

# Agenda

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

January 22, 2018  
5:00 to 7:00 p.m.

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

Welcome and approval of minutes	Tab 1	Steve Johnson, Chair
Rule 8.4(g) discussion	Tab 2	Simón Cantarero (subcommittee chair), Billy Walker, Vanessa Ramos, Joni Jones, and Trent Nelson
Rule 14-802 discussion	Tab 3	Steve Johnson
Next meeting		Steve Johnson

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

# Tab 1

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

*December 4, 2017*  
DRAFT

The meeting commenced at 5 p.m.

**Committee Members Attending:**

**Steven G. Johnson (chair)**  
**Daniel Brough (phone)**  
**Thomas B. Bruner**  
**J. Simòn Cantarero**  
**Timothy Conde**  
**Joni Jones**  
**Hon James Gardner (phone)**  
**Phillip Lowry, Jr.**  
**Hon. Trent Nelson**  
**Vanessa Ramos**  
**Austin Riter**  
**Gary G. Sackett**  
**Billy L. Walker**  
**Donald Winder**

**Excused:**

**Judge Darold J. McDade**  
**Timothy Merrill**  
**Cristie Roach**  
**Katherine Venti**  
**Padma Veeru-Collings**

**Staff:**

**Nancy Sylvester**

**Guests:**

**Joni Seko**  
**Dan Jensen**  
**Bryon Benevento**

**Approval of Minutes**

The minutes were approved without comment.

**ADA Lawsuits and Abusive Practices**

Austin Riter, subcommittee chair, provided a report of the subcommittee's work. The subcommittee met and considered the issue and recommended that no specific language be proposed by the committee to address the issue. The subcommittee published a memorandum outlining its reasons for its recommendation. It was included in the distributed agenda materials and presented to the committee for consideration. Mr. Sackett raised whether there is a way for the Office of Professional Conduct to police the matter. Billy Walker opined that it always has that option. The committee voted in favor of adopting the subcommittee's recommendation.

### **Military Attorney Admissions Rules 14-804, 14-805, 14-806**

Phil Lowry provided the committee with an update concerning the status of the issue. Joni Seko, Dan Jensen, and Bryon Benevento represented the Bar's Admissions Committee. The military attorney admission rule is nearly complete (14-804). The subcommittee's proposal mirrors the Virginia rule. The subcommittee is confident it and the Admissions Committee can reconcile the final points. Discussion ensued as to whether to adopt the "gold standard" Virginia rule or the Bar's proposed rule. Mr. Sackett moved to adopt the Admission's proposal. The motion passed.

The military spouse rule (Rule 14-806 for Military Spouses), however, remains in dispute. The subcommittee's proposed rule for bar admission of a military spouse attorney (a "Military Spouse Attorney") is the majority rule nationwide. Before the meeting, there appeared to be two material issues left to resolve: (1) whether passing a bar exam must be a requirement; and (2) whether the Military Spouse Attorney must be supervised by a Utah-based attorney. As to the first issue, the subcommittee ultimately agreed that a Military Spouse must have passed a bar exam. There was disagreement, however, regarding what score the Utah State Bar would accept for the MBE portion of the exam. As to the second issue, there was substantial disagreement regarding how much, if any, supervision a Military Spouse Attorney must have as a condition to being admitted to the Utah State Bar. The committee engaged in substantial discussion. The Admissions Committee favored more supervision, while the subcommittee favored less. The subcommittee, as well as other committee members, was concerned that the Military Spouse Attorney would almost certainly be unknown to Utah-based attorneys and that the applicant would have a difficult time identifying and convincing a Utah-based attorney to accept supervision obligations over him or her. The Admissions Committee representatives, as well as other committee members, emphasized the Bar's responsibility to protect the public and the integrity of the profession, and that more supervision ensures that the Bar is fulfilling that responsibility. Ultimately, the discussion focused on who should carry the burden of associating themselves with a local attorney and how material that burden should be.

After significant discussion, the committee favored two options:

1. The applicant must (i) participate and complete the Bar's New Lawyer Training Program and (ii) have passed a bar exam with an MBE score that satisfies the Utah State Bar's minimum score requirement; or
2. The applicant must (i) participate and complete the Bar's New Lawyer Training Program; (ii) have passed a bar exam; and (iii) be supervised by Utah attorney while admitted under the Military Spouse Attorney rule.

The Admissions Committee agreed to consider the two options and will report back to the subcommittee. In the meantime, Paul Burke agreed to revise the draft of the proposed rules to reflect the committee's discussion.

**Rule 8.4(g)**

The committee discussed briefly whether to make another attempt to reach an agreement on the Rule 8.4 issue. No final action was taken, although the committee confirmed that an available option is to take no action and observe how other states' versions of the ABA model rule are applied and enforced.

**Adjournment**

The meeting adjourned at 7:07 p.m. The next meeting was scheduled for January 22, 2018 at 5 p.m.

# Tab 2

## MEMORANDUM

FROM: Subcommittee on Rule 8.4(g)

TO: Advisory Committee on Rules of Professional Conduct

DATE: November 30, 2017

SUBJECT: Amendments to Rule 8.4 - Background and Proposals

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The primary purpose of this memorandum is two-fold: (1) to summarize the record for the benefit of the Advisory Committee, the Utah Supreme Court, the members of the Utah State Bar, and the interested public as it pertains to the addition of paragraph (g) to Rule 8.4; and (2) to present to the Advisory Committee several options or choices of an amended Utah Rule 8.4.

### **I. Historical Background of Proposal to Amend Rule 8.4**

The issue of amending Rule 8.4 was introduced to the Advisory Committee on October 3, 2016, by the then-President of Utah State Bar and its ABA Delegate. The Advisory Committee received a letter from the Chair of the ABA's Center for Professional Responsibility Policy Implementation Committee, addressed to Chief Justice Durrant and dated September 29, 2016. In that letter, the ABA committee asked the Chief Justice to "consider integrating" the new paragraph (g) to Rule 8.4 into the Utah Rules of Professional Conduct. The presentation by the Bar President and ABA Delegate on October 3, 2016 was a recommendation that the Advisory Committee consider seriously adopting the ABA Model Rule 8.4(g) or amending the existing Utah Rule 8.4 to be consistent with the ABA Model Rule.

The Advisory Committee was informed that adding paragraph (g) to Rule 8.4 would promote the Utah State Bar's initiative and efforts for diversity and inclusion in the legal profession. It should be noted that the subcommittee did not find a single reference or any point of discussion by the Utah Bar Commission, the governing body of the Utah State Bar and its lawyer members, in any of its Agendas or Minutes since August 2016. The Bar Commission did, however, submit a public comment in support of adopting ABA Model Rule 8.4(g). The ABA Delegate provided the background and history of the amendments, including debates and revisions that led to ABA Model Rule 8.4(g) after a two-year process, including comments in support and in opposition to the Model Rule and its various iterations during the drafting and editing process, and during the comment period. The amount of information regarding Rule 8.4(g) was voluminous when it was first presented to the Advisory Committee and has increased since.

It is worth noting that the ABA committee chair stated in his letter that, as of September 29, 2016, "twenty-five jurisdictions have adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules." Many, if not the vast majority, of those twenty-five jurisdictions, adopted or amended their rules before the Model Rule was approved by the ABA in August 2016. See, "ABA adopts new anti-discrimination Rule 8.4(g), September

2016, Peter Geraghty, director, ETHICSearch, ABA Center for Professional Responsibility, available at <https://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html> (last visited November 30, 2017).

A couple of recent examples from sister jurisdictions are worth highlighting. In Nevada, the Board of Governors of the State Bar of Nevada filed an administrative matter with the Nevada Supreme Court, seeking to adopt the ABA Model Rule. *In Re: Amendments to Rule of Prof. Conduct 8.4*, ADKT 0526, filed May 8, 2017 (Nevada Sup. Ct.). After filing, the Court received comments – primarily and vastly – in opposition to the rule. As a result, the Supreme Court twice rescheduled its original public hearing and twice extended the comment period. See <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=43193> (last visited November 30, 2017). The State Bar of Nevada withdrew its petition to adopt the ABA Model Rule on September 22, 2017, citing among the reasons: “Many comments were filed in opposition to the ADKT that [sic] causing the Board to pause” and “the consensus being that the language used in other jurisdictions was inconsistent and changing. Thus, the Board of Governors determined it prudent to retract ADKT 0526 with reservation to refile an ADKT when, and if the language in the rule sorts out in other jurisdictions.” See ADKT 0526, Doc. No. 17-15190. The Nevada Supreme Court granted the petition, and closed the matter on September 25, 2017. *Id.*, Doc. No. 17-32294.

In contrast, the Vermont Supreme Court amended and adopted a rule based on ABA Model Rule 8.4(g) on July 14, 2017.<sup>1</sup> See <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPr8.4%28g%29.pdf>. The Vermont rule differs from the ABA Model rule in some respects. In particular, the Vermont rule added color, ancestry, and place of birth as additional protected classes and the phrase “or other grounds that are illegal or prohibited under federal or state law” was added at the end of the first sentence to include provisions of state and federal law protecting discrimination against those afflicted with HIV, military veterans, and on the basis of genetic information. In explaining the breadth and scope of the new rule, the Court noted: “Comment [4] makes clear that ‘conduct related to the practice of law’ is to be understood broadly to include many activities beyond the confines of traditional client representation, including law practice management and bar association or other practice-related activities including social occasions.”

As with many issues of constitutional consequence, the question of adopting the ABA Model Rule 8.4(g) has a legion of supporters and opponents, many well-known and well-funded. There is a great volume of literature and propaganda on both sides of the argument. See e.g., ABA Journal, “States split on new ABA Model Rule limiting harassing or discriminatory conduct,” available at [http://www.abajournal.com/magazine/article/ethics\\_model\\_rule\\_harassing\\_conduct](http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct) (last visited November 30, 2017). Also, the issue of harassment and discrimination in the workplace has attracted national and international attention during the time the subcommittee has undertaken its task. See e.g., Wall Street Journal, “The Workplace After Harvey Weinstein: Harassment Scandals Prompt Rapid Changes”, November 10, 2017, available at <https://www.wsj.com/articles/the-workplace-after-weinstein-harassment-scandals-prompt-rapid->

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<sup>1</sup> Vermont was one of the original 25 jurisdictions referenced by the ABA committee chair.



[changes-1510333058](https://www.wsj.com/news/2017/11/30/sexual-harassment-workplace) (subscription required) (last visited November 30, 2017). The results of a survey conducted by the Wall Street Journal and NBC News are summarized in the following graphic:

### View from the Workplace

American workers say sexual harassment remains prevalent at their jobs.

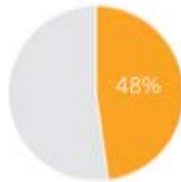
#### How prevalent is sexual harassment in the workplace?

Happens in: ■ Almost all companies ■ Most ■ Not sure ■ Some ■ Very few

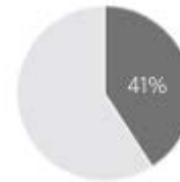


#### Personal experience with sex harassment at work

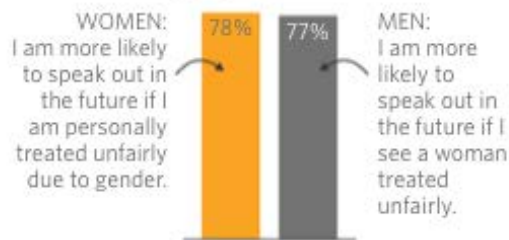
Share of employed women who say they've been the object of an unwelcome sexual advance or form of sexual harassment



Share of men who have witnessed women receiving an unwelcome sexual advance or form of sexual harassment



#### How recent high-profile stories about harassment have influenced opinions:



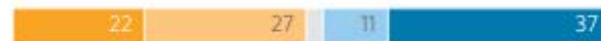
Source: WSJ/NBC News telephone polls, most recent of 900 adults conducted Oct. 23-26; margin of error +/-3.27 pct. pts.

Agree: ■ Strongly ■ Somewhat ■ Not sure  
Disagree: ■ Strongly ■ Somewhat

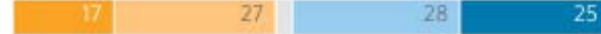
These stories have made you want to share your own past personal experiences about how you have been treated as a woman.



These stories have caused you to think about your own behavior and how you interact with women.



These stories have changed your view about how women are treated in society.



Ultimately, the subcommittee's preeminent concern is whether an addition of paragraph (g) and classifying discrimination and harassment as "professional misconduct" would be a net benefit for Utah lawyers and for the legal profession in Utah.

## II. Review of Subcommittee Proposals

The subcommittee has previously submitted two memoranda, with supporting materials, for consideration by the Advisory Committee. In each instance, the subcommittee proposed amending Rule 8.4 by adding paragraph (g). However, the new paragraph (g) proposed by the

subcommittee varied from the ABA Model Rule in certain important respects, with heightened standards and more narrow scope. The amendments proposed by the subcommittee aligned more closely to the Illinois version of Rule 8.4, and the Advisory Committee revised the proposed amendments before formally proposing them to the Utah Supreme Court. Ultimately, the version of Rule 8.4(g) proposed by the Advisory Committee on May 15, 2017, was declined by the Utah Supreme Court, which *sua sponte* published ABA Model Rule 8.4(g) for public comment. The overwhelming majority of comments submitted were in opposition of adopting the ABA Model Rule.

The Advisory Committee, and its subcommittee on Rule 8.4(g), is now tasked once again to deliberate whether, or how, Rule 8.4 should be amended. Should the decision be to amend Rule 8.4, it is the responsibility of the Advisory Committee, with assistance from its subcommittee, to propose a draft of Rule 8.4 that captures the public policy intent to deter and prohibit discrimination and harassment perpetrated by attorneys by codifying such behavior as professional misconduct, subject to disciplinary action. An important corollary of the anti-discrimination, anti harassment policy is the objective to promote professionalism, civility, inclusion, and diversity in the legal profession. The subcommittee is conscientious and cautious in its work to achieve the public policy objectives while at the same time remain faithful to Constitutional protections. Indeed it is a fine balance.

### **III. Proposed Alternatives of Utah Rule 8.4(g)**

The objective of adding paragraph (g) to Utah Rule 8.4 is to codify discriminatory and harassing conduct as “professional misconduct.” The rule is intended to deter and prevent misbehavior, and to discipline offending attorneys when the harassment or discrimination is committed when attorneys are not providing legal representation and advocacy on behalf of a client or the attorney’s employer. It is admitted that the rule would be more expansive than what civil law imposes, consistent with the public policy and aspiration that the rules governing attorney conduct impose upon a heightened expectation of civility, professionalism, respect, inclusion, and tolerance toward all – fellow members of the bar as well as the general public.

Inherent and implicit in the comments submitted regarding amending Rule 8.4 is the question, “why is this rule change necessary?” It is the subcommittee’s opinion that experience and history, both recorded and anecdotal, has shown that certain groups – particularly the historically underrepresented – are more vulnerable to being harassed, discriminated, alienated, and subject to demeaning and derogatory conduct by attorneys in a position of authority and power. As a matter of fact and experience, harassing, discriminatory, and demeaning conduct by attorneys to other attorneys and even clients continues to this day in a variety of settings, both public and private. Often silence and private humiliation are manifestations and outcomes of being harassed and discriminated against. While adopting paragraph (g) will not eradicate discrimination, harassment, and disrespect that is common to the human condition among lawyers, it would effectively censor and deter such behavior by defining it as “professional misconduct” unbecoming an officer of the court and subject to disciplinary action.

As the rule is currently written, there is no prohibition on discrimination or harassment. The closest the rule comes to prohibiting such misbehavior is to define professional misconduct

when an attorney “engage[s] in conduct that is prejudicial to the administration of justice.” Rule 8.4(d). Comment 3 to the rule explains and suggests that discrimination and harassment are violations of paragraph (d) when “such actions are prejudicial to the administration of justice.” In this way, the current rule defines professional misconduct as long as the offense is committed in such a way as to stunt the administration of justice. The corollary to the present rule, and its implied reading, is that discrimination and harassment are condoned when they are committed in the hallways of the courthouse, in the law firm hallways and parties, outside the deposition or mediation, or in the social functions of lawyers. Surprisingly, under the current rule, any harassment, discrimination, and hostility committed by an attorney in a corporate board room or during private negotiations of commercial transactions may very well be beyond the reach of Rule 8.4(d).

While the civil law may provide protections to victims of harassment and discrimination in some of the contexts and settings mentioned above, the effective consequence of speaking up and exercising those legal protections would lead to marginalizing the victim, labeling the victim as overly sensitive, or otherwise preclude advancement in the profession – whether in the law firm or company where the harassment was committed, or in the general marketplace for lawyers. In this sense, a victim of harassment or discrimination has some false choices: they are damned if they do, damned if they don’t stand up and speak out.

The subcommittee is conscientious of constitutional legal arguments regarding freedom of expression, association, and religious practice. The subcommittee has weighed the benefits, burdens, rights, duties, and privileges of being a licensed lawyer with respect to imposing a degree of censorship as paragraph (g) inevitably does. In the final analysis, and as a matter of public policy, the subcommittee recommends amending Rule 8.4 by adding paragraph (g). This memorandum presents several alternatives of a new Rule 8.4(g) in order to give the full Advisory Committee options on which to deliberate and send to the Supreme Court for consideration.

The alternatives for consideration by the full committee are as follows:

- 1) The ABA Model Rule 8.4(g).
- 2) January 23, 2017 version, proposed by the subcommittee and based in part on the Illinois rule.
- 3) March 6, 2017 version of Utah Rule 8.4(g) approved by Advisory Committee.
- 4) December 4, 2017 version of Utah Rule 8.4(g), based and modeled after California Rule 2-400.

Each of these rules, with their accompanying comments, is included in following pages. A modified rule, to be determined by the Advisory Committee after deliberations at its December 4, 2017 meeting, may still be another possibility, though not included in this memorandum, but to be included in the meeting minutes.

**Option 1**  
**ABA Model 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 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.

New Comments:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

**Option 2**  
**Utah Rule 8.4(g)**  
**January 23, 2017 version**  
**(based in part on the Illinois Rule)**  
**Proposed by Subcommittee**

It is professional misconduct for a lawyer to:

...

(g) engage in conduct that violates a federal, state, or local statute or ordinance that prohibits harassment or discrimination based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. 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 lawyer knew or should have known the conduct was prohibited by statute or ordinance; whether the act(s) was part of a pattern of prohibited conduct; and whether the conduct was committed in connection with the lawyer's professional activities. This paragraph does not limit the ability of the lawyer to accept representation or to 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 a client. For purposes of determining the violation of a statute or ordinance under this Rule, number of employees is not a defense.

Comments 3 and 4

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. 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 this Rule. Lawyers may engage in conduct undertaken to discuss diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations.

[4] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance of these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5a). 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).

**Option 3**  
**Utah Rule 8.4(g)**  
**March 6, 2017 version**  
**(based in part on the Illinois Rule)**  
**Approved by Advisory Committee and Proposed to Utah Supreme Court**

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 to 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 a client.

The Advisory Committee also recommended adding new comments 3, 4, and 5:

[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 not 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 towards others. Harassment includes sexual harassment and derogatory or demeaning conduct. Sexual harassment 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 3 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 challenges, 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 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 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).

**Option 4**  
**Utah Rule 8.4(g)**  
**December 4, 2017 version**  
**(based in part on California Rule 2-400)**  
**Proposed by Subcommittee**

It is professional misconduct for a lawyer to:

...

(g) unlawfully discriminate or harass, or knowingly permit unlawful discrimination or harassment, on the basis of race, national origin, sex, sexual orientation, religion, age or disability in the management or operation of a law practice, or in interactions with other members of the Bar, paralegals, and administrative staff in hiring, promoting, discharging, or otherwise affecting the conditions of employment of any person.

Comments

[4] "Law practice" includes sole practices, law partnerships, law corporations, corporate and government legal departments, and other entities which employ lawyers to practice law. "Knowingly permit" means a failure to advocate corrective action where the lawyer knows of a discriminatory or harassing policy or practice which results in the unlawful discrimination or unlawful harassment prohibited in paragraph (g). "Unlawful" shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination or unlawful harassment in employment. The "conditions of employment" also covers informal and formal work meetings or social gatherings, both during normal work hours and after hours.

# Tab 3





Nancy Sylvester &lt;nancyjs@utcourts.gov&gt;

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## Addition to RPC Agenda: Rule 14-802

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**Nancy Sylvester** <nancyjs@utcourts.gov>

Fri, Jan 19, 2018 at 3:25 PM

To: Austin Riter <ariter@parrbrown.com>, "Billy L. Walker" <bwalker@utahbar.org>, "Conde, Timothy" <timothy.conde@stoel.com>, Cristie Roach <crisitier@utcourts.gov>, Daniel Brough <dbrough@btjd.com>, Donald Winder <dwinder@winderfirm.com>, "Gary G. Sackett" <gsackett@joneswaldo.com>, "J. Simon Cantarero" <CantareroLaw@gmail.com>, Joni Jones <jonijones@agutah.gov>, Judge Darold McDade <djmcdade@utcourts.gov>, Judge James Gardner <jgardner@utcourts.gov>, Katherine Venti <kventi@parsonsbehle.com>, Padma Veeru-Collings <pveerucollings@gmail.com>, Phillip Lowry <phillip.e.lowry@gmail.com>, "Steven G. Johnson" <stevejohnson5336@comcast.net>, "Thomas B. Brunker" <tbrunker@agutah.gov>, Timothy Merrill <tmerrill@centralutahlaw.com>, "Trent D. Nelson" <trentdnelson@hotmail.com>, "Vanessa M. Ramos" <vanessa\_ramos@fd.org>

Rules of Professional Conduct Committee members,

We need to add an item to Monday's agenda regarding Rule 14-802, specifically regarding the comments to the rule. Please see the email exchange below.

Thanks.

----- Forwarded message -----

From: **Steven G. Johnson** <stevejohnson5336@comcast.net>  
Date: Fri, Jan 19, 2018 at 2:44 PM  
Subject: Fwd: RE: 14-802  
To: "Sylvester, Nancy" <nancyjs@utcourts.gov>

Nancy:

I thought I had included you on this email, but in hindsight I clearly forgot. We should add this matter to the end of the agenda on Monday if we have time to talk about it.

Steve

----- Original Message -----

From: Elizabeth Wright <Elizabeth.Wright@utahbar.org>  
To: "Steven G. Johnson" <stevejohnson5336@comcast.net>  
Cc: Joni Seko <joni.seko@utahbar.org>  
Date: December 15, 2017 at 10:21 AM  
Subject: RE: 14-802

Steve,

I think that language will be helpful. I also think it would be helpful to refer to the House Counsel rule. I have cc'd Joni Seko on this email in case she has any further thoughts.

Thanks again,

Elizabeth A. Wright

General Counsel

Utah State Bar

645 South 200 East

Salt Lake City, UT 84111

(801) 297-7047

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**From:** Steven G. Johnson [mailto:[stevejohnson5336@comcast.net](mailto:stevejohnson5336@comcast.net)]  
**Sent:** Friday, December 15, 2017 8:44 AM  
**To:** Elizabeth Wright <[Elizabeth.Wright@utahbar.org](mailto:Elizabeth.Wright@utahbar.org)>  
**Subject:** RE: 14-802

The intent is to cover people who, for example, must have regulatory compliance duties as part of their employment, or people who have sales functions and must enter into contracts with others under UCC Article 2. I can see that with the current language, house counsel have a good argument to not have to be licensed.

It sounds like we should fix this by amending the comment. The RPC committee meets next on January 22nd. I will put this on the agenda for that meeting. Perhaps appropriate language would be, "Similarly, an employee of a business entity is not engaged in 'the representation of the interest of another person' when activities involving the law are part of the employee's duties solely in connection with the internal business operations of the entity and do not involve providing legal advice to another person *or to the business entity*." We can even refer to the requirements under the House Counsel rule if you think that would be helpful. Your thoughts?

Steve

On December 14, 2017 at 5:33 PM Elizabeth Wright <[Elizabeth.Wright@utahbar.org](mailto:Elizabeth.Wright@utahbar.org)> wrote:

I didn't send an attachment in that email. But here is one. These are the comments to 14-802. Under subsection (b), the third paragraph that begins "Similarly." Who does that cover? We have an applicant reading that to mean he doesn't need a House Counsel license. Well then there would be no need for the House Counsel rule! Who did the Committee think would be engaged in "activities involving the law."

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**From:** Steven G. Johnson [mailto:[stevejohnson5336@comcast.net](mailto:stevejohnson5336@comcast.net)]  
**Sent:** Thursday, December 14, 2017 1:54 PM  
**To:** Elizabeth Wright <[Elizabeth.Wright@utahbar.org](mailto:Elizabeth.Wright@utahbar.org)>  
**Subject:** Re: 14-802

Elizabeth:

For some reason I can't open the attachment you sent.

Steve

On December 14, 2017 at 10:33 AM Elizabeth Wright wrote:

Hello Steve,  
Were you on the Rules of Professional Conduct Committee when it developed Rule 14-802? If yes, I need some insight into what some of the comments mean.  
Thanks,

Elizabeth A. Wright  
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## 2 attachments



**Rule 14-802.pdf**

64K



**Rule 14-802 (comments).pdf**

57K

### **Rule 14-802. Authorization to practice law.**

(a) Except as set forth in subsection (c) of this rule, only persons who are active, licensed members of the Bar in good standing may engage in the practice of law in Utah.

(b) For purposes of this rule:

(b)(1) The “practice of law” is the representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person’s facts and circumstances.

(b)(2) The “law” is the collective body of declarations by governmental authorities that establish a person’s rights, duties, constraints and freedoms and consists primarily of:

(b)(2)(A) constitutional provisions, treaties, statutes, ordinances, rules, regulations and similarly enacted declarations; and

(b)(2)(B) decisions, orders and deliberations of adjudicative, legislative and executive bodies of government that have authority to interpret, prescribe and determine a person’s rights, duties, constraints and freedoms.

(b)(3) “Person” includes the plural as well as the singular and legal entities as well as natural persons.

(c) Whether or not it constitutes the practice of law, the following activity by a non-lawyer, who is not otherwise claiming to be a lawyer or to be able to practice law, is permitted:

(c)(1) Making legal forms available to the general public, whether by sale or otherwise, or publishing legal self-help information by print or electronic media.

(c)(2) Providing general legal information, opinions or recommendations about possible legal rights, remedies, defenses, procedures, options or strategies, but not specific advice related to another person’s facts or circumstances.

(c)(3) Providing clerical assistance to another to complete a form provided by a municipal, state, or federal court located in the State of Utah when no fee is charged to do so.

(c)(4) When expressly permitted by the court after having found it clearly to be in the best interests of the child or ward, assisting one’s minor child or ward in a juvenile court proceeding.

(c)(5) Representing a party in small claims court as permitted by Rule of Small Claims Procedure 13.

(c)(6) Representing without compensation a natural person or representing a legal entity as an employee representative of that entity in an arbitration proceeding, where the amount in controversy does not exceed the jurisdictional limit of the small claims court set by the Utah Legislature.

(c)(7) Representing a party in any mediation proceeding.

(c)(8) Acting as a representative before administrative tribunals or agencies as authorized by tribunal or agency rule or practice.

(c)(9) Serving in a neutral capacity as a mediator, arbitrator or conciliator.

(c)(10) Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements or as otherwise allowed by law.

(c)(11) Lobbying governmental bodies as an agent or representative of others.

(c)(12) Advising or preparing documents for others in the following described circumstances and by the following described persons:

(c)(12)(A) a real estate agent or broker licensed by the state of Utah may complete State-approved forms including sales and associated contracts directly related to the sale of real estate and personal property for their customers.

(c)(12)(B) an abstractor or title insurance agent licensed by the state of Utah may issue real estate title opinions and title reports and prepare deeds for customers.

(c)(12)(C) financial institutions and securities brokers and dealers licensed by Utah may inform customers with respect to their options for titles of securities, bank accounts, annuities and other investments.

(c)(12)(D) insurance companies and agents licensed by the state of Utah may recommend coverage, inform customers with respect to their options for titling of ownership of insurance and annuity contracts, the naming of beneficiaries, and the adjustment of claims under the company's insurance coverage outside of litigation.

(c)(12)(E) health care providers may provide clerical assistance to patients in completing and executing durable powers of attorney for health care and natural death declarations when no fee is charged to do so.

(c)(12)(F) Certified Public Accountants, enrolled IRS agents, public accountants, public bookkeepers, and tax preparers may prepare tax returns.

[Advisory Committee Notes](#)

**Rule 14-802**

Advisory Committee Comment:

Subsection (a).

"Active" in this paragraph refers to the formal status of a lawyer, as determined by the Bar. Among other things, an active lawyer must comply with the Bar's requirements for continuing legal education.

Subsection (b).

The practice of law defined in Subparagraph (b)(1) includes: giving advice or counsel to another person as to that person's legal rights or responsibilities with respect to that person's facts and circumstances; selecting, drafting or completing legal documents that affect the legal rights or responsibilities of another person; representing another person before an adjudicative, legislative or executive body, including the preparation or filing of documents and conducting discovery; negotiating legal rights or responsibilities on behalf of another person.

Because representing oneself does not involve another person, it is not technically the "practice of law." Thus, any natural person may represent oneself as an individual in any legal context. To the same effect is Article 1, Rule 14-111 Integration and Management: "Nothing in this article shall prohibit a person who is unlicensed as an attorney at law or a foreign legal consultant from personally representing that person's own interests in a cause to which the person is a party in his or her own right and not as assignee."

Similarly, an employee of a business entity is not engaged in "the representation of the interest of another person" when activities involving the law are a part of the employee's duties solely in connection with the internal business operations of the entity and do not involve providing legal advice to another person. Further, a person acting in an official capacity as an employee of a government agency that has administrative authority to determine the rights of persons under the law is also not representing the interests of another person.

As defined in subparagraph (b)(2), "the law" is a comprehensive term that includes not only the black-letter law set forth in constitutions, treaties, statutes, ordinances, administrative and court rules and regulations, and similar enactments of governmental authorities, but the entire fabric of its development, enforcement, application and interpretation.

Laws duly enacted by the electorate by initiative and referendum under constitutional authority would be included under subparagraph (b)(2)(A).

Subparagraph (b)(2)(B) is intended to incorporate the breadth of decisional law, as well as the background, such as committee hearings, floor discussions and other legislative history, that often accompanies the written law of legislatures and other law- and rule-making bodies. Reference to adjudicative bodies in this subparagraph includes courts and similar tribunals, arbitrators, administrative agencies and other bodies that render judgments or opinions involving a person's interests.

Subsection (c).

To the extent not already addressed by the requirement that the practice of law involves the representation of others, subparagraph (c)(2) permits the direct and indirect dissemination of legal information in an educational context, such as legal teaching and lectures.

Subparagraph (c)(3) permits assistance provided by employees of the courts and legal-aid and similar organizations that do not charge for providing these services.

Subparagraph (c)(7) applies only to the procedures directly related to parties' involvement before a neutral third-party mediator; it does not extend to any related judicial proceedings unless otherwise provided for under this rule (e.g., under subparagraph (c)(5)).