

October 26, 2017

Utah Supreme Court
450 South State Street
P.O. Box 140210
Salt Lake City, UT 84114-0210

Re: Proposed Rule 8.4(g)

Michael K. Erickson
ATTORNEY AT LAW

PO Box 45385
Salt Lake City, Utah
84145-0385

36 South State Street
Suite 1400
Salt Lake City, Utah
84111

801 532-1500 FIRM
801 323-3351 DIRECT
801 532-7543 FAX
merickson@rqn.com
www.rqn.com

Dear Justices,

As a member of the Utah State Bar, I submitted comments in July of this year regarding Proposed Rule of Professional Conduct 8.4(g). Having recently become aware of two developments in other jurisdictions regarding the American Bar Association's Proposed Rule 8.4(g), I write to amend and supplement my earlier comments with the following additional information.

First, in my letter dated July 28, 2017, I wrote, "To date, no jurisdiction has adopted ABA's Model Rule 8.4(g)" It is my understanding now that this statement was incorrect. On July 14, 2017, the Vermont Supreme Court adopted a rule based on ABA's Proposed Rule 8.4(g). A copy of this order is attached hereto.

Second, in a letter dated September 6, 2017, the Board of Governors of the State Bar of Nevada withdrew its petition for the Supreme Court of the State of Nevada to amend its Rules of Professional Conduct and adopt Proposed Rule 8.4(g). The Board of Governors' request to withdraw the petition and the Nevada Supreme Court's order granting the request to withdraw are attached hereto.

Respectfully submitted,



Michael K. Erickson

1431800

STATE OF VERMONT
VERMONT SUPREME COURT
JULY TERM, 2017

Order Promulgating Amendments to the Vermont Rules of Professional Conduct

Pursuant to the Vermont Constitution, Chapter II, Section 37, it is hereby ordered:

1. That Rule 8.4(g) of the Vermont Rules of Professional Conduct and Comment be amended to read as follows (deleted matter struck through; new matter underlined):

Rule 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

* * * * *

(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.~~ engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, or other grounds that are illegal or prohibited under federal or state 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] 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.~~

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and antiharassment 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. Paragraph (g) does not prohibit conduct undertaken to promote

diversity. 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).

[4] [6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] [7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Reporter's Notes—2017 Amendment

Rule 8.4(g) and new Comments [3]-[5] are amended to adopt, with minor verbal changes, amendments to the American Bar Association's Model Rules of Professional Conduct approved by the ABA on August 8, 2016. See ABA, House of Delegates 2016 Annual Meeting Daily Journal, at 5. Former Comment [3] is deleted and replaced by new Comment [3]. Former Comments [4] and [5] are renumbered [6] and [7].

Despite prior unsuccessful amendment efforts, the Model Rules had not previously contained a specific provision prohibiting discrimination and harassment. Former Comment [3], adopted in 1988, had stated that discrimination and harassment could violate Rule 8.4(d) if they constituted conduct prejudicial to the administration of justice. That Comment, however, was only a guide to interpretation and was of narrow scope. See, generally, ABA Revised Report 109 (House of Delegates, August 2016). New Model Rule 8.4(g) was adopted to fill this void with a black letter rule. Its purpose is to fulfill the ABA's responsibility to "lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us." *Id.* at 15.

Vermont originally adopted the predecessor of V.R.Pr.C. 8.4(g) in 1986, becoming one of a group of 25 states frustrated by ABA inaction. ABA Revised Report 109, at 5 n.11. In addition, 13 states have adopted language similar to former Comment [3]; only 14 states do not address the matter at all

in their Rules of Professional Conduct. Id. at 5-6 nn.13, 14. The present amendment of V.R.Pr.C. 8.4(g) supersedes the prior language, both for uniformity with the amended ABA Model Rule and to incorporate the more specific and detailed language of the ABA amendment and its additions to the Comment.

The amended rule prohibits conduct in the practice of law that discriminates or harasses on the basis of a lengthy list of characteristics. The rule carries forward from the former Vermont rule “color,” “ancestry,” and “place of birth,” which are also included in the anti-discrimination provision of the Vermont Fair Employment Practices Act, 21 V.S.A. § 495(a)(1). The addition in the Vermont rule of “other grounds that are illegal or prohibited under federal or state law” extends the prohibition to include provisions such as 21 V.S.A. § 495(a)(5) (discrimination on the basis of HIV), 39 U.S.C. § 4301 et seq. (discrimination on the basis of veteran status), and 42 U.S.C. § 2000 et seq. (discrimination on the basis of genetic information).

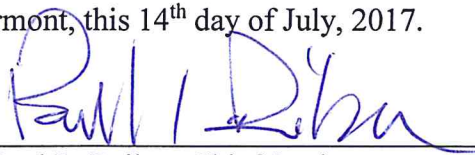
Comment [4] makes clear that “conduct related to the practice of law” is to be understood broadly to include many activities beyond the confines of traditional client representation, including law practice management and bar association or other practice-related activities including social occasions.


The rule also makes clear that it does not affect the provisions of Rule 1.16 concerning mandatory or optional refusal or optional withdrawal from representation. Rule 1.16(a)(1) requires withdrawal if the representation would lead to a violation of the Rules of Conduct or other law. Thus, a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g). The optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule.


Finally, Rule 8.4(g) permits “legitimate advice or advocacy” consistent with the rules. Essentially, as new Comment [5] suggests, this language calls on the lawyer not to forget that even the client whose views or conduct would violate legal prohibitions against discrimination and harassment applicable to him or her may deserve representation under Rules 6.1 and 6.2. As Rule 1.2 makes clear, representation does not constitute endorsement of a client’s views and may include efforts to assist the client to avoid unlawful activity. The effect of Rule 8.4(g) is to prohibit the lawyer from expressing views as his own that would violate that rule.

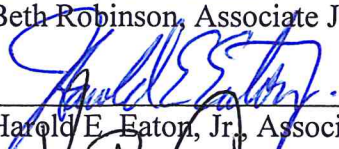
2. That this rule and comments, as amended, are prescribed and promulgated effective September 18, 2017. The Reporter’s Notes are advisory.

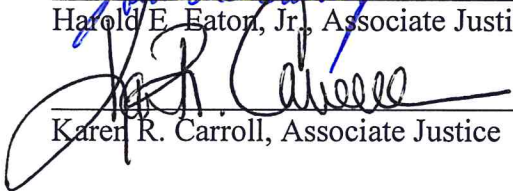
Dated in Chambers at Montpelier, Vermont, this 14th day of July, 2017.


Paul L. Reiber, Chief Justice


Marilyn S. Skoglund, Associate Justice


Beth Robinson, Associate Justice


Harold E. Eaton, Jr., Associate Justice


Karen R. Carroll, Associate Justice

STATE BAR OF NEVADA

September 6, 2017

Chief Justice Michael Cherry
Nevada Supreme Court
201 South Carson Street
Carson City, NV 89701-4702

FILED

SEP 22 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK



3100 W. Charleston Blvd.
Suite 100
Las Vegas, NV 89102
phone 702.382.2200
toll free 800.254.2797
fax 702.385.2878

9456 Double R Blvd., Ste. B
Reno, NV 89521-5977
phone 775.329.4100
fax 775.329.0522

www.nvbar.org

RE: ADKT 0526 (In the Matter of Amendments to Rule of professional Conduct 8.4.)

Dear Chief Justice Cherry:

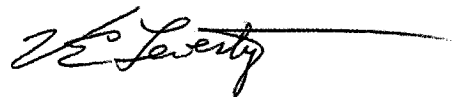
The Board of Governors filed ADKT 0526 (In the Matter of Amendments to Rule of professional Conduct 8.4.). This ADKT is scheduled for public hearing on November 6, 2017. Many comments were filed in opposition to the ADKT that causing the Board to pause. The Board of Governors appreciates the Court's willingness to move the initial public hearing date to November to allow for more discussion by the Board of Governors.

At the August 30, 2017 meeting of the Board of Governors they discussed the submitted comments regarding this ADKT. Additionally, they heard a report from Rew Goodenow, Nevada's Delegate to the ABA House of Delegates. Mr. Goodenow provided feedback regarding the ABA Model Rules of Professional Conduct covering Rule 8.4 Misconduct as to how other jurisdictions handled this rule. With the consensuses being that the language used in other jurisdictions was inconsistent and changing. Thus, the Board of Governors determined it prudent to retract ADKT 0526 with reservation to refile an ADKT when, and if the language in the rule sorts out in other jurisdictions.

Therefore, the Board of Governors respectfully requests that the Court withdraw ADKT 0526.

I am available to provide additional information as requested by the Court.

Respectfully,



Gene Leverty
State Bar of Nevada President

cc: Elizabeth Brown

17-32067

IN THE SUPREME COURT OF THE STATE OF NEVADA

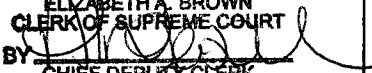
IN THE MATTER OF AMENDMENTS
TO RULE OF PROFESSIONAL
CONDUCT 8.4

ADKT 526

FILED

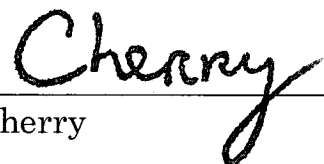
SEP 25 2017

O R D E R

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

The Board of Governors of the State Bar of Nevada have filed a request to withdraw its petition filed on May 8, 2017, seeking to amend Professional Conduct 8.4 (Misconduct). Cause appearing, the request to withdraw the petition is granted.

It is so ORDERED.


_____, C.J.
Cherry

cc: Vernon Leverty, President, State Bar of Nevada
Kimberly Farmer, Executive Director, State Bar of Nevada
Administrative Office of the Courts