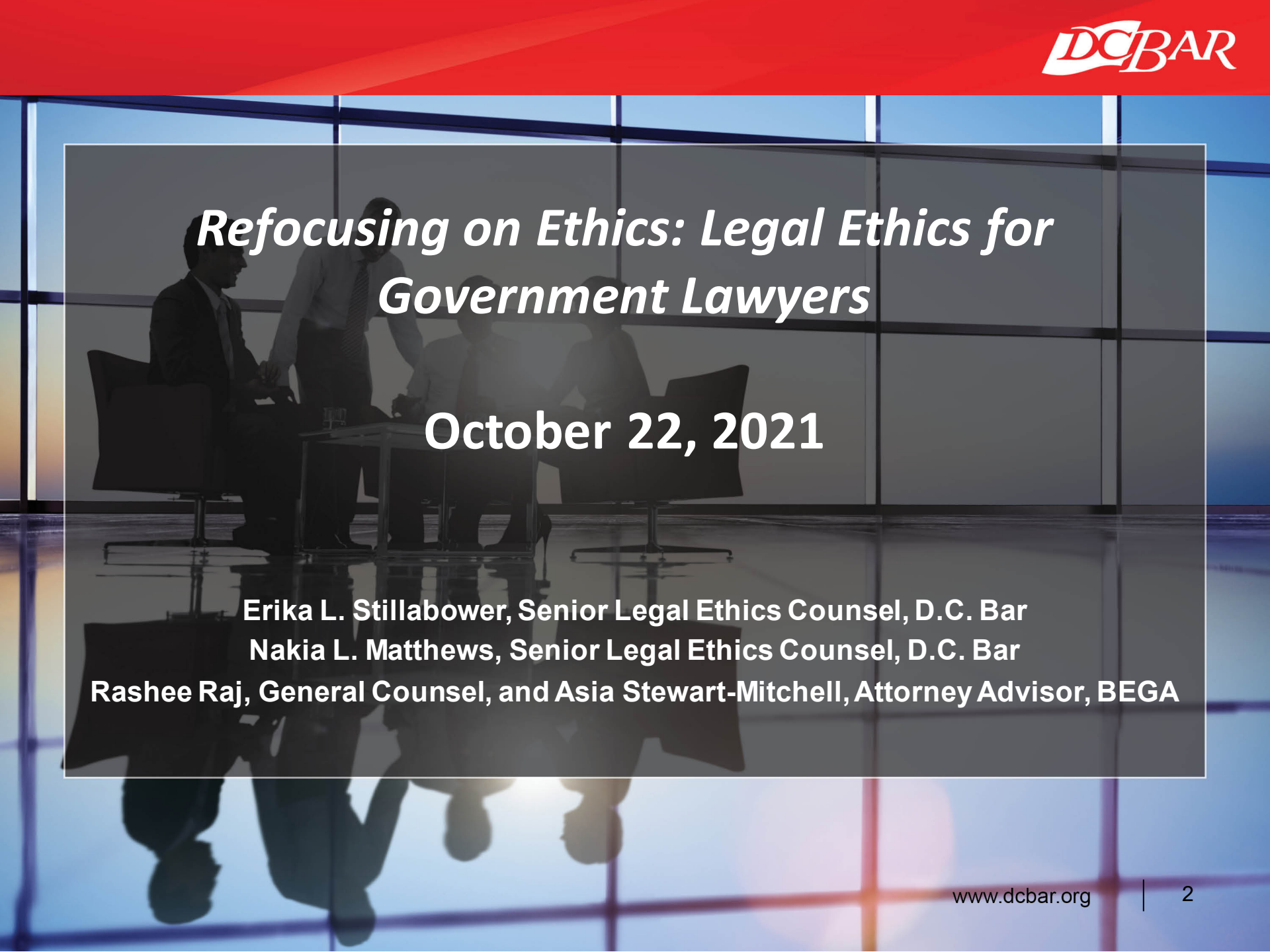




approach

ETHICS WEEK 2021
REAPPROACHING ETHICAL VALUES



The background of the slide shows a group of four people in business attire sitting around a table in a modern office setting with large windows. The scene is in silhouette, with light coming from the windows, creating a professional and collaborative atmosphere.

Refocusing on Ethics: Legal Ethics for Government Lawyers

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General Ethics Resources

www.dcbar.org

- D.C. Rules of Professional Conduct
- D.C. Legal Ethics Committee Formal Opinions
- Confidential Ethics Helpline – 202-737-4700 x. 1010
- Ask the Ethics Expert/Speaking of Ethics Columns
(Washington Lawyer)

BEGA

D.C. Government Ethics

D.C. Rules of Professional Conduct:

- Govern the conduct of lawyers admitted to practice in the District of Columbia
- MAY, SHOULD, or SHALL –
“Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process.” Scope [3]
- “The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” Scope [1]

Other Considerations:

- The Rules exist within a larger legal context including court rules, federal, and state law.
- Substantive law may guide or dictate ethical conduct.
- If the Rules are permissive and the law prohibits: Can't do it. If the law allows the conduct but the Rules prohibit: Can't do it.

Hypotheticals

Question 1

Charles Loomer is a lawyer in the General Counsel's office at the D.C. Department of Employment Services. Before becoming a lawyer, Charles was an accountant. In addition to his employment with the D.C. government, during tax season Charles operates a tax preparation business. He only takes on a handful of clients, many of whom have been with him for years. However, he does occasionally take on a new client.

May Charles operate a tax business in addition to his government employment?

- A. No, because outside employment is completely prohibited.
- B. Yes, because it is not prohibited by the D.C. Rules of Professional Conduct.
- C. Yes, as long he complies with laws regarding outside employment and D.C. government employees.
- D. Both B and C.

Question 1

Best Answer: D. Both B and C.

The Rules of Professional Conduct have several rules that may be used to provide guidance to lawyers about non-legal employment and instances where a lawyer has multiple streams of employment.

Rule 5.7

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term law-related services denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer

Question 1

Rule 1.7(b)(4)

(b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:

(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

Follow-up: What are the statutes, regulations and policies that govern outside employment for government employees? What disclosures need to be made, and to whom?

Question 2

After careful thought and consideration Charles has decided that he would like to leave the Department of Employment Services and join a law firm that provides representation in matters related to tax law and general civil litigation. After being at the firm for six months he is asked to serve as second chair on a case where the client is challenging a tax assessment made by the District of Columbia.

Can Charles serve as second chair on the case?

- A. Yes, but only because the matter does not involve his previous agency.
- B. Yes, because it is not prohibited by the Rules of Professional Conduct.
- C. No, because while the Rules may allow it, the laws and policies pertaining to former government employees do not.
- D. No, but he may apply for an exception at the agency ethics office.

Question 2

Best Answer: C. No, because while the Rules may allow it, the laws and policies pertaining to former government employees do not.

Rule 1.11

(a) A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee. Such participation includes acting on the merits of a matter in a judicial or other adjudicative capacity.

Note:

- Breadth of rule (no consideration of adversity)
- Does not provide for waiver
- Applies even to public officials who are not working as attorneys

Question 2

Guidance:

- “Personal and substantial” participation
 - D.C. LEO 315 – useful guidance on the analysis, but not dispositive
- D.C. Rule 1.11(g)
 - This Rule applies to any matter involving a specific party or parties.
 - Comment [3]: The making of rules of general applicability and the establishment of general policy ordinarily will not be a “matter” within the meaning of Rule D.C. 1.11.
 - D.C. LEO 297
- Also note that conflicts arising under Rule D.C. 1.11(a) are not imputed if the lawyer is timely screened, in accordance with D.C. Rule 1.11(b) and (c).

Follow-up: discussion of government post-employment restrictions

Question 3

Angela is an attorney with the D.C. Department of Housing and Community Development. One of the offices has asked for an opinion on whether a proposed course of action is in line with their statutory authority. Angela has been tasked with researching and drafting a response. Based on the current state of the law, Angela concludes that the office cannot proceed with the intended course of action and that doing so may cause harm to agency in multiple ways. Angela's boss disagrees and believes the agency can take the action and directs Angela to draft the memo with his conclusion.

What should Angela do?

- A. Draft the memo the supervisor wants. She is just following orders, so she is protected.
- B. Diplomatically tell her supervisor no and give the reasons why, then determine the lines of reporting authority in the agency so that she can report up the chain, if necessary.
- C. Talk to the local news station about the misconduct within the agency.

Question 3

Best Answer: B. Diplomatically tell her supervisor no and give the reasons why.

Rule 5.2

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Question 3

Rule 1.7(b)(4):

(b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:

(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

Question 3

Rule 1.13:

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) (b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests may be adverse to those of the constituents with whom the lawyer is dealing.

Question 3

Rule 1.6(a):

Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:

- (1) reveal a confidence or secret of the lawyer's client;
- (2) use a confidence or secret of the lawyer's client to the disadvantage of the client;
- (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

Rule 1.6(b):

“Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

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Question 3

Rule 1.6(c):

A lawyer may reveal confidences and secrets, to the extent reasonably necessary:

- (1) to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer; or
- (2) to prevent the bribery or intimidation of witnesses, jurors, court officials, or other persons who are involved in proceedings before a tribunal if the lawyer reasonably believes that such acts are likely to result absent disclosure of the client's confidences or secrets by the lawyer.

Rule 1.6(e):

A lawyer may use or reveal client confidences or secrets:

- (1) with the informed consent of the client;
- (2) (A) when permitted by these Rules or required by law or court order; and
(B) if a government lawyer, when permitted or authorized by law;

Limiting phrases seen throughout Rule 1.6:

- To the extent reasonably necessary
- To the minimum extent necessary (in connection with fee recovery)

Question 4

Dave, Angela's co-worker explained that their supervisor has also been forcing him to push through agency initiatives, and they have clashed on the interpretation of certain statutes. Dave has anxiety and depression and as a result of heightened tension with his supervisor, Dave has become dependent on prescription drugs. His doctor has stopped renewing his prescription, and he has had trouble focusing and doing his work. Dave confides in Angela that just yesterday he missed a deadline. He is working to resolve it and doesn't want to say anything until he is sure it can't be fixed.

Does Angela have to report Dave for missing the deadline?

- A. No, he is working to resolve the issue regarding the missed deadline.
- B. Yes, he missed a deadline.
- C. It depends.

Question 4

Best Answer: C. It depends.

Rule 8.3:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6 or other law.

What rule was violated?

Rule 1.1 (Competence)

Rule 1.3 (Diligence and Zeal)

Rule 8.4 (Misconduct)

Question 4

Other Resources:

- LEO 377 (Duties When a Lawyer Is Impaired)
Addiction and/or mental health issues, standing alone, are not a violation of the ethics rules.
- DC LEO 220
All that is needed to make a permissive report is a “good faith” belief that a violation of the Rules of Professional Conduct has occurred.
- Other considerations:
 - Rule 1.13 (reporting up within a client entity)
 - Rule 5.1 (Supervisory Lawyers)/Rule 5.2 (Subordinate Lawyers)
 - Rule 8.4(g) (threats of criminal or disciplinary charges)
 - Centralizing the reporting function within agencies
- D.C. Bar Lawyer Assistance Program

Follow up: Any relevant D.C. Government/agency policies re: substance abuse?

Question 5

Cathy is a lawyer at the D.C. Department of Human Services. During a mediation between Cathy and the respondent's counsel, Cathy made several statements about upcoming legislation that could impact the resolution of the case. Relying on these statements the respondent agreed to settle the case. After the case is settled the legislation is signed into law, but the final version does not contain the provisions that Cathy mentioned and the respondent relied on to settle the case.

Did Cathy violate an ethics rule?

- A. Yes, because the respondent relied on Cathy's statements to her detriment.
- B. No, if the statements that Cathy made were a true and accurate statement of the facts and the law at the time they were made.
- C. No, but Cathy should never have disclosed that information.
- D. Yes, because Cathy made those statements as a negotiation tactic.

Question 5

Best Answer: B. No, if the statements that Cathy made were a true and accurate statement of the facts and the law at the time they were made.

To this answer it might be wise to add: and she was authorized to make the statements she made about anticipated legislative changes.

Rule 3.3 (Candor to the Tribunal)

(a) A lawyer shall not knowingly:

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6;

Rule 4.1 (Truthfulness in Statements to Others)

In the course of representing a client, a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third person; or
- (b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Question 5

Rule 8.4(c) (Misconduct):

It is professional misconduct for a lawyer to:

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

Important consideration: Respondent had counsel!

Rule 4.3 (Dealing with Unrepresented Person):

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(1) Give advice to the unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client; or

(2) State or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested.

(b) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Other resources:

Hope Todd, "DC Rule 4.1: Is it up for Negotiation?" Washington Lawyer (May 2016)

Question 6

Martin is representing a client in a matter before an ALJ with whom he is casually acquainted. They attended law school together 20 years ago and are connected on Facebook and LinkedIn. Scrolling mindlessly through his feed one evening, Martin “liked” the judge’s post about her daughter’s 10th birthday.

Is this a violation of the Rules of Professional Conduct?

- A. Yes
- B. What rule prohibits “likes”?
- C. It’s unwise, but not a per se violation.
- D. No, but only because it has nothing to do with the court case.

Question 6

Best Answer: C. It's unwise, but not a per se violation.

Rule 3.5: Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) Seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- (b) Communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order;

Question 6

D.C. LEO 295:

The rules prohibiting ex parte communication with judges offer useful guidance here. The 1990 Model Code of Judicial Conduct, Canon 3B(7)(a) **permits ex parte communications for “scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits. . . .”**⁴ DC Rule 3.5(b), like the Model Rule, says “A lawyer shall not . . . communicate ex parte with a [judge] except as permitted by law.” **This rule does not articulate the “administrative matters exception explicitly, but is widely understood not to prohibit communication relating to administrative or “scheduling matters.”** The rule against ex parte communications, like Rule 4.2, is intended to ensure that both lawyers in a case have the opportunity to participate in discussion of matters of substance relating to the case. But a lawyer who contacts a judge’s chambers to get an address or to find out a filing deadline does not violate the rule.

Question 6

D.C. LEO 371

When no case or proceeding involving a lawyer is pending, Rule 3.5 does not forbid the lawyer from becoming a "friend" of judges, arbitrators, regulators, or other neutrals. Nor does it forbid public or private social media communication with such persons, as long as Rule 3.5(a) is not violated.⁵⁷ When a case or matter is pending before a decision-maker, the prohibition of *ex parte* communication in Rule 3.5(b) applies to all communication, including by social media.⁵⁸ **In such a circumstance a lawyer should consider whether to remove, at least temporarily, the decision-maker as a "friend" or other connection on social media.**

Additional considerations

- Lawyers SHOULD be looking at the public social media of the judges before whom they appear.
 - Model PC Rule 1.1 (Competence), Rule 1.3 (Diligence), D.C. LEO 371
- Improper contact with judges is a serious ethics violation. In addition to Rule 3.5, see Rule 8.4:
 - It is professional misconduct for a lawyer to:
 - (d) engage in conduct that seriously interferes with the administration of justice;
 - (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law; . . .
- The “appearance of impropriety” inquiries . . .

Follow up: D.C. guidance on use of social media?

The D.C. Bar Board of Governors has proposed a new Rule 8.4(h) modeled after MR 8.4(g):

It is professional misconduct for a lawyer to:

(h) engage in conduct directed at another person, with respect to the practice of law, that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status. This Rule does not limit the ability of a lawyer to accept, decline or, in accordance with Rule 1.16, withdraw from a representation. This Rule does not preclude providing legitimate advice or engaging in legitimate advocacy consistent with these Rules.