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Rules Prohibit Discriminatory Conduct Under Limited Circumstances

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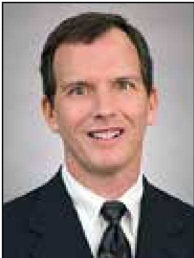
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The ABA Standing Committee on Ethics and Professional Responsibility recently proposed amending the ABA Model Rules of Professional Conduct to add to Rule 8.4 a prohibition against harassment or discrimination based on a protected status. Proposed Rule 8.4(g) specifically provides that it would be professional misconduct for a lawyer to knowingly harass or discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, while engaged [in conduct related to] [in] the practice of law. The proposed Comment 3 explains that the prohibition applies to lawyers acting "in the course of representing a client" and "knowingly manifests by words or conduct, bias or prejudice" based upon the listed classifications "when such actions are prejudicial to the administration of justice."

Many states already have rules addressing this issue. In Indiana, Minnesota and Ohio, for example, it is a violation of Rule 8.4(g) to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation or socioeconomic status with regard to public assistance, ethnicity, or marital status when that harassment occurs in a professional capacity (Indiana and Ohio) or in connection with the lawyer's professional activities (Minnesota). A similar Colorado rule applies only to lawyers representing a client and when the conduct is directed to a person involved in the legal process. Florida Rule 4-8.4(d) prohibits disparagement and humiliation in addition to discrimination, but is limited to conduct directed to litigants, jurors, witnesses, court personnel, or other lawyers. The lawyer's conduct may be knowing or through "callous indifference," but it must be in connection with the practice of law and prejudicial to the administration of justice. Michigan's Rule 6.5(g) broadly requires that lawyers must treat with courtesy and respect all persons involved in the legal process, taking care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic.

Illinois Rule 8.4(j) makes it misconduct only to violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. In addition, the conduct must reflect adversely on the lawyer's fitness as a lawyer, which depends on an analysis of factors that include the seriousness of the act, the lawyer's knowledge that the act was prohibited by statute or ordinance, whether the act was part of a pattern of prohibited conduct, and whether the act was committed in connection with the lawyer's professional activities. Another requirement for disciplinary action in Illinois is that a court or administrative agency must find that the lawyer has engaged in an unlawful discriminatory act. The Illinois rule is perhaps the most narrow in scope because of the requirement of a judicial or administrative finding of discriminatory conduct.

In Illinois, attorneys have been disciplined after judicial findings that they violated of laws that prohibit discriminatory conduct. In *In re Jones*, 2014 PR 45, M.R.26769 (September 12, 2014), an attorney was found to have engaged in conduct involving sexually exploiting four members of the office staff employed by his law firm over whom he had supervisory authority. The attorney was first disciplined in the state of Washington for violating its Rules of Professional Conduct, including Rule 8.4(g), which prohibits a lawyer from committing a discriminatory act prohibited by state law on the basis of sex in connection with the lawyer's professional activities. He was disciplined in Illinois for the same conduct, in violation of Illinois Rule 8.4(a)(9)(A) of the 1990 Rules and Rule 8.4(j) of the 2010 Rules, which made it misconduct to violate a federal, state or local statute or ordinance that prohibits discrimination based on a protected status when it reflects adversely on the lawyer's fitness as a lawyer.

In *In re Weiss*, 2008 PR 116, M.R.27547 (November 17, 2015), an attorney was disbarred for conduct that included making improper remarks and engaging in improper sexually suggestive conduct toward employees of his law firm and others. The ARDC Review Board found, however, that the attorney, while violating other Rules of Professional Conduct, did not violate Rule 8.4(a)(9)(B), which specifically prohibited discrimination based on certain factors, including sex, because there was never any final determination of sexual harassment by a court or administrative agency as required by the Rule.

As the *Weiss* proceedings indicate, even if there is no finding by a court or admin-

istrative agency, a lawyer can still be disciplined for certain kinds of discriminatory or harassing conduct based on violations of other rules of professional conduct. For example, in *In re Garnati*, 2013 PR 124, M.R. 26733 (*Petition for Discipline on Consent Allowed*, September 12, 2014), a county State's Attorney made racially based statements about a purported anti-police bias in the black community in the course of prosecuting a murder case, in violation of Rule 3.4(e), prohibiting lawyers from alluding to any matter that is not supported by admissible evidence, and Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice.

Lawyers have been disciplined for "engaging in offensive tactics" or "failing to treat with courtesy and consideration all persons involved in the legal process" in violation of former Rule 7-101. One lawyer called a witness a fraud, a liar and "a member of the oldest profession known to man," called defense counsel a liar and "a son of a bitch," made an obscene gesture and used obscene and profane language. *In re Garza*, 86 CH 21, M.R. 4206 (1987).

The ARDC Review Board in *In re Gerstein*, 99 SH 1, M.R.18377 (*Respondent's petition for leave to file exceptions to the Report and Recommendation of the Review Board denied*, November 26, 2002), criticized a lawyer for writing in letters to opposing counsel and others words such as "fool, idiot, punk, boy, honey, sweetheart, sweety pie and babycakes." The lawyer wrote to one individual, "you have your head so far up your anus you think it's a rose garden." He invited correspondents to place their letters "in that bodily orifice into which no sun shines." In an earlier case involving the same lawyer, *In re Gerstein*, 91 SH 354, M.R. 7626 (September 26, 1991), a censure was imposed for sending a letter to opposing counsel which contained obscene, offensive and vulgar language. In both *Gerstein* cases, the lawyer was found to have violated Rule 4.4, which prohibits a lawyer, while representing a client, from using means that have no substantial purpose other than to embarrass, delay or burden a third person.

In *In re Kenney*, 92 CH 293, M.R. 8423 (1992), another attorney was censured for videotaping three women in a library, without their consent or knowledge, as they were seated at study carrels, positioning his video camera in a manner so that it was directed to the area under the women's skirts, in violation of former Rule 1-102(a)(5), which prohibited conduct prejudicial to the administration of justice.

Thus, although Illinois Rule 8.4(j) is violated only under the narrow circumstance of a lawyer being found to have engaged in an unlawful discriminatory act in violation of a federal, state or local statute or ordinance, even without such a finding, discriminatory or harassing conduct may result in discipline under another rule of professional conduct. As a result, lawyers are well advised to treat others with civility and professionalism, not only to avoid discipline, but to conform to the highest standards of conduct of the legal profession.

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