



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 Relating to Misconduct

[46 Pa.B. 7519]

[Saturday, December 3, 2016]

Notice is hereby given that The Disciplinary Board of the Supreme Court of Pennsylvania is considering recommending to the Pennsylvania Supreme Court that it adopt amendments to Pennsylvania Rule of Professional Conduct (PA RPC) 8.4 relating to misconduct and amend PA RPC 8.4, as set forth in Annex A.

The proposed change to PA RPC 8.4 creates a new paragraph (g).

The genesis and development of the proposed amendments arose out of the American Bar Association's (ABA) adoption of new Model Rule of Professional Conduct 8.4(g). On August 8, 2016, the ABA House of Delegates approved a resolution by the Standing Committee on Ethics and Professional Responsibility to amend Model Rule 8.4 to bring into the black letter of the ABA Model Rules of Professional Conduct an anti-harassment and antidiscrimination provision.

New Model Rule 8.4(g) specifically provides that it is professional misconduct for a lawyer to 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. Further, the paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Model Rule 1.16, and does not preclude legitimate advice or advocacy consistent with the Model Rules. The language of new Model Rule 8.4(g) derives from former Comment [3] to the Model Rule, which was adopted by the ABA in 1998. The impetus for new Model Rule 8.4(g) was to move the language of Comment [3] to the black letter of the rule, as comments are instructive and have no authority as rules. The ABA deemed it in the

public's interest and the profession's interest to make clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law.

An analysis of the Rules of Professional Conduct in other jurisdictions demonstrates that twenty-five jurisdictions have adopted antidiscrimination and/or anti-harassment provisions into the black letter of their rules of professional conduct.¹ Thirteen jurisdictions have a comment that addresses this issue.² Fourteen jurisdictions, including Pennsylvania, do not address this issue at all.³

Historically, Pennsylvania has supported adoption of ABA Model Rule amendments to promote consistency in application and interpretation of the rules from jurisdiction to jurisdiction, except where controlling Pennsylvania precedent or other important policy considerations justify a deviation from the Model Rule language.

It is important to highlight for the entire legal profession that discriminating and harassing conduct is wrong and that lawyers should not engage in it, as it reflects poorly on the legal profession.

Proposed new paragraph (g) makes it misconduct for a lawyer to 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. Further, proposed paragraph (g) provides that 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.

The proposed amendment is narrow in scope compared to the ABA Model Rule, because of the requirement of a judicial or administrative finding of discriminatory conduct. It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule broadly defines "harassment" to include any "derogatory or demeaning verbal conduct" by a lawyer, and the rule subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was. Pennsylvania's proposed amendments will establish sufficient guidelines for the regulators charged with enforcement of this provision of RPC 8.4 and will eliminate the potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers. Requiring a prior adjudication by tribunals and limiting the scope of the proposed rule allows both lawyers and disciplinary authorities to rely on established federal and state laws and precedent to guide their conduct and the proceedings. Other jurisdictions have adopted

rules that require a prior, final determination of harassment or discrimination by a court or administrative agency.⁴

In Pennsylvania, a lawyer can still be disciplined for certain kinds of discriminatory or harassing conduct based on violation of other rules of professional conduct, even if there is no finding by a court or administrative agency. For example, RPC 4.4(a) prohibits a lawyer, in representing a client, from using means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of a person. Under this provision, which is not limited to litigation or to the courtroom, a lawyer may not disregard the rights of a third person.⁵ RPC 8.4(d) prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice. The broad language of this proscription allows for application of the rule in a wide variety of contexts.⁶

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 (717-231-3382), Email address Dboard.comments@pacourts.us on or before February 3, 2017.

*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) 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.

Comment:

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[Pa.B. Doc. No. 16-2062. Filed for public inspection December 2, 2016, 9:00 a.m.]

¹ See California RPC 2-400; Colorado RPC 8.4(g); Florida RPC 4-8.4(d); Idaho RPC 4.4(a); Illinois RPC 8.4(j); Indiana RPC 8.4(g); Iowa RPC 8.4(g); Maryland Lawyer's RPC 8.4(e); Massachusetts RPC 3.4(i); Michigan RPC 6.5; Minnesota RPC 8.4(h); Missouri RPC 4-8.4(g); Nebraska RPC 8.4(d); New Jersey RPC 8.4(g); New Mexico RPC 16-300; New York RPC 8.4(g); North Dakota RPC 8.4(f); Ohio RPC 8.4(g); Oregon RPC 8.4(a)(7); Rhode Island RPC 8.4(d); Texas RPC 5.08; Vermont RPC 8.4(g); Washington RPC 8.4(g); Wisconsin RPC 8.4(i); D.C. RPC 9.1.

² See Arizona RPC 8.4, cmt.; Arkansas RPC 8.4, cmt. [3]; Connecticut RPC 8.4, Commentary; Delaware Lawyers' RPC 8.4, cmt. [3]; Idaho RPC 8.4, cmt. [3]; Maine RPC 8.4, cmt. [3]; North Carolina RPC 8.4, cmt. [5]; South Carolina RPC 8.4, cmt. [3]; South Dakota RPC 8.4, cmt. [3]; Tennessee RPC 8.4, cmt. [3]; Utah RPC 8.4, cmt. [3]; Wyoming RPC 8.4, cmt. [3]; West Virginia RPC 8.4, cmt. [3].

³ The states that do not address this issue in their rules include Alabama, Alaska, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nevada, New Hampshire, Oklahoma, and Virginia.

⁴ See Illinois RPC 8.4(j); Minnesota RPC 8.4(h); New York RPC 8.4(g); Washington RPC 8.4(g).

⁵ See *Office of Disciplinary Counsel v. John J. Koresko, V*, No. 119 DB 2013 (D. Bd. Rpt. 6/1/2015) (S. Ct. Order 9/4/2015).

⁶ See *Office of Disciplinary Counsel v. Edward Charles Malloy, III*, No. 178 DB 2014 (D. Bd. Rpt. 4/26/2016) (S. Ct. Order 6/30/2016); *Office of Disciplinary Counsel v. Robert Philip Tuerk*, No. 51 DB 2014 (D. Bd. Rpt. 7/20/2015) (S. Ct. Order 10/15/2015); *Office of Disciplinary Counsel v. Allen L. Feingold*, 92 DB 2005 (D. Bd. Rpt. 5/4/2006) (S. Ct. Order 8/22/2006).

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