

Professionalism & Ethics Section

Summary of Subcommittee's Review of Model Rule 8.4(g)

May 29, 2017

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. The final redlined version is 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>

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COMMISSION ON DISABILITY RIGHTS
DIVERSITY & INCLUSION 360 COMMISSION
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
COMMISSION ON WOMEN IN THE PROFESSION

REPORT TO THE HOUSE OF DELEGATES

REVISED RESOLUTION

1 RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA
2 Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

3
4 Rule 8.4: Misconduct

5
6 It is professional misconduct for a lawyer to:

7
8 (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or
9 induce another to do so, or do so through the acts of another;

10
11 (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness
12 or fitness as a lawyer in other respects;

13
14 (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

15
16 (d) engage in conduct that is prejudicial to the administration of justice;

17
18 (e) state or imply an ability to influence improperly a government agency or official or to
19 achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

20
21 (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable
22 rules of judicial conduct or other law; or

23
24 (g) engage in conduct that the lawyer knows or reasonably should know is harassment or
25 discrimination ~~harass or discriminate~~ on the basis of race, sex, religion, national origin, ethnicity,
26 disability, age, sexual orientation, gender identity, marital status or socioeconomic status in
27 conduct related to the practice of law. This ~~Rule paragraph~~ does not limit the ability of a lawyer
28 to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph
29 does not preclude legitimate advice or advocacy consistent with these Rules.

30 Comment

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32 [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of
33 Professional Conduct, knowingly assist or induce another to do so or do so through the acts of
34 another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a),
35 however, does not prohibit a lawyer from advising a client concerning action the client is legally
36 entitled to take.

37

38 [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses
39 involving fraud and the offense of willful failure to file an income tax return. However, some kinds
40 of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses
41 involving "moral turpitude." That concept can be construed to include offenses concerning some
42 matters of personal morality, such as adultery and comparable offenses, that have no specific
43 connection to fitness for the practice of law. Although a lawyer is personally answerable to the
44 entire criminal law, a lawyer should be professionally answerable only for offenses that indicate
45 lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty,
46 breach of trust, or serious interference with the administration of justice are in that category. A
47 pattern of repeated offenses, even ones of minor significance when considered separately, can
48 indicate indifference to legal obligation.

49

50 ~~[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct,~~
51 ~~bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation~~
52 ~~or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the~~
53 ~~administration of justice. Legitimate advocacy respecting the foregoing factors does not violate~~
54 ~~paragraph (d). A trial judge's finding that peremptory challenges were exercised on a~~
55 ~~discriminatory basis does not alone establish a violation of this rule.~~

56

57 [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence
58 in the legal profession and the legal system. Such discrimination includes harmful verbal or
59 physical conduct that manifests bias or prejudice towards others ~~because of their membership or~~
60 ~~perceived membership in one or more of the groups listed in paragraph (g).~~ Harassment includes
61 sexual harassment and derogatory or demeaning verbal or physical conduct ~~towards a person who~~
62 ~~is, or is perceived to be, a member of one of the groups.~~ Sexual harassment includes unwelcome
63 sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a
64 sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law
65 may guide application of paragraph (g).

66

67 [4] Conduct related to the practice of law includes representing clients; interacting with witnesses,
68 coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or
69 managing a law firm or law practice; and participating in bar association, business or social
70 activities in connection with the practice of law. ~~Paragraph (g) does not prohibit conduct~~
71 ~~undertaken to promote diversity. Lawyers may engage in conduct undertaken to promote diversity~~
72 ~~and inclusion without violating this Rule by, for example, implementing initiatives aimed at~~

73 recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student
74 organizations.

75
76 ~~[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or~~
77 ~~legal issues or arguments in a representation. A trial judge's finding that peremptory challenges~~
78 ~~were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A~~
79 lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's
80 practice or by limiting the lawyer's practice to members of underserved populations in
81 accordance with these Rules and other law. A lawyer may charge and collect reasonable fees
82 and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their
83 professional obligations under Rule 6.1 to provide legal services to those who are unable to pay,
84 and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good
85 cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an
86 endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

87
88 {4} [6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief
89 that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to
90 the validity, scope, meaning or application of the law apply to challenges of legal regulation of the
91 practice of law.

92
93 {5} [7] Lawyers holding public office assume legal responsibilities going beyond those of other
94 citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role
95 of lawyers. The same is true of abuse of positions of private trust such as trustee, executor,
96 administrator, guardian, agent and officer, director or manager of a corporation or other
97 organization.

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; or

(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.

Commentary

...

[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.~~Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes sexual harassment such as unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal, written, or physical conduct of a sexual nature. Factors to be considered to determine whether conduct rises to the level of harassment under paragraph (g)(2) of this Rule include: the frequency of the harassing conduct; its severity; whether it is threatening or humiliating, or a mere offensive utterance; whether it is harmful to another person; or whether it unreasonably interferes with conduct related to the practice of law. Petty slights, annoyances, and isolated incidents, unless extremely serious, will not rise to the level of harassment under paragraph (g)(2). The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[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.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation consistent with Rule 1.5(a). Lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[57] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.