

THE ETHICS OF HARASSMENT AND DISCRIMINATION BY ATTORNEYS

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Media frequently report accusations against public figures of harassment and discrimination based on gender, sexual orientation, race, and ethnicity. Some of them allege violations of criminal law. Others sound in tort.

But attorneys, like Hebrew National, “have to answer to an even higher authority” than law.

The American Bar Association’s Model Rules of Professional Conduct Rule 8.4(g) states that 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. . .” Emphasis supplied.

Comments [3] and [4] to Model Rule 8.4(g) explain, “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).* . . . 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.

The American Bar Association’s Standing Committee on Ethics and Professional Responsibility’s Formal Opinion 493 (July 15, 2020) further guides Model Rule 8.4(g) application, specifying that the rule applies outside the employment context, regardless whether the conduct is severe or pervasive or violates law, beyond the courtroom, in contexts that may not connect to a specific client representation, and in all practice-related settings such as law firm or bar association social events.

To the extent that the courts of a state have adopted Model Rule 8.4(g) as part of that state’s Rules of Professional Conduct, the authority applying that rule to the conduct of an attorney licensed in that state may consider *but need not apply* antidiscrimination or antiharassment law.

Litigation in Pennsylvania and comments on rules adopted in other states challenged those states’ versions of Model Rule 8.4(g) on the basis that they restrict free speech in violation of the First Amendment of the U.S.A. Constitution notwithstanding

Formal Opinion 493’s declaration that the rule “does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern, nor . . . limit a lawyer’s speech or conduct in settings unrelated to the practice of law. The fact that others may personally disagree with or be offended by a lawyer’s expression does not establish a violation. The Model Rules are rules of reason, and whether conduct violates [the rule] must necessarily be judged, in context, from an objectively reasonable perspective.”

New York Rules of Professional Conduct Rule 8.4(g) prohibits only discrimination in employment and requires as a condition to disciplinary proceeding jurisdiction, “Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the first instance [and] a certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice.”

But in March 2021, the Administrative Board of the New York State Unified Court System proposed not only to eliminate that condition but to replace New York Rule 8.4(g) by American Bar Association Model Rule 8.4(g).

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