



Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

March 9, 2020

South Dakota State Bar
111 West Capitol #1
Pierre, SD 57501

To All Members of the State Bar:

At the February rules hearing, the Court considered a proposed amendment to Rule 8.4 of the South Dakota Rules of Professional Conduct submitted by the State Bar. The proposed amendment would add the following paragraph to the definition of professional misconduct:

(g) engage in harassing or discriminatory conduct by the known use of words or actions based upon race, sex religion, national origin, disability, age, or sexual orientation when that conduct is directed to litigants, witnesses, lawyers, judges, court personnel; or others and that conduct is prejudicial to the administration of justice. This rule does not apply to legitimate advocacy when race, sex religion, national origin, disability, age, or sexual orientation is an issue in any legal proceedings, action or forum where said counsel provides advice. This rule is not intended to prevent an attorney from declining to represent a client. A finding that a preemptory challenge is exercised in a biased or prejudicial fashion on any of the above-named does not violate this rule. Any violation of the rule may be used solely for disciplinary proceedings and shall not form the basis of a private civil cause of action or a criminal or quasi-criminal complaint or charge.

As related to the Court, the history behind the proposed amendment to Rule 8.4 began with the American Bar Association's adoption of a number of changes to the model Rules of Professional Conduct in 2016. The State Bar Commission declined to submit the ABA's amended model Rule 8.4 to the membership for consideration. However, the State Bar Ethics Committee and Bar Commission examined whether an alternative form of the rule should be proposed. After the Ethics Committee suggested three variations of the rule, the Commission, in a closely divided vote, ultimately agreed upon a different version proposed by a commissioner. This version was submitted to the membership at the June 2019 Annual Business Meeting. The membership, after a sharply divided vote, passed the currently proposed rule for submission to this Court at the February 2020 Rules Hearing.

As part of the hearing process, the Court considered a number of written and oral responses to the proposed amendment. The proponents argue the amendment is necessary to address the issue of

discrimination and harassment in the legal profession. Proponents acknowledge that the Rules may already prohibit discriminatory and harassing treatment by members of the profession in South Dakota, but urge that a specific rule is necessary to establish a clear expectation that such behavior is unacceptable within the profession.

The opponents argue that the language of the proposed amendment is too broad in its scope, and is vague in describing the words and conduct that could subject a lawyer to discipline. Opponents laud the effort to address discriminatory and harassing behavior within the profession, but assert the language of the proposed amendment will result in unintended consequences by infringing upon lawyers' constitutional rights of free speech and free exercise of religion.

Following the hearing, the State Bar presented the Court with a membership survey from 2018 that was part of the backdrop leading to the proposed amendment. The survey shows that 20% of the respondents indicated they had experienced some form of sexual harassment in the legal profession. Sexual harassment was not the focus of the survey, but a majority of those respondents who reported having experienced such harassment indicated that they were reluctant to report the incident. Half of those who did report indicated that the incident was not adequately addressed.

After carefully considering the submissions received from those on both sides of this issue, the Court has unanimously decided to deny the proposed amendment to Rule 8.4. The Court is not convinced that proposed Rule 8.4(g) is necessary or remedies an identified problem.

However, the State Bar survey does raise significant concern about the issue of sexual harassment in the profession. As such, the Court will appoint a Commission of justices, judges, lawyers, and others in the justice system to study and make recommendations to the Court regarding how best to prevent and redress sexual harassment within the legal profession in South Dakota. The Court will direct the Commission to study whether the current Rules provide the necessary framework to address any issues identified, including the underreporting of complaints. The Commission may recommend procedures to ensure that appropriate investigations are undertaken and responses are made to complaints, and may propose rules as needed. The Court expects to have a Commission in place by April 15, 2020 and a report from the Commission before the end of the calendar year.

The Court is grateful to the State Bar and the Ethics Committee for its work in drafting and presenting the proposed amendment to Rule 8.4, and the willingness of individual members to present their perspectives on the amendment.

Sincerely,



David Gilbertson
Chief Justice

cc: Supreme Court Justices