

Board proposes Alaska Rule of Professional Conduct 8.4(f)-(g)

At its May 7, 2020, meeting, the Board of Governors voted to publish proposed Alaska Rule of Professional Conduct (ARPC) 8.4(f)-(g) to the membership. You can submit comments regarding the proposed rule to Bar Counsel via email at shanahan@alaskabar.org or by mail to the Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99510. Comments should be received no later than August 10, 2020.

Proposed ARPC 8.4(f)-(g) was unanimously agreed upon by the Alaska Rules of Professional Conduct Committee, after consideration of all the comments submitted and working carefully and cordially through Committee members' various opinions and concerns about the Rule.

How discussion of a rule against discrimination and harassment began

On March 19, 2018, then-Bar Counsel Nelson Page received a letter from then-Alaska Attorney General Jahna Lindemuth that described offensive conduct that did not appear to be prohibited under the Alaska Rules of Professional Conduct. She stated:

We have recently encountered incidents in which an assistant attorney general has been subjected to conduct by opposing counsel that could constitute legal sexual harassment.

We have reviewed the Alaska Rules of Professional Conduct and are unsure whether the conduct is actionable under the Rules. I ask the Committee to consider this question: Is sexual harassment of opposing counsel a violation of the Alaska Rules of Professional Conduct, and if so, which rule would apply?

Mr. Page researched the status of ABA Model Rule 8.4(g), which expressly addresses discrimination and harassment, and how other jurisdictions had responded to that proposal. He then referred the matter to the Committee with his research.

ABA Model Rule 8.4(d) and its omission from the Alaska Rules

It may be helpful to briefly touch upon that question — whether a present Alaska Rule of Professional Conduct ("the Alaska Rules") applies to harassment or discrimination.

Several revisions of the Model Rules ago, the ABA proposed Model Rule 8.4(d), which provides that it is professional misconduct for a lawyer to:

- (d) engage in conduct that is prejudicial to the administration of justice.

The Committee reviewed that proposal and determined that this phrase was too vague. It failed to inform a practitioner of what was prohibited and did not provide Bar Counsel with a meaningful tool for enforcement. The Board of Governors agreed with the Committee's recommendation not to adopt 8.4(d). Therefore, ABA Model Rule 8.4(d) does not appear in the Alaska Rules.

Although it may be that some bar associations use their versions of Model Rule 8.4(d) as a basis for discipline for harassment and discrimination, the Committee maintains that the Alaska Rules must provide more precise guidance.

ABA Model Rule 8.4(g)

ABA Model Rule 8.4(g) provides that 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.

In creating a procedure for updating the Alaska Rules, the Alaska Supreme Court informed Bar Counsel and the Committee that, to the extent possible, it would prefer that the Alaska Rules track the ABA Rules. The value of that uniformity is that decisions from other jurisdictions regarding the application of a rule may be more instructive if Alaska's rule is the same.

But in this instance, no jurisdiction has adopted ABA Model 8.4(g) *verbatim*, so conformity of an Alaska rule to the ABA Model Rule would not advance that goal.

In advance of its meeting on September 5, 2019, the Board of Governors circulated a draft rule addressing discrimination and harassment, which tracked an earlier proposed version of ABA Model Rule 8.4(g). The Committee carefully reviewed the comments received and requested that the draft rule be remanded to it for additional work. The Board of Governors agreed.

Specific issues the Committee researched and discussed

ABA Model Rule 8.4(g) and the Committee's proposed Rule 8.4(f)-(g) are found in a side-by-side format on page 8.

The Committee determined that the following aspects of ABA Model Rule 8.4(g) needed to be evaluated and possibly revised:

- (1) determination of the appropriate mental state - ABA Model Rule 8.4(g) includes a negligent mental state;
- (2) providing definitions of harassment or discrimination - ABA Model Rule 8.4(g) does not define those terms;
- (3) determination of protected classes for the discrimination portion of the Rule and addressing the possibility that, as drafted, ABA Model Rule 8.4(g) would require a linkage of harassment to a protected class in order to support discipline;
- (4) determination of the scope of covered activities - ABA Model Rule 8.4(g) covers a broad scope of activities; and
- (5) determination of whether the rule should apply to workplace harassment or discrimination - ABA Model Rule 8.4(g) does so.

The materials reviewed by the Committee in addressing these questions include: ABA Model Rule 8.4(g) and its lengthy supporting report; the comments received from Bar members; the comments received from non-

Bar members; the comments made at the September 5, 2019, Board of Governors meeting; a summary prepared by Bar Counsel Nelson Page of what other bar associations have done with regard to ABA Model Rule 8.4(g), which concluded that at that time only one bar association had adopted it in near-verbatim form; several United States Supreme Court cases discussing the First Amendment and the scope of what speech may be regulated; several law review articles discussing the scope of restrictions on speech; several municipal codes from across Alaska that prohibit discrimination; Alaska statutes pertaining to the Human Rights Commission, as well as Alaska criminal statutes prohibiting harassment and providing enhanced sentencing in a criminal case if the victim is a member of a protected class, and that status was related to the offense; and a brief overview of the federal EEOC.

The Committee met on six occasions to review and discuss these materials in an effort to resolve these questions. Significant work was done by members in preparation for each meeting. Comments, research materials, research tips, and proposed edits were circulated by members prior to and after each meeting.

(1) mental state

ABA Model Rule 8.4(g) includes the mental state "or reasonably should know," which is the mental state linked to negligence. There is no requirement that the actor in fact know that their conduct constitutes discrimination or harassment. Many of the comments and the articles reviewed expressed concern about this aspect of ABA Model Rule 8.4(g).

The Committee agrees that "or reasonably should know" should not be included in the Alaska Rule. One of the most important factors in reaching that conclusion was Alaska Rule of Professional Conduct 9.1(h), which defines "knowingly" as follows:

"Knowingly" . . . denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

In light of Rule 9.1(h), a simple denial that the attorney did not know that the conduct constituted harassment or invidious discrimination will not end the inquiry. Under Proposed Rule 8.4(f), Bar Counsel will be fully empowered to look to the specific conduct, the circumstances of that conduct, and to any other relevant evidence in determining if the action was done "knowingly."

(2) scope of covered activities

The original proposed ABA Model Rule, which the Board of Governors circulated for comment in 2019, provided that the prohibition would apply: in 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; or participating in bar association business or social activities in connection with the practice of law.

Conduct related to the practice of law

There were many comments about the application of this broad language, with individuals concerned about the possible imposition of discipline for comments made at Bar functions and social gatherings, or in supporting or opposing legislative steps or court decisions. There were also comments raising First Amendment issues. The Committee reviewed numerous materials on this point, including *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 *The Georgetown Journal of Legal Ethics* 319 (2018), by Professor Rebecca Ariel.

The Committee agrees that ABA Model Rule 8.4(g) might pose First Amendment issues. Accordingly, the Committee ultimately modified ABA Model Rule 8.4(g)'s language to limit the scope of the proposed Alaska Rule. In the Comment to the ABA Model Rule, "conduct related to the practice of law" is said to include:

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.

The Committee narrowed application of the Alaska Rule to conduct that impacts the administration of justice as noted in the Comment to the Rule:

[O]ur justice system depends on the effectiveness of adversary counsel. One of the fundamental aims of our court rules, including the Rules of Professional Conduct, is to assure that adversaries have an equal opportunity to prepare and present their case, so as to advance the achievement of a just result. A lawyer's harassment of or invidious discrimination against other participants in a matter can impair their effectiveness, whether as advocates for opposing views or as officers of the court. An attorney who knowingly engages in such conduct perverts advocacy, obstructs the proper administration of justice, and undermines public respect for, and acceptance of, our adversary system and the legal profession.

This is not to suggest by agreeing to this narrower scope the Committee supports, encourages, or condones other discrimination or harassment. Rather, it is an acknowledgment that the Alaska Rules do not apply to all aspects of a Bar member's personal life, personal actions, or personal decisions, and that a rule of professional conduct should focus on actions that can have a negative effect on the administration of justice.

The Committee believes Proposed Rule 8.4(f)-(g) strikes the proper balance.

Exclusion of workplace discrimination absent an administrative or judicial determination

The ABA Model Rule includes workplace harassment and discrimina-

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tion as a basis for discipline. The Committee concluded that Bar Counsel, Area Hearing Committees, and the Disciplinary Board are not fully equipped to be the first decision makers to address these complicated substantive legal issues. The proposed Rule does include a basis for discipline should an agency like the Alaska Human Rights Commission or the EEOC determine the conduct took place. Specifically, the Rule provides:

(1) It is professional misconduct for a lawyer to knowingly engage in harassment or invidious discrimination in the lawyer's dealings with the lawyers, paralegals, and others working for that lawyer or for that lawyer's law firm, if the lawyer's conduct results in a final agency or judicial determination of employment misconduct or discrimination.

(3) protected classes covered by the discrimination portion of the rule

ABA Model Rule 8.4(g) might be read to require that both harassment and discrimination be linked to a protected class in order to support discipline. To avoid any ambiguity, the Committee has made clear that the prohibition of harassment defined in Proposed Rule 8.4(g)(1) is not linked to any protected class of individuals. The prohibition of invidious discrimination defined in Proposed Rule 8.4(g)(2) is linked to protected classes.

The Committee reviewed ABA Model 8.4(g) and its list of protected classes. This resulted in the elimination of one protected class: "socioeconomic status." The ABA report did not explain why this class was included, nor identify the harms it sought to proscribe. The Committee agreed that, particularly in light of the lack of legislative record from the ABA, it was not a sufficiently precise term to include in the Alaska Rule.

The Committee did review the scope of protected classes in the Alaska Human Rights Commission, portions of the Alaska Criminal Code that provide certain enhanced punishments, and pending Alaska legislation that would expand the scope of "hate crimes" victims. As a result, the following additional changes were made to the ABA Model rule:

- "gender" replaces "sex"

- "color" is included
- "sexual identity" is included
- "pregnancy or parenthood" is included
- "veteran status" is included

(4) definition of harassment

ABA Model Rule 8.4(g) does not include a definition of harassment, but its Comment provides:

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 contact of a sexual nature. The substantive law of anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (g).

The Committee has always required that important terms be defined, either in the specific rule itself, or in the definitions found in Alaska Rule 9.1. The Committee concluded that the definition of harassment should be in the rule itself, selected one based on the formulation used by the EEOC and included it in Proposed Rule 8.4(g)(1).

(5) definition of invidious discrimination

The Committee based the definition of invidious discrimination on the Commentary to the Alaska Code of Judicial Conduct Canon 2C. Of note is the insertion of the word "invidious," prior to the word discrimination. This term, commonly used in the law, is to highlight that the Rule is not intended to apply to the simple process of making choices. Rather, the unequal treatment must have "no reasonable relation to a legitimate purpose." Proposed Rule 8.4(g)(2) contains the definition of "invidious discrimination."

Conclusion

The Committee believes that its redrafting of ABA Model Rule 8.4(g), as set forth in Proposed Rule 8.4(f)-(g), addresses harassment and invidious discrimination while meeting the following goals:

- narrows the required mental state
- narrows the scope of conduct covered
- provides definitions to critical terms
- refines the scope of protected classes

and provides clear notice of what is considered to be professional misconduct.

Committee members: Dunnington Babb, Maria Bahr, Matthew Block, Robert Bundy, Andrea Hattan, Douglas Johnson, John Lohff, David Mannheim, Yale Metzger, Richard Monkman, John Novak, Megan Sandone, John Murtagh, Chair.

Board of Governors Action Items

May 7, 2020

- Approved the results of the February 2020 bar exam.
- Approved 12 reciprocity applicants and nine UBE score transfer applicants for admission.
- Approved a Rule 43 (ALSC) waiver for Ellen Hague.
- Voted to ratify the action of the President and Executive Director to temporarily limit the number of applicants for the September bar exam in line with our capacity and limits placed by distancing requirements; and to direct the Executive Director to look into getting a larger testing space in Anchorage; and that a subcommittee be appointed to discuss options - Brown, Graham and Hofmeister.
- Approved the minutes of the January 2020 board meeting as corrected.
- Appointed an awards subcommittee: Brown, Oravec, Sebold.
- Approved payment and reimbursement for Trustee Counsel Blaine Gilman in the Matter of Corey Stewart in the amount of \$8,314.50 from the Lawyers' Fund for Client Protection.
- Approved publication of proposed ARPC 8.4 for comment.
- Voted to purchase the building at 840 K Street (where the Bar office is currently located) at the price offered by Aleut Corp.
- Voted to negotiate with First National Bank regarding the rate and move the Bar's CDs to FNB.
- Voted to take \$1.8 million from the long-term capital reserve and the working capital reserve, with the remainder coming from the line of credit at FNB.
- Voted to move approximately \$3 million in funds to FNB.
- Authorized the President to sign the nonbinding Letter of Intent setting out the basic terms with FNB.
- Appointed a hiring subcommittee for the Executive Director position: Stone, Graham, S. Cox, Hofmeister and Leonard.

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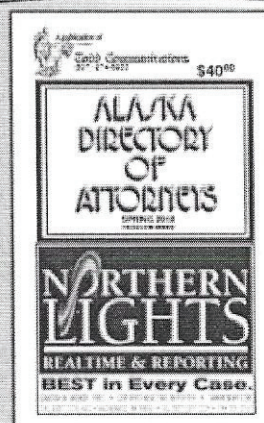
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Comparison of the ABA Model Rule with Alaska Proposed Rule

ABA Model Rule 8.4(g)

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.

COMMENT

[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 contact of a sexual nature. The substantive law of anti-discrimination 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).

ARPC Committee Proposal 8.4(f) and (g)

It is professional misconduct for a lawyer to:

(f) engage in conduct that the lawyer knows is harassment or invidious discrimination during the lawyer's professional relations with (1) officers or employees of a tribunal; (2) lawyers, paralegals, and others working for other law firms; (3) parties, regardless of whether they are represented by counsel; (4) witnesses; or (5) seated jurors.

In addition, it is professional misconduct for a lawyer to knowingly engage in harassment or invidious discrimination in the lawyer's dealings with the lawyers, paralegals, and others working for that lawyer or for that lawyer's law firm, if the lawyer's conduct results in a final agency or judicial determination of employment misconduct or discrimination.

This rule does not prohibit a lawyer from engaging in legitimate counseling or advocacy when a person's membership in a protected class is material.

This rule does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

(g) For purposes of paragraph (f)

(1) "Harassment" means unwelcome conduct, whether verbal or physical, that has no reasonable relation to a legitimate purpose and is so severe or sustained that a reasonable person would consider the conduct intimidating or abusive.

(2) "Invidious discrimination" means unequal treatment of a person because of their membership in a protected class when that unequal treatment has no reasonable relation to a legitimate purpose.

(3) "Protected class" refers to a person's race, color, gender, sexual identity or orientation, religion, ethnicity or national origin, disability, age, marital status, pregnancy or parenthood, or status as a veteran.

(4) "Witness" includes any person who is contacted in connection with a matter because that person may have knowledge or information pertinent to the matter.

COMMENT

Rules 8.4(f) and (g) are intended to be a counterpart to Rules 8.4 and 4.4(a), which declare that, in representing a client, a lawyer shall not use means that lack any substantial purpose other than to embarrass, delay, or burden a third person.

Harassment and invidious discrimination are intolerable because of their adverse effect on the proper administration of justice. The administration of justice is impeded when a lawyer engages in conduct that has no legitimate purpose other than to intimidate or distract those who have independent responsibilities and roles in the justice system.

For instance, our justice system depends on the effectiveness of adversary counsel. One of the fundamental aims of our court rules, including the Rules of Professional Conduct, is to assure that adversaries have an equal opportunity to prepare and present their case, so as to advance the achievement of a just result. A lawyer's harassment of or invidious discrimination against other participants in a matter can impair their effectiveness, whether as advocates for opposing views or as officers of the court. An attorney who knowingly engages in such conduct perverts advocacy, obstructs the proper administration of justice, and undermines public respect for, and acceptance of, our adversary system and the legal profession.

The persons who are protected from a lawyer's harassment or invidious discrimination under this rule include seated jurors, that is, jurors who have gone through the selection process and have been sworn to adjudicate a case. Allegations of harassment or invidious discrimination against prospective jurors should be handled by trial judges through the procedures developed under *Batson v. Kentucky*, 476 U.S. 79 (1986).

A lawyer's harassing or invidiously discriminatory conduct directed to persons working for the lawyer or the lawyer's firm adversely affects the proper administration of justice by undermining confidence in the legal profession. Because agencies and courts routinely adjudicate disputes arising out of allegations of harassment and invidious discrimination in the workplace, the existence of such misconduct should be determined, in the first instance, by an agency or court before it may be the subject of professional discipline.

Related Amendments to Professional Conduct Rule 9.1: Definitions

(j) "Party" denotes any person who participates in, and who has a legal interest in the outcome of, any matter for which the lawyer has been engaged.

COMMENT

Parties

In a lawsuit or proceeding before a tribunal, the parties include plaintiffs and defendants, petitioners and respondents, complainants, cross-complainants, cross-defendants, and all other persons with equivalent roles in the lawsuit or proceeding, no matter how they are denominated. In the negotiation, drafting, or action to enforce or alter a contract or other agreement, the parties include all individuals who are bound, or will be bound, by the terms of the agreement. If the matter for which the lawyer has been engaged concerns only giving advice without interaction with third parties, then the only parties are the lawyer's clients.

Throughout the Rules of Professional Conduct, words in the singular include the plural and words in the plural include the singular.

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