

Proposed Changes to Idaho Rule of Professional Conduct 8.4(g)

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Background on Model Rule 8.4(g)

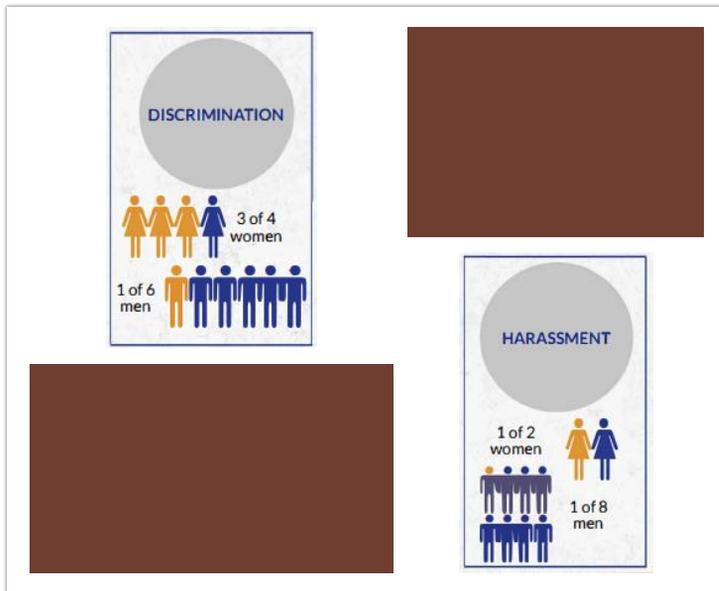
- Subsection (g) added by the ABA in 2016.
- Prohibits lawyers from engaging in discrimination and harassment "in conduct related to the practice of law."
- The P&E Section created the Anti-Discrimination Anti-Harassment Committee ("Committee") in 2016 to study Model Rule 8.4(g).
- **In 2017, the Committee did not recommend Model Rule 8.4(g), but instead recommended an anti-discrimination, anti-harassment rule that was narrower.**
- The P&E Section voted 86.67% in favor of the 2017 Proposed Rule, and the ISB Commissioners opted to co-sponsor.
- The 2017 Proposed Rule passed ISB membership with approximately 62% of the votes
- **In a 3-2 decision, the Idaho Supreme Court rejected the 2017 Proposed Rule on September 6, 2018.**

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Idaho Supreme Court in its 2018 decision:

"Members of the Court encourage the Idaho State Bar to revisit this matter in hopes of narrowing the rule to comport with new United States Supreme Court cases."

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CLIMATE SURVEY RESULTS

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The Committee's Objective

Propose a narrower recommendation that:

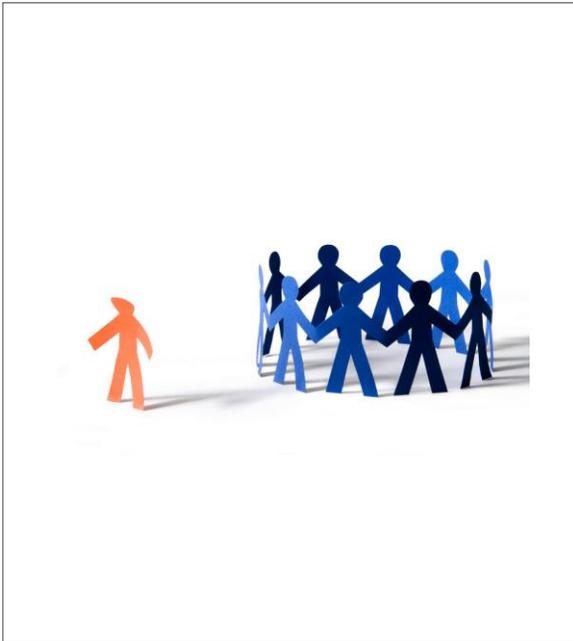
- Comports with relevant caselaw and advisory opinions and
- Balances protecting fellow Bar members from discrimination/harassment while still protecting First Amendment rights

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THE 2021 PROPOSED RULE



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Discrimination

- The 2021 Proposed Rule only prohibits unlawful discrimination

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Harassment

Harassment is derogatory or demeaning. . . conduct toward a person **based upon [that person's protected class]**. To constitute a violation of this subsection, the harassment must be **severe or pervasive** enough to create an environment that is **intimidating or hostile to a reasonable person**.

...

[3] . . . Harassment includes sexual harassment such as unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal, written or physical conduct of a sexual nature. Factors to be considered. . . : the frequency of the harassing conduct; its severity; whether it is threatening or humiliating, or a mere offensive utterance; whether it is harmful to another person; or whether it unreasonably interferes with conduct related to the practice of law. Petty slights, annoyances, and isolated incidents, unless extremely serious, will not rise to the level of harassment. . . The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of this paragraph (g).

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SCOTUS on Title VII Discrimination/Harassment

- “[T]he Constitution. . . places no value on **discrimination**,” and while “[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, . . . **it has never been accorded affirmative constitutional protections.**”
Norwood v. Harrison, 413 U.S. 455, 469-70 (1973).
- The Court has “**rejected the argument that Title VII infringed employer’s First Amendment Rights**,” and has cited Title VII “as an **example of a permissible content-neutral regulation of conduct.**” *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), *R.A.V. v. St. Paul*, 505 U.S. 377, 389-90 (1993)).

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Scope

- The 2021 Proposed Rule only regulates conduct in three areas:
 1. In the representation of a client,
 2. In operating or managing a law practice, or
 3. In the course and scope of employment in a law practice.
- Comment 4 expressly excludes bar association, business, or social activities outside of the above contexts.
- The black letter law states, “This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules.”

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Why the Committee Supports the 2021 Proposed Rule

- The Survey shows that many of our fellow Bar members have endured harassment and discrimination in their practice.
- The scope of the 2021 Proposed Rule is narrower in scope than the 2017 Proposed Rule that was approved by the Bar then rejected by the Idaho Supreme Court.
- The 2021 Proposed Rule is narrower in scope than any antidiscrimination rule that has been analyzed in judicial or advisory opinions to date.
- The 2021 Proposed Rule contains language that has been upheld by the U.S. Supreme Court.