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Feature

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ROOTING OUT BIAS IN THE LEGAL PROFESSION

The Path to ABA Model Rule 8.4(g)

YOU are mentoring a recent law school graduate who works as an associate at a Phoenix law firm. On Monday morning, he calls you to seek your confidential advice. Over the weekend, the associate attended a firm-sponsored dinner party for new associates, along with several other associates and partners from the firm. During dinner, one of the partners made a racist and sexist joke about a member of the U.S. women's national soccer team. After some awkward silence, the moment passed and the dinner concluded without further incident, but the associate was deeply offended.

During your phone conversation, the associate asks you a simple question. He knows the partner's joke was inappropriate, but was his conduct unethical?

Under the current Arizona Rules of Professional Conduct, the answer would be no. Although Comment [3] to Ethical Rule (ER) 8.4 refers to conduct that manifests bias or prejudice, such conduct violates the Rule only when it is prejudicial to the administration of justice.¹ Similarly, although Rule 41(g) of the Rules of the Supreme Court places a duty on members to “avoid engaging in unprofessional conduct,”² such conduct can result in discipline under Rule 41 only when it occurs “during the practice of law.”³

Until recently, the answer would be the same under the American Bar Association (ABA) Model Rules of Professional Conduct. Like Arizona's ER 8.4, Model Rule 8.4 used to prohibit discriminatory conduct only when prejudicial to the administration of justice.⁴ However, in August 2016 the ABA amended Model Rule 8.4 to add an antidiscrimination subsection as part of the black-letter language of the Rule.⁵

This article discusses the development and implementation of Model Rule 8.4(g), explains what conduct is prohibited by it, and explores how this amendment may affect Arizona lawyers.

Background of Model Rule 8.4(g)

The effort to incorporate an antidiscrimination provision into the Model Rules began in 1998, when the ABA Criminal Justice Section and the ABA Standing Committee on Ethics and Professional Responsibility (“Ethics Committee”) separately developed proposals for this provision.⁶ These proposals were combined and adopted at the ABA's 1998 annual meeting as Comment [3] to Rule 8.4:

[3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on 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.⁷

Although a laudatory first step, adoption of this Comment fell short of imposing an actual obligation on lawyers to refrain from discriminatory conduct.⁸ Furthermore, the guidance in the Comment pertained only to discriminatory conduct that is prejudicial to the administration of justice. In that sense, Comment [3] provided only additional guidance to complying with Model Rule 8.4(d), which proscribes conduct prejudicial to the administration of justice.

The drive to adopt a black-letter antidiscrimination rule began in earnest in 2014, when the ABA Ethics Committee convened a working group to consider such a rule.⁹ In December 2015, the Committee issued a memorandum¹⁰ and draft proposal¹¹ for Model Rule 8.4(g):

It is professional misconduct for a lawyer to:

(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

The draft proposal also included a revision to Comment [3] clarifying that the “operation and management of a law firm or law practice” is included in conduct related to the practice of law. The revised Comment further noted that the Rule does not require a lawyer to represent any particular person or entity, and it does not alter a lawyer's obligations under Rule 1.16 regarding withdrawing from or declining to accept representation.

The ABA published online all public comments received on the December 22 draft proposal. Although the draft proposal garnered some public support,¹² it also drew a great deal of criticism. One oft-repeated criticism was that the proposed Rule infringed on a lawyer's right to choose whether to represent a client.¹³ Certain religious organizations¹⁴ objected to the proposal, citing concerns that the Rule would limit their ability to make employment decisions based on religious beliefs,¹⁴ or would require lawyers to represent clients whose beliefs or practices were fundamentally at odds with those of the lawyer.¹⁵ Other groups expressed concern about vagueness in terminology¹⁶ and potential conflict with standards set forth in Title VII of the Civil Rights Act regarding harassment and discrimination.¹⁷

Responding to these concerns, the ABA Ethics Committee issued a revised draft proposal in April 2016. It stated in the Rule itself that the Rule would not limit a lawyer's ability to accept, decline, or withdraw from representation. Furthermore, the revised draft proposal expanded the Comments to define discrimination and harassment and provide examples of “conduct related to the practice of law.” It also expressly excludes from 8.4(g) conduct undertaken to promote diversity, and expressly states that limiting the scope or subject matter of a lawyer's practice does not violate 8.4(g). The ABA Ethics Committee submitted a resolution to the House of Delegates in August 2016 asking the ABA to adopt the revised draft proposal.

On August 8, 2016, the ABA House of Delegates voted in favor of amending [Rule 8.4](#) to add paragraph 8.4(g) and revised Comments. However, the version that the House of Delegates approved differed significantly from both the original proposal and the revised draft proposal of April 2016. The black-letter Rule as adopted added a sentence stating that the Rule did not preclude legitimate advice or advocacy, and further added a mens rea requirement by changing “harass or discriminate” to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination.” This last-minute revision apparently addressed the concerns of any holdout delegates, given that out of the 589 delegates attending the annual meeting, only a few “nays” were overhead during the vote.¹⁸

Practical Effect

Enacting a black-letter antidiscrimination rule accomplishes a few purposes.

For one, it brings squarely within the purview of the Model Rules certain conduct that before would have been considered unprofessional, but not unethical. For example, discriminatory conduct in connection with hiring, firing, and promotion decisions in a law firm violates Model [Rule 8.4\(g\)](#), because it is considered to be “conduct related to the practice of law.”¹⁹ Likewise, a lawyer violates Model [Rule 8.4\(g\)](#) if he harasses or discriminates while interacting with others within the legal system, such as “witnesses, court personnel, coworkers, [and other] lawyers,”²⁰ --even if such conduct would not be considered prejudicial to the administration of justice.

*37 In addition, Model [Rule 8.4\(g\)](#) allows certain misconduct to be labeled clearly as discrimination or harassment, which before its passage may have been shoehorned awkwardly into other Model Rules. For instance, a lawyer's sexual harassment of his own client is often classified as a conflict of interest under Rule 1.7(a)(2).²¹ Such misconduct is a personal interest conflict, because the lawyer's conduct serves his own interest, and not that of his client.²² However, classifying the sexual harassment itself as misconduct under [Rule 8.4\(g\)](#) better captures the nature of the underlying offense.

Looking at what Model 8.4(g) does not prohibit further illustrates the practical effect of the new Rule.

Despite the concerns of the Rule's critics, Model [Rule 8.4\(g\)](#) does not limit a lawyer's ability to represent clients accused of discriminatory conduct.²³ Furthermore, lawyers are still permitted to decline or withdraw from representation for reasons articulated in Rule 1.16.²⁴ For example, a deeply religious lawyer can decline to represent a member of an anti-religious group based on the lawyer's personal interest conflict, without being accused of discrimination.²⁵

For lawyers concerned about how Model [Rule 8.4\(g\)](#) might affect diversity initiatives or special-interest law firms, the Comments provide some reassurance. Comment [4] states that Model [Rule 8.4\(g\)](#) does not prohibit initiatives to promote diversity or inclusion. So, for instance, a law firm may ethically sponsor initiatives to support minority law students or to hire diverse associates.²⁶ And Comment [5] specifically permits lawyers to limit the scope or subject matter of their practice, or to limit their practice to “members of underserved populations.”²⁷ For example, a law firm ethically may limit its practice to representing only military veterans, or to representing only clients whose income falls below a certain threshold.

Relevance for Arizona Lawyers

Arizona is in the slim majority of states without a black-letter antidiscrimination provision within its Rules of Professional Conduct.²⁸ In 2010, the State Bar of Arizona petitioned the Supreme Court to amend [ER 8.4](#) to add an antidiscrimination provision. The proposed amendment stated that it was professional misconduct for a lawyer to:

Knowingly manifest bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, gender identity or expression, or socioeconomic status in the course of representing a client when such actions are prejudicial to the administration of justice; provided, however, this does not preclude legitimate advocacy when such classification is an issue in the proceeding.²⁹

Notably, this proposed amendment did little more than move the language of Comment *38 [3] into the Rule itself, given that the proposed amendment only prohibited discriminatory conduct when prejudicial to the administration of justice. Nonetheless, the proposal was met with criticism similar in nature to that of the opponents to the ABA's originally proposed Model [Rule 8.4\(g\)](#).³⁰ On December 20, 2011, the State Bar withdrew the petition to allow the Board of Governors to study the issue further.³¹

The enactment of Model [Rule 8.4\(g\)](#) by an overwhelming majority of ABA delegates will likely stimulate further consideration of an amendment to [ER 8.4](#). Now that the ABA has crafted language in the Rule and Comments that was able to quell the Rule's opposition, proponents of an amended Arizona [ER 8.4](#) will have guidance in drafting a proposed amendment that addresses the concerns of Arizona lawyers.

Conclusion

Going back to the opening scenario, how would you advise the associate?

If you were to apply the Model Rules, the partner's offensive joke would clearly be prohibited by [Rule 8.4\(g\)](#). Comment [4] explains that [Rule 8.4\(g\)](#) applies to conduct such as “operating or managing a law firm” and “social activities in connection with the practice of law.” A law firm-sponsored dinner party therefore falls under the definition of “conduct related to the practice of law,” and the partner's discriminatory remarks violate [Rule 8.4\(g\)](#).

Whether Arizona's ethical rules are amended to mirror the Model Rules remains to be seen. In the meantime, lawyers are advised to be mindful of their existing obligations under [ER 8.4](#) and [Rule 41\(g\) of the Arizona Rules of the Supreme Court](#).

Footnotes

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¹ Ariz. Rules of Professional Conduct, Rule 42, ARIZ.R.S. CT., [ER 8.4](#) cmt. 3.

² *Id.* [Rule 41\(g\)](#).

³ *Id.* [Rule 41](#) cmt. 1.

⁴ ABA MODEL RULES OF PROF. CONDUCT Rule 8.4 cmt. 3 (effective 1998-Aug. 8, 2016).

⁵ Samson Habte, *ABA Delegates Overwhelmingly Approve Anti-Bias Rule*, ABA/BNA LAW. MANUAL ON PROF. CONDUCT, Aug. 10, 2016.

- 6 ABA Standing Comm. on Ethics & Prof. Responsibility et al., *Report to the House of Delegates on Model Rule 8.4*, Aug. 2016, at 2, www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sccpr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.authcheckdam.pdf (last visited Dec. 5, 2016).
- 7 ABA MODEL RULE 8.4 cmt. 3, *supra* note 4.
- 8 MODEL RULES OF PROF. CONDUCT pmb. ¶ 14 (“Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”); *id.* ¶ 21 (“The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”).
- 9 Hon. Louraine C. Arkfeld, *Amending Rule 8.4 of the Model Rules of Professional Conduct*, VOICE OF EXPERIENCE (ABA), July 2016, www.americanbar.org/publications/voicc_of_experience/20160/july-2016/amending-rule-8-4-of-the-model-rules-of-professional-conduct.html (last visited Dec. 5, 2016). The ABA Ethics Committee formed this working group at the request of the ABA Goal III Commissions, referring to Goal III of the ABA's Association Goals: “Eliminate Bias and Enhance Diversity.” ABOUT ABA GOAL III, www.americanbar.org/groups/disabilityrights/initiatives_awards/goal_3.html (last visited Dec. 5, 2016).
- 10 ABA Standing Comm. on Ethics & Prof. Responsibility, *Draft Proposal to Amend Model Rule 8.4*, Dec. 22, 2015, www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2015.authcheckdam.pdf (last visited Dec. 5, 2016).
- 11 *Id.*
- 12 *See, e.g.*, Letter from the ABA Ctr. for Prof. Responsibility Diversity Comm. to the ABA Standing Comm. on Ethics & Prof. Responsibility (Feb. 16, 2016).
- 13 *See, e.g.*, Letter from 52 ABA member attorneys to the ABA Standing Comm. on Ethics & Prof. Responsibility (n.d.); Letter from Regent Univ. Sch. of Law Students and Alumni to the ABA Standing Comm. on Ethics & Prof. Responsibility (Mar. 9, 2016) (stating that the amendment can potentially create a duty to represent a client “whose cause is so repugnant it would certainly impair the client-lawyer relationship”).
- 14 Letter from the U.S. Conference of Catholic Bishops to the ABA Standing Comm. on Ethics & Prof. Responsibility (Mar. 10, 2016).
- 15 Letter from the Christian Legal Soc'y to the ABA Standing Comm. on Ethics & Prof. Responsibility (Mar. 10, 2016).
- 16 *See, e.g.*, Letter from Prof. Eugene Volokh, UCLA School of Law, to the ABA Standing Comm. on Ethics & Prof. Responsibility (n.d.) (citing “socioeconomic status” as a vague term that could prevent law firms from hiring law students with Ivy League pedigrees, or giving a hand-up to students of impoverished backgrounds).
- 17 *See* Letter from ABA Section of Labor and Employment Law to Myles V. Lynk, Chair of ABA Standing Comm. on Ethics & Prof. Responsibility (Mar. 11, 2016).
- 18 Habte, *supra* note 5.
- 19 *See* MODEL RULES OF PROF. CONDUCT Rule 8.4 cmt. 4 (“Conduct related to the practice of law includes ... operating or managing a law firm or law practice”).
- 20 *Id.*
- 21 *Id.* Rule 1.7; *see, e.g., In re Walker*, 24 P.3d 602 (Ariz. 2001) (censuring lawyer for personal interest conflict of interest when he admitted to “touching his client's breast and attempting to enter into a consensual sexual relationship with her”); *In re Piatt*, 951 P.2d 889 (Ariz. 1998) (censuring lawyer for a personal interest conflict of interest when he made explicit sexual comments to his divorce client).
- 22 *Piatt*, 951 P.2d at 891.

- ²³ See MODEL RULES OF PROF. CONDUCT Rule 8.4 cmt. 5 and Rule 1.2(b) (“A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities”).
- ²⁴ *Id.* Rule 8.4(g) (“This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.”).
- ²⁵ *Id.* Rule 1.16(a)(1) (requiring a lawyer to decline or withdraw from representation if it will result in the lawyer’s violation of the rules of professional conduct); Rule 1.7(a)(2) (stating that the personal interest of the lawyer can result in a concurrent conflict of interest).
- ²⁶ *Id.* Rule 8.4 cmt. 4.
- ²⁷ *Id.* Rule 8.4 cmt. 5.
- ²⁸ Twenty-four U.S. jurisdictions have some type of antidiscrimination rule in their rules of professional conduct for lawyers. Habte, *supra* note 5.
- ²⁹ Petition to Amend [ER 8.4](#), Rule 42, ARIZ.R.S.CT., June 16, 2010 (No. R-10-0031), www.azcourts.gov/Rules-Forum/aft/281 (last visited Dec. 5, 2016).
- ³⁰ See Public Comments on Petition to Amend [ER 8.4](#), Rule 42, ARIZ.R.S.CT., www.azcourts.gov/Rules-Forum/aft/281 (last visited Dec. 5, 2016).
- ³¹ Motion to Withdraw Petition to Amend [ER 8.4](#), Rule 42, ARIZ.R.S.CT., Dec. 20, 2011, www.azcourts.gov/Rules-Forum/aft/281 (last visited Dec. 5, 2016).

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