

RULE 8.4(G): A STEP IN THE RIGHT DIRECTION

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I will never forget my first day in a courtroom as a law student. As 1Ls, we were required to observe a portion of a case proceeding as part of the curriculum for the Introduction to Lawyering course. Excited, my classmates and I learned that we would be watching a criminal trial. It was a gang murder trial – the exact kind of crazy, dramatic material you watch on Law and Order. But what I remember most from that day is not the direct examination of the police officer that was the first to respond to the scene or his gruesome recollection of what he saw. What I remember most is a comment made by a male attorney to his female counterpart.

“Let the boys take care of this.” It was this small, seemingly insignificant sentence that caught my attention. It was so quick, so trivial that I’m not even sure anyone else heard it. He muttered it under his breath, as if he was just trying to pump himself up. But I was thrown. I watched the woman for a reaction, but she made no remark and nor did anyone else. As a young, impressionable law student, I got a sour taste in my mouth that day of how in 2016, women lawyers can be treated and how they are supposed to react.

The legal community sets the bar for how we treat one another. We, through our actions and through our words, determine what standard of conduct is acceptable and what is not. The comments that lawyers make to one another depict a certain picture of the legal profession, whether intended or not. What kind of message are we, as lawyers, sending our clients and our peers when we discriminate against and harass one another in the courtroom?

The American Bar Association (“ABA”) Standing Committee on Ethics and Professional Responsibility adopted Rule 8.4(g) (“the Rule”) in 2016, marking a transition into a legal

profession that does not tolerate discrimination or harassment, whether it be on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.¹ This Rule is a step in the right direction, evidencing the need for eviscerating the passive tolerance for discrimination and harassment that is still present amongst lawyers today.

Fierce opponents to the Rule argue that it poses threats to certain civil liberties.² Attorney Kim Colby argued that this change would have a “chilling effect” on the lawyer’s ability to engage in free speech, religious exercise, and other First Amendment rights.³ As a result, opponents argue that the Rule could impact the attorney-client relationship because lawyers could be hindered in their ability to zealously represent their clients.⁴ Opponents of the Rule claim that it is not narrowly tailored, and would thus result in broad implications for seemingly innocuous behavior.

However, the Rule does no such thing. In fact, Ms. Colby’s concerns are not well founded because the last sentence of the Rule should effectively put these claims to rest.⁵ Those who are arguing against the Rule stress how individuals could be fined or disbarred because of their support of certain groups or belief in certain religions that denounce things like same-sex marriage. Yet, nothing in the Rule applies to religious practice or membership in other

¹ See Model Rules of Prof’l Conduct R. 8.4(g) (2016) (stating “It is professional misconduct for a lawyer to: (g) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”).

² See e.g., Elizabeth Olson, *Association Considers Striking ‘Honeys’ From the Courtroom*, NEW YORK TIMES, (Aug. 4, 2016), <https://www.nytimes.com/2016/08/05/business/dealbook/sexual-harassment-ban-is-on-the-abas-docket.html>.

³ See *id.*

⁴ See *id.*

⁵ See Model Rules of Prof’l Conduct R. 8.4(g) (2016) (“This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”).

organizations. What the opponents fixate upon is the Rule's effect on attorney-client relationships, yet the last sentence of the Rule directly addresses this concern and therefore, criticism of the Rule is questionable.

Some individuals on the opposite side of the spectrum question whether the Rule goes far enough in terms of addressing discrimination and harassment in the legal profession. Because the Rule faced such backlash in the months leading up to its adoption and went through extensive debates and edits, I believe that the current formulation of the Rule is a positive initial step because it balances the concerns of each side. Going forward, I would propose that the Rule be amended to exclude the word "knowingly". This creates an extremely high standard and makes it difficult to address situations where discrimination or harassment exists, but conduct itself is not solely indicative of it because it exists in thought or mental state.

The lawyers who oppose the Rule are fixating upon an unrealistic result – the imposition of fines and punishments for behavior or speech that is constitutionally protected. Because it is undeniably imperative not to infringe upon the civil liberties of lawyers, the Rule was carefully drafted in order avoid such a consequence. If the ABA were to start publishing "unconstitutional" Model Rules, its renowned reputation would dissipate quickly. I do not believe that a body of just lawyers who work in the ABA would support and adopt a rule that was unconstitutional.

The sad part about my first experience in a courtroom as a law student is that it is far from unique. Talk to any lawyer, and I am sure that most can recount a similar occurrence at one point in their career. I believe that the Rule is incredibly important to promulgate the condemnation of endemic harassment and discrimination in the legal profession. In the words of past ABA President Paulette Brown, the Rule "makes it clear that discrimination, harassment,

bias and prejudice do not belong in the conduct related to the practice of law.”⁶ The Rule clearly nudges the legal profession in the right direction, towards the achievement of a more accepting and diverse legal community.

⁶ See Peter Geraghty, *ABA Adopts New Anti-Discrimination Rule 8.4(g)*, (Sept. 2016), <http://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g-at-annual-meeting-in-.html> (quoting Paulette Brown).