

ABA Model Rule 8.4(g)

CLE PRESENTED TO THE ISB PROFESSIONALISM & ETHICS SECTION
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This presentation is for informational purposes only and not for the purpose of providing legal advice.

Rule 8.4 - Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;**
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Rule 8.4 – Comment 3

*A lawyer who, **in the course of representing a client**, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.*

“The current Model Rules of Professional Conduct...do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation. The association should now correct this omission. It is in the public’s interest. It is in the profession’s interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law.”

Paulette Brown, Immediate Past-President, American Bar Association

ABA's New Model Rule 8.4(g)

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.

New Model Rule 8.4 – Comment 4

Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Rule 4.4 Respect for Rights of Third Parties

(a) In representing a client, a lawyer shall not:

(1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person, including conduct intended to appeal to or engender bias against a person on account of that person's gender, race, religion, national origin, or sexual preference, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants

Commentary

[2] Paragraph (a) contains an anti-bias provision, requiring lawyers to refrain from pejorative conduct that serves no purpose other than to exploit differences based on the listed categories. Nothing in the rule is intended to limit a lawyer's full advocacy on behalf of a client.

See also Rule 2.3 of the Idaho Code of Judicial Conduct which requires judges to perform duties of their office without bias or prejudice and to require lawyers to refrain from manifesting bias or prejudice.

Idaho Draft Rule 8.4(g)

It is professional misconduct for a lawyer to:

g) engage in discrimination or harassment, defined as follows:

(1) in representing a client or operating or managing a law practice, engage in conduct that the lawyer knows or reasonably should know is unlawful discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules; and

(2) in conduct related to the practice of law, engage in conduct that the lawyer knows or reasonably should know is harassment. Harassment is derogatory or demeaning verbal, written, or physical conduct toward a person based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. To constitute a violation of this subsection, the harassment must be severe or pervasive enough to create an environment that is intimidating or hostile to a reasonable person. This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules.

Discussion Points

- (1) How to define and scale “conduct related to the practice of law”;
- (2) How to define harassment and discrimination with respect to applicable state and federal laws;
- (3) The scope of the harassment and discrimination provision of the rules; and
- (4) Whether and to what extent an attorney’s 1st Amendment rights may be impacted by the rule.

Some Questions

- 1. Question:* Does the rule require me to represent any client? *Answer:* The rule does not restrict your ability to select and reject clients under Rule 1.16. Rule 1.5 allows you to collect a fee. Rules 1.1 and 1.3 require a lawyer to provide competent and diligent representation.
- 2. Question:* I serve on the board of a church that, as a policy, does not perform gay marriages. What if, as part of my duties on the board, I speak in favor of that policy. Am I subject to discipline under this rule? *Answer:* The rule does not prohibit you from freely expressing a viewpoint in your role on the board.

Discrimination

1. We separated Discrimination and Harassment because of the differing contexts in which they occur and because of 1st Amendment considerations.
2. After consideration, the subcommittee determined that the type of **Discrimination** that should be actionable is that which occurs “**in representing a client or operating or managing a law practice.**”
3. After hearing comments from legal organizations and individuals, the subcommittee acknowledges that legal associations, organizations, and informal gatherings of attorneys have the right to assemble with likeminded individuals. Accordingly, Idaho’s proposed rule does not include activities outside “representing a client or operating or managing a law practice.”
4. Additionally, the subcommittee recognized that the term discrimination is broad and can be applied in unintentional situations. Accordingly, the subcommittee restricted the definition of actionable discrimination to discrimination that is “unlawful” (See e.g. Title VII, ADA, and state and local counterparts).

Harassment

1. Harassment Definition: (1) targeting a protected class; (2) [D]erogatory or demeaning verbal, written, or physical conduct toward a person...”
2. Scope of Harassment: The subcommittee recognizes that harassment can occur not only in “representing a client or operating or managing a law practice,” but in various areas “related to the practice of law.”
3. Harassment occurs at ISB events, at legal association meetings, at work, and other places. When attorneys are subjected to harassment, they are “deprived of the access, opportunities, rights, or peaceful enjoyment” of being members of the legal community.
4. When attorneys are “deprived of the access, opportunities, rights, or peaceful enjoyment” of being members of the legal community, it not only negatively impacts the attorney, it negatively impacts his or her clients who do not receive the benefits of having an attorney who can fully engage the opportunities and support provided by the ISB.

Harassment

1. Question: So if I accidentally say something that someone finds offensive, does Rule 8.4(g) subject me to discipline?
2. The Subcommittee drafted the rule with the understanding that:
 - A. We all say things from time to time that we don't intend, and
 - B. That some people are offended by things that most people don't find offensive.
3. Proposed Rule 8.4(g)(2) requires that:
 - A. "To constitute a violation of this subsection, the harassment must be **severe or pervasive** enough to **create an environment that is intimidating or hostile** to a **reasonable person.**"

Rule 8.4(g) and the 1st Amendment

1. ABA's Model Rule generally prohibits "harassment or discrimination on the basis" of the protected class. The subcommittee's revisions acknowledged that these terms could be interpreted as vague and overbroad.

Vagueness

A rule is unconstitutionally vague when it is not clear enough for a person of ordinary intelligence to understand it.

1. With regards to Unlawful Discrimination under the proposed rule, antidiscrimination laws that apply to us are clear enough to understand, hence the reason they have not been deemed unconstitutional (i.e. Title VII, ADA, etc.).
2. Harassment is defined in the proposed rule as “derogatory or demeaning verbal, written, or physical conduct toward a person” based on a protected class. Further, to constitute a violation of proposed Rule 8.4(g)(2), the “harassment must be severe or pervasive enough to create an environment that is intimidating or hostile to a reasonable person.” Comment 3 gives examples of harassment, and further explains what does and what does not constitute actionable harassment in a way that a person of ordinary intelligence understands

Overbreadth

A rule is overbroad if it prohibits constitutionally protected conduct.

1. With regards to **Unlawful Discrimination** under the proposed Rule, the same antidiscrimination laws that already apply to us are not unconstitutionally overbroad.
2. With regards to **Harassment** under the proposed Rule, the rule is content and viewpoint neutral and narrowly tailored to fit the purpose of the ISB's objective to protect the opportunities and benefits provided as a result of being a member of the ISB or engaging with the legal community.

Next Steps

- The Section leadership will administer a ballot vote by email.
- If the Section approves the draft, it will be recommended to the Board of Commissioners.
- If the Board approves the draft, it will be presented to the membership through the 2017 resolution process.