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## Model Rule 8.4(d): Proposing a New Supporting Comment

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ANGELICA C. ROMERO

## Model Rule 8.4(d): Proposing a New Supporting Comment

### ABSTRACT

Despite the enduring history of the Model Rules of Professional Conduct, the maintenance of these Rules draws advocates and scholars to consider the study of human behavior. Maintaining the integrity of the profession has not been easy, yet maintaining the integrity of the profession has been preserved as a vital keystone to the Rules. In fact, discouraging misconduct within the legal profession has been a constant endeavor because society has demanded that advocates strive to produce a life of service that is above reproach. In recognizing the study of human behavior in the practice of law, this Comment proposes a new supporting comment for Model Rule 8.4(d).

Though reflecting on human behavior in the practice of law is not novel, drafting a supporting comment with the psychology of Man in mind may be helpful now that prejudicial conduct and the administration of justice have developed unruly parameters. After August 2016, Model Rule 8.4(d) was left without a supporting comment to accommodate Model Rule 8.4(g) changes. Notwithstanding the American Bar Association's (ABA) efforts to alleviate the strongholds of discrimination, some have come to believe that Model Rule 8.4(d) is far too broad and should be eliminated in favor of Model Rule 8.4(g)'s introduction. However, that would be a mistake.

This Comment proposes that paragraph (d) can find true meaning by considering psychological theories found in the study of human behavior. Some of these theories include situationism, heuristics, and various decision-making processes. Situationism challenges attorneys to evaluate their decision-making processes or methods as they are often ruled by unpredictable situations. Similarly, heuristics invite attorneys to confront the harms of using shortcuts. Though the practice of law often demands efficiency, it should never be at the expense of a client or the reputation of the profession. With these theories in mind, this Comment proposes a new supporting comment that gives Model Rule 8.4(d) a fresh perspective on how to evaluate when an attorney is engaging in conduct that is prejudicial to the administration of justice.

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## COMMENT

## MODEL RULE 8.4(d): PROPOSING A NEW SUPPORTING COMMENT

*Angelica C. Romero*<sup>†</sup>

## I. INTRODUCTION

The law is full of uncertainty. Though the law and its advocates strive to maintain standards into perpetuity, change is inevitable. Advancements in the law are often promulgated by external influences that press for its change. This is true even within legal ethics. Though riddled with uncertainty, understanding that attorneys are subject to external influences is important to understanding the practice of law. However, to some, attempting to understand the “soft” side of the law may be as idle as grasping for the wind. Nevertheless, it is important that attorneys, judges, and even disciplinary bodies understand the impact of human behavior in the practice of law. As “social engineers,” attorneys know that the legal profession is more than just knowing rules and regulations. Instead, the legal profession is composed of deal-making, favors, temptations, strategies, and rivalries. Therefore, maintaining the integrity of the profession may not always be easy.

Since 2016, Model Rule 8.4(d) has not had a supporting comment.<sup>1</sup> As such, this Comment proposes that the ABA add a supporting comment that considers various psychological explanations of human behavior. Accordingly, in drafting a new supporting comment, the legal profession ought to be mindful that attorneys are subject to a wide variety of tendencies that may not always be facially unethical. Because the history of the ABA Model Rules of Professional Conduct is important, Part II provides a brief history of these Rules and how maintaining the integrity of the profession has been an enduring maxim since 1908. Part II also provides a brief discussion of the various psychological explanations and theories that help to “quantify” human behavior.

Part III provides a brief survey of Model Rule 8.4(d) and four state case

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<sup>1</sup> Supporting comments are placed at the end of each Model Rule to provide guidance in applying the Rule. See MODEL RULES OF PRO. CONDUCT Preamble & Scope ¶¶14–15 (AM. BAR. ASS’N 2020).

studies that implement the Rule. The case studies include Wisconsin, Washington, Louisiana, and North Carolina. Each state represents a particular variation of how paragraph (d) has been adopted by the states. Part III provides in-depth psychology-based explanations of misconduct and their tie to each case study. Part IV sets forth the proposed supporting comment for paragraph (d). Lastly, Part V concludes with some basic principles mentioned throughout this Comment. In sum, this Comment introduces a fresh way of framing a new supporting comment for Model 8.4(d) by making space for the uncertainties of human nature.

## II. BACKGROUND

### A. *A Brief History: ABA Model Rules of Professional Conduct*

It was a Wednesday morning in late August of 1905. Lawyers from across the nation had gathered at Hotel Mathewson in Narragansett Pier, Rhode Island, to hold the Twenty-Eighth Annual Meeting of the ABA.<sup>2</sup> After being introduced as the new ABA president, Henry St. George Tucker<sup>3</sup> addressed the gentlemen of the ABA and quoted President Theodore Roosevelt in an attempt to “charge” the Association to inquire into “whether the ethics of [the] profession rise to the high standard which its position of influence in the country demands.”<sup>4</sup>

In response to Tucker’s impassioned commission, M.F. Dickinson of Massachusetts spoke for the Committee on Legal Ethics to offer a resolution that called for “a committee of five [to] be appointed . . . to report at the next meeting” concerning “the adoption of a code of professional ethics by [the] Association.”<sup>5</sup> Amasa M. Eaton of Rhode Island was pleased to second the

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<sup>2</sup> *Transactions of the Twenty-Eighth Annual Meeting of the American Bar Association, Held at Narragansett Pier, Rhode Island, August 23, 24 and 25, 1905*, 28 ANN. REP. A.B.A., at 3 (1905) [hereinafter *Transactions of A.B.A. Twenty-Eighth Annual Meeting*].

<sup>3</sup> *Id.*

<sup>4</sup> Henry St. George Tucker, A.B.A. President, Address of the President at the Twenty-Eighth Annual Meeting of the American Bar Association, 28 ANN. REP. A.B.A., at 299, 383–84 (1905).

<sup>5</sup> *Transactions of A.B.A. Twenty-Eighth Annual Meeting, supra* note 2, at 131–32.

resolution,<sup>6</sup> which was favorably adopted.<sup>7</sup> For the first time in ABA history, a code of ethics would be introduced to the legal profession.

At the following Meeting in 1906, the Committee on Code of Professional Ethics presented a report that determined the advisability and practicability of the ABA adopting a code of professional ethics.<sup>8</sup> By adopting a code of ethics states would be compelled to support the United States Constitution and the chosen standards of ethics to “promote the administration of justice and uphold the honor of the profession.”<sup>9</sup> In its Report, the Committee commended Alabama for having already established statutes addressing unethical behavior.<sup>10</sup> A few decades earlier, on December 14, 1887, the Alabama State Bar Association adopted a code of ethics, written by Judge Thomas Goode Jones.<sup>11</sup> Similar to the proceedings of the ABA 1905 Meeting, Judge Jones had recommended that the Alabama State Bar “appoint a committee . . . to report a Code of Legal Ethics for consideration at the [following] annual meeting.”<sup>12</sup> This Code went on to be adopted by eleven other states before the ABA established the Canons of Professional Ethics.<sup>13</sup>

Finally, in 1908, the new Association president, Jacob M. Dickinson of Illinois, presented the report of the Committee on Canons of Ethics.<sup>14</sup> Though Dickinson did not intend to persuade anyone to adopt the Canons, he did state the importance of its adoption by noting that three days was “a rather unusual [amount of] time for gentlemen from various parts of the country to devote to a work of that character.”<sup>15</sup> Those on the Committee “felt that it was one of the most important works that the American Bar

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<sup>6</sup> *Id.* at 132. In addition to Amasa M. Eaton participating in committee motions and resolutions on that Wednesday morning, he also happened to be one of the committee members hosting the annual meeting that year. *See id.* at 3, 132. In fact, William H. Sweetland, of Rhode Island, began the meeting with a few exhortations on behalf of the Rhode Island Bar Association. *Id.* at 3–6. Little did Eaton or Sweetland know that though “[Rhode Island is] a small state, and . . . make[s] but a very small spot upon a quite large map” it would host a meeting marked by history for imparting one of the ABA’s greatest legacies—the Model Rules of Professional Conduct. *Id.* at 4.

<sup>7</sup> *Id.* at 132.

<sup>8</sup> *Report of the Committee on Code of Professional Ethics*, 29 ANN. REP. A.B.A., at 600 (1906).

<sup>9</sup> *Id.* at 602–03.

<sup>10</sup> *Id.* at 603.

<sup>11</sup> Walter Burgwyn Jones, *First Legal Code of Ethics Adopted in the United States*, 8 A.B.A. J. 111, 111 (1922).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 113.

<sup>14</sup> John Hinkley, *Transactions of the Thirty-First Annual Meeting of the American Bar Association Held at Seattle, Washington*, 31 ANN. REP. A.B.A., at 3, 55 (1908).

<sup>15</sup> *Id.* at 55–56.

Association could ever undertake.”<sup>16</sup> The Report itself included a Preamble, thirty-two Canons, and an Oath of Admission.<sup>17</sup> Also, with this Report, the ABA recommended that the “subject of professional ethics be taught in all law schools, and that all candidates for admission to the Bar be examined thereon.”<sup>18</sup> As a result, 1908 would mark the beginning of the Bar’s devoted pursuit to uphold the excellence of the legal profession by adopting high ethical standards.

By 1935, thirty years after M.F. Dickinson introduced a resolution of legal ethics, the Association, in addition to the Canons for practicing attorneys, had adopted Canons of Judicial Ethics in 1924,<sup>19</sup> and the Canons had grown from thirty-two to forty-six.<sup>20</sup> Even with these landmark amendments, the Canons of Professional Ethics would undergo another proposed major overhaul thirty years later. In 1965, the ABA president, Lewis F. Powell, Jr., addressed the Bar and thought it appropriate to reflect on the state of the legal profession.<sup>21</sup> He made compelling remarks concerning the growth and competency of the legal profession; however, he also disquietedly harped on the public’s opinions and misconceptions of lawyers.<sup>22</sup> Powell believed that much of the public’s concern was rooted in the profession’s “failure to conform to ethical standards and to maintain adequate professional discipline.”<sup>23</sup> Powell outlined three major objectives that the Association would focus on for the year, one of which included “a comprehensive re-evaluation of the ethical standards of [the] profession.”<sup>24</sup>

Even though Powell may have only intended for his Address to exhort the attendees of the Eighty-Eighth Annual Meeting, the “damage” had been done. This time the legal profession did not have to wait another thirty years. Following Powell’s request, the House of Delegates adopted the Model Code

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<sup>16</sup> *Id.* at 56.

<sup>17</sup> *Final Report of the Committee on Code of Professional Ethics*, 31 ANN. REP. A.B.A., at 567, 575–85 (1908).

<sup>18</sup> *Id.* at 573.

<sup>19</sup> *Canons of Judicial Ethics, in Proceedings of the Fifty-Eighth Annual Meeting of American Bar Association Los Angeles, California*, 58 ANN. REP. A.B.A., at 57, 697 (1935).

<sup>20</sup> *Id.* at 691–95. “The supplemental canons, 33–45, were adopted at its Fifty-first Annual Meeting at Seattle, Washington, on July 26, 1928. Canons 11, 13, 34, 35 and 43 were amended, and Canon 46 was adopted at its Fifty-sixth Annual Meeting at Grand Rapids, Michigan, on August 31, 1933.” *Id.* at 683 n.\*.

<sup>21</sup> Lewis F. Powell Jr., A.B.A. President, *The State of the Legal Profession, Address at the Eighty-Eighth Annual Meeting of the American Bar Association*, 90 ANN. REP. A.B.A., at 391 (1965).

<sup>22</sup> *Id.* at 392.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 392–93.

of Professional Responsibility on August 12, 1969, and later amended the Code in February 1970.<sup>25</sup> This new Code replaced the Canons of Professional Ethics.

Despite the Model Code of 1970 replacing the Canons, its structure continued to reflect the spirit of the original Canons.<sup>26</sup> Finally, in August 1983, the Model Rules of Professional Conduct were approved and replaced the Model Code of Professional Responsibility.<sup>27</sup> In the Chairman's introduction of the new Model Rules, he commended the late Robert J. Kutak who led the charge of the Commission on Evaluation of Professional Standard to evaluate "whether existing standards of professional conduct provided comprehensive and consistent guidance for resolving the increasingly complex ethical problems in the practice of law."<sup>28</sup>

Despite undergoing several amendments since 1983, the Model Rules of Professional Conduct have stood the test of time. Yet time would further prod the standards of legal ethics and challenge states to address misconduct. For in 2016, Model Rule 8.4(d) would lose its supporting comment to create Model Rule 8.4(g).<sup>29</sup>

#### B. *Maintaining the Integrity of the Profession*

Though the "incorrigible" may seek to escape the influences of a system that strives to encourage honor and integrity, "the high position of trust and confidence that the lawyer must occupy to the public" demands an exaction.<sup>30</sup> This sentiment—to maintain the integrity of the profession—is what seems to have drawn Henry St. George Tucker and M.F. Dickinson to resolve and introduce a code of legal ethics to the profession. However, this is not to say that the primary purpose of high ethical standards is to punish the "incorrigible."<sup>31</sup> The main point is that maintaining the integrity of the

<sup>25</sup> *Preface and Title Page to MODEL CODE OF PRO. RESP.* (AM. BAR ASS'N 1980).

<sup>26</sup> *See generally* MODEL CODE OF PRO. RESP. Canons 1–9 (AM. BAR ASS'N 1980).

<sup>27</sup> *Model Code of Professional Responsibility and Model Code of Judicial Conduct*, 108 ANN. REP. A.B.A., at 1214 (1983).

<sup>28</sup> *ABA Model Rules of Professional Conduct*, 108 ANN. REP. A.B.A., at 1219 (1983).

<sup>29</sup> Myles V. Lynk, *Changes to Model Rule 8.4*, 2016 A.B.A. STANDING COMM. ON ETHICS & PRO. RESP. REP. 109.

<sup>30</sup> Tucker, *supra* note 4, at 388–89.

<sup>31</sup> *In re Vaughan*, 209 P. 353, 355 (Cal. 1922) ("[I]t has been said the disbarment of attorneys is not intended for the punishment of the individual but for the protection of the courts and the legal profession."); *see also* 27 N.C. ADMIN. CODE 2.8.4 cmt. 3 (2017) ("The purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession. Lawyer discipline affects only the lawyer's license to practice law."); Janine C. Ogando, Note, *Sanctioning Unfit Lawyers: The Need for Public Protection*, 5 GEO. J. LEGAL ETHICS 459, 459 n.1 (1992) ("[T]he primary purpose of attorney



profession is truly at the heart of the Model Rules, in that it has been preserved with the passage of each new set of ABA ethical standards.

For example, in the final report containing the 1908 Canons of Professional Ethics, Canon 29 encouraged that a lawyer “should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.”<sup>32</sup> Then, in 1969, the Model Code of Professional Responsibility, under sections EC 1-1 and DR 1-101, conferred an ethical responsibility upon all lawyers to “maintain[] the integrity and improv[e] the competence of the bar to meet the highest standards” of professionalism.<sup>33</sup> The tenet of maintaining the integrity of the profession was again preserved in 1983 under the Model Rules of Professional Conduct.<sup>34</sup> Even today, 112 years later, maintaining the integrity of the profession continues to serve as a foundational premise in legal ethics.<sup>35</sup>

#### 1. Defining Misconduct

For purposes of Model Rule 8.4, misconduct consists of conduct that an attorney may engage during practice. Attorney conduct “includes representing clients; interacting with . . . coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.”<sup>36</sup> In the broader context of attorney conduct, misconduct’s expansive definition allows states to cast a wider net when addressing attorney misconduct. Though this may seem ideal for accountability purposes, it also encourages “incorrigibles” to frame misconduct as mere conduct.

Model Rule 8.4 is often referred to as a “catch-all” provision that outlines various categories of misconduct subject to disciplinary action.<sup>37</sup> Therefore, defining misconduct under Model Rule 8.4 involves a list of allusive points of reference. This approach allows for a wide range of offensive misconduct to be covered and prevents any “technical manipulation of a rule stated more narrowly.”<sup>38</sup> Nevertheless, by definition, it is professional misconduct for a

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discipline is not the punishment of the attorney; it is the protection of the public, the profession, and the courts.” (quoting *In re Nadrich*, 747 P.2d 1146, 1148 (Cal. 1988)).

<sup>32</sup> *Final Report of the Committee on Code of Professional Ethics*, *supra* note 17, at 583.

<sup>33</sup> MODEL CODE OF PRO. RESP. Canon 1 (AM. BAR ASS’N 1980).

<sup>34</sup> *ABA Model Rules of Professional Conduct*, *supra* note 28, at 1311.

<sup>35</sup> See, e.g., MODEL RULES OF PRO. CONDUCT (AM. BAR ASS’N 2020).

<sup>36</sup> MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS’N 2020).

<sup>37</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWS § 5 cmt. c (AM. L. INST. 2000).

<sup>38</sup> *Id.*

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 or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) . . . ; or
- (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.<sup>39</sup>

Defining misconduct involves “subjective and idiosyncratic considerations,”<sup>40</sup> which make the outcome of disciplinary proceedings less predictable. Misconduct within the profession not only has the potential to become unruly because of a lack of integrity but also because courts often weigh different factors outside its jurisdiction's professional rules.<sup>41</sup> This Comment focuses specifically on misconduct under Model Rule 8.4(d)—conduct that is prejudicial to the administration of justice.

## 2. What Does “Prejudicial to the Administration of Justice” Mean?<sup>42</sup>

Presently, conduct that is “prejudicial to the administration of justice” depends on each state's interpretation, which may include various “ad hoc” methods.<sup>43</sup> The use of ad hoc methods developed after Model Rule 8.4(d)'s

<sup>39</sup> MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2020) (emphasis added).

<sup>40</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWS § 5 cmt. c (AM. L. INST. 2000).

<sup>41</sup> *Id.*

<sup>42</sup> It depends.

<sup>43</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWS § 5 cmt. c (AM. L. INST. 2000).

supporting comment was absorbed by Model Rule 8.4(g) in 2016, which left Model Rule 8.4(d) without a supporting comment. Despite the ABA's glorified renovation, some states retained a supporting comment for their version of paragraph (d).<sup>44</sup> Prior to August 2016, conduct that was prejudicial to the administration of justice occurred when a lawyer "knowingly" manifested a certain bias or prejudice based on "race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status."<sup>45</sup> Though Model Rule 8.4(d)'s previous comment offered a smorgasbord of conduct that constituted prejudicial misconduct in the administration of justice, it lacked specificity, and served as a "catch-all" for misconduct that did not fit other sections of Model Rule 8.4. The previous comment highlighted prejudicial conduct, but it seemed to presume the meaning of the administration of justice, which allowed the ABA to change the comment into a black letter rule by simply focusing on prejudicial conduct. By narrowing the comment's scope to prejudices that only addressed paragraph (g), the ABA inevitably eliminated paragraph (d)'s comment and broadened paragraph (d)'s meaning.

In general, Model Rule 8.4(d) allows clients, colleagues, and concerned judges to initiate disciplinary proceedings against attorneys for harassment and discrimination.<sup>46</sup> However, Model Rule 8.4(d) is also addressed in cases involving prejudicial conduct, whether in the context of a constitutional right or a mere dissatisfaction with an attorney's conduct.<sup>47</sup> Yet, despite some states declining to adopt paragraph (d),<sup>48</sup> issues still arise that would otherwise be addressed by paragraph (d) and its supporting comment.

### C. *How Psychology Helps to Explain Attorney Misconduct*

In 1879, to assist young barristers, Richard Harris, a reputable legal scholar, offered several "Hints" regarding the "Art of Advocacy" in his historic book, *Hints on Advocacy: Conduct of Cases Civil and Criminal, Classes of Witnesses, and Suggestions for Cross-Examining Them, Etc., Etc.*<sup>49</sup> Harris took issue with the fact that "[t]he newly-called Barrister has to find his way as he best can, very often to the sacrifice of important interests and many

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<sup>44</sup> Lynk, *supra* note 29, at 5–6.

<sup>45</sup> MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2016) ("[Conduct] in the course of representing a client.").

<sup>46</sup> See cases cited *infra* Section III.B.

<sup>47</sup> *Id.*

<sup>48</sup> See WIS. SUP. CT. R. 20:8.4.

<sup>49</sup> See RICHARD HARRIS, HINTS ON ADVOCACY: CONDUCT OF CASES CIVIL AND CRIMINAL, CLASSES OF WITNESSES, AND SUGGESTIONS FOR CROSS-EXAMINING THEM, ETC., ETC., at xi–xii (London, Stevens & Sons 7th ed. 1884) (1879) [hereinafter HINTS ON ADVOCACY 7th ed.].

unfortunate clients.”<sup>50</sup> As one of his majesty’s counsel, Harris managed to articulate and even candidly admit that advocacy is similar to an art form.<sup>51</sup> Harris thought it “lamentable that no instruction [would] ever be given in an art which requires an almost infinite amount of knowledge.”<sup>52</sup> Harris’s work is profound and telling because it was one of the first of its kind to offer instruction to young barristers,<sup>53</sup> and because it shared practical and implicit strategies concerning the practice of law. One such strategy considers the implications of human behavior.

Harris not only made it his aim to ensure that future advocates would strategically apply the rules of advocacy,<sup>54</sup> but he also understood that “[a]n advocate is *always* dealing with human nature.”<sup>55</sup> Harris’s work<sup>56</sup> stressed that “knowledge of human nature or human character is the key to success.”<sup>57</sup> Moreover, “To treat mankind as mere machines, as some advocates occasionally do, is to show an utter absence of that knowledge, which is often the last acquirement but always the first necessity of an advocate.”<sup>58</sup> Harris highlighted that competent advocacy requires an advocate to not only acknowledge the effects of human nature and “probe[] the mind and character”<sup>59</sup> of colleagues, witnesses, and the jury but also acquire the requisite knowledge and “*Common Sense*, [which is] invaluable in all human pursuits.”<sup>60</sup>

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<sup>50</sup> *Id.* at xi.

<sup>51</sup> See RICHARD HARRIS, HINTS ON ADVOCACY: CONDUCT OF CASES CIVIL AND CRIMINAL, CLASSES OF WITNESSES, AND SUGGESTIONS FOR CROSS-EXAMINING THEM, ETC., ETC., at iii–iv (London, Stevens & Sons, Ltd. 12th ed. 1903) (1879) [hereinafter HINTS ON ADVOCACY 12th ed.].

<sup>52</sup> *Id.* at iii.

<sup>53</sup> HINTS ON ADVOCACY 7th ed., *supra* note 49, at xi (“There is no SCHOOL OF ADVOCACY: there are no LECTURES ON ADVOCACY; and so far as I have been able to ascertain, there is no book on the subject.”).

<sup>54</sup> See HINTS ON ADVOCACY 12th ed., *supra* note 51, at iv–v.

<sup>55</sup> RICHARD HARRIS, HINTS ON ADVOCACY: CONDUCT OF CASES CIVIL AND CRIMINAL, CLASSES OF WITNESSES, AND SUGGESTIONS FOR CROSS-EXAMINING THEM, ETC., ETC. 3 (London, Stevens & Sons, Ltd. 17th ed. 1937) [hereinafter HINTS ON ADVOCACY 17th ed.] (emphasis added).

<sup>56</sup> Since Harris’s first edition of HINTS ON ADVOCACY in 1879, his work has consistently been re-published for the past 140 years, making it one of the most “culturally important” pieces of legal literature. See RICHARD HARRIS, HINTS ON ADVOCACY (Wentworth Press 2019) (explaining how scholars agree that Harris’s work has been important enough to reproduce and preserve over the years).

<sup>57</sup> HINTS ON ADVOCACY 17th ed., *supra* note 55, at 3.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

Harris appeared highly aware of the implications and explanations psychology provided concerning human behavior and even acknowledged its uncertainty. In an effort to articulate advocacy's application and tactics, Harris conceded that "[n]either LAW nor HUMAN NATURE is an exact science."<sup>61</sup> When considering human actors, an attorney can neither calculate nor determine with certainty the outcome of any particular situation.<sup>62</sup> Though Harris specifically used the *jury* as an example to outline the contours of human nature, no *person* could be considered a "machine into which [an attorney] could thrust . . . facts at one end and take them out in the shape of a [calculated outcome] at the other, [otherwise] all difficulties would vanish."<sup>63</sup>

Harris challenged the legal profession to understand what it means to be a true advocate and to exhort attorneys to understand the incalculable. Understanding the psychology behind human behavior would be but a mere complementary good to an attorney's efforts in understanding the law. Like the law, the psychology behind human behavior should not be discounted simply because its application and awareness are not yet commonplace in the practice of law.

This Comment aims to integrate various theories of psychology to help explain Model Rule 8.4(d). Relying on principles of psychology to explain human behavior may serve as a baseline to understand why misconduct occurs. It may even redeem the "incorrigible." Often, misconduct is a slippery slope that most attorneys never intended to entertain. In fact, most attorneys may have arrived at misconduct through incremental progressions of objectively reasonable conduct. In the aggregate, innocent conduct can culminate into an unwieldy beast of unethical behavior. So, how does an attorney get there?

This Comment focuses on three major psychological theories that may help explain why attorney behavior leads to unethical conduct. The first theory is situationism. In general, "People are . . . prone to underestimate the extent to which changes in [a] particular circumstance[] or environment confronting [an] individual might significantly change his or her behavior."<sup>64</sup> There seems to be a "dynamic relationship between [a] person and [a] situation in determining human behavior."<sup>65</sup> Therefore, "seemingly small

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<sup>61</sup> *Id.* at 309.

<sup>62</sup> *See id.*

<sup>63</sup> HINTS ON ADVOCACY 17th ed., *supra* note 55, at 310.

<sup>64</sup> Lee Ross & Donna Shestowsky, *Two Social Psychologists' Reflections on Situationism and the Criminal Justice System*, in IDEOLOGY, PSYCHOLOGY, AND LAW 612, 613 (Jon Hanson ed., 2012).

<sup>65</sup> *Id.* at 612.

and subtle manipulations of the social situation often have much larger effects on behavior than most lay observers would predict.”<sup>66</sup> In turn, “those effects . . . are likely to ‘swamp’ the impact of previously observed or measured individual differences in personality, values, or temperament.”<sup>67</sup> Situationism explains how a person’s behavior may be influenced by extraneous or even incidental factors, rather than personality traits, background, and prior experiences.

The second addresses decision-making theories. In this Comment, decision-making approaches and strategies are framed in terms of structuring mechanisms, emotional dispositions, and group contexts. Decision-making is often made absent full information, as gathering information to make an “informed” decision may be costly and time-consuming for attorneys and those in similar professions.<sup>68</sup> Because attorneys are constantly making decisions for themselves, superiors, and clients,<sup>69</sup> it is important to understand its implication on unethical behavior.

The third theory focuses on heuristics. A law student or advocate need not know the definition of a heuristic to spot or even practice its methodology. In layman’s terms, a heuristic is a “judgment shortcut.”<sup>70</sup> Though “many definitions of heuristics exist,” the term is of Greek origin, meaning, “serving to find out or discover.”<sup>71</sup> Heuristics has served and contributed to several ever-developing fields,<sup>72</sup> including the practice of law. In short, a heuristic “is a strategy that ignores part[s] of information, with the goal of making decisions more quickly, frugally, and/or accurately than more complex methods.”<sup>73</sup>

These psychological theories will serve as guideposts in developing a new supporting comment to Model Rule 8.4(d). Because the study of human behavior and the practice of law are “occasionally” incalculable and require subtle, but necessary recalibrations from time to time, it is possible that increased awareness of one may help guide the other. In addition to the

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<sup>66</sup> *Id.* at 615.

<sup>67</sup> *Id.*

<sup>68</sup> JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 86 (2012).

<sup>69</sup> *See id.* at 85.

<sup>70</sup> *See id.* at 67.

<sup>71</sup> Gerd Gigerenzer & Wolfgang Gaissmaier, *Heuristic Decision Making*, 62 *ANN. REV. OF PSYCH.* 451, 454 (2011).

<sup>72</sup> *Id.* (“Einstein included the term, [heuristics], in the title of his Nobel prize-winning paper from 1905 on quantum physics, indicating that the view he presented was incomplete but highly useful.”).

<sup>73</sup> *Id.*

ABA's efforts to maintain the integrity of the profession and to honor paragraph (d)'s application within the legal profession, this Comment offers a fresh perspective with the help of a few psychological theories. The theories are not meant to offer a comprehensive view of conduct that is prejudicial to the administration of justice but only serve as reference points for attorneys, judges, clients, and those thirsting for guidance; just as Harris may have anticipated.

### III. UNDERSTANDING MODEL RULE 8.4(d)

Model Rule 8.4(d) is best understood by considering its development throughout the states and the states' specific applications of paragraph (d). Further, offering psychology-based explanations to human behavior may help explain and provide a clearer interpretation of paragraph (d). Finally, drafting a new supporting comment with psychology-based explanations in mind is appropriate because of psychology's ongoing impact on the practice of law.

#### A. *The States and Model Rule 8.4(d)*

To understand the implications of Model Rule 8.4(d), it is important to first consider a brief survey of the various approaches states have taken in adopting this Rule. As a point of reference, prior to August 2016, the ABA's supporting comment to Model Rule 8.4(d) read as follows:

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).<sup>74</sup>

Though the ABA retained this language in part, it was not to support Model Rule 8.4(d) but to support Model Rule 8.4(g).<sup>75</sup> The ABA has yet to add a supporting comment for paragraph (d).<sup>76</sup>

First, eight states have either *not adopted* Model Rule 8.4(d) or have adopted language similar to the standard language used by the ABA.<sup>77</sup> For

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<sup>74</sup> MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2016).

<sup>75</sup> See MODEL RULES OF PRO. CONDUCT r. 8.4 cmts. (AM. BAR ASS'N 2020).

<sup>76</sup> See *id.*

<sup>77</sup> The states that have not adopted Model Rule 8.4(d), i.e., the states in which professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice, include Alaska, Georgia, Hawaii, Kentucky, New Hampshire,

example, Texas’s Rule states, “A lawyer shall not . . . engage in conduct constituting obstruction of justice.”<sup>78</sup> Other states, such as Wisconsin,<sup>79</sup> fail to reference misconduct that is prejudicial to the administration of justice. Second, six states have *expanded* on the general language of Model Rule 8.4(d) by including references to discriminatory conduct within the rule itself.<sup>80</sup> Of these states, Washington has taken the most unique approach to its adoption of Model Rule 8.4 in that it has two separate paragraphs that reference conduct that is prejudicial to the administration of justice.<sup>81</sup>

Moreover, twenty-five states *have not* retained, adopted, or drafted a supporting comment.<sup>82</sup> Of these states, several are worth mentioning. First,

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Texas, Virginia, and Wisconsin. See ALASKA RULES OF PRO. CONDUCT r. 8.4; GA. RULES & REGS. STATE BAR r. 8.4 (2015); HAW. RULES OF PRO. CONDUCT r. 8.4; KY. SUP. CT. R. 3.130(8.4); N.H. RULES OF PRO. CONDUCT r. 8.4; TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 8.04 (2018); VA. SUP. CT. RULE pt. 6, sec. II, r. 8.4; WIS. SUP. CT. R. 20:8.4.

<sup>78</sup> TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 8.04 (2018). Also, Texas does not have a supporting comment. See TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 8.04 cmts. (2018).

<sup>79</sup> Wisconsin is exceptional in that its misconduct rule is one of the shortest, and most of its language is preserved in the form of a comment. See WIS. SUP. CT. R. 20:8.4. Wisconsin’s entire rule reads as follows:

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.

*Id.*

<sup>80</sup> For example, Florida, Nebraska, Rhode Island, North Dakota, South Dakota, and Washington include an explanation of conduct that is prejudicial to the administration of justice, which includes discriminatory treatment. See RULES REGULATING THE FLA. BAR ch. 4 r. 4-8.4 (2021); NEB. CT. R. OF PRO. CONDUCT § 3-508.4; R.I. SUP. CT. art. V, r. 8.4; N.D. RULES OF PRO. CONDUCT r. 8.4; S.D. CODIFIED LAWS § 16-18-App., r. 8.4 (2020); WASH. RULES OF PRO. CONDUCT r. 8.4.

<sup>81</sup> See WASH. RULES OF PRO. CONDUCT r. 8.4. Paragraph (d) states that “[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.” *Id.* at r. 8.4(d). Similarly, paragraph (h) states that “[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice . . . that a reasonable person would interpret as manifesting prejudice or bias.” *Id.* at r. 8.4(h).

<sup>82</sup> The states that do not have a supporting comment for Model Rule 8.4(d) include Alabama, Alaska, California, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Vermont, Virginia, and Wisconsin. See ALA. RULES OF PRO. CONDUCT r. 8.4; ALASKA RULES OF PRO. CONDUCT r. 8.4; CAL. RULES OF PRO. CONDUCT r. 8.4; GA. RULES & REGS. STATE BAR r. 8.4 (2015); HAW. RULES OF PRO. CONDUCT r. 8.4; IND. RULES OF PRO. CONDUCT r. 8.4; KAN. S. Ct. R. 226(8.4); KY. SUP. CT. R.



Louisiana, in general, does not provide supporting comments for its rules of professional conduct,<sup>83</sup> which has caught the attention of some.<sup>84</sup> Second, New Jersey's amendment comment to paragraph (g) seems to exist for the sole purpose of explaining why it has not drafted one for that rule or others.<sup>85</sup> The comment reasons that "[t]he Court believes the administration of justice would be better served . . . by the adoption of this general rule[, New Jersey Rule 8.4(g),] than by a case by case development of the scope of the professional obligation."<sup>86</sup> Third, though Vermont Rule 8.4(d) does not have a supporting comment, Vermont Rule 8.4 does provide, at length, explanations to amendments that have impacted Vermont Rule 8.4(d).<sup>87</sup>

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3.130(8.4); LA. STATE BAR ASS'N art. XVI § 8.4 (2018); MASS. SUP. CT. R. 3.07, RPC r. 8.4; MICH. RULES OF PRO. CONDUCT r. 8.4; MINN. RULES OF PRO. CONDUCT r. 8.4; MISS. RULES OF PRO. CONDUCT r. 8.4; MO. SUP. CT. R. 4-8.4; MONT. RULES OF PRO. CONDUCT r. 8.4 (2020); N.H. RULES OF PRO. CONDUCT r. 8.4; N.J. CT. R. pt. I, app. 3, RPC 8.4; OHIO RULES OF PRO. CONDUCT r. 8.4; OKLA. STAT. tit. 5, ch. 1, app. 3-A, 8.4 (2021); OR. RULES OF PRO. CONDUCT r. 8.4 (2015); PA. RULES OF PRO. CONDUCT r. 8.4; TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 8.04 (2018); VT. RULES OF PRO. CONDUCT r. 8.4; VA. SUP. CT. RULE pt. 6, sec. II, r. 8.4; WIS. SUP. CT. R. 20:8.4.

<sup>83</sup> See LA. STATE BAR ASS'N art. XVI (2018). Montana is similarly situated. See MONT. RULES OF PRO. CONDUCT (2020).

<sup>84</sup> See N. Gregory Smith, *Missed Opportunities: Louisiana's Version of the Rules of Professional Conduct*, 61 LA. L. REV. 1, 3 (2000).

<sup>85</sup> See N.J. CT. R. pt. I app. 3, RPC 8.4 cmt.

<sup>86</sup> *Id.* The "general rule" or "professional obligation" is in reference to making "discriminatory conduct unethical when engaged in by lawyers in their professional capacity" and refraining from unethical misconduct in general. See *id.*

<sup>87</sup> See VT. RULES OF PRO. CONDUCT r. 8.4 reporter's notes to 2017 amendment. For example, the accompanying Reporter's Notes, amended on July 14, 2017, and effective as of September 18, 2017, specifically state:

Rule 8.4(g) and new Comments . . . are amended to adopt, with minor verbal changes, amendments to the American Bar Association's Model Rules of Professional Conduct approved by the ABA on August 8, 2016. Former Comment [3] is deleted and replaced by new Comment [3]. . . .

Despite prior unsuccessful amendment efforts, the Model Rules had not previously contained a specific provision prohibiting discrimination and harassment. Former Comment [3], adopted in 1988, had stated that discrimination and harassment could violate Rule 8.4(d) if they constituted conduct prejudicial to the administration of justice. *That Comment, however, was only a guide to interpretation and was of narrow scope.* New Model Rule 8.4(g) was adopted to fill this void with a black letter rule. Its purpose is to fulfill the ABA's responsibility to "lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us."

*Id.* (emphasis added) (citations omitted).

More specifically, Vermont Rule 8.4 explains paragraph (d)'s interaction with Vermont Rule 8.4(g).<sup>88</sup> Lastly, Wisconsin expended a significant amount of effort distinguishing its comments from those of the ABA—considering that it chose not to adopt Model Rule 8.4(d). As a result, Model Rule 8.4(d) is only referenced in Wisconsin's comments to denote the absence of paragraph (d) in its “Misconduct” rule and comments.<sup>89</sup>

On the other hand, of the states that *have* retained, adopted, or drafted a supporting comment, only six of those states have included particularized language that differs from the prior ABA supporting comment.<sup>90</sup> In other words, these states adopted the language provided by the ABA to the extent the states agreed with the ABA's interpretation of Model Rule 8.4(d). For example, Arkansas's supporting comment states that the proscribed conduct that is prejudicial to the administration of justice “extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute.”<sup>91</sup>

New York, however, took a more practical approach to develop language that addressed misconduct traditionally associated with the administration of justice.<sup>92</sup> For instance, its supporting comment indicates that conduct which is prejudicial to the administration of justice generally “results in substantial harm to the justice system,” which may include “advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding.”<sup>93</sup> In New York, as a general standard, prejudicial conduct “must be seriously inconsistent with a lawyer's responsibility as an officer of the court.”<sup>94</sup>

Other states have included more specific examples. For instance, North Carolina does not require a showing of actual prejudice to the administration of justice, only that the conduct have a “reasonable likelihood of prejudicing

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<sup>88</sup> *Id.*

<sup>89</sup> *See* WIS. SUP. CT. R. 20:8.4 cmts.

<sup>90</sup> The states that added different language include Arkansas, Florida, Maryland, North Carolina, New York, and Utah. *See* ARK. RULES OF PRO. CONDUCT r. 8.4; RULES REGULATING THE FLA. BAR ch. 4 r. 4-8.4 (2021); MD. R. 19-308.4 (2021); 27 N.C. ADMIN. CODE 2.8.4 (2017); N.Y. COMP. CODES R. & REGS. tit. 22 § 1200 r. 8.4 (2021); UTAH RULES OF PRO. CONDUCT r. 8.4.

<sup>91</sup> ARK. RULES OF PRO. CONDUCT r. 8.4 cmt. 3. Arkansas is one of the states that did not adopt Model Rule 8.4(g); however, it retained references to discriminatory conduct in its comment in support of its adoption of Model Rule 8.4(d). *See id.* Florida is similarly situated. *See* RULES REGULATING THE FLA. BAR ch. 4 r. 4-8.4 cmt. para. 5 (2021).

<sup>92</sup> *See* N.Y. COMP. CODES R. & REGS. tit. 22 § 1200 r. 8.4 cmt. 3 (2021).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

the administration of justice.”<sup>95</sup> Accordingly, North Carolina’s comments cite various cases that illustrate the Rule’s broad application.<sup>96</sup> Similarly, Utah includes a sub-paragraph in its supporting comment that generally states that, “The Standards of Professionalism and Civility . . . are intended to improve the administration of justice.”<sup>97</sup> Further, “An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).”<sup>98</sup>

While some states have not adopted Model Rule 8.4(d), others have created their own version of the Rule. Moreover, at least half of the states have failed to provide some form of a supporting comment. Despite the ABA providing a framework for states to create their own Rule, there has yet to be a general consensus favoring the shift of paragraph (d)’s supporting comment to paragraph (g) after 2016.<sup>99</sup> Thus, providing an opportunity for paragraph (d) to embrace a supporting comment tailored to its personality.

#### B. *Case Studies*

Though each state has taken its own approach in incorporating Model Rule 8.4 into its rules of professional conduct, there are four major variations that are worth mentioning. First, Wisconsin neither adopted paragraph (d), i.e., conduct that is prejudicial to the administration of justice, nor a supporting comment.<sup>100</sup> Second, Washington is the only state that provides two different versions of paragraph (d) without supporting comments.<sup>101</sup> Third, Louisiana is the only state that does not provide supporting comments for any of its rules of professional conduct, though it did adopt the ABA’s

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<sup>95</sup> 27 N.C. ADMIN. CODE 2.8.4 cmt. 4 (2017).

<sup>96</sup> 27 N.C. ADMIN. CODE 2.8.4 cmts. 4–5 (2017).

<sup>97</sup> UTAH RULES OF PRO. CONDUCT r. 8.4 cmt. 3a.

<sup>98</sup> *Id.*

<sup>99</sup> Approximately twenty-seven states have not adopted Model Rule 8.4(g) or have simply retained a version of the Rule by preserving 8.4(d). *See* ALA. RULES OF PRO. CONDUCT r. 8.4; ALASKA RULES OF PRO. CONDUCT r. 8.4; ARIZ. RULES OF PRO. CONDUCT r. 8.4; ARK. RULES OF PRO. CONDUCT r. 8.4; CONN. RULES OF PRO. CONDUCT r. 8.4; DEL. RULES OF PRO. CONDUCT r. 8.4; GA. RULES & REGS. STATE BAR r. 8.4 (2015); HAW. RULES OF PRO. CONDUCT r. 8.4; IDAHO RULES OF PRO. CONDUCT r. 8.4 (2004); KAN. S. Ct. R. 226(8.4); KY. SUP. CT. R. 3.130 (8.4); LA. STATE BAR ASS’N art. XVI § 8.4 (2018); MASS. SUP. CT. R. 3.07, RPC r. 8.4; MICH. RULES OF PRO. CONDUCT r. 8.4; MISS. RULES OF PRO. CONDUCT r. 8.4; MONT. RULES OF PRO. CONDUCT (2020); N.H. RULES OF PRO. CONDUCT r. 8.4; N.M. RULES OF PRO. CONDUCT r. 16-804; OKLA. STAT. tit. 5, ch. 1, app. 3-A, § 8.4 (2021); PA. RULES OF PRO. CONDUCT r. 8.4; S.C. APP. CT. R. 407, RPC 8.4; TENN. SUP. CT. R. 8.4; TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 8.04 (2018); UTAH RULES OF PRO. CONDUCT r. 8.4; VA. SUP. CT. RULE pt. 6, sec. II, r. 8.4; W. VA. RULES OF PRO. CONDUCT r. 8.4; WYO. RULES OF PRO. CONDUCT r. 8.4.

<sup>100</sup> *See* WIS. SUP. CT. R. 20:8.4.

<sup>101</sup> *See* WASH. RULES OF PRO. CONDUCT r. 8.4.

version of paragraph (d).<sup>102</sup> Lastly, North Carolina is one of few states that have adopted supporting comments for paragraph (d) that differ from the ABA's supporting comment prior to 2016.<sup>103</sup> North Carolina stands out from the bunch because it has two supporting comments for its version of paragraph (d).<sup>104</sup> North Carolina's supporting comments have helped lower courts to determine whether an attorney's conduct is prejudicial to the administration of justice.

1. Wisconsin: *Winston v. Boatwright*—Prejudicial Conduct Absent Paragraph (d)

Wisconsin's current version of Model Rule 8.4 reads as follows:

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.<sup>105</sup>

There is no indication that, at the time *Winston v. Boatwright* was decided, Wisconsin had adopted language reflecting the ABA's version of Model Rule 8.4(d),<sup>106</sup> i.e., conduct prejudicial to the administration of justice.<sup>107</sup> Though Wisconsin has not incorporated this language into its rule, it is worth mentioning for this very reason. Like seven other states,<sup>108</sup> Wisconsin has neither adopted the current version of Model Rule 8.4(d) nor a supporting

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<sup>102</sup> See LA. STATE BAR ASS'N art. XVI § 8.4 (2018).

<sup>103</sup> See 27 N.C. ADMIN. CODE 2.8.4 (2017).

<sup>104</sup> See 27 N.C. ADMIN. CODE 2.8.4 cmts. 4–5 (2017).

<sup>105</sup> WIS. SUP. CT. R. 20:8.4.

<sup>106</sup> *Winston v. Boatwright*, 649 F.3d 618, 631 (7th Cir. 2011) (referencing other states' versions of Model Rule 8.4 that prohibit conduct that is prejudicial to the administration of justice).

<sup>107</sup> The language of Model Rule 8.4(d) is only mentioned in the comments. WIS. SUP. CT. R. 20:8.4, cmts. Though paragraphs (a) and (b) comprise Wisconsin's entire rule, its comments include paragraphs (c) through (i), which seem to be a continuation of its rule. See *id.* Wisconsin includes the ABA comments for Model Rule 8.4 and briefly references actions that are prejudicial to the administration of justice. *Id.* However, the ABA comments seem to have little bearing on Wisconsin's rule. See *id.*

<sup>108</sup> The seven states include Alaska, Georgia, Hawaii, Kentucky, New Hampshire, Texas, and Virginia. See ALASKA RULES OF PRO. CONDUCT r. 8.4; GA. RULES & REGS. STATE BAR r. 8.4 (2015); HAW. RULES OF PRO. CONDUCT r. 8.4; KY. SUP. CT. R. 3.130(8.4); N.H. RULES OF PRO. CONDUCT r. 8.4; TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 8.04 (2018); VA. SUP. CT. RULE pt. 6, sec. II, r. 8.4.

comment. Absent paragraph (d), Wisconsin still confronts lawyers engaging in prejudicial conduct.<sup>109</sup>

*Winston* was not determined under the typical context of Model Rule 8.4(d); however, it is worth mentioning the court's reference to other states' versions of the Rule in light of the petitioner's constitutional right to effective assistance of counsel under *Strickland v. Washington*.<sup>110</sup> On October 5, 2001, the petitioner was working at a local convenience store in Milwaukee when Candida, a fifteen-year-old girl, invited the petitioner to "kick it" for the day.<sup>111</sup> According to Candida, while sitting in the back of the store, the petitioner touched her inappropriately.<sup>112</sup> The state initially charged the petitioner with "one count of second-degree sexual assault of a child by means of sexual intercourse," but later amended the charge to two counts of sexual assault in the second-degree.<sup>113</sup> After finally going to trial,<sup>114</sup> the jury acquitted the petitioner on the first count but found him guilty of the second.<sup>115</sup> The petitioner requested a new trial asserting that he had received ineffective assistance because defense counsel used his peremptory challenges to strike male jurors, which the petitioner alleged resulted in purposeful discrimination.<sup>116</sup>

In *Winston*, the Seventh Circuit highlighted *Strickland's* development of the two-prong approach to determine whether a defendant received ineffective assistance of counsel. Defendants have to show that (1) "counsel provided deficient assistance" and (2) "that there was prejudice as a result."<sup>117</sup> To establish the second prong, "a challenger must demonstrate a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"<sup>118</sup> Federal courts defer to state courts to determine the existence of a "reasonable probability."<sup>119</sup> According to the

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<sup>109</sup> See, e.g., *Winston v. Boatwright*, 649 F.3d 618 (7th Cir. 2011).

<sup>110</sup> *Id.* at 622 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

<sup>111</sup> *Id.* at 622–23.

<sup>112</sup> *Id.* at 623.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (explaining that in *Winston's* first trial, the jury did not reach a verdict, so the court ordered a mistrial and appointed new counsel, which led *Winston* to allege that appointed counsel had purposefully discriminated against him based on jury selection because all the jurors were women).

<sup>115</sup> *Winston*, 649 F.3d at 623.

<sup>116</sup> *Id.* at 623–24.

<sup>117</sup> *Id.* at 625 (quoting *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011)).

<sup>118</sup> *Id.* (quoting *Richter*, 131 S. Ct. at 787; *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

<sup>119</sup> *Id.* ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

court, the most difficult assessment was determining whether the petitioner was able to show prejudice.<sup>120</sup> Though an attorney may intuitively understand the meaning of prejudice or even experience prejudice at some point, understanding the legal boundaries in light of a state’s determination of prejudice is another matter.

Pursuant to a line of cases governing claims of unsatisfactory performance,<sup>121</sup> the court concluded that the petitioner’s attorney deficiently assisted him,<sup>122</sup> despite *Strickland*’s definition. This is especially important because, though a showing of prejudice is automatic when the selection of a jury is in violation of the line of cases governing unsatisfactory performance, it is not enough to overcome a state court’s error in its evaluation of a defendant’s *Strickland* claim of ineffective assistance.<sup>123</sup> For the petitioner to have overcome the state court’s resolution, the state court’s decision had to have been “so far out of bounds that it [was] objectively unreasonable.”<sup>124</sup> Therefore, the question for the court was “whether the state court transgressed the outer perimeter when it failed to see the link between the analysis of prejudice in the structural error cases and the analysis of prejudice in the *Strickland* line of cases.”<sup>125</sup> *Batson* governed the structural error cases, and *Strickland* governed the two-pronged assessment that required a showing of prejudice.<sup>126</sup> But because prejudice is not readily presumed under a *Strickland* claim in the Sixth Amendment context, and because the state

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<sup>120</sup> *Id.* at 622.

<sup>121</sup> “For more than 130 years, federal courts have held that discrimination in jury selection offends the Equal Protection Clause.” *Winston*, 649 F.3d at 622. Moreover, “[i]ntentional discrimination by any participant in the justice system undermines the rule of law and, by so doing, harms the parties, the people called for jury duty, and the public as a whole.” *Id.* (citing *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding race-based use of peremptory challenges unconstitutional); *Powers v. Ohio*, 499 U.S. 400 (1991) (noting the effects of discrimination during voir dire); *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding race-based use or considering racial stereotypes in the exercise of peremptory challenges unconstitutional); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (applying *Batson* to peremptory strikes meant to exclude men from the jury)). *Winston*’s unsatisfactory performance claim was determined under *Batson*, *Powers*, *McCollum*, and *J.E.B.* *Id.* at 625–27.

<sup>122</sup> *Winston*, 649 F.3d. at 630. To review *Winston*’s claim, the court first had to determine the “relevant clearly established law” at the time the state court made its decision. *Id.* at 625 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004)). To do this, the Seventh Circuit reviewed the “*Strickland* line of cases” governing “assertions of ineffective assistance of counsel in violation of . . . Sixth Amendment rights, and the *Batson* line of cases” governing claims of “unsatisfactory performance” of counsel. *Id.*

<sup>123</sup> *Id.* at 625, 631–33.

<sup>124</sup> *Id.* at 632.

<sup>125</sup> *Id.* at 632–33.

<sup>126</sup> *Winston*, 649 F.3d at 628, 632–33.

court's action was not objectively unreasonable under the then-existing principles recognized by the Supreme Court of the United States, the petitioner could not prevail in his petition for relief.<sup>127</sup>

But why does this matter? Though *Winston* was riddled with the complexities of Supreme Court jurisprudence, the petitioner's claim of ineffective assistance seemed to hinge, almost exclusively, on a nine-letter word: prejudice. In fact, Circuit Judge Wood prefaced the court's opinion by solidifying basic premises that most would acknowledge and accept.<sup>128</sup> For example, he stated that "society as a whole has an interest in the integrity of the jury system," but he later admitted that the most difficult question was whether there could be a showing of prejudice when the jury system is what prejudiced the petitioner.<sup>129</sup> But why was a showing of prejudice so difficult for the petitioner to establish? In other lines of cases, such as *Batson* and its progeny, prejudice is presumed upon establishing unsatisfactory performance.<sup>130</sup> The plain answer, as provided by the Seventh Circuit, is that even though the state court mixed apples and oranges, its resolution was not objectively unreasonable.<sup>131</sup> After all, how could a state court have predicted "that the Supreme Court would apply a harmless-error standard even to intentional *Batson* violations"?<sup>132</sup>

Notwithstanding *Winston's* conclusions, could the underlying reason have been that Wisconsin had not yet developed its own line of cases assessing "reasonable probability" based in factually similar cases involving prejudicial conduct or maybe even conduct prejudicial to the administration of justice? If the conduct were not prejudicial to the administration of justice, could the court have granted the petitioner's petition? When *Winston* was decided jury selection would have certainly fallen within the scope of the administration of justice.<sup>133</sup> These considerations stem from Wisconsin's need for a rule that addresses conduct that is prejudicial to the administration of justice. Had there been a line of state court cases establishing reasonable probability for the Seventh Circuit to determine whether prejudice was present in jury selection, the Seventh Circuit could have assessed whether the conduct was prejudicial to the administration of justice and could have

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<sup>127</sup> *Id.* at 633–34.

<sup>128</sup> *Id.* at 622.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 633.

<sup>131</sup> *Id.* at 632–33 (highlighting the state court's error in determining petitioner's *Strickland* claim, despite the Supreme Court distinguishing structural error cases from others).

<sup>132</sup> *Winston*, 649 F.3d at 634.

<sup>133</sup> See cases cited *supra* note 121.

properly determined the petitioner’s *Strickland* claim. Though this is merely speculative and does not comport with the law’s glacial pace of change, it does provide an alternative theory that presses Wisconsin to adopt Model Rule 8.4(d) or at least consider a version of the Rule. *Winston*’s emaciated reference to conduct that is prejudicial to the administration of justice urges change.

Though mentioned in the context of *Strickland* and *Batson* claims,<sup>134</sup> the court stated, “Deliberately choosing to engage in conduct that the Supreme Court has unequivocally banned is both professionally irresponsible and well below the standard expected of competent counsel.”<sup>135</sup> This, of course, was meant to call out the petitioner’s attorney’s conduct, despite him framing his actions as a “strategic advantage,” which, according to *Batson*, did not contribute to protecting “society’s interest in an unbiased system of justice.”<sup>136</sup> Additionally, “intentionally violating the Constitution . . . is not consistent with, or reasonable under, prevailing professional norms.”<sup>137</sup>

According to the court, state rules of professional conduct established “professional norms.”<sup>138</sup> For example, “Wisconsin forbids lawyers from engaging in unlawful representation”<sup>139</sup> and requires a lawyer’s conduct to “conform to the requirements of the law.”<sup>140</sup> But Wisconsin fails to mention conduct that is prejudicial to the administration of justice. Thus, instead of the Seventh Circuit citing to Wisconsin’s version of Model Rule 8.4(d), it deferred to other states’ versions of the Rule and admitted that other “[p]rofessional rules typically prohibit lawyers from engaging in conduct prejudicial to the administration of justice.”<sup>141</sup> Considering other states’ “well-established professional norms,” the court had no trouble concluding that the petitioner’s attorney’s conduct “constituted deficient performance.”<sup>142</sup> Wisconsin should have determined its own professional norms within its jurisdiction, not other states—especially professional norms that related to prejudicial conduct.

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<sup>134</sup> *Winston*, 649 F.3d at 630.

<sup>135</sup> *Id.* at 630.

<sup>136</sup> *Id.* at 631.

<sup>137</sup> *Id.* (internal quotation marks omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

<sup>138</sup> *See id.*

<sup>139</sup> *Id.* (citing WIS. SUP. CT. R. 20, Preamble). Wisconsin does not have a version of Model Rule 8.4(d) to reference to determine professional norms. *See generally* WIS. SUP. CT. R. 20:8.4.

<sup>140</sup> *Winston*, 649 F.3d at 631.

<sup>141</sup> *Id.* at 631.

<sup>142</sup> *Id.*



As it stands, reasonable minds may have differed, “but for counsel’s unprofessional errors, the [outcome] of the proceeding would have been different.”<sup>143</sup> However, had Wisconsin adopted its own version of Model Rule 8.4(d), the petitioner’s claim may not have gone before the Seventh Circuit because the state court would have had its own rule to refer to at the beginning of its proceedings. Instead, the Seventh Circuit deferred to other states’ rules of professional conduct to determine professional norms in Wisconsin.<sup>144</sup> Though mentioned briefly in the petitioner’s ineffective assistance of counsel claim,<sup>145</sup> the rules of professional conduct could have helped to determine whether the petitioner’s attorney’s actions were prejudicial. Unfortunately, the petitioner could only rely on a few short phrases referring to other states’ rules,<sup>146</sup> even though the prejudice claimed by the petitioner differed from the prejudice in paragraph (d).

2. Washington: *In re Cottingham*—Conduct that is Prejudicial to the Administration of Justice Absent a Supporting Comment

Washington is unique because its rule includes two separate paragraphs addressing conduct that is prejudicial to the administration of justice.<sup>147</sup> Washington’s current version of Model Rule 8.4 includes the following:

It is professional misconduct for a lawyer to: . . . (d) engage in *conduct that is prejudicial to the administration of justice*; . . . (h) in representing a client, engage in *conduct that is prejudicial to the administration of justice* toward judges, lawyers, or LLLTs, other parties, witnesses, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias . . .<sup>148</sup>

Despite Washington adopting Model Rule 8.4(g) and language addressing discrimination based on the listed categories,<sup>149</sup> Washington not only retained 8.4(d), but it also created a hybrid paragraph from paragraphs (d)

<sup>143</sup> *Id.* at 625 (quoting *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011)).

<sup>144</sup> *Id.* at 631.

<sup>145</sup> *Id.* at 625.

<sup>146</sup> *See id.* at 631 (referring to Illinois, Minnesota, Washington, and even the ABA’s version of Model Rule 8.4(d)).

<sup>147</sup> *See* WASH. RULES OF PRO. CONDUCT r. 8.4.

<sup>148</sup> *Id.* (emphasis added).

<sup>149</sup> *See* WASH. RULES OF PRO. CONDUCT r. 8.4(g) (including categories such as “sex, race, age, creed, religion, color, national origin, disability, sexual orientation, honorably discharged veteran or military status, or marital status”).

and (g), as reflected by paragraph (h) above. Thus, Washington created a second paragraph that delineated a narrower approach in defining conduct that is prejudicial to the administration of justice but also preserved a broad approach to paragraph (d). At the time *In re Cottingham* was decided, though it spanned across a “five-year boundary line dispute,”<sup>150</sup> Washington’s version of Model Rule 8.4 aligned with the changes adopted by the ABA after 2016 and accommodated both paragraphs (d) and (g) to promote ABA objectives.<sup>151</sup>

Unlike most states, Washington’s version of Model Rule 8.4 includes several well-developed paragraphs that address conduct that is prejudicial to the administration of justice but fails to include similarly developed supporting comments.<sup>152</sup> Despite Washington’s unique approach, like many other states, it has yet to draft a supporting comment for its version of paragraph (d).<sup>153</sup>

Prior to the proceedings in *Cottingham* that led to an eighteen-month suspension, the attorney had no record of misconduct or discipline.<sup>154</sup> However, the attorney’s thirty-year streak of practicing law absent disciplinary issues ended in June 2009 when he filed a lawsuit against his neighbors over the removal of eight laurel bushes.<sup>155</sup> The trial judge found in favor of the attorney’s claim of adverse possession; however, the trial judge also condemned the land in favor of his neighbors.<sup>156</sup> Thus, the judge ordered the attorney’s neighbors to pay the fair market value of the land and damages for the bushes, but the attorney did not accept.<sup>157</sup> Instead, the attorney pursued a number of legal challenges to change the court’s decision, which included “court filings [that] were often, but not always, unintelligible [and] rife with typographic and grammatical errors . . . .”<sup>158</sup> Finally, in August 2015,

<sup>150</sup> *In re Cottingham*, 423 P.3d 818, 820 (Wash. 2018).

<sup>151</sup> As highlighted in the ABA’s report revising Model Rule 8.4, the Association’s objectives were reformulated in 2008 to include “four major ‘Goals’ . . . .” Lynk, *supra* note 29, at 1. Two of which included the promotion of “full and equal participation in the association, our profession, and the justice system by all persons” and the elimination of “bias in the legal profession and the justice system.” *Id.*; see WASH. RULES OF PRO. CONDUCT r. 8.4.

<sup>152</sup> WASH. RULES OF PRO. CONDUCT r. 8.4 cmts.

<sup>153</sup> Washington’s supporting comment currently reads as follows: “Legitimate advocacy respecting the factors set forth in paragraph (h) does not violate paragraphs (d) or (h).” WASH. RULES OF PRO. CONDUCT r. 8.4 cmt. 3.

<sup>154</sup> *In re Cottingham*, 423 P.3d at 820.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 820–21.

<sup>157</sup> *Id.* at 821.

<sup>158</sup> *Id.* (internal citation and quotation marks omitted).

the attorney accepted his neighbor's payment for the land.<sup>159</sup>

Those laurel bushes were worth more than anyone could have anticipated. The attorney's "pursuit involved two lawsuits, four judicial appeals, two administrative appeals, [over 700 filings], . . . and nearly \$60,000 in sanctions for [pleadings and motions] violations."<sup>160</sup> Notwithstanding the surge of sanctions at each stage of the litigation, the court pointed out that the attorney's "initial lawsuit was not frivolous."<sup>161</sup> But because the attorney "had ample warning that his arguments were unavailing and his continued pursuit was frivolous," his suspension was warranted.<sup>162</sup> The Office of Disciplinary Counsel (ODC) "formally charged [the attorney] with five counts of violating the Rules of Professional Conduct."<sup>163</sup> The last count included that "[b]y pursuing litigation and/or appeals before the trial court, the court of appeals, and/or the . . . County hearing examiner with intent to harass and/or annoy [his neighbors], [the attorney] violated RPC . . . 8.4(d) (conduct prejudicial to the administration of justice)."<sup>164</sup> The attorney denied all charges.<sup>165</sup>

Essentially, the attorney "interfer[ed] with the administration of justice by consuming substantial judicial time and resources without justification."<sup>166</sup> The court further provided that conduct that is prejudicial to the administration of justice "applies to 'violations of practice norms and physical interference with the administration of justice,'"<sup>167</sup> which "is generally . . . carried out by an attorney in an official or advocacy role."<sup>168</sup> As a result, the consumption of judicial resources violates practice norms and thus paragraph (d).<sup>169</sup> Although the attorney's initial pleadings were not frivolous and his conduct conformed with practice norms when filing suit, the repetitive nature of each new pleading and motion amounted to an "intent to harass his neighbors," especially because his pleadings were "made in his role as an advocate for himself and his wife."<sup>170</sup>

*Cottingham* seemed to further solidify Washington's consistent approach to addressing violations related to conduct that is prejudicial to the

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<sup>159</sup> *Id.* at 822.

<sup>160</sup> *In re Cottingham*, 423 P.3d at 820, 822.

<sup>161</sup> *Id.* at 822.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 823.

<sup>165</sup> *Id.*

<sup>166</sup> *In re Cottingham*, 423 P.3d at 823.

<sup>167</sup> *Id.* at 825 (quoting *In re Curran*, 801 P.2d 962, 970 (Wash. 1990)).

<sup>168</sup> *Id.* (citing *In re Conteh*, 284 P.3d 724, 731 (Wash. 2012)).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 822, 825.

administration of justice. Despite the progression of modern trends, Washington seems to employ a fairly moderate textual approach when interpreting its version of paragraph (d). In addressing misconduct under Model Rule 8.4, the court affirmed Washington’s focus on the “purposes of lawyer discipline” and “serious misconduct” directly related to a lawyer’s “professional life,”<sup>171</sup> not to conduct that did not directly relate to the practice of law.<sup>172</sup> However, Washington does not embrace a strict focus on conduct that directly interferes with the administration of justice.<sup>173</sup>

For example, the court acknowledged that “[t]he modern trend focuses lawyer discipline fairly tightly upon conduct which directly interferes with the administration of justice or occasions doubt about a lawyer’s competence or honesty.”<sup>174</sup> Notwithstanding the modern trend, as advanced by the ABA, Washington did “not fully embrace” it.<sup>175</sup> However, Washington did “embrace the modern trend by putting more emphasis on disciplining lawyers for violation[s] of practice norms.”<sup>176</sup> As seen in *Cottingham*’s review of the attorney’s disciplinary proceedings, violating practice norms amounts to conduct that is prejudicial to the administration of justice.<sup>177</sup> Both in 1990 and as recently as 2018, violating practice norms amounted to conduct that is prejudicial to the administration of justice, which made it difficult for the court to determine whether an attorney’s “acts merit[ed] discipline and if so, what sort of discipline,”<sup>178</sup> when based on practice norms.

Despite the difficulties that may come with using “practice norms” to determine whether conduct is prejudicial to the administration of justice, there are numerous examples of violations of practice norms that clearly fall within the proscribed conduct of Model Rule 8.4(d), which require little to no interpretation.<sup>179</sup> Further, proscribed conduct as measured or determined by practice norms seems to be confined to only two specific contexts: (1)

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<sup>171</sup> *In re Curran*, 801 P.2d 962, 966 (Wash. 1990).

<sup>172</sup> *See id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* (emphasis added).

<sup>176</sup> *Id.*

<sup>177</sup> *See In re Cottingham*, 423 P.3d 818, 824–25 (Wash. 2018).

<sup>178</sup> *In re Curran*, 801 P.2d at 966.

<sup>179</sup> *See, e.g., In re Johnson*, 790 P.2d 1227 (Wash. 1990) (converting trust fund money to personal use); *In re Lynch*, 789 P.2d 752, 754 (Wash. 1990) (taking photos of undercover police and showing them to a friend with a cocaine problem); *In re Krogh*, 536 P.2d 578, 579 (Wash. 1975) (conspiring to violate civil rights by breaking into a psychiatrist’s office to steal documents); *In re Conteh*, 284 P.3d 724, 728 (Wash. 2012) (en banc) (holding that the attorney had falsely and incorrectly made statements that influenced the tribunal’s decision and thus were “prejudicial to the administration of justice”).

“conduct of an attorney in his official or advocatory role” or (2) “conduct which might physically interfere with enforcing the law.”<sup>180</sup> Thus, when determining whether conduct is prejudicial to the administration of justice, Washington follows a fairly textual understanding of the administration of justice, even with the supplementary considerations of practice norms serving as a backdrop.

If practice norms are part of determining whether conduct was associated with an attorney’s professional life or whether it physically interfered with the justice system, then it stands to reason that Washington would differentiate between conduct that is prejudicial to the *administration* of justice and conduct that is prejudicial to *persons*. Otherwise, it would have been irrelevant for Washington to have recognized a general trend of decisions identifying conduct that was prejudicial to the administration of justice as seen in *Curran*<sup>181</sup> and others. By simply distilling the text to anchor its understanding of Model Rule 8.4(d), Washington’s focus seems to be on an attorney’s disposition or physical interference in the administration of the law, not on persons. Providing for an “expansive construction of the rule against conduct prejudicial to the administration of justice [is] unnecessary, even if the aims of lawyer discipline are viewed rather expansively.”<sup>182</sup> Therefore, imposing sanctions under the Rule was never “meant to protect the bar from damage done to the reputation of its members *not* connected with either physical interference with law enforcement or violation of practice norms.”<sup>183</sup> Though Washington provides these distinctions in its case law, it has yet to include them in a supporting comment for paragraph (d). Only time will tell if Washington’s trend of rule development will spill over into its supporting comments.

### 3. Louisiana: *In re McCool*—Conduct that is Prejudicial to the Administration of Justice Absent Supporting Comments

Louisiana’s current version of Model Rule 8.4(d) reads as follows: “It is professional misconduct for a lawyer to . . . (d) Engage in conduct that is prejudicial to the administration of justice.”<sup>184</sup> Louisiana is a unique state

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<sup>180</sup> *In re Curran*, 801 P.2d at 970.

<sup>181</sup> “Decisions in this jurisdiction show that conduct deemed prejudicial to the administration of justice has generally been conduct of an attorney in his official or advocatory role or conduct which might physically interfere with enforcing the law.” *Id.* The court recognized, “Professor Hazard, a leading authority on legal ethics, [who] stated that the rule against conduct prejudicial to the administration of justice should be construed to include only clear violations of accepted practice norms.” *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* (emphasis added).

<sup>184</sup> LA. STATE BAR ASS’N art. XVI § 8.4 (2018).

because none of its black letter rules of professional conduct have supporting comments.<sup>185</sup> Despite Louisiana’s missed opportunities, it has taken advantage of not having supporting comments because “problems of vagueness and overbreadth”<sup>186</sup> have been implicitly addressed in its case law.<sup>187</sup> At the time *McCool* was decided, Louisiana’s version of paragraph (d) had not changed since its initial adoption in December 1986.<sup>188</sup>

In determining sanctions, Louisiana is mindful that “disciplinary proceedings are not primarily to punish the lawyer, but rather are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct.”<sup>189</sup> Therefore, “[t]he discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances.”<sup>190</sup> Though the *McCool* court followed a set process when determining sanctions by weighing several factors in a two-step assessment, the court did not formulate a clear process to determine whether an attorney’s conduct violates the state’s rules of professional conduct. In the court’s defense, attorneys will know they have crossed the line when their conduct is egregious enough;<sup>191</sup> however, it is difficult to know precisely when that line has been crossed. For example, in *McCool*, Justice Crichton wrote separately to highlight respondent’s “disregard”:

[R]espondent’s most astounding and *egregious* action is her complete and utter lack of remorse, and defiance in the face of her impending sanction. At oral argument of this matter, respondent admitted she did “not have any remorse for [her] conduct” and that she would “continue to speak out and advocate for change.” It is unfortunate that respondent does not seem to understand that being a zealous advocate does not equate to such repugnant disrespect for the system we are charged to honor and serve.<sup>192</sup>

<sup>185</sup> See LA. STATE BAR ASS’N art. XVI (2018); Smith, *supra* note 84, at 16–17.

<sup>186</sup> Smith, *supra* note 84, at 16–17, 86–87.

<sup>187</sup> See, e.g., *In re McCool*, 2015-0284 (La. 6/30/15); 172 So. 3d 1058; *In re O’Dwyer*, 2016-1848 (La. 3/15/17); 221 So. 3d 1 (per curiam); *In re Evans*, 2019-01461 (La. 12/10/19); 284 So. 3d 634 (per curiam); *In re Gill*, 2015-1373 (La. 10/23/15); 181 So. 3d 669 (per curiam).

<sup>188</sup> See LA. STATE BAR ASS’N art. XVI § 8.4 (1986).

<sup>189</sup> *In re McCool*, 2015-0284, pp. 31–32 (La. 6/30/15); 172 So. 3d 1058, 1078 (citing La. State Bar Ass’n v. Reis, 513 So. 2d 1173, 1177–78 (La. 1987)).

<sup>190</sup> *Id.* at 32, 172 So. 3d at 1078 (citing La. State Bar Ass’n v. Whittington, 459 So. 2d 520, 524 (La. 1984)).

<sup>191</sup> E.g., *id.* at 41, 172 So. 3d at 1089–90 (Crichton, J., concurring).

<sup>192</sup> *Id.* at 41, 172 So. 3d at 1090 (emphasis added).

Hence, it was not that the respondent's conduct prejudiced the administration of justice and violated other rules of professional conduct, but that she neither noticed nor acknowledged that her conduct warranted such disregard by the court. The respondent believed her conduct was "perfectly okay."<sup>193</sup>

In a "rather complex" series of events, the respondent's disciplinary proceedings sprouted from her friend Raven's divorce in 2006.<sup>194</sup> Raven accused her former husband of sexually abusing their two daughters.<sup>195</sup> These accusations were part of proceedings pending resolution before Judge Deborah Gambrell in Mississippi.<sup>196</sup> Thus, in an effort to further her friend's intentions, the respondent filed a petition before Judge Dawn Amacker in Louisiana to begin intrafamily adoption proceedings on behalf of Raven's new husband.<sup>197</sup> However, displeased with the rulings made by both judges, the respondent "drafted an online petition entitled 'Justice for [H] and [Z]' which she and Raven posted on the internet at change.org, along with a photo of the two girls."<sup>198</sup>

To further disseminate the petition, the respondent posted the "petition on her blog site and in online articles she authored," which included the judges' offices' contact information and encouraged readers to express how they felt about the cases by contacting the judges.<sup>199</sup> One of the signers of the petition contacted Judge Gambrell's office and said that "she would 'be paying attention' to Raven's case 'due to the fact that Judge Gambrell refused to hear evidence of abuse in the case of little girls who [were] likely being molested by their father.'"<sup>200</sup> Similarly, Raven or her mother faxed a copy of the petition to Judge Amacker's office, which was returned with instructions that the attorney caution Raven against these communications.<sup>201</sup> Nevertheless, the respondent persisted and even provided a link to audio recordings of Raven and the two girls discussing the alleged abuse.<sup>202</sup> Later, the respondent went on to use her "personal Twitter account to promote the online petition and to . . . draw attention to the audio recordings."<sup>203</sup> On one

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<sup>193</sup> *Id.* at 21, 172 So. 3d at 1072.

<sup>194</sup> *Id.* at 1, 172 So. 3d at 1060.

<sup>195</sup> *In re McCool*, 2015-0284, p. 1 (La. 6/30/15); 172 So. 3d 1058, 1060.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 2, 172 So. 3d at 1060–61.

<sup>198</sup> *Id.* at 2, 172 So. 3d at 1061.

<sup>199</sup> *Id.* at 3, 172 So. 3d at 1061.

<sup>200</sup> *Id.* at 4, 172 So. 3d at 1062.

<sup>201</sup> *In re McCool*, 2015-0284, pp. 4–5 (La. 6/30/15); 172 So. 3d 1058, 1062.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 6, 172 So. 3d at 1063.

particular day, she tweeted thirty times about it.<sup>204</sup>

After both Judge Amacker and Judge Gambrell recused themselves,<sup>205</sup> the ODC filed one count against the respondent, alleging her conduct violated Louisiana Rule 8.4(d), among others.<sup>206</sup> Thus, in an effort to properly distinguish the allegations brought against the respondent, the court created three broad categories, one of which included a discussion on conduct prejudicial to the administration of justice.<sup>207</sup> The court used specific instances of the respondent's conduct to determine whether she violated the first two categories—improper ex parte communications and dissemination of false and misleading information.<sup>208</sup> But when assessing the third category—conduct prejudicial to the administration of justice—the court pointed out that the attorney's "overall conduct" constituted a violation.<sup>209</sup> Nevertheless, at her formal hearing, the respondent "suggested her conduct was justified by what the judges had done in the underlying cases and in the interest of protecting the minor children."<sup>210</sup> Also, during her testimony, when asked, "What is your recourse then under the law?"—after she exhausted what the law allowed—she answered, "Weep for the children."<sup>211</sup>

After concluding the respondent violated Louisiana Rule 8.4(d), the court implied three major findings from the ODC hearing committee. First, using extraneous communications, information, or publications to influence a judge's ruling violates paragraph (d).<sup>212</sup> Second, intimidating the "independence and integrity" of the court violates paragraph (d).<sup>213</sup> Third, causing a judge to be concerned for his or her personal safety violates paragraph (d).<sup>214</sup> Notwithstanding the committee's conclusions, the respondent claimed she intended her statements to "encourage the public, to extoll their elected judges to do justice, listen to the evidence, apply the law,

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<sup>204</sup> *Id.* One of the tweets included the following: "Judges are supposed to know s[ ] about—the law—aren't they. And like evidence and s[ ]? Due process? [link to online petition]." *Id.*

<sup>205</sup> *Id.* at 8–9, 172 So. 3d at 1065.

<sup>206</sup> *Id.* at 9–10, 172 So. 3d at 1065.

<sup>207</sup> *In re McCool*, 2015-0284, p. 15 (La. 6/30/15); 172 So. 3d 1058, 1068–69.

<sup>208</sup> *See id.* at 16–26, 172 So. 3d at 1069–75.

<sup>209</sup> *Id.* at 26, 31, 172 So. 3d at 1075, 1078. *McCool's* "overall conduct" included using the "internet and social media . . . to influence the judges and to expedite . . . her goals in the case . . ." *Id.* at 26, 172 So. 3d at 1075.

<sup>210</sup> *Id.* at 11, 172 So. 3d at 1066.

<sup>211</sup> *Id.*

<sup>212</sup> *See id.* at 26–27, 172 So. 3d at 1075.

<sup>213</sup> *See In re McCool*, 2015-0284, pp. 26–27 (La. 6/30/15); 172 So. 3d 1058, 1075.

<sup>214</sup> *See id.* at 27, 172 So. 3d at 1075.



and protect children.<sup>215</sup> Though the court noted several United States Supreme Court cases within the context of the First Amendment when addressing the respondent's claims,<sup>216</sup> the principles that followed from the court's observations seemed to highlight Model Rule 8.4(d)'s purpose and even provided a glimpse into an attorney's desire for justice and high ethical standards.

The United States Constitution was not meant to shield attorneys from engaging in unethical conduct.<sup>217</sup> Therefore, an attorney's extraneous communications may be "extremely circumscribed"<sup>218</sup> to preserve the integrity of the profession and independence of judicial proceedings. If the United States Constitution does not shield attorneys and *is* meant to preserve the integrity of the profession, then attorneys' obligations as officers of the court require them to deny their own desires in exchange for justice and the highest standards of legal ethics. For example, in *In re Sawyer*, Justice Stewart exhorted, "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected . . ."<sup>219</sup> Instead of identifying advocates as human beings or lawyers, they are "intimate and trusted and essential part[s] of the machinery of justice, . . . 'officer[s] of the court' in the most compelling sense."<sup>220</sup> This goes to show that attorneys are limited—even in their zealous desire to see justice come to fruition. The justice system demands an attorney to renounce all selfish ambition at the threshold of advocacy. Consequently, both to appease fairness and to honor the authority that comes with being an officer of the court, attorneys ought to refrain from conduct perceived to be threatening or intimidating. Thus, it stands to reason that the court in *McCool* held the respondent "to a higher standard than a non-lawyer member of the public"<sup>221</sup> and found the respondent's conduct prejudicial to the administration of justice.

But is it enough to say that the attorney in *McCool* should have known to draw the line where the court suggested it was? Justice Crichton summarized by quoting Judge Benjamin Cardozo: "Membership in the bar is a privilege burdened with conditions."<sup>222</sup> Being that those conditions are often without

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<sup>215</sup> *Id.*

<sup>216</sup> *See id.* at 27–29, 172 So. 3d at 1075–77.

<sup>217</sup> *See In re Sawyer*, 360 U.S. 622, 646 (1959) (Stewart, J., concurring).

<sup>218</sup> *In re McCool*, 2015-0284, p. 27 (La. 6/30/15); 172 So. 3d 1058, 1076 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991)).

<sup>219</sup> *In re Sawyer*, 360 U.S. at 646–47 (Stewart, J., concurring).

<sup>220</sup> *Id.* at 668 (Frankfurter, J., dissenting).

<sup>221</sup> *In re McCool*, 2015-0284, p. 29 (La. 6/30/15); 172 So. 3d 1058, 1077.

<sup>222</sup> *Id.* at 41, 172 So. 3d at 1089 (Crichton, J., concurring) (quoting *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917)).

count, it is difficult, even now, for the court to determine what those conditions are, or when they are met. Consequently, when do extraneous communications become prejudicial, or when is the independence or integrity of the court violated, let alone the safety of the judiciary? Is it when the administrators of justice are coerced into a position of bias as a result of experiencing prejudice? Or is it when the administrators of justice anticipate the likelihood of an advocate becoming prejudicial? The former is an innate human response, while the latter is a forecasting of the human condition. They are simply two sides of the same coin. On one side, bias is inevitable as a matter of prejudice, and on the other, prejudice is presumed to avoid bias.

4. North Carolina: *North Carolina State Bar v. DuMont*—  
Conduct that is Prejudicial to the Administration of Justice  
with Supporting Comments

North Carolina’s current version of Model Rule 8.4(d) reads as follows: “It is professional misconduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice.”<sup>223</sup> Even though North Carolina Rule 8.4 only has one paragraph that references “conduct that is prejudicial to the administration of justice,” its paragraph has two supporting comments.<sup>224</sup> Comment 4 to North Carolina Rule 8.4 reads as follows:

A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. . . . Conduct warranting the imposition of professional discipline under paragraph (d) is characterized by the element of intent or some other aggravating circumstance. The phrase “conduct prejudicial to the administration of justice” in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings.<sup>225</sup>

Comment 5 reads as follows:

Threats, bullying, harassment, and other conduct serving no substantial purpose other than to intimidate, humiliate, or embarrass anyone associated with the judicial

<sup>223</sup> 27 N.C. ADMIN. CODE 2.8.4 (2017).

<sup>224</sup> See 27 N.C. ADMIN. CODE 2.8.4 cmts. 4–5 (2017).

<sup>225</sup> 27 N.C. ADMIN. CODE 2.8.4 cmt. 4 (2017).

process . . . violate the prohibition on conduct prejudicial to the administration of justice. . . . Comments “by one lawyer tending to disparage the personality or performance of another . . . tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand.”<sup>226</sup>

These comments are noteworthy. Of the states that have included supporting comments for their versions of paragraph (d), only a few states have provided their own explanations or illustrations as alternatives to the language drafted by the ABA.<sup>227</sup> North Carolina is one of them. North Carolina’s comments have consistently offered guidance in determining whether an attorney’s conduct has risen to the level proscribed by paragraph (d),<sup>228</sup> as comments are meant to do.<sup>229</sup> *North Carolina State Bar v. DuMont* was a foundational case in developing North Carolina’s supporting comments to paragraph (d). North Carolina has continued to build off of *DuMont* to support paragraph (d)’s application.<sup>230</sup>

As the keystone case of Comment 4, *DuMont* serves as a general example of when conduct is prejudicial to the administration of justice. The *DuMont* court held that procuring false testimony had a reasonable likelihood of prejudicing the administration of justice and warranted suspension.<sup>231</sup> Thus, when establishing a violation of paragraph (d), a showing of actual prejudice is not required.<sup>232</sup> Instead, it is sufficient to show that an attorney’s conduct

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<sup>226</sup> 27 N.C. ADMIN. CODE 2.8.4 cmt. 5 (2017).

<sup>227</sup> For example, both Arkansas and Florida drafted a similar supporting comment, but one that differs from the language provided by the ABA prior to the 2016 shift. *See* ARK. RULES OF PRO. CONDUCT r. 8.4 cmt. 3; RULES REGULATING THE FLA. BAR ch. 4 r. 4-8.4 cmt. para. 5 (2021). Also, New York’s supporting comment states: “The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by the obstruction of justice . . . .” N.Y. COMP. CODES R. & REGS. tit. 22 § 1200 r. 8.4 cmt. 3 (2021). It ends by summarizing: “The conduct must be seriously inconsistent with a lawyer’s responsibility as an officer of the court.” *Id.*

<sup>228</sup> *See* discussion *infra* Section III.B.4.

<sup>229</sup> *See* MODEL RULES OF PRO. CONDUCT Preamble & Scope ¶ 21 (AM. BAR ASS’N 2020).

<sup>230</sup> Recently, additional language was added to Comment 4, which was adopted by the Council of the North Carolina State Bar, to further illustrate the Comment’s case examples. *See* Amends. to the Rules of Pro. Conduct of the N.C. State Bar, 2017 N.C. LEXIS 789, at \*1, \*5–6 (N.C. Sept. 28, 2017).

<sup>231</sup> *N.C. State Bar v. DuMont*, 277 S.E.2d 827, 835–36 (N.C. Ct. App. 1981), *modified*, 286 S.E.2d 89 (N.C. 1982).

<sup>232</sup> 27 N.C. ADMIN. CODE 2.8.4 cmt. 4 (2017).

had a “*reasonable likelihood*” of prejudicing the administration of justice.<sup>233</sup> *North Carolina State Bar v. Key*<sup>234</sup> further defined paragraph (d)’s scope. For example, neglecting client matters was a violation of paragraph (d), because paragraph (d) could be construed to include conduct “outside the scope of judicial proceedings.”<sup>235</sup> Consequently, a “[w]illful refusal to appear” on behalf of a client “has a ‘reasonable likelihood of prejudicing the administration of justice.’”<sup>236</sup>

North Carolina courts continue to assess an attorney’s conduct based on a broad reading of paragraph (d) and based on the reasonable likelihood of conduct prejudicing the administration of justice, as prescribed by Comment 4.<sup>237</sup> For example, in *North Carolina State Bar v. Sutton*, the court emphasized that “[t]he Comment accompanying each Rule [of Professional Conduct] explains and illustrates the meaning and purpose of the Rule.’ As such, the official commentary . . . ‘provide[s] guidance for practicing in compliance with the Rules.’”<sup>238</sup> It was proper for the court to have utilized the commentary to paragraph (d) in construing paragraph (d)’s meaning.<sup>239</sup> In fact, well before 2016, the language in Comment 4 had already been adopted as a standard in assessing attorney conduct under paragraph (d).<sup>240</sup> Consequently, the court reasonably concluded that Sutton’s repeated interjections, sarcastic remarks, coached responses, answered questions, and misrepresented assertions of forgery violated paragraph (d), because “such disruptive and improper tactics ‘had a *reasonable likelihood* of prejudicing the administration of justice.’”<sup>241</sup>

In 2017, the Supreme Court of North Carolina decided to amend Comment 4 to include “[c]onduct warranting the imposition of professional discipline under paragraph (d) is characterized by the element of intent or some other aggravating circumstance.”<sup>242</sup> Though the amendment was meant to further develop Comment 4, Comment 5 was supplemented because

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<sup>233</sup> *Id.* (emphasis added).

<sup>234</sup> *N.C. State Bar v. Key*, 658 S.E.2d 493 (N.C. Ct. App. 2008).

<sup>235</sup> *Id.* at 501 (quoting 27 N.C. ADMIN. CODE 2.8.4 cmt. 4 (2005)).

<sup>236</sup> *Id.* (quoting 27 N.C. ADMIN. CODE 2.8.4 cmt. 4 (2005)); *see* 27 N.C. ADMIN. CODE 2.8.4 cmt. 4 (2017).

<sup>237</sup> *See* 27 N.C. ADMIN. CODE 2.8.4 cmt. 4 (2017).

<sup>238</sup> *N.C. State Bar v. Sutton*, 791 S.E.2d 881, 897 (N.C. Ct. App. 2016) (citations omitted) (quoting 27 N.C. ADMIN. CODE 2.0.2(a), (h) (2003)).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* (citing *Key*, 658 S.E.2d at 501).

<sup>241</sup> *Id.* at 897, 899 (emphasis added) (quoting 27 N.C. ADMIN. CODE 2.8.4 cmt. 4 (2015)).

<sup>242</sup> Amends. to the Rules of Pro. Conduct of the N.C. State Bar, 2017 N.C. LEXIS 789, at \*5–6 (N.C. Sept. 28, 2017).

Comment 4's "reasonable likelihood" standard would apply to Comment 5—but as defined in the context of Comment 5. As such, the amendment seemed misplaced because it better reflected Comment 5's efforts in defining paragraph (d). For instance, the amendment to Comment 4 characterizes conduct in terms of intent or aggravating circumstances, while Comment 5 highlights examples, such as "[t]hreats, bullying, harassment, and other conduct serving no substantial purpose other than to intimidate, humiliate, or embarrass," which "tend[s] to disparage the personality or performance of another."<sup>243</sup> The amendment to Comment 4 seemed to be a precursor to Comment 5 by listing examples of Comment 4's broad language. North Carolina should consider moving the amended language to the beginning of Comment 5. To preserve Comment 4's standard in determining whether conduct is prejudicial to the administration of justice under Comment 5, Comment 5 should simply reference Comment 4's standard.

In light of Comment 5 and other supporting comments,<sup>244</sup> two cases were decided a few months after the Supreme Court of North Carolina amended Rule 8.4.<sup>245</sup> First, in *North Carolina State Bar v. Foster*, the court held the defendant engaged in conduct "serving no substantial purpose other than to" disrespect the tribunal.<sup>246</sup> As proscribed by Comment 5 and other supporting comments, the "defendant made vulgar and profane statements toward and in the presence of [the] Magistrate [Judge,]" which prejudiced the administration of justice because disrespecting a judicial officer is reasonably likely to encourage disrespect for the courts and legal profession.<sup>247</sup> Apart from Comment 5's admonitions, the defendant's behavior seriously concerned the court,<sup>248</sup> which further affirmed North Carolina's decision to

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<sup>243</sup> 27 N.C. ADMIN. CODE 2.8.4 cmts. 4–5 (2017).

<sup>244</sup> See, e.g., 27 N.C. ADMIN. CODE 2.4.4 cmt. 2 (2003); 27 N.C. ADMIN. CODE 2.3.5 cmt. 10 (2019).

<sup>245</sup> See *N.C. State Bar v. Foster*, 808 S.E.2d 920 (N.C. Ct. App. 2017); *N.C. State Bar v. Livingston*, 809 S.E.2d 183 (N.C. Ct. App. 2017).

<sup>246</sup> *Foster*, 808 S.E.2d at 924 (emphasis omitted).

<sup>247</sup> *Id.* at 924–25.

<sup>248</sup> Despite the court reversing the defendant's conviction on procedural grounds, it reiterated its concerns from a prior decision:

We are, however, very troubled by defendant's use of profanity in the magistrate's office while conducting court-related business despite warnings by the magistrate about the inappropriate language. Such disrespect, particularly by an attorney familiar with proper courtroom practices, is wholly inappropriate. . . . [W]e find defendant's attitude offensive and incomprehensible.

*Id.* at 924 (quoting *In re Foster*, 744 S.E.2d 496, No. COA12-865, 2013 WL 2190072, at \*19 (N.C. Ct. App. May 21, 2013) (unpublished table decision)).

add new language to Comment 4.

Second, in *North Carolina State Bar v. Livingston*, the court held the attorney violated North Carolina Rule 4.4 as determined under Comment 2.<sup>249</sup> This is significant because it is similar to Comment 5.<sup>250</sup> On one hand, the attorney's conduct was prejudicial to the administration of justice because he failed "to take corrective action" and exercise reasonable diligence to amend his client's pleadings.<sup>251</sup> On the other hand, his conduct may have also been prejudicial to the administration of justice under Comment 5, which is similar to Rule 4.4.<sup>252</sup> The attorney's conduct violated Rule 4.4 when he threatened to file a new, but frivolous lawsuit every month against opposing counsel to force a settlement.<sup>253</sup> Though the court did not explicitly state he prejudiced the administration of justice in light of Rule 4.4, it did use Comment 2 of Rule 4.4 to conclude that the attorney violated paragraph (a) by making threats and claims unfounded in law or fact.<sup>254</sup> Due to the attorney's misconduct, "his clients were deprived of any opportunity to pursue whatever potentially legitimate claims they had against the proper parties,"<sup>255</sup> thus constituting conduct prejudicial to the administration of justice.

North Carolina's supporting comments set out a clear standard and a robust set of illustrations to apply paragraph (d).<sup>256</sup> The ABA and other states can learn a lot from North Carolina's approach.

### C. *The Psychology Underlying Misconduct*

Attorneys spend most of their time making decisions.<sup>257</sup> Therefore, it is no mystery that attorneys' conduct would be measured in terms of their decisions, and thus, their behavior. Pressing situations and decision-making mechanisms tend to shape the legal profession; consequently, it stands to reason that these concepts could help explain an attorney's conduct in the practice of law. Like the practice of law, the concepts that help characterize

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<sup>249</sup> *Livingston*, 809 S.E.2d at 197–98.

<sup>250</sup> Compare 27 N.C. ADMIN. CODE 2.4.4 cmt. 2 (2003) (highlighting conduct that serves no substantial purpose in violation of its rule), with 27 N.C. ADMIN. CODE 2.8.4 cmt. 5 (2017) (using similar language to proscribe conduct prejudicial to the administration of justice).

<sup>251</sup> *Livingston*, 809 S.E.2d at 192.

<sup>252</sup> Compare 27 N.C. ADMIN. CODE 2.8.4 cmt. 5 (2017), with 27 N.C. ADMIN. CODE 2.4.4 (2017).

<sup>253</sup> *Livingston*, 809 S.E.2d at 197–98.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 192.

<sup>256</sup> See 27 N.C. ADMIN. CODE 2.8.4 cmts. 4–5 (2017).

<sup>257</sup> Ask any attorney. ROBBENOLT & STERNLIGHT, *supra* note 68, at 85.

human behavior are not an exact science.<sup>258</sup> Because the practice of law is not an exact science, valuing the implications of human behavior to understand misconduct should be intuitive for those in the legal profession. After all, conduct is defined in terms of one's behavior.<sup>259</sup>

Sorting through and recognizing the nuances of human behavior is not a novel concept. This Comment suggests that judges, attorneys, and court personnel are better equipped to determine whether conduct is prejudicial to the administration when paragraph (d)'s supporting comment incorporates theories of psychology.

1. Psychology: The Science of How People Feel, Think, and Behave<sup>260</sup>

Why should practicing attorneys occupy themselves with the feelings, thoughts, and behaviors of others? The simple answer is that attorneys are constantly communicating with people.<sup>261</sup> In fact, it would be quite difficult to accomplish anything in the practice of law without interacting with others. And yes, that even includes submitting electronic documents to the court, because after all, the court is merely a composite of individual persons. Therefore, because interacting with others is inevitable, whether personally or virtually, attorneys have the potential to be more effective officers of the court by acknowledging and effectuating the depth of psychology.<sup>262</sup> Not only would the application of psychology offer insight into other people's behaviors, but attorneys may even stand to appreciate the insights gained by reflecting on their own conduct.

Luckily, the conversation addressing the impact that science can have on the administration of justice is already here and has been for some time.<sup>263</sup> While evaluating patents for a sodium chloride solution, Judge Learned Hand noted, "I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any

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<sup>258</sup> See generally HINTS ON ADVOCACY 17th ed., *supra* note 55, at 309–10.

<sup>259</sup> In general, "conduct" is "[p]ersonal behavior, whether by action or inaction, verbal or nonverbal; the manner in which a person behaves; collectively, a person's deeds." *Conduct*, BLACK'S LAW DICTIONARY (11th ed. 2019). Further, "unprofessional conduct" is "[b]ehavior that is immoral, unethical, or dishonorable, esp[ecially] when judged by the standards of the actor's profession." *Unprofessional Conduct*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>260</sup> See ROBBENOLT & STERNLIGHT, *supra* note 68, at 1.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> See generally *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911) (drawing attention to the role that science can play in the practice of law), *aff'd in part, rev'd in part*, 196 F. 496, 497, 500 (2d Cir. 1912) ("Judge Hand's opinion is most exhaustive.").

knowledge of even the rudiments of chemistry to pass upon such questions as these.”<sup>264</sup> Judge Hand appeared to imply that the practice of law is always in a position to gain “from the whole range of human knowledge,”<sup>265</sup> which can include the science behind human behavior. Judge Hand also noted, “How long [shall we] continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.”<sup>266</sup> Thus, the legal profession thrives when legally significant principles are incorporated into the practice of law.

Since Judge Hand’s benediction, the law has, in some respects, honored the science behind certain practice areas. For example, the science underlying patents has been honored by requiring technical qualifications to practice before the United States Patent and Trademark Office (USPTO),<sup>267</sup> however, little honor has been rendered to the science behind human behavior in the training and practice of law.<sup>268</sup> Most are left to simply rely on intuition,<sup>269</sup> even though the study of human behavior in the practice of law stands by idly, not yet fully explored. To honor Judge Hand’s exhortation, the legal profession should continue to employ science. Imagine if the legal profession had a work-made-for-hire<sup>270</sup> with the study of human behavior, where the

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<sup>264</sup> *Id.* at 97, 115.

<sup>265</sup> *Id.* at 115.

<sup>266</sup> *Id.*

<sup>267</sup> “No individual will be registered to practice before the Office unless he or she has,” among other requirements,

Established to the satisfaction of the OED Director that he or she: (i) [p]ossesses good moral character and reputation; (ii) [p]ossesses the *legal, scientific, and technical qualifications* necessary for him or her to render applicants valuable service; and (iii) [i]s competent to advise and assist patent applicants in the presentation and prosecution of their applications before the Office.

37 C.F.R. § 11.7(a)(2)(i)–(iii) (2021) (emphasis added).

<sup>268</sup> “Law school courses do not usually focus on the part of the job that involves understanding human psychology.” ROBBENOLT & STERNLIGHT, *supra* note 68, at 1.

<sup>269</sup> *See id.* at 2.

<sup>270</sup> A work-made-for-hire, as provided under the Copyright Act, allows “employers and parties who commission the creation of copyrightable works [to] stand in as the sole author for such works.” Sean M. O’Connor, *Hired to Invent vs. Work Made for Hire: Resolving the Inconsistency Among Rights of Corporate Personhood, Authorship, and Inventorship*, 35 SEATTLE U. L. REV. 1227, 1233 (2012) (citing 17 U.S.C. §§ 101, 201(b) (2011)). Its counterpart under patent law is the hired-to-invent exception, which allows “title to the invention [to be] equitably vest[ed] in the employer.” *Id.* at 1240 (citing *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 188–89 (1933)).



study of human behavior framed the Model Rules' definition of misconduct. If the legal profession employed the study of human behavior, attorneys would better understand when conduct becomes misconduct.

## 2. Situationism

Situationism is traditionally framed as a juxtaposed term within attribution theory; however, situationism is worth exploring individually. Nevertheless, to better understand situationism and its role in explaining human behavior, the competing approach is worth mentioning.

Attribution theory is defined in social psychology as the “processes involved in judgments about the cause of behavior and inferences about those people made on the basis of such judgments.”<sup>271</sup> There are two attributional approaches.<sup>272</sup> The first approach is “the dispositionist approach, which explains outcomes and behavior with reference to people’s dispositions (that is, personalities, preferences, and the like).”<sup>273</sup> The second is “the situationist approach [or situationism], which bases attributions of causation and responsibility on unseen (though often visible) influences within us and around us.”<sup>274</sup> Understanding the general scope of situationism, in light of dispositionism, “is vitally important because law is centrally concerned with making attributions.”<sup>275</sup> For example, judges and attorneys constantly make inferences about a person’s behavior and evaluate outcomes in terms of those inferences. Whether people care to admit it, “humans are subject to significant attributional biases.”<sup>276</sup>

Attributional biases may be more prevalent in the practice of law than the use of objective reasoning. The practice of law, and the law itself, is often framed in terms of objectivity; and the law frequently encourages attorneys to act within the bounds of reasonable objectivity. “In spite of the prevalence and strong appeal of those notions, however, we are actually moved significantly more by our situations—unseen or underappreciated elements in our environment and within our interiors—than we are by disposition-based choice.”<sup>277</sup> For instance, situationism would suggest that people fall

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<sup>271</sup> Igor Grossmann & Lee Ross, *Attributions*, in THE SAGE ENCYCLOPEDIA OF LIFESPAN HUMAN DEVELOPMENT 189, 189 (Marc H. Bornstein ed., 2018).

<sup>272</sup> Adam Benforado & Jon Hanson, *Attributions and Ideologies: Two Divergent Visions of Human Behavior Behind Our Laws, Policies, and Theories*, in IDEOLOGY, PSYCHOLOGY, AND LAW 298, 298 (Jon Hanson ed., 2012).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 299.

<sup>277</sup> *Id.*

into “bankruptcy because of lost jobs, divorce, or unforeseen medical costs,” while dispositionism would suggest that people fall into bankruptcy because of some proclivity of character.<sup>278</sup> Thus, just as some would “encourage policymakers to rely more heavily on situationist advisers and adopt additional measures to strengthen situationism in broader society,”<sup>279</sup> the ABA may also consider formulating its supporting comments in terms of situationism, as it is more telling of one’s behavior. Though inaccurate, dispositionism “can be a simple, time-saving, affirming, psychic-cost-minimizing heuristic,”<sup>280</sup> that serves as a means of explaining human behavior in the practice of law.<sup>281</sup>

a. Limitations

Situationism may act as a forecast of human behavior, but it is not without its limitations. In light of dispositionism’s focus on internal proclivities, it is worth noting a couple of situationism’s limitations.<sup>282</sup> First, though “[i]ndividuals realize that situational factors play a significant role in shaping behavior,” they do so “to the extent that[] the situational factors are cognitively striking.”<sup>283</sup> Because people have “limited cognitive capacit[y],”<sup>284</sup> people make sweeping judgments about other people’s decisions by only concentrating on a person’s decision, as oppose to the situational elements that led the person to make that decision.<sup>285</sup> Our internal proclivities are summoned by our cognitive inability to change our focus from one’s disposition to situational influences. Thus, to evaluate others in terms of their situations, people must be intentional about distinguishing between the two.

Another limitation on situationism is that humans are naturally “inclined toward dispositionist attributions.”<sup>286</sup> This is especially true in the practice of law because objectivity is more desirable, and attorneys “desire to see [them]selves in self-affirming ways.”<sup>287</sup> In other words, people “like to believe that [they] are independent, intelligent consumers of life’s many options—the attitude-driven, reasoning choice makers of commercials and

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<sup>278</sup> Benforado & Hanson, *supra* note 272, at 299.

<sup>279</sup> *Id.* at 300.

<sup>280</sup> *Id.*

<sup>281</sup> See discussion *infra* Section III.C.3.

<sup>282</sup> See Benforado & Hanson, *supra* note 272, at 301.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> See *id.* at 302.

<sup>286</sup> *Id.* at 303.

<sup>287</sup> *Id.*

[movies].”<sup>288</sup> People “see [them]selves as in control of [their] destinies,” not as “victims of situation[s].”<sup>289</sup> Justice may lead some attorneys to believe that “[w]hen something bad happens,” someone must be blamed, and “when something really bad happens,” someone “*really*” must be blamed.<sup>290</sup> Thus, people “defensively seek protection through [their] attributions.”<sup>291</sup> This is especially true when people use objective reasoning to prove that their decisions are safe and just.<sup>292</sup> When people frame others in terms of dispositions as opposed to situations, objective reasoning suggests that people can maintain control to avoid a negative result.<sup>293</sup>

b. Lay psychology

Though these limitations significantly thwart people’s ability to see their behavior as it truly occurs out in the wild, another more pressing factor continues to infringe upon people’s ability to evaluate human behavior. “[C]ontemporary psychology’s understanding of the dynamic relationship between the person and the situation in determining behavior” inadvertently finds itself competing with “the views of fairness and efficacy that underlie the ‘lay psychology’ that pervades our society.”<sup>294</sup> Should the developments of behavioral social sciences outweigh the lay views of psychology? Though pragmatism is often at the forefront of the practice of law, it is important to consider “the relative power of influences that are considered in discussions of . . . appropriate punishment for violations of the law”<sup>295</sup> or in this case, rules of professional conduct.

Laypeople have the tendency “to underestimate the impact of situational pressures and constraints.”<sup>296</sup> As such, “the legal system’s consideration of mitigating factors or ‘excuses’ reflects *lay* conceptions of behavioral causation and dualistic notions of ‘free will’ that are neither empirically nor logically

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<sup>288</sup> Benforado & Hanson, *supra* note 272, at 303.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *See id.* at 303–04.

<sup>293</sup> *Id.*

<sup>294</sup> Ross & Shestowsky, *supra* note 64, at 612.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* A lay person’s tendency to make “unwarranted dispositional” attributions “is exacerbated by *naïve realism*,” which is “the assumed veridicality and objectivity of one’s own perceptions and judgments relative to those of one’s peers.” *Id.* This is especially dangerous when determining whether an attorney has violated a rule of professional conduct, because the attorney is viewed in terms of another’s disposition as opposed to the influencing factors of the attorney’s particular situation.

defensible.”<sup>297</sup> This would be equivalent to a jury sitting as judge in a bench trial. Laypersons would be tasked with determining both questions of law and fact—making the practice of law, law school, and even apprenticeships superfluous. Indeed, neither legal scholars nor those practicing would propose such a shift in the legal profession. Therefore, why would judges and attorneys compete or even impose their lay views of psychology on well-established theories of psychology? The simple answer is obliviousness. Nevertheless, contemporary psychologists suggest and situationism implicitly promotes that “[a] logically coherent account of behavioral causation that incorporates the lessons of empirical research, . . . would at the very least compel us to treat transgressors with more compassion than they typically receive.”<sup>298</sup>

Social psychology exhorts legal professionals to recognize “laypeople’s intuitions about how they or other ‘reasonable’ people would have acted in the face of various situational factors and constraints” and how those intuitions “are likely to be erroneous.”<sup>299</sup> This, in part, helps to explain:

That [a] relative lack of insight in considering the power of the situation is particularly likely in cases in which the external influences at play are . . . subtler matters of peer pressure or of situations inducing small initial transgressions that in turn lead . . . to increasingly serious ones.<sup>300</sup>

If most people can be misled by these subtle changes in their surroundings to engage in conduct that they believe they are incapable of engaging in,<sup>301</sup> then situation attributions are at least worth exploring in determining Model Rule violations. More importantly, though laypeople may not fully understand these conventions, such as the “power of situation” and “dispositionist bias,” or change in a “wrongdoer’s” behavior, changing how the legal profession defines the roles of judges and attorneys and other social structures is likely to foster change in behavior.<sup>302</sup>

Despite laypeople’s perceptions of psychology, situational influences continue to impact how attorneys approach the practice of law. The implications of experiencing child abuse, spousal abuse, the death of a loved one, or parental absenteeism in determining the causal link to “wrongful”

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<sup>297</sup> *Id.* (emphasis added).

<sup>298</sup> *Id.* at 613.

<sup>299</sup> Ross & Shestowsky, *supra* note 64, at 614.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *See id.* at 615.

conduct<sup>303</sup> are without end, and yet, the power of those situational influences can hardly be denied or underestimated. Still, people cannot forget that “many actors in similar situations (and many who faced even more dysfunctional . . . environments) *did* act otherwise.”<sup>304</sup> Nevertheless, the legal system should consider the “incorrigibles” in light of their misfortune<sup>305</sup> or situational factors. Evaluating misconduct through situational factors is not meant to enable “incorrigibles” to engage in misconduct, but to determine whether their conduct was truly the result of behavioral ills.

### 3. Heuristics: Judgment Shortcuts

The practice of law often compels attorneys to make judgments based on objective reasoning and “full information,” but attorneys are not always deliberate or systematic in making judgments, and instead, rely on intuition.<sup>306</sup> Attorneys often rely on intuition because it is cost-effective, efficient, and effortless.<sup>307</sup> “*Cognitive heuristics* are ways in which people simplify or take shortcuts in making judgments.”<sup>308</sup> However, these shortcuts can lead to “systematic errors in judgment.”<sup>309</sup> Two ways in which heuristics can lead to skewed judgments include positive illusions and hindsight bias; both are founded in the belief that people perceive themselves in self-serving ways.<sup>310</sup>

Overconfidence is a positive illusion that most legal professionals have experienced. Overconfidence may be a hard pill to swallow, but is one with which most people are familiar. Sometimes attorneys are oblivious to the existence of overconfidence.<sup>311</sup> Placing outcomes in terms of self-serving success keeps observers from seeing the uncertainty inherent in their judgments.<sup>312</sup> One example of this is when “negotiators are overconfident about the persuasiveness of their positions.”<sup>313</sup> Ironically, “the greater the uncertainty [people] face, the more overconfident . . . predictions tend to be.”<sup>314</sup> This can be further exacerbated by the “*illusion of control*,” which

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<sup>303</sup> See *id.* at 620.

<sup>304</sup> *Id.*

<sup>305</sup> See Ross & Shestowsky, *supra* note 64, at 633.

<sup>306</sup> ROBBENOLT & STERNLIGHT, *supra* note 68, at 67.

<sup>307</sup> See *id.*

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 68.

<sup>310</sup> *Id.* at 68, 76.

<sup>311</sup> *Id.* at 68.

<sup>312</sup> ROBBENOLT & STERNLIGHT, *supra* note 68, at 68.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

involves “the tendency to overestimate [one’s] ability to control events and outcomes that are not within [one’s] control.”<sup>315</sup> Though positive illusions help legal professionals make decisions and serve their clients well, a mistaken judgment of one’s true disposition can lead to undesirable outcomes and missed opportunities.<sup>316</sup> As most missteps come with assurances of learning new insights about oneself or others, it is important for attorneys, and even law students,<sup>317</sup> to self-reflect and come to terms with overconfidence or acknowledge when high confidence is misplaced.

Hindsight bias may provide an anchor for jurors and judges to determine whether the facts of a case validate their conclusions. Hindsight bias occurs when “people predicting the outcome of an event after the fact are more certain that they would have predicted the actual outcome than are those who attempt to predict in foresight.”<sup>318</sup> Therefore, if people feel like they “knew it all along,” that makes it difficult for them to determine whether their judgments would have been “made in foresight.”<sup>319</sup> One common example of this in the practice of law is when a judge or juror evaluates “the reasonableness of particular conduct” knowing that an adverse result has occurred.<sup>320</sup> The trier of fact evaluates the conduct with an eye toward foreseeability or likelihood based on what has already occurred, thus leading to hindsight bias.<sup>321</sup> This is incredibly important in the practice of law “[b]ecause hindsight bias makes such outcomes seem predictable,” and thus, “this phenomenon makes it difficult” for judges and jurors to see the results of another person’s conduct as unpredictable.<sup>322</sup> Instead, people should look at conduct from an unbiased perspective, while keeping in mind that “[i]n a world where everyone ‘knew it all along,’ there is no incentive to learn and very little left to learn.”<sup>323</sup>

#### 4. Decision-Making

Attorneys *will* spend most of their time making decisions for others. And

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<sup>315</sup> *Id.* at 69.

<sup>316</sup> *Id.*

<sup>317</sup> Overconfidence among *prospective* law students is just as prevalent. For example, “[p]rospective law students tend to be more confident about their own job prospects than they are about their peers’ prospects.” *Id.* However, this overconfidence does not consider the possibility that they might not make it past their first year of law school.

<sup>318</sup> ROBBENOLT & STERNLIGHT, *supra* note 68, at 76.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> RANDALL KISER, *BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS* 133 (2010).

though grueling to admit, those decisions may, at times, be based on less-than-ideal grounds. One ground may include an attorney's emotions.<sup>324</sup> Though emotions may be difficult to manage or even articulate, they do "provide useful information about [a] decision-maker's values and priorities,"<sup>325</sup> which are often unexpressed. For example, knowing how the opposition values specific interests during negotiations is a vital tool by which to understand the opposition's goals.<sup>326</sup> Though "people are reasonably accurate in predicting" their emotions at a point in the future, they are "not very good at predicting the intensity or duration of these anticipated emotions."<sup>327</sup> This is true because making a decision based on how people might feel often precedes *complete* outcome satisfaction.

Thus, "[i]n similar ways, it can be difficult to predict our own behavior in future circumstances."<sup>328</sup> For example, a study was done to evaluate how women predict they will act when asked "sexually harassing interview questions."<sup>329</sup> As it turned out, "women tend to anticipate that they will take some kind of action to protest such questions, such as confronting . . . , refusing to answer . . . , or leaving the interview. But when actually asked sexually harassing questions in an interview setting, most interviewees simply answer[ed] the questions."<sup>330</sup>

People are led to make such faulty predictions about their own emotions and behaviors because of a lack of experience or inaccurate recollection of how they reacted or behaved in a similar circumstance, making it difficult for them to accurately predict how they might behave in the current situation.<sup>331</sup> Hence, when coupled with emotion and our ability to predict our emotional disposition over the course of any given situation, our decisions are made absent full information. Thus, attorneys are left to conduct themselves as they see others conduct themselves, or worse, act completely out of character.

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<sup>324</sup> See ROBBENOLT & STERNLIGHT, *supra* note 68, at 97.

<sup>325</sup> *Id.*

<sup>326</sup> See generally Katie Shonk, *Value Claiming in Negotiation: Prepare to Get Your Fair Share with Value Claiming When Negotiating*, HARV. L.: PROGRAM ON NEGOT. DAILY BLOG (July 6, 2021), <https://www.pon.harvard.edu/daily/negotiation-skills-daily/value-claiming-in-negotiation/> (framing value in terms of preferences can help reach negotiation goals).

<sup>327</sup> ROBBENOLT & STERNLIGHT, *supra* note 68, at 97–98.

<sup>328</sup> *Id.* at 98.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* (citing Julie A. Woodzicka & Marianne LaFrance, *Real Versus Imagined Gender Harassment*, 57 J. SOC. ISSUES 15 (2001); see also Janet K. Swim & Lauri L. Hyers, *Excuse Me—What Did You Just Say?!: Women's Public and Private Responses to Sexist Remarks*, 35 J. EXPERIMENTAL SOC. PSYCH. 68 (1999)).

<sup>331</sup> *Id.*

## 5. Ethics

Though the ABA Model Rules currently provide a practical framework for legal ethics, ethics can also be explained through social psychology. In the words of Earl Warren, “In civilized life, law floats in a sea of ethics.”<sup>332</sup> This quip is more than a simple reflection, especially because “[l]awyers routinely face a range of ethical and moral issues.”<sup>333</sup> These issues are often found in pressing situations, such as making decisions and formulating judgments. Even though the ABA has gone to great lengths to ensure that officers of the court and judges are given the tools, resources, and standards needed to be effective and ethical attorneys, “many more situations implicate ethics or morality in ways that may not register . . . consciously.”<sup>334</sup> Psychology “helps [to] explain how ethical lapses can occur more easily and less intentionally than [people] might imagine.”<sup>335</sup>

## a. Bounded ethicality

Bounded ethicality occurs when “there are a range of ‘psychological processes that lead people to engage in ethically questionable behaviors that are inconsistent with their own preferred ethics.’”<sup>336</sup> For example, many of us have ethical blind spots.<sup>337</sup> Blind spots occur when there “is a lack of appreciation for the ethical tensions inherent in a particular decision or course of action.”<sup>338</sup> As a result, attorneys should take precautions when they perceive that their decisions do not involve ethical issues, especially when attorneys believe that any challenges they or their clients may face can be *easily* resolved.<sup>339</sup> This is closely related to dispositionist perceptions.<sup>340</sup> People perceive themselves to be more objective and competent than they actually are. When compared to others, “attorneys tend to believe that their own ethical standards are more stringent than those of other attorneys.”<sup>341</sup>

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<sup>332</sup> *Id.* at 385.

<sup>333</sup> ROBBENOLT & STERNLIGHT, *supra* note 68, at 385.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 387 (quoting MAX H. BAZERMAN & DON A. MOORE, JUDGMENT IN MANAGERIAL DECISION MAKING 123 (7th ed. 2009)).

<sup>337</sup> *See id.*

<sup>338</sup> *Id.*

<sup>339</sup> *See* ROBBENOLT & STERNLIGHT, *supra* note 68, at 387.

<sup>340</sup> *See supra* Section III.C.2.

<sup>341</sup> *See* ROBBENOLT & STERNLIGHT, *supra* note 68, at 387 (citing Jonathan R.B. Halbesleben et al., *The Role of Pluralistic Ignorance in Perceptions of Unethical Behavior: An Investigation of Attorneys’ and Students’ Perceptions of Ethical Behavior*, 14 ETHICS & BEHAV.



These views keep attorneys from “thoughtfully consider[ing] . . . ethical tensions,” which results in an unlikelihood of revisiting past decisions that may have included an inability to properly “fix or otherwise manage ethical problems.”<sup>342</sup> Unfortunately, because no one “wants to be seen as weak,”<sup>343</sup> attorneys are not motivated to thoughtfully reassess their own ethical standards.

b. The adversarial legal system

Many of the ethical dilemmas that attorneys face in the practice of law are often attributed to the adversarial legal system.<sup>344</sup> Unfortunately, “[i]n the service of zealous advocacy” and in the context of ethical issues, “attorneys may, among other things, fail to ask important or probing questions of their client, fail to disclose material information, exaggerate claims, dissemble about alternative deals, coach rather than prepare witnesses, and aggressively cross-examine even candid witnesses.”<sup>345</sup> Hence, “the adversary system can incline lawyers to ‘treat[] behavior that would be ethically problematic in other contexts as not problematic’<sup>346</sup> in the practice of law. These tendencies may even be true of law students, considering that law school is unnecessarily competitive and often adversarial. In the words of Justice Clarence Thomas, law school is a “cauldron of competition.”<sup>347</sup> Thus, “[a]cting in a way that would provide an advantage to an opponent may [be] unthinkable,” but in some circumstances, not disclosing certain information (that may seem like an advantage) may be prejudicial to the administration of justice.<sup>348</sup> Using one’s “analytical skills . . . to excuse what others might see as unethical

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17 (2004); Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 *FORDHAM L. REV.* 773 (1998)). Comparing one’s self to another is not exclusive to attorneys; it is also practiced by judges. For example, Judge Richard A. Posner writes, “[w]e use introspection to acquit ourselves of accusations of bias, while using realistic notions of human behavior to identify bias in others.” RICHARD A. POSNER, *HOW JUDGES THINK* 121 (2008).

<sup>342</sup> ROBBENOLT & STERNLIGHT, *supra* note 68, at 387–88.

<sup>343</sup> *Id.* at 389.

<sup>344</sup> *See id.* at 400–01.

<sup>345</sup> *Id.* at 401.

<sup>346</sup> *Id.* (quoting Austin Sarat, *Ethics in Litigation: Rhetoric of Crisis, Realities of Practice*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION* 145, 149 (Deborah L. Rhode ed., 2000)).

<sup>347</sup> *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) (Thomas, J., concurring in part and dissenting in part).

<sup>348</sup> *See* ROBBENOLT & STERNLIGHT, *supra* note 68, at 401.

conduct<sup>349</sup> is not a valid excuse. As former Justice Potter Stewart once said, “[e]thics is knowing the difference between what you have a right to do and what is right to do.”<sup>350</sup>

D. *Framing Misconduct Under Model Rule 8.4(d)*

Given the various approaches states have adopted to maintain the integrity of the profession and to determine whether conduct is prejudicial to the administration of justice, a new supporting comment for paragraph (d) should also incorporate various psychological theories. This would require proscribed conduct to be framed in terms of situational and decision-making influences—as found in the administration of justice or specifically within the scope of judicial proceedings. Under dispositionism, framing misconduct in terms of one’s objectively perceived actions would be too easy. Looking at one’s behavior based on objective proclivities of character, such as personality and preferences, may be cost-effective, efficient, and more convenient; however, these objective proclivities do not accurately depict one’s behavior as it truly occurs in the practice of law. Consequently, the impact that situational influences or decision-making limitations have on an attorney’s conduct and the underlying factors that compose the legal system may help explain how conduct can become prejudicial to the administration of justice.

1. The Impact of Psychology on Attorneys and the Law

There is little doubt that the practice of law incorporates the science of human behavior. Attorneys and judges constantly and inadvertently evaluate people’s behavior to determine whether their own conduct is appropriate—through comparison or by evaluating an appropriate standard of conduct.<sup>351</sup> As attribution theory would suggest, dispositionism in light of situationism may be the best way to understand when conduct becomes misconduct, specifically when that conduct becomes prejudicial to the administration of justice. Not only would objective and subjective concepts bring meaning to an attorney’s conduct, but heuristics and predictions of emotions in decision-making processes may also bring meaning to an attorney’s conduct. Overall, situationism, dispositionism, emotions, and heuristics may help determine

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<sup>349</sup> *Id.* at 402.

<sup>350</sup> *Id.*; see also Bob Beckel & Cal Thomas, *Common Ground: We Need an Ethics Check*, USA TODAY (Jan. 29, 2014, 6:24 PM), <https://www.usatoday.com/story/opinion/2014/01/29/politicians-ethics-mcdonnell-indictment-scandal-lobbyists-column/5037593/>.

<sup>351</sup> See ROBBENOLT & STERNLIGHT, *supra* note 68, at 387; see also *supra* note 341 and accompanying text.

when conduct becomes misconduct in the practice of law. Thus, it is worth re-examining *Winston*, *Cottingham*, and *McCool* with these understandings in mind.

a. When might attorney conduct be prejudicial:  
*Winston* and heuristics

“[P]rejudicial” means “[t]ending to harm, injure, or impair; damaging or hurtful” or, alternatively, “[u]nfairly disadvantageous” or “inequitably detrimental.”<sup>352</sup> This Comment suggests that attorney conduct is prejudicial whenever it tends to harm, injure, impair, damage, cause hurt, or unfairly disadvantage another. However, prejudicial conduct does not exist or occur in a vacuum. Evaluating misconduct requires substance, which often involves the facts underlying an attorney’s misconduct, and may include situational influences that give rise to an attorney’s conduct. An attorney’s misjudgments of a situation or a client’s disposition are also at play.

Notwithstanding the potential dangers of judgment shortcuts, these “efficient” judgments help attorneys make decisions. Therefore, it is important to consider how cataloging previous experiences and making decisions from those cataloged or predicted outcomes can harm clients and lead to perceived attorney misconduct. For example, the attorney in *Winston* misjudged his decisions during jury selection.<sup>353</sup> According to the state post-conviction court, “the defense lawyer used his [peremptory challenges] to strike six men and one woman.”<sup>354</sup> However, the post-conviction counsel asserted that it “was not enough to support a claim of ineffective assistance, because it proved that the lawyer had a strategic reason for his actions.”<sup>355</sup> The strategic reason was to have an all-woman jury to favor the petitioner since the attorney thought “the female jurors would be more critical of the victim.”<sup>356</sup> Instead, this decision harmed his client because the state post-conviction court denied relief and “found that [not] striking the female jurors was ‘trial counsel’s strategy’ and ‘reasonable under the circumstances.’”<sup>357</sup> Though the petitioner’s allegations of prejudice were never fully proven, the attorney’s strategy did little to avoid conviction. The Seventh Circuit noted that “[c]alling the lawyer’s actions ‘strategic’ does not help” because well-established precedent “exists not only to protect the criminal defendant, but

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<sup>352</sup> *Prejudicial*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>353</sup> See *Winston v. Boatwright*, 649 F.3d 618, 623–24 (7th Cir. 2011).

<sup>354</sup> *Id.* at 623.

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 623–24.

<sup>357</sup> *Id.* at 624.

also to protect . . . society's interest in an unbiased system of justice."<sup>358</sup>

The attorney's alleged misconduct seemed to result from heuristics, which led the petitioner to believe that the attorney engaged in prejudicial conduct. In *Winston*, the petitioner's counsel claimed to have made a deliberate and systematic judgment to strike most of the male jurors. However, the attorney's judgment seemed to have also sprouted from his intuition.<sup>359</sup> Because female jurors were critical of the victims in other cases, he thought the female jurors he selected would also be critical of the petitioner's alleged victim. However, he miscalculated his judgment shortcut. Luckily for him, his conduct was not prejudicial because of a state court "error," which was left undisturbed.

The attorney's perceived error of misjudgment may have also resulted from hindsight bias, where "people predicting the outcome of an event after the fact are more certain that they would have predicted the actual outcome than are those who attempt to predict in foresight."<sup>360</sup> Though the petitioner's attorney made the decision in foresight, the attorney attempted to predict the outcome of the petitioner's case in hindsight by considering other cases involving female jurors. Thus, the petitioner's attorney evaluated the outcome of his decision with an eye toward foreseeability or likelihood, like the way a judge or disciplinary committee may evaluate prejudicial conduct. Judgment shortcuts and other predictive strategies hardly seem to constitute misconduct. Though the attorney's conduct may not have had a prejudicial purpose, the conduct appeared to have had a prejudicial effect on the outcome of the petitioner's case. The prejudicial effect of the attorney's conduct was never fully proven because of a mischaracterization of asserted claims. Consequently, the question becomes: Should attorneys be prohibited from using intuition and strategic methods to advocate for their clients? Certainly not. Otherwise, what would be left of the practice of law?

- b. When might attorneys be engaging in the administration of justice: *Cottingham* and situationism

"[D]ue administration of justice" means "[t]he proper functioning and integrity of a court or other tribunal and the proceedings before it in accordance with the rights guaranteed to the parties."<sup>361</sup> Facially, its scope is limited. As such, the "administration of justice" should be defined in terms of an attorney's professional life and conduct throughout judicial

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<sup>358</sup> *Id.* at 631.

<sup>359</sup> See ROBBENOLT & STERNLIGHT, *supra* note 68, at 67.

<sup>360</sup> *Id.* at 76.

<sup>361</sup> *Due Administration of Justice*, BLACK'S LAW DICTIONARY (11th ed. 2019).

proceedings. This is not to say that attorney misconduct cannot occur outside of judicial proceedings;<sup>362</sup> however, for purposes of interpreting paragraph (d), the administration of justice should be viewed in terms of an attorney's misconduct regarding its effect on the actual administration or adjudication of judicial proceedings.<sup>363</sup>

As previously discussed, situationism “bases attributions of causation and responsibility on unseen (though often visible) influences within [people] and around [them].”<sup>364</sup> Understanding that situational factors can influence our behavior, and thus our conduct, is “vitaly important because law is centrally concerned with making attributions.”<sup>365</sup> Further, situations that attorneys encounter in the practice of law (specifically related to the adjudication process) may help to explain why attorneys engage in misconduct. *Cottingham* provides a clear example of how conduct may be contrary to the proper administration of justice. The attorney in *Cottingham* meant to vindicate a past wrong initiated by his neighbors, which led to a violation of paragraph (d) based on his conduct during judicial proceedings—not based on conduct aimed at his neighbors. It was the repeated filings and conduct within the administration of justice that led to a finding of misconduct. As outlined in this Comment, an attorney's professional life and conduct within the scope of judicial proceedings, including honoring practice norms of a specific jurisdiction, characterize the administration of justice.

Further, *Cottingham* showed that objective considerations are not always a strong predictor of attorney misconduct. The attorney in *Cottingham* had been practicing law since 1979.<sup>366</sup> At the time *Cottingham* was decided, the attorney “had no record of prior discipline.”<sup>367</sup> How does a practicing attorney of almost forty years, with no prior record of disciplinary issues, end up suspended for eighteen months? Perhaps his neighbors should have never removed those laurel bushes. Though facetious, the removal of the laurel bushes is telling of his conduct and why he chose to embark on a five-year-long dispute with his neighbors.<sup>368</sup> Another important point is that he

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<sup>362</sup> See, e.g., Iowa Sup. Ct. Att’y Disciplinary Bd. v. Deremiah, 875 N.W.2d 728, 737 (Iowa 2016) (attorney domestic violence).

<sup>363</sup> Washington has already distilled this distinction. See cases cited *supra* note 179 and accompanying text.

<sup>364</sup> Benforado & Hanson, *supra* note 272, at 298.

<sup>365</sup> *Id.*

<sup>366</sup> *In re Cottingham*, 423 P.3d 818, 820 (Wash. 2018).

<sup>367</sup> *Id.*

<sup>368</sup> See *id.*

“represented himself pro se and [even] appeared as counsel for his wife.”<sup>369</sup> He also represented himself before the Washington State Bar Association.<sup>370</sup> Despite his forty-year stint absent misconduct, the removal of eight laurel bushes amounted to “two lawsuits, four judicial appeals, two administrative appeals, countless motions, years of delay, unnecessary and wasteful expenditure of judicial resources, injury to his neighbors, . . . nearly \$60,000 in sanctions,” and one violation of Washington Rule 8.4(d).<sup>371</sup>

Situationism suggests that people fall into bankruptcy “because of lost jobs, divorce, or unforeseen medical costs”<sup>372</sup> instead of proclivities of character; similarly, situationism may help to explain how the attorney in *Cottingham* fell into misconduct. Suggesting that the attorney engaged in misconduct because of character proclivities would be completely inaccurate, considering he had no outstanding issues prior to the court’s holding in 2018. Although the trial court held that the attorney “adversely possessed 292.3 square feet” of his neighbor’s property,<sup>373</sup> there may have been other personal attachments to the laurel bushes that caused him to pursue what appeared to be a vendetta for justice. This speculation may be true considering the attorney’s course of action and his apparent frustration, especially after the court condemned the land in favor of his neighbors. The attorney may have intended that land for his family, or he may have planned to use that land to supplement his retirement. Either way, the trial court’s holding was enough to cause the attorney to engage in misconduct.

Despite these observations, determining whether attorney conduct is misconduct, situational factors and external influences are not meant to undermine or lessen attorney misconduct but instead are meant to encourage a “totality of the circumstances” approach. Attorneys may not always make decisions based on objective considerations or even objective reasoning. Instead, attorneys may be led by situations that judges and disciplinary bodies often consider when assessing whether an attorney’s conduct was appropriate. Thus, attorney misconduct is more than just conduct. Just as the trial judge equitably favored the neighbors in *Cottingham*, extending equitable and deferential treatment to attorneys based on situational factors is appropriate and just.

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<sup>369</sup> *Id.*

<sup>370</sup> *See id.*

<sup>371</sup> *Id.* at 820, 825.

<sup>372</sup> Benforado & Hanson, *supra* note 272, at 299.

<sup>373</sup> *In re Cottingham*, 423 P.3d at 820.

- c. When might attorneys be engaged in conduct that is prejudicial to the administration of justice: *McCool*, decision-making, and ethics

Now that the contours of “prejudicial” and the “administration of justice” have been established, along with a basic understanding of heuristics and situationism, it is important to remember how these explanations help to form a supporting comment for Model Rule 8.4(d). For example, *Winston* shows that “prejudicial” conduct, absent a black letter rule and supporting comment,<sup>374</sup> can still be defined—if the claims fall within the Sixth Amendment context. This Comment asserts that in *Winston*, the attorney’s alleged “prejudicial” conduct was a result of heuristics, which most, if not all attorneys are “guilty” of invoking. Further, *Cottingham* provides an example of when an attorney is engaged in the “administration of justice,” absent a supporting comment, but with black letter rules that distinguish between the impact on persons versus the impact on the adjudication process.<sup>375</sup> Therefore, this Comment proposes that the attorney’s conduct within the administration of justice—filing copious motions and wasting judicial resources—amounted to misconduct partly because of situational influences. Finally, *McCool* illustrates that an attorney’s conduct can constitute conduct that is prejudicial to the administration of justice, absent supporting comments,<sup>376</sup> but in light of well-developed case law.<sup>377</sup> In sum, decision-making may involve “unbridled” emotions and pose other ethical dilemmas.

Decision-making, according to psychology, can involve several methods and influences. For example, “information gathering” is a vital part of decision-making but may not always lead to optimal conclusions because “people tend to seek out and pay attention to confirming information to the neglect of information that is contrary to their existing beliefs or preferences.”<sup>378</sup> Similarly, an attorney evaluating options is also influenced by the “substance of those options” and “the way those options are presented,”

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<sup>374</sup> Wisconsin does not have a black letter rule or a supporting comment. See WIS. SUP. CT. r. 20:8.4.

<sup>375</sup> Though Washington does not have a supporting comment, it does have two black letter rules that set out the distinctions of prejudicial conduct. See WASH. RULES OF PRO. CONDUCT r. 8.4.

<sup>376</sup> See LA. STATE BAR ASS’N. art. XVI § 8.4 (2018).

<sup>377</sup> See, e.g., *In re McCool*, 2015-0284 (La. 6/30/15); 172 So. 3d 1058; *In re O’Dwyer*, 2016-1848 (La. 3/15/17); 221 So. 3d 1; *In re Evans*, 2019-01461 (La. 12/10/19); 284 So. 3d 634; *In re Gill*, 2015-1373 (La. 10/23/15); 181 So. 3d 669.

<sup>378</sup> ROBBENOLT & STERNLIGHT, *supra* note 68, at 87.

not just by objective analyses.<sup>379</sup> Avoiding a decision could be just as bad.<sup>380</sup> Avoiding a decision may result from not properly structuring decisions that incorporate various alternatives.<sup>381</sup> Finally, as a practical matter, the practice of law is often done in groups, which in turn influences individual decision-making processes.<sup>382</sup> Despite these various decision-making methods and influences, emotions also contribute to framing decisions.<sup>383</sup> Acknowledging the role emotions play in the decision-making process may be difficult because emotions are often contrary to an objective analytical process; nevertheless, emotions should still be addressed.

Several facts from *McCool* may help explain why the respondent's conduct was "unyielding" and why the respondent's decision-making process led to disbarment. First, the respondent was friends with the person involved in the initial dispute.<sup>384</sup> Second, the dispute involved child custody issues.<sup>385</sup> Third, the respondent's friend accused her former husband of sexually abusing their two children.<sup>386</sup> Fourth, there were two proceedings pending in two separate states.<sup>387</sup> Consequently, the respondent's actions were aimed at two separate judges in two different states. If Judge Amacker had not stayed the proceedings in the intrafamily adoption proceedings and declined to exercise

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<sup>379</sup> *Id.* at 88.

<sup>380</sup> *See id.* at 100–02.

<sup>381</sup> *See id.* at 102. Robbennolt and Sternlight highlight an excerpt of a letter that Benjamin Franklin wrote to Joseph Priestley, which addressed some challenges involved in decision-making. *Id.* The letter highlighted the following:

When . . . difficult Cases occur, they are difficult, chiefly because while we have them under Consideration, all the Reasons pro and con are not present to the Mind at the same time; but sometimes one Set present themselves, and at other times another, the first being out of Sight. Hence the various Purposes or Inclinations that alternately prevail, and the Uncertainty that perplexes us.

. . . And, tho' the Weight of Reasons cannot be taken with the Precision of Algebraic Quantities, yet, when each is thus considered, separately and comparatively, and the whole view before me, I think I can judge better, and am less likely to make a rash step.

*Id.* (quoting Letter from Benjamin Franklin to Joseph Priestley (Sept. 19, 1772), <https://franklinpapers.org/framedVolumes.jsp>).

<sup>382</sup> *See* ROBBENNOLT & STERNLIGHT, *supra* note 68, at 108–11.

<sup>383</sup> *See id.* at 100 (discussing how people make themselves feel happy about a decision they made and how people make decisions to avoid feeling regret).

<sup>384</sup> *In re McCool*, 2015-0284, p. 1 (La. 6/30/15); 172 So. 3d 1058, 1060.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at 1–2, 172 So. 3d at 1060–61.



jurisdiction over the respondent's motion for emergency custody, would the respondent have taken the measures she took? It is hard to say. Though it is interesting to note that the court in *McCool* explicitly stated that the respondent was “*unhappy* with the various rulings made by Judge Gambrell and Judge Amacker.”<sup>388</sup> How did the Supreme Court of Louisiana know the respondent was “unhappy”? Was it because the respondent drafted an online petition entitled “Justice for [H] and [Z]”?<sup>389</sup> Or was it because the respondent specifically named Judge Gambrell and Judge Amacker in the online petition? Or was it because the respondent tweeted thirty separate messages about the case in one day?<sup>390</sup> Though it may be difficult to pinpoint the exact moment in which the court acknowledged that the respondent's unhappiness was the driving force behind her postings, the respondent's emotions—at least as recognized by the court—had spilled over into her decision-making process.

Similarly, it is difficult to know for certain whether the respondent anticipated that her fight for justice, that is, “Justice for [H] and [Z],”<sup>391</sup> would end in disbarment. Though emotions themselves may be difficult to manage or even articulate, they do “provide useful information about the decision-maker's values and priorities.”<sup>392</sup> As outlined in *McCool*, the respondent's sole focus was to help her friend. Though the wisdom of respondent's decision to support her friend is arguable, her emotions led her to make decisions that clearly communicated her priorities. But why does this matter? It matters because, although people may believe that their decisions are based on reasonable predictions or projections of how their emotions may cause them to act in the future, the duration or even the extent of their emotions is not as predictable.<sup>393</sup> Thus, people's decisions are based on inaccurate calculations, though reasonable under the circumstances. This is true because making decisions based on how one *might* feel often precedes *complete* outcome satisfaction.

Consequently, the respondent may have based her decision on future emotions, which in part, may have been influenced by her predictions about the judges' future actions. However, the respondent's predictions were wrong. Instead, “Judge Gambrell filed a complaint against [the] respondent with the ODC,”<sup>394</sup> which substantially frustrated the respondent's initial

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<sup>388</sup> *Id.* at 2, 172 So. 3d at 1061 (emphasis added).

<sup>389</sup> *Id.*

<sup>390</sup> *In re McCool*, 2015-0284, p. 6 (La. 6/30/15); 172 So. 3d 1058, 1063.

<sup>391</sup> *Id.* at 2, 172 So. 3d at 1061.

<sup>392</sup> ROBBENOLT & STERNLIGHT, *supra* note 68, at 97.

<sup>393</sup> *Id.* at 97–98.

<sup>394</sup> *In re McCool*, 2015-0284, p. 9 (La. 6/30/15); 172 So. 3d 1058, 1065.

decision. The respondent's decisions—coupled with emotion and her perceived ability to predict her emotional disposition throughout the proceedings—were made absent full information. The respondent did what any friend would do under the circumstances; yet the respondent's actions were inappropriate for an attorney who had practiced law for almost fifteen years.<sup>395</sup> Similarly, the judges' emotions may have been subject to external influences regarding the events that unfolded.<sup>396</sup>

Emotions are not inferior to other objective measures of decision-making. In fact, the opposite may be true. Emotions help attorneys make reasonable predictions about future emotional states, which lead them to make informed decisions. However, the intensity and duration of the respondent's, or even the judges', emotions could not have been anticipated. In fact, the entire series of events may not have been intended by the respondent. It seemed that the respondent's "unhappy" disposition may have been due to her perceptions of injustice. Nevertheless, as referenced in *McCool*, "a lawyer actively participating in a trial, particularly an *emotionally* charged [proceeding], is not merely a person and not even merely a lawyer."<sup>397</sup> Instead, an attorney "is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense."<sup>398</sup> Even the four dissenting Justices in *Sawyer* acknowledged that attorneys are confronted with emotionally taxing situations, and yet, the Justices did not discount the possibility that emotions can help attorneys make decisions to accurately forecast legal outcomes.<sup>399</sup>

The *McCool* court concluded that the respondent violated Louisiana Rule 8.4(d).<sup>400</sup> However, according to the respondent, the recommendations and conclusions of the presiding Justices undermined the profession and "ensure[d] that 'justice' w[ould] be whatever judges sa[id] it [was], regardless of the law, ethics, or all the facts and circumstances that would otherwise

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<sup>395</sup> *Nanine McCool*, BALLOTPEDIA, [https://ballotpedia.org/Nanine\\_McCool#:~:text=McCool%20received%20a%20B.A.%20in,Louisiana%20State%20University%20in%202000](https://ballotpedia.org/Nanine_McCool#:~:text=McCool%20received%20a%20B.A.%20in,Louisiana%20State%20University%20in%202000) (last visited Oct. 13, 2021).

<sup>396</sup> As it turned out, the respondent ran for election in the 22nd Judicial District, but "was defeated in the primary on November 4, 2014, [having] receiv[ed] 26.5 percent of the vote. She competed against [Judge] Dawn Amacker." *Id.* Further, *McCool* was decided on June 30, 2015, only seven months after the respondent's defeat in the primary. See *In re McCool*, 2015-0284 (La. 6/30/15); 172 So. 3d 1058.

<sup>397</sup> *Id.* at 28, 172 So. 3d at 1076 (emphasis added) (quoting *In re Sawyer*, 360 U.S. 622, 666, 668 (1959) (Frankfurter, J., dissenting)).

<sup>398</sup> *Id.* (quoting *In re Sawyer*, 360 U.S. at 666, 668 (Frankfurter, J., dissenting)).

<sup>399</sup> *In re Sawyer*, 360 U.S. at 666, 668.

<sup>400</sup> See *In re McCool*, 2015-0284, p. 31 (La. 6/30/15); 172 So. 3d 1058, 1078.

contradict them.”<sup>401</sup> Bounded ethicality and the adversarial system may have led the respondent to engage in conduct that was prejudicial to the administration of justice. Attorneys and judges alike have ethical blind spots that make them susceptible to sub-optimal conduct. Thus, attorneys are cautioned to take reasonable measures to ensure that their actions are ethical, especially when they doubt that their actions comport with the ABA Model Rules and other principles of legal ethics. Ultimately, while the respondent felt that the judges were not acting within reasonable ethical standards, the respondent found herself acting outside those same boundaries. Or, perhaps, the respondent felt that she needed to act with rigor and haste due to the pressures of an adversarial system. If the respondent did not win, then someone else would. Thus, it became a battle between protecting her friend’s children and standing up against those that would get in her way—including judges. The respondent made the following remark: “I have no interest in practicing law in a profession that demands absolute deference to an individual, rather than the law.”<sup>402</sup>

Ultimately, the respondent’s “social media blitz” resulted in conduct that was prejudicial to the administration of justice because it forced the judges to recuse themselves and seriously frustrated the court’s proceedings. Though disbarment was ordered against the respondent for violating Louisiana Rule 8.4(d), the case resulted in a plurality decision.<sup>403</sup> The court’s decision shows that there are several extenuating circumstances that must be considered to determine whether an attorney has violated Model Rule 8.4(d) and to determine whether sanctions are appropriate.

## 2. The Purpose of Professional Discipline

As it stands, what is good for the goose is good for the gander. What is good for an attorney, is likely good for society. Though written with reference to North Carolina Rule 8.4(b), which states, “[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,”<sup>404</sup>

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<sup>401</sup> Debra Cassens Weiss, ‘Social Media Blitz’ in Custody Case Yields Possible Suspension for Louisiana Lawyer, A.B.A. J.: LEGAL ETHICS (Feb. 17, 2015, 5:45 AM), [https://www.abajournal.com/news/article/social\\_media\\_blitz\\_in\\_custody\\_case\\_brings\\_possible\\_suspension\\_for\\_louisiana](https://www.abajournal.com/news/article/social_media_blitz_in_custody_case_brings_possible_suspension_for_louisiana).

<sup>402</sup> *Id.*

<sup>403</sup> Former Justice Jeannette Theriot Knoll wrote the majority opinion of the court, while Justice John L. Weimer concurred in part and dissented in part, former Justice Greg G. Guidry concurred in part and dissented in part, Justice Scott J. Crichton concurred, and finally, the late Justice James L. Cannella concurred in part and dissented in part. See *In re McCool*, 2015-0284, pp. 1, 41 (La. 6/30/15); 172 So. 3d 1058, 1060, 1084, 1089.

<sup>404</sup> 27 N.C. ADMIN. CODE 2.8.4 (2017).

Comment 3 reflects an impressive principle. According to Comment 3, “[t]he purpose of professional discipline for misconduct is not punishment, but to protect the public, the courts, and the legal profession.”<sup>405</sup> Further, Comment 3 notes that “[l]awyer discipline affects only the lawyer’s license to practice law.”<sup>406</sup> Therefore, the legal profession should continue to learn from attorney misconduct to improve the profession.

This Comment does not suggest that an attorney who fails to comport with Model Rule 8.4(d), should be provided an excuse through psychological theories. Instead, the point of this Comment is to highlight the impact that psychology can have on understanding attorney misconduct, and how psychology can help form a new supporting comment for paragraph (d). Further, this Comment is neither meant to help attorneys avoid professional discipline nor to enable attorneys to engage in misconduct. North Carolina’s supporting comments are practical in that they provide a standard, pose illustrations, and consider other aggravating circumstances;<sup>407</sup> however, North Carolina’s supporting comments do not include external influences that an attorney may confront in the administration of justice. Yet Comment 5 recognizes how an attorney’s conduct or certain behavior can impact other attorneys.<sup>408</sup> For example, when prejudicial conduct such as threatening, bullying, harassing, and humiliating actions are “directed to opposing counsel, such conduct tends to impede opposing counsel’s ability to represent his or her client effectively.”<sup>409</sup> Therefore, Comment 5 acknowledges that outside forces can have a negative impact on an attorney’s conduct, and in extreme cases, may compel a prejudiced attorney to act out of character and engage in similar misconduct. Comment 5 highlights the following:

Comments “by one lawyer tending to disparage the personality or performance of another . . . tend to reduce public trust and confidence in our courts and, in more extreme cases, directly interfere with the truth-finding function by distracting judges and juries from the serious business at hand.” *State v. Rivera*, 350 N.C. 285, 291, 514 S.E.2d 720, 723 (1999). See Rule 3.5, cmt. [10] and Rule 4.4, cmt. [2].<sup>410</sup>

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<sup>405</sup> 27 N.C. ADMIN. CODE 2.8.4 cmt. 3 (2017).

<sup>406</sup> *Id.*

<sup>407</sup> See 27 N.C. ADMIN. CODE 2.8.4 cmts. 4–5 (2017).

<sup>408</sup> See 27 N.C. ADMIN. CODE 2.8.4 cmt. 5 (2017).

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

Consequently, assessing attorney misconduct through external influences not only ensures just outcomes, but also serves other attorneys, the profession, and society.

Sanctions and attorney misconduct are often assessed with the public, the profession, and the courts in mind. This is true because, as seen in *McCool*, the Supreme Court of Louisiana not only parsed out when conduct is prejudicial to the administration of justice, but it also provided a framework to determine whether sanctions were appropriate. The court reasoned: “In determining a sanction, we are mindful disciplinary proceedings are not primarily to punish the lawyer, but rather are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct.”<sup>411</sup> Therefore, “[t]he discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances.”<sup>412</sup> In determining attorney sanctions, the court explained the following:

[I]n imposing a sanction after a finding of lawyer misconduct, this Court shall consider four factors:

- (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
- (2) whether the lawyer acted intentionally, knowingly, negligently;
- (3) the amount of actual or potential injury caused by the lawyer’s misconduct; and
- (4) the existence of any aggravating or mitigating factors.<sup>413</sup>

Just as North Carolina provides illustrations in its supporting comments and the Supreme Court of Louisiana determines attorney sanctions, a new supporting comment to Model Rule 8.4(d) should be composed of guiding principles and references to external influences that help identify attorney misconduct.

#### IV. A PROPOSED COMMENT IN SUPPORT OF MODEL RULE 8.4(d)

In the landmark case, *Mistretta v. United States*, one of the main goals of

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<sup>411</sup> *In re McCool*, 2015-0284, pp. 31–32 (La. 6/30/15); 172 So. 3d 1058, 1078.

<sup>412</sup> *Id.* at 32, 172 So. 3d at 1078.

<sup>413</sup> *Id.* at 32, 172 So. 3d at 1078–79.

the Sentencing Commission was “to reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.”<sup>414</sup> As a result, it is not novel to incorporate advancements in the knowledge of human behavior to better understand the justice system. Similarly, Part IV is meant to reflect human behavior as it relates to attorney conduct that is prejudicial to the administration of justice by proposing a new supporting comment to paragraph (d). Therefore, conceptualizing the implications of human behavior in the administration of justice and incorporating pragmatic approaches to underlying psychological considerations—to better support Model Rule 8.4(d)—is central to achieving a more comprehensive understanding of the practice of law. To make impactful strides, the new supporting comment to Model Rule 8.4(d) should be drafted to reflect human behavior as illustrated through situationism, heuristics, decision-making practices, and general concepts of legal ethics. Further, attorney discipline should not be aimed at punishing an attorney, but instead should be focused on preserving the principles that help attorneys, judges, and court personnel maintain the integrity of the profession.

The 2016 ABA Report, and the current Model Rules, make clear that though comments “use the term ‘should’ . . . [they] do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”<sup>415</sup> Additionally, “the Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule,” and is “intended as [a] guide[] to interpretation,” not a means of authority.<sup>416</sup> For some states,<sup>417</sup> supporting comments do more to determine whether a rule has been violated than the rule itself.

Model Rule 8.4(d)’s new supporting comment should read as follows:

*A violation of paragraph (d) is invoked when an attorney’s prejudicial conduct—which includes conduct that may be attributed to an attorney’s professional life or within the scope of judicial proceedings—results in substantial harm to the justice system and should be read in terms of its procedural effect in administering justice. Whether an attorney’s conduct warrants the imposition of professional discipline under*

<sup>414</sup> *Mistretta v. United States*, 488 U.S. 361, 374 (1989) (internal quotations omitted) (quoting 28 U.S.C. § 991(b)(1)(C)).

<sup>415</sup> Lynk, *supra* note 29, at 4; MODEL RULES OF PRO. CONDUCT Preamble & Scope ¶ 14 (AM. BAR ASS’N 2020).

<sup>416</sup> MODEL RULES OF PRO. CONDUCT Preamble & Scope ¶ 21 (AM. BAR ASS’N 2020) (explaining the Rules, not the Comments, are meant to be authoritative).

<sup>417</sup> See *supra* Section III.B.4.; see also *supra* note 227 and accompanying text.

*paragraph (d) should be determined by considering situational or decision-making influences, such as extraneous circumstances absent proclivities of character, inaccurate predictions present in the decision-making process, conduct resulting from perceived efficiencies, professional or public interests, and any mitigating factors as determined by the court. A showing of conduct that is prejudicial to the administration of justice must not only include conduct seriously inconsistent with a substantial purpose to serve anyone associated with the judicial process but must also include adverse situational or decision-making factors impacting an attorney's conduct, as weighed by the disciplinary body. Attorney discipline is not meant to punish but to protect the public, the courts, and the legal profession.*

This supporting comment preserves paragraph (d) by honoring its true purpose and provides paragraph (d) an opportunity to find new meaning.

#### V. CONCLUSION

May we dispel the myths of perfection and embrace faults with hopes that accountability within the profession will be more than pointing fingers, and instead, be a space where the legacy of our profession is lengthened by trustworthiness, honesty, and integrity. In 1936, Jerome Frank, author of *Law and the Modern Mind*, wrote:

The lay attitude towards lawyers is a compound of contradictions, a mingling of respect and derision. Although lawyers occupy leading positions in government and industry, although the public looks to them for guidance in meeting its most vital problems, yet concurrently it sneers at them as tricksters and quibblers.

Respect for the bar is not difficult to explain. Justice, the protection of life, the sanctity of property, the direction of social control—these fundamentals are the business of the law and of its ministers, the lawyers. Inevitably the importance of such functions invests the legal profession with dignity.

But coupled with a deference towards their function there is cynical disdain of the lawyers themselves.<sup>418</sup>

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<sup>418</sup> JEROME FRANK, *LAW AND THE MODERN MIND* 3 (1936).

What does this mean for the profession? Does it mean that attorneys should continue as they were because laypeople believe them all to be “incorrigibles?” Certainly not. Instead, the legal profession ought to reflect on the uncertainties within the practice of law, which may include various considerations and explanations set forth in human and social psychology.

Put simply, lawyers are humans too, and not just gilded widgets of the justice system. By “do[ing] away with legal mysteries”<sup>419</sup> and by acknowledging the basic attributions that laypeople confront every day, attorneys may better understand when their conduct is prejudicial to the administration of justice. Thus, the new supporting comment for Model Rule 8.4(d) should be read to incorporate the fallacies of human behavior because the practice of law is itself full of uncertainty and naturally incorporates essential parts of an attorney’s humanness.<sup>420</sup> As paragraph (d) finds new meaning, may the thoughts of former Justice Benjamin N. Cardozo be remembered:

The law “must be satisfied to test the validity of its conclusions by the logic of probabilities rather than the logic of certainty.” . . . “Magic words and incantations are as fatal to our science as they are to any other. . . . We seek to find peace of mind in the word, the formula, the ritual. The hope is an illusion. . . . Hardly is the ink dry upon our formula before the call of an unsuspected equity—the urge of a new group of facts, a new combination of events—bid us blur and blot and qualify and even, it may be, erase.” *“In our worship of certainty we must distinguish between the sound certainty and the sham, between what is gold and what is tinsel; and then, when certainty is attained, we must remember that it is not the only good; that we can buy it at too high a price; that there is danger in perpetual quiescence as well as in perpetual motion; and that a compromise must be found in a principle of growth.”*<sup>421</sup>

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<sup>419</sup> *Id.* at 236.

<sup>420</sup> *Id.*

<sup>421</sup> *Id.* at 236–37 (emphasis added) (footnotes omitted) (quoting BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 33 (1927)).