

TEN COMMANDMENTS OF ETHICS AND PROFESSIONALISM IN ARBITRATION

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1. **Promote the governing principles and goals of arbitration:** Achieving resolution of disputes with:
 - a. speed,
 - b. economy,
 - c. impartiality, and
 - d. justice.

2. **Comply with the Rules of Professional Conduct governing the client-lawyer relationship in effect in each state where you are licensed to practice law, including among others the Rules regarding:**
 - a. Competence. **ABA Model Rule 1.1.**
 - b. Diligence. **ABA Model Rule 1.3.**
 - c. Communications. **ABA Model Rule 1.4.**
 - d. Confidentiality of Information. **ABA Model Rule 1.6.**
 - e. Conflicts of Interest. **ABA Model Rules 1.7, 1.8, 1.9, 1.10, and 1.11.**

3. **Comply with the Rules of Professional Conduct governing transactions with persons other than clients in effect in each state where you are licensed to practice law, including among others the Rules regarding:**
 - a. Truthfulness in Statements to Others. **ABA Model Rule 4.1.**
 - b. Respect for Rights of Third Persons. **ABA Model Rule 4.4**, including subsection (a):
“In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

4. **Comply with the Rules of Professional Conduct concerning maintaining the integrity of the profession in effect in each state where you are licensed to practice law, including among others the Rule regarding**

Misconduct, **ABA Model Rule 8.4**, including subsection (g):

“[It is professional misconduct for a lawyer 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. 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.”

Comment [3] to subsection (g) reads in part, “Discrimination and harassment by lawyers in violation of paragraph (g) . . . 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).”

Comment [4] to subsection (g) reads in part, “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. [Emphasis supplied.]”

Comment [5] to subsection (g) reads in part, “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).” **Would striking a prospective arbitrator’s name from a list of arbitrators provided by an arbitration platform on a discriminatory basis establish a violation of paragraph (g)?**

Comment [5] to subsection (g) also includes, “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.”

According to the Report by Professional Responsibility Committee of the New York City Bar Association Proposing Amendment to New York Rule of Professional Conduct 8.4(g):

some states have adopted rules substantially similar or analogous to ABA Model Rule 8.4(g),

-others, including New York, are considering adopting rules substantially similar to ABA Model Rule 8.4,

-others (*e.g.*, Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, South Carolina, and Tennessee) have rejected adopting ABA Model Rule 8.4(g) or a similar or analogous Rule, and

-Pennsylvania adopted Rule 8.4(g) to become effective on December 8, 2020, reading, “[It is professional misconduct for a lawyer to:] in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, 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.”

On August 6, 2020, the Hamilton Lincoln Law Institute filed a lawsuit in the United States District Court for the Eastern District of Pennsylvania against the members of the Disciplinary Board of the Supreme Court of Pennsylvania seeking an injunction against implementation of this Rule: Zachary Greenberg v. James C. Haggerty, in his official capacity as Board Chair of The Disciplinary Board of the Supreme Court of Pennsylvania, et al. (Docket No. 2:20-cv-03822-CFK). On December 8, 2020, Judge Chad F. Kenney of that court denied Defendants' motion to dismiss that lawsuit and granted Plaintiff's motion for a preliminary injunction against that implementation based upon the Judge's finding that the Rule would violate the U.S. Constitution's First Amendment protection of freedom of speech. In March 2021, the parties stipulated and agreed to voluntary dismissal of Defendants' appeal of Judge Kenney's order to the United States Court of Appeals for the Third Circuit.

Regardless of whether and, if so, the form of ABA Model Rule 8.4(g) or a similar or analogous Rule that is adopted in a state and not challenged or held to be consistent with the United States Constitution and amendments to it, do current standards of professionalism require at least good faith attempted compliance with the spirit of that Model Rule?

5. **Observe the golden rule of flexibility:** Be flexible and creative in collaborating with arbitrators and other counsel and representatives to resolve challenges and concerns about virtual hearings, return to in-person hearings, and emergencies requiring postponement or rescheduling hearings or use of different virtual platforms for hearings.
 - a. FINRA, federal law, and some state laws prohibit the arbitrator from inquiring of any potential participant in a hearing the extent, if any, to which that participant has received vaccination for COVID19.
 - b. Not all arbitrators and parties' counsel or representative are able to use Zoom; *e.g.*, some law firms require their attorneys to use Webex.
 - c. For virtual hearings, participants may need more breaks to accommodate children, pets, or other interruptions.

6. **Be prepared and timely:**
 - a. Find, arrange for, and give the other parties' counsel or representative notice of experts and other witnesses well before the hearing. Do not assume that you can substitute affidavits for testimony.
 - b. Prepare sufficient exhibit notebooks as soon as possible so that you can deliver them to all arbitrators, parties, and counsel or other representatives well before the hearing date, especially for a virtual hearing.

- c. Include among the exhibits:
 - (1) supporting legal authorities and copies of statutes, regulations, and judicial opinions on which you rely,
 - (2) a timeline of relevant occurrences,
 - (3) a glossary of terms, including the names by which you refer to certain statutes (do not assume that the arbitrator knows them), and
 - (4) specific alternative damage calculations and other remedy requests.
- d. Arrive early for hearings and extra-hearing negotiations with an opposing party's counsel or other representative.
- e. Plan to remain at the hearing for the duration of the scheduled time for the hearing and avoid requesting early departure or lengthy breaks except for emergencies. For example, unless you have not received reasonable advance notice of the opposing party's witness and subjects of that witness' planned testimony, do not request extra breaks for you to prepare for cross-examination.

7. Behave courteously and respectfully to each arbitrator, party, counsel, and other representative and the time of each of them:

- a. Be focused and specific in your discovery requests to reduce unnecessary effort and expense in responding to them.
- b. Limit exhibits to non-duplicative documents and legal authorities relevant to your case. Attempt to stipulate to exhibits and facts to reduce the volume and weight of exhibits for shipping and witness testimony time.
- c. Limit depositions to avoid duplication, ambiguity, and examination not directly related to the matters that you intend to prove to the arbitrator.
- d. Respond to discovery requests in good faith without requiring opposing parties to file motions to compel with the arbitrator.
- e. Avoid last-minute requests to postpone a hearing, even if the arbitrator charges a hearing cancellation fee.
- f. Avoid multiple requests to postpone and re-set depositions or hearings.
- g. Be flexible and reasonable in responding to requests by opposing parties for witnesses to testify out of order in the interests of efficiency and accommodation of reasonable needs of those witnesses.

- h. Listen attentively to each participant in the hearing without engaging in live conversations, looking at screens on your phone or computer not directly relevant to the hearing, eating, or drinking noticeably, or interrupting other participants when they are speaking, *e.g.*, use the “raise hand” icon or a sign to alert the arbitrator or arbitrators that you wish to speak, whichever procedure the arbitrator suggests.
- i. Suppress theatrics, histrionics, and hubris, such as (a) stage whispers about witness testimony, opposing counsel or representative arguments, (b) rolling eyes and other unnecessary or exaggerated facial expressions or body language, and (c) laughing, snickering, groaning, and other unnecessary noises.

8. Avoid statements and actions intended or having the effect of impugning the appearance of neutrality of an arbitrator:

- a. Do not communicate directly with the arbitrator except, and then only if the arbitrator consents at the time he or she accepts appointment as arbitrator in your case, to advise the arbitrator of settlement of the case. And do not attempt to trick the arbitrator into an *ex parte* conversation with you, *e.g.*, about your mutual *alma mater* or opinions regarding sports.
- b. Do not state or imply that you intend to use the arbitrator in a future, different case or otherwise intend to take any action resulting in or other to provide anything of value to an arbitrator.
- c. Do not advise the arbitrator about your intention to appeal and seek vacatur of an unfavorable award.

9. Control your client:

- a. Admonish your client to avoid *ad hominem* attacks on opposing parties and their counsel or other representatives.
- b. Remind client that theatrics, histrionics, hubris, and other unnecessary and interruptions of an arbitrator, you and other counsel or representatives are unacceptable and may adversely affect the results of the case.
- c. Encourage client to arrive early for hearings and extra-hearing negotiations with an opposing party’s counsel or other representative.
- d. Instruct client not to communicate directly with the arbitrator or to trick the arbitrator into an *ex parte* conversation with the client.

10. Observe virtual hearing etiquette:

- a. Wear a suit or dress that is not revealing or distracting by color, pattern, dimensions, or otherwise.
- b. Groom your hair and nails to be as tidy as possible.
- c. Avoid jewelry, other accessories, or makeup that may be distracting by appearance or noise.
- d. Participate from as quiet and solitary location as possible. Put your other devices on vibrate or airplane mode (if you still remember how to do that).
- e. Eliminate from webcam view clutter and items or images inappropriate for view by the other participants in the hearing.
- f. Use a desktop or laptop computer instead of a smartphone or tablet so that you can see on the monitor many participants simultaneously and avoid unintended webcam movement and internet disconnection.
- g. Use as strong and high speed, private (not unsecured, public wifi) internet connection as possible, preferably hard wired through a USB cable. Turn off other streaming devices connected to the same internet source.
- h. Shut off pop offs on your computer to minimize “pings.”
- i. Do not use artificial backgrounds, in order that the arbitrator and the other participants can see who is with you, if anyone. The arbitrator may ask that you move the computer camera or other web cam to face all parts of your location to verify who is with you.
- j. Position the webcam at or slightly above eye level, avoiding glare on your glasses, so that your head and shoulders are center of your screen.
- k. Set your microphone to 75%, select “Medium” in “Suppress Background Noise,” and position your mouth 6 inches from microphone to minimize extraneous noise and avoid sounding too loud to the other participants. Remain on “mute” unless and until the arbitrator recognizes you to speak, when you should “unmute.”
- l. Avoid sitting near a window without a curtain or blinds and position an LED or lume cube or ring light facing you from behind the computer.
- m. Sit straight and minimize fidgeting, standing, walking around, or other movement to reduce distraction and extraneous noise. (That rule also applies to in person hearings.)

- n. Even if the chat function is not disengaged, use it only to send a message simultaneously to all participants in the hearing.
- o. If you have not had extensive experience with virtual meetings on the platform designated for the hearing, including screen sharing, white board, adjusting font size of and highlighting text in exhibits, and break out rooms, then. . . practice, practice, practice.