THE NATIONAL LAW JOURNAL
NOVEMBER 16, 2022
ALM.

'Virtue Signaling Is Not Enough': A Debate Over an ABA Model Rule Highlights Persistent Harassment Challenges in Law

As a self-regulating industry, lawyers have a responsibility to ensure equal justice. If the industry continues to tolerate harassment and discrimination, the face and reputation of the profession will not change.

BY CHRISTINE SCHIFFNER

Welcome to The National Law Journal's Inadmissible feature, a regular Q&A series with Washington, D.C., legal professionals. The interviews take a short, to-the-point look at an issue at the intersection of law and politics and highlight the type of work being led by professionals in the nation's capital. If you are interested in being profiled, reach out to cschiffner@alm.com.

In this edition, MoloLamken partner Sarah Newman discusses the recent debate over ABA Model Rule 8.4(g) on discrimination and sexual harassment in the legal industry and why a frank conversation about the rule matters.

Courtesy photo

Sarah Newman of MoloLamken.

INADMISSIBLE

There has been public debate about ABA Model Rule 8.4 and discrimination in the legal profession. What are the key points of the rule?

In 2016, the ABA adopted Model Rule 8.4(g) to address the prevalence of sexual harassment in the legal industry. The rule broadly prohibits lawyers from engaging in discrimination and harassment on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, and socioeconomic status "in conduct related to the practice of law." Conduct can violate the rule—and be ground for discipline—even if the same conduct wouldn't trigger liability under Title VII. And the rule applies outside the courtroom.

Before Rule 8.4(g) was adopted, the ABA's Model Rules broadly stated that it was "professional misconduct for a lawyer to … engage in conduct that is prejudicial to the administration of justice." The addition of Rule 8.4(g) made explicit the ABA's view that discrimination and harassment should not be tolerated in the profession, even when a lawyer is not technically representing a client.

Before the ABA adopted Rule 8.4(g), many states and Washington, D.C., already had some form of

non-discrimination provision in their professional responsibility rules. Since 2016, at least seven states and territories have adopted a version of Rule 8.4(g). But over a dozen states have rejected adopting a similar rule.

The rule has been under attack by various groups. What is your reaction?

The adoption of Rule 8.4(g) quickly became a hot topic of debate in professional responsibility circles. On one side, lawyers have applauded the rule's attempt to eliminate bias in the profession. Others have criticized it as a speech code targeting disfavored views.

Many have criticized the rule as infringing lawyers' First Amendment free-speech rights. Some have argued that the rule is too vague. Because it does not explicitly define "related to the practice of law," some fear that disciplinary bodies could apply the rule to conduct that is remote from—albeit still "related to"—the practice of law simply because a person is a lawyer. The rule has also been criticized as overly broad. Critics argue that the rule could chill a lawyer's protected speech, especially in the context of teaching or social events.

I do not find these arguments compelling. Courts have long held that regulating lawyers' conduct is a compelling interest that has justified other professional responsibility rules that proscribe lawyer conduct and speech. Rules that regulate lawyer advertisements have withstood First Amendment challenges, as have rules on fee sharing and the operation of legal entities.

The plain language of Rule 8.4(g) also clarifies that it does not apply to just any conduct of a lawyer. It is strictly limited to "conduct related to the practice of law." Especially when read alongside the comments to the rule, it doesn't take much commonsense to figure out when a lawyer's conduct relates to the practice of law and when it doesn't. The comments, for example, clarify that "conduct related to the practice of law" includes interacting with coworkers and witnesses, managing a law firm, and participating in bar association activities. In 2020, the ABA Standing Committee on Ethics and Professional Responsibility also issued Formal Opinion 493, which offers further guidance on the rule.

Moving forward, what are the main points to consider in relation to the rule?

In my view, the debate on Rule 8.4(g) will mostly be academic. Disciplinary bodies are unlikely to expend resources prosecuting isolated incidents or close calls where lawyers might have valid First Amendment concerns. Regulators will instead focus on serious and pervasive issues.

It is still critical, however, that the legal profession does not tolerate discrimination and harassment. Although the industry has made significant strides, there is no serious debate that bias, discrimination and harassment are still pervasive at law firms. And one need only look at lawyer headshots on most law firms' websites to see that the profession continues to struggle with diversity efforts.

As a self-regulating industry, lawyers have a responsibility to ensure equal justice. Virtue signaling is not enough. If the industry continues to tolerate harassment and discrimination, the face and reputation of the profession will not change.