

*ACTION PENDING – The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the Pennsylvania Bar Association and, accordingly, should not be construed as representing the policy of the Pennsylvania Bar Association.*

PENNSYLVANIA BAR ASSOCIATION  
WOMEN IN THE PROFESSION COMMISSION  
AMENDED RECOMMENDATION AND REPORT

Recommendation

That the Pennsylvania Bar Association (PBA) urges the Supreme Court of Pennsylvania to adopt the amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct which adds section (g), as follows: "It is professional misconduct for a lawyer to: (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination [as those terms are defined in applicable federal, state or local statute or ordinance,] 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."

That the President and/or the President's designee(s) shall communicate its position to the Supreme Court of Pennsylvania, the legal profession and the public and take such other action as may be necessary to effectuate this Recommendation.

Report

The PBA Women in the Profession Commission makes this Recommendation because:

The PBA has recognized its commitment to equal justice for all, the responsibility to the public good, the promotion of diversity in the legal profession and has historically maintained that diversity and inclusion are core values of the PBA. On May 3, 1996, the PBA House of Delegates approved an amendment to Rule 8.4 proposed by the PBA Gender Education Committee that would make it professional misconduct for a lawyer to “engage in sexual harassment in the practice of law.” The proposed amendment, which was fully supported by the PBA Women in the Profession and the Joint Task Force to Ensure Gender Fairness in the Courts, was transmitted to the Supreme Court of Pennsylvania for consideration and adoption in October 1996. In 1999, the PBA renewed its request to the Supreme Court for an amendment to Rule 8.4 that would expand the prohibition to include other discrimination on the basis of sex, race or ethnicity in the practice of law.

The PBA has maintained a policy of not discriminating in employment and its activities. In April of 2006 it reaffirmed its non-discrimination policy and specifically adopted a written policy promoting diversity throughout the Association in a Resolution approved by the PBA House of Delegates on June 9, 2006.

The PBA has developed a Diversity and Inclusion Plan with its stated goal of a genuine, sustainable diverse and inclusive environment within the PBA and throughout its membership. Reflecting its steadfast commitment to the achievement of diversity and inclusion, the Plan demonstrates the goals, metrics and reporting mechanisms to ensure the Association fulfills its commitment to advancing diversity and inclusion in the legal profession.

The PBA has many active committees devoted to diversity and inclusion, including the Minority Bar Committee, the GLBT Rights Committee, the Civil and Equal Rights Committee, the Women in the Profession Commission, and the Diversity Team.

The PBA Women in the Profession Commission's Mission Statement provides:

The Commission on Women in the Profession shall assess the current status of women in the legal profession and identify barriers that prevent them from full participation in the work, responsibilities and rewards of the profession; make recommendations to the PBA Board of Governors and House of Delegates for action to solve problems the commission identifies and develop educational programs to address discrimination against women lawyers and the unique problems they encounter in pursuing their professional careers.

The PBA Minority Bar Committee Mission Statement provides:

The mission of the Minority Bar Committee...is to assure full and equal participation of minorities in the PBA, the legal profession, and the justice system in general. In order to achieve this mission, the Minority Bar Committee will:

1. Identify and promote opportunities that allow minorities within the legal profession to participate fully in the work, responsibilities, and rewards of the PBA and the legal profession in general. Included in this objective are matters relating to the advancement of minorities within law firms and other professional and business entities, job opportunities for minorities, elimination of racial discrimination in the legal profession and within the broader community, and effective avenues for minority lawyers and judges to avail themselves of opportunities within the PBA to address issues of special interest to minority lawyers.
2. Monitor the current status of minorities in the legal profession and the justice system in general, identify their career paths and goals, and actively promote their advancement and achievement.
3. Develop educational programs in the way of seminars and surveys, among other measures, to address discrimination against minorities within the legal profession, and the justice system in general.
4. Make recommendations to the PBA Board of Governors and House of Delegates for action on issues affecting minorities within the legal profession and the justice system in general.
5. Make recommendations to the judicial, legislative, and executive branches of government, and other groups within the justice system on issues affecting racial minorities and their communities in accordance with the PBA Bylaws.

The PBA GLBT Rights Committee Mission Statement provides:

The GLBT Rights Committee shall study matters pertaining to the recognition and protection of the legal rights of the gay, lesbian, bisexual and transgender (GLBT) community. The committee will monitor and make recommendations on issues and developments in the law impacting GLBT people in the public and the legal profession.

The PBA Civil and Equal Rights Committee Mission Statement provides:

The Civil and Equal Rights Committee shall promote and defend civil rights and responsibilities, fair treatment and equal opportunity for all individuals and the avoidance and elimination of wrongful discrimination and unfair bias by (a) monitoring actual and proposed legislation, litigation, rules of conduct and procedures and other relevant developments; (b) educating the legal community and the public; and (c) making proposals and recommendations to advance and effect the goals of the committee.

In 1994, the Civil and Equal Rights Committee (CERC) was formed from two pre-existing PBA Committees - the Civil Rights and Responsibilities Committee and the Equal Rights Committee. The Equal Rights Committee dealt with issues affecting women. The Civil Rights Committee focused on issues involving "protected classes" and Section 1983 actions. Because there was overlap of membership and substantive issues, and due to budgetary constraints, the two committees were combined into the present-day CERC.

The PBA Diversity Team mission statement provides:

The PBA Diversity Team establishes resources and forums for enhanced communication among PBA groups with diversity initiatives. The Diversity Team is committed to work collaboratively with PBA leadership, staff and all other PBA-related groups and entities, including the Pennsylvania Bar Foundation, the Pennsylvania Bar Insurance Fund and Trust Fund, PABAR-PAC and the Pennsylvania Bar Institute, to promote and enhance diversity. Each member of the Diversity Team (Diversity Ambassadors) works collaboratively with PBA groups to promote and enhance their existing diversity initiatives and/or assist with creating new opportunities.

The American Bar Association has long recognized its responsibility to represent the legal profession and promote the public's interest in equal justice for all. Since 1983, when the Model Rules of Professional Conduct ("Model Rules") were first adopted by the Association, they have been an invaluable tool through which the Association has met these dual responsibilities and led the way toward a more just, diverse and fair legal system. Lawyers, judges, law students and the public across the country and around the world look to the ABA for this leadership.

Since 1983, the ABA has also spearheaded other efforts to promote diversity and fairness. In 2008 the ABA reformulated its objectives into four major "Goals" that were adopted by the House of Delegates. Goal III is entitled, "Eliminate Bias and Enhance Diversity." It

includes the following two objectives: 1. Promote full and equal participation in the association, our profession, and the justice system by all persons. 2. Eliminate bias in the legal profession and the justice system.

In February 1998, the Criminal Justice Section and SCEPR (Standing Committee on Ethics and Professional Responsibility) of the ABA developed separate proposals to add a new anti-discrimination provision into the ABA Model Rules. These proposals were then combined into Comment [3] to Model Rule 8.4, which was adopted by the House of Delegates at the ABA's Annual Meeting in August 1998.

Comments are not Rules; they have no authority as such. Authority is found only in the language of the Rules. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

The ABA House of Delegates resoundingly passed Resolution 109 at its meeting on August 8, 2016, which added (g) to Rule 8.4: Misconduct, which provides as follows:

“RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows:

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(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.”

**[The WIP recommends that the] ~~The additional Comments to ABA Model Rule 8.4~~ accompanying subpart (g) [be adopted with the following amendments] ~~provide as follows:~~**

**[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). [This Rule does not serve to expand upon or limit a claimant’s available rights or remedies under other law governing harassment or discrimination.]**

**[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). [This Rule does not require a lawyer to accept or reject the representation of any prospective client who is a member of any of the referenced classifications.] 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).

On October 26, 2016, acting on the recommendation of its Women in the Profession and Professional Responsibility Committees, the Philadelphia Bar Association Board of Governors unanimously adopted a "Resolution Supporting Adoption by the Pennsylvania Supreme Court of the Amendment to ABA Model Rule 8.4." [Leadership of WIP has conferred with leadership of the Legal Ethics and Professional Responsibility Committee. Both Committees agree with the proposed amendment to Rule 8.4 and its accompanying Comments as set forth herein.]

The Pennsylvania Bar Association has repeatedly stated that diversity and inclusion are core values of the Pennsylvania Bar Association through the Diversity and Inclusion Plan and elsewhere.

The PBA has expressed its support of the diversity mission which is stated in Goal III of the ABA and its inclusion in this Association's Statement of Diversity Principles.

Respectfully Submitted,

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Co-Chairs  
PBA Women in the Profession Commission  
*Revised November 14, 2016*