

IMPLEMENTING THE ABA'S NEW ANTI-DISCRIMINATION RULE, 29-DEC Utah B.J. 42

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Utah Bar Journal

November/December, 2016

Focus on Ethics and Civility

IMPLEMENTING THE ABA'S NEW ANTI-DISCRIMINATION RULE

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On August 8, 2016, the American Bar Association House of Delegates adopted a rule designed to eliminate discrimination and harassment in conduct related to the practice of law. The House of Delegates vote followed months of debate, comment, and revision, culminating in a revised rule that faced very little opposition.

**The Rule**

The new rule adds a new paragraph (g) to Model [Rule of Professional Conduct 8.4](#), which defines acts of professional misconduct. The new rule provides:

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.

Model Rules of Prof'l Conduct [R. 8.4\(g\)](#). The ABA also added three new comments to [Rule 8.4](#). See *id.* [R. 8.4](#) cmts. 3-5, available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/final\\_revised\\_resolution\\_and\\_report\\_109.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf).

Model [Rule 8.4\(g\)](#) broadly prohibits harassment and discrimination in all conduct “related to the practice of law.” *Id.* [R. 8.4\(g\)](#). New comment 4 begins to define this to include “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.” *Id.* [R. 8.4](#) cmt. 4.

Comment 3 describes the meaning of discrimination and harassment. Discrimination includes “harmful verbal or physical conduct that manifests bias or prejudice towards others.” *Id.* [R. 8.4](#) cmt. 3. Harassment includes “sexual harassment and derogatory or demeaning verbal or physical conduct,” as well as “unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.” *Id.* The comment adds that

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substantive anti-discrimination and anti-harassment statutes and case law may guide the interpretation of these concepts under the rule. *Id.*

While there is much yet to be determined regarding the full scope and application of the new rule, it clearly leaves open the possibility for a lawyer to limit his or her representation of clients based on personal views. By expressly allowing lawyers to accept, decline, or withdraw from a representation in accordance with [Rule 1.16](#), [Rule 8.4](#) allows lawyers to refuse representation if the client “insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” Model Rules of Professional Conduct [R. 1.16\(b\) \(4\)](#). Comment 5 of [Rule 8.4](#) also contains a “*Batson*” sentence, stating that a “trial judge’s findings that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.” *Id.* R. 8.4 cmt. 5.

### \*43 What about Utah?

The Model Rules of Professional Conduct are not, of course, legally binding in Utah. It remains to be seen whether Utah will adopt the ABA’s version of [Rule 8.4\(g\)](#).

But the Utah Rules of Professional Conduct are not silent on the issue. [Rule 8.4\(d\)](#) already provides that it is professional misconduct to “engage in conduct that is prejudicial to the administration of justice.” Utah R. Professional Conduct 8.4(d). And Utah’s Comment 3 to that rule provides: “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 ....” *Id.* R. 8.4 cmt. 3.

### Real Solutions

While appropriate legislative “fixes” to insidious issues such as discrimination and harassment are certainly valuable and needed, I maintain that issues like these cannot simply be legislated away. There is a human element to these issues that rule makers cannot fix. Complex and compelling issues such as rights to equality, privacy, free speech, and religious liberty will continue to bump into each other as we move our way forward as a society.

I believe one key to increased social harmony is better communication, understanding and respect on an *individual*, person-to-person level. Most of us commonly associate with those who look, act, and believe similar to ourselves. Social scientists refer to this as the “similarity attraction theory.” Functioning as separate “groups” of mass individuals, it is much easier to ignore, misunderstand, and disrespect the views and rights of others. However, most of the time, interacting one-on-one with someone holding a different worldview or different life experience will promote understanding and respect.

As lawyers, we have unique opportunities to lead out in making our law firms, neighborhoods, communities, state, and nation socially better and stronger. We should each look for more opportunities to expand our social networks to include others not like ourselves for better understanding, social advancement, and personal enrichment.

### Footnotes

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