Putting the sexual harassment, bias issue in black and white

H ave you seen the movie “Legally Blonde” starring Reese Witherspoon? She plays a character named Elle Woods, an attractive sorority girl with a high sense of fashion who is rejected by her boyfriend right before he heads off to Harvard Law School.

She devises a plan to apply to Harvard so she can follow him and win him back. No one believes she can do this, but to everyone’s astonishment, she does.

The movie is light and comical as we watch Elle navigate law school while wearing pink skirts and high heels and carrying her dog around in a pink purse. She stumbles at first (and who didn’t stumble in the first year of law school), but then she starts to do well and we watch her evolve into a committed, hard-working student.

She is selected by Professor Callahan (along with a few other students) to work at his law firm to compete for a coveted internship if she will sleep with him. She rejects the offer and interns if she will sleep with him. She rejects the offer and

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The ABA Model Rules and sexual harassment

As of this writing, at least 23 states have jumped ahead of the professional misconduct. It is, for example, professional misconduct for a lawyer to (a) violate the ethics rules; (b) commit a criminal act; (c) engage in conduct involving dishonesty, fraud, deceit or mis-representation; or (d) engage in conduct that is prejudicial to the administration of justice. Comment 3 to the ABA Model Rules states that lawyers who “knowingly manifests by words or conduct, bias or prejudice against” protected groups “violates Paragraph (d) when such actions are prejudicial to the administration of justice.”

Notably, Paragraph 21 of the preamble to the ABA Model Rules states in part, that the comments are “intended as guides to interpretation, but the text of each rule is authoritative.”

The ABA Standing Committee on Ethics and Professional Responsibility has spent the better part of two years working on a proposed amendment — Rule 8.4(g) — that would eliminate Comment 3 and provide an authoritative rule that expressly prohibits harassment or discrimination against protected groups in conduct related to the practice of law. (In full disclosure, I am a member of the committee, but the views expressed here are my own).

There have been a series of lengthy and thoughtful discussions about how phrases are worded, whether comments will provide sufficient guidance and various scenarios where application of the rule would be warranted.

Later, comments and concerns advanced by other committees and bar groups are considered, and additional modifications are made. The proposed amendment will be presented to the ABA House of Delegates for approval when they convene for the annual meeting in San Francisco in August.

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and retain the next generation of lawyers and firms seeking to learn more about these issues may want to review “A Current Glance at Women in the Law 2016” by the ABA Commission on Women in the Profession and “Racial Discrimination in the Legal Profession” prepared by the Society of American Law Teachers in June 2014.

Wendi S. Lazar, in her article “Sexual Harassment in the Legal Profession: It is Time to Make It Stop” in the New York Law Journal (March 4, 2016), and Deborah L. Rhode, in her article “Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That” in the Washington Post (March 27, 2015), highlight the need for the legal profession to address these issues.

The proposed amendment of Rule 8.4(g) sends a message to the public that the legal profession takes self-regulation seriously; that it will not tolerate harassment and discrimination; and that these efforts are being made to welcome and retain the next generation of diverse practitioners.