

2015-2016

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Myles Lynk
American Bar Association
Chair
Standing Committee on Ethics & Professional Responsibility
321 North Clark Street
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Dear Myles:

As you know, the mission of the American Bar Association is "to serve equally our members, our profession, and the public by defending liberty and delivering justice as the national representative of the legal profession." To advance that mission, the ABA adopted four goals, including Goal III, which seeks "to eliminate bias and to enhance diversity." Goal III includes the specific objectives to:

1. Promote full and equal participation in the association, our profession, and the justice system by all persons
2. Eliminate bias in the legal profession and the justice system.

In furtherance of that mission, the ABA created four commissions that have the mandate to advance the aspirations of Goal III. The Commission on Sexual Orientation and Gender Identity ("SOGI") believes that if the ABA truly wishes to deliver justice and to eliminate bias, it is incumbent upon the Association to ensure that its own rules of professional conduct reflect these values.

Thus, SOGI welcomes the recent inquiry of the Standing Committee on Ethics and Professional Responsibility ("SCEPR") into amending ABA Model Rule of Professional Conduct 8.4 to expressly address bias, prejudice, discrimination, and harassment in the rule itself.

The SOGI Commission prepared the attached memo outlining our views and recommendations for a new Model Rule 8.4(g). We appreciate your continued hard work and look forward to working with SCEPR to advance this effort. We are ready to provide any assistance you require during this process. Please do not hesitate to contact me to discuss our request.

Thank you for your consideration. We look forward to working with you on this important issue.

Sincerely,

Mark Johnson Roberts



Chair, Commission on Sexual Orientation and Gender Identity

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MEMORANDUM

TO: Standing Committee on Ethics and Professional Responsibility

FROM: ABA Commission on Sexual Orientation and Gender Identity

RE: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4

DATE: October 22, 2015

SOGI RECOMMENDATION

The ABA Commission on Sexual Orientation and Gender Identity (SOGI) urges the Standing Committee on Ethics & Professional Responsibility (SCEPR) to propose to the ABA House of Delegates an amendment to ABA Model Rule of Professional Conduct 8.4 that makes it unethical, professional misconduct for lawyers, in their professional capacities, to engage in conduct that manifests bias, prejudice, discrimination, and/or harassment on the basis of race, national origin, ethnicity, sex, age, disability, sexual orientation, gender identity/expression, marital status, or socioeconomic status.

The SOGI Commission believes the new model rule should:

- 1) Be added as a new, separate black letter rule 8.4(g) that is separate from the limitations of Rule 8.4(d) and that is not tied to conduct that is A prejudicial to the administration of justice.
- 2) Address lawyer conduct whenever a lawyer is acting in his/her professional capacity as a lawyer.
- 3) Address bias, prejudice, discrimination, and harassment.
- 4) Include all the categories already included in ABA Model Rule of Judicial Conduct 2.3 with the addition of gender identity/expression and the exclusion of political affiliation.

- 5) Should not include ‘knowingly’ or any similar intent requirement in the language of the rule. Including such language in proposed Model Rule 8.4(g) would impose a higher standard of proof for professional discipline than currently exists for civil liability under federal and state civil rights laws.

No federal civil rights law includes a “knowing” standard in its language. See statutory language at Exhibit 11.

Of the 24 states/DC with separate ethical rules against discrimination only five include a “knowing” or “willful” intent requirement. Nineteen of 24 do not. See analysis of state rules at Exhibit 9.

The SOGI Commission believes that the new model rule should include a comment that:

- (1) Explains the purpose of the rule and its importance in promoting public confidence in the legal profession and legal system.
- (2) Addresses the failure to accommodate as a basis for disability discrimination, particularly in light of the obligations already placed on lawyers by the Americans with Disabilities Act.
- (3) Clarifies and strictly defines the availability of exemptions for legitimate advocacy.
- (4) Explains that discrimination based upon a socioeconomic status’ does not mean limiting ones legal practice to (a) clients who can pay one’s regular billable rate or (b) clients from low income or other under-served populations.

Based upon these guidelines, SOGI recommends the following Model Rule 8.4(g):

It is professional misconduct for a lawyer to:

- (g) *engage in conduct, while acting in a lawyer’s professional capacity, that manifests bias, prejudice, discrimination, or harassment, on the basis of race, national origin, ethnicity, sex, age, disability, sexual orientation, gender identity/expression, marital status, or socioeconomic status.*

This recommendation closely tracks the language in Indiana’s Rule 8.4(g)¹. Thus, it is not language that should be widely controversial.

¹ Indiana Rule 8.4(g) provides in part:

It is professional misconduct for a lawyer to.... (g) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors.

I. EXISTING MODEL RULE 8.4

ABA Model Rule 8.4 currently states:

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.*

Comment [3]

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, 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.

II. BACKGROUND on EFFORTS TO CHANGE RULE 2014-2015

On May 7, 2014, the ABA Commission on Sexual Orientation & Gender Identity, the ABA Commission on Women in the Profession, the ABA Commission on Racial & Ethnic Diversity in the Profession, and the ABA Commission on Disability Rights (the "ABA Goal III Commissions") wrote a letter to the SCEPR to request that it work to amend the ABA Rules of Professional Conduct to expressly address bias, prejudice, discrimination (the "Goal III Letter"). The letter further urged that the rule address harassment and intimidation as forms of bias. Exhibit 1. The letter included a detailed chart of state ethical rules that address bias, prejudice, discrimination, and/or harassment. Exhibit 2 is an updated version of that chart.

On July 20, 2014, SCEPR responded with a letter stating that it would establish a working group to study the issue and to make a recommendation to SCEPR and the ABA. Exhibit 3. SCEPR chair Myles Lynk named a working group of bar counsel, professional discipline attorneys, and one representative from each Goal III commission. The working group began meeting by phone in October, 2014, and met in person at the February, 2015, ABA midyear meeting. After additional phone calls and emails, the working group submitted a summary of their work to SCEPR in a letter dated May 26, 2015. Exhibit 4.

SCEPR reviewed the input from the working group and issued a new draft Model Rule 8.4(g) in July, 2015, for discussion at the 2015 ABA annual meeting. The materials provided with that release are included at Exhibit 5. That initial SCEPR draft rule states:

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

....

- (g) *knowingly harass or 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 rule also includes a newly proposed Comment 3:

Conduct that violates paragraph (g) undermines confidence in the legal profession and our legal system and is contrary to the fundamental principle that all people are created equal. A lawyer may not engage in such conduct through the acts of another. See Rule 8.4(a). Legitimate advocacy respecting any of these factors when they are at issue in a representation does not violate paragraph (g). It is not a violation of paragraph (g) for lawyers to limit their practices to clients from under-served populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). Paragraph (g) incorporates by reference relevant holdings by applicable courts and administrative agencies.

III DISCUSSION ISSUES

SCEPR and the working group identified several different components of a proposed rule that require additional discussion. They include:

- (A) Should Comment 3 be replaced with a new, separate Model Rule 8.4(g) that is not tied to the "prejudicial to the administration of justice" language of Model Rule 8.4(d)?

SOGI position: YES

- (B) When should a lawyer's behavior be covered (person vs professional behavior)?

SOGI position: Professional capacity

- (C) Should a new Model Rule 8.4(g) continue Comment 3's use of "bias and prejudice" or should it use "discrimination" and/or "harassment" or should it include all four?

SOGI position: Include bias, prejudice, discrimination, and harassment

- (D) Which groups should be covered by the rule?

SOGI position: All groups included in Judicial Rule 2.3 with the addition of gender identity/expression and the exclusion of political affiliation

- (E) Should a new Model Rule 8.4(g) only cover "knowing" or "willful" misconduct, which would require a higher standard of proof for bar prosecution than state and federal civil rights laws currently require for civil liability?

SOGI position: NO

- (F) Should a new Model Rule 8.4(g) expressly exclude "legitimate advocacy?"

SOGI position: If SCEPR believes there is a need to address "legitimate advocacy," it should do so in the comment and not the rule itself. Any exception for "legitimate advocacy" should be limited to ensure that it only covers behavior directly related to the purpose of the exception.

A. NEW MODEL RULE 8.4(g) SHOULD NOT BE TIED TO OLD MODEL RULE 8.4(d)

Currently, the comment on bias is tied to Model Rule 8.4(d). Subsection (d), however, relates only to conduct that is "prejudicial to the administration of justice." As the Goal III letter noted, most lawyers think of something that is "prejudicial to the administration of justice" as something that relates to the overall fairness of the tribunal. They do not view it as "prejudice" in the context of discrimination on the basis of race, sex, or other characteristics. Thus, Comment 3 itself seems to address conduct that is different from Rule 8.4(d) and should be addressed in a separate rule.

A rule tied to the "administration of justice" is too limited. It applies only to legal work within the justice system, which means civil and criminal litigation. Most lawyers never litigate a case and never see a court room. Nor are they affiliated with the justice system in any way. Tax lawyers, real estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system should be covered by a

rule against bias. They should not be allowed to behave in discriminatory ways that court lawyers cannot.

The Model Rules of Judicial Conduct already require judges to ensure that lawyers who appear before them not engage in such conduct. Model Rule 2.3(C) states:

A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to, race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

Thus, a rule tied to the “administration of justice” seems redundant of Model Rule of Judicial Conduct 2.3 at the same time that it completely leaves out most members of the legal profession.

It is also important to take the concept of bias/prejudice out of the comments and to put it in the black letter rules. Many states that adopt the ABA model rules do not adopt the comments. Twelve states that adopt ABA Model Rule 8.4 do not adopt Comment 3 or any other reference to bias/prejudice. Those states that do adopt Comment 3 cannot rely on it as the basis for prosecution. Comments are merely explanatory. Prosecution in the disciplinary process must be tied directly to the black letter rule. If the rule itself does not address bias or prejudice or if it is tied only to the “administration of justice,” then it is unlikely that lawyers will be disciplined for bias, prejudice, or similar misconduct.

Canadian lawyers take discrimination so seriously that they dedicate six pages to it in their Code of Professional Conduct. Canadian Chapter XX bars all forms of discrimination except when otherwise “permitted by law.” In other words, the default standard is no discrimination, as opposed to discrimination prevails unless it is expressly prohibited. Exhibit 11. The Canadian rule also makes clear that the discriminatory attitudes of clients or others do not diminish a lawyer’s responsibility to refrain from discrimination. The fact that Canada spends six pages outlining their rules against discrimination compared to the ABA’s 1 paragraph in a comment suggests to the outside world that the ABA does not take this very important issue as seriously as it should.

A separate rule should be adopted to emphasize the importance of the issue. Bias, prejudice, discrimination and harassment so fundamentally undermine public confidence in lawyers and the legal system that they should be addressed in a separate black letter rule and not as an aside in a comment.

Other professions already expressly prohibit discrimination in their ethics codes. Exhibit 7. It is time for lawyers to do so also B not in a comment but in the black letter rules for all to see and understand.

B. WHEN SHOULD A LAWYER'S CONDUCT BE COVERED BY THE RULE?

The SOGI Commission believes that the rule should apply to lawyers whenever they are acting as lawyers. It supports coverage whenever a lawyer acts in his/her "professional capacity."

Comment 3's limitation to "in the course of representing a client" or "in the representation of a client" is inadequate, because not all lawyers represent clients. Academics, nonprofit lawyers, and some government lawyers do not represent clients. More and more lawyers do not practice traditional law. The current comment misses too many lawyers when they are acting as lawyers.

Some state rules apply to conduct "in the practice of law," while others apply to conduct in a lawyer's "professional capacity." The SCEPR draft is limited to "the practice of law." This option is too limiting. It also opens up a large loophole for lawyers to argue that they were not "practicing law" when they discriminated but instead were giving business or political advice. The rule should not allow for such hair-splitting.

"Professional capacity" applies to a broader array of conduct. When lawyers serve as leaders of ABA, state, or local bar associations they are not practicing law but they are acting in a "Professional capacity" as a lawyer. Surely, lawyers should comply with an ethical rule against discrimination when they are serving in these roles. Indeed, the ABA business conduct rules require lawyers to do so whenever they represent the ABA. See Exhibit 6.

Similarly, when lawyers serve as corporate directors they may not be practicing law, but they still are subject to the ethical rules against fraud or deceit. They should be similarly subject to ethical rules against bias, prejudice, discrimination, and harassment.

Numerous other professions already have ethical rules that bar discrimination. Their rules are not limited or qualified. See Exhibit 7 for a sample of such rules.

If lawyers are ever going to eliminate bias, prejudice, and discrimination in the profession and in lawyer leadership roles, we must include those roles and conduct relating to those roles within the proposed Model Rule 8.4(g).

Nine of the states with a separate ethical rule against discrimination apply to lawyers when they act in their "professional capacity." Only three states have rules that apply to "the practice of law." The state breakdown is provided at Exhibit 8.

C. BIAS, PREJUDICE, DISCRIMINATION, and/or HARASSMENT

Comment 3 addresses "bias" and "prejudice." This language has been in place since the ABA House of Delegates adopted the comment in 1998. This mirrors the existing language in Model Rule of Judicial Conduct 2.3. The judicial code has used "bias" and "prejudice" since

the early 1980s. Thus, bar prosecutors should already be familiar with enforcing any rule based upon this language.

The ABA Model Code of Judicial Conduct Rule 2.3 added harassment in the 1990s based upon the strong recommendations of the ABA Commission on Women in the Profession, the National Association of Women Judges, and other women's groups. They believed that harassment, especially sexual harassment was different from bias and prejudice and thus should be separately noted. We agree with this addition.

SCEPR's draft rule uses "discriminate" and "harass." Most state rules use "bias" and "prejudice." Some add "harass" or "harassment." Federal civil rights laws and most state civil rights laws focus on discrimination and harassment. Most lawyers are or should be familiar with these concepts. Bar prosecutors who are not already familiar with these concepts can certainly learn what judges and civil rights lawyers deal with every day.

The SOGI Commission urges the use of all four commonly used conduct words in the black letter rule. Lawyers like to find loopholes. Unless the rule covers all such conduct, it is likely that lawyers accused of improper conduct will try to categorize their conduct under a conduct not expressly covered by the rule.

SOGI also urges the inclusion of a comment that makes clear that the rule is intended to apply to all similar conduct so that semantic loop holes do not develop.

Finally, SOGI supports the efforts of the Commission on Disability Rights to include a comment that addresses the failure to accommodate as a basis for disability discrimination. The Americans with Disabilities Act addresses discrimination in public accommodations. The statute expressly includes lawyers' offices within the definition of a public accommodation in 42 U.S.C. '12181(7)(F). If lawyers must already comply with the ADA, then the ethical rules should extend to the same conduct.

D. COVERED GROUPS

The SOGI Commission supports the inclusion of all groups already included in the ABA Model Rule of Judicial Conduct 2.3 with the addition of gender identity/expression and the exclusion of political affiliation.

The rule should add gender identity/expression, because ABA policy already prohibits discrimination based upon gender identity or expression. As the Commission on Sexual Orientation and Gender Identity, we must insist in our full inclusion in the new model rule.

While it is necessary for the Judicial Code to prohibit bias/prejudice based upon political affiliation in order to preserve nonpartisan courts, it is not plausible to include such a prohibition in the rules for lawyers. Many lawyers work in politics, which inherently are divided by political affiliation.

The new rule should not drop any existing categories, because it should focus on being more inclusive, not less inclusive.

Some people have raised unspecified concerns about the inclusion of “marital status.” We have not heard any reason for doing so beyond unsupported assertions that such discrimination does not exist any more. If that were true, then keeping “marital status” in the rule should have no impact on anyone. However, excluding it may harm many people, especially women and LGBT persons.

Lawyers and the legal system still discriminate against people based upon marital status. For centuries, women endured this discrimination the most. The legal system barred women from serving on juries. Some states barred women from owning property in their own name or from serving as estate executors. Women could not have credit in their own name. They did not even have legal or personhood status of their own. They were considered part of B or even the property of C their husbands. Vestiges of this history remain. Many women lawyers who endured these laws and marital status discrimination still practice law. Many lawyers who committed this kind of discrimination still practice law. So long as they remain in our profession, marital status should remain a protected category.

The recent development of same sex marriage makes “marital status” an important category for LGBT persons also. LGBT persons can now get married on Saturday but then be fired on Monday for doing so, because marriage makes the LGBT status more public. That is marital status discrimination. After Obergefell v. Hodges, even more LGBT people are likely to face marital status discrimination.

Some people want to exclude socioeconomic status. The only reasons we have heard for opposing socioeconomic status are (1) Legal Aid accepts clients based upon socioeconomic status, (2) lawyers should be able to choose to work only for clients who can pay for their services (the ethical rules on pro bono notwithstanding), and (3) it is not a Title VII or state civil rights category. The SCEPR comment or something like it should satisfy objections based upon (1) and (2). No one intends to force lawyers to work for clients who can't pay them. Nor does anyone want to prevent lawyers from helping poor and under-represented populations. That is not the intent of its inclusion in the rule. The ABA should be able to come up with a comment that explains this intent.

SOGI supports the inclusion of socioeconomic status in the rule, because studies by the ABA, the National Center for State Courts, and others show that the public overwhelmingly believes that lawyers and the legal system discriminate against people who are not rich. They believe that lawyers and court personnel treat them disrespectfully and discount their testimony and problems because they are poor (or not rich). They do not believe that they receive justice, solely because of their socioeconomic status. This is unacceptable. This is the basis for our support for its inclusion in the rule.

We have not heard any explanation about why the ABA should not include socioeconomic status just because federal civil rights law does not include it. Business may be all about socioeconomic discrimination, but the justice system should not be.

E. INTENT

The SOGI Commission believes that the new Model Rule 8.4(g) should not include “knowingly,” “willful,” or any similarly express intent requirement.

The analogous Model Rule of Judicial Conduct 2.3 does not include a knowing or willful standard. Twenty-four states (including the District of Columbia) have adopted separate rules against bias, prejudice, discrimination, and/or harassment. Of these 24, only five have a “knowing” or “willful” intent requirement. Nineteen of the 24 do not. Over 75% of the states that have thought about this issue enough to devise their own separate rule have decided against a “knowing” standard. The “intent” summary at Exhibit 9 outlines the choices of each state.

No federal civil rights law includes a “knowing” standard in its language. See statutory language at Exhibit 10.

SCEPR’s proposed “knowing” standard is impractical. “Knowing” is the highest level of intent requiring the highest level of proof, making enforcement extremely difficult. Only the most obvious behavior would subject lawyers to discipline under this standard. But even lawyers who intentionally discriminate know better than to make their intent obvious enough to satisfy the “knowing” standard. They use pretext and dog whistle terms to carry out their bias/prejudice. The ABA should not adopt a rule that lawyers can flaunt so easily.

Adopting a “knowing” standard would impose a higher standard of proof for professional discipline than currently exists for civil liability under federal and state civil rights laws. This means that a lawyer could be held liable for discriminating under civil rights laws and yet not be held accountable under the ethics rules. Such a scenario is unacceptable. It would damage public confidence in the legal profession and the justice system.

Instead, the level of intent required to demonstrate a violation should be left open so that the states can apply the same level of intent already used to enforce their existing ethics rules or their state civil rights laws. Well-established case law already exists that establishes the level of intent required to establish a civil rights law violation. Courts already are well versed in applying that case law. The ABA should rely on this well-established precedent. It should not reinvent the wheel with a new, higher standard.

Some people who agree with applying this civil rights liability standard of intent suggest that the new rule should cover “unlawful discrimination.” This option does not work, because most lawyers are not subject to most state or federal civil rights laws. Thus, their discriminatory actions are not unlawful. Most lawyers are employees or small firm employers, so they are not covered by employment discrimination laws. Most lawyers do not operate their own places of public accommodation and thus are not covered by those laws either. In other words, if a partner at a big law firm with many employees engaged in discrimination, his conduct would likely be unlawful and he could be disciplined under an ethical rule against “unlawful discrimination,” but one of his employees who engaged in the same discriminatory conduct would not be. A new Model Rule 8.4(g) should cover all lawyers B not just those who are covered by civil rights laws.

Some state rules accomplish this standard by merely referencing conduct that “manifests” bias or prejudice. This is the language that SOGI recommends.

If opponents are uncomfortable with the lack of an express standard in the rule, it would be easy to include comment language that explains that covered conduct includes any words or actions that would subject a lawyer to liability under federal, state, or local civil rights laws if the lawyer were subject to such laws or if those laws covered the same protected categories. This is necessary to ensure that Model Rule 8.4(g) covers all lawyers are covered and to ensure that discrimination based upon LGBT, marital, and socioeconomic status are covered by the rule even if they are not covered by state law.

F. LEGITIMATE ADVOCACY

SOGI understands that race, sex, etc. may be relevant facts in a matter. Lawyers, of course, should be free to reference such facts without fear of discipline. SOGI also understands that race, sex, etc. may be issues within a case, particularly discrimination cases. Again, lawyers should be free to address such issues when they are relevant to the underlying case. However, SOGI believes that the proposed comment’s language on “legitimate advocacy” is too broad. It states:

Legitimate advocacy respecting any of these factors when they are at issue in a representation does not violate paragraph (g).

This language implies that lawyers can discriminate or harass lawyers, witnesses, opponents, etc. on the basis of a protected category whenever the underlying case involves such a category. This suggests that a lawyer could sexually harass witnesses or opposing counsel in a case just because the case itself is about sexual harassment. It also suggests that a lawyer could appeal to the racial animus of jurors just because a case is about race discrimination. Surely, SCEPR does not intend for such a broad exception, but lawyers will read it that way if they believe they can gain advantage from doing so.

SOGI suggests that “legitimate advocacy” be accepted solely to the extent it is necessary to the underlying issue in the case. Lawyers should be able to address the underlying issue but should not be able to engage in actions that in and of themselves constitute bias, prejudice, discrimination, or harassment or that is attended to appeal to the bias, prejudice, discrimination, or harassment of others.

CONCLUSION

The ABA SOGI Commission commends SCEPR for seriously examining the need to amend Model Rule 8.4 to expressly address bias, prejudice, discrimination, and harassment. More than 16 years after the adoption of Comment 3, it is time to do better with the addition of a new, independent Model Rule 8(g). This issue is important to reducing discrimination in the legal profession and the legal system. It is important to maintaining public confidence. The SOGI Commission looks forward to working with SCEPR to move this effort forward.