ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I work for a governmental agency. We recently held a training workshop for our junior staff attorneys pertaining to trial advocacy. The attorneys were required to cross-examine witnesses, and give opening and closing statements as part of the training. After their closing statements, they received feedback from me as well as other senior staff attorneys. After one of the junior attorneys had concluded his summation, one of my colleagues critiqued him as follows: "You did a great job, but next time try to turn down the gay. A jury is not likely to react positively to it." The junior attorney is openly gay. I watched his reaction and he was visibly upset and taken aback by the comment. As his supervisor, I'm deeply concerned about how to address this situation. On the one hand, my senior colleague was trying to provide constructive feedback because jury bias toward counsel may clearly have an effect on the outcome of a case. On the other hand, my colleague's comments could be construed as being highly offensive and insensitive, if not discriminatory. How should I, as a supervisor, be addressing this issue internally with my colleagues and with the junior attorney? Do I have an obligation to do something? And if so, how do I approach the issue without exposing my team to liability?

Sincerely,
A.M. Awkward

Dear A.M. Awkward:

Social standards surrounding discriminatory conduct have changed dramatically in recent years, and the legal profession is attempting to keep pace by amending ethical rules and redefining the standards of professional conduct that govern the practice of law. Nowhere has the social and legal shift toward greater acceptance and equality been more evident than in the area of gay rights. As the ABA Commission on Sexual Orientation and Gender Identity wrote in its memorandum in support of a proposed amendment to ABA Model Rule 8.4 to prohibit discrimination on the basis of, among other things, sexual orientation, "it is time for the legal profession to support its rhetoric of equal justice with action and consequences. An ethical rule will set a standard for lawyer conduct [and] force lawyers to examine and reform their own behavior." *See* Memorandum to Standing Committee on Ethics and Professional Responsibility, February 7, 2016. As an attorney, you have a professional obligation to keep abreast of these developments, or else risk exposing yourself or your colleagues to ethical violations and, potentially, official sanctions or censure. While there may be no bright line rule for assessing whether your senior colleague's comments about the junior attorney's sexual orientation constitute an ethical violation, familiarizing yourself with the relevant rules and requirements will enable you to take the necessary preventative measures and, if needed, deal with a potentially discriminatory act in a manner consistent with your own ethical obligations.

New York has been a pioneer in enacting rules of professional conduct to prohibit discrimination in the practice of law. In 1990, New York adopted DR 1-102(a)(6), which prohibits discrimination on the basis of sexual orientation, race, gender and other specified bases. *See* Roy D. Simon, *Simon's Rules of Professional Conduct* Annotated at 1968 (2016 ed.) By contrast, the ABA's model rule counterpart was not adopted until August of 2016. *See* Wendy Wen Yun Chang, *A New Model Anti-Discrimination Rule*, Daily Journal, August 19, 2016. In fact, "many states still have no rule making discrimination an ethical violation." Simon *supra*, at 1968. Indeed, as one commentator has noted, "New York's anti-discrimination rule is the paradigm model for targeting and proscribing determination because of its bifocal approach to prohibiting discrimination against clients and other lawyers." Nicole Lancia, *New Rule, New York: A Bifocal Approach to Discipline and Discrimination*, 22 Geo. J. Legal Ethics 949, 949 (Summer 2009).

Rule 8.4(g) of the New York Rules of Professional Conduct (NYRPC), which replaced DR-102(a)(6), governs discriminatory misconduct by attorneys and states that "[a] lawyer or law firm shall not unlawfully discriminate in the practice of law . . . on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation." NYRPC 8.4(g). NYRPC Rule 8.4(g) is, however, somewhat limited in its scope. First, the Rule applies only to an attorney's conduct in the practice of law, and therefore a lawyer cannot be disciplined for discrimination in his or her personal life or in any other business outside the practice of law. Second, Rule 8.4(g) requires that before a complaint for discrimination can be brought before disciplinary authorities, it must first be brought before a tribunal and the petition-

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er must obtain a final determination and the right of appeal must be exhausted. As Professor Roy Simon has observed, "[t]he goal of the rule is lofty and laudable, but the scope of the rule is extremely limited." Simon *supra*, at 1966.

With that said, New York courts have been willing to impose penalties upon attorneys that have violated the requirements of NYRPC Rule 8.4. For example, in *Principe v. Assay Partners*, the Supreme Court, New York County, considered a claim of abusive and improper professional conduct by plaintiff's counsel toward an opposing counsel. 154 Misc. 2d 702 (Sup. Ct., N.Y. Co. 1992). During a deposition, plaintiff's counsel made derogatory comments to his opposing counsel which demeaned her on the basis of her gender. He referred to her as "little lady," "little girl" and told her to "pipe down" and "go away." *Id.* at 704. These comments were "accompanied by disparaging gestures [such as] dismissively flicking his fingers and waving a back hand" at opposing counsel. *Id.* The court concluded that the conduct exhibited by plaintiff's counsel was the "paradigm of rudeness" and degraded his colleague on the basis of her gender. *Id.* The court stated that "[a]n attorney who exhibits a lack of civility, good manners and common courtesy tarnishes the image of the legal profession, and an attorney's conduct that projects offensive and invidious discriminatory distinctions . . . is especially offensive." *Id.* The court concluded that plaintiff's counsel had violated the predecessor to NYRPC Rule 8.4(g) and that his behavior fell "within well-established categories of sanctionable conduct." *Id.* at 708. In summarizing the importance of New York's rule against discriminatory conduct, the court in *Principe* found that "[t]he fundamental concern raised is that discriminatory conduct on the part of an attorney is inherently and palpably adverse to the goals of justice and the legal profession," and that "any reasonable attorney must be held to be well aware of the need for civility [and] to avoid abusive and discriminatory conduct." *Id.* at 707–08.

In *In re Monaghan*, the Appellate Division, Second Department considered an appeal of an order of public censure by the U.S. District Court for the Southern District of New York in response to an attorney's race-based abuse of opposing counsel during a deposition. 295 A.D.2d 38 (2d Dep't 2002). The attorney in question harassed opposing counsel for her alleged mispronunciation of certain words, invoking unambiguous racial stereotypes in the process. The District Court warned and then publicly censured the attorney for his race-based abuse and his violation of the predecessor to NYRPC Rule 8.4(g). On appeal, the Second Department granted the petitioner's motion to impose discipline upon the attorney and affirmed the censure for the attorney's professional misconduct. *Id.* at 41.

Courts in other states have issued similar decisions arising from violations of their own professional prohibition of discriminatory conduct by an attorney. For example, in *In re Kelley*, the Supreme Court of Indiana considered a disciplinary petition against an attorney for her derogatory comments to the employee of a company that she contacted on her client's behalf. 925 N.E.2d 1279 (Ind. 2010). The attorney's client had received unlisted phone calls from a company attempting to contact someone with the same name. The attorney called the company and spoke to a male representative. The attorney said that she was calling on behalf of her client and "gratuitously asked the company's representative if he was 'gay' or 'sweet.'" *Id.* The company representative commented on the unprofessional nature of the attorney's comment and ended the phone conversation. The Supreme Court of Indiana subsequently concluded that the attorney had violated Indiana Professional Conduct Rule 8.4(g), which prohibits prejudicial acts by an attorney on the basis of sexual orientation, and imposed a public reprimand and costs against the attorney.

The adoption of ABA Model Rule 8.4(g), and other state rules prohibiting discriminatory conduct by attorneys in the practice of law, has not been without controversy. Some commentators have suggested that such rules restrict an attorney's freedom of speech and thus run contrary to the constitutional values that attorneys are obliged to uphold. (*See* Ronald D. Rotunda, *the ABA Decision to Control What Lawyers Say: Supporting "Diversity" but not Diversity of Thought*, The Heritage Foundation Legal Memorandum No. 191 (Oct. 6, 2016).) They have argued that ABA Model Rule 8.4(g) and its state counterparts attempt to penalize forms of speech protected by the First Amendment and that "[e]ven when a court does not enforce this rule by disbarring or otherwise disciplining the lawyer, the effect will still be to chill lawyers' speech, because good lawyers do not want to face any non-frivolous accusations that they are violating the rules." (*Id.* at 4.) Others have opposed the adoption of ABA Model Rule 8.4(g) on the grounds that it would "change the attorney-client relationship and impair the ability to zealously represent clients." (Elizabeth Olson, *Bar Association Considers Striking 'Honeys' from the Courtroom*, The New York Times (Aug. 4, 2016).) Such objections aside, our profession should expect that the adoption of ABA Model Rule 8.4(g) is likely to cause more states to follow New York's example by adopting ethical rules restricting or prohibiting discrimination by attorneys in the practice of law. As a result, attorneys everywhere have a professional obligation to apprise themselves of current developments in this area.

Your senior colleague's comment that a junior attorney "turn down the gay" raises in our view several issues under NYRPC Rule 8.4(g). First, while the comment appears to have been made in an attempt to provide the junior attorney with constructive criticism, it is also based on certain discriminatory stereotypes concern-

ing the ways in which gay men speak, and attempted to impose an arbitrary and prejudicial standard of how a male attorney would or should sound when giving a closing statement to a jury. In this way, it is very similar to the attorney's comment in *In re Kelley*, which appeared to be based on certain assumptions about the company representative's sexual orientation based purely on his manner of speech. And while your senior colleague's comment does not appear to embody the same degree of vitriol as the statements by the attorney in *In re Monaghan*, it could still be construed as an unnecessary critique of another attorney's speech based purely on a similar set of discriminatory stereotypes. Your senior colleague might claim that it was not his intention to discriminate against the junior attorney. Indeed, he may not have even meant to upset the junior attorney at all. However, NYRPC Rule 8.4(g) does not require that the discrimination be intentional, or even reckless. Instead, the Rule prohibits discriminatory conduct of any kind, whether the conduct was intentional or not. In this way, NYRPC Rule 8.4(g) differs from ABA Model Rule 8.4(g), which requires that the discriminatory conduct be knowing or, at a minimum, negligent. *Compare* NYRPC Rule 8.4(g) with ABA Model Rule 8.4(g).

The other question raised by your senior colleague's comment is whether it was made "in the practice of law," as required by NYRPC Rule 8.4(g). The comments at issue in both *In re Monaghan* and *Principe v. Assay Partners* were made during depositions. The comments by the attorney in *In re Kelley* were not made during a formal proceeding, but were clearly made in the attorney's professional capacity while making a call on behalf of her client. Your senior colleague's comment appears to be somewhat more remote from the actual practice of law than any of the foregoing cases, but could still be construed as having been made within the practice of law because it was made in a professional environment during an official attorney training program. There is not enough case law on this point to definitively say whether the comment was made "in the practice of law," but there is certainly a chance that a court could conclude that it was. *See* Simon *supra*, at 1967 (noting that Rule 8.4(g) does not extend to private business activities).

Regardless of how your senior colleague's comments may be construed by a court in an ethical proceeding, it would be prudent of you to inform him of his ethical obligations under NYRPC Rule 8.4(g). Whether the comments constitute a violation of the Rule or not, they certainly seemed to offend the junior attorney and made him feel as if he was being unfairly targeted based on his sexual orientation. This is likely to have an adverse impact upon not only the junior attorney, but also other attorneys that may have found the comments to be offensive or discriminatory. It could also lead to further problems in your agency and, potentially, employment litigation. While the comments may have been intended as constructive criticism of the junior attorney's performance, there was no reason for your senior colleague to tether his criticism to the junior attorney's sexual orientation. Your senior colleague should not have told the junior attorney to "turn down the gay," just as he should not tell a female attorney to "act more ladylike" or an African-American attorney to "turn down the ghetto." Your senior colleague's critique should have been made without reference to the attorney's sexual orientation, and instead should have been limited to the specifics of the junior attorney's closing argument. For example, did the junior attorney speak too fast, or too slow? Was he too animated, or too droll? Your colleague's choice to bring the junior attorney's sexual orientation into the discussion was a poor one, which has put him and your agency at risk of a potential violation of NYRPC Rule 8.4(g) and civil liability.

Perhaps your senior colleague may be completely unaware of the requirements of NYRPC Rule 8.4(g), and may not have realized that his comment would make the junior attorney so uncomfortable. As discussed above, the fact that he was not aware, however, will not protect him from sanctions under NYRPC Rule 8.4(g). In our opinion, you should discuss the situation with your senior colleague, inform him of his ethical obligations and recommend that he has a follow-up session with the junior attorney in which he provides him with a more constructive, less discriminatory assessment of his performance. You may also want to recommend diversity training for all your staff to avoid similar situations in the future as a failure to address the issue may lead to future improper conduct.

Finally, we should note that this past February, the ABA's House of Delegates enacted Resolution 107 which encourages bar associations and other licensing and regulatory authorities that require mandatory CLE to offer "as a separate required credit, programs on diversity and inclusion in the legal profession of all persons, regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias ('D&I CLE')." Resolution 107 has the support of various bar associations who see D&I CLE as an important tool to raise awareness of bias in our profession and develop the means to effectuate change. The adoption of stand-alone D&I CLE in New York is an issue that we expect will be addressed by the NYSBA's House of Delegates in the near future.

Sincerely,

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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I have a new client that is a party to a number of related actions with many parties. My client's prior attorney was a solo practitioner and she recently passed away unexpectedly. My client relied on the prior attorney implicitly, doesn't have any of the voluminous files for the litigation, and believes that the attorney was holding money in her escrow account pending the resolution of the litigation. I have been in communication with the prior attorney's husband who is attempting to wind up the law office. It is clear, however, that in addition to being completely distraught about the loss of his wife, he is not an attorney and doesn't have any idea what to do. He is so concerned that he is going to turn over the wrong files to the wrong person, or turn over files without having collected all of his wife's fees, that he just refuses to turn anything over. He isn't sure if he is going to try to sell the practice or just dissolve it. It doesn't seem like he will be able to resolve this quickly. Meanwhile, I am having a very difficult time moving forward with my client's cases without her file and the client and remaining parties are beginning to lose patience.

Although I am sympathetic to the husband's dilemma, my client is beginning to suffer from the delays. I am worried that I am not doing enough to convince the former attorney's husband to assist me in getting the files and turn over the escrow funds. In our last conversation, he even asked me, "Do you have any thoughts about whether I should dissolve the practice or try to sell it? Would you be interested in purchasing it?" When I asked my client if he had fully paid the prior attorney's fees, the client told me he thought he might owe some fees, but due to the recent delay, he believed that he no longer had to pay them.

Is there anything I can do to encourage the prior attorney's unrepresented husband to turn over the file and escrow funds? Should I be concerned that I am trying to get the file even though the prior attorney may not have been fully paid by my client? I have also been thinking about the offer to buy the practice. Here, it would kill three birds with one stone: I would get the file for my client, help out the prior counsel's husband, and expand my practice. Would I create a conflict of interest with my client by performing due diligence and negotiating to purchase the practice? What if I wasn't buying the practice, but just offering to assist in dissolving the practice?

Sincerely,
Somewhat Conflicted

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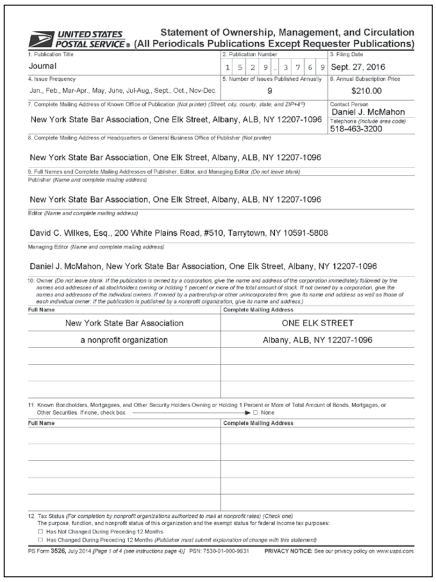

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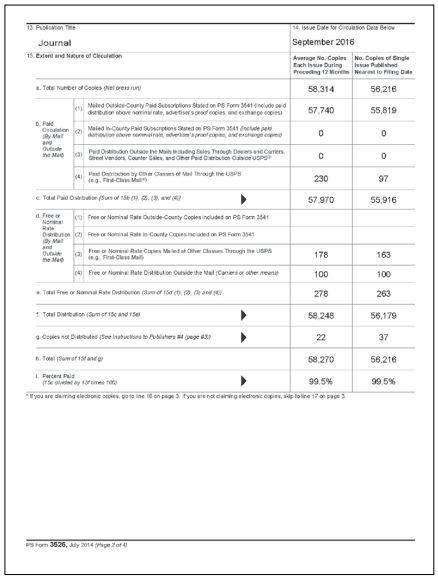

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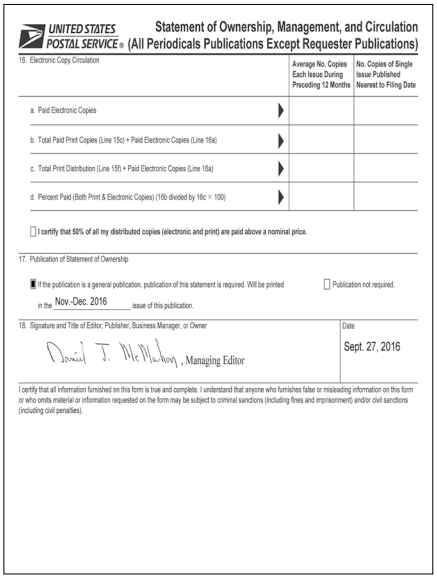

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