MEMORANDUM

FROM: Subcommittee on Rule 8.4(g)

TO: Advisory Committee on Rules of Professional Conduct

DATE: November 30, 2017

SUBJECT: Amendments to Rule 8.4 - Background and Proposals

The primary purpose of this memorandum is two-fold: (1) to summarize the record for the benefit of the Advisory Committee, the Utah Supreme Court, the members of the Utah State Bar, and the interested public as it pertains to the addition of paragraph (g) to Rule 8.4; and (2) to present to the Advisory Committee several options or choices of an amended Utah Rule 8.4.

I. Historical Background of Proposal to Amend Rule 8.4

The issue of amending Rule 8.4 was introduced to the Advisory Committee on October 3, 2016, by the then-President of Utah State Bar and its ABA Delegate. The Advisory Committee received a letter from the Chair of the ABA's Center for Professional Responsibility Policy Implementation Committee, addressed to Chief Justice Durrant and dated September 29, 2016. In that letter, the ABA committee asked the Chief Justice to "consider integrating" the new paragraph (g) to Rule 8.4 into the Utah Rules of Professional Conduct. The presentation by the Bar President and ABA Delegate on October 3, 2016 was a recommendation that the Advisory Committee consider seriously adopting the ABA Model Rule 8.4(g) or amending the existing Utah Rule 8.4 to be consistent with the ABA Model Rule.

The Advisory Committee was informed that adding paragraph (g) to Rule 8.4 would promote the Utah State Bar's initiative and efforts for diversity and inclusion in the legal profession. It should be noted that the subcommittee did not find a single reference or any point of discussion by the Utah Bar Commission, the governing body of the Utah State Bar and its lawyer members, in any of its Agendas or Minutes since August 2016. The Bar Commission did, however, submit a public comment in support of adopting ABA Model Rule 8.4(g). The ABA Delegate provided the background and history of the amendments, including debates and revisions that led to ABA Model Rule 8.4(g) after a two-year process, including comments in support and in opposition to the Model Rule and its various iterations during the drafting and editing process, and during the comment period. The amount of information regarding Rule 8.4(g) was voluminous when it was first presented to the Advisory Committee and has increased since.

It is worth noting that the ABA committee chair stated in his letter that, as of September 29, 2016, "twenty-five jurisdictions have adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules." Many, if not the vast majority, of those twenty-five jurisdictions, adopted or amended their rules before the Model Rule was approved by the ABA in August 2016. See, "ABA adopts new anti-discrimination Rule 8.4(g), September

2016, Peter Geraghty, director, ETHICSearch, ABA Center for Professional Responsibility, available at https://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html (last visited November 30, 2017).

A couple of recent examples from sister jurisdictions are worth highlighting. In Nevada, the Board of Governors of the State Bar of Nevada filed an administrative matter with the Nevada Supreme Court, seeking to adopt the ABA Model Rule. *In Re: Amendments to Rule of Prof. Conduct 8.4*, ADKT 0526, filed May 8, 2017 (Nevada Sup. Ct.). After filing, the Court received comments – primarily and vastly – in opposition to the rule. As a result, the Supreme Court twice rescheduled its original public hearing and twice extended the comment period. *See* http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=43193 (last visited November 30, 2017). The State Bar of Nevada withdrew its petition to adopt the ABA Model Rule on September 22, 2017, citing among the reasons: "Many comments were filed in opposition to the ADKT that [sic] causing the Board to pause" and "the consensuses being that the language used in other jurisdictions was inconsistent and changing. Thus, the Board of Governors determined it prudent to retract ADKT 0526 with reservation to refile an ADKT when, and if the language in the rule sorts out in other jurisdictions." See ADKT 0526, Doc. No. 17-15190. The Nevada Supreme Court granted the petition, and closed the matter on September 25, 2017. Id., Doc. No. 17-32294.

In contrast, the Vermont Supreme Court amended and adopted a rule based on ABA Model Rule 8.4(g) on July 14, 2017.[1] See https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4%28g%29.pdf. The Vermont rule differs from the ABA Model rule in some respects. In particular, the Vermont rule added color, ancestry, and place of birth as additional protected classes and the phrase "or other grounds that are illegal or prohibited under federal or state law" was added at the end of the first sentence to include provisions of state and federal law protecting discrimination against those afflicted with HIV, military veterans, and on the basis of genetic information. In explaining the breadth and scope of the new rule, the Court noted: "Comment [4] makes clear that 'conduct related to the practice of law' is to be understood broadly to include many activities beyond the confines of traditional client representation, including law practice management and bar association or other practice-related activities including social occasions."

As with many issues of constitutional consequence, the question of adopting the ABA Model Rule 8.4(g) has a legion of supporters and opponents, many well-known and well-funded. There is a great volume of literature and propaganda on both sides of the argument. *See e.g.*, ABA Journal, "States split on new ABA Model Rule limiting harassing or discriminatory conduct," available at http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct (last visited November 30, 2017). Also, the issue of harassment and discrimination in the workplace has attracted national and international attention during the time the subcommittee has undertaken its task. See e.g., Wall Street Journal, "The Workplace After Harvey Weinstein: Harassment Scandals Prompt Rapid Changes", November 10, 2017, available at https://www.wsj.com/articles/the-workplace-after-weinstein-harassment-scandals-prompt-rapid-

[1] Vermont was one of the original 25 jurisdictions referenced by the ABA committee chair.

changes-1510333058 (subscription required) (last visited November 30, 2017). The results of a survey conducted by the Wall Street Journal and NBC News are summarized in the following graphic:

View from the Workplace

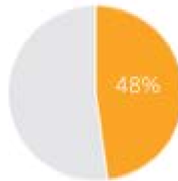
American workers say sexual harassment remains prevalent at their jobs.

How prevalent is sexual harassment in the workplace?

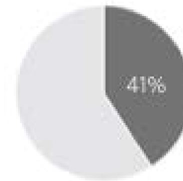
Happens in: Almost all companies | Most | Not sure | Some | Very few

Personal experience with sex harassment at work

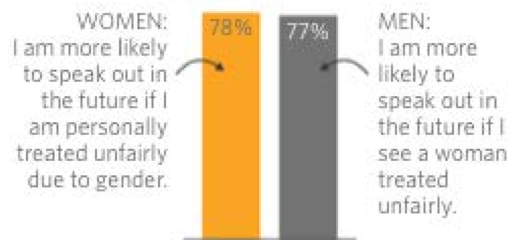
Share of employed women who say they've been the object of an unwelcome sexual advance or form of sexual harassment



Share of men who have witnessed women receiving an unwelcome sexual advance or form of sexual harassment



How recent high-profile stories about harassment have influenced opinions:



Source: WSJ/NBC News telephone polls, most recent of 900 adults conducted Oct. 23-26; margin of error +/-3.27 pct. pts.

Agree: Strongly | Somewhat | Not sure
Disgree: Strongly | Somewhat

These stories have made you want to share your own past personal experiences about how you have been treated as a woman.

These stories have caused you to think about your own behavior and how you interact with women.

These stories have changed your view about how women are treated in society.

Ultimately, the subcommittee's preeminent concern is whether an addition of paragraph (g) and classifying discrimination and harassment as "professional misconduct" would be a net benefit for Utah lawyers and for the legal profession in Utah.

II. Review of Subcommittee Proposals

The subcommittee has previously submitted two memoranda, with supporting materials, for consideration by the Advisory Committee. In each instance, the subcommittee proposed amending Rule 8.4 by adding paragraph (g). However, the new paragraph (g) proposed by the

subcommittee varied from the ABA Model Rule in certain important respects, with heightened standards and more narrow scope. The amendments proposed by the subcommittee aligned more closely to the Illinois version of Rule 8.4, and the Advisory Committee revised the proposed amendments before formally proposing them to the Utah Supreme Court. Ultimately, the version of Rule 8.4(g) proposed by the Advisory Committee on May 15, 2017, was declined by the Utah Supreme Court, which *sua sponte* published ABA Model Rule 8.4(g) for public comment. The overwhelming majority of comments submitted were in opposition of adopting the ABA Model Rule.

The Advisory Committee, and its subcommittee on Rule 8.4(g), is now tasked once again to deliberate whether, or how, Rule 8.4 should be amended. Should the decision be to amend Rule 8.4, it is the responsibility of the Advisory Committee, with assistance from its subcommittee, to propose a draft of Rule 8.4 that captures the public policy intent to deter and prohibit discrimination and harassment perpetrated by attorneys by codifying such behavior as professional misconduct, subject to disciplinary action. An important corollary of the anti-discrimination, anti harassment policy is the objective to promote professionalism, civility, inclusion, and diversity in the legal profession. The subcommittee is conscientious and cautious in its work to achieve the public policy objectives while at the same time remain faithful to Constitutional protections. Indeed it is a fine balance.

III. Proposed Alternatives of Utah Rule 8.4(g)

The objective of adding paragraph (g) to Utah Rule 8.4 is to codify discriminatory and harassing conduct as "professional misconduct." The rule is intended to deter and prevent misbehavior, and to discipline offending attorneys when the harassment or discrimination is committed when attorneys are not providing legal representation and advocacy on behalf of a client or the attorney's employer. It is admitted that the rule would be more expansive than what civil law imposes, consistent with the public policy and aspiration that the rules governing attorney conduct impose upon a heightened expectation of civility, professionalism, respect, inclusion, and tolerance toward all – fellow members of the bar as well as the general public.

Inherent and implicit in the comments submitted regarding amending Rule 8.4 is the question, "why is this rule change necessary?" It is the subcommittee's opinion that experience and history, both recorded and anecdotal, has shown that certain groups – particularly the historically underrepresented – are more vulnerable to being harassed, discriminated, alienated, and subject to demeaning and derogatory conduct by attorneys in a position of authority and power. As a matter of fact and experience, harassing, discriminatory, and demeaning conduct by attorneys to other attorneys and even clients continues to this day in a variety of settings, both public and private. Often silence and private humiliation are manifestations and outcomes of being harassed and discriminated against. While adopting paragraph (g) will not eradicate discrimination, harassment, and disrespect that is common to the human condition among lawyers, it would effectively censor and deter such behavior by defining it as "professional misconduct" unbecoming an officer of the court and subject to disciplinary action.

As the rule is currently written, there is no prohibition on discrimination or harassment. The closest the rule comes to prohibiting such misbehavior is to define professional misconduct

when an attorney "engage[s] in conduct that is prejudicial to the administration of justice." Rule 8.4(d). Comment 3 to the rule explains and suggests that discrimination and harassment are violations of paragraph (d) when "such actions are prejudicial to the administration of justice." In this way, the current rule defines professional misconduct as long as the offense is committed in such as a way as to stunt the administration of justice. The corollary to the present rule, and its implied reading, is that discrimination and harassment are condoned when they are committed in the hallways of the courthouse, in the law firm hallways and parties, outside the deposition or mediation, or in the social functions of lawyers. Surprisingly, under the current rule, any harassment, discrimination, and hostility committed by an attorney in a corporate board room or during private negotiations of commercial transactions may very well be beyond the reach of Rule 8.4(d).

While the civil law may provide protections to victims of harassment and discrimination in some of the contexts and settings mentioned above, the effective consequence of speaking up and exercising those legal protections would lead to marginalizing the victim, labeling the victim as overly sensitive, or otherwise preclude advancement in the profession – whether in the law firm or company where the harassment was committed, or in the general marketplace for lawyers. In this sense, a victim of harassment or discrimination has some false choices: they are damned if they do, damned if they don't stand up and speak out.

The subcommittee is conscientious of constitutional legal arguments regarding freedom of expression, association, and religious practice. The subcommittee has weighed the benefits, burdens, rights, duties, and privileges of being a licensed lawyer with respect to imposing a degree of censorship as paragraph (g) inevitably does. In the final analysis, and as a matter of public policy, the subcommittee recommends amending Rule 8.4 by adding paragraph (g). This memorandum presents several alternatives of a new Rule 8.4(g) in order to give the full Advisory Committee options on which to deliberate and send to the Supreme Court for consideration.

The alternatives for consideration by the full committee are as follows:

1) The ABA Model Rule 8.4(g).
2) January 23, 2017 version, proposed by the subcommittee and based in part on the Illinois rule.
3) March 6, 2017 version of Utah Rule 8.4(g) approved by Advisory Committee.
4) December 4, 2017 version of Utah Rule 8.4(g), based and modeled after California Rule 2-400.

Each of these rules, with their accompanying comments, is included in following pages. A modified rule, to be determined by the Advisory Committee after deliberations at its December 4, 2017 meeting, may still be another possibility, though not included in this memorandum, but to be included in the meeting minutes.

Option 1
ABA 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 Comments:

[3] 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).

[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.

[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 or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also 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. See Rule 6.2(a), (b) and (c). 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).

Option 2
Utah Rule 8.4(g)
January 23, 2017 version
(based in part on the Illinois Rule)
Proposed by Subcommittee

It is professional misconduct for a lawyer to:
…
(g) engage in conduct that violates a federal, state, or local statute or ordinance that prohibits harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the lawyer knew or should have known the conduct was prohibited by statute or ordinance; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in connection with the lawyer's professional activities. This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client. For purposes of determining the violation of a statute or ordinance under this Rule, number of employees is not a defense.

Comments 3 and 4

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Lawyers may engage in conduct undertaken to discuss 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.

[4] 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 or by limiting the lawyer's practice to members of underserved populations in accordance of these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5a). Lawyers should also 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. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's view or activities. See Rule 1.2(b).

Option 3
Utah Rule 8.4(g)
March 6, 2017 version
(based in part on the Illinois Rule)
Approved by Advisory Committee and Proposed to Utah Supreme Court

It is professional misconduct for a lawyer to:
…
(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status as provided in Federal and Utah State law and jurisprudence, and that reflects adversely on the lawyer's fitness as a lawyer. This paragraph does not limit the ability of the lawyer to accept representation or to decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per Rule 2.1, or limit a lawyer's full advocacy on behalf of a client.

The Advisory Committee also recommended adding new comments 3, 4, and 5:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) may undermine confidence in the legal profession and the legal system. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Such discrimination includes harmful conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the 3 conduct; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in the lawyer's professional capacity.

[4] Lawyers may engage in conduct undertaken to discuss diversity, including discussing any benefits or challenges, without violating this rule. Implementing initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers should also 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. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's view or activities. See Rule 1.2(b).

Option 4
Utah Rule 8.4(g)
December 4, 2017 version
(based in part on California Rule 2-400)
Proposed by Subcommittee

It is professional misconduct for a lawyer to:
…
(g) unlawfully discriminate or harass, or knowingly permit unlawful discrimination or harassment, on the basis of race, national origin, sex, sexual orientation, religion, age or disability in the management or operation of a law practice, or in interactions with other members of the Bar, paralegals, and administrative staff in hiring, promoting, discharging, or otherwise affecting the conditions of employment of any person.

Comments

[4] "Law practice" includes sole practices, law partnerships, law corporations, corporate and government legal departments, and other entities which employ lawyers to practice law. "Knowingly permit" means a failure to advocate corrective action where the lawyer knows of a discriminatory or harassing policy or practice which results in the unlawful discrimination or unlawful harassment prohibited in paragraph (g). "Unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination or unlawful harassment in employment. The "conditions of employment" also covers informal and formal work meetings or social gatherings, both during normal work hours and after hours.