

THE COURTS

Title 204—JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

[204 PA. CODE CH. 81]

Proposed Amendments to the Pennsylvania Rules of Professional Conduct Regarding Misconduct

[48 Pa.B. 2936]

[Saturday, May 19, 2018]

Notice is hereby given that the Disciplinary Board of the Supreme Court of Pennsylvania ("Board") is planning to recommend to the Supreme Court of Pennsylvania that it adopt amendments to Pennsylvania Rule of Professional Conduct ("RPC") 8.4 relating to misconduct, as set forth in Annex A. This proposed rule amendment is intended to declare discriminatory and harassing conduct as misconduct when engaged in by lawyers, in the practice of law.

By way of brief background, on August 8, 2016, the American Bar Association amended Model Rule 8.4 to add new paragraph (g) relating to discrimination and harassment. In pertinent part, the new Model Rule prohibits a lawyer from engaging 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."

At present, in contrast with many other jurisdictions, Pennsylvania's rules do not address harassment or discrimination in the black letter law or in the comments. In December 2016, after studying new Model Rule 8.4(g) and the rules of other jurisdictions, the Board published proposed amendments to RPC 8.4 that prohibited a lawyer from violating a federal, state or local antidiscrimination statute or ordinance.¹ Following extensive review and discussion of the numerous comments and suggestions received in response to the published proposal, the Board determined not to move forward with the proposed amendments, and renewed its study of the issue.

For a significant time, bar associations and related organizations and institutions have engaged in active debate over whether to include discrimination and harassment as professional misconduct. The Board supports these efforts and we conclude that it is in the best interest of the profession and the public for Pennsylvania to amend its rules to formally disapprove the conduct of any lawyer who knowingly engages in harassment or discrimination in the practice of law.

The Board modeled its proposed rule language on the Pennsylvania Code of Judicial Conduct. Pa.R.J.C. 2.3 governs bias, prejudice and harassment; subsection (B) prohibits judges from engaging in such conduct in the performance of their judicial duties, and subsection (C) directs judges to require lawyers to refrain from such conduct in proceedings before the court. The Board favors similar language, in order that a lawyer's ethical obligations under the RPC correspond to the conduct prohibited in the Code of Judicial Conduct and in order that the same protected classes are covered.

The proposed change to RPC 8.4 creates a new paragraph (g) and adds commentary as follows:

It is professional misconduct for a lawyer to:

* * *

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation (except employment discrimination unless resulting in a final agency or judicial determination). 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.

Comment:

* * *

(3) Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.

(4) Harassment, as referred to in paragraph (g), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

(5) Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome

* * *

As part of the Board's renewed look at this matter, we revisited Model Rule 8.4(g). Based on our review, we determined not to pursue wholesale adoption of Model Rule 8.4(g). We conclude that the Model Rule language is susceptible to challenges related to constitutional rights of lawyers, such as freedom of speech, association and religion, due to the broad scope of the

language "conduct related to the practice of law," which the comment to the Model Rule explains extends to lawyers "participating in bar association, business or social activities in connection with the practice of law." The Board has grave concerns that adoption of such language would unconstitutionally chill lawyers' speech in forums disconnected from the provision of legal services. Parenthetically, of the many comments received in response to the Board's first rulemaking proposal, only one supported adoption of the Model Rule, and at this time, Vermont, the U.S. Virgin Islands, American Samoa and the Northern Mariana Islands are the only jurisdictions to adopt Model Rule 8.4(g) in its entirety.

The Board reviewed other jurisdictions' language relative to discrimination and harassment, particularly as to the scope of the prohibited conduct. According to the most recent compilation of data analyzing 56 jurisdictions (U.S. states, the District of Columbia, and territories),² at least 39 jurisdictions have anti-discrimination/anti-harassment provisions in their rules of professional conduct. Of those jurisdictions, 28 place the provision in the black letter law and 11 place the provision in the commentary.³ The Board proposes placing the rule amendments in the black letter law, as a black letter rule is enforceable in disciplinary proceedings.

Thirty-four jurisdictions require that the conduct have some connection to the practice of law.⁴ For example, "in the representation of a client";⁵ "in connection with the practice of law";⁶ "in a professional capacity";⁷ "in the practice of law";⁸ "in the course of representing a client";⁹ and "in connection with the lawyer's professional activities."¹⁰ Upon our review, the provisions in these jurisdictions require some nexus to delivering legal services and, the majority do not purport to reach "social activities."

Similar to the provisions in these jurisdictions, the Board proposes the language "in the practice of law" as a more narrowly-tailored scope of prohibited conduct. We conclude that private activities are not intended to be covered by this proposed rule amendment, since to do so would increase the likelihood of infringing on constitutional rights of lawyers.

The Pennsylvania RPC and the Pennsylvania Rules of Disciplinary Enforcement do not define what constitutes the practice of law; generally, the Supreme Court of Pennsylvania has explained what specific activities constitute the practice of law on a case-by-case basis. This case law is instructive and guides lawyers in determining the scope of the prohibited conduct relative to proposed new paragraph (g). The Supreme Court of Pennsylvania has outlined three broad categories of activities that constitute the practice of law: (1) the instruction and advising of clients in regard to the law so that they may pursue their affairs and be informed as to their rights and obligations; (2) the preparation of documents for clients requiring familiarity with legal principles beyond the ken of ordinary laypersons; and (3) the appearance on behalf of clients before public tribunals in order that the attorney may assist the deciding official in the proper interpretation and enforcement of the law. *Office of Disciplinary Counsel v. Frank J. Marcone*, 855 A.2d 654, 660 (Pa. 2004) (citing *Shortz et al. v. Farrell*, 193 A. 20, 21 (Pa. 1937)). The Court has provided additional guidance by noting that "the practice of law is implicated by the holding out of oneself to the public as competent to exercise legal judgment and the implication that he or she has the technical competence to analyze legal problems and the requisite character qualification to act in a representative capacity." *Id.*, citing *Dauphin County Bar Association v. Mazzacaro*, 351 A.2d 229, 222-223 (Pa. 1976).

Similar to social activities, employment discrimination in hiring, firing, promotion, or

partnership status is not intended to be covered in the proposed rule, unless it has resulted in either an agency or judicial determination of discriminatory conduct. In its review of the rule provisions of other jurisdictions, the Board took particular note of New Jersey's rule, which excludes employment discrimination unless adjudicated.¹¹ The Board favors this exclusion, as existing agencies and courts are better able to deal with such matters, and the disciplinary resources required to investigate and prosecute discrimination and harassment in the employment area would be disproportionate to the benefits to the system given the remedies available elsewhere.

In jurisdictions that have a black letter rule, six have a *mens rea* requirement.¹² For example, "knowingly, or through callous indifference";¹³ "knowingly manifest by words or conduct";¹⁴ "knowingly intimidate or harass";¹⁵ "intentionally manifesting";¹⁶ and "willfully."¹⁷ Many of the jurisdictions that place anti-discrimination and anti-harassment provisions in their commentary also use the word "knowingly."¹⁸ The Board proposes the use of the word "knowingly," as the knowledge requirement prevents unintentional violation of the rule, and serves to exclude inadvertent conduct.

The Board proposes the inclusion of language relative to RPC 1.16, so that lawyers may retain professional independence and are not limited in their ability to accept, decline or withdraw from representation, except as set forth in RPC 1.16. This language is in Model Rule 8.4(g) and is contained in at least one other jurisdiction's provision.¹⁹ We further note that the Pennsylvania Bar Association ("PBA") and Allegheny County Bar Association ("ACBA") proposed versions of Rule 8.4(g) containing this exception.²⁰

The proposed language affirms that legitimate advocacy or advice concerning the protected classes contained in the rule does not violate the rule. As noted above, this proposed language is modeled on the Pennsylvania Code of Judicial Conduct. Pa.R.J.C. 2.3(D) advises that judges or lawyers are not precluded from making legitimate reference to the listed factors, when such factors are relevant to an issue in a proceeding. Additionally, this language concerning legitimate advocacy or advice is similar to the Model Rule language and is consistent with the rules of the vast majority of jurisdictions.²¹

The new comments proposed by the Board are modeled on the comments to Pa.R.J.C. 2.3. Proposed comments (3), (4), and (5) provide guidance to attorneys on the types of behavior covered by proposed paragraph 8.4(g), while explicitly stating that the examples provided are not limited to that list of behaviors. Although there is no uniform jurisdictional approach to providing specific examples of the prohibited conduct, upon review, the Board concludes that the proposed commentary is necessary to assist lawyers in complying with the proposed rule.

Interested persons are invited to submit written comments by mail or facsimile regarding the proposed amendments to the Office of the Secretary, The Disciplinary Board of the Supreme Court of Pennsylvania, 601 Commonwealth Avenue, Suite 5600, PO Box 62625, Harrisburg, PA 17106-2625, Facsimile number (717-231-3381), Email address Dboard.comments@pacourts.us on or before June 18, 2018.

*By the Disciplinary Board of the
Supreme Court of Pennsylvania*

JULIA FRANKSTON-MORRIS, Esq.,
Secretary

Annex A

TITLE 204. JUDICIAL SYSTEM GENERAL PROVISIONS

PART V. PROFESSIONAL ETHICS AND CONDUCT

Subpart A. PROFESSIONAL RESPONSIBILITY

CHAPTER 81. RULES OF PROFESSIONAL CONDUCT

Subchapter A. RULES OF PROFESSIONAL CONDUCT

§ 81.4. Rules of Professional Conduct.

The following are the Rules of Professional Conduct:

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

* * * * *

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation (except employment discrimination unless resulting in a final agency or judicial determination). 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.

Comment:

(1) Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.

(2) Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

(3) Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.

(4) Harassment, as referred to in paragraph (g), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

(5) Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

[(3)] (6) A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[(4)] (7) Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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¹ See 46 Pa.B. 7519 (December 3, 2016)—"It is professional misconduct for a lawyer to: (g) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. If there is an alternative forum available to bring a complaint, no charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the

court or administrative agency has become final and enforceable and any right of judicial review has been exhausted."

² https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adapt_8_4_g.authcheckdam.pdf

³ The following jurisdictions have black letter law: California, Colorado, Washington, D.C., Florida, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, Texas, Vermont, Washington, and Wisconsin. The following jurisdictions have commentary: Arizona, Arkansas, Connecticut, Delaware, Maine, South Carolina, South Dakota, Tennessee, Utah, and Wyoming.

⁴ Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Washington, D.C., Florida, Idaho, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

⁵ Among the jurisdictions that use this verbiage are Colorado, Idaho and Missouri.

⁶ Among the jurisdictions that use this verbiage are Arkansas and Florida.

⁷ Among the jurisdictions that use this verbiage are Indiana, Massachusetts, Maryland, Nebraska, New Jersey and Ohio.

⁸ Among the jurisdictions that use this verbiage are Iowa and New York.

⁹ Among the jurisdictions that use this verbiage are Arizona, Connecticut, Delaware, Maine, North Dakota, New Hampshire, Oregon, South Carolina, Tennessee and Washington.

¹⁰ Among the jurisdictions that use this verbiage are Minnesota and Wisconsin.

¹¹ It is professional misconduct for a lawyer to: (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap whether the conduct is intended or likely intended to cause harm. N.J. RPC 8.4(g).

¹² Florida, Maryland, New Mexico, North Dakota, Oregon, and Texas.

¹³ Florida

¹⁴ Maryland and North Dakota.

¹⁵ Oregon

¹⁶ New Mexico

¹⁷ Texas

¹⁸ Arizona, Connecticut, Delaware, Maine, New Hampshire, South Carolina, South Dakota, Tennessee, Utah, and Wyoming.

¹⁹ Washington

²⁰ Letter from PBA to Board dated December 9, 2016, enclosing PBA's proposed version of RPC 8.4(g); letter from ACBA to Chief Disciplinary Counsel dated January 9, 2017, enclosing ACBA's proposed version of RPC 8.4(g).

²¹ Arizona, Arkansas, Connecticut, Delaware, Idaho, Indiana, Iowa, Maine, Maryland, Massachusetts, Missouri,

Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

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