

To: House of Delegates
From: Kirsten Small, Chairperson, Professional Responsibility Committee
Re: Request to Oppose ABA Proposed Amendments to Rule 8.4, SCRPC

The Professional Responsibility Committee requests that the House send the attached memorandum to the Court. The vote in the Committee was not unanimous.

In September, a courtesy copy of the letter attached at the end of the memorandum was sent to President Witherspoon. The letter from the American Bar Association requests that the Court adopt the language adopted by the ABA at its August meeting.

The language of Model Rule 8.4(g) adopted by the ABA is also attached.

The position of the Committee is that the language adopted by the ABA is overbroad and that South Carolina's Civility Oath and current Rule 8.4 with its comments are sufficient to address the issues identified by the proponents of the Model Rule.

Attachments

Memorandum

In Re: Proposed amendments to Rule 8.4(g) S.C. Rules of Professional Conduct

The ABA recently adopted amendments to Rule 8.4(g) of the Model Rules of Professional Conduct. By a letter dated September 29, 2016, John Gleason, Chair of the Center for Professional Responsibility Policy Implementation Committee, requested that Chief Justice Pleicones and the members of the SC Supreme Court consider adoption of those amendments. The letter is attached hereto.

The South Carolina Bar's Professional Responsibility Committee (Committee) has considered the amendments and, in addition to the links provided in the ABA's report, the Committee has considered the minority report and other comments provided prior to the ABA's adoption. The Committee requests that the SC Bar adopt a position opposing the adoption of proposed Rule 8.4(g) or, in the alternative, requests the Court hold a public comment period on the proposed rule and consider possible amendments. ¹

The Committee is aware that the amendments to the rule are offered in a spirit of seeking to eliminate discrimination. In response, South Carolina's own Professor Nathan Crystal and Keith R. Fisher wrote on behalf of the ABA's Business Law Section Ethics Committee that, "no matter how salutary the motivation, however, codifying this position into the Model Rules is fraught with

¹ In a letter dated December 20, 2016, South Carolina Bar President William Witherspoon suggested that a period of public comment should be scheduled on proposed rule 8.4(g) should the Supreme Court consider adopting its provisions.

difficulties.”² Although this letter was originally written in response to and in opposition of an early version of the amendment, its sentiment remains applicable.³

The Proposed Rule is Unnecessary

Our Civility Oath, in conjunction with our current Rule 8.4 and its comments, is sufficient to address the issues identified by the proponents of the proposed rule. Addressing the relationships of an attorney in her practice of law, our civility oath requires attorneys to show “respect and courtesy” to the courts and personnel working within them, to act with “good judgment,” among other traits, when interacting with clients, and to act with “fairness, integrity, and civility, not only in court, but also in all written and oral communications” when dealing with opposing counsel or parties.⁴ Additionally, Rule 8.4 comment [3] provides that “A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (e) when such actions are prejudicial to the administration of justice.”⁵

When examining the civility oath, the South Carolina Supreme Court found that the oath protected “the administration of justice and the integrity of the lawyer- client relationship” and that “[t]here is no substantial amount of protected free speech penalized by the civility oath in light of

² Fisher, Keith R. and Crystal, Nathan M. Letter to Myles Link, Chair, ABA Standing Committee on Ethics and Professional Responsibility on Behalf of the of the Professional Responsibility Section of the ABA Business Law Section, March 10, 2016 (hereafter “BLS Ethic Comm. Ltr.”). A copy of the letter may be found at: (http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/aba_business_law_ethics_committee_comments.authcheckdam.pdf) The Committee, in a July 11, 2016 memorandum to the Business Law Section of the ABA, responded to proposed amendments to the then pending draft of Rule 8.4(g), reiterating many of the concerns expressed in the original memorandum. A copy of the July 11 memorandum is attached for reference and is referred to as “BLS Ethics Comm. Mem.”

³ In addition to the BLS Ethics Comm. Ltr., the ABA website at http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html has collected comments of various constituent groups or members regarding the proposed rule. In addition to the BLS Ethics Comm. Ltr. the following two documents on the website contain extended discussion of objections and concerns with the proposed rule that parallel those discussed below: (1) Joint Comments of 52 ABA Member Attorneys, lawyers; (2) The Christian Legal Society Comments, 3/10/2016. Many of the individual attorney comments simply adopt positions of these or other larger constituent groups.

⁴ Rule 402, (k) (3), SCACR

⁵ Rule 8.4, comment [3] RPC, Rule 407, SCACR

the oath's plainly legitimate sweep of supporting the administration of justice and the lawyer-client relationship. Thus, we find the civility oath is not unconstitutionally overbroad."⁶ This same sentiment applies to current Rule 8.4 and its comments, which expressly tie discipline to conduct that reflects "adversely on fitness to practice law" (Comment 2, discussing why certain criminal activity may subject a lawyer to discipline), to actions that are "prejudicial to the administration of justice" (Comment 3, discussing when manifestations of invidious discrimination may lead to discipline), or to conduct that "suggest[s] an inability to fulfill the professional role of lawyers" (Comment 5, discussing abuses of public or private trust).

The Committee's position is that it would be an error to attempt to correct something that is working effectively. South Carolina's Rule 8.4 in connection with our civility oath is the most effective method of protecting the administration of justice without restricting unnecessarily the First Amendment rights of attorneys as discussed below.

The Proposed Rule is Unconstitutionally Vague⁷

The United State Supreme Court explicated the hazards of vague statutes by saying that they "force potential speakers to 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked."⁸ Vague statutes fall short of the requirement to "regulate in the area" of the First Amendment "only with narrow specificity"⁹ and fail to give people fair notice of what is prohibited.

The proposed rule prohibits "harassment," a term which is open to a multitude of interpretations. "Harassment" in a courtroom in Pickens County may have an entirely different

⁶ In re Anonymous Member of South Carolina Bar, 392 S.C. 328, 337, 709 S.E.2d 633, 638 (2011).

⁷ The issue of unconstitutional vagueness is addressed more fully in BLS Ethics Comm. Memo, pp. 7-12. It should be noted that one issue raised in the Memo – the omission of a scienter requirement, was addressed in the final, adopted version of the proposed rule.

⁸ Baggett v. Bullitt, 377 U.S. 360, 372, 84 S.Ct. 1316 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 78 S. Ct. 1332, 1460 (1958))

⁹ National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 433, 83 S.Ct.328, 405 (1963).

meaning than “harassment” in Colleton County, depending on the court, the judge and the parties. Thus, the proposed rule would likely be arbitrary in its application.

The vagueness of this proposed amendment raises due process concerns. The United States Supreme Court has held that disciplinary procedures are quasi-criminal and certain due process requirements apply, including fair notice of the charges.¹⁰ The Court has also held that “[a] disciplinary rule that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process law.”¹¹ As in the “harassment” example above, attorneys must guess the exact definition. Although some may argue that there are examples of harassment in the proposed comments to the proposed amendment, those examples do not define harassment and are limited in their scope.

The Proposed Rule is Unconstitutionally Overbroad

While attorneys, like all American citizens, are entitled to the protection of the First Amendment, we are held to professional standards of behavior that place limitations on our speech. “Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.”¹² However, these restrictions must balance “the State’s interest in the regulation of a specialized profession against a lawyer’s First Amendment interest...”¹³

The proposed model rule seeks to prohibit “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,”¹⁴ thereby making 8.4(g) overbroad and diluting the main justification of restricting attorney speech. Our current

¹⁰ In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968).

¹¹ Connally v. General Construction Co., 269 U.S.385, 391, 46 S.Ct 126, 127 (1926).

¹² In re Sawyer, 360 U.S. 622, 646-47, 79 S.Ct. 1376, 1388 (1959).

¹³ Gentile v. State Bar of Nevada, 501 U.S. 1030, 1073, 111 S.Ct.2720, 2744 (1991).

¹⁴ Model Rules of Prof’l Conduct R. 8.4 (g) (2016)

phrase in comment [3] to Rule 8.4 uses the language, “[i]n the course of representing a client...” and requires that the manifestation of a bias or prejudice be “...prejudicial to the administration of justice.”

Ostensibly, every word uttered by a lawyer, whether work-related or personal, may be considered “related to the practice of law.” If every action an attorney makes is related to the practice of law, how does an attorney attend a rally that opposes or questions same-sex marriage or participate in a protest with a poster stating “He’s not my president”? Another attorney, a client, or a potential client, may cite a violation of the proposed amendment based on these actions. At the end of the day, lawyers are also humans and have their own personal beliefs and causes outside of the profession. The proposed rule, unlike the current Civility Oath and Rule 8.4 and its comments, does not clearly contain its application to instances involving “the administration of justice and the integrity of the lawyer- client relationship”¹⁵ as noted by the South Carolina Supreme Court in addressing the specific application of the Civility Oath.

Indiana amended its Rule 8.4 to largely model the proposed Rule 8.4(g), but using the phrase “in a professional capacity,” rather than “related to the practice of law” in the black letter rule. An Indiana attorney inquired of the Indiana Legal Ethics Committee if he, as a member of a nonprofit organization that admits only men of a certain religion, could serve on the governing board of the organization and be one of its officers without being subject to discipline under the Indiana rule. *See* Ind. Bar State Legal Ethics Comm. Op. No. 2015-01, p. 1 (a copy of the opinion is attached for reference). After summarizing various Indiana court opinions applying that state’s version of Rule 8.4(g) and stating that mere membership in such an organization would not likely trigger discipline under the Indiana rule, the committee expressly noted the vagueness of the statute and the restraint upon the attorney’s participation in the face of imprecise guidance:

¹⁵ In re Anonymous Member of South Carolina Bar, 392 S.C. 328, 337, 709 S.E.2d 633, 638 (2011).

So, a lawyer should be mindful of the particular practices of such an organization if the lawyer intends to personally participate in activities that advance any of its discriminatory requirements, policies or beliefs. The lawyer should proceed with particular caution if the lawyer's status as a lawyer is connected to his or her participation in the organization's activities. Accepting a leadership role in such an organization or using one's status as a lawyer in support of the organization creates more ethical risk than mere membership. But in either case, the nature of the organization and the lawyer's role in the organization are critical to the outcome of any ethical analysis. In light of the delicate balance between constitutional rights and the necessity of fairness in the administration of justice, it is the Committee's hope that the Indiana Supreme Court may offer further clarification on the scope of "professional capacity" by way of an official Comment to Rule 8.4(g).

Ind. Bar Legal Ethics Comm. Op. 2015-01, p. 5.¹⁶

The proposed rule's "related to the practice of law" provision implements an even more indefinite measure of sanctionable conduct. If adopted, Rule 8.4(g) may prevent attorneys from speaking freely on myriad current events and social topics in order to avoid perceived harassment or discrimination. If a law punishes a substantial amount of protected speech in relation to a statute's legitimate purpose, then is it overbroad and unconstitutional. "[T]he party challenging a statute simply must demonstrate that the statute could cause someone else- anyone else- to refrain from constitutionally protected expression."¹⁷

The Proposed Rule Codifies Unconstitutional Content Discrimination

Proposed rule 8.4(g) would punish those who speak out against particular social and political issues. At the same time, the proposed Rule offers no disincentive for those who speak in favor of these issues.¹⁸ When looking at content discrimination, the United States Supreme Court held that "Viewpoint discrimination is thus an egregious form of content discrimination. The government

¹⁶ In the disciplinary proceeding *In the Matter of Joseph Barker*, 993 N.E.2d 1138 (Ind. 2013) the court suspended the attorney pursuant to Rule 8.4(g) for referring to the opposing party as an "illegal alien" in a communication to opposing counsel regarding the possible filing of a contempt motion for obstructing visitation of the child in the course of a custody dispute, thus suggesting that a lawyer may be suspended under the terms of the rule for using disfavored words or expressions. The court also cited Ind. R. of Prof. Cond. 4.4 regarding conduct causing embarrassment to opposing parties in imposing a 30 day suspension on the lawyer.

¹⁷ *In re Amir X.S.*, 371 S.C. 380, 384, 639 S.E.2d 144, 146 (2006).

¹⁸ Model Rules of Prof'l Conduct R. 8.4 (g) , comment (4) (2016).

must abstain from regulating such speech when the specific motivating ideology or opinion or perspective of the speaker is the rationale for the restriction.”¹⁹

The adoption of this rule would not only codify content discrimination but also create a chilling effect on attorney speech. An attorney could be accused of committing professional misconduct for simply disagreeing with the prevailing cultural zeitgeist. As attorneys, the free exchange of ideas and opinions should be encouraged, and the Court should not seek to stifle and punish those who hold ideas contrary to our own.

The Proposed Rule Would Restrict A Lawyer’s Autonomy

If the proposed amendments are adopted, attorneys will be subject to professional discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases. Under the proposed Rule, attorneys will be affirmatively precluded from declining certain clients or cases. They will, in other words, be forced to take cases or clients they might have otherwise declined.²⁰

It should be noted that ABA claims that Rule 8.4(g) does not limit the ability of a lawyer to accept, decline, or withdraw from representation so long as the attorney is acting in accordance with Rule ABA Model Rule 1.16.²¹ However, Rule 1.16 does not permit an attorney to decline representation based upon personal morality or ethics. Zealous representation could be impaired if a lawyer may not decline representation of a client who falls outside of the lawyer’s field of morality and ethics, and the impairment of zealous representation creates an inherent conflict, putting the lawyer in violation of 1.7.

The Rule Could Be Used as a Weapon

¹⁹ Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995).

²⁰ See the discussion of this issue in the Comments of 52 ABA Members found at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/joint_comment_52_member_attys_1_19_16.authcheckdam.pdf

²¹ This issue is discussed more fully in BLS Ethics Comm. Memo, pp. 8-10.

This addition to the rule is based on the perception of the “receiver” of the conduct. The receiver can always allege this violation of the rules. It is not hard to believe that clients who are upset with their representation will seek recourse by claiming they were subjected to harassment. Additionally, one could imagine an unscrupulous attorney using this rule to gain some type of advantage over opposing counsel without overtly violating Rule 4.5. Rule 8.4 was created to shield individuals from activity prejudicial to the administration of the law. But the ABA’s amendment has transformed it into a club that can be swung at an attorney any time a conflict arises.

Conclusion

This proposed rule violates the very spirit—in addition to the text— of the First Amendment’s guarantees and transgresses the most fundamental principles that American lawyers have adhered to since 1788 regarding a lawyer’s right to express and live out his own belief system, as well as the right to full and zealous legal representation on behalf of any client, including (and indeed, especially) those whose views diverge from political correctness or modern social orthodoxy. “For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.”²²

²² National Ass’n for Advancement of Colored People v. Button, 371 U.S. 415, 445, 83 S.Ct.328, 344 (1963)

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September 29, 2016

Honorable Costa M. Pleicones
Chief Justice
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: Recent Amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct

Dear Chief Justice Pleicones:

We take this occasion to report to you the recent amendment of Rule 8.4 of the ABA Model Rules of Professional Conduct with the hope that your Court will undertake a review of the changes and consider integrating them into your state's rules of professional conduct. These revisions and additions were the culmination of two years of work by the ABA Standing Committee on Ethics and Professional Responsibility ("Ethics Committee"). http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html

Amended Model Rule 8.4 contains new paragraph (g) that establishes a black letter rule prohibiting harassment and discrimination in the practice of law. It also contains three new Comments related to paragraph (g).

New paragraph (g) to Model Rule 8.4 is a reasonable, limited, and necessary addition to the Model Rules of Professional Conduct. It makes it clear that it is professional misconduct to engage in conduct that a lawyer knows or reasonably should know constitutes harassment or discrimination while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers. 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 and managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Amended Model Rule 8.4 (g) does not prohibit speech, thought, association, or religious practice. The rule does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with current rules of professional conduct.

Twenty-five jurisdictions have adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules. To properly address this issue, the ABA adopted an anti-discrimination and anti-harassment provision in the black letter of the Model Rules. Studies on the perception of the public about the justice system and

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lawyers support the need for the amendment to Model Rule 8.4.

Adopted Revised Resolution 109 and its accompanying Report can be found at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf

The Center for Professional Responsibility Policy Implementation Committee has created a Power Point Presentation to assist courts, rules committees, the legal profession, and the public to understand the amendments to Model Rule

8.4. https://www.dropbox.com/s/6seu8x1i0m411l6/Model%20Rules%208_4%20Presentation_Final.wmv?dl=0

We can provide you with electronic copies of Revised Resolution 109 with Report and discussion points if you or the Chair of your state review committee contact John Holtaway, Policy Implementation Counsel, john.holtaway@americanbar.org, (312) 988-5298. We have sent copies of this letter to your State Bar Association President, State Bar Association Executive Director, State Bar Admissions Director, and Chief Disciplinary Counsel, and ABA State Delegate.

The Center for Professional Responsibility Policy Implementation Committee is available to assist states with the review process. Members of the Committee, including members of the Ethics Committee, are available to meet in person or telephonically with review committees.

The work product of the Ethics Committee reflects the ABA's continued leadership in professional responsibility law. The ABA looks forward to assisting you on this important project.

Respectfully,



John S. Gleason, Chair
Center for Professional Responsibility Policy Implementation Committee

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.

Comments

[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