LEGAL COMMITTEE COLUMN

REVISED ABA MODEL RULE 8.4(G): ANTI-DISCRIMINATION RULE OR UNCONSTITUTIONAL SPEECH CODE?

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After much debate, both within the ABA and outside of it, the ABA has adopted a revised version of Rule 8.4(g) of the Model Rules of Professional Conduct. While by itself this revision has no effect, the Model Rules are very influential with the state bars and it can be expected that at least some states will move to amend their rules to conform to this change. Every lawyer, and in particular those lawyers who represent other lawyers, should be aware of the implications of this Model Rule.

An example of the vigor of the debate on this issue can be found in discussion at Federalist Society's 2017 National Student Symposium at Columbia Law School between Professor Eugene Volokh of the UCLA Law School and Attorney Rob Weiner of Arnold & Porter Kaye Scholer, LLP moderated by Judge Lavenski Smith of the 8th Circuit Court of Appeals.
https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/13/video-of-debate-on-proposed-aba-lawyer-speech-code-plus-a-separate-podcast/?utm_term=.dafd95427403

A defense of the First Amendment implications of Model Rule 8.4(g) has been put forth by Claudia E. Haupt of Yale University Law School.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911219##

Language of Model Rule 8.4(g)

Model Rule 8.4(g) makes it professional misconduct to "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." The comments to the Model Rule make clear that the rule is intended to go well beyond work by an attorney in a courtroom or for a client, and includes the regulation of activities by a lawyer in the operation of a law firm as well as bar association activities and social functions related to bar association activities. The writing of this article is likely covered as an activity related to the practice of law under Model Rule 8.4(g).

In 2010, the Supreme Court of Illinois adopted a similar rule which requires a finding of a "violation of a federal, state, or local statute or ordinance that prohibits discrimination." That rule, Illinois' Rule 8.4 (j), is also limited to "professional activities." While that term is not defined in the Illinois Rule, it appears the Rule would not include social activities related to bar associations because there is a requirement of a finding of violation by a court or administrative agency and the entry of a final, enforceable order after exhaustion of all avenues of appeal. Such a finding would be very difficult to conceive of for physical or verbal conduct that arose out of speech at a bar association or related social event.

In contrast, Model Rule 8.4(g) only requires a finding that a lawyer negligently made statements (the Model Rule refers to speech as "verbal conduct") that were found by someone to be "harassment or discrimination." The person making the complaint about the alleged conduct need not even be the object of the alleged harassment or discrimination; the statement merely needs to be directed at "others."

To determine what constitutes discrimination, the comments to the Model Rule point to statutes and case law related to the substantive law of anti-discrimination. Accordingly, under this Model Rule, both employment practices and speech by lawyers could lead to sanction by a bar regulator. If adopted by the state bar regulators, this Model Rule places lawyers in a fundamentally different place from nearly any other American: without a finding by a fact finder of a violation of a law against discrimination or for speech that someone finds offensive, a lawyer could be censured, reprimanded, suspended, or disbarred. In other words, a lawyers' profession could be taken away, or at least severally damaged, for a stray comment or employment practices that

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were not found to be violative of the law or which were protected by the First Amendment.

Reasons for Model Rule 8.4(g)

There are noble bases for this Model Rule. The reasoning put forward for this Model Rule is that the legal profession, as a self-regulated profession, has lagged behind other areas of professional practice in the advancement of women and minorities. If lawyers are to be those most engaged in fighting for equality, then the profession must lead by example in how it regulates itself and promotes disadvantaged groups. The Model Rule is also similar to other current rules that prohibit discrimination by lawyers, but no current rule has so low a bar as negligence and no current rule places a requirement on lawyers that is broader than the law of the particular state.

One of the justifications for the Model Rule is that the rules already regulate lawyer speech and conduct outside of the courtroom. For example, the rules regulate what a lawyer can disclose about client communications, the conduct and speech of lawyers with respect to depositions, and the types of statements lawyers can make to the press related to cases they are handling. The rules mandate candor to the tribunal, including requiring lawyers to disclose controlling authority to the court (even when adverse) Further, the rules control the business of the practice of law when they regulate when and how a lawyer can sell his practice, with whom a lawyer can share profits for legal work, and whether a lawyer can take a case in which he has a conflict of interest. Finally, the rules regulate how a lawyer relates, controls, and may be responsible for the conduct of other lawyers, paraprofessionals, and non-professionals within the law firm setting. Each of these examples relate to the administration of justice in court or the provision of ethical service to clients. .

In contrast, Model Rule 8.4(g) significantly expands lawyer regulation by imposing a duty well beyond a lawyer's interaction with courts and clients. The enlarged rule is not focused on the interests of protecting the legal process from harassing conduct, ensuring that lawyers are truthful with the court, preventing conflicts, or regulating business relationships among lawyers and non-lawyers. Model Rule 8.4(g) proscribes conduct even when wholly unrelated to a lawyer's representation of a client.

To understand the intent of the rule, it is important to contrast the language of the comments with respect to Model Rule 8.4(b) and (c), which forbid engaging in criminal acts and conduct involving "dishonesty, fraud, deceit or misrepresentation." Comment 2 to Rule 8.4 states: "[m]any kinds of illegal conduct reflect adversely on fitness to practice law ... 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." The comments to Rule 8.4 make clear that it is the ABA's view that discrimination and harassment bear more on the practice of law than do certain violations of law. The ABA's view seems to stand even if the alleged harassing or discriminatory conduct was only tangentially related to the practice of law since no finding of fact is required to punish a lawyer under Rule 8.4(g).

Model Rule 8.4(g) and the First Amendment

The most vigorous concerns about Model Rule 8.4(g) have been the issues related to the First Amendment. Professor Volokh has called the rule a "speech code" for lawyers. He has raised concerns about the chilling effect that the rule will have on lawyer speech and the ability to speak on topics of public importance for fear of being accused of professional misconduct.

As an example, a panel discussion at a bar association event or cocktail hour regarding the decision in *Obergefell v. Hodges* could lead to a bar complaint if an attorney expressed the belief that the decision was wrongly decided and advanced the arguments of Justice Thomas' dissent. Someone could conceivably find that position harassing or discriminatory. In addition, a panel discussion related to the legality of President Trump's executive order concerning immigration from certain Muslim majority countries could invoke a claim that someone in support of the executive order is harassing Muslims merely by taking the position that the executive order is legal or advancing the position that the executive order is a wise policy position.

Model Rule 8.4(g) and Employment Practices

Model Rule 8.4(g) places bar regulators as chief overseers of law firm employment practices. It is further important to note that in the employment context, many states do not prohibit discrimination on the basis of marital status, gender identity or sexual orientation. If adopted in states in which these are not prohibited, lawyers will have different rules with respect to employment than any other employer in that state.

The comments to the Model Rule state "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." This comment is intended to provide some guidance to bar overseers by giving content to what may constitute discrimination and harassment for the purposes of determining a violation of the Model Rule. However, the language is merely in a comment, not the rule itself, and then is further weakened by the caveat

"The reasoning … is that the legal profession … has lagged behind … advancement of women and minorities."

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contained therein that such statutes and case law "may guide" application of the Model Rule. This is in stark contrast to Illinois's rule which requires a finding of violation of such a Rule and thus gives clear instruction on when the Rule is to be applied.

Further, the Model Rule includes protection for "socioeconomic status." Protection for socioeconomic status is far broader protection than most, if not all, anti-discrimination statutes at the federal, state, and local level. Lawyers could be punished for favoring students from Ivy League law schools as those having the pedigree necessary to serve their clients and fit into their firm culture. Likewise, lawyers could be punished for favoring law students who went to night school while working to pay their tuition because they valued those students' work ethic. As socioeconomic status is not defined in the Model Rule, nor is there jurisprudence on socioeconomic status in the anti-discrimination law to use as guidance, it is not possible to know how a lawyer should act with respect to this issue.

How Should Lawyers Respond?

Lawyers should monitor any changes to the rules governing professional conduct in the states in which they are licensed. Irrespective of the rules, lawyers should not engage in harassing and discriminatory conduct. Any potential claim should be treated extremely seriously as it could lead to not only a civil action, but a bar complaint as well. If adopted, it can be expected that bar complaints will be used in conjunction with or in preparation for an employment discrimination lawsuit, just as they are in legal malpractice cases.

In view of that possibility, if Model Rule 8.4(g), or a rule with similar language is added to their state's rules, lawyers should be aware that many law firms do not carry Employment Practices Liability insurance to cover third party claims for sexual harassment and discrimination. If lawyers think their Lawyers' Professional Liability policy will cover those types of claims they may be surprised to find an exclusion in their policy for claims which are solely based on actual or alleged sexual misconduct or sexual harassment. Some policies include that exclusion, with the intent being if there is no allegation of malpractice to go with a sexual harassment/discrimination claim, it should be covered by an EPL policy. Even if there is no such exclusion in a policy, it would be an open question whether allegations of sexual harassment/discrimination meet the definition of claim on a policy in the rendering of or failing to render professional services, if there is no allegation of malpractice to go with it.

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