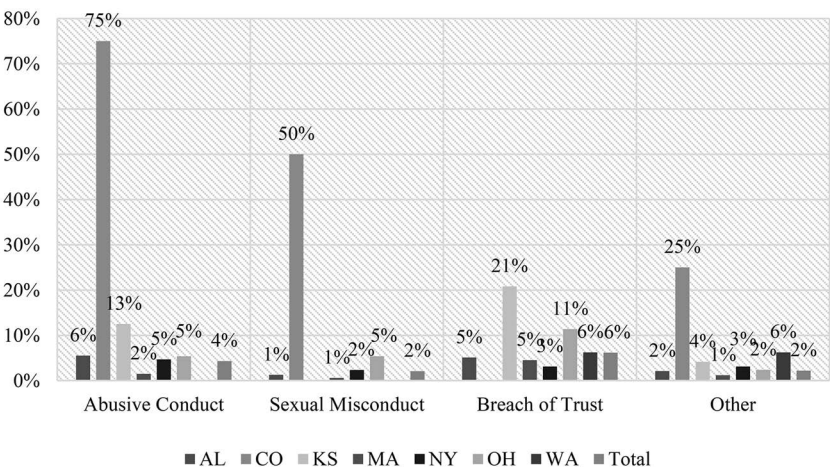


FIGURE 6-B: Distribution by state—nontraditional categories.

To be clear, the exceedingly high percentages for Colorado reflect the fact that the state had only four FTP-provision violations during the time period under study. Accordingly, no inferences should be drawn based on those percentages alone. However, these results, coupled with those in Figure 6-A, show that

345. See *supra* Figure 1.
346. See *supra* Figure 1.
347. See, e.g., *In re Hunt*, No. 13#00085 (Wash. St. Bar Ass’n Disciplinary Bd. Dec. 31, 2013), available at <https://www.mywsba.org/WebFiles/CusDocs/000000033499-0/0421.pdf> [<https://perma.cc/5A36-GT2U>] (disbarment based on ten counts of misconduct and violations of numerous rules and provisions, including the FTP provision).
348. See *supra* Figure 1.
349. See *supra* Figure 6-A.

Colorado is exclusively using the FTP provision to regulate misconduct that does not fit within the purview of currently-existing rules. Kansas regularly uses the FTP provision to sanction misconduct that constitutes a breach of trust (21%) or abusive conduct (13%).³⁵⁰

Ohio also uses the FTP provision to regulate misconduct that involves a breach of trust (11%).³⁵¹ Notably, out of the fourteen breach-of-trust violations that involved government attorneys, twelve (86%) arose in Ohio. This finding indicates that Ohio in particular has latched on to the FTP provision as a way to regulate those types of public-facing improprieties. Furthermore, Ohio has used the FTP provision to sanction sexual misconduct at a higher-than-average rate (5% versus 2%), although the numbers and percentages still are low from an absolute perspective.³⁵²

States that cite the FTP provision more frequently, such as Alabama, Massachusetts, and New York, have lower percentages of FTP-provision violations that fall into the nontraditional categories.³⁵³ These results are to be expected given their orientations toward the FTP provision and the various types of traditional misconduct to which they ascribe FTP-provision violations.

V. RECONSIDERING THE FITNESS-TO-PRACTICE PROVISION

As Part IV demonstrates, the FTP provision is far from a dead letter for those states that have retained it in their codes of professional conduct. In nearly all of those states, it is strongly associated with more severe sanctions and, in some states, it is being used to capture more information about the egregiousness of the conduct than is captured through other rules. Furthermore, the FTP provision is being used to regulate a variety of categories of misconduct, including some that are not fully covered by other rules.

This Part examines the utility of the FTP provision as a tool to regulate the continually-evolving and nuanced ways in which lawyer misconduct may arise. It concludes that the FTP provision can be a valuable tool to regulate elusive lawyer misconduct and recommends its widespread adoption, even in states that have adopted Rule 8.4(g) or a similar anti-bias provision. In order to maximize its effectiveness and address criticisms about its potential for misuse, however, states should abide by the best practices identified below.

A. FTP PROVISION AS TOOL TO REGULATE ELUSIVE MISCONDUCT

The results of the empirical study in Part IV indicate that there are two distinct ways in which disciplinary authorities use the FTP provision to sanction attorneys who commit misconduct. First, a disciplinary authority may find a violation of

350. See *supra* Figure 6-B.

351. See *supra* Figure 6-B.

352. See *supra* Figure 6-B.

353. See *supra* Figure 6-B.

the FTP provision where the attorney has engaged in egregious misconduct that goes beyond a routine violation of an existing ethics rule. In all states that have retained the FTP provision, there is a positive relationship between having an FTP-provision violation and the imposition of more severe sanctions such as disbarment.³⁵⁴ Moreover, in Ohio and Massachusetts in particular, the FTP provision is independently predictive of the imposition of more severe sanctions—meaning that it serves a distinct “ratcheting” function that is not fulfilled by other ethics rules.³⁵⁵ In fact, Ohio authorities are expressly administering the FTP provision in this manner and indicate as much in their disciplinary opinions.³⁵⁶

Second, disciplinary authorities are using the FTP provision to regulate misconduct that does not clearly fall within a state’s existing ethics rules—including discrimination and harassment. Colorado provides an apt example of this second use of the FTP provision, in that disciplinary authorities there may use the FTP provision only in these circumstances. Before Colorado’s recent adoption of a sexual harassment provision in its code, disciplinary authorities successfully used the FTP provision to sanction attorneys who had committed sexual harassment in connection with their professional activities.³⁵⁷ But even in a state such as Ohio that has adopted an anti-bias provision, disciplinary authorities still use the FTP provision to sanction attorneys who commit such misconduct—perhaps because the state’s anti-bias provision is limited to conduct that is “prohibited by law.”³⁵⁸ These two examples show that the FTP provision can be used to regulate misconduct that falls between the cracks, either because the state has not adopted a more specific rule or because a specific rule has limitations that prevent it from effectively covering the ways in which lawyer misconduct may manifest itself.

Furthermore, the FTP provision is more than just an alternative for states that are unable to adopt a version of Rule 8.4(g) for legal or policy reasons. This study reveals that the FTP provision is also used to regulate other types of misconduct, including abusive conduct that does not fall squarely within the definitions of discrimination or harassment, sexual misconduct, breaches of trust, and other instances of misfeasance that do not fit within a defined category.³⁵⁹ Although there were only twenty-nine disciplinary opinions that found a single violation of the FTP provision,³⁶⁰ that number surely is under-representative of the cases in which a part of the lawyer’s misconduct was not proscribed by another existing rule.

354. See *supra* Part IV.D.

355. See *supra* Part IV.D (describing the additional data modeling for Ohio and Massachusetts).

356. See, e.g., *Disciplinary Counsel v. Adelstein*, 159 N.E.3d 1126, 1129 (Ohio 2020) (recent opinion affirming FTP-provision violation for multiple successive trust account violations).

357. See *supra* note 287 and accompanying text.

358. OHIO RULES OF PROF’L CONDUCT R. 8.4(g); see, e.g., *Lake Cty. Bar Ass’n v. Mismas*, 11 N.E.3d 1180 (Ohio 2014) (finding single FTP violation where an attorney sent sexually inappropriate texts to third-year law student).

359. See *supra* Part IV.E.

360. *Supra* Table 3.

Nevertheless, because most states do not provide that level of detail in their opinions, it is impossible to know precisely how frequently that occurs.

Conceived of in this way, disciplinary authorities can use the FTP provision to regulate attorney misconduct that should be sanctionable except for the fact that there is not (yet) a specific rule that adequately covers the conduct. In this regard, the significant number of Ohio cases that involve breaches of trust committed by government attorneys suggests that the state's ethics code might eventually include a more specifically targeted provision.³⁶¹ Likewise, there were several cases of sexual misconduct that might not constitute sexual harassment but clearly called into question the lawyer's ability to ethically practice.³⁶² One wonders whether lawyers in other states evade discipline for these types of misconduct because those states' codes lack an FTP provision. While disciplinary authorities could try to frame the misconduct in such a way that it violates another existing rule, doing so would risk the disciplinary action not representing the true nature of the underlying conduct.

Despite the persuasive empirical evidence that the FTP provision is a valuable tool for regulating attorney misconduct, it was eliminated during the transition from the *Model Code* to the *Model Rules* based on two sets of concerns. These concerns must be addressed in order to determine conclusively whether the ABA and other states should adopt the FTP provision.

The first set of concerns was related to the vagueness and potential overbreadth of the FTP provision, which could raise due process concerns.³⁶³ To be sure, the language of the FTP provision is vague—*by design*—since one of its roles is to capture misconduct that is not fully addressed by existing rules.³⁶⁴ Evaluating the actual use of the FTP provision in the states that have retained it, it is apparent that these concerns are unfounded in practice. The FTP provision was the sole basis for imposing discipline in only twenty-nine cases, representing just 3.2% of the total disciplinary actions that found an FTP violation.³⁶⁵

Even in those twenty-nine cases, the sanctioned lawyers would be hard pressed to argue that they had no notice that their conduct was unethical and could lead to discipline. Five of the nine categories in the taxonomy of FTP-provision violations are associated with existing ethics rules; thus, an attorney whose conduct falls into one of those categories should be on notice that their conduct was improper. For the other four categories—abusive conduct, sexual misconduct, breach of trust, and other misfeasance—the misconduct at issue was, if anything, more wrongful than that which would fall under another existing ethics rule. That is not surprising since, by definition, the misconduct must reflect adversely on the lawyer's fitness to practice. With

361. See *supra* notes 297–300 and accompanying text.

362. See *supra* Part IV.E.1–2.

363. See *supra* Part I.B (identifying possible reasons for elimination of FTP provision during transition to *Model Rules*).

364. See *Levine*, *supra* note 21, at 550–58 (discussing the necessarily broad language of the FTP provision and how it has been evaluated by disciplinary authorities and courts).

365. *Supra* Table 3.

regard to discrimination and harassment in particular, the FTP provision was never used to sanction lawyer negligence or inadvertence. Nor were there any disciplinary actions over the eight-year period in which an attorney had mounted a successful constitutional challenge to a finding of an FTP-provision violation.³⁶⁶

The second set of concerns was related to the potential for duplication of existing rules, including other catchall provisions such as the fraud provision, crime provision, and administration-of-justice provision.³⁶⁷ The response to these concerns is a bit more nuanced and varies by state. Although there were only twenty-nine disciplinary actions that cited the FTP provision as the sole basis for imposing discipline, that number under-represents its impact in at least two ways. First, as noted earlier, a number of disciplinary actions cited the FTP provision as the basis for regulating one aspect of the lawyer's conduct but included other rule violations as well.

Second, some states are using the FTP provision to identify instances of egregious conduct that simultaneously violates another rule. But instead of viewing this use of the FTP provision as a mere duplication of existing rules, it should be seen as denoting additional misfeasance relevant to the imposition of sanctions—that is, it has a ratcheting function. When used in that manner, the FTP provision is elevating the degree of an offense, as provisions in the criminal codes of most states do.³⁶⁸ At least where the disciplinary authority identifies that it is using the FTP provision in this way and articulates the aspects of the attorney's conduct that are egregious, the FTP provision has a clearly identifiable and separate function. But in New York, a violation of the FTP provision does not appear to be much more than a rubber stamp on nearly all disciplinary actions.³⁶⁹ In that instance, the criticism is well taken.

Assessing these results in light of the guiding principles for evaluating an ethics rule identified in Part III.B, it follows that the FTP provision can be an effective rule when disciplinary authorities have clearly articulated its proper use and consistently administer it. In several states, including Colorado, Ohio, and Massachusetts, it serves one or more distinct functions. With regard to the regulation of abusive conduct that might not otherwise meet the legal definition of discrimination or harassment, the FTP provision fills a regulatory gap. On the other hand, in states such as New York and Alabama, the indiscriminate use of the FTP provision undercuts the purpose of having this type of catchall provision, especially when it is regularly used in connection with less-severe sanctions. Likewise, while some states have included additional guidance to ensure that its application is effectively tailored, others apparently have given less thought to its application, leading to uncertainty about its use.

366. One Massachusetts decision affirmed a dismissal of a petition for discipline for an FTP-provision violation because of concerns about notice, but that decision did not hold that the imposition of discipline would have been unconstitutional. *See supra* notes 227–29 and accompanying text.

367. *See supra* note 74 and accompanying text.

368. *See* Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225, 233–34 (2018) (providing brief history of grading offenses and discussing the pervasiveness of the practice among states).

369. *See supra* Table 1 (91.4% of New York disciplinary actions cite FTP provision).

B. BEST PRACTICES FOR IMPLEMENTATION

Notwithstanding the variation among states that have retained the FTP provision, this Article strongly recommends that the ABA and all states adopt such a provision. But given this variation and, in some instances, *de facto* practices that have limited or undercut the purpose and value of the FTP provision, this section identifies five best practices for successfully implementing it. These best practices can be implemented both in the seven states that currently have the provision and in other states in which it may be adopted.

First, disciplinary authorities should identify and clearly articulate the roles that the FTP provision will serve. In so doing, disciplinary authorities can properly identify the FTP provision's regulatory objectives and ensure that it promotes the relevant constituent interests.³⁷⁰ Colorado and Ohio have taken positive steps in that direction: their state supreme courts have identified the ways in which the FTP provision may (and may not) be used. For Colorado, the FTP provision is truly a gap filler; for Ohio, it may be a gap filler or denote especially egregious conduct that violates another rule.³⁷¹ But even these states could do more. Ideally, states would include an associated comment describing the types of misconduct to which the FTP provision would apply. This comment could be expanded upon through the issuance of formal ethics opinions that could provide examples of conduct that would—and would not—be subject to discipline. It should also address whether the lawyer's conduct would need to satisfy a particular mental state or whether it is merely a consideration in determining whether the conduct reflects adversely on the lawyer's fitness to practice.³⁷² This would put attorneys on greater notice of the workings of the provision, so that they could conform their conduct accordingly. Indeed, the ABA has already recognized the need to do so in relation to its adoption of Rule 8.4(g).³⁷³

Second, disciplinary opinions should clearly identify which aspects of an attorney's conduct violated the FTP provision, as is done in Ohio. This practice has a number of benefits. From a deterrence perspective, it provides valuable information for attorneys who seek to avoid discipline. From a consistency perspective, it helps to ensure that the FTP provision is applied uniformly across cases. From a procedural fairness and transparency perspective, it enables critics of the FTP provision to understand how it is being applied. If stakeholders have concerns, identifying the unethical aspects of the attorney's behavior allows critics to raise and adjudicate them more effectively.

370. See *supra* Part III.B.1–2.

371. See *supra* notes 230–33 and accompanying text.

372. The author takes no position on whether a requisite mental state should be included. For a thoughtful discussion of the issue, see *generally* Moore, *supra* note 223.

373. See ABA Comm. on Ethics and Prof'l Responsibility, *supra* note 155 (explaining the scope and application of Rule 8.4(g)).

Third, disciplinary authorities should refrain from using the FTP provision indiscriminately or redundantly, since doing so leads to claims that the rule does not have a distinct function. The data from New York and Washington illustrate the crux of these concerns. When the FTP provision is cited in nearly all disciplinary actions, as it is in New York (91.4% of all actions),³⁷⁴ it appears to not have any independent meaning. Such ubiquity prompts the question: what differentiated those cases from the 8.6% that did not include a violation of the provision? In Washington the FTP provision is cited infrequently, but it seems to be used as a pile-on provision in cases in which disbarment was a foregone conclusion. These uses of the FTP provision do not make positive contributions to the administration of discipline.

Fourth, disciplinary authorities should consider and articulate how the FTP provision fits into the state's ethics code. In Washington, where there are six additional state-specific catchall provisions, the FTP provision has considerably less utility; it was cited 4% of the time, whereas the other six catchall provisions were cited 48% of the time.³⁷⁵ Furthermore, it is difficult to ascertain precisely how the disciplinary authorities in Washington determine which catchall provisions are violated by particular types of misconduct. This may lead to considerable confusion among attorneys or, perhaps worse, attempts to draw distinctions where they do not in fact exist.³⁷⁶ If a state's ethics code already has other nontraditional catchall provisions, rule-makers should consider streamlining them, perhaps into a single FTP provision.

Fifth, the FTP provision should not be the basis of discipline for ordinary lawyer misconduct and, when it is the basis of discipline, it generally should result in a public sanction. If the FTP provision is to serve a distinct function, it cannot be used to regulate misconduct that is completely governed by a more specific rule. This is not to say that the FTP provision cannot be used to denote particularly egregious conduct, but that use should be specifically identified by the disciplinary authority in its opinion. By the same token, FTP-provision violations should, by their nature, result in public sanctions. It is incongruous to make a finding that a lawyer engaged in misconduct that reflects adversely on the lawyer's fitness to practice, yet simultaneously determine that such misconduct does not warrant a public sanction. Of course, there may be exceptions, but one would expect to see sanctioning patterns more similar to that of Massachusetts, in which 4.7% of private sanctions include an FTP-provision violation, than that of Alabama, in which 38.1% of private sanctions do.³⁷⁷ Indeed, this high percentage of private sanctions in Alabama suggests that the state may be using the FTP provision to regulate ordinary lawyer misconduct and may explain why the FTP provision is not an independently significant predictor of the type of sanction imposed there.

374. *Supra* Table 1.

375. *Supra* Table 4.

376. *Cf.* Robinson, *supra* note 187, at 9 n.18 (discussing the problems in having duplicative provisions within a single criminal code).

377. *Supra* Figure 2.

CONCLUSION

Bias and prejudice have long existed in the legal profession. Yet only relatively recently have those in the profession come to recognize that the profession has an obligation to sanction attorneys who manifest bias and prejudice through harassment and discriminatory acts. It then took decades for the ABA to adopt Model Rule 8.4(g), and its reception by states has been lukewarm at best to antagonistic at worst. To be clear, this Article does not suggest that states should decline to adopt an anti-bias provision such as Rule 8.4(g). To the contrary, it is critically important for our professional codes to explicitly proscribe discrimination and harassment in the course of a lawyer's professional activities.

The Rule 8.4(g) controversy is an instructive one, however, because it shows that it is nearly impossible to adopt such a provision without facing criticism that it goes too far yet does so little. And even when a state enacts such a provision, questions arise about what categories should be included. Should it cover socioeconomic status? What about a lawyer who discriminates on account of military service or veteran status? What about gender expression in addition to gender identity? What if the basis for the harassment or discrimination is not clear?

When disciplinary authorities have a general catchall rule such as the FTP provision, they can continue to regulate misconduct in the multitude of ways that it is manifested, while simultaneously allowing the code to keep pace with our profession's evolving understanding of unethical conduct. Unfortunately, the ABA failed to retain the FTP provision in the transition from the *Model Code* to the *Model Rules* based on concerns about vagueness, overbreadth, and duplication.

As the results of this empirical study have demonstrated, these concerns are largely unfounded. In several of the seven states that chose to retain the FTP provision, it has been used to denote and sanction particularly egregious conduct that also violates an existing rule. In Colorado, it was used to regulate sexual harassment before the adoption of a more specific rule. In Kansas and Ohio, it has been used to sanction lawyers who breached the trust placed in them by clients and the general public. In several states, it has been used to regulate abusive conduct or sexual misconduct that may not fit within the legal definitions of harassment or discrimination. For these reasons, it is strongly recommended that the ABA and all states incorporate the FTP provision into their professional codes.

On the other hand, these results do not suggest that the FTP provision is a cure-all. Without additional guidance on how the provision should be applied, disciplinary authorities may use it indiscriminately or ineffectively to regulate misconduct that should be sanctioned under different rules—or not at all. Given the inherently broad language of the FTP provision, it is critical that states define the ways it will be used, clearly articulate its use, and administer discipline accordingly. Otherwise, disciplinary authorities' biases could influence determinations and subvert the very purposes for which the FTP provision should be adopted.