The Antidiscrimination Amendment to Rule 8.4 of the Minnesota Rules of Professional Conduct: An Unnecessary and Unprecedented Expansion in Professional Regulation

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THE ANTIDISCRIMINATION AMENDMENT TO RULE 8.4 OF THE MINNESOTA RULES OF PROFESSIONAL CONDUCT: AN UNNECESSARY AND UNPRECEDENTED EXPANSION IN PROFESSIONAL REGULATION

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I. INTRODUCTION

In April 1991, the Minnesota Supreme Court granted a petition by the Minnesota State Bar Association to amend Rule 8.4 of the Minnesota Rules of Professional Conduct. Rule 8.4 governs attorney misconduct, and the amendment, Rule 8.4(h), states that it is professional misconduct for a lawyer to "commit a discriminatory act, prohibited by federal, state, or local ordi-
nance, that reflects adversely on the lawyer’s fitness as a lawyer.’”


   It is professional misconduct for a lawyer to:

   (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

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

   (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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

   (e) state or imply an ability to influence improperly a government agency or official;

   (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

   (g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer’s professional activities;

   (h) commit a discriminatory act, prohibited by federal, state or local statute or ordinance, that reflects adversely on the lawyer’s fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer’s fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer’s professional activities.

Id. The comment to the rule states:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to the practice of law. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Paragraph (g) specifies a particularly egregious type of discriminatory act—harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status. What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly.

Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status may violate either paragraph (g) or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in connection with the lawyer’s professional activities. Harassment, even if not committed in connection with the law-
Other states, including New Jersey, New York, Rhode Island, Vermont, and the District of Columbia, have amended their professional codes to include antidiscrimination provisions. In addition, California, Massachusetts and Michigan are considering such amendments. The antidiscrimination provisions in other states seek merely to regulate a lawyer's conduct either in an employment context or in connection with the lawyer's professional activities. By comparison, Minnesota's amendment is far more extreme. Minnesota's new rule seeks to regulate a lawyer's conduct not only in a professional capacity but also in the lawyer's private life.

This Comment examines the purpose and rationale of self-

yer's professional activities, violates paragraph (h) if the harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely on the lawyer's fitness as a lawyer, determined as specified in paragraph (h).

Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities.

Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. See, e.g., Minn. Stat. Section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(c)-(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Id. at cmt.


5. See infra notes 135-38 and accompanying text.
regulation in the legal profession. This Comment further examines professional antidiscrimination regulations in various states and draws a comparison to Minnesota's rule. After considering problems surrounding the new rule and the rule's implications for Minnesota practitioners, the Comment concludes that Minnesota's new rule is not only an inappropriate means to implement social policy but also violates due process.

II. SELF REGULATION IN THE LEGAL PROFESSION AND THE PURPOSE OF PROFESSIONAL LEGAL ETHICS CODES

A. The History of Self-Regulation

Under early English law, lawyers were officers of the court and therefore subject to supervision of the court.\(^6\) In response to public distrust of attorneys,\(^7\) and increasing calls for reform in the legal profession, the English bar developed a system of self-regulation.\(^8\) By the turn of the twentieth century, the American bar had embraced the English system of self-regulation.\(^9\)

The American Bar Association's first attempt at promulgating rules governing attorney conduct resulted in the drafting of the Canons of Professional Ethics in 1908.\(^10\) These rules remained in effect for over sixty years. In the late 1960’s, the ABA drafted the Model Code of Professional Responsibility (Model Code) and, more recently, the Model Rules of Professional Conduct (Model Rules).\(^11\) The purpose of the Model Code and the Model Rules is to protect the public, to preserve the integrity of the legal profession, and to preserve public confidence in

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7. This public distrust was due, in part, to extravagant legal fees. Id.

8. Id. at 250.

9. Id.


the profession. 12 Most jurisdictions have adopted either the Model Code, the Model Rules, or some variation thereof. 13

12. See e.g., Ex parte Wall, 107 U.S. 265, 307 (1883); see also People v. Morley, 725 P.2d 510, 514 (Colo. 1986); In re Draper, 317 A.2d 106, 108 (Del. 1974); Tingle v. Arnold, 199 S.E.2d 260, 263 (Ga. Ct. App. 1979); In re Jensen, 418 N.W.2d 721, 722 (Minn. 1988); In re Kraemer, 361 N.W.2d 402, 404-05 (Minn. 1985); In re Kirtz, 494 S.W.2d 324, 326 (Mo. 1973); In re MacLeod, 479 S.W.2d 443, 445 (Mo. 1972), cert. denied, 509 U.S. 979 (1972).

When determining penalties in legal disciplinary proceedings, courts have stated that the critical factor influencing their decision is public protection, rather than attorney punishment. See, e.g., In re Rivkind, 791 P.2d 1037, 1040 (Ariz. 1990); Young v. State Bar, 791 P.2d 994, 1000 (Cal. 1990); People v. Grenemyer, 745 P.2d 1027, 1029 (Colo. 1987); In re Christie, 574 A.2d 845, 851 (Del. 1990); In re Williams, 513 A.2d 793, 796 (D.C. 1986); DeBock v. State, 512 So.2d 164, 166 ( Fla. 1987), cert. denied, 484 U.S. 1025 (1988); In re Topper, 553 N.E.2d 306, 314 (Ill. 1990); Committee on Professional Ethics & Conduct v. Baudino, 452 N.W.2d 455, 459 (Iowa 1990); Louisiana State Bar Ass'n v. Lindsay, 539 So.2d 807, 813 (La. 1989); In re Peters, 474 N.W.2d 164, 168 (Minn. 1991); In re Staab, 785 S.W.2d 551, 554 (Mo. 1990) (en banc); State ex rel. Nebraska State Bar Ass'n v. Rhodes, 453 N.W.2d 73, 91 (Neb. 1990), cert. denied, 111 S. Ct. 153 (1990); In re Yaccarino, 564 A.2d 1184, 1195 (N.J. 1989); In re Ellis, 439 N.W.2d 808, 810-11 (N.D. 1989); In re Maragos, 285 N.W.2d 541, 545 (N.D. 1979); State ex rel. Oklahoma Bar Ass'n v. Colston, 777 P.2d 920, 925 (Okla. 1989); In re Gortmaker, 782 P.2d 421, 424 (Or. 1989); In re Weinstein, 459 P.2d 548, 549 (Or. 1969), cert. denied, 398 U.S. 903 (1970); Office of Disciplinary Counsel v. Stern, 526 A.2d 1180, 1185-86 (Pa. 1987); Carter v. Ross, 461 A.2d 675, 676 (R.I. 1983); In re Kennedy, 176 S.E.2d 125, 126 (S.C. 1970); State v. Jennings, 159 S.E. 627, 628 (S.C. 1931); Zimmerman v. Board of Prof. Responsibility, 764 S.W.2d 757, 761 (Tenn. 1989), cert. denied, 490 U.S. 1107 (1989); In re McGough, 793 P.2d 430, 438 (Wash. 1990); Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107, 115 (W. Va. 1986); In re Rabideau, 306 N.W.2d 1, 17 (Wis. 1981), appeal dismissed, 454 U.S. 1025 (1981).

The Minnesota Supreme Court has repeatedly held that the primary purpose of disciplinary proceedings is to protect the public. See In re Lochow, 469 N.W.2d 91, 96 (Minn. 1991); In re Ladd, 463 N.W.2d 281, 284 (Minn. 1990); In re Walker, 461 N.W.2d 219, 222 (Minn. 1990); In re Levenstein, 438 N.W.2d 665, 668 (Minn. 1989); In re Schaefer, 423 N.W.2d 680, 683 (Minn. 1988); In re Jensen, 418 N.W.2d 721, 722 (Minn. 1988); In re N.P., 361 N.W.2d 386, 393 (Minn. 1985), appeal dismissed, 474 U.S. 976 (1985); In re Peters, 332 N.W.2d 10, 16 (Minn. 1983); In re Olkon, 324 N.W.2d 192, 196 (Minn. 1982); In re Serstock, 316 N.W.2d 559, 561 (Minn. 1982); In re Peterson, 274 N.W.2d 922, 925 (Minn. 1979); In re Hanson, 258 Minn. 231, 233, 103 N.W.2d 863, 864 (Minn. 1960).

13. ALABAMA RULES OF PROFESSIONAL CONDUCT (1992); ALASKA CODE OF PROFESSIONAL RESPONSIBILITY (1992); ARIZONA RULES OF PROFESSIONAL CONDUCT (1992); ARKANSAS MODEL RULES OF PROFESSIONAL CONDUCT (1992); CALIFORNIA RULES OF PROFESSIONAL CONDUCT (1992); COLORADO RULES OF PROFESSIONAL CONDUCT (1992); CONNECTICUT RULES OF PROFESSIONAL CONDUCT (1992); DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT (1992); FLORIDA RULES OF PROFESSIONAL CONDUCT (1992); GEORGIA CODE OF PROFESSIONAL RESPONSIBILITY (1992); HAWAII CODE OF PROFESSIONAL RESPONSIBILITY (1992); IDAHO RIGHTS AND DUTIES OF ATTORNEYS (1992); ILLINOIS RULES OF PROFESSIONAL CONDUCT (1992); INDIANA RULES OF PROFESSIONAL CONDUCT (1992); IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS (1992); KANSAS MODEL RULES OF PROFESSIONAL CONDUCT (1992); KENTUCKY RULES
The Model Code consists of three "separate but interrelated" sections: Canons, Ethical Considerations, and Disciplinary Rules. The Canons are statements of axiomatic norms and express the general standards of professional conduct expected of lawyers in their relationship with the public, the legal system, and the legal profession. The Ethical Considerations and the Disciplinary Rules are derived from the Canons. The Ethical Considerations constitute a body of principles upon which a lawyer can rely for guidance in many fact-specific situations. They are aspirational in nature and represent the objectives that every member of the profession should strive to achieve.

If the Ethical Considerations represent the ceiling of professional conduct, the Disciplinary Rules represent the floor. The Disciplinary Rules are mandatory rules and state the minimum
level of acceptable conduct. If a lawyer does not perform at this minimum level, the lawyer may be subject to disciplinary action.17

The Model Rules consist of fifty-four rules, supplemented by explanatory comments.18 While some of the rules are permissive in nature, others impose obligations, prohibitions, or “define the nature of the lawyer’s relationships between the lawyer and others.”19

B. Discipline for Extraprofessional Misconduct

Discipline for misconduct committed outside an attorney’s professional role has always been problematic for the legal profession. Both the Model Code and the Model Rules contain regulations that define misconduct for lawyers.20 Although the rules specifically regulate conduct in the courtroom21 or in the attorney’s professional capacity,22 the general wording of the rules impliedly allow discipline for conduct wholly unrelated to a lawyer’s practice.23 Many states have ra-

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22. See Model Rules of Professional Responsibility Rule 7.1 (1983) (prohibiting a lawyer from making false or misleading statements about the lawyer or the lawyer’s services).
23. See Model Code of Professional Responsibility DR 1-102(A)(4) (1981) (stating a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). Numerous cases have held that regulation of conduct unrelated to professional conduct is permissible. See William H. Raley Co. v. Superior Court, 197 Cal. Rptr. 232 (Cal. Ct. App. 1983) (stating professional responsibilities are relevant beyond a member of the bar’s role as a lawyer); Committee on Prof. Ethics and Conduct v. Millen, 357 N.W.2d 313 (Iowa 1984) (stating that lawyers’ professional responsibility applies to actions taken in their personal lives. Thus, discipline is appropriate even where the misconduct does not involve professional activities); Louisiana State Bar Ass’n v. Frank, 472 So.2d 1 (La. 1985) (holding that disbarment may be appropriate discipline after conviction of violation of a law, even if the violation is not related to the practice of law); State ex rel. Nebraska State Bar Ass’n v. Hahn, 356 N.W.2d 885 (Neb. 1984) (noting that license to practice law is granted on implied understanding that the party receiving it shall act in a proper manner and avoid practices that will discredit the profession and the courts); but see In re Peters, 428 N.W.2d 375, 382 (Minn. 1988) (Popovich, J., concurring specially).
ionalized imposing discipline for extraprofessional misconduct because a lawyer should be held to a higher standard of conduct than the average citizen, in light of his or her privileged role in society. Moreover, some behavior may be so egregious as to reflect negatively on the entire legal profession.

Various types of behavior have been sanctioned as misconduct by virtue of a person's status as a lawyer. Under the Model Code, a lawyer is subject to discipline for criminal conduct involving "moral turpitude." In contrast, under the Model Rules, a lawyer is subject to discipline for criminal conduct that reflects "adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

"Moral turpitude" has been broadly defined as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." One problem with the "moral turpitude" criterion is ambiguity. This ambiguity invites differing and competing interpretations and leads to conclusory judi-

24. The organized bar has continually portrayed attorneys as moral guardians. See Deborah L. Rhode, Moral Character as a Professional Credential, 94 YALE L.J. 491, 510 (1985). According to Justice Frankfurter, lawyers stood "as a shield" . . . in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character." Id. at 508 (citing Schwe v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).


30. Several commentators have criticized the moral turpitude standard as invit-
cial analysis.31

In contrast, the Model Rules eliminate the moral turpitude standard and limit the extraprofessional conduct subjecting a lawyer to professional discipline to criminal conduct that reflects "adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."32 Thus, under the Model Rules, the scope of criminal conduct for which lawyers are disciplined is narrower than under the Model Code.33

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While a criminal conviction for certain offenses committed outside of an attorney's professional role may result in disbarment, not all criminal conduct results in such a severe sanction. Most jurisdictions require that the conduct underlying the criminal conviction involve "moral turpitude" or "reflect adversely on the lawyer's fitness as a lawyer" before sanctions will be imposed. However, such standards tend to be ambiguous. As a result, similar factual patterns may generate disparate responses within and across jurisdictions.

Convictions for tax evasion and sexual misconduct committed outside of an attorney's professional role frequently result in attorney discipline and illustrate the inconsistencies in applying the "moral turpitude" or "fitness as a lawyer" standards. State courts disagree whether deliberate evasion of taxes or failure to file a tax return reflects adversely on a lawyer's fitness as a lawyer. In Minnesota, no attorney has ever been disbarred where the only misconduct involved was a violation of personal income tax law filing requirements. However, attorneys have been disciplined for noncompliance with filing requirements when the evidence shows the attorney acted to avoid or to delay paying taxes, especially if other misconduct is involved.

Rules and, thus, include its narrower standard for misconduct. See In re Weiblen, 439 N.W.2d 7, 9 n.2 (Minn. 1989).

34. See Rhode, supra note 24, at 551 (citing Kentucky Bar Ass'n v. Pope, 549 S.W.2d 296, 297 (Ky. 1976) (noting that disbarment was warranted upon conviction for felonies relating to tax evasion)); CAL. BUS. & PROF. CODE §§ 6101, 6102 (West 1990) (requiring suspension and disbarment upon conviction of crimes involving moral turpitude); N.Y. JUDICIARY LAW § 90(4) (McKinney 1983) (requiring disbarment upon conviction of all felonies).

35. See, e.g., MODEL CODE DR 1-102(3) (stating that a lawyer shall not engage in illegal conduct involving moral turpitude); MODEL RULES Rule 8.4(b) (stating that it is misconduct to commit criminal acts that reflect adversely on a lawyer's fitness as a lawyer).

36. In Konigsberg v. State Bar, 353 U.S. 252, 263 (1957), the United States Supreme Court made a similar observation regarding character. The Court noted that "definition[s] [used to clarify this standard] will necessarily reflect the attitudes, experiences, and prejudices of the definer." Id. Accordingly, the standard can be used as a "dangerous instrument for arbitrary and discriminatory denial of the right to practice law." Id.

37. See Rhode, supra note 24, at 552.


39. Id. Cases resulting in long term suspension involve numerous or willful violations of tax laws without substantial mitigating circumstances. Id. at 426. See In re Chrysler, 434 N.W.2d 668, 670 (Minn. 1989) (suspending a lawyer convicted twice of tax evasion for failing to file a return for fifteen years), reinstatement ordered, 447
Criminal convictions arising out of sexual misconduct have consistently been an area of concern for the bar when assessing an individual's moral character. Judicial decisions generally reflect the sexual mores of the era in which a case was decided. Yet, modern cases still reflect divergent views. Convictions for child molestation, adultery, or homosexual acts may result in different sanctions, depending on the jurisdiction or the relationship of the acts to the practice of law.

These examples illustrate that disciplinary proceedings for extraprofessional conduct can be highly subjective. Without any meaningful precepts, disciplinary panels and courts may merely air their own subjective inclinations in judging the conduct at issue.

C. Judicial Application of the Fitness to Practice Standard

One of the few cases to offer a cogent analysis of the "fitness to practice" standard in the context of nonprofessional conduct is the Washington decision of In re Curran. In Curran, an attorney was convicted of vehicular homicide. The attorney became intoxicated at a luncheon with a group of clients and, while driving them home, he drove off the road, killing two clients. The state bar charged that Curran's conduct "reflect[ed] adversely on his fitness as a lawyer." Relying for guidance upon an Indiana decision, the Washington Supreme Court focused on the nexus between the misconduct...
and the lawyer's fitness to practice law. The court noted that the purpose of the fitness to practice rule was to "assure the public that attorneys provide legal services responsibly and competently."

The court concluded that "conduct reflecting adversely on a lawyer's fitness to practice law can only be found when there is some nexus between the lawyer's conduct and those characteristics relevant to law practice." The court went on to state that the fitness to practice rule is not concerned with maintaining public confidence in the bar, rather, the rule's policy is to protect the public from incompetent practitioners.

In contrast, the Minnesota Supreme Court has expressed a willingness to apply professional disciplinary rules to extraprofessional conduct that is seemingly unrelated to an attorney's ability to practice law. For example, in In re Miera, the Minnesota Supreme Court sanctioned and reprimanded a judge for sexual harassment. The court issued an admonition to Miera in his capacity as a lawyer stating that "[w]hether or not his conduct technically constitutes sexual harassment under . . . [the Minnesota Human Rights Act], it shows at least

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48. Id. at 970-71 (quoting In re Oliver, 493 N.E.2d 1237, 1242 (Ind. 1986)). See also In re Krogh, 536 P.2d 578 (Wash. 1975).
49. Curran, 801 P.2d at 972. But see Nat'l Rptr. on Legal Ethics, D.C. Formal op. 222, at 23 (1992) (dissenting opinion). A number of commentators have noted that discrimination outside the practice of law does not necessarily have a detrimental impact on a practitioner's fitness. For example, in response to an inquiry into whether a lawyer's refusal to hire homosexuals reflected adversely on his fitness, a District of Columbia Ethics Committee member noted:

The inquirer is a lawyer licensed in the District of Columbia but not in any other jurisdiction. He is an elder in several religious organizations presumably participating in employment decisions. The religious organizations as a matter of conviction restrict employment based on sexual orientation. There is no color of legal practice in the lawyer's participation in these organizations, and there is no basis for believing that his participation colors his legal practice in the District of Columbia. We may assume that his participation in them reflects personal beliefs and, hypothetically, that these beliefs may affect the way he conducts his practice. However, many lawyers have deeply felt beliefs or convictions, religious or otherwise, which may influence their practice. Unless there is clear indication that conformance to such a conviction has resulted in actions within his practice that violate the Rules, we cannot say that he cannot practice law if he holds what may well be contentious or even offensive convictions.

Id.
50. Curran, 801 P.2d at 972.
51. See, e.g., In re Peters, 428 N.W.2d 375, 381 (Minn. 1988); In re Miera, 426 N.W.2d 850, 856 (Minn. 1988); In re Kirby, 354 N.W.2d 410, 414 (Minn. 1984).
52. 426 N.W.2d 850 (Minn. 1988).
indifference to his legal and ethical obligations. Such conduct adversely reflects on his fitness to practice law, and a public reprimand is warranted." 53

III. DUE PROCESS CONCERNS OVER PROFESSIONAL DISCIPLINE

The United States Supreme Court has characterized attorney disciplinary proceedings as "adversary proceedings of a quasi-criminal nature" 54 and, accordingly, held that due process protections apply. 55 The Court has long acknowledged that pursuit of one's chosen profession is a rudimentary liberty interest, accorded due process protection under the Fifth and Fourteenth Amendments. 56 In Schware v. Board of Bar Examiners, 57 the Supreme Court held that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process . . . Clause of the Fourteenth Amendment." 58

Courts have held that an attorney's license to practice law is not a "matter of grace and favor." 59 Rather, it is a right that cannot be revoked without satisfying the requirements of procedural due process. 60 Although states can impose certain requirements on persons who practice law, these requirements must be rationally related to an attorney's fitness to practice law. 61

Since disbarment and, therefore, deprivation of one's cho-

53. Id. at 859.
54. In re Ruffalo, 390 U.S. 544, 551 (1968). See also Erdmann v. Stevens, 458 F.2d 1205, 1209-10 (2d Cir. 1972) (holding that attorney disciplinary proceedings are quasi-criminal in nature because the proceedings may result in the loss of livelihood and harm to the attorney's reputation), cert. denied, 409 U.S. 889 (1972).
56. Id. (holding that due process requires fair notice of the charge against an attorney); Willner v. Committee on Character and Fitness, 373 U.S. 96, 103 (1963) (holding that due process requires confrontation and cross-examination of character witnesses in an attorney disciplinary proceeding).
58. Id. at 238-39 (citing Dent v. West Virginia, 129 U.S. 114, 121-22 (1889)). See also Willner, 373 U.S. at 102; Ex parte Secombe, 60 U.S. (19 How.) 9, 10 (1856).
59. Willner, 373 U.S. at 102 (quoting Ex parte Garland, 71 U.S. (4 Wall.) 333, 379 (1866)).
60. Id. at 103.
61. Schware, 353 U.S. at 239. See also Douglas v. Noble, 261 U.S. 165, 168 (1923) (holding that state statute regulating the practice of dentistry violates due process if requirements have no relation to the capacity to practice dentistry); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319-20 (1866) (holding that oath requirement violates due process, because oath has no relation to capacity to preach and to teach).
sen profession is a potential penalty for violation of a disciplinary rule, due process protections are particularly important. Moreover, where a person's reputation is jeopardized through governmental action, due process guarantees must be meticulously observed. Thus, the Minnesota Rules of Professional Conduct must be sufficiently specific in their terms to satisfy the due process requirements set forth in the void for vagueness doctrine.

A. The Void for Vagueness Doctrine

A statute is unconstitutionally vague and violates due process if (1) the statute does not provide a person of ordinary intelligence with notice of conduct that is proscribed; and (2) the law impermissibly delegates legislative decisions to those charged with enforcing the law "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." As a result, where a rule lacks clear guidelines for enforcement, the danger of arbitrary or discriminatory enforcement of the rule may violate due process.

62. Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)); Paul v. Davis, 424 U.S. 693, 722-23 (1976) (Brennan, J., dissenting) ("[T]he enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal 'liberty.' ").

63. An unconstitutionally vague statute is one that requires a person of average intelligence to guess as to its meaning or intended application. See, e.g., Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). This rule, originally applied to criminal statutes, has been extended to civil statutes as well. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982).

64. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); see also Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). In Papachristou, the Supreme Court struck down a vagrancy statute on vagueness grounds. In doing so, the Court found that the statute failed to provide adequate guidance for law enforcement agents and thus gave the police "unfettered discretion" to arrest any person whose lifestyle they disapproved of. Papachristou, 405 U.S. at 168.

65. See Smith v. Goguen, 415 U.S. 566, 575 (1974) (holding a Massachusetts statute that prohibited mutilation or contemptuous treatment of the flag void because it allowed "policemen, prosecutors, and juries to pursue their personal predilections.").

A fundamental purpose of the Due Process Clause is to restrict state deviations from the notion of "ordered liberty" and the ideal of a "government of laws, and not men." See Rhode, supra note 24, at 572-73. By demanding precision in standards, "the void-for-vagueness doctrine seeks to restrain erratic and capricious governmental oversight." Id. Furthermore, "[g]iven the limitations and expense of ad hoc appellate review, legal mandates must be framed with sufficient precision to afford a
B. Vagueness Challenges to the Fitness to Practice Standard

Judicial treatment of the "fitness to practice" standard is often circular and conclusory. Outcomes are inconsistent, and often courts simply pronounce an assessment that the conduct at issue renders the attorney unfit, and that the constitutional challenge is without merit.66

1. United States Supreme Court Treatment

The United States Supreme Court has repeatedly declined to review state decisions upholding the "fitness to practice" standard.67 The Court has, however, reviewed state decisions in which individuals were denied admission to the bar based on a lack of "fitness."68

For example, in 1971, the Supreme Court upheld a New York "fitness" standard for bar admission that was challenged on vagueness grounds. In Law Students Civil Rights Research...
Council, Inc. v. Wadmond, a group of law students challenged a New York law that denied admission to the bar unless the applicant proved two things: first, the applicant believed in the United States government, and second, the applicant was loyal to the government.

The court noted that "[l]ong usage in New York and elsewhere had given well-defined contours to [the loyalty] requirement, which . . . [had been] construed narrowly as encompassing no more than 'dishonorable conduct relevant to the legal profession.'" Accordingly, the "fitness" standard was held not to violate due process.

2. State Court Treatment
   a. Colorado

In People v. Morley, a Colorado lawyer, who allegedly counseled clients in illegal activities, unsuccessfully challenged the "fitness to practice" standard on vagueness grounds. The Colorado Supreme Court noted that the fitness to practice rule is specifically directed at attorneys rather than the public at large. Therefore, the standard to be applied was whether a "licensed lawyer" was able to comprehend the nature of the conduct proscribed by the rule.

The court found that the disciplinary rules were adequate to inform lawyers of the nature of the conduct proscribed. Moreover, the rule provided "sufficiently clear norms of conduct for the objective administration of the disciplinary process." The court concluded that "[i]t requires little imagination to conclude that any practicing attorney would know that counseling illegal activity . . . reflects adversely on that lawyer's fitness to practice law."  

b. New York

New York's highest court recently rejected a constitutional
challenge of the "fitness to practice" standard. In In re Holtzman, a district attorney publicly released allegations of judicial misconduct that were later found to be unsupported by the evidence. The Grievance Committee for the Tenth Judicial District of New York issued a letter of reprimand to the attorney, stating that she had engaged in conduct that adversely reflected on her fitness to practice law. In rejecting the attorney's vagueness challenge, the New York Court of Appeals articulated three reasons why the "fitness" standard was not unconstitutionally vague. First, the court noted that the United States Supreme Court has acknowledged that "it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney or counsellor ought to be removed." Second, the court stated that if they were to hold the "fitness to practice" standard unconstitutionally vague, any attempts to promulgate general behavioral guidelines would be futile. Third, the court noted that the proper standard to be applied was whether a reasonable attorney, familiar with the professional rules and its ethical strictures, would have notice of what conduct is proscribed. Applying this standard, the court believed that the attorney "was plainly on notice that her conduct in this case . . . could be held to reflect adversely on

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79. Id. at 32.
80. Id.
81. Id. at 33 (citing Ex parte Secombe, 60 U.S. (19 How.) 9, 14 (1856)).
83. Id. The "reasonable attorney" standard has been used by several other jurisdictions. See, e.g., Committee on Professional Ethics & Conduct v. Durham, 279 N.W.2d 280, 283-84 (Iowa 1979). While due process protections apply, several courts have utilized a vagueness standard that is less stringent than that applied to criminal statutes. These courts have simply adjusted the standard to account for the knowledge of the persons subject to the regulation. See id. at 283 (citing In re Rook, 556 P.2d 1356, 1357 (Or. 1976); In re Keiler, 380 A.2d 119, 126 (D.C. 1977), overruled on other grounds by, In re Hutchinson, 534 A.2d 919 (D.C. 1987)).

In Durham, the court justified a lower standard of due process scrutiny because "the Code of Professional Responsibility was written for lawyers by lawyers" and "guidelines setting standards for members of the bar need not and cannot meet the standard of clarity required of rules of conduct for laymen due to the training and specialized nature of the body being regulated." Durham, 279 N.W.2d at 284. However, the United States Supreme Court has affirmed that lawyers are entitled to some of the same constitutional protections as laymen. See Spevack v. Klein, 385 U.S. 511, 516 (1967).
her fitness to practice law."\(^{84}\)

c. Iowa

In *Committee on Professional Ethics & Conduct v. Durham*,\(^{85}\) an attorney was disciplined for having sexual contact with a client, who was incarcerated in the state penitentiary.\(^{86}\) The Iowa Supreme Court held that the attorney’s conduct reflected adversely on her fitness as a lawyer.\(^{87}\) In dismissing the vagueness challenge, the court held that the standard for determining whether a provision of the Code of Professional Responsibility is unconstitutionally vague is whether a reasonable attorney would understand what conduct was prohibited.\(^{88}\) The court found that a reasonable attorney would understand that sexual contact with an incarcerated client, which occurred while the attorney was acting in a professional capacity, was prohibited behavior.\(^{89}\)

d. Minnesota

The Minnesota Supreme Court has only considered the constitutionality of the “fitness to practice” standard on one occasion. In *In re N.P.*,\(^{90}\) the director of the Professional Responsibility Board issued a number of charges against an attorney as a result of the attorney’s activities in soliciting and representing clients involved in the Dalkon Shield litigation.\(^{91}\) These charges alleged the wrongful solicitation of claims and payment of referral fees, altering law firm records in an effort to subvert the disciplinary investigation, receipt of confidential information which enhanced his client’s position, subverting the adversary system, breach of fiduciary duty, and failure to obtain his client’s consent to settlements.\(^{92}\)

Relying on broad principles of statutory construction, the Minnesota Supreme Court noted that, although the subjects of

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84. *Holtzman*, 577 N.E.2d at 33.
85. 279 N.W.2d 280 (Iowa 1979).
86. *Id.* at 285.
87. *Id.*
88. *Id.* at 284.
89. *Id.* at 285-86.
91. *Id.* at 391-92.
92. *Id.*
disciplinary proceedings are entitled to due process, discipline in construction is not in itself sufficient to set aside a rule, and the [disciplinary] rule 'should be upheld unless the terms are so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent.'

In support of its analysis, the court noted that "[t]he United States Supreme Court recognized long ago that 'it is difficult, if not impossible, to enumerate and define, with legal precision, every offense for which an attorney . . . ought to be removed.' In addition, the court stated that the "fitness to practice" standard does "no more than reflect the fundamental principle of professional responsibility that an attorney, as an officer of the court, has a duty to deal fairly with the court and the client." The court also concluded that when "[r]ead in conjunction with other disciplinary rules," the "fitness to practice" standard is "sufficiently well defined to satisfy due process." Thus, the fitness standard was upheld.

IV. THE DEVELOPMENT OF RULE 8.4(h)

The impetus for Rule 8.4(h) was the Minnesota Supreme Court Task Force for Gender Fairness in the Courts (Minnesota Report). The Minnesota Supreme Court established the

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93. Id. at 394.
94. Id. at 394 (quoting Anderson v. Burnquist, 216 Minn. 49, 53, 11 N.W.2d 776, 778 (1943)). Note that the Anderson court applied this language to a statute, while the court in In re N.P. at 395 applied this language to the rules of professional conduct.
95. In re N.P. at 395 (quoting Ex parte Secombe, 60 U.S. (1 How.) 9, 14 (1856).
96. Id. at 395.
97. Id.

Task Force in June 1987. Its charter was to explore the pervasiveness of gender bias in the Minnesota state court system, to classify and record bias where found, and to suggest procedures to eradicate bias.

The Task Force focused on three areas of discrimination: gender-based employment discrimination, sexual harassment of attorneys in the court system, and harassment of female litigants and witnesses in the court system. The Task Force recommended that the state bar association increase its pro bono efforts in attempting to ameliorate gender-based employment discrimination, attempt to increase attorney fee awards in prosecuting such claims, and to double or triple plaintiff’s damage awards to encourage claimants to come forward.

Based on its finding that participants in the courtroom were subjected to disparate treatment based on gender, the Task Force recommended that the Code of Judicial Conduct, the Rules of Professional Conduct, and the Rules for Uniform De-
corum be amended to include standards for gender-fair behavior. 105 The Task Force also recommended that law schools, continuing legal education, and employee training programs incorporate gender fairness issues into their curricula. 106

The Task Force concluded that sexual harassment was common in the legal profession finding that, although sexual harassment policies had been adopted throughout the court system, sexual harassment continued to occur and often went unremedied. 107 Accordingly, the Task Force recommended that sexual harassment policies and procedures be developed that would work effectively within the judicial system. 108 The Task Force also recommended amending the Canons of Judicial Ethics to forbid sexual harassment. 109

The subcommittee on discrimination initially convened to determine whether the Rules of Professional Conduct should be amended to prohibit discrimination in an attorney’s professional capacity. 110 However, after reviewing the Task Force’s report, the subcommittee on discrimination recommended

105. Id. at 933.
106. Id.
107. Id. at 945. The Task Force also found that court personnel were more likely to be subjected to sexual harassment than other participants in the judicial system. Id. Furthermore, the existing internal grievance system was inadequate to protect these employees, because court personnel perceived themselves to be more vulnerable to the power of judges. Id.
108. MINNESOTA REPORT, supra note 98, at 945-46.
109. Id. at 946. The Task Force noted that:

The present grievance system for sexual harassment complaints is inadequate in part because of the special vulnerability of court personnel, some of whom are employees at will, and because of the perceived power of judges which makes attorney victims fear negative consequences for themselves and their clients if they pursue complaints.

Id. at 945.
110. See MINNESOTA STATE BAR ASSOCIATION RULES OF PROFESSIONAL CONDUCT COMMITTEE SUBCOMMITTEE ON DISCRIMINATION REPORT (on file with WILLIAM MITCHELL LAW REVIEW). The report notes:

The Minnesota State Bar Association Ad Hoc Committee on Rule 8.4(b), which recommended the amending of Rule 8.4 of the Minnesota Rules of Professional Conduct to create a subsection g which prohibits harassing a person while the lawyer is acting in a professional capacity, also recommended that the Minnesota State Bar Association establish and appoint an ad hoc committee to consider and further study discrimination in the practice of law and to prepare recommendations to the Minnesota State Bar Association for possible additional amendments to the Minnesota Rules of Professional Conduct regarding discrimination. Consequently, in December 1989, R. Walter Bachman, chairperson of the Rules of Professional Conduct Committee, established a Subcommittee on Discrimination to consider the issues which had been referred to it by the Ad Hoc Committee on Rule 8.4(b).
that the charter of the Task Force be expanded to promulgate a rule prohibiting unlawful discrimination by lawyers.\textsuperscript{111}

In 1991, the subcommittee considered draft proposals of various antidiscrimination provisions. The drafts ranged from prohibiting discriminatory acts committed in a professional capacity, to prohibiting employment discrimination, to prohibiting all discriminatory acts. The subcommittee eventually drafted a broad antidiscrimination provision. Rather than limiting the rule to the lawyer's conduct in the workplace or to acts committed by a lawyer while acting in a professional capacity, the rule covered all acts by lawyers. In support of its actions, the subcommittee declared that the new rule:

reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fit-

\textsuperscript{111} See \textsc{Subcommittee on Discrimination, Minnesota State Bar Association, Board of Governors Meeting 2.05a (1991).}

\textsuperscript{111.} The Minnesota Gender Bias Task Force had recommended that the Minnesota Rules of Professional Conduct be amended, directing lawyers not to engage in discriminatory conduct within the judicial system. \textit{See Minnesota Report, supra note 98, at 933.}

When the Task Force looked at the issue of gender-based employment discrimination in general, however, the Task Force noted that the Minnesota Human Rights Act appeared to offer considerable protection against such discrimination. \textit{Id.} at 917. The Task Force also found that victims of gender discrimination have the option of filing a civil action in state court or filing a charge with the Minnesota Department of Human Rights or similar local agency within one year of the occurrence of the discriminatory conduct. \textit{Id. (citing Minn. Stat. § 363.06 (1)-(3) (1992).}

The Task Force made no findings regarding the prevalence of attorney discrimination in the workplace, nor did it make any recommendations that the Minnesota Rules of Professional Conduct be amended to proscribe any other discriminatory act.
ness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities.  

V. Analysis

A. Vagueness Analysis of Rule 8.4(h)

Rule 8.4(h) violates due process because it is open to differing and subjective interpretations. Under both the "long usage" standard, employed by the United States Supreme Court in *Law Students Civil Rights Research Council v. Wadmond* 113 and the "reasonable attorney" standard employed in various jurisdictions, 114 the language of Rule 8.4(h) is unconstitutionally vague. Even when analyzed under the diminished due process rationale used by the Minnesota Supreme Court in *In re N.P.*, 115 the language of the rule lacks the requisite specificity and is therefore unconstitutionally vague.

Minnesota's Rule 8.4(h) is the only rule of its kind. No other state seeks to regulate an attorney's extraprofessional conduct in such a fashion. 116 Since there has been no pattern of "long usage" in regulating an attorney's conduct for discriminatory acts committed outside an attorney's professional life, no well-defined contours exist to place attorneys on notice of the conduct that is proscribed.

Even when viewed in light of the diminished due process analysis performed by the Minnesota Supreme Court in *In re N.P.*, the rule encounters several difficulties. In *In re N.P.*, the court stated that difficulty with construction of a rule is not, by itself, sufficient to invalidate a rule. 117 However, the court acknowledged that it must, nonetheless, be possible to ascertain the intent of the drafters. 118 In the case of rule 8.4(h), it is not

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112. MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 8.4(h) at cmt. (1992).
113. 401 U.S. 154, 159 (1971). In *Wadmond*, the Court held that "[l]ong usage in New York and elsewhere had given well-defined contours to [the loyalty] requirement . . . ." *Id.* at 159; *see supra* note 71 and accompanying text.
115. 361 N.W.2d 386 (Minn. 1985); *see supra* notes 93-94 and accompanying text.
116. Several other jurisdictions have contemplated antidiscrimination provisions as expansive as Minnesota's but have explicitly rejected them. *See infra* note 151 and accompanying text.
117. *In re N.P.*, 361 N.W.2d 386, 394 (Minn. 1985).
118. *Id.* (citing Getter v. Travel Lodge, 260 N.W.2d 177, 180 (Minn. 1977)).
at all clear whether the drafters intended sanctions for all discrimination, or only “serious” discrimination.

Rule 8.4(h) is broadly worded and is thus open to subjective and diverse interpretations. The rule states:

Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including (1) the seriousness of the act, (2) whether the lawyer knew that it was prohibited by statute or ordinance, (3) whether it was part of a pattern of prohibited conduct, and (4) whether it was committed in connection with the lawyer's professional activities.\(^\text{119}\)

The comment to Rule 8.4(h) states that all relevant circumstances, including the four factors listed above, will be considered in determining whether the act reflects adversely on a lawyer's fitness.\(^\text{120}\) The factors listed are not necessarily weighted equally, nor are they exclusive.\(^\text{121}\)

The language of Rule 8.4(h) violates due process in two ways. First, in determining whether discrimination reflects adversely on a lawyer's fitness to practice courts will determine the “seriousness” of the discrimination. However, the determination of what constitutes serious discrimination is entirely subjective.\(^\text{122}\) This determination is further complicated by the fact that no objective criteria are available to measure the severity of the discriminatory act. For example, the Minnesota Human Rights Act\(^\text{123}\) does not categorize any discriminatory act as more serious than any other.

The language of the rule implies that an objective hierarchy exists which categorizes unlawful discriminatory acts from least serious to most serious. It is difficult, if not impossible, to determine which discriminatory acts are more serious than others. Is gender discrimination more egregious than sexual harassment? Is public accommodation discrimination based


\(^{120}\) Id. at cmt.

\(^{121}\) Id.

\(^{122}\) Justice White has argued that an attorney should not be disbarred under a general standard of conduct if reasonable attorneys would differ in appraising the propriety of the conduct. See In re Ruffalo, 390 U.S. 544, 556 (1968) (White, J., concurring). Considering the diversity of opinion in the legal profession, it is almost certain that reasonable attorneys will differ over the issue of what constitutes “serious discrimination.”

on race more repugnant than housing discrimination based on sexual preference? Problems arise as to who makes this determination and under what criteria. While some may argue that certain unlawful discriminatory acts are inherently more serious than others, the rationale of such arguments is likely to be entirely subjective. The use of a subjective factor to define the scope of the rule does little to elucidate what type of discriminatory acts adversely reflect on a lawyer’s fitness.

Second, the rule is unconstitutionally vague because it expressly states that the list of factors to be considered in determining a lawyer’s fitness to practice is nonexclusive. Thus, the rule fails to give notice of all factors that may be considered in determining whether a discriminatory act adversely reflects on a lawyer’s fitness. Other factors may be used in this determination, and the rule provides no clear guidance to practitioners as to what these factors might be.

In addition, Rule 8.4(h) is flawed in its attempt to regulate attorney conduct that is unrelated to the attorney’s practice of law. While attorneys clearly have unique obligations to the public in light of their status as officers of the court, these responsibilities are not sufficient to sanction restraining attorneys of their rights in relation to the public in general.

Third, the amendment is inconsistent with the comment to Rule 8.4, which states that attorneys should be professionally answerable only for offenses that indicate a lack of qualities relevant to the practice of law. According to the comment, these offenses include violence, dishonesty, and breach of trust or serious interference with the administration of justice. Minnesota’s Rule 8.4(h), however, now requires attorneys to be professionally answerable for “offenses” that fall outside the defined categories.

**B. Antidiscrimination Provisions Implemented in Other Jurisdictions**

Professional antidiscrimination provisions are currently in place not only in Minnesota but also in the District of Columbia, New Jersey, New York, Rhode Island, and Ver-
However, other jurisdictions have limited the scope of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap." District of Columbia Rules of Professional Conduct Rule 9.1 (1992).

128. Rule 8.4 of the New Jersey Rules of Professional Conduct provides, in pertinent part:

It is professional misconduct for a lawyer to: . . .

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.


The comment to Rule 8.4(g) provides, in pertinent part:

This rule . . . is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

Id. at cmt.

129. The New York Code of Professional Responsibility states in pertinent part:

A lawyer shall not . . . (6) Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, or marital status. Where there is available a tribunal of competent jurisdiction, other than a Departmental Disciplinary Committee, a complaint of professional misconduct based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.


130. The Rhode Island Rules of Professional Responsibility states in pertinent part: “It is professional misconduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice, including but not limited to harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, nationality, or sex.” Rhode Island Rules of Professional Conduct Rule 8.4(d) (1992).

131. The Vermont Code of Professional Responsibility provides, in pertinent part: “A lawyer shall not: . . . (6) [d]iscriminate against any individual because of his
of the rule to activities related to the attorney’s professional role. Furthermore, some of these jurisdictions have procedural requirements that must be satisfied before disciplinary proceedings can be initiated.\textsuperscript{132}

No other states that have implemented antidiscrimination provisions seek to regulate discriminatory acts that occur in the attorney’s private life. Rather, these other states merely prohibit attorney discrimination in a professional capacity or in the context of employment. The New Jersey Supreme Court has stated that “purely private activities are not intended to be covered by this rule.”\textsuperscript{133} New York’s rule is expressly limited to discriminatory acts involving the practice of law.\textsuperscript{134} Rhode Island’s rule only addresses conduct “prejudicial to the administration of justice” and focuses on discriminatory treatment of participants in the judicial system.\textsuperscript{135} Finally, the rules in Vermont and the District of Columbia apply only to employment discrimination.\textsuperscript{136}

Antidiscrimination rules implemented in other jurisdictions also contain various procedural safeguards absent in Minnesota’s rule. For example, New Jersey’s rule requires a final adjudication by an administrative or judicial tribunal—other than a professional responsibility board—before an attorney is subject to discipline.\textsuperscript{137} Thus, groundless allegations never reach professional responsibility review boards. Further, to constitute misconduct under New Jersey’s rule, the attorney’s actions must be intended or likely to cause harm.\textsuperscript{138} Also, in cases of employment discrimination, the rule requires a final judicial or administrative determination prior to professional disciplinary proceedings.\textsuperscript{139}

Rules adopted by the District of Columbia, Rhode Island,
and Vermont, also limit the potential for the rule's abuse. For example, the District of Columbia's rule permits discrimination complaints to be deferred until substantially similar complaints filed and pending with human rights agencies are resolved.  

Thus, antidiscrimination provisions in other states provide substantive protection because they limit an attorney's exposure to discipline to the scope of the attorney's actions as an attorney. The rules also provide various procedural safeguards once the disciplinary process is initiated.

By contrast, Minnesota's antidiscrimination rule contains none of the substantive or procedural safeguards found in the rules of other jurisdictions. Minnesota's rule may extend to activities entirely unconnected to an attorney's practice of law. Further, the rule does not require an administrative or judicial finding prior to the initiation of proceedings by the professional responsibility board, nor does it require a finding of intent to discriminate. Rather, the rule merely contemplates a "violation."  

In the absence of such safeguards, there is an increased likelihood that the rule may be used as a tool for harassment or intimidation.  

The broad scope, ambiguous language, and absence of procedural safeguards within the language of Rule 8.4(h) may falsely subject attorneys to liability for discriminatory actions. In fact, the language and scope of the rule may actually create a climate that encourages false charges. Charges later proven false have the ability to severely damage an attorney's reputation.


141. In drafting the rule, the discrimination subcommittee recommended a rule that "does not require a proven violation of a statute or ordinance" because "there may be technical reasons, such as the statute of limitations or other procedural reasons, why a matter may have been dismissed. . . ." Discrimination Subcommittee Minutes, Rules of Professional Conduct Committee, July 5, 1990 (on file with the William Mitchell Law Review).


143. Members of the discrimination subcommittee recognized this possibility. Phyllis Karasov, co-chair of the discrimination subcommittee, stated that "the subcommittee's goal was not to create a climate encouraging discrimination charges, but to provide the bar with a clear, usable measure of what constitutes discrimination, and to suggest guidelines the Lawyers Professional Responsibility Board can follow in determining whether discipline is appropriate." (quoting Phyllis Karasov, co-chair of the discrimination subcommittee).
According to the co-chair of the discrimination subcommittee of the Minnesota State Bar Association's Professional Conduct Committee, the four factors of Rule 8.4(h), which are to be considered in determining whether a discriminatory act reflects adversely on a lawyer's fitness, were intended to protect attorneys from baseless charges of misconduct.\textsuperscript{144} However, since the factors themselves are vague and provide no notice of the conduct to avoid, these factors will likely be ineffective as a screen against unfounded charges.

C. Appropriateness of Professional Rules as a Means of Social Change

Over the years, ethics codes have gone from advisory guidelines, to rules implementing ethical concerns, to their present form, where they have assumed the power of black letter law.\textsuperscript{145} However, the proper role of professional rules is becoming increasingly unclear.\textsuperscript{146} Besides being used to regulate extraprofessional conduct, there is a growing tendency to use these rules as standards in malpractice cases and other private causes of action.\textsuperscript{147}

One of the most difficult issues underlying Rule 8.4(h) is whether legal disciplinary rules—ostensibly designed to protect clients and the administration of justice—should be used as tools of social policy.\textsuperscript{148} Minnesota's rules once drew a dis-

\textsuperscript{144}. Id. at 4. As one participant noted during a public hearing preceding the adoption of the rule, the rule could have a detrimental effect by causing lawyers to avoid service on organizational boards due to fear of future discrimination charges and disciplinary action. \textit{Id.} While the members of the subcommittee acknowledged these problems, the subcommittee failed to address them. \textit{Id.} at 8.

\textsuperscript{145}. See supra discussion at section II.A.; see also Geoffrey C. Hazard Jr. and Cameron Beard, \textit{A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Hearings}, 96 \textit{Yale L.J.} 1060, 1075 (1987).


\textsuperscript{147}. \textit{See} Hampton, supra note 146, at 662.

\textsuperscript{148}. Some may argue that professional rules ought to be used to encourage social change, in light of an attorney's ethical responsibilities. Almost thirty years ago, Elliott Cheatham stated:

The law and its institutions change as social conditions change. They must change if they are to preserve, much less advance, the political and social values from which they derive their purpose and their life. This is true of the most important of legal institutions, the profession of law. The profession, too, must change when conditions change in order to preserve and advance the social values that are its reasons for being.
tinction between personal and professional conduct. The comment to Rule 8.4 states that lawyers should be professionally answerable only for offenses that indicate a lack of those characteristics relevant to the practice of law. The fraud, misrepresentation, and dishonesty prohibitions in Rule 8.4(c) focus on the lawyer's honesty, fiduciary duties to a client, and the ability to tell the truth. Clearly, Rule 8.4 was initially designed to regulate lawyers' professional activities, rather than to implement social policy. However, Rule 8.4(h) has the aspirational goal of promoting equality and attempts to use the disciplinary floor of Rule 8.4(h) to mandate social change. It is inappropriate to expand rules of professional conduct to private activities, unrelated to the profession, in an effort to implement general social policy.

D. Alternative Remedies for Discrimination

The question remains as to whether Rule 8.4(h) is necessary to protect persons from discrimination by lawyers, or whether it creates additional problems, while failing to effectively further the elimination of discrimination. New York and New Jersey have recently considered expansive antidiscrimination provisions similar to Minnesota's amended rule. Both states rejected the proposed revisions, in part, because state and federal statutes provide adequate remedial remedies. One sub-

Elliott E. Cheatham, Availability of Legal Services: The Responsibility of the Industrial Lawyer and the Organized Bar, 12 U.C.L.A. L. Rev., 438, 440 (1965). See also Suzannah Bex Wilson, Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform, 67 Ind. L.J. 817 (1992). In her article, Wilson argues that the initial impetus for changing society's views on sexual discrimination must come from the legal profession. Id. Ms. Wilson also argues that this is appropriate on a practical level because [the legal profession] is uniquely linked to all segments constituting the public sphere—the judiciary, the legislature, and the business sector. The majority of judges are lawyers, as are many legislators, and employers inevitably interact with lawyers at some point in time. Thus, lawyers are capable of influencing all segments of the public. [There are also] [e]thical considerations [which] support this proposal: the profession that represents justice should not be guilty of treating individuals in an unlawful and unfair manner. Ending sex discrimination within the legal profession will benefit the profession by enabling it to truly represent as both an advocate and a source of justice. Id. at 817-18.

150. Id.
committee recommended not adopting any rule for this very reason. A past chairman of the ABA's Committee on Ethics and Professional Responsibility has questioned whether antidiscrimination provisions fit into the types of professional responsibilities addressed by the model rules.\textsuperscript{152} Rather, the chairman noted that both state and federal laws offer adequate protection against discrimination.\textsuperscript{153} Thus, the discrimination targeted by Rule 8.4(h) can be remedied by other means.

VI. Conclusion

Rule 8.4(h) of the Minnesota Rules of Professional Conduct violates due process because it is unconstitutionally vague. In addition, the amendment to the rule does not comply with the judicial “fitness to practice” standard because the factors which determine whether the discriminatory act reflects adversely on the lawyer's fitness to practice are purely subjective. Reasonable attorneys may differ as to whether the commission of a discriminatory act, prohibited by federal statute, state statute, or local ordinance, reflects adversely on a lawyer's fitness as a lawyer. Accordingly, the rule fails to give notice of the type of conduct that attorneys must avoid. In addition, Rule 8.4(h) extends regulation to extraprofessional noncriminal conduct. Minnesota's rule is not only the most expansive of any in the country, it is also clearly outside the intended scope of the professional rules. The Minnesota Rules of Professional Conduct are inappropriate as a means of implementing social policy.

Discrimination of any sort is repugnant. However, society, through its elected bodies, has ample means to denounce such behavior. When professional rules are used as tools of social policy, problems of application will inevitably arise. Determining their proper application implicitly requires that a decision be made as to the social desirability of the policy that provides the basis for discipline. Who should be entrusted to make this decision? The Minnesota Rules of Professional Conduct

\textsuperscript{152} Faye A. Silas, Lawyer Conduct, 72 A.B.A. J. May 1, 1986, at 31 (quoting Robert Hetlage, past chair of the ABA's Committee on Ethics and Professional Responsibility).

\textsuperscript{153} Id.
should not be used to implement a desired social policy, nor be turned into a laundry list of remedies devised to eliminate society's ills. This is especially the case when the rules seek to regulate activities in an attorney's private life and these activities are unrelated to the attorney's practice of law.

Andrew D. Pugh