



**Assembly Meeting  
December 10, 2016**

**Agenda Item 9  
ABA Model Rule 8.4(g)**



## MEMORANDUM

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To: ISBA Assembly

From: Charles Northrup, General Counsel

Date: November 18, 2016

Re: ABA Model Rule 8.4(g) (Anti-harassment/discrimination)

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### **I. Introduction**

In August, 2016 the American Bar Association (“ABA”) adopted revisions to the Model Rules of Professional Conduct to address harassment and discrimination in the legal profession. The Illinois Supreme Court’s Committee on Professional Responsibility is reviewing these revisions and considering whether to recommend that the Court adopt them. The Professional Responsibility Committee has invited the ISBA to comment. ISBA President Cornelius is asking that the Assembly review, debate, and take a position on this matter at its December 10, 2016 meeting.

### **II. Background**

In the spring, 2016, a proposal to establish ABA Model Rule 8.4(g) to prohibit harassment and discrimination in the practice of law was placed on the ABA House of Delegates agenda. The ABA proposal was circulated to all ISBA sections. Twenty-one sections expressed opposition to the proposal, three expressed support, and the remainder either took no position or did not consider it. In July, the ISBA Executive Committee reviewed the ABA proposal and ISBA section input and determined to oppose the proposal on grounds of vagueness, overbreadth, and potential disciplinary uncertainty in its application and enforcement. The Executive Committee’s position, while not binding, was conveyed to Illinois’ ABA House of Delegate delegates.

On the eve of ABA House of Delegate consideration, the proposal was amended. The amended proposal passed the House of Delegates on a voice vote. As noted above, the Court’s Professional Responsibility Committee is now considering amending Illinois’ Rules of Professional Conduct to mirror the amended ABA Model Rule 8.4(g).

### **III. Analysis**

#### **1. New ABA Model Rule 8.4(g)**

ABA Model Rule 8.4 (g) and associated Comments [3], [4], and [5] are attached. Under the Model Rule, it is misconduct for a lawyer to engage in conduct that the lawyer knows, or reasonably should know, is harassment or discrimination related to the practice of law. It provides that the prohibition does not apply to legitimate advice or advocacy. (These two provisions were part of the amendments presented to, and ultimately approved by, the ABA House of Delegates.) The related Comments provide additional interpretation of the Model Rule. Among other aspects, the Comments provide that: the Rule applies to all facets of practicing law as well as participation in bar association, business, and social activities related to the practice of law; the substantive law of antidiscrimination and anti-harassment may guide the application of the Rule; and a judicial

finding that peremptory challenges were exercised on a discriminatory basis do not alone establish a violation of the Rule.

Supporters of the Model Rule contend that it is consistent with, and in furtherance of, broad ABA policy goals of promoting full and equal participation in the justice system and eliminating bias in the legal profession. The broad scope of the Model Rule is justified on the grounds that lawyers have a special responsibility for the administration of justice in all aspects related to the practice of law and that ethics rules should make it clear that harassment and discrimination will not be tolerated. Supporters note that 22 states (including Illinois) already include anti-discrimination prohibitions in their professional conduct rules and that it was important for the ABA to include such a provision in the Model Rules. The inclusion of the “knows or reasonably should know” knowledge standard protects lawyers against overaggressive prosecutions for conduct they could not have known was harassment or discrimination, while conversely preventing evasive defenses of suspect conduct. Supporters also contend that the Model Rule does not expand on what would be considered harassment and discrimination under federal or state law. They contend the Rule does not impact issues such as lawyer decisions to accept or decline representation, or the ability to charge a reasonable fee.

## 2. Current Illinois Rule 8.4(j)

The Illinois Rules of Professional Conduct currently include a prohibition against discrimination. Illinois RPC 8.4(j) and its associated Comment are attached. The Illinois Rule has been in place since 1990.

While broadly similar, there are several differences between ABA Model Rule 8.4(g) and the current Illinois Rule 8.4(j):

\* Perhaps the most significant difference is that under the Illinois Rule, misconduct must be specifically tied to a violation of a federal, state, or local law prohibiting discrimination and that no disciplinary charge can be brought against a lawyer without a final court or administrative order finding that the lawyer has engaged in an unlawful discriminatory act. The ABA Model Rule does not include this prerequisite. Comment [3] of the Model Rule provides “The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).”

\* The Illinois Rule is limited to discrimination, while the ABA Rule specifically references both discrimination and harassment. Comment [3] of the new Model Rule provides “Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct.”

\* The scope of conduct prohibited in Illinois encompasses conduct that “reflects adversely on the lawyer’s fitness as a lawyer.” To determine whether the conduct impacts the lawyer’s fitness as a lawyer, a number of circumstances are identified in the Rule including the seriousness of the conduct, whether the lawyer knew the conduct was prohibited, whether there is a demonstrated pattern of conduct, and whether the conduct occurred in connection with professional activities. The Model Rule encompasses “conduct related to the practice of law.” As provided in the Comments, this phrase includes “representing clients, interacting with witnesses, coworkers, court personnel, and lawyers, operating a law practice, and participating in bar association, business or social activities in connection with the practice of law.”

\* The Model Rule includes certain classifications not currently included in the Illinois Rule, including: gender identity, marital status, and ethnicity.

Disciplinary statistics from the ARDC provide the number of charges (the initial consumer complaint) against Illinois lawyers alleging discriminatory conduct. In 2015, five out of 5,090 charges involved claims of discrimination; in 2014 it was seven out of 5,254; in 2013 it was two out of 5,410; in 2012 it was six out of 5,712; in 2011 it was zero out of 6,155; and in 2010 it was two out of 5,617. It also appears that none of these charges resulted in any formal disciplinary prosecution.

ISBA sections have not had an opportunity to review Model Rule 8.4(g). Many section objections to the earlier ABA proposal have been addressed in the new Model Rule. Nevertheless, as context and an aid to the Assembly's review, general objections to the original proposal included the potential inability of lawyers employed by faith based organizations to advise their employers on permissible religiously-based employee conduct standards (such as marriage or human sexuality). There was also a faith-based concern that the proposal would have a chilling effect on the willingness of lawyers to participate and serve on boards of religious organizations whose tenets might be considered discriminatory under the proposal. Additional concerns centered on vagueness of the proposed Model Rule which might allow misapplication and misinterpretation of the rule, especially by disciplinary authorities. Specific ISBA section objections included the proposal's vagueness, overbreadth, and lack of any knowledge requirement. Concerns centered on fee charging issues, the ability of lawyers to decline to take on client matters, and the possibility that the rule might simply serve as a means for disgruntled clients (or prospective clients) to complain against lawyers (resulting in burdensome responses to ARDC inquiries).

#### **IV. Action Item**

The Assembly is asked to consider the above information and determine whether it supports or is opposed to amending the Illinois Rules of Professional Conduct to mirror the new ABA Model Rule 8.4(g), or should take some other action as may be warranted.

ABA Model Rules of Professional Conduct (August 2016):

**Rule 8.4 Misconduct**

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

**Official Comments:**

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[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

## **Illinois Rules of Professional Conduct**

### **RULE 8.4: MISCONDUCT**

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.

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. Nor shall a lawyer give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge's family may receive under Rule 65(C)(4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to the order of an entity that the lawyer reasonably believes to be a political committee supporting such judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.

(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) 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. 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.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

Adopted July 1, 2009, effective January 1, 2010.

### **Comment**

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[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.

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Adopted July 1, 2009, effective January 1, 2010.