Agenda

Supreme Court's Advisory Committee on the Rules of Professional Conduct

October 3, 2016
5:00 to 7:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Salt Lake City
Judicial Council Room, Suite N31

Welcome and approval of minutes.	Tab 1	Steve Johnson, Chair
ABA Model Rule 8.4(g) proposed amendment	Tab 2	Steve Johnson, Rob Rice, Margaret Plane
Report of Rule 3.3 Subcommittee (*Larsen v. Utah State Bar*, 2016 UT 26, and Comment 3 to Rule 3.3).	Tab 3	Tom Brunker, John Bogart, Phillip Lowry, Padma Veeru-Collings
Note about Ethics Advisory Opinion regarding lawyers settling potential malpractice or disciplinary claims.	Tab 4	Steve Johnson
Update on Licensed Paralegal Practitioners and the effects on the Rules of Professional Conduct (Rule 14-802, Rule 4.2, Rule 5.1).		Steve Johnson
Next meeting.		Steve Johnson

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

Tab 1

MINUTES OF THE SUPREME COURT'S
ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

August 22, 2016
DRAFT

The meeting commenced at 5 p.m.

Committee Members Attending:

Gary G. Sackett (directed the meeting)
Christie Roach
Padma Veeru-Collings
Joni Jones
Nayer H. Honarvar
Trent D. Nelson
John H. Bogart
Vanessa M. Ramos
Phillip E. Lowry
Simòn Cantarero (via phone)
Timothy K. Conde
Hon. Darold J. McDade
Daniel Brough
Gary L. Chrystler
Timothy Merrill
Billie Walker
Don Winder
Tom Brunker
Timothy Conde (recording secretary)

Excused:
Steven G. Johnson, Chair

Staff:
Nancy Sylvester

Welcome and Recognition of New Committee Members

Mr. Sackett presided and welcomed committee members to the meeting. He excused Mr. Johnson, who was travelling. He also recognized new committee members Joni Jones, Phillip Lowry, Timothy Merrill, Cristie Roach, Padma Veeru-Collings, and Timothy Conde (recording secretary).

Recognition of Retiring Member

Mr. Sackett recognized and thanked retiring member Nayer Honarvar for her dedicated service to the committee. He presented a certificate of appreciation to Ms. Honarvar and spoke of the significant contribution she had made to committee during her tenure.

Rule 11-101(4)

The committee was provided with a copy of Rule 11-101(4), which describes the creation and composition of advisory committees. The rule was reviewed and Mr. Sackett asked whether members had questions or comments about it. None did.

Rule 8.4

Members were provided with a copy of Rule 8.4. The committee discussed newly added comment 3a, which states, "The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d)." Mr. Sackett asked what members' experiences were with this rule and the comment. The committee was especially interested in whether the judicial members of the committee and Mr. Walker had thoughts about the rule. Judge McDade commented that he has yet to make a referral to the Office of Professional Conduct. Mr. Walker stated that he would have preferred to include the substance of some of the comments in the rule itself, but that it was decided to address some of the substance of the rule via comments. Mr. Walker commented that leaving it in the comment may be insufficient, in light of the *Larsen* decision (addressed below).

***Larsen v. Utah State Bar*, 2016 UT 26 (and Comment 3 to Rule 3.3)**

Mr. Sackett addressed the recent Utah Supreme Court, *Larsen v. Utah State Bar*. He identified the following issue and asked the committee to discuss it: As a result of the decision, is the Utah Supreme Court encouraging that the ruled be changed? For example, should the rule be amended to include "reckless," or should the comment be changed to remove the portion regarding reasonable diligence?

There was disagreement among the members regarding the issues. Some members opined that they thought the Court had not taken a position as to what should be changed, but that it merely concluded that a rule cannot be contradicted by a comment. In other words, a comment must be consistent with the rule. Others disagreed and believed that the Court was signaling that it rejects the notion that Rule 3.3 be governed by a subjective standard of recklessness. The committee agreed that its staff representative, Ms. Sylvester, should confer with the Court to discuss the issue. The committee also elected to form a subcommittee to further consider the issue. The members of that subcommittee include John Bogart, Phil Lowry, Padma Veeru-Collings, and Tom Brunker.

Update on Licensed Paralegal Practitioners and Effect on Rules of Professional Conduct (Rule 14-802, Rule 4.2, and Rule 5.1)

Ms. Sylvester described the task a Supreme Court task force is undertaking to form a new kind of bar license for paralegal professionals. Committee members commented that some of the Rules of Professional Conduct, *e.g.*, Rule 4.2, and Rule 5.1, may need to be amended to account for the program. The committee agreed to consider the matter further and discuss those changes during future meetings. Mr. Johnson is a member of the task force addressing this issue, so he'll be bringing the task force's recommendations to the committee.

Next Meeting

Ms. Sylvester said she would coordinate with committee members to determine an appropriate date for the next meeting.

The meeting adjourned at 5:41.

Tab 2

AMERICAN BAR ASSOCIATION

Center for Professional Responsibility
Policy Implementation Committee
321 N. Clark Street
Chicago, IL 60610
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John.Holtaway@americanbar.org

September 29, 2016

Honorable Matthew B. Durrant
Chief Justice
Supreme Court of Utah
Scott Matheson Courthouse
450 South State Street
P.O. Box 140210
Salt Lake City, UT 84114-0210

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

Dear Chief Justice Durrant:

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 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

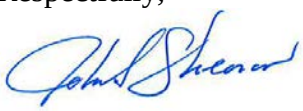
The Center for Professional Responsibility Policy Implementation Committee has created a Power Point Presentation to assist courts, rules committees, the legal profession, and the public to understand the amendments to Model Rule 8.4.
https://www.dropbox.com/s/6seu8x1i0m411l6/Model%20Rules%208_4%20Presentation_Final.wmv?dl=0

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

NEWS

August 10, 2016

By Samson Habte

Aug. 9 — A vast majority of the ABA's policy-making House of Delegates voted in favor of a rule change that will make workplace harassment and discrimination a basis for professional discipline.

The rule change was approved by a voice vote on Aug. 8, the fifth day of the bar group's six-day annual meeting in San Francisco. Only a handful of "nays" were heard when ABA Resolution 109 was presented to the 589 delegates in attendance.

The delegates approved nearly every other resolution that was put before them on Aug. 8, and most proposals passed by similarly lopsided margins.

The resolution that drew the most opposition before ultimately passing was a change to the ABA's law school accreditation standards to remove a long-standing ban that prevented law students from receiving both pay and academic credit for externships.

In other action at the meeting, the delegates voted to:

‣morph the longtime Task Force on Trade in International Services into a new permanent standing committee;

‣urge courts and legislatures to adopt rules establishing an evidentiary privilege for communications between lawyer referral services and their clients;

‣reaffirm the ABA's commitment to lawyer referral services sponsored by state and local bar associations;

‣urge jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to justice for the poor; and

‣urge the U.S. President and members of the U.S. Senate to emphasize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for federal judges; and to urge federal appellate courts to do the same in the selection process for federal bankruptcy and magistrate judges.

Black-Letter Anti-Bias Rule

The margin of the vote approving Resolution 109 may have been the most surprising development at the Aug. 8 session.

The resolution drew criticism from political conservatives and religious groups from the moment it was floated in 2015 until just a few days before its passage.

One prominent critic was former U.S. Attorney General Edwin Meese III, who said in a March 5 letter to the ABA that the proposed rule “borders on fascism” and threatened “freedom, justice and religious liberty.”

The resolution was amended several times over the last year, and several speakers said the near-unanimity of the final approval vote was attributable to last-minute changes that assuaged the concerns of constituent groups that had expressed qualms about the proposal in its earlier iterations.

In its final form, the resolution called for the addition of a new provision—Model Rule 8.4(g)—that expands the definition of “professional misconduct” to include:

> 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.

Some 24 U.S. jurisdictions have already amended their ethics standards to incorporate some form of an anti-discrimination rule.

Arizona State University law professor Myles V. Lynk, the chair of the ABA's ethics committee, introduced the resolution by saying that the states “have been laboratories of change” and that “it's time now for the ABA to catch up.”

Personal Stories of Discrimination

Sixty-nine ABA members signed up to speak in favor of Resolution 109, while none signed up to speak in opposition.

All but a few of the scheduled speakers waived the opportunity to address the delegation.

Oregon attorney Mark Johnson Roberts did take the podium and related an anecdote about his own experience with workplace discrimination.

“Twenty-eight years ago, when I was a new lawyer, I was passed over by a law firm's hiring committee,” Roberts said. “They decided that a gay man couldn't be a litigator. Ten years later, I was their [state] bar president.”

Wendi S. Lazar, a member of the ABA Commission on Women in the Profession, also addressed the delegates. Lazar, a plaintiffs' side employment lawyer, spoke about female lawyers she has represented in sexual harassment cases.

“I would like to share with you some of their stories, because they are invisible to many of you, and their suffering has for the most part been in silence,” Lazar said.

Lazar said some of her clients were victims of “behaviors that are unspeakable.”

“My clients have had male colleagues expose themselves in conference rooms, grope them in limousines after a hard day in the office, and threaten them that if they would not have sex in the bathroom at a retreat, they would not be promoted to lead counsel in a litigation,” Lazar said.

"These women need protection, and they need a remedy," Lazar added. "Firms don't want to punish their partners, and judges often are reluctant to police their own. So in the end there is no justice for victims of discrimination."

Privilege for Lawyer Referral Services

The delegates also easily passed Resolution 106, which urges courts and legislatures to adopt rules or enact statutes that would establish an evidentiary privilege for communications between bar-sponsored lawyer referral services and the clients who contact them for assistance in locating representation.

Steve Steinberg, past president of Contra Costa County Bar Association in California, said the resolution was important because of the uncertainty surrounding the question of "whether there is a privilege that would cover communications that take place in that first contact between a client and a lawyer referral service."

Steinberg said no court has ever found that such a privilege exists, and that only one state—California—has enacted legislation creating such a privilege.

"We are aware of at least a couple of situations where opposing parties have subpoenaed lawyer referral services to get their records, to get testimony on these conversations they had with their clients," Steinberg said.

"The uncertainty means that lawyer referral services cannot reassure their clients that conversations will be privileged and that they can be honest and open when talking about their matter," Steinberg said. "And honest and open communication is absolutely crucial in order for a lawyer referral service to make sure that a client gets to the right place."

David G. Keyko, chairman of the New York City Bar's Legal Referral Service Committee, said the ABA's passage of Resolution 106 would "be of major assistance" in New York, where bar authorities will ask state legislatures to create a statutory privilege.

International Trade in Legal Services

There wasn't any debate on the floor about the proposal to create a new Standing Committee on International Trade in Legal Services.

Resolution 11-7 sailed through on voice vote after speakers described why it's critical to establish an ongoing structure to deal with cross-border access to legal markets.

According to the accompanying background report, the change to a permanent entity will help the ABA continue promoting the interests of the U.S. legal profession regarding inbound

and outbound access to legal services markets.

The task force was launched in 2003 during negotiations about trade in legal services under GATS, the General Agreement on Trade in Services. See 19 Law. Man. Prof. Conduct 325.

The size and activities of the task force have grown over the years as trade in services, including legal services, are negotiated in other trade agreements. For example, the Trans Pacific Partnership agreement contains a professional services annex with a specific section on legal services. See 31 Law. Man. Prof. Conduct 679.

With ongoing globalization, it's time for the ABA to put in place a standing committee that will assume the functions of the task force, the report says.

The Standing Committee on International Trade in Legal Services will perform these functions:

- monitor trade negotiations that impact the U.S. legal profession;
- coordinate the ABA's positions on U.S. lawyers' access to the legal services markets of other countries and foreign lawyers' access to the U.S. legal services market;
- advise the U.S. government on ABA policies relating to these issues;
- develop policy recommendations for ABA delegates to consider;
- help ABA entities implement ABA policies on these issues; and
- inform interested entities about international trade agreement negotiations and seek their input.

Support for Bar Associations' Referral Services

The Philadelphia bar association and other state and local bar associations asked the ABA to reaffirm its support for lawyer referral services sponsored by bar associations, and to encourage bar association referral services to comply with ABA model standards on lawyer referral services.

The delegates went along with that request and approved Resolution 10A after part of the proposal was withdrawn.

The now-withdrawn part of the proposed resolution said the ABA would “consider and thoroughly discuss with its constituent members, who are represented by state and local bar associations, in advance of approving any program or legal service initiative that may result in an individual or business hiring an attorney for a fee.”

The accompanying report makes clear the proposal was sparked by the ABA's short-lived “ABA Law Connect” venture, under which small business owners could ask an ABA member

a question for $4.95 through Rocket Lawyer's cloud–based platform—and then hire the lawyer for additional advice if they wanted.

The report says state and local bars were concerned that ABA Law Connect would compete with their own lawyer referral services, which help the public, create potential business for bar association members and produce revenue that funds pro bono programs and other public service efforts.

The state and local bar associations were even more concerned that the new ABA program wouldn't meet the standards set out in the ABA Model Supreme Court Rules Governing Lawyer Referral Services, the report says.

Paid Field Placements in Law School

By adopting Resolution 100, the delegates accepted proposed changes to the *ABA Standards and Rules of Procedure for Approval of Law Schools* regarding academic credit for field placements in law school.

The changes beef up the standards for field placements and eliminate a prohibition against granting credit if the student receives compensation.

According to the background report, many who commented on the issue believed that granting credit for field placements would change the nature of the activity and that the supervising employer would likely assign tasks that would benefit the employer and not benefit the student's educational growth.

Lawrence J. Fox was one of the speakers who voiced that concern. Fox said his views were shaped by his experience as a law firm partner, law school professor and director of a law school clinic.

"When we run an experiential program in a clinic, we do it in a way that is organized pedagogically," Fox said. "If somebody as an intern comes to work at my firm, we give them an experience that is organized by whatever the latest crisis is for our clients."

The upshot, Fox said, is that students who are allowed to take experiential positions at law firms may be assigned menial tasks that do not further their educational development.

Christopher Jennison, a 2016 graduate of Syracuse University College of Law who followed Fox and spoke in favor of the resolution, took issue with the notion that the "menial" tasks students may be assigned in paid externships are devoid of educational value.

"As a young attorney, reporting to supervisors in a law firm or a government office, who among us has not been pulled into client matters when a big deadline looms?" Jennison said. "That experience, even if it may seem menial at the time, is educational in itself."

Jennison also stressed that the revised standards on field placements were drafted to ensure that students who participate in paid field placements are given substantive assignments that deserve academic credit.

To contact the reporter on this story: Samson Habte in Washington at shabte@bna.com

To contact the editor responsible for this story: Ethan Bowers at sbowers@bna.com

For More Information

The full list of House of Delegates resolutions, with links to the final resolution and report, is posted at http://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions.html.

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ABA STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
Research Document Regarding ABA Model Rules of Professional Conduct
August 26, 2016

COMPARISON OF ABA MODEL RULE 8.4(g) WITH OTHER JURISDICTIONS' ANTI-DISCRIMINATION/HARASSMENT PROFESSIONAL CONDUCT RULES

	Model Rule 8.4(g) and Comment [3], [4] & [5] **(adopted August 2016)**
ABA MODEL RULE	**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**s** 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).

CA	**Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice** **(A) For purposes of this rule:** **(1) "law practice" includes sole practices, law partnerships, law corporations, corporate and governmental legal departments, and other entities which employ members to practice law;** **(2) "knowingly permit" means a failure to advocate corrective action where the member knows of a discriminatory policy or practice which results in the unlawful discrimination prohibited in paragraph (B); and** **(3) "unlawfully" and "unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in employment and in offering goods and services to the public.** **(B) In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in:** **(1) hiring, promoting, discharging, or otherwise determining the conditions of employment of any person; or** **(2) accepting or terminating representation of any client.** **(C) No disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred. Upon such adjudication, the tribunal finding or verdict shall then be admissible evidence of the occurrence or non-occurrence of the alleged discrimination in any disciplinary proceeding initiated under this rule. In order for discipline to be imposed under this rule, however, the finding of unlawfulness must be upheld and final after appeal, the time for filing an appeal must have expired, or the appeal must have been dismissed.** ***Discussion:*** In order for discriminatory conduct to be actionable under this rule, it must first be found to be unlawful by an appropriate civil administrative or judicial tribunal under applicable state or federal law. Until there is a finding of civil unlawfulness, there is no basis for disciplinary action under this rule. A complaint of misconduct based on this rule may be filed with the State Bar following a finding of unlawfulness in the first instance even though that finding is thereafter appealed. A disciplinary investigation or proceeding for conduct coming within this rule may be initiated and maintained, however, if such conduct warrants discipline under California Business and Professions Code sections 6106 and 6068, the California Supreme Court's inherent authority to impose discipline, or other disciplinary standard.

CO	**RPC 8.4(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or** **RPC 8.4(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law.** **Comment** [3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.
District of Columbia	**RPC 8.4(d): Engage in conduct that seriously interferes with the administration of justice;** **Comment** [3] A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. **RPC 9.1 – Discrimination in Employment** **A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap**. **Comment** [1] This provision is modeled after the D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), though in some respects is more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law. [2] The investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission. Such experience may involve, among other things, methods of analysis of statistical data regarding discrimination claims. These agencies also have, in appropriate circumstances, the power to award remedies to the victims of discrimination, such as reinstatement or back pay, which extend beyond the remedies that are available through the disciplinary process. Remedies available through the disciplinary process include such sanctions as disbarment, suspension, censure, and admonition, but do not extend to monetary awards or other remedies that could alter the employment status to take into account the impact of prior acts of discrimination. [3] If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the

	processing of complaints by Disciplinary Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Disciplinary Counsel and material allegations involved in such other proceedings. *See* §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.
FL	**RPC 4-8.4:** **(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;** **Comment** [5] Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers, whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, physical characteristic, or any other basis, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as notions of equality. This subdivision does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct.
ID	**RPC 4.4 (a) In representing a client, a lawyer shall not: (1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person, including conduct intended to appeal to or engender bias against a person on account of that person's gender, race, religion, national origin, or sexual preference, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants** **Comment** [2] Paragraph (a) contains an anti-bias provision, requiring lawyers to refrain from pejorative conduct that serves no purpose other than to exploit differences based on the listed categories. Nothing in the rule is intended to limit a lawyer's full advocacy on behalf of a client.

IL	**RPC 8.4 (d) engage in conduct that is prejudicial to the administration of justice.** **RPC 8.4 (j): violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted**. **Comment** [3] 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 (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.
IN	**RPC 8.4(g) engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule**.
IA	**RPC 32:8.4(g) engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so.** **Comment** [3] 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 (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. For another reference to discrimination as professional misconduct, see paragraph (g).

MD	**RPC 8.4(e)**: **knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph;** **Comment** [3] Sexual misconduct or sexual harassment involving colleagues, clients, or co-workers may violate paragraph (d) or (e). This could occur, for example, where coercion or undue influence is used to obtain sexual favor in exploitation of these relationships. *See Attorney Grievance Commission v. Goldsborough*, 330 Md. 342 (1993). See also Rule 1.7. **Comment** [4] Paragraph (e) reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in paragraph (e) and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must require lawyers to refrain from the conduct described in paragraph (e). *See* Md. Rule 16-813, Maryland Code of Judicial Conduct, Rule 2.3.
MA	**RPC 3.4(i): in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation against a party, witness, counsel, or other person. This paragraph does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding.** **Comment** [7] Paragraph (i) is taken from former DR 7-106(C)(8) concerning conduct before a tribunal that manifests bias or prejudice based on race, sex, religion, national origin, disability, age, or sexual orientation of any person. When these factors are an issue in a proceeding, paragraph (i) does not bar legitimate advocacy.
MI	**RPC 6.5** **(a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.** **(b) A lawyer serving as an adjudicative officer shall, without regard to a person's race, gender, or other protected personal characteristic, treat every person fairly, with courtesy and respect. To the extent possible, the lawyer shall require staff and others who are subject to the adjudicative officer's direction and control to provide such fair, courteous, and respectful treatment to persons who have contact with the adjudicative tribunal.**

	Comment: (not officially adopted by the Court – only to aid the reader) *DUTIES OF THE* LAWYER A lawyer is an officer of the court who has sworn to uphold the federal and state constitutions, to proceed only by means that are truthful and honorable, and to avoid offensive personality. It follows that such a professional must treat clients and third persons with courtesy and respect. For many citizens, contact with a lawyer is the first or only contact with the legal system. Respect for law and for legal institutions is diminished whenever a lawyer neglects the obligation to treat persons properly. It is increased when the obligation is met. A lawyer must pursue a client's interests with diligence. This often requires the lawyer to frame questions and statements in bold and direct terms. The obligation to treat persons with courtesy and respect is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly. Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly rude. A lawyer's professional judgment must be employed here with care and discretion. A lawyer must take particular care to avoid words or actions that appear to be improperly based upon a person's race, gender, or other protected personal characteristic. Legal institutions, and those who serve them, should take leadership roles in assuring equal treatment for all. A judge must act "[a]t all times" in a manner that promotes public confidence in the impartiality of the judiciary. Canon 2(B) of the Code of Judicial Conduct See also Canon 5. By contrast, a lawyer's private conduct is largely beyond the scope of these rules. See Rule 8.4. However, a lawyer's private conduct should not cast doubt on the lawyer's commitment to equal justice under law. A supervisory lawyer should make every reasonable effort to ensure that subordinate lawyers and nonlawyer assistants, as well as other agents, avoid discourteous or disrespectful behavior toward persons involved in the legal process. Further, a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm on the basis of race, gender, or other protected personal characteristic. See Rules 5.1 and 5.3. *DUTIES OF ADJUDICATIVE OFFICERS* The duties of an adjudicative officer are included in these rules, since many legislatively created adjudicative positions, such as administrative hearing officer, are not covered by the Code of Judicial Conduct. For parallel provisions for judges, see the Code of Judicial Conduct.
MN	**RPC 8.4(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status in connection with a lawyer's professional activities;** **RPC 8.4(h) commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including:**

	(1) the seriousness of the act, **(2) whether the lawyer knew that the act was prohibited by statute or ordinance,** **(3) whether the act was part of a pattern of prohibited conduct, and** **(4) whether the act was committed in connection with the lawyer's professional activities;** **Comment** (comments included for convenience and does not reflect court approval) [4] Paragraph (g) specifies a particularly egregious type of discriminatory act-harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. What constitutes harassment in this context may be determined with reference to antidiscrimination legislation and case law thereunder. This harassment ordinarily involves the active burdening of another, rather than mere passive failure to act properly. [5] Harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status may violate either paragraph (g) or paragraph (h). The harassment violates paragraph (g) if the lawyer committed it in connection with the lawyer's professional activities. Harassment, even if not committed in connection with the lawyer's professional activities, violates paragraph (h) if the harassment (1) is prohibited by antidiscrimination legislation and (2) reflects adversely on the lawyer's fitness as a lawyer, determined as specified in paragraph (h). [6] Paragraph (h) reflects the premise that the concept of human equality lies at the very heart of our legal system. A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession. Therefore, a lawyer's discriminatory act prohibited by statute or ordinance may reflect adversely on his or her fitness as a lawyer even if the unlawful discriminatory act was not committed in connection with the lawyer's professional activities. [7] Whether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the four factors listed in paragraph (h). It is not required that the listed factors be considered equally, nor is the list intended to be exclusive. For example, it would also be relevant that the lawyer reasonably believed that his or her conduct was protected under the state or federal constitution or that the lawyer was acting in a capacity for which the law provides an exemption from civil liability. See, e.g., Minn. Stat. Section 317A.257 (unpaid director or officer of nonprofit organization acting in good faith and not willfully or recklessly).

MO	**RPC 8.4 (g) manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or other similar factors, are issues.** **Comment** [4] Rule 4-8.4(g) identifies the special importance of a lawyer's words or conduct, in representing a client, that manifest bias or prejudice against others based upon race, sex, religion, national origin, disability, age, or sexual orientation. Rule 4-8.4(g) excludes those instances in which a lawyer engages in legitimate advocacy with respect to these factors. A lawyer acts as an officer of the court and is licensed to practice by the state. The manifestation of bias or prejudice by a lawyer, in representing a client, fosters discrimination in the provision of services in the state judicial system, creates a substantial likelihood of material prejudice by impairing the integrity and fairness of the judicial system, and undermines public confidence in the fair and impartial administration of justice. Whether a lawyer's conduct constitutes professional misconduct in violation of Rule 4-8.4(g) can be determined only by a review of all of the circumstances; e.g., the gravity of the acts and whether the acts are part of a pattern of prohibited conduct. For the purpose of Rule 4-8.4(g), "manifest … bias or prejudice" is defined as words or conduct that the lawyer knew or should have known discriminate against, threaten, harass, intimidate, or denigrate any individual or group. Prohibited conduct includes, but is not limited to, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (a) submission to that conduct is made, either explicitly or implicitly, a term or condition of an individual's employment; (b) submission to or rejection of such conduct by an individual is used as a factor in decisions affecting such individual; or (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an intimidating, hostile or offensive environment.
NE	**RPC 3-508.4(d) engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.** **Comment** [3] 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 (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

NJ	(*NOTE: Comments are not included in NJRPC but Court made exception for this Rule). **RPC 8.4(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.** ***Official Comment by Supreme Court (May 3, 1994)** This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs. "Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory. Case law has already suggested both the area covered by this amendment and the possible direction of future cases. *In re Vincenti*, 114 N.J. 275 (554 A.2d 470) (1989). The Court believes the administration of justice would be better served, however, by the adoption of this general rule than by a case by case development of the scope of the professional obligation. While the origin of this rule was a recommendation of the Supreme Court's Task Force on Women in the Courts, the Court concluded that the protection, limited to women and minorities in that recommendation, should be expanded. The groups covered in the initial proposed amendment to the rule are the same as those named in Canon 3A(4) of the Code of Judicial Conduct. Following the initial publication of this proposed subsection (g) and receipt of various comments and suggestions, the Court revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, to restrict the scope to conduct intended or likely to cause harm, and to include discrimination because of sexual orientation or socioeconomic status, these categories having been proposed by the ABA's Standing Committee on Ethics and Professional Responsibility as additions to the groups now covered in Canon 3A(4) of the New Jersey Code of Judicial Conduct. That Committee has also proposed that judges require attorneys, in proceedings before a judge, refrain from manifesting by words or conduct any

	bias or prejudice based on any of these categories. See proposed Canon 3A(6). This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. *See, e.g., In re Vincenti*, 114 N.J. 275 (554 A.2d 470) (1989).
NM	**RPC 16-300. Prohibition against invidious discrimination.** **In the course of any judicial or quasi-judicial proceeding before a tribunal, a lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice based on race, gender, religion, national origin, disability, age, or sexual orientation against the judge, court personnel, parties, witnesses, counsel or others. This rule does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age or sexual orientation is material to the issues in the proceeding.** **Committee Commentary:** [1] For purposes of this rule, the term "judicial or quasi-judicial proceeding" shall refer to any and all courts, regardless of their jurisdiction or location, as well as any governmental agency, board, commission, or department before whom the lawyer is engaged in the practice of law. The rule also encompasses arbitration or mediation proceedings, whether or not court ordered. [2] For purposes of this rule, the term "proceeding" shall mean any judicial or administrative process relating to the adjudication or resolution of legal disputes (including, but not limited to, discovery procedures, arbitration and mediation), rule making, licensing, lobbying, the imposition or withholding of sanctions or the granting or withholding of relief. For purposes of this rule, the term "sexual orientation" shall mean heterosexuality, bisexuality or homosexuality.
NY	**RPC 8.4(g) Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding**. **The Appellate Division does not adopt Comments to the Rules.** Comments are provided by the New York State Bar Association as guidance: Comment [5A] Unlawful discrimination in the practice of law on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation is governed by paragraph (b) of this Rule.

ND	**RPC 8.4(f) engage in conduct that is prejudicial to the administration of justice, including to knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel, or others, except when those words or conduct are legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding;** **Comment** [3] 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, or sexual orientation violates paragraph (f) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (f). For example, a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.
OH	**RPC 8.4(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;** **Comment** [3] Division (g) does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.
OR	**RPC 8.4(a)(7): in the course of representing a client, knowingly intimidate or harass a person because of that person's race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability.** **RPC 8.4(c): Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein**.
RI	**RPC 8.4(d): engage in conduct that is prejudicial to the administration of justice, including but not limited to, harmful or discriminatory treatment of litigants, jurors, witnesses, lawyers, and others based on race, national origin, gender, religion, disability, age, sexual orientation or socioeconomic status;"** **Comment** [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A judicial finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

TX	**RPC 5.08 Prohibited Discriminatory Activities** **(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.** **(b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as confidential information under these Rules. See Rule 1.05(a),(b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:** **(i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and** **(ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.** **Comment:** 1. Subject to certain exemptions, paragraph (a) of this Rule prohibits willful expressions of bias or prejudice in connection with adjudicatory proceedings that are directed towards any persons involved with those proceedings in any capacity. Because the prohibited conduct only must occur "in connection with" an adjudicatory proceeding, it applies to misconduct transpiring outside of as well as in the presence of the tribunal's presiding adjudicatory official. Moreover, the broad definition given to the term "adjudicatory proceeding" under these Rules means that paragraph (a)'s prohibition applies to many settings besides conventional litigation in federal or state courts. See Preamble: Terminology (definitions of "Adjudicatory Proceeding" and "Tribunal"). 2. The Rule, however, contains several important limitations and exemptions. The first, found in paragraph (a), is that a lawyer's allegedly improper words or conduct must be shown to have been "willful" before the lawyer may be subjected to discipline. 3. In addition, paragraph (b) sets out four exemptions from the prohibition of paragraph (a). The first is a lawyer's decision whether to represent a client. The second is any communication made by the lawyer that is "confidential" under Rule 1.05(a) and (b). The third is a lawyer's communication that is necessary to represent a client properly and that complies with applicable rulings and orders of the tribunal as well as with applicable rules of practice or procedure. 4. The fourth exemption in paragraph (b) relates to the lawyer's words or conduct in selecting a jury. This exemption ensures that a lawyer will be free to thoroughly probe the venire in an effort to identify potential jurors having a bias or prejudice towards the lawyer's client, or in favor of the client's opponent, based on, among other things, the factors enumerated in paragraph (a). A lawyer should remember, however, that the use of peremptory challenges to remove persons from juries based solely on some of the factors listed in paragraph (a) raises separate constitutional issues.

VT	**RPC 8.4(g) discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual.** **Comment:** [3] 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 (g) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.
WA	**RPC 8.4(g) commit a discriminatory act prohibited by state law on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status, where the act of discrimination is committed in connection with the lawyer's professional activities. In addition, it is professional misconduct to commit a discriminatory act on the basis of sexual orientation if such an act would violate this Rule when committed on the basis of sex, race, age, creed, religion, color, national origin, disability, or marital status. This Rule shall not limit the ability of a lawyer to accept, decline, or withdraw from the representation of a client in accordance with Rule 1.16;** **RPC 8.4(h) in representing a client, engage in conduct that is prejudicial to the administration of justice toward judges, lawyers, or LLLTs, other parties, witnesses, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, or marital status. This Rule does not restrict a lawyer from representing a client by advancing material factual or legal issues or arguments** **Comment** [3] Legitimate advocacy respecting the factors set forth in paragraph (h) does not violate paragraphs (d) or (h). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.
WI	**RPC 8.4(i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i).** **Wisconsin Committee Comment**: Paragraphs (f) through (i) do not have counterparts in the Model Rule. What constitutes harassment under paragraph (i) may be determined with reference to anti-discrimination legislation and interpretive case law. Because of differences in content and numbering, care should be used when consulting the ABA Comment.

Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession
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.

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Rule 8.4. Misconduct.

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(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; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct or knowingly assist or induce another to 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.

[1a] A violation of paragraph (a) based solely on the lawyer’s violation of another Rule of Professional Conduct shall not be charged as a separate violation. However, this rule defines professional misconduct as a violation of the Rules of Professional Conduct as the term professional misconduct is used in the Supreme Court Rules of Professional Practice, including the Standards for Imposing Lawyer Sanctions. In this respect, if a lawyer violates any of the Rules of Professional Conduct, the appropriate discipline may be imposed pursuant to Rule 14-605.

[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] 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 (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended to improve the administration of justice. An egregious violation or a pattern of repeated violations of the Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph (d).

[4] 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.

[5] 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.

Tab 3

Administrative Office of the Courts

Chief Justice Matthew B. Durrant
Utah Supreme Court
Chair, Utah Judicial Council

Daniel J. Becker
State Court Administrator
Raymond H. Wahl
Deputy Court Administrator

MEMORANDUM

To: Rules of Professional Conduct Committee
From: Nancy Sylvester
Date: September 29, 2016
Re: Rule 3.3 and *Larsen v. Utah State Bar*, 2016 UT 26

After the last committee meeting, I met with the Supreme Court and below are the options I gave them with respect to *In re Larsen* and potential changes to Rule 3.3. They chose #4.

> 1) Would the court like the committee to strike the entire comment and renumber the other comments?
>
> 2) Would the court like the committee to simply strike the comment language it addresses in paragraph 28 of the opinion (" 'an assertion purporting to be on the lawyer's own knowledge . . . in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry' ") and leave the rest?
>
> 3) Would the court like the committee to create a new comment that provides guidance to practitioners but tracks the Larsen opinion in terms of expressly foreclosing recklessness?
>
> 4) Or would the court like the committee to explore adding express language in Rule 3.3 "to encompass reckless misstatements made without any plausible basis in fact." Id. ¶23.

Tom Brunker chaired a Rule 3.3 subcommittee consisting of John Bogart, Phillip Lowry, and Padma Veeru-Collings. The committee reported that it had some trouble determining whether the recklessness mental state should cover paragraphs (a)(1) through (a)(3) or if it should only cover (a)(1) and (a)(2). *Larsen* was really only about (a)(1), and (a)(3) was treated differently throughout the comments. The subcommittee made the changes to address all 3 subparts but would like to discuss with the whole group whether that is too inclusive in terms of the Supreme Court's charge.

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Rule 3.3. Candor toward the Tribunal.

(a) A lawyer shall not knowingly or recklessly:

(a)(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(a)(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(a)(3) offer evidence that ~~the lawyer knows to be~~is false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false or is reckless with respect to its truth.

Representations by a Lawyer

~~[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).~~

Legal Argument

[4] Legal argument based on a knowingly or recklessly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) ~~requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This~~ imposes a duty that is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] ~~The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false.~~ A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false or a lawyer's recklessness with respect to its truth, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] ~~Although p~~Paragraph (a)(3) ~~only prohibits a lawyer from offering evidence the lawyer knows to be false, it~~ permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done-making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing

advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Tab 4

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SOUND THINKING. SOUND SOLUTIONS.

John A. Snow
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March 23, 2016

Via Email First Class Mail

Steven G. Johnson, Esq.
5336 Earl Place
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stevejohnson5336@comcast.net

Re: Ethics Advisory Opinion 16-02; Issued March 23, 2016

Dear Mr. Johnson:

In response to your request, the Ethics Advisory Committee has issued Ethics Advisory Opinion 16-02, March 23, 2016.

If you have any other questions or concerns regarding the opinion, please contact me.

Very truly yours,

John A. Snow, Chair
Ethics Advisory Opinion Committee

JAS/kl
Encl.: Ethics Advisory Opinion 16-02

4817-0634-5263, v. 1

Ethics Advisory Opinion Committee
Opinion Number 16-02
Issued March 23, 2016

ISSUES

1. What are the ethical constraints on lawyers settling potential legal malpractice claims or bar complaints with clients?

OPINION

2. A lawyer may neither request nor agree to limit his or her duties to the administration of justice regarding filing or participating in a bar complaint.
3. A lawyer may not request that a present or former client refrain from filing or participating in a bar complaint as a condition to settling disputes between the client and the lawyer.
4. A lawyer may not participate in an agreement that limits the lawyer's liability for malpractice or prohibits the lawyer from accepting future clients except as permitted by rule or law.[1]

BACKGROUND

5. There are three factual situation to consider:
    a. In the context of settling civil litigation a lawyer for one party demands as a condition of settlement that the lawyer for the opposing party agree to forgo filing or participating in a bar complaint.

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[1] Rule 1.8(h) of the Utah Rules of Professional Conduct provides:

> A lawyer shall not:
> (h)(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
> (h)(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

b. A lawyer is settling a dispute with a former client. That client has threatened to file a bar complaint which the lawyer believes frivolous. As a condition of settling the dispute the lawyer wishes to include a provision precluding the former client from filing or participating in a bar complaint.

c. Finally, in consideration of settlement, a party demands conditions that would limit the lawyer's ability to take further cases against the settling party or waives a former client's malpractice claim.

DISCUSSION

6. Requesting an opposing attorney, an opposing party, or a client or former client to refrain from filing or participating in a bar complaint as a condition of settlement of outstanding disputes violates several of the Rules of Professional Conduct including Rules 8.3 and 8.4.[2] Agreeing to refrain from filing or participating in such a complaint also violates these same rules.

7. Rule 8.3 of the Rules of Professional Conduct **requires** that a lawyer who has knowledge[3] "that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial[4] question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects **shall**[5] inform the appropriate professional authority" (emphasis

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[2] We note that the lawyer is dealing with an unrepresented party. "In dealing with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested." RPC 4.3(a).

[3] "Knowledge" denotes actual knowledge of the fact in question. UTAH RULES OF PROF'L CONDUCT R. 1.0(g).

[4] "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance." UTAH RULES OF PROF'L CONDUCT R. 1.0(m).

[5] "Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline." UTAH RULES OF PROF'L CONDUCT, Preamble, ¶ 14.

added). Accordingly, Rule 8.3(a) would preclude a lawyer from agreeing to refrain from filing or participating in a meritorious bar complaint.

8. Rule 8.4 (a) provides that "it is professional misconduct" for a lawyer to "knowingly assist or induce another" to "violate . . .the Rules of Professional Conduct." Because it is unethical for an attorney to agree not to report a serious breach of the Rules of Professional conduct, Rule 8.4 (a) would preclude a lawyer from making such a request as his conduct would knowingly "assist or induce" a violation of the other lawyer's obligation to report under Rule 8.3.

9. Demands to forego reporting as a condition of settlement would hinder bar authorities from meeting their responsibilities of deterrence of serious matters and the protection of the public. As the Comment to Rule 8.3 notes, "An apparently isolated incident may indicate a pattern of misconduct that only a disciplinary investigation can uncover."

10. Simply because the opposing party or client is a lay person without duties to the public and the bar does not lessen the misconduct in attempting to obtain an agreement not to file a complaint. It is "professional misconduct" to "engage in conduct that is prejudicial to the administration of justice." Rule 8.4(d). Seeking to prevent a client or opposing party from filing or participating in a bar complaint is "prejudicial to the administration of justice."

11. Similarly, it is "professional misconduct" to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Rule 8.4(c). Requesting a client or former client to not file a bar complaint could possibly involve "dishonesty, fraud, deceit or misrepresentation." Where an attorney has made mistakes in handling the client's case, the attorney must nevertheless "keep the client reasonably informed about the status of the matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions." Rule 1.4. Where the attorney is attempting to resolve a possible malpractice case with a client or

former client, the lawyer may be tempted to provide less than thorough or candid information, which could constitute "conduct involving dishonest, fraud, deceit or misrepresentation."

12. Rule 1.8(h) deals with an attorney settling a claim or prospective claim for "malpractice" with a client or former client. It requires that the client be "independently represented" in an agreement "prospectively limiting" malpractice liability and that the client or former client be "advised in writing" of the desirability of having "independent counsel" to settle a "claim or potential claim" for malpractice. Tellingly, this rule addresses only settlement for "malpractice" and does not address the protocol for settling claims for violations of the Rules of Professional Conduct or complaints to the Bar. This suggests that including agreements that a client or former client will decline to report an attorney to the bar is not permitted under the Rules of Professional Conduct.

13. The purpose of attorney discipline is "to protect the public and the administration of justice from those who have demonstrated by their conduct that they are unable or unlikely to properly discharge their professional responsibilities." Supreme Court Rules 14-501(a). Requesting an agreement not to report misconduct might fall within this provision. Violation of Rule 8.4(d) of the Utah Rules of Professional Conduct is grounds for disbarment under Supreme Court Rule 14-605(a).

14. Even if the threatened bar complaint is believed to be frivolous, or not substantial, a request to forego a bar complaint still violates the Rules of Professional Conduct. Paragraph 10 of the Preamble to the Rules of Professional Conduct provides, "Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of

government and law enforcement." Responding to frivolous, or not substantial, complaints is simply a price lawyers pay for the extensive societal power granted members of the profession.

15. In settling cases, placing other conditions may also violate the Utah Rules of Professional Conduct. The Committee warned against analogous requests requiring a settling lawyer to indemnify the defendant against unknown medical claims in Ethics Advisory Opinion No. 11-01. The Committee found that requesting or agreeing to indemnify against unknown medical claims created a conflict of interest between the lawyer and the client. Further, Rule 5.6(b) specifically precludes the inclusion of restrictions on the lawyer's right to practice as a portion of a settlement agreement. Simply put, a lawyer may not include conditions in a settlement agreement that would raise impermissible conflicts of interests for either settling lawyer.

16. A request to a lawyer as a condition of settlement of a civil lawsuit to waive reporting an incident of serious professional misconduct places the lawyer in conflict with her duties to the client to settle the matter and her duties to the court and to the public.[6] This is because in litigation, a lawyer owes duties to the public and the court. "In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients,[and] to the legal system...."[7]

17. If the request was not related to a violation of the rules, it would violate Rule 4.4's prohibition on a lawyer using means that have no substantial purpose other than embarrass,

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[6] Rule 1.7(a)(2) prohibits representation if there is a significant risk that the representation would be materially limited by the lawyer's responsibilities to third persons which would include responsibilities to the Court as well as to the general public. UTAH RULES OF PROF'L CONDUCT R. 1.7(a)(2).

[7] UTAH RULES OF PROF'L CONDUCT, Preamble, ¶¶ 8-9.

delay or burden a third person.[8] This is mere harassment, analogous to using frivolous threats of criminal prosecution to obtain civil settlements.

[8] While Rule 4.4 does not prohibit such threats, "[a] *baseless* threat to inform a prosecutorial or regulatory authority would constitute 'means that have no substantial purpose other than to embarrass.'" Hazard, Hodes, & Jarvis, THE LAW OF LAWYERING 40.4 n. 6 (2008) (citing ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-363 (1992)).