

Summary of Professionalism & Ethics Section Subcommittee’s Review of Model Rule 8.4(g)

In August 2016, the ABA House of Delegates adopted [Model Rule 8.4\(g\)](#), called the anti-discrimination rule, after more than two years of discussions and revisions. This rule was designed to move the anti-discrimination provisions from the comments to the black letter rule. Currently, 25 jurisdictions already have an anti-discrimination provision in their black letter rule.¹ The ABA advises that 11 states are actively considering the rule, two states have adopted the rule (one with modifications), seven states haven’t started considering the rule, and the status of the other states is unknown.

The Idaho State Bar Board of Commissioners asked the Professionalism and Ethics Section to vet the new proposed rule. In December 2016, Bar Counsel Brad Andrews and Idaho State Bar President Dennis Voorhees provided a CLE regarding the model rule at the regular meeting of the Section. The Section formed a subcommittee to study the model rule and ultimately to develop and recommend a draft rule for consideration by the Professionalism and Ethics Section. If approved by the Section, the recommended rule will be considered by the Board of Commissioners.

The following people served on the sub-committee: Jodi Nafzger (Section Chair), Bob Aldridge (Section Treasurer), Larry Hunter (Idaho Delegate to the ABA), Scott Gray (Diversity Section Liaison), Dennis Voorhees (Bar President), Brad Andrews (Bar Counsel), Caralee Lambert (Assistant Bar Counsel), and Section members Jeremiah Hudson, Catie Freeman, Mark Freeman, Steve Smith, Yvonne Dunbar, and Greg LeDonne.

From January to May 2016, the subcommittee met five times to vet the model rule. The subcommittee also gathered and considered input from other members of the Bar as well as other states and professional organizations studying the rule. The subcommittee focused its efforts on the following topics:

- (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 First Amendment rights may be impacted by the rule.

The subcommittee worked through several drafts. Redlined versions are attached. See also the attached memorandum by Subcommittee Member Steve Smith opposing the draft rule.

The Section will review and vote on the subcommittee’s final draft at the June 6, 2017 section meeting and present the draft to the Board of Commissioners. If the Board approves the rule, it will be presented to the membership through the 2017 resolution process.

¹ Peter Geraghty, *ABA Adopts New Anti-Discrimination Rule 8.4(g)* (September 2016). Found at: <http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html>