Proposed Rule 8.4(f)-(g), a dissenting view

Thank you for the opportunity to respond to the Committee's April 23, 2020 Redraft of Proposed Rule 8.4(f)-(g). Last August, we submitted two Joint Comments to the committee, expressing our concerns that the Proposed Rule had certain material defects. We appreciate the committee's recent efforts to ameliorate the Proposed Rule, but we remain concerned.

First, please let us address the March 19, 2018, scenario that prompted the committee's actions. We think that actionability of sexual harassment at the hands of an opposing attorney — the situation described by former AG Jahna Lindemuth in the committee's redraft — is already provided for under Alaska's Rules of Professional Conduct and existing Alaska law. Canon 3(B)(6) of Alaska's Code of Judicial Conduct states that:

[a] judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, color, sex, religion, national origin, disability, age, marital status, changes in marital status, pregnancy, parenthood, sexual orientation, or social or economic status.

As we read this canon, any attorney subjected to sexual harassment from opposing counsel has immediate recourse to the judge overseeing the case. If sexual harassment occurs at an out-of-court deposition or conference, then, the complaining attorney or her supervisor should file an appropriate motion for sanctions.[1] Similarly, a Bar complaint pursuant to Alaska Rule of Professional Conduct 8.4(a), coupled with Rule 3.4(c) ("A lawyer shall not knowingly violate or disobey an order of a tribunal or an obligation under the rules of a tribunal") appears apropos.

As pointed out previously to the committee, Alaska Supreme Court case law is rife with examples of attorneys being disciplined for rude and intemperate language. *See Additional Comment on Alaska Freedom of Speech Law and Rule 8.4(f)* at 5-6 (August 15, 2019).

And not only lawyers have been disciplined, but judges as well. In 1997, Chief Justice Compton was privately censured for making sexual advances on two of his female law clerks. Two reported cases involve actions taken against lower court judges for making sexual (and other inappropriate) comments. In the Disciplinary Matter Involving Honorable Timothy D. Dooley, 376 P.3d 1249 (Alaska 2016), In re David Landry, 157 P.3d 1049 (Alaska 2007). So, whether it's a judge or lawyer, it appears the Alaska Supreme Court has tools at hand to discipline the kind of behavior brought to the Bar's attention by Ms. Lindemuth.

For these reasons, we think that the Proposed Rule is unnecessary.

Second, admitting for the sake of argument that additional subsections to Rule 8.4 are necessary, there are three basic problems with the Committee Redraft: (1) vagueness, (2) divergence from employment discrimination law and (3) the pronoun problem and the First Amendment.

(1) There are still vagueness problems with the Rule.

In the words of Voltaire, "If you wish to converse with me, define your terms."

Here, at Proposed Rule 8.4(g)(1), the Committee Redraft attempts to define the terms "harassment" and "invidious discrimination," but the way it does so — particularly with respect to the term "harassment" — is so vague as to be confusing; it fails to give attorneys sufficient guidance on what is prohibited and what is not.

For example, "harassment" is defined as "unwelcome conduct [that] has no reasonable relation to a legitimate purpose" and that is "so severe or sustained that a reasonable person would consider the conduct intimidating or abusive." The problem is that much of what an attorney — particularly an attorney engaged in litigation — engages in as a matter of course is, to the opposing party, unwelcome and so severe and sustained that a reasonable person would consider the conduct intimidating. See, e.g., Feichtinger v. State, 779 P.2d 344, 348 (Alaska App. 1989) (observing that "[o]ften litigants and their attorneys will be particularly vexatious").

Consider the boilerplate response to discovery requests many of us receive on a daily basis: "Objection. Interrogatory No. 18 is harassing." Is creative discovery practice now possible grounds for professional discipline? Or, conversely, is the author of such a written objection now subject to professional discipline for leveling a meritless accusation? Under the proposed rule, the answer looks like "Yes" to both.

If Alaska enacts the proposed rule with the Committee Redraft definition, it will instill fear that zealous representation might offend the rule, and chill our ability as lawyers thereby.

(2) Harassment and invidious discrimination in the employment context.

The second paragraph of Proposed Rule 8.4(g) prohibits, essentially, employment discrimination. It is certainly a salutary provision that, in order for employment harassment or discrimination to be actionable under the rule, the complained-of conduct must "result[] in a final agency or judicial determination of employment misconduct or discrimination." There are, however, several ways in which this provision should be improved.

First, the provision should be modified to read: "In addition, it is professional misconduct for a lawyer to knowingly engage in **unlawful** harassment or invidious discrimination . . ." Since the provision appears to be tying the prohibited behavior to laws that prohibit harassment and discrimination in the workplace, it should be clear that the conduct being prohibited is "unlawful" harassment or invidious discrimination. This would not only make clear that only unlawful conduct is prohibited, but also would give lawyers guidance — by reference to case law under employment discrimination statutes — to what sort of conduct is prohibited. If the conduct is prohibited in statutes or ordinances that prohibit harassment and discrimination in the workplace, then that is precisely the sort of conduct that is also prohibited in legal employment, and not some other sort of conduct.

Second, the requirement should be that the conduct "results in a final and unappealable agency or judicial determination." As long as an agency or judicial determination is appealable, the lawyer should be able to pursue that appeal before being found to have engaged in unlawful harassment or discrimination that would constitute professional misconduct. Otherwise, a lawyer could be professionally disciplined for having been found guilty by a lower tribunal that is subsequently overturned on appeal.

Third, the phrase "misconduct or discrimination" should be changed so as to follow the Proposed Rule – by reading "employment harassment or invidious discrimination." The Rule should be internally consistent and avoid changing the terms of how the prohibited conduct is described. What the rule prohibits is "harassment and invidious discrimination," not "misconduct and discrimination."

(3) The Pronoun Problem and the First Amendment

The Committee Redraft steers clear of addressing the use of pronouns for transgender[2] participants in the legal system, and the latent First Amendment issues therein. This is not an esoteric issue. For example, in Meriwether v. Trustees of Shawnee State Univ., Sep 5, 2019, Case No. 1:18-cv-753 (S.D. Ohio), a university professor refused on religious grounds to refer to a transgender student by the student's preferred pronoun. The university said he had to do so. He sued the university under various theories, including religious freedom, but the court dismissed his case.

On the other hand, in United States v. Norman Varner, 19-40016 (5th Cir. 2020), the court held that a transgender litigant did not have a right to be addressed by a preferred pronoun.

Then there's Soule v. Conn., U.S.D.Ct. Conn., 3:2020cv00201, a pending case in which female athletes sued to bar male athletes (who identify as female) from competing against them. Recently the court ruled that the attorneys for the female athletes had to refer to the male athletes by their preferred pronoun.

As written, then, the "protected classes" of Proposed Rule 8.4(g)(3) are on a collision course with themselves, not to mention First Amendment protections for freedom of speech and religious freedom. If a transgender lawyer is questioning a litigant on the stand, and demands to be called by pronouns that contradict the litigant's religious beliefs, both are in a protected class under the proposed rule. Who wins?

It is not as if our sister state Bars are acting on a groundswell to curb a rampant problem; in fact, as we stated in our Joint Comment to the Committee last August, the American Bar Association's Model Rule 8.4(g) is unpopular.

Since the ABA adopted Model Rule 8.4(g) — although many states have considered it, only one state, Vermont, has adopted it. The supreme courts of four states — Arizona, Idaho, South Carolina, and Tennessee — have expressly rejected the rule. And the supreme court of Montana – the first state supreme court to consider Model Rule 8.4(g) — ended its consideration of the rule and declined to adopt it.

Indeed, the majority of states continue to have no blackletter nondiscrimination rule at all in their Rules of Professional Conduct. Of the minority, eight states (California, Iowa, Minnesota, New Jersey, New York, Illinois, Ohio and Washington State) limit their antidiscrimination rules to "unlawful" discrimination or discrimination "prohibited by law." Nearly half of them (Illinois, New Jersey and New York) actually require that, before any disciplinary claim can even be filed, a tribunal of competent jurisdiction *other than a disciplinary tribunal* must have found that the attorney has actually violated a federal, state, or local antidiscrimination statute or ordinance. The Committee's Redraft now follows this requirement.

Eight of the states with black letter antidiscrimination rules require that the alleged discrimination actually either prejudice the administration of justice or render the attorney unfit to practice law (Florida, Illinois, Maryland, Minnesota, Nebraska, North Dakota, Rhode Island, and Washington State). The Committee's Redraft now follows this, too.

Further, unlike Model Rule 8.4(g) — which has a "know or reasonably should know" standard — four states with black letter rules require the discriminatory conduct to be "knowing," "intentional" or "willful" (Maryland, New Jersey, New Mexico, and Texas). The Committee's Redraft follows this also.

While we appreciate these improvements in the Committee Redraft, we maintain that there are good reasons why the majority of jurisdictions have not adopted any blackletter nondiscrimination Rules in their Rules of Professional Conduct — namely, because harassment and invidious discrimination are already actionable under law, including Bar discipline provisions.

CONCLUSION

In sum, the Alaska's current Rules of Professional Conduct should remain unchanged. Whether it's a judge or lawyer doing the harassing or discriminating, recourse is already available under Alaska Statute, Civil Rules, Rules of Professional Conduct, Code of Judicial Conduct, and Alaska Supreme Court case law.

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FOOTNOTES

[1]Civil Rule 30(d)(3):
At any time during a deposition, on motion of a party, or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the judicial district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition . . . .
See also Civil Rule 37(g).

[2]Cf. Gender Dysphoria or Gender Identity Disorder, Diagnostic and Statistical Manual of Mental Disorders (DSM-5)