Summary of Recent Activity re: Rule 8.4 and Religious Freedom/Exemptions

***Mott v. Accenture*, 2017 U.S. Dist. LEXIS 171279 (Maryland, Oct 17, 2017):**

Employee brought action against employer for discrimination based upon age, gender, and national origin. The employers (who were lawyers) were subject to Maryland's Rules of Professional Conduct 8.4. That rule states it is misconduct for a lawyer "to engage in conduction 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." *Id.* at *4.

The Court found that the rule did not reach the employers as plaintiff was working remotely in Maryland and his employers were overseas, not subject to the rules of professional conduct. The Court went on to state that even if the employers/lawyers were subject to the rules, it did not apply because the rule "is limited to the administration of justice" not the operations of managers and officers of a corporation." *Id.* at *11.

Not entirely on point, but the Court did not express any concerns with the wording of the rule or its scope.

Tennessee Proposed Amendment to Rule 8.4

In November of 2017, the Tennessee Bar petitioned their Supreme Court to amend the rule and adopt proposed 8.4(g), which stated:

It is 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 RPC 1.16. This paragraph does not preclude legitimate advocacy consistent with these Rules.

The comments to the rules also were similar to our proposed comments, in that it provided an aspirational explanation as to why such behavior undermines confidence in the legal system. The comments also stated that the substantive law of antidiscrimination statutes and anti-harassment statutes and case law guide application. The comments reflect and exception to conduct undertaken to promote diversity etc. There is also a comment about the rule not restricting free speech or conduct protected by the First Amendment. The comments also carve out an exception for representation regarding underserved communities.

Over 400 comments were received by the bar membership, and the Court eventually decided NOT to adopt the amendments. The prior rule that was left in place has NO mention at all about discrimination or harassment.

***Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 2018 U.S. LEXIS 3386 (S. C. 2018).**

Baker declined to make a wedding cake for same-sex couple, which prompted a complaint to the Colorado Civil Rights Commission. Supreme Court held that Commission did not consider baker's objection with the neutrality required by the Free Exercise Clause. The Commission treated his case disparately from other similar cases in which complaints were filed involving the refusal of bakers to make cakes that depicted anti-gay messages or images.

The Court held that this case involved not only the First Amendment's freedom of speech protections, but also freedom of religion protections.

The Colorado Anti-Discrimination Act states that it is:

> a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

The Court reiterated its position that "the government . . . cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposed the illegitimacy of religious beliefs and practices." *Id.* at 1731.

Even though this case does not arise in the context of the Rules of Professional Conduct, it appears to clearly exempt religious practices and beliefs, which would be outside the scope of our proposed rule 8.4(g).

***Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751, 2014 U.S. LEXIS 4505 (S.C. 2014).**

This case involved the Religious Freedom Restoration Act of 1993 (RFRA) which prohibits the Government from substantially burdening a person's exercise of religion even if the burdens results from a rule of general applicability, unless the Government demonstrates that such burden is in furtherance of a compelling governmental interest and it uses the least restrictive means. The facts arise out of the Hobby Lobby privately held cooperation (and others) refusing to provide contraceptive coverage to its employees based upon religious objections by the company's owners.

This was the first look at this issue for privately held corporations that were not religious employers such as churches or religious institutions that were exempt from such contraceptive mandates.

The Court found that such mandate did substantially burden the exercise of religion on the part of Hobby Lobby's owners, and that requiring them to comply with the contraceptive coverage violated their sincerely held religious beliefs. Further, the Court held that it was not its place "to determine the plausibility of their religious beliefs. *Id.* at 2778. The Court was to

determine if those beliefs reflect an "honest conviction," which in this case there was "no dispute" that they did. *Id.* at 2779.

Perhaps our Court would feel more comfortable, even in light of what appears to be clear religious exemptions allowed by the Supreme Court, if we were to adopt a comment similar to Tennessee that specifically carves out a First Amendment exception.

The language they proposed was as follows:

Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thurs a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.