Agenda

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

August 23, 2022
4:00 to 5:30 p.m.
In-person and via Zoom

Welcome and approval of minutes.	Tab 1	Simon Cantarero, presiding
Welcome to new members Ian Quiel and Mark Hales and fond farewell to departing emeritus member Steve Johnson.		Simon Cantarero, Nancy Sylvester
Rule 1.2(d) • Proposal to clarify language so that attorneys providing counsel to the cannabis industry do not run afoul of the rule. See ABA article. • Subcommittee to report on study and recommended solutions.	Tab 2	Subcommittee: Austin Riter (chair), Joni Jones, Judge Trent Nelson, Corey Talbot, Billy Walker J.D. Lauritzen (proposed clarification)
Projects in the pipeline: • Rules 1.16 (trial attorney responsibility for ensuring criminal appeal right) and 8.4(c) (undercover law enforcement operations) out for comment until August 28th. • Rule 8.3: Recommended to Supreme Court; awaiting Bar Commission recommendation of Fee Dispute rules (will present rule package). • Rules 8.4 and 14-301: Assigned to Judicial Council's Fairness and Accountability Committee (*updated historical memo attached*). • LPP updates.	Tab 3	--

2022 Meeting Schedule: 1st Tuesday of the month from 4 to 6 p.m. unless otherwise scheduled

Meetings: (In-person unless otherwise indicated) October 4, November 1, December 6

Tab 1

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

[Draft] Meeting Minutes
June 7, 2022

Zoom
16:00 Mountain Time

J. Simon Cantarero, Chair

Attendees:
J. Simon Cantarero, Chair

Katherine Venti
Alyson McAllister
Cory Talbot
Adam Bondy
Gary Sackett (Emeritus)
Steve Johnson (Emeritus)
Jurhee Rice
Billy Walker
Dane Thorley
Austin Riter
Robert Gibbons
Hon. Mike Edwards
Hon. Trent Nelson (Emeritus)
Hon. James Gardner
Dan Brough

Excused:
Phillip Lowry
M. Alex Natt, Recording Secretary
Scotti Hill
Julie J. Nelson
Hon. Amy Oliver

Staff:
Nancy Sylvester

Guests:
Christine Greenwood
Jacqueline Carlson
Douglas Thompson
Bryson King
J.D. Lauritzen
Hannah Follender

1. **Welcome and approval of the May 3, 2022 meeting minutes (Chair Cantarero)**

   Chair Cantarero recognized the existence of a quorum and called the meeting to order at 16:05.

   Professor Thorley moved to adopt the May 3, 2022 minutes. Ms. Jones seconded. The Motion passed by acclamation.

2. **Rule 1.16 (Mr. Thorley)**

   Professor Thorley discussed the work of the subcommittee. He noted two questions: whether trial attorneys would have to discuss the merits with a client and whether the attorney should have to file a notice of appeal.

   He noted that the subcommittee deleted the previously proposed language: "consulting with the client regarding the lawyer's professional judgment as to whether there are meritorious grounds for appeal." He said the subcommittee instead used this language (in bold):

   (e) In the event of a conviction or a guilty plea in a criminal case, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests in appeal, including informing the client of the right to take an appeal and the time within which any appeal must be filed, **the potential grounds for appeal**, and filing a notice of appeal if requested.

   The subcommittee also drafted the following comment:

   Assisting the Client upon End of Client-Lawyer Relationship at Criminal Plea or Conviction
   [10] These obligations can be fulfilled by timely ensuring that the client has secured representation for appeal. Some critical decisions regarding a client's rights of appeal occur soon after a conviction or guilty plea but before the termination of trial-stage representation. The trial lawyer should take whatever steps are necessary to protect the client's rights of appeal, including filing a timely notice of appeal with the trial court if requested by the client, even if counsel does not expect to continue as counsel on appeal, and requesting the appointment of counsel for appeal if indigent. Consultation regarding the potential grounds for appeal should include advising the client about the meaning of the court's judgment, **any preserved issues,** and the advantages and disadvantages of an appeal. During consultation and representation, the lawyer should make reasonable efforts to discover the client's wishes.

Professor Thorley noted that the bolded language "any preserved issues" captures the "grounds for appeal" language in (e). He also noted that the subcommittee expects that there will be an increase in notices of appeal filed, but that it will probably be slight. Mr. Thompson observed that any non-meritorious appeals will be handled expeditiously by the Court of Appeals. The court has implemented good tools in the last few years to weed out non-meritorious claims. He also observed that when defendants realize that the Court of Appeals can only review the sentence following a plea, defendants often voluntarily waive their appeals.

The committee discussed the importance of having in a black-letter rule the *Strickland/Roe v. Flores-Ortega* requirements/public policy of protecting criminal defendants' appeal rights. The committee also noted that the trial attorneys' job would end if there is appellate counsel to pass the case off to.

Chairman Cantarero noted that the comment language, "including filing a timely notice of appeal with the trial court if requested by the client," was redundant to the rule and should be taken out.

Mr. Sackett observed that the comment should reference paragraph (e) specifically. He also observed that the comment language should talk about informing the client of the right to appeal first. Following discussion about sentence order, Professor Thorley moved this language to the end of the comment paragraph: "The obligations under paragraph (e) can be fulfilled by timely ensuring that the client has secured representation on appeal."

The committee then added at the beginning of the comment: "Paragraph (e) highlights that there are some critical decisions…."to flag to the reader which rule language the comment was addressing.

Billy Walker moved to recommend that the amendments to Rule 1.16 be sent to the Supreme Court. Katherine Venti seconded. The motion carried.

3. Rule 1.2(d) and the Cannabis Industry (J.D. Lauritzen)

J.D. Lauritzen introduced himself, noting that he is the head of governmental compliance with Wholesome.co, a Utah cannabis company. Mr. Lauritzen noted that Hannah Follender is an IP attorney who works on trademarking cannabis strains. Mr. Lauritzen and Ms. Follender are the co-chairs of the Cannabis Law Section. Mr. Lauritzen discussed with the committee the tension between state and federal law and how this plays out in Rule 1.2(d). He said his private practice fee agreements would specifically state that he was only representing the client on state issues and that cannabis remained illegal at the federal level.

Billy Walker noted that Rule 1.2(d) is problematic because of the term "assist." He said he served on an ABA Committee that tried to take up the tension between the rule and legal work with the cannabis industry, but the committee

ultimately left it to the states to figure out what to do with the rule. He noted that some presidential administrations have chosen not to enforce the federal law on cannabis, while some have.

Mr. Lauritzen said at last check, 64 attorneys belonged to the Cannabis Law Section, so there is definitely an interest in this area of the law and as such a need for protection.

Chairman Cantarero asked a subcommittee to take up the issues Ms. Lauritzen presented. He said the subcommittee should specifically look at what constitutes criminal conduct under Rule 1.2(d).

Subcommittee: Austin Riter (chair), Cory Talbot, Billy Walker, Joni Jones, Judge Trent Nelson

4. Fond Farewell to Dan Brough and Katherine Venti

Chairman Cantarero and the committee said a fond farewell to Mr. Brough and Ms. Venti as their terms were expiring.

5. Adjournment

The meeting adjourned at 17:24. The next meeting will be in-person on August 2, 2022.

Tab 2

Prof'l Rules Committee / Rule 1.2(d) Subcommittee

Austin J. Riter

Tue 7/26/2022 4:11 PM
To: Simón Cantarero; Nancy Sylvester
Cc: Billy Walker; Joni Jones; Trent D. Nelson; Cory Talbot

1 attachments (515 KB)
0527_001.pdf;

Hi Simón and Nancy,

Our Rule 1.2(d) subcommittee met via Zoom this afternoon to discuss the cannabis counseling issue. Our census is that the issue is principally a policy issue with respect to which we initially recommend that our committee request guidance and clarification from the Court about which policy direction the Court would like to us to go in considering potential changes to the wording of Rule 1.2(d) (and, by necessary extension, of Rule 8.4).

Sometimes, our committee is tasked with analyzing issues that inextricably cross into policy, and we need to deal with the policy aspects in our proposals. But, to us, this situation is distinct, where not only is the Court tasked with setting policy and lawyer discipline, but there is an unambiguous, direct conflict between federal law and Utah law on the cannabis issue. Without direction from the Court, we don't know that it's our committee's proper role, given the clear conflict with federal law, to consider and propose rule language that would permit the scope of attorney counseling advocated by J.D. Lauritzen.

If the Court responds that it does want our committee to play this role, our subcommittee will propose different options accordingly. For example, the attached shows proposed changes to Model Rules 1.2 and 8.4 that were considered but ultimately abandoned by an ABA Standing Committee on Ethics on which Billy sat in 2019. These changes attempt to draw the line between "advising" and "assisting" a client in complying with and taking actions consistent with state laws while, at the same time, advising the client of the existence and consequences of federal law that may impose criminal penalties for actions or matters permitted by state law.

As another example, here is some potential language provided by Judge Nelson in the event that the Court wants us to go down this road:

> Elected representatives set the public policy for the State of Utah. The State of Utah authorizes and strictly regulates the production, distribution, sale, and use of marijuana for approved medical purposes. Most, if not all such activities, while legal under Utah law, may violate existing federal law. Attorneys and Professional Paralegal Practitioners are tasked with understanding and complying with the law. Therein lies a conflict. To support the established public policy of the State, attorneys will not be subject to discipline for advising and assisting clients in compliance with establish Medical Marijuana laws of the State of Utah. Attorneys, however, shall fully inform their clients of such conflict with federal law, and of the potential risks involved. While the Utah Supreme Court will not take disciplinary action against an attorney for so advising a client, it goes without saying that this is no protection from federal action.

But, again, such options seem so policy dependent that we think the best course is first to make sure that we know specifically what the Court wants us to do given the conflict with federal law.

I'll be happy to relay this update at our August 2 meeting.

Thanks and hope you're both well.

Austin

PROPOSED CHANGES TO MODEL RULES 1.2 and 8.4

Client-Lawyer Relationship

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (i) discuss the legal consequences of any proposed course of conduct with a client ~~and may~~, (ii) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law, and (iii) advise and assist a client in complying with and taking actions consistent with state laws while at the same time advising the client of the existence and consequences of federal law that may impose criminal penalties for actions or matters permitted by state law.

Comment on Rule 1.2
Client-Lawyer Relationship
Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer - Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the

lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. ~~Nor does the~~ The fact that a client uses advice in a course of action that is criminal or fraudulent of itself does not make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. There are times when state laws and federal laws may diverge. In such instances, lawyers may advise and assist a client in complying with state laws, even if these laws may conflict with federal criminal laws. That advice and counsel includes negotiating contracts and writing documents that depend upon state law for their validity, but a lawyer in all instances must advise the client both of the conflict between state and federal law and of the potential criminal penalties for violation of federal law.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1. If state law and federal law conflict, however, Rule 1.2(d) permits the lawyer to advise and assist the client in complying with state law. See Comment (9), above.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. ~~The last clause of~~

Paragraph (d) recognizes not only that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities, but that when state law and federal law conflict, a lawyer may properly give advice so that the client complies with state law as long as the lawyer also advises the client about federal law that may provide for criminal penalties for actions or matters permitted by state law.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

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Maintaining The Integrity Of The Profession

Rule 8.4 Misconduct

~~It~~ Except as provided in Rule 1.2(d), it is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

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

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Maintaining The Integrity Of The Profession
Rule 8.4 Misconduct - Comment

[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 concerning action the client is legally 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 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, but actions taken in compliance with Rule 1.2(d) do not constitute professional misconduct. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[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).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law as well as to advising clients when state law is in conflict with federal criminal law.

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

JURISDICTIONAL COMPARISONS: NOBC MARIJUANA SURVEY (2019) AS AMENDED (AUGUST 2022)

STATE	PERMITTED MJ USE:			NEW OR AMENDED RULE?	NEW OR AMENDED COMMENT?	ETHICS OPINIONS	DISCIPLINARY CASES	MISC.
	MED.	REC.	N/A					
AL			X					
AK	1998	2014		Rule 1.2(f) (2015) (lawyer may counsel and assist in conduct lawyer reasonably believes is authorized by AK law and shall advise re: federal law and policy)	Comment [5] to R. 8.4 (2015) ("[5] Although assisting a client under Rule 1.2(d) may violate federal drug laws, it is not a violation of Rule 8.4.			
AZ	2010					Op. 11-01: Scope of Representation (lawyer may counsel or assist client re: conduct expressly permitted under AZ Med W Act only if no court decisions have held the Act preempted, void, or invalid; lawyer reasonably believes client conduct complies fully with state law; and lawyer advises client re: federal law, refers client to other counsel for those issues, or limits scope of representation.		
AR	2016			No developments yet.				

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
CA	1996	2016		Rule 1.2.1 (2018) (lawyer may not counsel or assist in conduct lawyer knows is criminal or fraudulent, but may discuss legal consequences of any proposed conduct and counsel or assist client to make good faith effort to determine validity, scope, meaning, or application of law)	Comment [61 to R. 1.2.1 (2018) (lawyer may advise client re: validity, scope, and meaning of CA laws that may conflict with federal or tribal law and may assist client in drafting, administering, interpreting, or complying with CA law, even if client's conduct may violate federal or tribal law; must inform client of related federal or tribal law and may be required to advise client re: the conflict)	Bar Assoc. of SF Ethics Op. 2015-1: (lawyer may represent client re: conduct permissible under state law; should advise client re: federal law.) LA County Bar Assoc. Op. 527 (2015) (lawyer may advise and assist re: conduct permitted under state law provided lawyer does not advise or assist client in violating federal law in manner that would enable client to evade arrest or prosecution; must limit scope of representation to exclude assistance or advice to violate federal law with impunity; must advise re: federal law and penalties)		

STATE	PERMITTED MJ USE:			NEW OR AMENDED RULE?	NEW OR AMENDED COMMENT?	ETHICS OPINIONS	DISCIPLINARY CASES	MISC.
	MED.	REC.	N/A					
CO	2000	2012			Comment [14] to Rule 1.2 (2014) (lawyer may counsel and assist client re: conduct lawyer reasonably believes is permitted by state law and shall advise client re: federal law and policy)	Formal Op. 124 (April 2012 addendum Dec. 2012): A Lawyer's Medical Use of Marijuana (lawyer's medical (addendum: or recreational) use of MJ per CO law does not violate R. 8.4(b) absent additional evidence use adversely implicates honesty, trustworthiness, or fitness)	People v. Furtado. 2015 WL 7574128 (CO 2015) (Gen. Counsel for MJ dispensaries publicly censored for violating 8.4(c) where lawyer opened two trust accounts with bank under his own name, did not inform bank purpose of accounts was to pay bills for med. W dispensaries, and where bank did not allow MJ-related businesses to open accounts.)	Judicial Ethics Op. 2014-01 Judge's use of med. or rec. MJ impermissible as it is a federal crime)

STATE	PERMITTED MJ USE:			NEW OR AMENDED RULE?	NEW OR AMENDED COMMENT?	ETHICS OPINIONS	DISCIPLINARY CASES	MISC.
	Med.	Rec.	N/A					
CT	2012, 2016			Rule 1.2(d)(3) 2015 (lawyer may counsel or assist client re: conduct expressly permitted by CT law if lawyer counsels re: legal consequences under federal law)		Inf. Op. 2013-02 (lawyer may advise client re: requirements of state law and must inform client of conflict between state and federal law, regardless of federal enforcement policy; may advise clients re: CT Palliative Use of MJ Act but may not assist in violation of federal law		
DE	2011							
DC	2011	2015						Sale, purchase, and public consumption of MJ in DC remains illegal; federal govt. controls 29% of DC land and still enforces fed. prohibition of MJ session

STATE	PERMITTED MJ USE:			NEW OR AMENDED RULE?	NEW OR AMENDED COMMENT?	ETHICS OPINIONS	DISCIPLINARY CASES	MISC.
	Med.	Rec.	N/A					
FL	2014					FL Bar Board of Governors Policy 2014 (lawyers will not be prosecuted solely for advising or assisting client re: conduct lawyer reasonably believes is permitted by FL law if lawyer also advises re: federal law and policy)	Florida Bar v. Christensen, 233 So.3d 1019 (Fla. Jan. 28, 2018). Lawyer disbarred for advising clients to grow and use marijuana pursuant to an 'Official Legal Certification', a document reflecting that a doctor (but not a Florida-licensed physician) believed that the client needed to have MJ out of 'medical necessity'. Several of the clients were criminally prosecuted.	***See*** the Florida Bar Journal Article, "Up in Smoke or Down in Flames? A Florida Lawyer's Legal and Ethical Risks in Advising a Marijuana Industry Client, by Bruce E. Reinhart (March 2016).

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
GA	CBD oil 2019			A new Rule 1.2(e) was proposed which would permit a lawyer to counsel a client re: conduct expressly permitted by GA or other applicable law, even if such conduct would be criminal, provided that "the lawyer counsels the client about the legal consequences of the client' proposed course of conduct." On June 21, 2021, the Supreme Court of Georgia denied the request of the State Bar to amend the rule.				
HI	2015			Rule 1.2(d). 2015 (lawyer may advise and assist re: conduct permitted by state law; must advise re: other applicable law)		Formal Opinion 49, withdrawn after amendment of 1.2(d) (not available online)		
ID			X					

STATE	PERMITTED MJ USE:			NEW OR AMENDED RULE?	NEW OR AMENDED COMMENT?	ETHICS OPINIONS	DISCIPLINARY CASES	MISC.
	MED.	REC.	N/A					
IL	2014	2020		Rule 1.2(d). 2015 (lawyer may counsel or assist in conduct expressly permitted by IL law; must advise about federal law)	Comment [10] to Rule 1.2 (allows lawyer to provide advice and assistance to client re: conduct permitted by IL Med. MJ law; should advise about federal law and policy; should be especially careful about counseling or assisting re: conduct in context other than MJ law that violates or conflicts with federal, state, or local law.	ISBA Advisory Op. 14-07 (lawyer may advise and assist in conduct permitted by IL MJ law; recommends rule change)		
IN	CBD Oil, 2018							
IA	CBD Oil, 2014							
KS			X					
KY	CBD Oil, 2014							
LA	2015							

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
ME	1999	2016				Opinion 199 (2010) (urges caution; case by case determination as to where the line is drawn; significant risk) Opinion 215 (2017) (lawyer may advise re: conduct permitted by state law but must advise re: federal law and policy)		
MD	2014				Comment 12 to Rule 1.2 (MD 19-301.2) (2017) (Given 2014 federal govt. policy not to interfere with state-compliant retail sales, atty may counsel client and provide legal services in connection with business activities permitted by state law, provided atty advises about federal law.	Ethics Op. 2016-10 (lawyer may advise and assist compliance with state law; lawyer may have ownership interest in med. MJ business; based in part on federal enforcement policy)		

STATE	PERMITTED MJ USE:			NEW OR AMENDED RULE?	NEW OR AMENDED COMMENT?	ETHICS OPINIONS	DISCIPLINARY CASES	MISC.
	MED.	REC.	N/A					
MA	2012	2016						Board of Bar Overseers Office of Bar Counsel Joint Policy on Legal Advice on MJ (2017) (no prosecution for advising or assisting in conduct permitted by MA law)
MI	2008	2019						
MN	2004					MN Ethics Op 23 (2015) (lawyer may advise and assist re: conduct permissible under state law; must advise clients re: federal law)		
MS			X					

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
MO	CBD Oil 2014; Med 2018			Comment [8] to Rule 4-1.2 Scope of Representation. Provides that, in counseling or assisting, if a state law conflicts with federal law, the lawyer should advise the client of that fact but cannot (1) undertake conduct that would violate federal law or (2) counsel or assist the client as to how to perform an act that would violate federal law even if that conduct would be lawful under the state statutory or constitutional law. See Rule 4-1.1 and 4-1.4.		Inf. Op. 2021-02 If a lawyer representing individuals or businesses in conduct pursuant to Article XIV of the Missouri Constitution, Medical Cannabis, would be in conflict with federal law, the lawyer should advise the client of that fact, but the lawyer cannot undertake conduct that would violate federal law or counsel or assist a client as to how to perform an act that would violate federal law even if that conduct would be lawful under the state statutory or constitutional law.		

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
MT	2004						In the Matter of Christopher J. Lindsey, PR 13-0025 (6-month suspension and five years' probation; followed guilty plea in federal court in 2012 to Conspiracy to Maintain Drug Involved Premises in violation of 21 USC §846.	Preamble paragraph (6) effective 1/1/20: [lawyer may counsel and assist client re: MT cannabis laws; must advise of any conflict with federal or tribal law]
NE			X			On August 11, 2022, Advisory Opinion No. 22-03 was adopted. The opinion issued after a neighboring State, SD, legalized MJ use. Three specific questions were considered. Two of them: Can a Nebraska licensed attorney invest in a medical cannabis business in another state where the business is legal? If not, can an attorney's spouse do so? There were dissents to the adoption of the opinion.		

STATE	PERMITTED MJ USE:			NEW OR AMENDED RULE?	NEW OR AMENDED COMMENT?	ETHICS OPINIONS	DISCIPLINARY CASES	MISC.
	MED.	REC.	N/A					
NH				Rule 1.2(e) (lawyer may counsel or assist conduct expressly permitted by state law if lawyer counsels client re: consequences under federal law)	Comment [4] to Rule 1.2 (Rule 1.2(e) allows lawyer to counsel or assist in state law compliant conduct without violating NH RPCs, despite conflict with federal law, if lawyer also counsels re: federal law)			
NJ	2010			Rule 1.2(d) 2016 (lawyer may counsel and assist client in conduct lawyer reasonably believes authorized by NJ MJ law; should advise client about federal law and policy)				
NM	2007				Comment [11] to NMRA 16-102 (amended re: W in 2017) (lawyer may counsel and assist in conduct expressly permitted by NM MJ Act and assist in conduct lawyer reasonably believes permitted by the Act)	Ethics Op. 2016-01 (lawyer may advise client re: legality of proposed conduct but may not assist in conduct that violates federal law)		Op. 2016-01 (n. 1) notes the NM sup. Ct. declined to adopt proposed R. 16-102(E) permitting lawyer to counsel or assist re: conduct expressly permitted by NM MJ law

NV	2001, 2013	2016			Comment [11 to Rule 1.2. 2014 (lawyer may counsel or assist re: conduct that is consistent with NV law; should advise about federal law) Comment [11 to 8.4. 2017 (federal prosecution of lawyer for use, possession, or distribution of MJ in violation of federal law may trigger disciplinary proceeding)			
NY	2014					NY Ethics Op. 1024. 2014 (In light of current federal enforcement policy, lawyer may assist client in conduct designed to comply with state law, notwithstanding federal law prohibiting the conduct.) NY State Bar Assoc. Ethics Op. 1177 (2019) (reaffirming conclusion from Op. 1024, notwithstanding rescission of the Cole Memo, because in light of Rohrabacher Amendment, federal policy continues to permit NY to implement its med. MJ law		

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
NC			X					
ND	2016			Rule 1.2(.e). 2017 (lawyer may counsel or assist conduct expressly permitted by ND law; shall counsel client about legal consequences under other law)		Ethics Op. 14-02 (Lawyer licensed in ND violates ND R. 8.4(b) if lawyer moves to MN to participate in medical W treatment program legal under MN law because conduct would be illegal under ND and federal law.)		
OH	2016			Rule 1.2(d)(2) 2016 (lawyer may counsel or assist in conduct expressly permitted by state law and shall advise client re: federal law)		Ethics Op. 2016-6 (Aug. 5, 2016) (superseded in part by amendment of Rule 1.2, Sept. 20, 2016) (lawyer may not advise or assist client in conduct that violates federal law, even if conduct complies with state law; lawyer's personal use/investment re: medical MJ in compliance with state law can reflect adversely on lawyer's fitness to practice.		

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
OK	2018, 2019							OK House of Delegates proposed in 2018 OK House of Delegates Res. No. One. (1.2(e): atty may counsel and assist re: OK MJ law; shall advise re: federal and tribal law); Bd. of Governors did not recommend passage. Supreme Court did not adopt. Federal prosecutors in OK opposed rule change.

STATE	PERMITTED MJ USE:			NEW OR AMENDED RULE?	NEW OR AMENDED COMMENT?	ETHICS OPINIONS	DISCIPLINARY CASES	MISC.
	MED.	REC.	N/A					
OR	1988 et seq.			Rule 1.2(d). 2015 (lawyer may counsel and assist in conduct re: OR MJ laws, but shall advise client about federal and tribal law and policy)			(Five disciplinary cases from 1993 2012; four for conduct related to MJ but violating RPCs or laws other than the Fed. CSA) In re Conduct of Taylor. 851 P.2d 1138 (Or. 1993) (lawyer disbarred following federal conviction for 2 MJ-related felonies (conspiracy to mfr., possess, and distribute and for possession with intent to distribute) and conviction for federal tax evasion; lawyer also charged with misappropriating funds from decedents' estates.)	

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
PA	2016			Rule 1.2.e). 2017 (lawyer may counsel or assist regarding conduct expressly permitted by state law, provided lawyer counsels client re: consequences under other law)		PA Bar Assoc. and Phil. Bar Assoc. Joint Formal Opinion 2015-100 (R. 1.2(d) forbids counseling or assisting regarding conduct permitted by state law that violates federal law, even if federal enforcement policy does not target such conduct; recommends amendment of Rule 1.2(d).		
RI	2012					Ethics Op. 2017-01 (2017) (lawyer may advise and assist in complying with state med. MJ law and shall advise re: federal law and policy.		
SC			X			Ethics Op. 19-03 (lawyer's ownership interest in MJ-related business illegal under federal or state law may violate SC R. 8.4; lawyers cautioned about participating in activities illegal under state or federal law		
SD			X					
TN			X					

STATE	PERMITTED MJ USE:			NEW OR AMENDED RULE?	NEW OR AMENDED COMMENT?	ETHICS OPINIONS	DISCIPLINARY CASES	MISC.
	MED.	REC.	N/A					
TX	CBD Oil 2017						In re Jose Luis Palacios 54410 2014 (disbarred after pleading guilty to knowingly and intentionally conspiring to possess with intent to distribute a controlled substance in violation of 21 USC §§846, 841); In re Damon Dean Robertson 54411 2014 (suspended after pleading guilty in AZ state court to violation of AZ law for Transportation of MJ for Sale	
UT	2018			Utah is presently studying the issue				
VT	2003 2004	2018 limited adult cultivation			Comment [14] to Rule 1.2. 2016 (lawyer may counsel and assist client in conduct lawyer reasonably believes permitted by state law and shall advise client re: consequences under federal law and policy)			

STATE	PERMITTED MJ USE:			NEW OR AMENDED RULE?	NEW OR AMENDED COMMENT?	ETHICS OPINIONS	DISCIPLINARY CASES	MISC.
	MED.	REC.	N/A					
VA	CBD Oil Med MJ possession of up to one ounce			Rule 1.2(c)(3) has been amended to specify that a lawyer can "counsel or assist a client regarding conduct expressly permitted by state or other applicable law that conflicts with federal law, provided that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law."				

STATE	PERMITTED MJ USE:			NEW OR AMENDED RULE?	NEW OR AMENDED COMMENT?	ETHICS OPINIONS	DISCIPLINARY CASES	MISC.
WA	2012, 2014				Comment [18] to Rule 1.2. 2014 amended 2018 (lawyer may counsel and assist conduct lawyer reasonably believes permitted by state law and shall advise client re: federal or tribal law and policy) Comment [8] to Rule 8.4. 2018 (lawyer who counsels or assists conduct lawyer reasonably believes is permitted by state law does not violate 8.4)	WA Bar. Assoc. Op. 201501 (2015) (advice and assistance in compliance with state law is permissible; lawyer may own and operate state-law compliant MJ business, consume MJ if fitness to practice not affected, and engage in implementation of state law. Issued prior to Obama-era DOJ guidelines' withdrawal) (Revision of opinion is under consideration to reflect amended comments to Rules 1.2 and 8.4) King County Bar Assoc. Op. 1-502 (2013) (lawyer should not be subject to discipline for advising re: compliance with state MJ law, for lawyer ownership of med. MJ dispensary, or for lawyer's personal use of MJ complying with state law.)		

State	Permitted MJ use:			New or amended Rule?	New or amended Comment?	Ethics opinions	Disciplinary cases	Misc.
	Med.	Rec.	N/A					
WV	2017			Rule 1.2(e). 2018 (lawyer may counsel and assist conduct if lawyer reasonably believes authorized by state law and shall advise re: federal law and consequences				
WI			X					
WY			X					

Tab 3

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.