

American Bar Association
Standing Committee on Ethics and Professional Responsibility
Working Discussion Draft – Revisions to Model Rule 8.4
Language Choice Narrative

July 16, 2015

Introduction

In May 2014, the American Bar Association’s Goal III¹ Entities -- the Commission on Disability Rights, the Commission Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession -- wrote to the ABA Standing Committee on Ethics and Professional Responsibility (“Ethics Committee”) urging it to draft amendments to the ABA Model Rules of Professional Conduct that would directly address lawyer bias, prejudice, and harassment in the black letter of the Rules. This issue is currently addressed only in Comment [3] to ABA Model Rule of Professional Conduct 8.4(d). The Goal III Entities wrote that this indirect reference in a Comment to a Rule was not sufficient for this purpose.²

Currently, Rule 8.4(d) prohibits conduct prejudicial to the administration of justice. Comment [3] to Rule 8.4 provides one example of such conduct. That Comment reads:

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.

As noted in the Goal III Entities’ letter to the Ethics Committee, the ABA Model Rules of Professional Conduct do not facially address bias, discrimination, or harassing behavior by a lawyer. By contrast, twenty-four jurisdictions in the United States have adopted in the black letter of their Rules of Professional Conduct some form of anti-bias, anti-prejudice, and/or anti-harassment rule prohibiting lawyers from engaging in such conduct. These 24 jurisdictions prohibit such behavior in a number of different ways – sometimes very broadly, sometimes more narrowly. In addition, fifteen jurisdictions in the United States have adopted an official Comment to their Rules of Professional Conduct to address bias, discrimination and prejudicial behavior by lawyers. These Comments either mirror Comment [3] to ABA Model Rule 8.4 or contain substantially similar restrictions and exceptions. The remaining fourteen jurisdictions do not address lawyer bias or prejudice in their Rules of Professional Conduct. Appendix B is a chart detailing all of the state rules.

¹ ABA’s Goal III is: Eliminate Bias and Enhance Diversity.

² The letter from the Goal III entities is provided in Appendix A.

In response to the Goal III Entities' letter, Ethics Committee Chair Myles Lynk appointed an ad hoc Working Group to consider this issue and solicited representatives from the Ethics Committee, the Goal III Entities, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers to participate in the research and drafting of a proposed rule. Paula Frederick, former member of the Board of Governors, immediate past chair of the Ethics Committee and former chair of the Center for Racial and Ethnic Diversity, graciously agreed to serve as chair of the Working Group. The Working Group met, researched the issue and provided valuable input and recommendations to the Ethics Committee.

Based on this input and the recommendation of the Working Group, the Ethics Committee crafted the following working draft amendment to ABA Model Rule of Professional Conduct 8.4.

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, while engaged [in conduct related to] [in] the practice of law.

The new language in Comment [3] to Rule 8.4 would read:

[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. 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 underserved 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.

The Ethics Committee has concluded that a black letter Rule in the ABA Model Rules of Professional Conduct prohibiting lawyers from knowingly discriminating against or harassing

others because of their race or other specific factor set forth in the proposal, is appropriate. While the current Model Rules do address this conduct through Comment [3] to Rule 8.4, “[C]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.” See ABA Model Rules of Professional Conduct Preamble and Scope, paragraph [14]. Lawyers are licensed officers of the court. Discrimination and harassment represent unacceptable behavior. They undermine confidence in the legal profession and our legal system and such conduct is contrary to the fundamental principle that all people deserve to be treated with equal dignity and respect.

Drafting Choices

Drafting rules requires writers to consider the meaning and possible effect of every word. When precisely crafted, every word choice reflects the intent of the drafter. The following is an in-depth discussion of the language choices made by the Ethics Committee for this proposal.

1. *Mens rea* requirement

Under the current Model Rules, a violation of Rule 8.4(d) for bias and prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status requires a *mens rea* of knowledge. Knowledge is a defined term and “denotes actual knowledge of the fact in questions. A person’s knowledge may be inferred from circumstances.”

By contrast, both the ABA’s Model Judicial Code and the ABA Criminal Justice Standards prohibit biased and prejudiced conduct, but neither the Code nor the Standards contain a knowledge requirement in these provisions.³ Most states that have written their own anti-bias rule do not include a knowledge requirement. These states include: Colorado, Florida, Indiana, Iowa, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, Ohio, Rhode Island, Washington, Wisconsin.

Nonetheless, the Ethics Committee was concerned that a model rule that did not include a *mens rea* would in effect impose a strict liability standard on the profession. The Ethics Committee was not convinced that this was necessary, or that prohibiting “knowing” conduct would not adequately prevent the conduct this Rule is intended to address. Therefore, the Ethics Committee decided to retain the knowledge requirement that currently exists in Comment [3] to Model Rule of Professional Conduct 8.4.

The Ethics Committee does, however, seek comments on this issue: Should the Rule include a *mens rea*?

2. Prohibited Conduct

The draft proposal would prohibit a lawyer from knowingly harassing or discriminating against another person. The Ethics Committee chose to not use the phrase “manifest bias or prejudice” for a number of reasons. First, because the Model Rules of Professional Conduct are rules of

³ See ABA Model Code of Judicial Conduct, Rule 2.3; ABA Criminal Justice Standards for the Prosecution Function 3-1.6; ABA Criminal Justice Standards for the Defense Function 4-1.6.

conduct and not rules enacted to regulate thoughts or feelings of lawyers. The word “discrimination” more accurately reflects conduct or action, while bias and prejudice are deemed to be opinions or feelings.

However, based on the recommendation of the ad hoc Working Group, the Ethics Committee recommends expanding the prohibited conduct in current Comment [3] to include harassing conduct. The ABA Model Code of Judicial Conduct, Rule 2.3(C) already requires judges to ensure lawyers refrain from harassment in proceedings before the court, and harassment based on gender is also prohibited by statute. The Ethics Committee notes that lawyers are licensed officers of the court. When lawyers engage in harassment their conduct demonstrates a lack of respect for the law and undermines the integrity and impartiality of the judicial system.

The Ethics Committee seeks comments on this issue: should the prohibition apply to discrimination or should the phrase “manifest bias or prejudice” remain? Also, should the prohibited conduct be expanded to include harassment?

3. Expanding the Categories of Persons Protected by the Rule

The categories of persons identified in Comment [3] to Rule 8.4 include those discriminated against because of their “race, sex, religion national origin, disability, age, sexual orientation or socioeconomic status.”

There is ongoing discussion about continued inclusion of “socioeconomic status” as a protected class. Research failed to reveal either a definition for the term or its application in any disciplinary context. To address a concern raised about including socioeconomic status in the list of protected groups, the suggested Comment includes the statement: “It is not a violation of paragraph (g) for lawyers to limit their practices to clients from underserved populations as defined by any of these factors, or for lawyers to decline to represent clients who cannot pay for their services.” This language recognizes that this provision could affect lawyers and legal service organizations that represent other defined groups as well. However, there was discussion of how the Committee would define “underserved.” For example, if a lawyer represents only wives in family law matters, that is not an “underserved” population. Would this practice violate the Rule? Similarly there are a variety of lawyers who limit their practices on the basis of particular economic factors, e.g. high-asset divorce cases, white collar criminal defense, or corporate mergers and acquisitions. Would such limited practices violate the Rule?

The Goal III Entities recommended the addition of “gender identity.” In subsequent meetings, the Working Group also recommended the addition of “ethnicity” and “marital status” as protected classes. The prohibition against discrimination of persons based on their marital status and ethnicity already exists in the ABA Model Judicial Code, Rule 2.3(C), but it does not appear in Comment [3] to ABA Model Rule 8.4.

The Ethics Committee seeks comments on whether expanding the list of classes to include gender identity, ethnicity, and marital status is appropriate.

The Ethics Committee also seeks comments on whether socioeconomic status should be included in this Rule.

4. Reach of the Rule

The proposed draft reframes the scope of the prohibition from conduct “in the course of representing a client” to either “engaged in conduct related to the practice of law” or “engaged in the practice of law.”

The Ethics Committee believes that jurisdictions should have the option of establishing a narrow or expansive rule to fit the needs of their jurisdiction. At the same time, the Committee rejected retaining the scope of current Comment [3], “in the course of representing a client,” because too many jurisdictions have read this provision to mean that the lawyer’s biased or prejudiced act must be specifically connected to court proceedings. In fact, many transactional lawyers are not engaged in trial work, and trial lawyers necessarily engage in a variety of practice-related matters that are not related to specific court proceedings.

At the same time, the Ethics Committee is also cognizant of lawyers’ First Amendment rights to express their personal views on any subject. Therefore, the Ethics Committee seeks input on whether the Rule’s Comment should address the issue of a lawyer engaged in, for example, a political campaign or other advocacy that is unrelated to the practice of law.

5. Exclusions

The proposed draft retains the “legitimate advocacy” exception in current Comment [3] to Model Rule 8.4. However, the exclusion for legitimate advocacy would be tempered by the phrase “when they are at issue in a representation,” so as to provide balance to the exception.

The proposal also retains the caution in Comment [3] that a trial judge’s finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).

The Ethics Committee seeks comments on whether these exceptions should continue.

6. Providing Guidance to Disciplinary Counsel

The proposed language for revised Comment [3] includes the statement, “Paragraph (g) incorporates by reference relevant holdings by appropriate courts and administrative agencies.” This statement is included to explain that relevant holdings from courts and agencies enforcing civil rights laws may be used to provide context and standards for disciplinary counsel seeking to enforce the Rule.

The Ethics Committee seeks comment on whether this language provides sufficient guidance to disciplinary counsel.

7. Location of the Rule

Finally, the Committee decided to place the amended Rule into Rule 8.4, Misconduct. There was, however, some discussion about placing this provision in a separate free-standing Rule, for example, a new Model Rule 8.6, Harassment and Discrimination. Because the current Comment is in Rule 8.4 and the majority of states with similar rules have located their comparable rules in Rule 8.4, the Ethics Committee decided to follow that practice, but has left open the possibility of an alternative placement. Therefore, the Ethics Committee seeks comment on this issue.