

ATTORNEY COMPETENCE AND PUBLIC CONFIDENCE:
EVOLVING STANDARDS FOR LAW SCHOOLS AND LICENSES

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ABSTRACT

Public confidence in the rule of law is key to safeguarding the fair administration of justice. This Article examines a common thread linking three rules that the American Bar Association (ABA) adopted to promote public confidence in the legal profession and to ensure attorneys are competent to protect the public's trust. From law school education to the continuing education of licensed lawyers, each rule focuses on the importance of legal education in the areas of diversity and inclusion in order to ensure attorney competence and public confidence in the rule of law. Starting with the 2016 adoption of Rule 8.4(g) in the ABA Model Rules for Professional Conduct, to the 2017 revision of the ABA's Model Rule for Minimum Continuing Legal Education, to the 2022 creation of Standard 303(c) in the ABA Standards and Rules governing the Program of Legal Education—the unifying purpose across the three changes is the belief that all lawyers should be required to take continuing legal education in diversity and inclusion because it is crucial to maintaining public confidence in the legal profession, the rule of law, and the fair administration of justice.

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TABLE OF CONTENTS

INTRODUCTION	56
I. DIVERSITY AND INCLUSION IN THE MODEL RULE FOR MCLE.....	59
A. <i>Context</i>	60
B. <i>Purpose</i>	62
C. <i>Delivery</i>	65
II. STATE IMPLEMENTATION OF DIVERSITY AND INCLUSION PROGRAMMING.....	67
A. <i>States that Mandate Diversity and Inclusion Programming</i>	69
B. <i>States that Permit Diversity and Inclusion Programming</i>	71
C. <i>The Remaining States</i>	73
i. <i>The Example of Wisconsin</i>	73
ii. <i>The Example of Tennessee</i>	76
D. <i>Lessons Learned from the States' Stated Purposes</i>	77
III. THE SIX-YEAR BRIDGE BETWEEN MODEL RULE 8.4(G) & STANDARD 303(C).....	81
A. <i>Beginning at the Beginning: Model Rule 1.1 and Model Rule 8.4(g)</i>	81
B. <i>Standard 303(c): Bias, Cross-Cultural Competency, and Racism</i>	91
CONCLUSION	94

INTRODUCTION

This Article examines a key component to maintaining public confidence in the rule of law and to ensuring that attorneys are competent to practice law: developing practical legal skills to navigate a multitude of issues interwoven with diversity and inclusion. The Article explores three interconnected rules that strive to protect attorney competence and public trust in the United States legal system by teaching lawyers to better understand diversity and inclusion in the law: (1) the American Bar Association (ABA) Model Rule for Minimum Continuing Legal Education (MCLE); (2) the ABA Model Rules for Professional Conduct (focusing on

Rule 8.4(g)); and (3) the ABA Standards and Rules governing the Program of Legal Education for ABA-accredited law schools (focusing on Standard 303(c)). The first two address the professional conduct and continuing education of attorneys, while the third addresses the education of law students.

The Article begins by discussing diversity and inclusion (DI) programming in continuing legal education (CLE).¹ All but four states require some form of CLE for lawyers to renew their law license.² Of the forty-six states that have MCLE, thirteen states³ require attorney education in the areas of DI⁴ as part of that mandate.⁵ In addition to the thirteen states that mandate DI program attendance to maintain one's license to practice law, an additional thirteen states expressly allow (but do not require) DI programming as part of the CLE an attorney may attend to maintain their license to practice law.⁶

1. *See Mandatory CLE*, AM. BAR ASS'N [hereinafter ABA CLE], <https://www.americanbar.org/events-cle/mcle/> [<https://perma.cc/3QG5-2324>]. The ABA website allows visitors to view each state's MCLE rule requirements by following the link to "MCLE Rules by Jurisdiction" and then selecting the jurisdiction name. *See id.*

2. The four jurisdictions that do not mandate minimum CLE renewal requirements are Massachusetts, Maryland, Michigan, and South Dakota. *See id.* Maryland is considering mandatory minimum CLE requirements that would include DI programming. *See* STUART R. BERGER & ZACHARY BABO, WORKGROUP TO STUDY MANDATORY CONTINUING LEGAL EDUCATION ("MCLE") IN MARYLAND: FINAL REPORT AND RECOMMENDATIONS 131 (2023) [hereinafter MD REPORT]. This research was presented at an invited symposium in August 2024 and the publication date is 2025. Readers should be mindful the landscape is quickly evolving in the areas of diversity and inclusion education, and states are actively updating their rules.

3. The thirteen states that require DI programming are California, Colorado, Illinois, Maine, Minnesota, Missouri, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *See* ABA CLE, *supra* note 1. Of these thirteen states, Rhode Island's requirement is the most recent. It adopted the requirement in April of 2024, and the requirement went into effect January 1, 2025. *See* R.I. SUP. CT. R. art. IV 1, 3.2(a) (revised 2024) (laying out R.I. MCLE requirements); *see also Rhode Island CLE Requirements and Courses*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/rhode-island/> [<https://perma.cc/G6Y8-3WA9>].

4. The ABA has defined DI programming as "CLE Programming that addresses diversity and inclusion in the legal system of all persons regardless of race, ethnicity, religion, national origin, gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias." MODEL RULE FOR MINIMUM CONTINUING LEGAL EDUC. § 1(C) (AM. BAR ASS'N 2017) [hereinafter ABA MODEL MCLE]. While the terminology of diversity, equity, and inclusion (DEI) has become more widely used in recent years, this Article focuses on the language used in the Model Rule of Professional Conduct (MRPC or Model Rules) to discuss these CLE requirements.

5. *See* ABA CLE, *supra* note 1.

6. The thirteen states with permissive, rather than mandatory, DI programming are Arizona, Hawaii, Indiana, Iowa, Kansas, Louisiana, Nebraska, Nevada, North Carolina, Ohio, Virginia, West Virginia, and Wyoming. *See id.* As an example, Iowa mandates that attorneys attend one hour of

The 2017 enactment of the new ABA Model Rule for MCLE—which required DI programming—is part of the story of why twenty-six states currently require or permit DI programming for lawyers’ continuing education. At the same time, it is not the whole story. The ABA’s Model Rule and the states’ individual rules did not evolve in a vacuum. Indeed, over the course of six years, the changes in CLE rules are only one leg of a three-legged stool.

The first change—or the first leg of the stool—occurred in 2016, when the ABA Model Rules for Professional Conduct (MRPC) enacted Rule 8.4(g) which states discrimination and bias in the practice of law constitutes attorney misconduct.⁷ The second leg was the stand-alone DI programming requirement of the new ABA Model Rule for MCLE in 2017—and its effect on the individual states. The third leg was the adoption of Standard 303(c) in the *ABA Standards and Rules of Procedure for Approval of Law Schools* in 2022, which shifted the educational focus to earlier in an attorney’s career by mandating DI programming during law school.⁸

This Article examines the intersection between these three changes. By comparing ABA Model Rule for MCLE with Model Rule 8.4(g) and ABA Standard 303(c), this Article joins a burgeoning conversation analyzing how the ABA’s evolving standards for law school accreditation and its model

programming in DI or in wellness every year in order to retain their license to practice law. *Iowa CLE Requirements and Courses*, AM. BAR ASS’N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/iowa/> [<https://perma.cc/AU7M-26VS>]. In this way, attorneys may choose DI programming or wellness; they are not required to attend DI programming if they have chosen to attend a wellness CLE instead of a DI CLE. *See id.*

7. Rule 8.4 of the ABA MRPC covers “Misconduct, *Maintaining the Integrity of The Profession*,” which states:

It is professional misconduct for a lawyer to: (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. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018).

8. *See* AM. BAR. ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2024–2025, at 20 (2024) (Rule 303(c) states, “[a] law school shall provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation.”); *see also* Michelle Weyenberg, *ABA Passes Revisions to Accreditation Standards*, NAT’L JURIST (Apr. 5, 2022, 10:00AM), <https://nationaljurist.com/national-jurist/news/aba-passes-revisions-to-accreditation-standards/> [perma.cc/9UM8-APS2].

rules for attorney licensure strive to protect attorney competency and public confidence in the legal profession.⁹

Understanding how the ABA envisions lawyer education—from educating students in law schools through the arc of a practicing attorney’s career—is critical to ensuring that attorney competency evolves as the world evolves. It is also critical to analyzing whether these changes do, in fact, further public confidence in the legal profession, and by extension, whether they help to preserve the rule of law.

I. DIVERSITY AND INCLUSION IN THE MODEL RULE FOR MCLE

Examining the development of DI programming in the twenty-six states that either require or permit DI programming for CLE credit is instructive when considered in light of changes the ABA enacted in 2017. That year, the ABA substantively reconfigured its Model Rule for MCLE requirements.¹⁰ One of the changes in the new Model Rule was to require DI programming.¹¹ Many—but not all—of the twenty-six states that have DI programming¹² took note of the ABA’s change and chose to either maintain their existing program, update their offerings, or enact new DI programming. This section provides context for understanding the Model Rule change before examining its purpose and how effectively that content

9. See, e.g., Rima Sirota, *Mandatory Anti-Bias CLE: A Serious Problem Deserves a More Meaningful Response*, 73 J. LEGAL EDUC. (forthcoming 2024) (manuscript at 1) (focusing on the central question of “whether there is any reason to believe that [anti-bias training] requirements have had or will have any more impact on bias in the law than general CLE requirements have had on lawyer competence.”). Sirota asserts that it would be a reasonable choice to end anti-bias training requirements in CLE’s, placing the resources toward other anti-bias initiatives; or, alternatively, Sirota suggests that the legal profession should dedicate resources and time to improving empirical studies. *Id.* (manuscript at 10).

10. Adopted in 2017, the ABA’s Model Rule for CLE requires the following:

(1) All lawyers with an active license to practice law in this Jurisdiction shall be required to earn an average of fifteen MCLE credit hours per year during the reporting period established in this Jurisdiction; (2) As part of the required Credit Hours referenced in Section 3(A)(1), lawyers must earn Credit Hours in each of the following area(a) Ethics and Professionalism Programming (an average of at least one Credit Hour per year); (b) Mental Health and Substance Use Disorders Programming (at least one Credit Hour every three years); and (c) Diversity and Inclusion Programming (at least one Credit Hour every three years).

See ABA MODEL MCLE, *supra* note 4, § 3(A).

11. See *id.*

12. See *supra* notes 3, 6 and accompanying text.

is delivered.

A. Context

In adopting its new Model Rule for MCLE in 2017, the ABA highlighted that several states already required or permitted DI programming as part of an attorney's regular MCLE credits—well before the ABA had adopted its new Model Rule. Indeed, this recognition was baked into the new Model Rule itself. In footnote 12 to the *ABA Report to the Resolution* accompanying the proposed change, the ABA described the status of DI programming in various states before the Model Rule change as follows:

California, Minnesota, and Oregon require specific Diversity and Inclusion Programming (which they refer to “elimination of bias” or “access to justice” programming), while states such as Hawaii, Kansas, Illinois, Maine, Nebraska, Washington, and West Virginia allow such programs to count towards their Ethics and Professionalism Programming requirements. This Model Rule encourages Jurisdictions to implement a stand-alone credit requirement, but Section 3, Comment 4 also recognizes that “Jurisdictions may choose not to impose a stand-alone requirement and, instead, accredit those specialty programs towards the Ethics and Professionalism Programming requirement.”¹³

Following this observation, footnote 12 also explained why, given that ten states already required or permitted DI programming, the Model Rule for MCLE stand-alone requirement was nonetheless necessary. From the ABA's perspective, endorsing DI programming as a stand-alone within the Model Rule for MCLE was necessary to ensure the maximum possible compliance of attorneys attending DI programming.¹⁴ Comparing it to the Mental Health and Substance Use Disorder credit that was also part of the

13. AM. BAR ASS'N, MODEL RULE FOR MINIMUM CONTINUING LEGAL EDUCATION: REPORT 8 n.12 (2017) [hereinafter ABA MODEL MCLE REPORT].

14. *Id.* “Section 3(A)(2) recognizes that Jurisdictions may choose to identify specific MCLE credits that each lawyer must earn, such as those addressing particular subject areas. This Model Rule recommends that every lawyer be required to take the specific credits outlined in Section 3(A)(2)(a), (b), and (c) [DI programming].” *Id.* at 6.

ABA's new Model Rule for MCLE, the ABA believed it was "extremely unlikely that one hundred percent of lawyers will elect to take Diversity and Inclusion Programming if it is not specifically required, which is why this Model Rule recommends a stand-alone requirement."¹⁵

This means that as early as 2017, the ABA was highlighting the importance of DI programming and observing that states should require it as a "stand-alone" CLE requirement to ensure the highest percentage of attorney participation.¹⁶

This 2017 change to the Model Rule for MCLE was the most significant change to that Rule since the ABA adopted the MCLE requirement in 1988. While the Model Rule underwent various amendments in the subsequent twenty-nine years, the changes in February 2017 replaced the old rule entirely.¹⁷ In its replacement Rule, the ABA highlighted that the new Model Rule for MCLE "builds on four decades of experience" in the states that have various forms of mandated MCLEs, and that the new Model Rule "recognizes effective ways to provide lawyers with the . . . programming that enables them to be competent [attorneys]."¹⁸

Through this language, the ABA focused its Rule change on attorney competence, explaining that MCLE requirements and the stand-alone DI programming "continues to play a crucial role in maintaining public confidence in the legal profession and the rule of law—promoting fair administration and justice."¹⁹ As to how "high quality, accessible, relevant, and affordable programming" enables attorneys to maintain competency, the ABA Rule highlights several aspects of attorney competence—for example, it underscores how such programming enables attorneys "to be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices."²⁰

The 2017 ABA Model Rule for MCLE invited states to reconsider their own MCLE requirements in light of the ABA's new Model Rule.²¹ While

15. *Id.* at 8 n.12.

16. *See id.*

17. *See id.* at 14.

18. *Id.*

19. *Id.*

20. *Id.*

21. Three jurisdictions did have a MCLE rule requiring study in the area of DI prior to the 2017 ABA Model Rule. *Id.* at 8 n.12. This included California, Minnesota, and Oregon. *See id.*

not the exclusive focus of the new Model Rule, DI programming was one of the significant changes in the 2017 makeover. The next section examines the purpose of the ABA's Model Rule for MCLE before examining individual states' decisions about whether to adopt a state-specific version of it.

B. Purpose

Although the ABA's stand-alone requirement is commonly referred to as "diversity and inclusion" programming, that umbrella term encompasses two different (but related) programs: those that address "diversity and inclusion in the legal system of all persons regardless of race, ethnicity, religion, national origin, gender, sexual orientation, gender identity, or disabilities," and those that focus on "the elimination of bias."²² Both programs fall within the definition of "diversity and inclusion programming," although the definition itself does not explain what constitutes "diversity" or what constitutes "inclusion."

Indeed, the Resolution that led to the adoption of the ABA's Model Rule for MCLE does not define the terms "diversity" or "inclusion" at all. Rather, "diversity and inclusion programming" is defined—somewhat circularly—as programming that addresses "diversity and inclusion in the legal system" or "the elimination of bias."²³ Either kind of programming satisfies the Model Rule's stand-alone DI programming requirement in Section 3(A)(2)(c), so long as an attorney participates in one credit hour of education every three years.²⁴

With those loose definitions in mind, another step to unpack the goals of the ABA's new Model Rule for MCLE is understanding the broader purpose of requiring CLE in the first place. Both the Report accompanying the 2017 Resolution to change the Model Rule for MCLE and the Model Rule itself are explicit about the purpose of CLE:²⁵

To maintain public confidence in the legal profession and the rule of law, and to promote the fair administration of

22. ABA MODEL MCLE, *supra* note 4, §1(C).

23. *Id.*

24. *Id.* § 3(A)(2)(c).

25. *See id.* § 2, 3; *see also* ABA MODEL MCLE REPORT, *supra* note 13, at 2–3 (stating the purpose of the MCLE).

justice, it is essential that lawyers be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices. In furtherance of this purpose, the ABA recommends this Model Rule for Minimum Continuing Legal Education (MCLE) and Comments, which replaces the prior Model Rule for MCLE and Comments adopted by the American Bar Association in 1988 and subsequently amended.²⁶

With this language, the ABA linked attorney competency with the maintenance of “public confidence in the legal profession and the rule of law” and the promotion of “the fair administration of justice.”²⁷ To maintain and improve attorney competency, the ABA explained, jurisdictions should provide “high quality, accessible, relevant, and affordable programming.”²⁸ Such programming enables attorneys “to be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices.”²⁹ Moreover, because programming is only effective if attorneys attend, it follows that the ABA envisioned mandated programming requirements to achieve these goals.

In updating the Model Rule for MCLE to require DI programming, the ABA also stressed the importance of making DI programming a “stand-alone” requirement.³⁰ Although some jurisdictions already permitted DI programming to satisfy their state’s CLE requirements,³¹ the ABA expressed concern that merely permitting DI programs as one way to satisfy a broader category of ethics would not ensure that “all lawyers receive minimal training” in this area.³²

26. See ABA MODEL MCLE REPORT, *supra* note 13, at 2–3.

27. See *id.*

28. See *id.*

29. See *id.* at 14.

30. See ABA MODEL MCLE, *supra* note 4, § 3 cmt. 4; see also ABA MODEL MCLE REPORT, *supra* note 13, at 8 n.12.

31. See ABA MODEL MCLE REPORT, *supra* note 13, at 8 n.12. Prior to the 2017 ABA Rule modification, “California, Minnesota, and Oregon [already] require[ed] specific Diversity and Inclusion Programming (which they refer[red] to as ‘elimination of bias’ or ‘access to justice’ programming).” *Id.* “Hawaii, Kansas, Illinois, Maine, Nebraska, Washington, and West Virginia allow[ed] such programs to count towards their Ethics and Professionalism Programming requirements.” *Id.*

32. See ABA MODEL MCLE, *supra* note 4, § 3 cmt. 4.

The Model Rule also explained that diversity and inclusion is one of “several topics that [is] so crucial to maintaining public confidence in the legal profession and the rule of law, and promoting the fair administration of justice, that all lawyers should be required to take CLE in [this] topic area[.]”³³ Therefore, “[a]ll jurisdictions are encouraged to promote the development [of DI programming] . . . in order to reach as many lawyers as possible.”³⁴ The Model Rule stresses this principle by asserting that all attorneys need to receive continuing DI education.³⁵

Although the ABA recommends DI programming as a stand-alone requirement, it is one of three critical areas of continuing legal education that the ABA recognizes—and thus, it is one of three equally weighted stand-alone requirements. Those three areas are: (1) Ethics and Professionalism; (2) Diversity and Inclusion; and (3) Mental Health and Substance Use Disorders.³⁶

The reason behind the ABA’s recommendation of stand-alone programming in these three areas is apparent: each impact distinct and critical aspects of practice. Education in these three areas correlates with attorney competence and an enhanced ability to serve clients, which in turn helps to maintain public confidence in the legal profession and the rule of law.

In explaining what those three areas include, both the Resolution to the Model Rule and Section 1(D) of the Model Rule explain that Ethics and Professionalism Programming addresses standards of a given jurisdiction’s rules of professional conduct as well as “the tenets of the legal profession by which a lawyer demonstrates civility, honesty, integrity, character, fairness, competence, ethical conduct, public service, and respect for the rule of law, the courts, clients, other lawyers, witnesses, and unrepresented

33. See ABA MODEL MCLE REPORT, *supra* note 13, at 2–3.

34. See ABA MODEL MCLE, *supra* note 4, § 3 cmt. 4. Despite the encouragement of a stand-alone requirement for DI programming, the ABA recognized, “[j]urisdictions may choose not to impose a stand-alone requirement and, instead, accredit those specialty programs towards the Ethics and Professionalism Programming requirement.” *Id.* However, this should not be construed as approval or encouragement for that option. See *id.*

35. See *id.* § 3 cmt. 4, 3(A)(1); ABA MODEL MCLE REPORT, *supra* note 13, at 8 (“This Model Rule recommends that all lawyers be required to take one credit [of DI programming] every three years.”).

36. See ABA MODEL MCLE REPORT, *supra* note 13, at 3–5 (Section III identifies key themes that this Model Rule addresses).

parties.”³⁷

In contrast to Ethics and Professionalism Programming, Mental Health and Substance Use Disorders Programming was envisioned as focusing “on the prevention, detection, and/or treatment of mental health disorders and/or substance use disorders.”³⁸ The ABA anticipated that such programs could address “topics including, but limited to, the prevalence and risks of mental health disorders (including depression and suicidality) and substance use disorders (including the hazardous use of alcohol, prescription drugs, and illegal drugs).”³⁹

Insofar as Diversity and Inclusion Programming is concerned, in addition to the definitions contained in the Model Rule and in the Resolution,⁴⁰ both the Resolution and the Model Rule explain that “[d]iversity and Inclusion Programming can be used to educate lawyers about implicit bias, the needs of specific diverse populations, and ways to increase diversity in the legal profession.”⁴¹

C. Delivery

A major question that arises from these three requirements is whether the delivery of the content in each area achieves its purpose. While each state that mandates CLE also controls what programs count for CLE credits, the ABA Model Rule for MCLE provides its own standards for program accreditation.⁴² Rather than certifying any program that simply intersects with the subject area, the Model Rule specifies that “[t]he program must have significant intellectual or practical content and be designed for a lawyer audience.”⁴³ Moreover, in keeping with the purpose of enacting the MCLE Rules, the Model Rule also emphasizes that the “primary objective” of the program must be “to increase the attendee’s professional competence and skills as a lawyer, and to improve the quality of legal services rendered to the public.”⁴⁴

37. ABA MODEL MCLE, *supra* note 4, § 1(D).

38. *Id.* § 1(J).

39. ABA MODEL MCLE REPORT, *supra* note 13, at 7.

40. *See* ABA MODEL MCLE, *supra* note 4, § 1(C).

41. *See* ABA MODEL MCLE REPORT, *supra* note 13, at 8.

42. *See* ABA MODEL MCLE, *supra* note 4, § 4.

43. *Id.*

44. *Id.*

In an effort to provide specific insight into the kind of programming envisioned, the ABA issued concurrent Comments to Section 3. These indicate aspirational goals for what specific courses should be offered. The Comments acknowledge the increased “burden on accrediting agencies, CLE sponsors, and individual lawyers,” and the additional work required “to ensure the availability of programs.”⁴⁵ To aid with implementation of the recommendation in jurisdictions, the ABA noted that “numerous bar associations, including the American Bar Association, have diversity committees that can offer, or assist in offering, Diversity and Inclusion Programming.”⁴⁶ Whether the aid from state bar and ABA diversity committees cures the strain, “it is believed that those burdens are outweighed by the benefit of having all lawyers regularly receive education in those specific areas.”⁴⁷

Critiques abound as to whether required continuing legal education programming achieves its intended purpose, and colleagues in this Symposium have analyzed the most current arguments thoroughly and thoughtfully.⁴⁸ Concerns related to DI programming share many of the same overarching themes and concerns related to other mandatory CLE programming—from costs and time to the disproportional effect on attorneys who may have fewer resources and less assistance to attend such programming (including small firms and nonprofit organizations).⁴⁹

Additional concerns relate to the subject matter of DI itself, especially in light of the polarization of the subject nationally.⁵⁰ Other scholars have

45. *Id.* § 3 cmt. 3.

46. *Id.* § 3 cmt. 4; *see also* *CLE Marketplace*, AM. BAR ASS'N, <https://www.americanbar.org/cle-marketplace/> [<https://perma.cc/HYK2-6NF6>] (click on CLE by Topics, load more, and then diversity and inclusion) (ABA's catalogue of available on-demand CLE courses).

47. ABA MODEL MCLE, *supra* note 4, § 3 cmt. 3.

48. *See* Bruce Green & Ellen Murphy, *Certifying and Regulating New Legal Providers: Should Courts Replicate Lawyer Regulation – Or Do Better?* 76 WASH. U. J.L. & POL'Y 45, 69; Leslie Levin, *Rethinking Mandatory State Bars*, 76 WASH. U. J.L. & POL'Y 123, 126; Marsha Griggs, *The Serendipity of the NextGen Exam*, 77 WASH. U. J.L. & POL'Y (forthcoming 2025); *see also* Sirota, *supra* note 9 (manuscript at 1).

49. *See* MD REPORT, *supra* note 2, at 2; *see also* *CLE Marketplace*, *supra* note 46 (for example, one sixty-minute course costs \$130).

50. *See, e.g.*, Dennis A. Rendleman, *ABA Model Rule 8.4(g): Then and Now*, THE PUB. LAW. (Jan. 20, 2023), https://www.americanbar.org/groups/government_public/publications/public-lawyer/2023-winter/aba-model-rule-8-4-g-then-now/ [<https://perma.cc/8T6H-JGDA>] (noting that “[t]his polarization, what the late Supreme Court Justice Antonin Scalia called a Kulturkampf, has expanded exponentially since 2016” and that it “is perhaps too facile to say that the origin of this opposition precisely demonstrates the need for the rule.”).

observed that the lecture-based delivery of most DI programming, or what is sometimes called “anti-bias training,” is “among the least effective” ways that anti-bias education could be administered.⁵¹ Or worse yet, scholars have also observed that anti-bias training may sometimes “exacerbate biases” rather than help to alleviate them.⁵²

Despite these significant downsides, a value of adopting mandatory DI programming is that it conveys the message that the jurisdiction cares about promoting DI, eliminating bias, and is trying to encourage education and improvement in these areas—however fraught.⁵³ Such complex considerations lead to the question of how states are choosing to implement—or not to implement—DI programming in light of the Model Rule. The next section explores this question.

II. STATE IMPLEMENTATION OF DIVERSITY AND INCLUSION PROGRAMMING

Because the 2017 ABA Model Rule for MCLE is just that—a model rule—individual states must decide whether to adopt the Model Rule as their own, ignore it, or modify it to fit the state’s needs.⁵⁴ While many states have adopted DI programming requirements similar to those in the ABA Model Rule,⁵⁵ other states have added language that permits—but does not require—DI programming as a source of CLE credit.⁵⁶

The map below provides a visual depiction of the states’ positions on DI programming. Of the forty-six states with mandatory CLE requirements,⁵⁷ thirteen have enacted a requirement for attorney education in the area of DI programming as a part of that mandate.⁵⁸ These states

51. See, e.g., Sirota, *supra* note 9 (manuscript at 9); see also Katerina Bezrukova et al., *Reviewing Diversity Training: Where We Have Been and Where We Should Go*, 11 ACAD. MGMT. LEARNING EDUC. 207, 222 (2012); Frank Dobbin & Alexandra Kalev, *Why Doesn’t Diversity Training Work?*, 10 ANTHROPOLOGY NOW 48, 50 (2018).

52. See, e.g., Sirota, *supra* note 9 (manuscript at 9) (collecting and analyzing several studies).

53. *Id.*

54. See *ABA MCLE Model Rule Implementation Resources*, AM. BAR ASS’N, <https://www.americanbar.org/events-cle/mcle/modelrule/> [<https://perma.cc/J724-9Q9Y>].

55. Recall that California, Oregon, and Minnesota already had mandatory DI programming CLE requirements as of the time of the ABA Model Rule adoption. See *supra* note 21 and accompanying text.

56. See *supra* note 6 and accompanying text.

57. The four states that do not require some level of MCLE are Maryland, Massachusetts, Michigan, and South Dakota. See MD REPORT, *supra* note 2.

58. See *supra* notes 1–4 and accompanying text.

(shown in green) include California, Colorado, Illinois, Maine, Minnesota, Missouri, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.⁵⁹ Rhode Island changed its MCLE requirement to include DI programming as recently as May 2024, to become effective July 2025, so it is depicted in green with a black line.⁶⁰

Thirteen additional states (as shown in yellow) expressly permit—but do not require—DI programming to count toward MCLE requirements attorneys must take.⁶¹ Those jurisdictions include Arizona, Hawaii, Indiana, Iowa, Kansas, Louisiana, Nebraska, Nevada, North Carolina, Ohio, Virginia, West Virginia, and Wyoming.⁶²

The remaining twenty states have neither adopted mandatory DI programming as a part of their MCLE requirement nor enumerated DI programming as a possibility for receiving CLE credit in another required area.⁶³ These states (shown in red) include Alaska, Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Kentucky, Mississippi, Montana, New Hampshire, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and Wisconsin.⁶⁴ Of these twenty states, three of them—Florida, Tennessee, and Wisconsin—had significant disagreements about whether DI programming should be required within their MCLE rule, so they are shown in red with black lines.⁶⁵ Two of these states, Tennessee and Wisconsin, are discussed within the state-specific section that follows the general ABA section.

59. See *supra* note 3 and accompanying text.

60. *Id.*

61. See *supra* note 6 and accompanying text.

62. See *id.*

63. See ABA CLE, *supra* note 1.

64. See *id.*

65. See *infra* Sections II.C1–2; see also Sirota, *supra* note 9 (manuscript at 9) (discussing in detail what transpired in Florida).

DI stand-alone Rule.⁶⁸

In addition to different naming conventions, the three states also have different requirements from the Model Rule vis-à-vis compliance timing. For example, whereas the Model Rule recommends one credit hour of DI programming every year, Oregon requires attorneys to report their compliance with the requirement every other reporting period,⁶⁹ California requires compliance every three years,⁷⁰ and Minnesota requires a minimum of two elimination of bias credit hours as part of the total credit hours that attorneys must report every three years.⁷¹

Another interesting aspect of these long-time adopters is how they have chosen to implement the requirement. Given the critique that passive lectures addressing elimination of bias are not necessarily the most effective,⁷² California's requirement that elimination of bias trainings must include actionable steps that participants take to recognize and address their own implicit biases may represent one of the more successful attempts to require meaningful—rather than “check-the-box”—training.⁷³

The remaining states that mandate CLE DI programming are Colorado, Illinois, Maine, Missouri, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington.⁷⁴ Illinois, Maine, and Washington already had permissive DI programming prior to the adoption of the ABA Model Rule for MCLE,⁷⁵ and have since updated their MCLE requirements to make DI programming mandatory.⁷⁶ Each jurisdiction requiring DI

68. *See id.* at 8–9.

69. *See* MINIMUM CONTINUING LEGAL EDUC. RULES & REGUL. r. 1.2, 3.2(e), 5.14(d) (OR. STATE BAR ASS'N 2023). Oregon initially required this programming every reporting period but adjusted this requirement through a compromise decision issued by the Oregon Supreme Court. *See, e.g.*, Janine Robben, *Elimination of Bias: Membership to Consider MCLE Rule Change on EOB Credit Enforcement*, OR. STATE BAR BULL. (Feb./Mar. 2006), <https://www.osbar.org/publications/bulletin/06febmar/eob.html> [https://perma.cc/647Z-NCTD] (providing background information); *see also* Sirota, *supra* note 9 (manuscript at 4).

70. *See* CAL. RULES OF PROF. CONDUCT r. 2.71, 2.72(C)(2)(a)(ii) (CAL. STATE BAR 2023).

71. RULES OF THE BOARD OF CONTINUING LEGAL EDUC. r. 9(B)(2), 9(C) (STATE OF MINN. 2024).

72. *See* Sirota, *supra* note 9 (manuscript at 7–9) (discussing studies analyzing the effects of DI programming).

73. CAL. BUS. & PROF. CODE § 6070.5 (2024); *see* Memorandum from J. Esther Kim et al. on the Outcome of Public Comment on Proposed MCLE Elimination of Bias Rules Changes and Upcoming Board of Trustees Agenda Item to the Council on Access and Fairness (COAF), at 3 (Aug. 28, 2020).

74. *See supra* note 3 and accompanying text.

75. *See* ABA MODEL MCLE REPORT, *supra* note 13, 8 n.12.

76. *See generally* Illinois CLE Requirements and Courses, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/illinois/> [https://perma.cc/X8J7-YVH8];

programming either follows or improves upon the ABA Model Rule requirements.⁷⁷

B. States that Permit Diversity and Inclusion Programming

While only three states had mandatory DI programming prior to ABA's adoption of its Model Rule in 2017, another seven states had permissive DI programming prior to 2017.⁷⁸ These seven states were Hawaii, Kansas, Illinois, Maine, Nebraska, Washington, and West Virginia.⁷⁹ Just as the three states that mandated it before the 2017 Model Rule have grown to thirteen, the number of states that permit DI programming has also grown to thirteen. As discussed above, Illinois, Maine, and Washington altered their MCLE rules to require mandatory DI programming⁸⁰ while Hawaii, Kansas, Nebraska, and West Virginia maintained permissive DI programming following the ABA Rule change.⁸¹ Thus, following the 2017 ABA Rule change, nine *additional* states now encourage DI programming by making it permissive in their MCLE rules.⁸² These states are Arizona, Indiana, Iowa, Louisiana, Nevada, North Carolina, Ohio, Virginia, and Wyoming.⁸³

Maine CLE Requirements and Courses, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/maine/> [<https://perma.cc/HSY4-6CM4>]; *Washington CLE Requirements and Courses*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/washington/> [<https://perma.cc/5QDA-AJV9>].

77. See generally ABA CLE, *supra* note 1; see also ABA MODEL MCLE, *supra* note 4, § 3; Sirota, *supra* note 9 (manuscript at 5).

78. See ABA MODEL MCLE REPORT, *supra* note 13, at 8 n.12.

79. See *id.*

80. See generally *Illinois CLE Requirements and Courses*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/illinois/> [<https://perma.cc/X8J7-YVH8>]; *Maine CLE Requirements and Courses*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/maine/> [<https://perma.cc/HSY4-6CM4>]; *Washington CLE Requirements and Courses*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/washington/> [<https://perma.cc/5QDA-AJV9>].

81. See generally *Hawaii CLE Requirements and Courses*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/hawaii/> [<https://perma.cc/9CE4-7NLJ>]; *Kansas CLE Requirements and Courses*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/kansas/> [<https://perma.cc/B33G-C2FE>]; *Nebraska CLE Requirements and Courses*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/nebraska/> [<https://perma.cc/LS8E-SV23>]; *West Virginia CLE Requirements and Courses*, AM. BAR ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/west-virginia/> [<https://perma.cc/PB7F-BMFA>].

82. See generally ABA CLE, *supra* note 1.

83. See generally *supra* note 6 and accompanying text.

While the 2017 Model Rule may have instigated some of these mandatory and permissive adoptions, scholars have reflected on the wider political climate that has been unfolding since 2017 and its possible influence on states' adoption decisions.⁸⁴ For example, consider that as far back as 1975, when Minnesota and Iowa were the first states to originally require MCLE, one of the reasons they adopted MCLE requirements was “to counteract negative publicity caused by the involvement of lawyers in the Nixon Watergate scandal.”⁸⁵

In light of this historical context and the negative associations with the lawyers involved in Watergate, consider the more recent political climate that has unfolded through the 2016, 2020, and 2024 presidential elections as well as the global pandemic that descended in 2020 and the public outcry that erupted in the wake of the 2020 murder of George Floyd. As Professor Rima Sirota observed:

George Floyd's 2020 murder and growing public awareness of similar events sharpened the debate over mandatory lawyer [anti-bias training] and added a sense of urgency on both sides. In Colorado, for example, bar leaders' successful [anti-bias training] campaign was motivated in substantial part by “the tragic deaths of George Floyd, Breonna Taylor, Rayshard Brooks, and . . . countless other Black Americans.”⁸⁶

It is impossible to know, following the 2017 Model Rule change, whether the ten additional states that chose to make DI programming mandatory—or the nine additional states that chose to make it permissive—did so because of the 2017 Model Rule change, the evolving political context, both, or for other reasons.

84. Christine Hernández & Annie Martínez, *Leading the Way to a Diversity-Focused CLE Requirement*, COLO. LAW., Dec. 2020, at 4–5.

85. ABA MODEL MCLE REPORT, *supra* note 13, at 3; *see id.* at 3 n.6 (citing Rocio T. Aliaga, *Framing the Debate on Mandatory Continuing Legal Education (MCLE): The District of Columbia Bar's Consideration of MCLE*, 8 GEO. J. LEGAL ETHICS 1145, 1150 (1995) (analyzing “The Purpose of MCLE”)); *see also* Hannah Hayes, *Professional Ethics Compliance: From Watergate to Today*, WOMEN IN THE PROFESSION, A.B.A., July 2015 (discussing shift in legal ethical standards following Nixon's Watergate Scandal in 1973).

86. Sirota, *supra* note 9 (manuscript at 5); for additional information surrounding the murder of George Floyd and subsequent shifts in DI trainings, *see* ABA MODEL MCLE REPORT, *supra* note 13, at 8 n.12 (analyzing § 4 of the MCLE Qualifying Program Standards); Rendelman, *supra* note 50.

Even though there may be no definitive answer, recognizing the context in which states choose whether or not to adopt their own versions of the Model Rule is an important consideration in the analysis. To that end, the next section examines some of the discourse that has emerged in states that tried, but failed, to adopt a version of the Model Rule.

C. *The Remaining States*

After excluding the four states that have no mandatory CLE (whether DI or otherwise), as well as the twenty-six states that have either mandatory or permissive DI programming, twenty states remain.⁸⁷ Those twenty states require CLE programming but do not expressly recognize DI programming as a component.⁸⁸ While these states do not expressly exclude it, neither do they highlight its importance by making DI programming mandatory or permissive as the kind of programming that counts for CLE reporting.

These states are examples that tried, but failed, to implement DI programming. Tennessee⁸⁹ and Wisconsin⁹⁰ are examples of states whose proposed amendments were ultimately defeated. Examining what happened in those states provides windows into the kinds of discussions that could lead to success or failure in other states.⁹¹

i. The Example of Wisconsin

The story of the proposed amendment for DI in Wisconsin begins and ends with the Wisconsin Supreme Court.

87. See generally ABA CLE, *supra* note 1; see also *supra* notes 2–3, 6 and accompanying text.

88. See ABA CLE, *supra* note 1; see also *supra* notes 3, 6 and accompanying text.

89. See Stephen Elliott, *Nashville Bar Request for Diversity Training Requirement Denied*, NASHVILLE POST (Apr. 19, 2022), https://www.nashvillepost.com/business/legal/nashville-bar-request-for-diversity-training-requirement-denied/article_da6a8806-bf5b-11ec-b983-8bb938485b83.html [https://perma.cc/J58V-C2AK].

90. See *In re Diversity, Equity, Inclusion, & Access Training for Continuing Legal Educ.*, No. 22-01, 2023 Wisc. LEXIS 167, at *3 (Wisc. July 13, 2023) [hereinafter *In re Diversity*].

91. In addition to Tennessee and Wisconsin, the third state that is identified on the map as red with black lines is Florida. This map depiction signals that the DI programming discussion in Florida was particularly charged. In contrast to Tennessee and Wisconsin, where proposed amendments to adopt DI programming ultimately failed, Florida had enacted DI programming, but the state supreme court dismantled that programming on its own initiative. See Sirota, *supra* note 9 (manuscript at 5) (discussing in detail what transpired in Florida).

On March 22, 2022, the State Bar of Wisconsin, through its then-President, filed a rule petition on behalf of the State Bar's Board of Governors.⁹² The petition asked the Wisconsin Supreme Court “to amend Wisconsin Supreme Court Rule 31.02(5) & (6) to create a new specialty continuing legal education (CLE) credit that would be called the ‘Diversity, Equity, Inclusion, and Access’ (DEIA) credit.”⁹³ According to the petition, the proposed rule largely tracked the language in ABA Model Rule for MCLE.⁹⁴ The proposed courses would be designed to address:

the subject of diversity, equity, inclusion, access, or recognition of bias, which includes topics addressing diversity and inclusion in the legal system of all persons regardless of age, race, ethnicity, religion, national origin, gender, sexual orientation, gender identity, or disabilities and topics designed to educate attorneys on the recognition and reduction of bias.⁹⁵

Under the proposal, “lawyers could use DEIA CLE credit-hours to fulfill their 30 hours of required CLE credits under Supreme Court Rule 31.02 (1).”⁹⁶

On July 13, 2023, without holding a hearing, the Wisconsin Supreme Court denied the petition.⁹⁷ The fractured positions among the justices were captured in a forceful concurrence and dissent.⁹⁸

Writing in dissent, Justice Rebecca Frank Dallet described her dismay with how the process unfolded:

The Court dismisses this rule petition without so much as a hearing, implying that it lacks even “arguable merit.” *See IOP.IV.A.* (stating that the court should hold a public hearing on a rule petition when it has “arguable merit.”). But twenty-one states, including our neighboring states, either require DEIA training or allow those trainings to

92. *See In re Diversity* at *1.

93. *Id.*

94. *See id.*; *see also id.* at *72–73 (Dallet, J., dissenting).

95. *In re Diversity* at *1.

96. *Id.*

97. *Id.* at *3.

98. *See id.* at *1–2.

count toward CLE requirements. And the American Bar Association (ABA) similarly recommends that states require one credit hour of such training every three years. Collectively, these states and the ABA, like our State Bar, recognize that DEIA training "is vital for attorneys to gain knowledge of individual and cultural differences and turn this knowledge into usable skills for serving a diverse community, thereby improving the quality of legal services." In short, the arguable merit of this rule petition is obvious and I would follow our internal operating procedures and hold a hearing. Accordingly, I respectfully dissent.⁹⁹

In observing that Wisconsin's neighboring states either require or allow DI programming to count toward CLE requirements, the dissent noted that Illinois and Minnesota require attorneys to obtain DEIA training, that Iowa has made such training optional, and that Michigan has no CLE requirements at all.¹⁰⁰ A footnote in the dissent also notes that the dissenter chose "not to respond to the substance of the concurrence, which is hostile, divisive, and disrespectful."¹⁰¹ The footnote continued by saying that this "political rhetoric has no place in an order of the court" and that the court "should instead engage earnestly with opposing perspectives by granting a hearing on the petition, which is what our ordinary process requires."¹⁰²

The concurrence that the dissent is referencing spanned more than forty pages.¹⁰³ As Justice Rebecca Grassl Bradley explained in her concurrence, she chose to write separately in order to "highlight how DEIA courses damage human dignity, undermine equality, and violate the law."¹⁰⁴ In support of her position, Justice Grassl Bradley explained that the permissive DEIA programming that the petition sought was but one step on the path to mandatory DEIA programming; that DEIA programming stifles, rather than

99. *Id.* at *72–73 (Dallet, J., dissenting).

100. *Id.* at *72 n.1.

101. *Id.* at *73 n.4.

102. *Id.*

103. *Id.* at *29–72 (Bradley, J., concurring).

104. *Id.* at *30 (internal citations omitted). For more on this, see also, Taylor Telford & Julian Mark, *Does DEI Training Discriminate Against White People? Courts Will Decide.*, WASH. POST (Aug. 9, 2024), <https://www.washingtonpost.com/business/2024/08/09/dei-training-court-cases-discrimination/>.

lifts, dissenting voices; and that “the buzzwords ‘diversity, equity, inclusion, and access’ (DEIA) represent a smoke screen for a divisive political agenda that perniciously reduces people to racial categories and strips them of their unique individuality.”¹⁰⁵

While the concurrence articulates a wide range of arguments expressing concern for the DI programming, the dissent takes primary issue with the process of the denial—asserting that the Court should have heard argument on the petition rather than denying it without a hearing.¹⁰⁶

In contrast to the experience in Wisconsin, the experience in Tennessee provides a different window into the process of attempting to adopt DI programming.

ii. The Example of Tennessee

Whereas the Wisconsin experience unfolded after the Wisconsin Supreme Court discussed the petition at a “closed administrative conference,” resulting in a cursory denial (accompanied by a heated concurrence and dissent), the Tennessee Supreme Court took a different tack. Rather than a flat denial, the Tennessee Supreme Court acknowledged the importance of diversity and the limitations imposed by bias in the legal system before declining to make DI programming mandatory.¹⁰⁷

The timing of the Tennessee process was also significant. The Nashville Bar Association filed the petition with the Tennessee Supreme Court on

105. *In re Diversity* at *30. For example, the concurrence notes the following:

[I]f the Bar's end game were simply CLE credit, the petition would be easily dismissed as virtue signaling given the liberality with which the Board of Bar Examiners (BBE) already awards credit for such courses. But the Bar ultimately seeks to mandate DEIA training, impose group think on attorneys, and condition bar admission and continuing licensure on subscribing to an illiberal political ideology. Real diversity means welcoming dissenting voices, not coercing them into an echo chamber using the force of the State.

Id. The concurrence also expresses concern that the petition “originated in partisan controversy and is a well-documented step toward mandatory DEIA CLE,” that the “Bar's one-and-a-half page memorandum in support of its petition presents a pretextual and underdeveloped argument for attorney freedom of choice but all along the Bar has planned to seek compulsory DEIA CLE”; and that the “proposed rule raises serious moral and constitutional concerns.” *Id.* at *30, 51 (internal citations omitted).

106. *Id.* at *73 (Dallet, J, dissenting).

107. See *In re Amend. of Rule 21, Rules of the Tenn. Sup. Ct.*, No. ADM2020-01159, 2022 Tenn. LEXIS 135, at *1 (Tenn. Apr. 14, 2022) [hereinafter *In re Amend. of Rule 21*].

August 28, 2020.¹⁰⁸ This came after several local bar associations made statements in the wake of the murder of George Floyd and Breonna Taylor and the ensuing turmoil that unfolded.¹⁰⁹ Before the Court denied the petition on April 14, 2022, the Court reviewed the fifty-seven total comments it had received (both in favor and against) on the petition.¹¹⁰ Even though it denied the petition, the Court recognized “the importance of ensuring that our judicial system and the legal profession are free from bias or prejudice,” and it encouraged “related continuing legal education.”¹¹¹

D. Lessons Learned from the States’ Stated Purposes

Among the forty-six states that require some form of CLE for attorneys to retain their license to practice law, many of those states identify an explicit purpose for their CLE requirements,¹¹² which usually focuses on attorney competence.¹¹³ In this way, many individual states share a similar

108. *Id.* at *1.

109. Press Release, Nashville Bar Ass’n, Nashville Bar Ass’n Statement on Death of George Floyd, Racial Injustice (June 4, 2020) (on file with author).

110. *In re Amend. of Rule 21* at *1.

111. *Id.*

112. See generally ABA CLE, *supra* note 1 (using drop down menu for each state, links to each state bar website containing MCLE rules). Not all states have an explicit purpose for imposing mandatory CLE’s. *Id.* The purpose statements were gathered if available in each jurisdiction’s MCLE rule, regulations, or if located on the website of a jurisdiction’s highest court. Those that could not be located include Alabama, Arizona, Arkansas, Indiana (stated purposes for Judicial CLE requirements, but not for attorneys), Illinois, Kentucky, Mississippi, Missouri, Nevada, Oklahoma, Tennessee, and Virginia. See, e.g., *Rules for Admission to the Bar and the Discipline of Attorneys*, IND. RULES OF CT. (Oct. 15, 2024), https://www.in.gov/courts/rules/ad_dis/index.html#_Toc139466489 [perma.cc/R3JQ-CLZJ] (the only stated purpose of the MCLE is as follows: “The purpose of this Rule is to establish minimum continuing legal education requirements for each Attorney admitted to the Bar of the State of Indiana. The minimum continuing education requirements for an Attorney who serves as a Judge in the State of Indiana shall be governed by the provisions of Admission and Discipline Rule 28.”).

113. Nineteen jurisdictions include attorney competency within their stated purpose. See generally ABA CLE, *supra* note 1 (using drop down menu for each state, links to each state bar website containing MCLE rules). These jurisdictions include Alaska, Colorado, Delaware, Georgia (proposed), Hawaii (in comments), Iowa, Kansas, Louisiana, Maine, Montana, Nebraska, New Jersey, North Carolina, Oregon, Pennsylvania, South Carolina, Utah, Washington, and Wyoming. *Id.* Though Maryland does not require mandatory CLE’s, they created a workgroup who extensively studied the pros and cons of mandatory CLE requirements. See MD REPORT, *supra* note 2. The “[w]orkgroup spent much of its early meetings weighing reasons in favor of a CLE mandate—such as the value of ensuring *all attorneys* engage with continuing education and the impact this would have on competency and public perception of the legal profession, the aligning of Maryland with the overwhelming majority of states that already require some baseline CLE participation, and the potential beneficial impact of MCLE on professional development and competency.” *Id.*

purpose with the ABA Model Rule for MCLE¹¹⁴ and with Comment [8] to Rule 1.1 within the ABA Model Rules for Professional Conduct.¹¹⁵ In addition to this shared purpose, many states also identify another shared goal with the ABA Model Rule for MCLE, which is maintaining and improving public confidence in the legal profession and enhancing client service.¹¹⁶

In recognizing the shared goal of helping attorneys maintain competency, the states that require mandatory CLE show awareness that law is not static. This awareness is visible through the purpose of adapting to the ever-changing nature of the law, and it is also visible through the fifteen jurisdictions that state it in their MCLE objectives or comments.¹¹⁷

114. See *supra* Section I.A.

115. See MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR. ASS'N 2024) (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”). See *infra* Section III.A; see also ME. BAR RULES r. 5 (2004):

To maintain public confidence in the legal profession and the rule of law, and to promote the fair administration of justice, attorneys must be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices. The purpose of minimum continuing legal education (MCLE) requirements is to promote and sustain competence and professionalism and to ensure that attorneys remain current on the law, law practice management, and technology in our rapidly changing society.

116. See *supra* Section I.A. Twenty-one states have identified enhancing public confidence and/or improving client service as one of the objectives for their mandatory MCLE program. See generally ABA CLE, *supra* note 1 (using drop down menu for each state, links to each state bar website containing MCLE rules). Jurisdictions such as Oregon particularly emphasize this purpose. *Oregon CLE Requirements and Courses*, AM. BAR. ASS'N, <https://www.americanbar.org/events-cle/mcle/jurisdiction/oregon/> [<https://perma.cc/76LA-CBW2>]. Oregon even goes a step further, tying their MCLE purpose to increasing access to justice, an idea frequently discussed in diversity and inclusion programming. See MINIMUM CONTINUING LEGAL EDUC. RULES & REGULS., Purpose (OR. STATE BAR 2024). Oregon has written into its MCLE requirement the purpose of achieving education in equity to “effectively and fully serve all Oregon communities.” *Id.* This objective includes “increasing access to justice.” *Id.*

117. Fifteen jurisdictions specifically invoke this language. See generally ABA CLE, *supra* note 1 (using drop down menu for each state, links to each state bar website containing MCLE rules). These include Alaska (comments), California, Colorado, Connecticut, Hawaii (comments), Idaho, Iowa, Maine, Montana, New Jersey, North Carolina, Oregon, Pennsylvania, South Carolina, and Texas. *Id.* The ABA’s purpose statement alludes to this through their emphasis on competency in current practice and skills, but these jurisdictions state outright that there is a need continue to learn since the law and society are not static. See *supra* Section I.A; see, e.g., *Continuing Legal Education Overview and Requirements*, COLO. SUP. CT., <https://coloradosupremecourt.com/Current%20Lawyers/Cle.asp> [<https://perma.cc/769L-HMGY>] (“The purpose of mandatory continuing legal education requirements is to ensure that every lawyer, LLP and judge in Colorado pursues a plan of continuing legal education and professional

These jurisdictions highlight the need for attorneys to stay “abreast of changes to the law” in order to maintain competency.¹¹⁸ States emphasize the fast pace of legal developments “in a rapidly changing society,”¹¹⁹ where the law is “constantly evolving,”¹²⁰ becoming “more complex,”¹²¹ and changing “with increasing frequency.”¹²²

The emphasis on keeping abreast of changes to the law to maintain competency is a direct link between Comment [8] to Rule 1.1 within the ABA Model Rules of Professional Conduct and the ABA Model Rule for MCLE. The shared emphasis makes sense given the cross-over emphasis on competency and the state supreme courts’ jurisdiction over rules governing professional conduct and mandatory CLE.

An example of this cross-over function is reflected in North Carolina’s mandatory MCLE Rule, whose purpose is to assist “lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve.”¹²³ While this purpose is specific to North Carolina, it is also representative of other states’ expressed purposes for requiring MCLE.¹²⁴ North Carolina’s Rules of Professional Conduct require that “lawyers adhere to important ethical standards, including that of rendering competent legal services in the representation of their clients.”¹²⁵ North Carolina’s mandatory MCLE Rule

development throughout their career in order to promote competence and professionalism and to remain current on the law in our rapidly changing society.”).

118. *Compare Commission on Continuing Legal Education*, IOWA JUD. BRANCH, <https://www.iowacourts.gov/opr/about-opr/commission-on-continuing-legal-education> [https://perma.cc/MRY8-CVR6] (“This requirement helps ensure that lawyers and judges keep abreast of the latest legal developments.”) with MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (AM. BAR ASS’N 2024) (“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”).

119. A “Rapidly Changing Society” is mentioned in the MCLE purpose statement of Colorado, Maine, North Carolina, and Texas. *See generally* ABA CLE, *supra* note 1.

120. 27 N.C. ADMIN. CODE 01D .1501 (2023) [hereinafter NC MCLE Purpose] (discussing the Scope, Purpose, and Definitions of North Carolina State Bar’s CLE requirements); *see Minimum Continuing Legal Education: Frequently Asked Questions*, STATE OF CONN. JUD. BRANCH, https://www.jud.ct.gov/mcle/MCLE_FAQs.htm#:~:text=The%20MCLE%20requirement%20will%20ensure,and%20fulfill%20their%20professional%20responsibilities [https://perma.cc/GV3T-YYG7].

121. S.C. APP. CT. R. 408.

122. *Id.*

123. *See* NC MCLE Purpose, *supra* note 120.

124. *See generally* ABA CLE, *supra* note 1; *see also supra* note 113 and accompanying text.

125. *See* NC MCLE Purpose, *supra* note 120.

expands on this cross-over with the rules of professional conduct, focusing on continued education on legal and societal changes as a requisite condition for attorney competency and ethical behavior.¹²⁶

As it pertains to competency, the purpose of North Carolina's MCLE requirement is that "[a]t a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, laws and legal principles are also in transition . . . and are increasing in complexity. One cannot render competent legal services without continuous education and training."¹²⁷

As it pertains to attorney behavior, the Rule focuses on continuous education as a means for achieving ethical behavior by referencing the necessity of such education.¹²⁸ Specifically, the governing rules note that "[t]he data accumulated in the discipline program of the North Carolina State Bar argue persuasively for the establishment of a formal program for continuing and intensive training in professional responsibility and legal ethics. It is in response to such considerations that the North Carolina State Bar has adopted these MCLE requirements."¹²⁹

As if the connection were not direct enough, the purpose statement for North Carolina's MCLE program goes so far as to declare that the goals of the MCLE program and the goals of its Rules of Professional Conduct are one and the same: "The purpose of these minimum continuing legal education requirements is the same as the purpose of the Revised Rules of Professional Conduct themselves—to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards".¹³⁰

Through this shared language, North Carolina's MCLE program and North Carolina's Rules of Professional Conduct share the explicit goals of attorney competency and ethical behavior. These cross-over purposes provide further support for the position that MCLE programs must require DI programming. As so, many jurisdictions acknowledge that law and society are constantly evolving and reacting to one another.¹³¹ The understanding of what it means to be a diverse, equitable, and inclusive

126. *Id.*

127. *Id.*

128. *See id.*

129. *See id.*

130. *Id.*

131. *See id.*

society is likewise evolving.¹³² Attorneys must continue their education to keep pace with that evolution in order to maintain competency.¹³³

Such goals are especially true as the discussion evolves from the longstanding understanding of competency in Model Rule of Professional Conduct 1.1 to two more recent adoptions: Model Rule 8.4(g) and ABA Standard 303(c).

III. THE SIX-YEAR BRIDGE BETWEEN MODEL RULE 8.4(G) & STANDARD 303(C)

So far, this Article has explained how the need to maintain attorney competence through ever-evolving changes in the law has driven the discussion of CLE requirements—as well as the ABA’s Model Rule for MCLE adding a DI requirement. This Article’s examination of DI programming in attorney education would be incomplete without examining the Model Rule that the ABA enacted one year before enacting its model MCLE requirements, as well as the Standard that the ABA enacted six years later.

The bridge between Model Rule 8.4(g) and Standard 303(c) is the same shared pillars as those guiding DI programming: attorney competence and public confidence in the legal profession. This section explores how those pillars operate within Model Rule 8.4(g) and Standard 303(c), and how the states have enacted (or chose not to enact) their own versions of Rule 8.4(g).

A. Beginning at the Beginning: Model Rule 1.1 and Model Rule 8.4(g)

The heart of ensuring the rule of law is attorney competence. Without competent attorneys, the public would lose faith in the legal system, and if the public loses faith in the legal system, the rule of law will begin to erode. For these reasons, after various definitions are delineated in Model Rule of Professional Conduct 1.0, the Model Rules begin, in earnest, with one of the pillars of the Model Rules of Professional Conduct: Competence.

As Model Rule 1.1 explains: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for

132. *See id.*

133. *Id.*

the representation.”¹³⁴ While the eight Comments to Model Rule 1.1 explore different aspects of attorney competence, such as the meanings of “legal knowledge and skill,” or how competence operates vis-à-vis retaining and contracting with other attorneys, the Comments to Model Rule 1.1 conclude by discussing the topic of “Maintaining Competence.”¹³⁵ Within this section, in order to “maintain the requisite knowledge and skill,” Comment [8] specifies that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”¹³⁶ In other words, at the heart of one of the pillars of the Model Rules of Professional Conduct is a direct connection between maintaining competence and engaging in continuing study and education—including complying with CLE requirements in the jurisdictions where the lawyer practices.

Competence includes staying “abreast of changes in the law and its practice.”¹³⁷ These changes in the law and its practice include changes in statutes and judicial decisions. More than just statutory rule changes or newly decided cases, however, changes in the law include *the way* law is practiced. Just as attorneys learned to conduct Zoom hearings in the heart of the pandemic, so must attorneys stay abreast of other changes in the practice of the law.

One way to contextualize the meaning of Comment [8] to Model Rule 1.1 is to read it in conjunction with Model Rule 8.4, which is concerned with “Maintaining the Integrity of The Professional.”¹³⁸ Model Rule 8.4 specifies five situations that constitute professional misconduct for attorneys—its newest subpart is 8.4(g), which focuses on specific misconduct related to the practice of law.¹³⁹ In the Comments to Model Rule 8.4, the ABA expanded on the rule change, highlighting in Comment [3] that “[d]iscrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal professional and the legal system.”¹⁴⁰ In

134. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 2024).

135. *Id.* at cmt. 8.

136. *Id.*

137. *Id.*

138. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS’N 2024).

139. *Id.*

140. *Id.* at cmt. 3:

this and other ways, the thread of maintaining public confidence in the legal profession runs through both Model of Professional Conduct Rule 8.4(g) and Model Rule for MCLE.

More specifically, Model Rule 8.4(g) specifies that it is professional misconduct for an attorney to:

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. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.¹⁴¹

While not precluding “legitimate advice or advocacy” that is consistent with the Rules, and while not limiting the ability of a lawyer to decline or terminate representation under Model Rule 1.16, the heart of Model Rule 8.4(g) underscores that attorneys cannot harass or discriminate in conduct related to the practice of law.¹⁴²

The map below is a visual depiction of the states’ positions relative to the prohibited conduct covered in Model Rule 8.4(g). In analyzing the map, it is important to note that not a single jurisdiction has adopted Model Rule 8.4(g) in its entirety.¹⁴³

Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

141. *Id.*

142. *Id.*

143. Rendleman, *supra* note 50 (observing that “it was never expected—and history has demonstrated—that no state has adopted the ABA Model Rules of Professional Conduct *in toto* or uniformly individually, but the degree of uniformity that has been achieved has made professional responsibility law a more comprehensible national practice.”).

Map 2: States' Positions on Prohibited Conduct of 8.4(g)



In the map above: Thirty states have adopted a version of Model Rule 8.4(g) (as shown in green), nine states include the prohibition against discrimination in comments to their state rules of professional conduct (as shown in yellow), and the remaining eleven states have neither adopted a version of Model Rule 8.4(g) nor chosen to expressly prohibit discrimination in the comments to their state rules of professional conduct (as shown in red).

In addition to noting how each state's rules compare to Model Rule 8.4(g), it is also significant to observe that twenty-four states and the District of Columbia had already included some form of anti-bias regulations in their state rules prior to the ABA's enactment of Model Rule 8.4(g).¹⁴⁴

144. See Nellie Q. Barnard & Christopher Heredia, *Efforts Toward Improved Diversity and Inclusion Through the Anti-Bias Rule*, FED. BAR ASS'N (Dec. 15, 2021), <https://www.fedbar.org/blog/efforts-toward-improved-diversity-and-inclusion-through-the-anti-bias-rule/> [<https://perma.cc/JZY5-BQEV>]; see also CPR Pol'y Implementation Comm., *Variations of the ABA Model Rules of Professional Conduct: Rule 8.4: Misconduct*, AM. BAR ASS'N (June 2024) (displaying state variations of Rule 8.4 in a table format). In addition, as an example of a state specific rule enacted long prior to Model Rule 8.4(g), compare the 2016 enactment of ABA Model Rule 8.4(g) with the 1985

Moreover, Model Rule 8.4(g) itself is derived from similar language that has existed since 1988 in the prior version of Comment [3] to Model Rule 8.4(d),¹⁴⁵ and the Model Code of Judicial Conduct has a similar provision since 2011.¹⁴⁶

The move from the prior version of Comment [3] to a newly created subsection (g) could be seen as a reaffirmation of the importance of what had—until the revision—been relegated to a Comment. This move also

version of Indiana Rule of Professional Conduct 8.4(g). MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N. 2024);

It is professional misconduct for a lawyer to . . . engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

IND. RULES OF PRO. CONDUCT r. 8.4(g) (IND. STATE BAR ASS'N 1985); *see also* Rendleman, *supra* note 50 (discussing Indiana's rule).

145. MODEL RULES OF PRO. CONDUCT r. 8.4(d) cmt. 3 (AM. BAR ASS'N 1998):

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). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

146. *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 3 n.8 (2020) (citing MODEL CODE OF JUD. CONDUCT r. 2.3 (2011)):

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

enabled the ABA to provide additional guidance in the revised version of Comment [3], which now modifies 8.4(g) (instead of 8.4(d)), and states:

Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).¹⁴⁷

Expressly comparing the prior version of Comment [3] to Model Rule 8.4(d) to the newly enacted Model Rule 8.4(g) helps to clarify what the ABA strove to do through this change. Indeed, the ABA's goals became even more apparent through the public debate that ensued after the adoption of Model Rule 8.4(g), as the ABA issued Formal Opinion 493 in response to that debate.¹⁴⁸

Formal Opinion 493 was published in 2020—four years after the enactment of Model Rule 8.4(g).¹⁴⁹ The ABA's stated purpose in issuing Formal Opinion 493 was to provide “guidance on the Rule's purpose, scope and application.”¹⁵⁰ Among the aspects of Rule 8.4(g) that it attempted to clarify was the standard by which conduct should be judged. Formal Opinion 493 clarifies that the “Model Rules are rules of reason, and whether conduct violates Rule 8.4(g) must necessarily be judged, in context, from an objectively reasonable perspective.”¹⁵¹

Combined with underscoring that the prohibited conduct in Model Rule 8.4(g) would be viewed from an “objectively reasonable” standard, the ABA also strove to explain what was similar to—and what was different from—the language that had existed in the previous version of Comment

147. MODEL RULES OF PRO. CONDUCT r. 8.4(d) cmt. 3 (AM. BAR ASS'N 2024).

148. Barnard & Heredia, *supra* note 144.

149. *Id.*

150. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 2 (2020).

151. *Id.* at 1.

[3] to Model Rule 8.4(d).¹⁵² As far as what was similar, Formal Opinion 493 pointed out that the prior version of Comment [3] and the newly enacted Model Rule 8.4(g) both “explained that some of the same behavior subjected a lawyer to discipline when the behavior was prejudicial to the administration of justice.”¹⁵³

What is different, according to Formal Opinion 493, is that Model Rule 8.4(g) does not simply affirm what had been in the prior version of Comment [3], rather Model Rule 8.4(g) goes beyond it. Formal Opinion 493 acknowledges that Model Rule 8.4(g) is “more expansive, also forbidding harassment and discrimination in practice-related settings beyond the courtroom and in contexts that may not be connected to a specific client representation.”¹⁵⁴ According to the ABA, “[s]uch breadth was necessitated by evidence that sexual harassment, in particular, occurs outside of court-related and representational situations—for example, in non-litigation matters or at law firm social events or bar association functions.”¹⁵⁵

Formal Opinion 493 also explained specific ways that Model Rule 8.4(g) can “reach” to “prohibit[] conduct that is not covered by other law, such as federal prohibitions on discrimination and harassment in the workplace.”¹⁵⁶ For example, Formal Opinion 493 explains that “a single instance of a lawyer making a derogatory sexual comment directed towards another individual in connection with the practice of law would likely not be severe or pervasive enough to violate Title VII, but would violate Rule 8.4(g)”¹⁵⁷—although the “isolated nature of the conduct . . . could be a mitigating factor in the disciplinary process.”¹⁵⁸ So long as the conduct is connected to the practice of law, the Rule “impose[s] a higher standard on lawyers than that expected of the general public.”¹⁵⁹ In explaining the justification for imposing a higher standard on lawyers in their practice of law than is expected of the general public, Formal Opinion 493 underscores

152. *See id.* at 3.

153. *Id.*

154. *Id.* at 4.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 4 n.14 (“[wh]ether discipline is imposed for any particular violation of Rule 8.4(g) will depend on a variety of factors, including, for example: (1) severity of the violation; (2) prior record of discipline or lack thereof; (3) level of cooperation with disciplinary counsel; (4) character or reputation; and (5) whether or not remorse is expressed”).

159. *Id.* at 5.

the link to public confidence and trust by stating that “[h]arassment and discrimination damage the public’s confidence in the legal system and its trust in the profession.”¹⁶⁰

While the clarifications in Formal Opinion 493 were intended to ease any lingering reticence by states to adopt Model Rule 8.4(g) in its entirety, in some ways Formal Opinion 493 did the opposite.¹⁶¹ For example, if states were concerned that the Rule is too far-reaching and effectively extends beyond conduct related to the practice of law, the examples in the Formal Opinion may not have abated those concerns.¹⁶² Nonetheless, the Rule 8.4(g) itself, as well as the Report to the House of Delegates that accompanied Revised Resolution 109 (which is the resolution that created Model Rule 8.4(g)), clarified that Model Rule 8.4(g) is limited to “conduct related to the practice of law” and does not extend to a lawyer’s non-legal pursuits.¹⁶³

These kinds of critiques are part of the ongoing debate that has taken place before and after the adoption of Model Rule 8.4(g). In addition to concerns that the Rule reaches beyond the practice of law, other critiques focus on the First Amendment rights of lawyers.¹⁶⁴ For example, legal scholars such as Professors Bruce Green and Rebecca Roiphe have asserted that Model Rule 8.4(g) “will chill valuable speech.”¹⁶⁵ In *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, Green and Roiphe agree that “lawyers trained in argument and persuasion should work to inspire the profession to become a more civil and inclusive group,” but they highlight that there is nonetheless “no evidence that restrictions on speech like Model Rule 8.4(g) achieve their ambitions.”¹⁶⁶ They point out that the Rule “may deter racist and sexist lawyers from openly speaking their minds” but is ineffective if such views “take a more insidious form.”¹⁶⁷ They conclude by noting that “it is appropriate for disciplinary rules to address harmful conduct” but that “the better response to most hateful speech is

160. *Id.*

161. See Bruce A. Green & Rebecca Roiphe, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, 50 HOFSTRA L. REV. 543, 544 (2022).

162. *Id.*

163. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2024).

164. See *In re Abrams*, 488 P.3d 1043, 1048 (Colo. 2021).

165. See Green & Roiphe, *supra* note 161, at 571.

166. *Id.* at 578.

167. *Id.*

twenty-six states adopted mandatory or permissive DI programming for attorney's MCLE—the ABA moved its focus from the CLE of practicing attorneys to the formal education of law students. As the ABA's focus widened to include the education of law students in DI programming, so did the ABA's accreditation standards to include that language and intent in the promulgation of Standard 303(c). The next section sets forth some of the basic contours of this evolving discussion.

B. Standard 303(c): Bias, Cross-Cultural Competency, and Racism

The third leg of the three-legged stool came in February 2022 as part of the changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools*. In addition to providing Model Rules for maintaining professional conduct for lawyers after they have obtained their license to practice, one of the ABA's other functions is serving as an accrediting agency for United States law schools. Because all fifty states recognize graduation from an ABA-approved law school as constituting eligibility to sit for the bar examination, attending an ABA-approved law school ensures a law graduate the ability to sit for a bar exam in any state.¹⁶⁹ Conversely, while some states allow graduation from a non-ABA-approved law school to sit for their state's bar exam, graduates must carefully check the legal education requirements in the jurisdiction in which they intend to seek admission to the bar to ensure their eligibility.¹⁷⁰

Because graduating from an ABA-approved law school ensures eligibility in all states, obtaining and maintaining ABA accreditation is mission critical for law school viability. In February 2022, the ABA House of Delegates concurred in the action previously taken by the ABA Council of the Section of Legal Education and Admissions to the Bar to enact a rule change in Standard 303.¹⁷¹ This change included a new Standard—Standard 303(c)—which requires law schools to “provide education to law students

169. *Frequently Asked Questions*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/#:~:text=All%20states%20recognize%20graduation%20from%20an%20ABAapproved,they%20intend%20to%20seek%20admission%20in%20the [<https://perma.cc/ALQ7-XBTP>].

170. *Id.*

171. See Kimberly E. O'Leary, *ABA Standard 303(c) Causes Buzz in DEI Programming in Law Schools*, COOLEY L. SCH., <https://info.cooley.edu/blog/aba-standard-303c-causing-a-buzz-in-diversity-equity-inclusion-programming-in-law-schools> [<https://perma.cc/3CZR-FKGR>].

on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education; and (2) at least once more before graduation.”¹⁷²

Standard 303(c) sets forth a new component of the Program of Legal Education that law schools must follow to retain their ABA accreditation. Since its adoption, law schools have focused on how to implement Standard 303(c) to remain compliant with the ABA Standards. While not prescribing the “form or content of the education on bias, cross-cultural competency and racism required by Standard 303(c),”¹⁷³ law schools “must demonstrate that all law students are required to participate in a substantial activity designed to reinforce the skill of cultural competency and their obligation as future lawyers to work to eliminate racism in the legal profession.”¹⁷⁴

Similarly, while the ABA Standards do not prescribe the “form or content of the education on bias, cross-cultural competency and racism,”¹⁷⁵ law schools have worked to develop two kinds of programming to comply with the Standards: one to take place at the start of the program of legal education, and a second to take place at some point before graduation.

In addition, even though the first programming can happen during orientation and can be anything from a brief lecture to a graded class, the interpretation explaining the second type of programming—the one that must take place “at least once again before graduation”—has more specificity.¹⁷⁶ According to Interpretation 303-7, for the second type of programming under Standard 303(c), law schools must demonstrate that “all law students are required to participate in a substantial activity designed to reinforce the skill of cultural competency and their obligation as future lawyers to work to eliminate racism in the legal profession.”¹⁷⁷ What the “substantial activity” looks like is open for interpretation, and law schools have implemented everything from lectures to credited classes.

Whatever kind of programming a law school develops, it must comply with Standard 303(c) and, for all practical purposes, the first step must take place during orientation and the second step must take place before the end of a student’s first year. This is because the Standard specifies that “[f]or

172. AM. BAR. ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2024–2025, at Standard 303 (2024).

173. *Id.* (describing Interpretation 303-8).

174. *Id.* (describing Interpretation 303-7).

175. *Id.*

176. *Id.*

177. *Id.* (describing Interpretation 303-7).

students engaged in law clinics or field placements, the second educational occasion will take place before, concurrently with, or as part of their enrollment in clinical or field placement courses.”¹⁷⁸ In practice, since many students take summer field placements during their first summer, law schools must offer such programming before the end of a student’s first year or concurrently with summer field placements or clinics.¹⁷⁹

Because the ABA’s House of Delegates adopted Standard 303(c) in February 2022, with implementation expected by no later than the 2023–2024 academic year, law schools moved swiftly to develop programming to comply with Standard 303(c).¹⁸⁰ In developing their programming, law schools focused on two interpretations to Standard 303 that specifically guided their implementation. First, Interpretation 303-6 provided more guidance about the meaning of cross-cultural competency, explaining that:

With respect to 303(a)(1), the importance of cross-cultural competency to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced.¹⁸¹

While Interpretation 303-6 provided guidance about what cross-cultural competency means and why it is important, Interpretation 303-7 explained:

While law schools need not add a required upper-division course to satisfy this requirement, law schools must demonstrate that all law students are required to participate in a substantial activity designed to reinforce the skill of

178. *Id.*

179. See Louis D. Bilionis & Neil W. Hamilton, *Revised ABA Standards 303 (b) and (c) and the Formation of a Lawyer’s Professional Identity, Part 3: Cross-Cultural Competency, Equal Access, and the Elimination of Bias, Discrimination, and Racism*, NALP (Nov. 2022), <https://www.nalp.org/revised-aba-standards-part-3#:~:text=At%20the%20heart%20of%20Section%20303%20%28c%29%20is,discrimination%2C%20and%20racism%20in%20the%20law.%E2%80%9D%20%28Interpretation%20303-6.%29.> [https://perma.cc/4FP2-AV4U].

180. See, e.g., *ABA Standard 303: Curriculum (c)*, UNIV. AT BUFFALO SCH. OF L., <https://www.law.buffalo.edu/beyond/aba303c.html> [https://perma.cc/LRX6-YB33].

181. See AM. BAR. ASS’N, *ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2024–2025*, at Standard 303 (2024) (describing Interpretation 303-6).

cultural competency and their obligation as future lawyers to work to eliminate racism in the legal profession.¹⁸²

In this way, Interpretation 303-7 explained that the way that students engage with this material must be a “substantial activity” and that the goal of developing skills in cultural competency was to help to “eliminate racism” within the context of the legal profession.¹⁸³

Thinking back to the adoption of Model Rule 8.4(g) in 2016, through the adoption of Model MCLE in 2017, and the enactment of Standard 303(c) in 2022, the full arc of the ABA’s design comes into focus. If attorney competency is critical to maintaining public confidence in the legal profession—and if the combination of attorney competency and public confidence are what preserves the rule of law—then the rules governing attorney conduct must keep a sharp focus on maintaining attorney competency. Given the United States’ ever-evolving legal landscape and ever-evolving population, the ABA has enacted model rules to try to shape the way that lawyers learn to be develop and maintain competency. These rules ensure that law students—and later, practicing lawyers—develop necessary skills for competent practice. The ABA’s focus on a DI requirement strives toward a standard of practice that does not perpetuate bias and racism, and that employs cross-cultural competency in the practice of law. The arc of these rules—from law student to lawyer—is as long as the need is wide.

CONCLUSION

This Article joins a national conversation focused on preserving public confidence in the United States legal system, CLE for lawyers, and national accreditation standards for law schools. As part of this discussion, the Article has examined three interlacing threads:

- (1) The 2016 adoption of Rule 8.4(g) within the ABA’s Model Rules of Professional Conduct and the degree to which states have adopted a state version of 8.4(g);

182. *Id.* (describing Interpretation 303-7).

183. *Id.*

- (2) The 2017 addition of DI programming to the requirements of the ABA's Model Rule for MCLE requirements and the degree to which states have adopted a state version of the Model Rule for MCLE; and
- (3) The 2022 addition of ABA Standard 303(c), which requires law schools to provide education on bias, racism, and cross-cultural competency in order to maintain accreditation.

Examining how these three changes inform one another helps to understand their overriding goal of maintaining public confidence in the legal system and the rule of law.

A critical part of attorney competence is keeping up with changes in the law and the world. The common thread between promoting DI programming in CLE, attorney practice, and law school education is the goal of preserving attorney competence in order to maintain public confidence in the legal profession. While education in DI is the tip of the iceberg of attorney competence, it is a crucial tip. It correlates with an enhanced ability to serve clients, which in turn helps to maintain public confidence in the legal profession and the rule of law.

From education in DI, to understanding and addressing attorney wellness, to rapidly evolving advances in artificial intelligence and other technological wonders we cannot even imagine—the horizon is unbounded, the challenges are acute, and the need to maintain attorney competence is imperative. As understandings regarding DI continue to evolve, so the skills of law students and practicing attorneys must also evolve. How best to ensure that evolution is but one of the threads pulling it all together and ensuring hope for the future.