

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 IN THE MATTER OF AMENDMENTS TO
4 RULE OF PROFESSIONAL CONDUCT 8.4 }

ADKT NO.: 0526

FILED

MAY 08 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: *[Signature]*
CHIEF DEPUTY CLERK

7 **PETITION**

8 The Board of Governors of the State Bar of Nevada (State Bar) hereby
9 petitions this Court to amend its Rule of Professional Conduct ("RPC") 8.4
10 (Misconduct) to include the anti-harassment / anti-discrimination provision
11 approved by the ABA and added to the ABA Model Rules of Professional Conduct.
12 The proposed amendatory language is set forth in **Exhibit A**.

13 **GROUND FOR THE AMENDMENT**

14 The Board of Bar Governors proposes amending RPC 8.4 to include a new
15 subsection (g), the anti-harassment / anti-discrimination provision approved by the
16 ABA in August 2016.

17 **I. Background**

18 In August 2016, the ABA amended the Model Rules of Professional Conduct
19 to include harassment and discrimination "in conduct related to the practice of law"
20 within the definition of misconduct (**Exhibit B**):

21 Rule 8.4 Misconduct

22 It is professional misconduct for a lawyer to:

23 ...

24 (g) engage in conduct that the lawyer knows or reasonably
25 should know is harassment or discrimination on the basis of race,
 sex, religion, national origin, ethnicity, disability, age,

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1 sexual orientation, gender identity, marital status or
2 socioeconomic status in conduct related to the practice of law.
3 This paragraph does not limit the ability of a lawyer to accept,
4 decline or withdraw from a representation in accordance with
5 Rule 1.16. This paragraph does not preclude legitimate advice
6 or advocacy consistent with these Rules.

7 The Comments to the Model Rule 8.4 were also amended to address
8 subsection (g):

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

20 Comment [4]: Conduct related to the practice of law includes
21 representing clients; interacting with witnesses, coworkers, court
22 personnel, lawyers and others while engaged in the practice of
23 law; operating or managing a law firm or law practice; and
24 participating in bar association, business or social activities in
25 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.

Model Rule 8.4(g) replaces former Comment [3] to Model Rule 8.4, which
asserted that harassing or discriminatory conduct should be treated as a violation of
Model Rule 8.4(d) when such actions are prejudicial to the administration of justice.
The Comment was only guidance. By moving the anti-harassment / anti-
discrimination prohibition into the Rule itself, the Rule is more clearly enforceable
in a disciplinary proceeding.

As of August 2016, approximately 25 jurisdictions had already adopted an
anti-harassment / anti-discrimination provision in their professional conduct rules.

1 Bar Counsel sought National Organization of Bar Counsel input regarding
2 enforcement experiences in these jurisdictions, and learned that enactment of an
3 anti-discrimination provision had neither substantially impacted prosecution
4 caseloads in those jurisdictions, nor generated significant First Amendment
5 litigation. Several jurisdictions viewed the provision as an educational tool in
6 improving professional conduct because such a rule makes it clear that it is
7 professional misconduct for a lawyer to engage in conduct that the lawyer knows,
8 or reasonably should know, constitutes harassment or discrimination in the practice
9 of law.

10 **II. Discussion**

11 The change in the Model Rule occurred when the ABA House of Delegates
12 adopted Resolution 109 put forth by the ABA Standing Committee on Ethics and
13 Professional Responsibility. The Resolution was the result of significant discussion
14 and comment, both written and oral, both pro and con, concerning the specifics of
15 the language.

16 After more than two years of drafting and negotiation with entities from
17 within and outside of the ABA, Resolution 109 regarding the new Rule 8.4(g),
18 Misconduct, was adopted. The new Rule reflects the ABA's stated goal to eliminate
19 bias and enhance diversity in the legal profession, and recognizes the changing face
20 and makeup of bar membership nationwide. Information presented at the ABA
21 2016 Annual Meeting indicated that the number of female law students is now
22 nearly on parity with the number of males at American law schools, and 36% of
23 licensed attorneys are women. The percentage of minority law students has
24 increased from 17.8% in 1993–94, to 28% in 2013–14, and similarly, the percentage
25 of licensed attorneys that are members of a racial minority are increasing.

1 Recognizing this changing makeup in bar membership, as of September 2016, as
2 noted above, twenty-five jurisdictions, had adopted an anti-discrimination rule
3 within their professional practice rules, and thirteen states had at least a comment
4 to the rules. Fourteen states, including Nevada, had no rule and no comment
5 concerning harassment or discrimination.

6 Adoption of a clear anti-harassment anti-discrimination rule in Nevada will
7 assist our profession as it moves toward an increasingly diversified membership,
8 and on a larger scale will demonstrate the bar's leadership on this topic. Placing
9 the anti-discrimination / anti-harassment provision in the black letter of the
10 professional conduct rules may better protect clients and the public against such
11 conduct by highlighting the prohibition against discriminatory and harassing
12 conduct in the practice of law. Said conduct not only reflects badly on the legal
13 profession, but would also violate standards of professional conduct in Nevada.

14 **III. Analysis**

15 As adopted, the language of the Model Rule specifies the *mens rea* applicable
16 to the prohibited conduct, limiting a rule violation to conduct which the lawyer
17 "knows or reasonably should know is harassment or discrimination."

18 The Model Rule language also excepts from its application, professional
19 conduct which is considered advocacy: "This paragraph does not preclude
20 legitimate advice or advocacy consistent with these Rules."

21 Consistent with Nevada Rule of Professional Conduct 1.0A, the ABA
22 Comments to subsection (g) may be consulted for guidance when interpreting and
23 applying this new provision.

24 The ABA Model Rule language, and the ABA Comment guidance, coupled
25 with the clear and convincing standard of proof set forth in Supreme Court Rule

1 105(2)(f), protect lawyers from abuse of the Rule in its enforcement, while setting
2 forth a clearer statement to guide lawyer conduct in the practice of law.

3 **RECOMMEDATION**

4 The Board of Governors, therefore, recommends that RPC 8.4 be amended
5 to include a subsection (g) making it professional misconduct for a lawyer to engage
6 in harassment or discrimination in relation to the practice of law, and that the ABA
7 Comments to subsection (g) be utilized as guidance in the enforcement of this new
8 provision. The proposed amendment is attached as **Exhibit A**.

9 RESPECTFULLY SUBMITTED this 19th day of May 2017.

10 STATE BAR OF NEVADA
11 BOARD OF GOVERNORS

12 

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EXHIBIT A

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; or

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

(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.

EXHIBIT B

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Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession

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.

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Comment on Rule 8.4

Maintaining The Integrity Of The Profession **Rule 8.4 Misconduct - 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 concerning action the client is legally 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] 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).

[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.

[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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