Utah Supreme Court
Advisory Committee on the Rules of Professional Conduct
Meeting Agenda
Cory Talbot, Chair

Location: Virtually via Webex Link

Date: December 2, 2025

Time: 4:00 – 6:00 p.m.

Welcome and approval of minutes	Tab 1	Cory Talbot
Rule 8.4 (*Discussion*)	Tab 2	Ashley Gregson
Rule 8.4 – Comment Request from Samantha Wilcox (*Discussion*)	Tab 3	Cory Talbot
New / Old Business		

Reminder: Check style guide for conformity before rules are sent to the Supreme Court.

Upcoming Items:
Referral Fee rules back from public comment (Rules 1.0, 1.5, 5.4, and 5.8)

Rules of Professional Conduct Committee Website: Link

2026 Meeting Schedule:
Jan 6 • Feb 3 • Mar 3 • April 7 • May 5 • June 2 • Aug 4 • Sept 1 • Oct 6 • Nov 3 • Dec 1

Tab 1

Utah Supreme Court's

Advisory Committee on the Rules of Professional Conduct

Meeting Minutes
November 3, 2025
Via Webex
4:00 pm Mountain Time

Cory Talbot, Chair

Attendees:

Cory Talbot (Chair)
Jurhee Rice (Vice Chair)
Adam Bondy
Ian Quiel
Alyson McAllister
Hon. Matthew Bates
Hon. Craig Hall
Hon. Richard Pehrson
Mark Nickel
Mark Hales
Kent Davis
Lakshmi Vanderwerf
Robert Harrison
Ashley Gregson
Lynda Viti
Robert Gibbons
Alyson McAllister
Paige Nelson
Beth Kennedy (ex officio)
Christine Greenwood (ex officio)
Hon. Trent Nelson (emeritus)

Staff:

Stacy Haacke
Sonia Sweeney

Guests:

1. Welcome, Approval of the May 6, 2025 meeting minutes (Chair Talbot)

Chair Cory Talbot called the meeting to order and welcomed the attendees. The Chair requested a review of the minutes from the previous meeting. Kent Davis moved to adopt the prior month's minutes, stating they were consistent with his recollection. The motion received a second from Robert Gibbons. There being no opposition voiced, the motion passed unanimously.

2. Rules 1.0, 1.5, 5.4, and 5.8 – Return from Public Comment (Discussion)

Chair Cory Talbot introduced the discussion regarding the public comments received on the proposed amendments to Rules 1.0, 1.5, 5.4, and 5.8, noting that the majority of comments focused on Rule 5.8.

Robert Gibbons requested a historical reminder of the initiative behind Rule 5.8, particularly concerning the context of the referral fee prohibition. Chair Talbot explained that the fee sharing amendments originated in conjunction with the sandbox program, but the Court later withdrew the initial amendment upon realizing its broad application outside the sandbox context. He clarified that fee sharing with non-lawyers is currently permitted only within the sandbox, while sharing with lawyers is permitted if consistent with Rules 1.1 and 1.3, necessitated partly by the need to clarify the definition of "referral fee" due to inconsistent usage among practitioners. Beth Kennedy noted that the Court had previously made it clear that they do not want to allow bare referral fees, and that the comments primarily constitute a pushback against this established principle. Chair Talbot agreed that the Committee should raise the issue with the Court again, noting that commenting attorneys do not see a reason for the distinction prohibiting bare referral fees.

Christine Greenwood found some comments on the referral fee issue somewhat persuasive, but confirmed the Court remains pretty firmly against referral fees. She drew attention to specific comments from Alex Leeman regarding structural duplication, noting that Rule 5.8(a) prohibiting referral fees is redundant with Rule 5.4(c). Ms. Greenwood also agreed with Mr. Leeman that the term "payable" in Rule 5.8(b)(1) is confusing and suggested "earned" would be more consistent with the language used elsewhere in the Rules of Professional Conduct. Furthermore, she pointed out the overlap between the reasonableness factors listed in Rule 5.8(c) and the factors found in Rule 1.5(a). Robert Gibbons voiced a concern that the ambiguity between prohibited "referral fees" and permissible "fee sharing" might lead attorneys to merely couch referral fees as fee sharing to bypass the rule. Ashley Gregson supported this observation, raising the confusion regarding the definition of referral fees and its potential unintended consequence of prohibiting "origination credit" within large firms, a practice typically viewed as a referral fee internally, citing Scott Crooks's comment. Chair Talbot acknowledged the need to

address the definition of referral fees to avoid unintended scrutiny of intra-firm compensation structures.

Lakshmi Vanderwerf suggested that while the criticisms regarding the rule are legitimate, the proposed alternative solution (referral to competent counsel) may not be a workable standard for the rules. Robert Gibbons proposed sending the issues back to the subcommittee for further consideration. Chair Talbot agreed, noting that since five months had passed since the last review, revisiting the issues would be beneficial.

The Committee decided to send Rules 1.0, 1.5, 5.4, and 5.8, along with all public comments, back to the relevant subcommittee for comprehensive review and formulation of new recommendations for the full Committee.

3. New Business

Chair Talbot addressed the presence of new committee member Hon. Richard Pehrson, who introduced himself, noting that he had a fully civil docket that would blend to half criminal/half civil in January. The Chair apologized for neglecting to initiate introductions at the beginning of the meeting, which is a Committee rule, and requested that all attendees reintroduce themselves for the benefit of Hon. Pehrson and the observers. The members and staff provided brief introductions outlining their roles and tenure on the Committee.

Chair Talbot inquired about the status of the ongoing work regarding Rule 8.4. Ashley Gregson provided an update on the Rule 8.4 subcommittee's work, stating that she is preparing a memo to summarize the options the subcommittee has discussed and to seek further instruction from the Court on how to proceed. The Chair provided a general reminder, as noted on the agenda, to ensure conformity with the style guide before rules are sent to the Supreme Court.

4. Upcoming Items

The next meeting of the Committee is scheduled for December 2, 2025. The meeting adjourned.

Tab 2

MEMORANDUM

From: Rules of Professional Conduct Committee
To: Utah Supreme Court
Re: Proposed Amendments to Rule 8.4
Date: 12/1/25
Attachments: (1) August 10, 2022 Utah State Bar Memo; (2) Rule 8.4 Proposed Amendments (2022); (3) Drafts of Rule 8.4 Revised Proposed Amendments (2025)

In 2024, the Utah Supreme Court Advisory Committee on the Rules of Professional Conduct (the "Court") requested that the Rules of Professional Conduct Committee review potential amendments to Utah R. Prof. Conduct 8.4. This Memorandum reports to the Court the Committee's efforts to evaluate potential amendments and requests additional direction from the Court.

BACKGROUND

The committee's work on potential changes to Rule 8.4 arose out of two circumstances. First, in 2015, the committee began to discuss whether repeated violations of the Standards of Professionalism and Civility in Rule 14-301 should constitute professional misconduct under the Rules of Professional Conduct.

Second, in 2016, the ABA adopted a new subsection to Model Rule 8.4 aimed at addressing harassment and discrimination, which now includes the following conduct as professional misconduct of a lawyer:

> (g) engage in conduct that 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.

As a result, several amendments to Rule 8.4 have been proposed and published over the years, including in 2015, 2017, 2019, 2020, and 2022. These proposed amendments were met with opposition in the comments, many of which referenced First Amendment freedom of speech concerns.

In 2022, the Utah State Bar submitted a comprehensive memorandum to the Court regarding the history of Rule 8.4(g) and (h) amendments, which we incorporate herein by reference.

The latest redline amendments proposed in 2022 are also attached. Those amendments, among other things, attempted to define "harassment or discrimination" from the ABA Model Rule by referencing statutes like the Utah Antidiscrimination Statute and the Civil Rights Act.

In response to these proposed amendments, the Court requested that the committee define the specific conduct behind those statutes rather than simply citing to the statutes themselves. In 2024 the committee assembled a sub-committee to address this task.

COMMITTEE EFFORTS

The sub-committee met several times over the course of the subsequent year to discuss ways to incorporate the Court's instructions, along with other options for Rule 8.4. The sub-committee investigated how other states had incorporated the ABA Model Rule, discussed case law and ethics opinions interpreting such rules, and created multiple versions of proposed amendments for discussion.

The task of defining conduct that constitutes "harassment or discrimination" for purposes of Rule 8.4(g) proved challenging because these legal concepts are not always clearly defined in the law and largely rely upon case law interpretations, which change over time. For instance, federal case law indicates that a hostile work environment can be considered a form of harassment under the Civil Rights Act, however the language of the Act itself does not mention hostile work environments. Also, recent United States Supreme Court precedent can be interpreted to make it a civil rights violation for an employer not to provide gender neutral bathrooms to its employees, while such conduct was not previously considered discriminatory. The sub-committee was concerned that attempting to define the conduct too precisely would require frequent future amendments to conform to the developments of the case law, but leaving the definition too broad would eliminate the usefulness of the amendment.

The sub-committee first attempted a draft that summarized various forms of harassment and discrimination as defined by the statutes and case law. However, the committee was concerned that the summary was too vague. Next, the sub-committee attempted a draft that used language directly from the state and federal statutes, but this was too specific and lengthy.

Furthermore, the sub-committee identified concerns with linking Rule 8.4 to laws that already apply to lawyers as employers. For instance, the Utah Antidiscrimination Act only applies to employers with more than 15 employees, but the proposed amendment to the Utah Rule of Professional Conduct would apply to all Utah lawyers regardless of the size of their office.

Regarding Rule 8.4(h) (the amendment to enforce the Standards of Professionalism and Civility), the sub-committee did not seek to change this sub-section as it appears the Court did not require additional revisions. However, should the Court require additional revisions to this paragraph, the committee stands ready to revisit that language.

REQUEST FOR GUIDANCE

Because the sub-committee found these problems with identifying the specific conduct prohibited by the statutes referenced in the 2022 amendments to Rule 8.4(g), the

committee seeks further guidance and clarification from the Court regarding this and the other amendments to Rule 8.4.

Rule 8.4. Misconduct.

(1) 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; ~~or~~

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

(g) notwithstanding the number of employees in the lawyer's firm,

(1) ~~engage in~~ refuse to hire, promote, discharge, demote, or terminate a person, or to retaliate against, harass, or discriminate in matters of compensation or in terms, privileges, and conditions of employment against a person otherwise qualified, because of :

(A) race;

(B) color;

(C) sex;

(D) pregnancy, childbirth, or pregnancy-related conditions;

(E) age, if the individual is 40 years of age or older;

(F) religion;

(G) national origin;

(H) disability;

(I) sexual orientation; or

(J) gender identity;

(2) Unless based upon a bona fide occupational qualification, or required by

And given to an agency of government for a security reason, print, circulate,

Commented [NS1]: Query to Court whether this rule may contain a numbering convention that differs from the Style Guide. The Style Guide calls for rules to start with (a). But the numbering/lettering of these provisions is so ingrained in caselaw, it would be helpful to have the rule start with a (1) so that paragraph (d), for example, is not renumbered to (a)(4) but instead becomes (1)(d).

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Or cause to be printed or circulated a statement, advertisement, or publication, or use a form of application for employment, or make any inquiry in connection with prospective employment which directly expresses a limitation, specification, or discrimination as to the characteristics listed in (g)(1)(A) through (J).

(3) Aid, incite, compel, or coerce the doing of an act defined in this section Defined to be discriminatory or prohibited employment practice, obstruct or prevent a person from complying with these rules, or attempt, either directly or indirectly, to commit an act prohibited in this section;

(4) deny to, or withhold from, any qualified person the right to be admitted to or participate In an apprenticeship training program, on-the-job training program, or other occupational Instruction, training, or retraining program because of any of the characteristics listed in (g)(1)(A) through (J), or discriminate against or harass a qualified person in that person's pursuit of such a program, or discriminate against a qualified person in the terms, conditions, or privileges of such a program because of any of those characteristics;

(6) print, publish, or cause to be printed or published, a notice or advertisement relating to employment By the employer, indicating a preference, limitation, specification, or discrimination based on any of the characteristics listed in (g)(1)(A) through (J) unless it is a bona fide occupational qualification;

(7) refuse to provide reasonable accommodations for an employee related to pregnancy, childbirth, breastfeeding, or related conditions if the employee requests a reasonable accommodation and unless the accommodation would recate an undue hardship on the operations of the employer;

(8) require an employee to terminate employment if another reasonable accommodation can be provided for the employee's pregnancy, childbirth, breastfeeding, or related conditions unless the employer demonstrates that the accommodation would create an undue hardship on the operations of the employer;

(9) deny employment opportunities to an employee, if the denial is based on the need of the employer to make reasonable accommodations related to the pregnancy, childbirth, breastfeeding, or related conditions of an employee unless the employer demonstrates that the accommodation would create an undue hardship on the operations of the employer;

(10) fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

Commented [AG1]: 1-9 are all taken directly from the Utah Antidiscrimination Act 35A-5-107 definitions of prohibited conduct.

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(11) limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect their status as an employee, because of such individual's race, color, religion, sex, or national origin;

(12) refuse to refer for employment, or otherwise discriminate against, any individual because of their race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of their race, color, religion, sex, or national origin;

(13) discriminate against any individual, or hire or refer for employment any individual because of their race, color, religion, sex, or national origin in the admission to, or employment in, any program established to provide apprenticeship or other training;

(14) rely upon race, color, religion, sex, or national origin as a motivating factor for any employment practice, even though other factors also motivated the practice;

(15) discriminate against an employee or applicant for opposing any unlawful employment practice or for making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing related to employment discrimination;

(16) print or publish notices or advertisements indicating prohibited preference, limitation, specification, or discrimination based on race, color, religion, sex, or national origin unless a bona fide occupational qualification for employment.

~~any~~

~~conduct that is listed as a discriminatory or prohibited employment practice under Sec 2000e-2 [Section 703] of Title VII of the Civil Rights Act of 1964, as amended, or under Section 34A-5-106 of the Utah Antidiscrimination Act, as amended, or pursuant to applicable court cases; or~~

~~(h)~~ (h) egregiously violate, or engage in a pattern of repeated violations of, Rule 14-301 if such violations harm a participant in the legal process and are prejudicial to the administration of justice.

~~(2)~~ (2) Paragraph (1)(c) does not apply to a government lawyer who participates in a lawful, covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation, or deceit for the purpose of gathering relevant information.

Commented [AG2]: (10) through (16) are drawn from the language in Title VII (obviously lots of overlap here).

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(3) Paragraphs (1)(d), (1)(g), and (1)(h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

(4) Legitimate advocacy does not violate this rule.

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] An act of professional misconduct under Rule 8.4(1)(b), (c), (d), (e), ~~or~~ (f), (g), or (h) cannot be counted as a separate violation of Rule 8.4(1)(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(1)(a) for the purpose of determining sanctions.

[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.

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[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race; color; ~~,~~ sex; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion; ~~,~~ national origin; ~~,~~ disability; ~~,~~ ~~age~~, sexual orientation; gender identity ~~,~~ or genetic information ~~socioeconomic status~~, violates may violate 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. The protected classes listed in this comment are consistent with those enumerated in the Utah Antidiscrimination Act or 1965, Utah Code Sec. 34A-5-106(1)(a) (2016), and in federal statutes, and is not meant to be an exhaustive list as the statutes may be amended from time to time. ~~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] The substantive law of antidiscrimination and anti-harassment statutes and case law governs the application of paragraph (g), except that for the purposes of determining a violation of paragraph (g), the size of the law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from representation, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact finder in order to allege or prove a violation of paragraph (g). Lawyers may discuss the benefits and challenges of diversity and inclusion without violating

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paragraph (g). Unless otherwise prohibited by law, implementing or declining to implement initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] 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 any particular population 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 should also be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay and their obligations under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] Participants in the legal process include lawyers, clients, witnesses, judges, clerks, court reporters, translators, bailiffs, arbitrators, and mediators.

~~[4]~~ [7] 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]~~ [8] 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.

[9] This rule differs from ABA Model Rule 8.4 to the extent that it renumbers the paragraphs, changes paragraph (1)(g), adds paragraphs (1)(h), (2), (3), and (4), and modifies the comments accordingly.

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Rule 8.4. Misconduct.

(1) It is professional misconduct for a lawyer to:

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(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;

(g) notwithstanding the number of employees in the lawyer's firm,

(1) engage in discrimination in the hiring, firing, discipline, promotion, compensation, or other employment conditions of a person on the basis of race, color, religion, sex, pregnancy, pregnancy-related condition, childbirth, sexual orientation, gender identity, national origin, age if the person is over 40 years of age, genetic information, or disability;

(2) harass a person based upon the person's race, color, religion, sex, pregnancy, pregnancy-related condition, childbirth, sexual orientation, gender identity, national origin, age if the person is over 40 years of age, genetic information, or disability. This includes sexual harassment, which includes unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.; or

(3) ~~any~~engage in conduct that creates a hostile work environment, including Discriminatory, intimidating, or insulting conduct that is severe and pervasive enough to alter employment conditions in the workplace; or

~~conduct that is listed as a discriminatory or prohibited employment practice under Sec 2000e-2 [Section 703] of Title VII of the Civil Rights Act of 1964, as amended, or under Section 34A-5-106 of the Utah Antidiscrimination Act, as amended, or pursuant to applicable court cases; or~~

(h) egregiously violate, or engage in a pattern of repeated violations of, Rule 14-301

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Comment

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~~[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] The substantive law of antidiscrimination and anti-harassment statutes and case law governs the application of paragraph (g), except that for the purposes of determining a violation of paragraph (g), the size of the law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from representation, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact finder in order to allege or prove a violation of paragraph (g). Lawyers may discuss the benefits and challenges of diversity and inclusion without violating

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paragraph (g). Unless otherwise prohibited by law, implementing or declining to implement initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] 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 any particular population 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 should also be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay and their obligations under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] Participants in the legal process include lawyers, clients, witnesses, judges, clerks, court reporters, translators, bailiffs, arbitrators, and mediators.

~~[4]~~ [7] 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]~~ [8] 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.

[9] This rule differs from ABA Model Rule 8.4 to the extent that it renumbers the paragraphs, changes paragraph (1)(g), adds paragraphs (1)(h), (2), (3), and (4), and modifies the comments accordingly.

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Rule 8.4. Misconduct.

(1) 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; ~~or~~

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

(g) notwithstanding the number of employees in the lawyer's firm, engage in any conduct that is listed as a discriminatory or prohibited employment practice under Sec 2000e-2 [Section 703] of Title VII of the Civil Rights Act of 1964, as amended, or under Section 34A-5-106 of the Utah Antidiscrimination Act, as amended, or pursuant to applicable court cases; or

(h) egregiously violate, or engage in a pattern of repeated violations of, Rule 14-301 if such violations harm a participant in the legal process and are prejudicial to the administration of justice.

(2) Paragraph (1)(c) does not apply to a government lawyer who participates in a lawful, covert governmental operation that entails conduct employing dishonesty, fraud, misrepresentation, or deceit for the purpose of gathering relevant information.

Commented [NS1]: Query to Court whether this rule may contain a numbering convention that differs from the Style Guide. The Style Guide calls for rules to start with (a). But the numbering/lettering of these provisions is so ingrained in caselaw, it would be helpful to have the rule start with a (1) so that paragraph (d), for example, is not renumbered to (a)(4) but instead becomes (1)(d).

(3) Paragraphs (1)(d), (1)(g), and (1)(h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

(4) Legitimate advocacy does not violate this rule.

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] An act of professional misconduct under Rule 8.4(1)(b), (c), (d), (e), ~~or~~ (f), (g), or (h) cannot be counted as a separate violation of Rule 8.4(1)(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(1)(a) for the purpose of determining sanctions.

[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; color; ~~,~~ sex; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion; ~~,~~ national origin; ~~,~~ disability ~~,~~; ~~age~~, sexual orientation; gender identity ~~,~~ or genetic information ~~socioeconomic status~~, violates may violate 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. The protected classes listed in this comment are consistent with those enumerated in the Utah Antidiscrimination Act or 1965, Utah Code Sec. 34A-5-106(1)(a) (2016), and in federal statutes, and is not meant to be an exhaustive list as the statutes may be amended from time to time. ~~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] The substantive law of antidiscrimination and anti-harassment statutes and case law governs the application of paragraph (g), except that for the purposes of determining a violation of paragraph (g), the size of the law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from representation, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact finder in order to allege or prove a violation of paragraph (g). Lawyers may discuss the benefits and challenges of diversity and inclusion without violating

paragraph (g). Unless otherwise prohibited by law, implementing or declining to implement initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] 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 any particular population 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 should also be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay and their obligations under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] Participants in the legal process include lawyers, clients, witnesses, judges, clerks, court reporters, translators, bailiffs, arbitrators, and mediators.

~~[4]~~ [7] 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]~~ [8] 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.

[9] This rule differs from ABA Model Rule 8.4 to the extent that it renumbers the paragraphs, changes paragraph (1)(g), adds paragraphs (1)(h), (2), (3), and (4), and modifies the comments accordingly.

Utah State Bar®

MEMORANDUM

TO: Utah Supreme Court Advisory Committee on the Rules of Professional Conduct
Utah Judicial Council Standing Committee on the Office of Fairness and Accountability

FROM: Nancy Sylvester, General Counsel, Utah State Bar
Scotti Hill, Ethics Counsel, Utah State Bar

RE: History of Rule 8.4(g) and (h) amendments and caselaw developments

DATE: August 10, 2022

In August 2016, the American Bar Association (ABA) adopted Model Rule 8.4(g) in response to concerns over the pervasiveness of sexual harassment and other forms of discrimination in the law. The amendment prohibits discrimination and harassment by lawyers based on a protected class (including sex, race, national origin, and sexual orientation) while engaged in "conduct related to the practice of law." ABA Formal Ethics Opinion 493, written in July 2020, aimed to explain the application of this novel rule. Interestingly, by the time the ABA Standing Committee on Ethics and Professional Responsibility adopted Rule 8.4(g) in August 2016, several jurisdictions had already crafted similar language into their state rules.[1]

The year preceding the ABA Model Rule's adoption, Utah's Advisory Committee on the Rules of Professional (RPC) commenced discussions regarding whether repeated violations of the Standards of Professionalism and Civility (SPC) under Rule 14-301 should be professional

[1] According to a March 12, 2019, ABA article, "The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law," Kristine A. Kubes, Cara D. David, and Mary E. Schwind, prior to the ABA adoption of Rule 8.4(g), 20 jurisdictions had already incorporated similar language prohibiting discrimination into their state rules. A total of 29 states have included antidiscrimination language into their rules, while 13 states have declined to adopt the amended rule. Note: this calculation has likely changed in the years following this source reporting. https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/

misconduct under the RPC. These discussions were topically similarly to issues addressed by ABA Model Rule 8.4.

Since 2015, the Advisory Committee has proposed numerous versions of Rule 8.4 and Rule 14-301 to the Supreme Court. The Court has published for comment five versions of Rule 8.4 and two versions of Rule 14-301.[2] The Court adopted just two Rule 8.4 proposals, each of which came in response to Utah Supreme Court case law.[3]

The Court has not yet finalized Rule 8.4 as part of the larger ABA Model Rule efforts. This is likely due at least in part to the swift, negative reaction the rule generates each time it is published. Most commenters oppose adopting language that even resembles the ABA Model Rule, opining that the language is overbroad and violates attorneys' First Amendment rights. Nonetheless, the issues identified by the ABA persist in Utah's legal profession and there is renewed interest to pass a rule. This time, that interest derives from the Utah State Courts' newly-created Office of Fairness and Accountability and Utah's LGBTQ+ Chamber of Commerce.

The following memorandum summarizes Utah's efforts to adopt amendments to Rule 8.4 and 14-301. Our hope is that this historical document will serve as a launching point for these renewed discussions and ensure that the committee does not continue to pave old paths.

I. Origin of a proposed amendment to Rule 8.4 (2015)

Discussions on Rule 8.4 began in ***February 2015*** in response to a Supreme Court request to analyze the overlap between the SPC and the RPC. The Committee studied whether Rule 8.4 should be amended to make repeated violations of the SPC professional misconduct. These discussions came in response to concerns that incivility by attorneys was having a negative impact on the legal profession, the courts, and access to justice. The Committee convened a subcommittee to research the issue.

[2] The Court published proposed amendments to Rule 8.4 in May 2015, June 2017, December 2018, March 2019, and most recently in June 2020. The Court published proposed amendments to Rule 14-301 in March 2019 and August 2020.

[3] The 2015 amendments added Comment [3a] and the 2018 amendments added Comment [1a].

At the ***April 27, 2015*** RPC committee meeting, the committee proposed a new comment advising attorneys that certain violations of the SPC *could* lead to sanctions. The new comment language read as follows:

> *[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]

The Supreme Court circulated the proposal, which garnered three comments during the comment period. All three opposed adoption. Nonetheless, the Supreme Court adopted the amendment and the comment remains in the rule today.

II. Developments from 2016-2017

The 2016 Utah Supreme Court case of *Larsen v. Utah State Bar*, 2016 UT 26, raised important questions for the RPC committee about the knowledge requirement necessary to affirm a rule violation and also the role that rule comments play.

Larsen was a Davis County prosecutor who was assigned to a 2009 proceeding involving a woman on DUI probation. He was also assigned to a 2010 felony robbery case. On July 8, 2014, the district court entered a seven-month Order of Suspension against Larsen for violations of Rule 3.3(a)(1) (Candor toward the Tribunal) and Rule 3.8(d) (Special Responsibilities of a Prosecutor). As to the 2009 proceeding, the court found that Mr. Larsen recklessly misstated facts regarding a DUI probationer's fine payments. As to the 2010 case, it found that Mr. Larsen failed to show photographs of any suspect other than the defendant to robbery victims and failed to make timely disclosure of this fact to the defense. Larsen challenged both rule violations. On June 16, 2016, the Utah Supreme Court affirmed the district court's six-month Rule 3.8 suspension, but struck the Rule 3.3 thirty-day suspension. The Court

[4] The committee added "approved by the Utah Supreme Court" as a reminder of the importance of the SPC. To make the remaining language more concise, they deleted "even actions of minor significance when considered separately" because it is covered by "a pattern of repeated violations". The committee also deleted "prejudicial to the administration of justice" as it is inherent in paragraph (d), and "through this State" because it is unnecessary. The committee was concerned that the automatic violation mandate dictated by the last clause of the last sentence may not be precisely correct. The language was changed to "may support a finding" that paragraph (d) is violated.

addressed at length the requirement that a lawyer must have "actual knowledge," and not constructive knowledge or recklessness, to establish a Rule 3.3 violation. It found that the district court had erroneously relied upon comment [3], which appeared to override Rule 3.3(a)(1) in setting forth a "reasonably diligent inquiry" standard. The Court then analyzed the role of advisory committee notes as follows: "The Advisory Committee Notes are not law. They are not governing rules voted on and promulgated by this court. They set forth only the advisory committee's views of our rules. And although they may provide helpful guidance, they cannot override the terms of the rules themselves." *Id.* at ¶31.

In light of this analysis, Billy Walker, Chief Disciplinary Officer of the Office of Professional Conduct, expressed concern that the language of Rule 8.4, comment [3a], as amended on November 1, 2015, was insufficient to impose liability on attorneys if it did not appear in the body of the rule.

At the ***October 3, 2016*** meeting of the RPC Committee, Robert Rice, President of the Utah State Bar, and Margaret Plane, State Delegate for Utah to the ABA's House of Delegates, attended the meeting to speak about the ABA's proposed change to Rule 8.4(g). Mr. Rice emphasized that amending the rule would further the Bar's diversity and inclusion efforts. Ms. Plane noted that she was a State Delegate in the ABA's House of Delegates at the time the rule change was debated. She noted that the model rule included a mens rea, or knowledge, requirement. Ms. Plane then provided the committee with a state-by-state survey of black letter rules on anti-discrimination. The committee discussed a few general areas of concern: whether the language was overbroad and implicated First Amendment concerns, whether the rule was unclear regarding what practices constitute the "practice of law," whether the rule may impact affirmative action policies, the definition of "socio-economic," the rule's impact on extending Title VII to all lawyers, and the lawyer's freedom to make appropriate client intake decisions. Another subcommittee was formed—comprised of Simón Cantarero, Billy Walker, Vanessa Ramos, Joni Jones, and Trent Nelson—to study the ABA Model Rule. In addition to the issues already identified, the group was also encouraged to discuss a possible conflict between Rules 8.4(g) and Rule 1.16.

During the RPC Committee's ***November 28, 2016***, meeting, Simón Cantarero reported that the subcommittee was unable to reach conclusions about the important questions

underlying this debate. Mr. Cantarero reported that the subcommittee's discussions were ongoing and that it was not yet prepared to make a rule change recommendation to the Supreme Court. The subcommittee worried that the application of the rule could be overly broad, applying to situations where the lawyer is merely conducting the business of practicing law and could elevate attorneys to some sort of public status or quasi-state actor.

The committee also solicited feedback as to whether they had heard complaints about discriminatory behavior. Among other comments, Mr. Walker stated that he had seen substantial evidence of females being treated differently from males.

The ABA Model Rule 8.4(g) subcommittee issued and discussed its report and recommendation, as set forth in the committee's memorandum dated ***January 16, 2017***, (the "Rule 8.4(g) Report," p.15-32 of the Agenda Materials). Several committee members expressed concerns and questions regarding the report. Specific questions or issues that were raised included the following:

- Does the proposed rule delegate rulemaking to governmental entities? For example, are Salt Lake City attorneys required to comply with Logan City's ordinances?
- Does the proposed rule force attorneys to be responsible for standards of all states and municipalities? The committee favored limiting its reach to only Utah.
- Among the factors to consider in determining the severity of the misconduct is "whether the conduct was committed in connection with the lawyer's professional activities." This language appears to suggest that connection to professional activity is not a necessary condition. If so, the rule likely reaches throughout a lawyer's private life, which many members of the committee did not favor.
- What is the preclusive effect of disciplinary proceedings? This may be relevant since there is no requirement that there be an adjudicatory finding of harassment or discrimination before disciplinary proceedings. Regarding the second sentence of Comment 3, it is unclear whether that sentence prohibits any discussion of sex, gender, race, etc. For example, would a firm be prohibited from discussing increased diversity within the firm?

- Committee members were troubled by the statement in Comment 4 that "a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (a)."

As such, the committee chairman recommended that a few representatives from the committee schedule a time to discuss this issue with the Utah Supreme Court to gain further insight on how to address *Larsen* in future rulemaking. The result of that discussion was guidance that mandatory rule language should appear in the rule itself. Comments should only explain, but not add to, the black letter law.

At a ***March 6, 2017***, RPC Committee meeting, the committee recommended that the following language be inserted as Rule 8.4(g):

It is professional misconduct for a lawyer to:

> *(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status as provided in Federal and Utah State law and jurisprudence, and that reflects adversely on the lawyer's fitness as a lawyer. This paragraph does not limit the ability of the lawyer to accept representation or decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice per rule 2.1, or limit a lawyer's full advocacy on behalf of the client.*

The committee also recommended that the following comments (new comments three, four, and five) be included among the Rule 8.4 changes:

> *[3] Discrimination and harassment by lawyers in violation of paragraph (g) may undermine confidence in the legal profession and the legal system. Discrimination or harassment does no need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of this Rule. Such discrimination includes harmful conduct that manifests bias or prejudice toward others. Harassment includes sexual harassment and derogatory or demeaning conduct. Sexual conduct includes unwelcome sexual advances, requests for sexual favors, and other unwelcome conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g). Whether discriminatory or harassing conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the conduct; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in the lawyer's professional capacity.*
>
> *[4] Lawyers may engage in conduct undertaken to discuss diversity, including discussing any benefits or challenged without violating this rule. Implementing initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically*

underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] 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 or other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers should also 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 view or activities. See Rule 1.2(b).

The revisions included the following deviations from the ABA Model Rule 8.4(g): (a) a lawyer must know his conduct is harassing, and (b) the conduct must reflect adversely on the profession. The draft sparked discussion regarding what type of conduct reflects adversely on the profession. The committee also discussed comment 3 and whether the "substantive law" sentence is necessary in light of the addition of "unlawful." Cristie Roach moved to circulate the rule in a preliminary discussion period (not a full comment period) to get a feel for attorneys' thoughts on the proposed rule and its deviations from the Model Rule. The motion passed unanimously. The subcommittee agreed to draft bullet points outlining the pros and cons of the revisions versus the Model Rule for the discussion period.

The committee voted to approve these additions and Chairman Johnson agreed to advise the Utah Supreme Court promptly of the Committee's actions. The Supreme Court declined to publish the Committee's version of Rule 8.4(g). In ***June 2017***, the Court published ABA Model Rule 8.4(g) for comment. The rule received 60 comments.

On ***August 28, 2017***, the Committee discussed the many comments to Rule 8.4(g). Steve Johnson noted that most were negative and that they generally fell into the following categories: a) vagueness/due process/overbreadth; b) freedom of speech/conscience; and c) freedom of religion, association, and the 6th amendment. The concerns prompted the Utah Supreme Court to request that the RPC committee provide clear guidance on the issues addressed in the comments.[5]

At this juncture, the committee contemplated the following options: (1) propose the Model Rule; (2) re-submit the proposed rule from the subcommittee; and (3) hold on to

[5] This message was relayed at the August 28, 2017, RPC Committee meeting.

the rule and wait to see how the adoption of the Model Rule and similar rules in other states proceeded before recommending further action. The committee voted to revisit the originally proposed rule from March 6, 2017, along with a supporting memorandum, policy briefing, and comments.

At the ***October 30, 2017***, RPC committee meeting, Judge Trent Nelson suggested that given the Model Rule's broad implication on all areas of practice, the committee should instead focus on a more limited area, such as the employment law context, which may resolve some of the concerns many commenters have. The subcommittee said it would explore amending its proposal to address only the employment law context.

III. Developments from 2018-2019

Following the 2017 discussions, new Utah Supreme Court caselaw created the need for an additional amendment to Rule 8.4. On ***December 19, 2018***, the Utah Supreme Court approved for the addition of comment [1a] in response to *In re Discipline of Steffensen*, 2018 UT 53, Footnote 7. The comment sought to eliminate confusion as to what sanctions may be applicable for a violation of Rule 8.4. It provides that an act of professional misconduct under Rule 8.4(b), (c), (d), (e), or (f) cannot be counted as a separate violation of Rule 8.4(a) for the purpose of determining sanctions. Conduct that violates other Rules of Professional Conduct, however, may be a violation of Rule 8.4(a) for the purpose of determining sanctions.

Meanwhile, the Rules of Professional Conduct Committee continued to study Model Rule 8.4(g). In ***March 2019***, the Utah Supreme Court published a version of Rule 8.4(g) that contained a narrower definition of the proscribed behavior, curtailing the discriminatory conduct to that which is banned by Title VII of the Civil Rights Act of 1964 and by the Utah Antidiscrimination Act. The March 2019 amendments also included a new paragraph (h), which incorporated 2015's comment [3a]. During the comment period, fifteen comments opposed the rule, two supported, and one was mixed. The Court instructed the committee to continue working on the rule amendments.

After the proposed comment period, and at the ***June 17, 2019***, RPC committee meeting, the Committee made two additional amendments. The committee amended paragraph (h) in comment 4a to read:

Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

The committee also moved to amend standard 3 of Rule 14-301 to read:

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of any such participant unless such matters are directly relevant under controlling substantive law. Lawyers shall avoid hostile, demeaning, humiliating, intimidating, harassing, or discriminatory conduct with all other counsel, parties, judges, witnesses, and other participants in all proceedings. Discriminatory conduct includes all expressions of discrimination against protected classes as enumerated in the Utah Antidiscrimination Act of 1965, Utah Code section 34A-5-106(1)(a), and federal statutes, as amended from time to time.

The committee, after conversing with the Court, decided the rules required additional investigation and research.

At the ***September 16, 2019***, RPC committee meeting, the subcommittee discussed which standards from Rule 14-301 should be included in Rule 8.4. The committee discussed the problem with including particular standards while excluding others. The subcommittee recommended that court personnel and venue be added but with specificity (such as a listing of services and/or places) so that "venue" is defined and limited to those places where legal services are being provided with a specific purpose.

IV. Developments from 2020-2021

In April and May 2020, the subcommittee recommended additional language amendments to Rule 8.4 and Rule 14-301. The subcommittee proposed changing Standard 14-301 into a Rule under Rule 8.4(h), making it an extension of the Rules of Professional Conduct prohibiting discriminatory conduct. In order to reconcile the comment and rule, the subcommittee agreed and recommended a change to the word "participant" to "person" under Standard 14- 301(3). The committee also approved the following revision to Rule 14-301(3):

Lawyers shall avoid hostile, demeaning humiliating or discriminatory conduct in law-related activities. Discriminatory conduct includes all discrimination against protected classes as those classes are enumerated in the Utah Antidiscrimination Act of 1965, Utah Code section 34A-5-106(1)(a), and federal statutes, as amended from time to time.

In addition, the committee sought to incorporate the following language:

> *Finally, the term "standard" has historically pointed to the aspirational nature of this rule. But Rule 8.4(h) now makes the provisions of this rule mandatory for all lawyers. Cross References: R. Prof. Cond. Preamble [1], [13]; R. Civ. P. 1; R. Civ. P. 65B(b)(5); R. Crim. P. 31 1(b); R. Juv. P. 1(b); R. Third District Court 10-1-306; Fed. R. Civ. P. 1; DUCivR 83-1.1(g)" and to retain standards throughout for Rule 14-301.*

In ***June 2020***, the March 2019 version of Rule 8.4(g) and (h) was republished for public comment with the following amendment: comment 3 was updated to include gender identity to the list of protected classes. Nearly all the thirty comments received during the comment period were opposed to the amendments.

In ***March 2021***, the committee once again investigated the issue of constitutionality and whether the rule language was narrowly tailored to advance a compelling state interest. A subcommittee was formed to continue researching the issue. At the ***June 7, 2021***, RPC committee meeting, Mr. Walker noted a new opinion from the Colorado Supreme Court captioned, *In the Matter of Robert E. Abrams*, 2021 CO 44, which upheld Colorado Rule 8.4(g). The court found the rule constitutional in a circumstance where counsel made a comment denigrating the presiding judge's physical appearance and apparent sexual orientation. Mr. Walker circulated the opinion for committee review.

V. Developments from 2022

In a January 5 letter to the Utah Supreme Court, RPC committee Chair Simón Cantarero summarized the various oppositions and reoccurring concerns of the RPC committee regarding the efforts to address Model Rule 8.4(g):

> Opponents have objected to the language and structure of the ABA Model Rule for its overbreadth and ambiguities. The same and very similar arguments have been repeated by largely the same commenters, against the most recent versions of the Utah Rule. Most comments in opposition take the view that Rules 8.4(g), (h), and 14-301 create a speech code for lawyers that extends beyond the courtroom and into private settings. They argue that the amended rules constitute a content- or viewpoint-based restriction on protected speech, suppressing politically incorrect speech while protecting or promoting politically correct speech. Opponents assert that adopting the rules would chill speech and dramatically curtail an attorney's responsibility to vigorously and aggressively litigate a case, particularly when cross-examining witnesses, and would adversely affect their livelihood for fear of discipline for engaging an objectionable client or cause or

declining to represent a particular client when the client alleges to have been discriminated against. In addition to being an intrusive regulation of private conduct, opponents also argue that the rule changes violate the Free Exercise clause and infringe on an attorney's freedom of association protected by the First Amendment. Opponents also point out that the rules would impose legal liability on lawyers and law firms that are otherwise immune from employment laws and regulations because of their size and number of employees.

The issues to study remain the following:

1) In addition to being an intrusive regulation of private conduct, opponents argue that the rule changes violate the Free Exercise clause and infringe on an attorney's freedom of association protected by the First Amendment. Opponents also point out that the rules would impose legal liability on lawyers and law firms that are otherwise immune from employment laws and regulations because of their size and number of employees.
2) Paragraph (1)(h) as currently drafted requires that the prohibited conduct be egregious or involve a pattern of repeated violations of Rule 14-301. This is like the well-established "severe and pervasive" standard in employment law.
3) Paragraph (1)(h) requires "harm" to a participant in the legal process and the offensive conduct must also be "prejudicial to the administration of justice." Comment [6] provides a non-exhaustive list of the participants in the process (lawyers, clients, witnesses, judges, clerks, court reporters, translators, bailiffs, arbitrators, and mediators).
4) Paragraph (3) makes clear that paragraphs (1)(d), (1)(g), and (1)(h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.
5) Paragraph (4) provides that legitimate advocacy does not violate the rule. A similar exception for "legitimate advocacy" has been added to Rule 14-301(3).

At this juncture, the Court has expressed hesitation with amending Rule 14-301 and is not prepared to adopt the committee's suggested amendments to Rule 8.4(g).

Nonetheless, the issues identified by the ABA persist in Utah's legal profession and there is renewed interest to pass a rule. This time, that interest derives from the Utah State Courts' newly-created Office of Fairness and Accountability and Utah's LGBTQ+ Chamber of Commerce. In a letter dated January 21, 2022, (p. 7-24 of the March RPC committee meeting materials), Samantha Taylor, Chairwoman for the Utah LGBTQ+ Chamber of Commerce,

proposed the immediate adoption of the ABA Model Rule. Taylor's letter also noted recent efforts by the Court's newly formed Office of Fairness and Accountability, and cited the Court Commissioner Conduct Committee's recommendation (and the Judicial Council's adoption of that recommendation) to remove of Second District Court Commissioner T.R. Morgan. The Court Commissioner Conduct Committee found that Commissioner Morgan violated Rule 2.3 of the Code of Judicial Administration (UCJA Chapter 12, Canon 2) for actions meant to "denigrate or show aversion to Complainant on the basis of sex, gender, or sexual orientation, and therefore constitute[s] harassment."

On April 5, 2022, Johnathan Puente, Director of the Utah State Courts' Office of Fairness and Accountability, attended the RPC committee meeting. He explained how the courts created a committee on fairness and accountability, the goal of which is to eliminate bias in the courts. He discussed the difficulty of the courts in achieving their mission when there is bias present and the need for a concerted effort by the whole legal community to eliminate bias. He noted that bias creates an access to justice issue and that several states have been requiring education on eliminating bias through MCLE. The RPC Committee decided to continue to work on these efforts. The court's new Office of Fairness and Accountability will be a resource to the RPC committee. A new subcommittee is comprised of Adam Bondy, Billy Walker, Joni Jones, Katherine Venti, Judge Trent Nelson, and Jonathan Puente. The subcommittee agreed to report back to the RPC committee by August on a recommendation (this will now be later in light of the date of this memorandum).

VI. Caselaw Developments

To date, various jurisdictions have fielded challenges to the anti-bias and discrimination language within their respective misconduct rules. An analysis of the relevant case law on jurisdictions that have adopted Rule 8.4(g) and related anti-bias language reveals that courts have continually rejected First Amendment arguments, among them for vagueness, overbreadth, and facial legitimacy. Further, this case law affirms what the ABA and University of Denver Law Professor Rebecca Aviel consider a legitimate expression of regulatory authority applied to lawyer behavior that not only survives but is outside the scope of First Amendment protections. See Aviel, Rebecca, *Rule 8.4(g) and the First Amendment: Distinguishing between*

Discrimination and Free Speech (August 30, 2018), Georgetown Journal of Legal Ethics, Vol. 31, No. 31, 2018).

This case law also affirms that courts have largely rejected challenges to anti-bias and discrimination language in misconduct rules that are broader in scope than the one currently under consideration in Utah. See *Attorney Grievance Commission v. Alison*, 317 Md. 523 (1989) (the court rejected the respondent lawyer's assertion of vagueness because the regulation of harassment and discriminatory conduct applied solely to lawyers and is thus warranted by case law, court rules, and "the lore of the profession.") See also *In re Snyder*, 472 U.S. 634, 645 (1985) ("'Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."); *In re Abrams*, 488 P.3d 1043 (Colo. 2021) (Finding constitutional Colorado's Rule 8.4(g); "A state's interest in regulating attorney speech is at its strongest when the regulation is necessary to preserve the integrity of the justice system or to protect clients. Moreover, the Supreme Court has explained that 'the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard' because the lawyer in that role is an officer of the court.")

At present, the recent *Greenberg v. Goodrich*, No. 20-03822, 2022 WL 874953 (E.D. Pa. Mar. 24, 2022). decision out of Pennsylvania offers the only successful—and what some might argue an irregular—facial challenge and constitutional rebuke of Rule 8.4(g).

The foregoing decisions concern state rules that vary in scope. They also concern professional misconduct that implicates other rule violations. We look at one constitutional challenge in Colorado that was unsuccessful as well as the Pennsylvania decision that was. We also examine a sample of how the various iterations of 8.4(g) have been applied across other jurisdictions. Those cases help us to understand the kind of behavior 8.4(g) aims to curtail.

A. The Supreme Court of Colorado has upheld the constitutionality of its Rule 8.4(g).

The Supreme Court of Colorado held in *In re Abrams*, 488 P.3d 1043 (Colo. 2021) that

Colorado's Rule 8.4(g) is constitutional. The conduct in question—homophobic slurs directed against a judge in a client communication—was the very behavior section (g) was designed to prevent. Colorado's Rule 8.4(g) is significantly narrower than the ABA Model Rule. In affirming the scope of paragraph (g), the Court affirmed the rule was neither vague nor overbroad, as the conduct giving rise to the violation occurred during the representation of a client and constituted a constitutionally permissible regulation of the attorney's conduct as an officer of the court.

Further, the Court held that Colorado's Rule 8.4(g) is narrowly tailored to achieve several compelling state interests and does not burden a substantial amount of constitutionally protected speech.

Colorado's Rule 8.4(g) considers attorneys who do the following to be guilty of professional misconduct:

> 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.

The respondent argued that a violation of Rule 8.4(g) could only result from the determination that he harbored anti-gay bias, but the Office of Regulation Counsel argued that a violation of Rule 8.4(g) does not require proof of actual bias, because the Rule "does not regulate bigotry, it regulates behavior." *Id.* 1050, citing *People v. Abrams*, 459 P.3d 1228 ,1239 (Colo. O.P.D.J. Feb. 12, 2020).

Colorado's version of 8.4(g) uses "in the representation of a client," to limit the scope of application. Unlike Model Rule 8.4(g), there is no "knows or reasonably should know" requirement in Missouri's rule regarding bias, prejudice, or harassment. Also, the ABA Model rule uses "discrimination" whereas Colorado uses "bias." And Colorado's rule addresses participants in the legal process.

B. The U.S. District Court for Pennsylvania held that Pennsylvania's Rule 8.4(g) is unconstitutional under the First Amendment

In *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (2020), the United States District Court for the Eastern District of Pennsylvania granted a recently licensed attorney's motion for summary judgment and an injunction against the Supreme Court of Pennsylvania's Disciplinary Board. The injunction prohibited the Board from prosecuting Greenberg under Model Rule 8.4(g).

In its ruling, the court held that Pennsylvania's Rule 8.4(g) unconstitutionally infringed free speech under the First Amendment because it constituted impermissible viewpoint-based discrimination. As such, the court noted the burden placed on freedom of expression was not incidental to its enforcement and it prohibited attorney's speech too broadly to fall within acceptable limits of professional speech regulation. The court held that Rule 8.4(g) was unconstitutionally vague under the Due Process clause of the Fourteenth Amendment.

This matter stemmed from plaintiff Greenberg's earlier facial challenge to the constitutionality of Rule 8.4(g) and its comments after he claimed fear of prosecution for speaking on controversial subjects deemed to be hateful or offensive. In a December 2020 opinion relating to earlier rule amendments, the court ruled in Greenberg's favor, stating "the government, as a result, de facto regulates speech by threat, thereby chilling speech," *Id.* at 23.

Pennsylvania's 8.4(g), which is nearly identical to the ABA model rule, considers the following behavior professional misconduct:

> in the practice of law, knowingly engage in conduct constituting harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. 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 advice or advocacy consistent with these Rules.

The rule was adopted, following revision of earlier amendments, on July 26, 2021.

C. Application of the various iterations of Rule 8.4(g) across the country.

The following is a sample examination of how the various iterations of 8.4(g) have been applied across other jurisdictions. Those cases help us to understand the kind of behavior 8.4(g) aims to curtail.

1. Maryland— application of 8.4(g) language, "prejudicial to the administration of justice" and "acting in a professional capacity"

Two recent Maryland state court decisions addressed the issue of what behavior is "prejudicial to the administration of justice" "when acting in a professional capacity" in the context of Rule 8.4(g). The first, *Attorney Grievance Comm'n v. Vasiliades*, 475 Md. 520 (2021), acknowledged that there was professional misconduct prejudicial to the administration of justice when it analyzed racial, homophobic, and sexist comments linked to a lawyer's firm social media account. Maryland also considered Rule 8.4(g)'s juxtaposition with the definition of the "practice of law" in *Attorney Grievance Commission v. Markey*, 469 Md. 485 (2020). The *Markey* court held that a series of offensive and discriminatory emails, exchanged by two federal lawyers while they were working in a professional capacity, to be conduct prejudicial to the administration of justice and therefore professional misconduct.

Maryland's version of Rule 8.4(g) reads as follows:

> It is professional misconduct for an attorney to 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 section;

Maryland's version of Rule 8.4(g)—labeled subsection (e)—considers misconduct when discriminatory speech or conduct is "prejudicial to the administration of justice," a decidedly broader standard than other state rules. Similar to Model Rule 8.4(g), there is a knowledge requirement in Maryland's rule regarding bias or prejudice. Also, the ABA Model rule uses "discrimination" whereas Maryland uses "bias or prejudice."

2. Iowa—application of 8.4(g) language, "engage in sexual harassment or other unlawful discrimination in the practice of law"

In *Iowa Supreme Court Atty. Disciplinary Bd. v. Watkins*, 944 N.W.2d 881 (2020), the Iowa Supreme Court suspended an attorney's license for not fewer than six months following a finding that he violated the state's version of Rule 8.4(g). The attorney committed professional misconduct by engaging in persistent sexual harassment in the form of gender discrimination of two female employees. Iowa's Rule 8.4(g) prohibits attorneys from engaging in sexual harassment or other unlawful discrimination in the practice of law. "Sexual harassment is broadly defined and includes conduct that may not give rise to civil liability. It includes any physical or verbal act of a sexual nature that has no legitimate place in a legal setting." *Iowa Supreme Court Atty. Disciplinary Bd. v. Newport*, 955 N.W.2d 176, 182 (2021) (cleaned up).

Iowa's Rule 8.4(g) reads as follows:

> It is professional misconduct for a lawyer to 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.

This version of 8.4(g) uses "in the practice of law" to limit the scope of application. Unlike Model Rule 8.4(g), there is no "knows or reasonably should know" requirement in Iowa's rule regarding harassment or discrimination.

3. Minnesota— application of 8.4(g) language, "harass a person on the basis of sex…in connection with…professional activities"

In *In re Kennedy*, 946 N.W.2d 568, (2020), the Minnesota Supreme Court found that attorney Duane Kennedy had violated Minnesota Rules of Professional Conduct 8.1(a), 8.4(a), 8.4(c), 8.4(d), and 8.4(g) when he engaged in a pattern of repeated sexual harassment of his female clients and lied to authorities about the behavior. Minnesota's Rule 8.4(g) reads as follows: [6]

[6] Notably, Minnesota has also enacted an 8.4(h) that reads as follows: "It is professional misconduct for a lawyer to…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

> It is professional misconduct for a lawyer to…harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer's professional activities;

This version of 8.4(g) uses "in connection with a lawyer's professional activities" to limit the scope of application. Unlike Model Rule 8.4(g), there is no "knows or reasonably should know" requirement in Minnesota's rule regarding harassment.

4. Missouri—application of 8.4(g) language, "manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment"

In *In re Schuessler*, 578 S.W.3d 762 (2019), a prosecutor was found to have violated Missouri's version of Rule 8.4(g) for making a racist and homophobic comment about the assault of a robbery suspect by a police detective who put a gun in the suspect's mouth.

Missouri's Rule 8.4(g) states that it is professional misconduct for an attorney to

> manifest by words or conduct, in representing a client, bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or other similar factors, are issues. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 4-1.16.

This version of 8.4(g) uses "in representing a client," to limit the scope of application. Unlike Model Rule 8.4(g), there is no "knows or reasonably should know" requirement in Missouri's rule regarding bias, prejudice, or harassment. Also, the ABA Model rule uses "discrimination" whereas Missouri uses "bias" and "prejudice."

5. Vermont—application of Model Rule 8.4(g)

In *In re Robinson*, 209 A.3d 570 (2019), the Supreme Court of Vermont affirmed that respondent Robinson violated Rules 1.7, 4.3, and 8.4(g) of the Vermont Rules of Professional

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act was committed in connection with the lawyer's professional activities." This is very similar to what Utah has attempted to do with its 8.4(g). It may be worthwhile for Utah to consider a similar approach to Minnesota's: breaking out harassment from illegal discriminatory acts.

Conduct by "engaging in a sexual relationship with one client while representing her in her divorce proceedings and failing to obtain her consent to the representation in writing, failing to advise another former client/employee that she should consult an independent attorney before waiving all sexual harassment or discrimination claims against him, and creating a hostile work environment by making unwelcome sexual advances to her." The Court considered disbarment an appropriate sanction due to the respondent's "pattern of misconduct, the vulnerability of his victims, and the potential injury and actual harm that his conduct caused to the victims and to public perception of the legal practice."

Vermont's Rule 8.4(g), which is Model Rule 8.4(g) verbatim, considers it professional misconduct to

> 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.

D. Caselaw conclusions

As the above caselaw analysis indicates, various iterations of Rule 8.4(g) have been analyzed in court, including in Vermont, which has adopted the model rule. There have only been two challenges to 8.4(g) itself thus far. Colorado represents an unsuccessful challenge to Rule 8.4(g), while Pennsylvania represents a successful challenge that resulted in injunctive relief for an attorney's prospective conduct. Unlike when it started the process of adopting its own Rule 8.4(g), Utah now has other examples it can look to for not just language but also caselaw analysis. Utah should pick a version of Rule 8.4(g) that has an adequate amount of caselaw developed around it.

VII. Conclusion

Utah should continue to work on developing its own version of Rule 8.4(g) that is narrowly tailored so that it falls within accepted limits of professional speech regulation while still protecting against discriminatory and harassing behavior at the hands of our licensed legal

professionals. Finding and striking such a balance will help to protect the integrity and accessibility of our justice system while rebuilding and maintaining trust in our institutions.

Tab 3

Rule 8.4
Potential Comment Request
From – Samantha Wilcox
Wilcox & Mastrorocco

I'm reaching out to suggest a potential rule change (by way of an added Comment) to rule 8.4 of the Utah Rules of Professional Conduct. The potential comment would address when a lawyer conditions resolving a civil dispute by requiring that an individual refrain from requesting a disciplinary investigation regarding alleged professional misconduct or by requiring that an individual withdraw a pending request for disciplinary investigation regarding alleged misconduct.

This is pertinent to me now in a civil case that I'm presently handling. In my pending case, opposing counsel engaged in conduct that I felt I had an ethical duty to report. After opposing counsel learned of my bar complaint, the lawyer sent me a highly favorable settlement offer on the express condition that I withdraw my pending bar complaint against him. In evaluating the appropriate response, I observed that there was no express rule or comment that addresses the impropriety of this conduct.

The Idaho State Bar is presently considering a revision to their rules to address this specific scenario. A few weeks ago, the Idaho Bar asked its members to vote on the attached resolution, which would add an additional Comment to Rule 8.4, expressly stating, "A lawyer engages in conduct prejudicial to the administration of justice when that lawyer individually or in the course of representing a client, conditions resolving a civil dispute by requiring that an individual refrain from requesting a disciplinary investigation regarding alleged professional misconduct or by requiring that an individual withdraw their request for a disciplinary investigation regarding alleged professional misconduct." I think a similar comment would be a useful addition to Utah's mirroring Rule 8.4 as well.

Thanks for your consideration,
Samantha

RESOLUTION 25 – 06

Amendments to Idaho Rule of Professional Conduct 8.4 – New comment addressing a lawyer seeking to avoid the filing of or compelling the dismissal of a grievance as conduct prejudicial to the administration of justice

Presented by: Board of Commissioners of the Idaho State Bar

Rationale:

- Idaho Rule of Professional Conduct ("I.R.P.C.") 8.4(d) states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.
- The Board is concerned that a lawyer, individually or in the course of representing a client, may condition resolving a civil dispute by requiring that an individual refrain from requesting a disciplinary investigation regarding alleged professional misconduct or by requiring that an individual withdraw their request for a disciplinary investigation regarding alleged professional misconduct.
- The proposed revision to I.R.P.C. 8.4 would add a comment stating that a lawyer requiring an individual to refrain from filing a grievance, or requiring a grievant to seek to withdraw their grievance, as consideration for settling a civil dispute involving the lawyer or the lawyer's client constitutes conduct prejudicial to the administration of justice.

NOW, THEREFORE, BE IT RESOLVED THAT the Board of Commissioners recommends that the members of the Idaho State Bar recommend to the Idaho Supreme Court that the Idaho Rules of Professional Conduct be amended to add a comment stating that a lawyer who requires that an individual refrain from filing a grievance or requires that a grievant seek to withdraw their grievance as consideration for settling a civil dispute involving the lawyer or the lawyer's client constitutes conduct prejudicial to the administration of justice.

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

Commentary

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific

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[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.

[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.

[6] A lawyer engages in conduct prejudicial to the administration of justice when that lawyer, individually or in the course of representing a client, conditions resolving a civil dispute by requiring that an individual refrain from requesting a disciplinary investigation regarding alleged professional misconduct or by requiring that an individual withdraw their request for a disciplinary investigation regarding alleged professional misconduct.