

Amendments to Disciplinary Rule 8.4 Open For Debate

On November 1, 2013, the Oregon State Bar, through a vote of the House of Delegates, proposed an amendment to a Rule of Professional Conduct, RPC 8.4., which added to the list of activities deemed “professional misconduct” a lawyer’s engaging, in the course of representing a client, “in conduct that knowingly manifests bias or prejudice based upon race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, disability or socioeconomic status.”¹



Dan Schanz

I learned about the proposed amendment from a concerned plaintiff’s lawyer, just days before it was to be voted upon by the House of Delegates at its Annual Meeting. I was surprised at the number of other members of the Bar who, like myself, were unaware that the proposed amendment was to be voted upon. The Bar performs a valuable service in posting on its website information about issues impacting members, including proposed changes to disciplinary rules.² Unfortu-

nately, many of us do not take the time to review this information.

At the House of Delegates Annual Meeting in November 2013, there was spirited debate both for and against the amendment to RPC 8.4.³ Ultimately, the amendment was passed by a majority vote of the Delegates present.

The Rule was then presented to the Oregon Supreme Court. According to the information on the OSB website, during a public meeting on December 3, 2013, there were concerns expressed by the Court that the amendment to RPC 8.4, as drafted, “would impermissibly restrict the speech of OSB members” and that the rule would be violated “by any manifestation of bias, even the mere expression of opinion, without a requirement that there be an adverse impact therefrom.”⁴ There were other concerns with the Rule that were also raised on behalf of the Court.⁵

After the public meeting with the Supreme Court, the Board of Governors decided to convene a special committee—the RPC 8.4 Drafting Committee—to develop a revised amendment with the intent to satisfy the concerns with adopting the Rule as proposed. In June 2014, the Committee released its report with

revised proposed language amending RPC 8.4, providing that:

(a) It is professional misconduct for a lawyer to—

...

(7) in the course of representing a client, knowingly intimidate or harass a person because of that person’s race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status or disability.

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein.⁶

This new proposal has been presented to the Board of Governors, and will be sent to the House of Delegates Annual Meeting for a vote on November 7, 2014. If it is passed by a majority of the Delegates, it will again be presented to the Supreme Court.

As members of the Bar and OADC, we need to be aware of—and actively participate in—the debate of proposals

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by the OSB that will directly impact our practices, discipline issues, and constitutional rights. I suspect that all of us would agree that no one should be intimidated or harassed based upon the categories listed in the proposed amendment to RPC 8.4. However, in considering this new category of misconduct, there are a number of questions as to how the Rule could impact our practices and whether it is ultimately necessary.

What would it mean to "intimidate or harass" a person under the revised language of the Rule? These terms could be problematic, because many of us routinely send demand letters,⁷ file pleadings, and depose and cross-examine individuals—all in a sanctioned adversarial setting. (The classic role of legal advocacy, of course, is to represent the interests of those whose viewpoints are socially unpopular or even abhorrent to societal norms. Moreover, the individuals who hold those viewpoints are entitled to effective legal representation and to the protection of their First Amendment Constitutional Rights. Any disciplinary rule which subjects the legal profession to censor because of the content of expression, whether made on their own behalf or on behalf of their clients, chills the availability of legal representation.)

Further, how would it be determined if the claimed intimidation or harassment was because of one of the protected categories? If someone feels intimidated or harassed, could they claim, without more, that this provision is violated? How would one prove that their actions were not motivated by conduct toward one of the protected categories?

Is this new rule necessary? Is there a problem within our Bar of members intimidating and harassing people based upon the categories inserted in the amendment? Do we not have dis-

ciplinary rules that would address that behavior? Rule 8.4 already provides that "it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The criminal code covers a variety of crimes of intimidation and harassment based upon race, color, national origin and sexual orientation.⁸ Subsection (4) of the current version of 8.4 also precludes conduct that is prejudicial to the administration of justice. Is the conduct addressed by the proposed amendment prejudicial to the administration of justice?

Similarly, RPC 4.4(a) already provides that "[i]n representing a client or the lawyer's own interests, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, harass or burden a third person" What conduct does the new proposed

amendment to RPC 8.4 allow the Bar to discipline that it cannot discipline under the current rules?

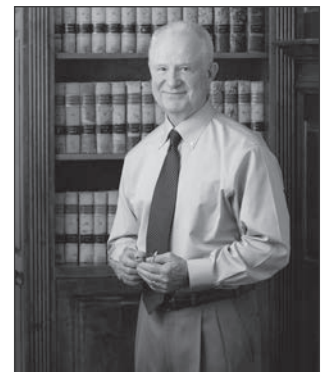
Finally, Subsection (c) of the proposed RPC 8.4 amendment contains a "legitimate advocacy" exception to the prohibitions listed within Section (7) of the Rule. Under what circumstances could intimidation and harassment constitute "legitimate advocacy"? No one wants to be intimidated or harassed.⁹ If this Rule is necessary, should it apply to everyone and simply preclude any conduct that has no substantial purpose other than to intimidate or harass a person? (As we know, what is "legitimate" depends on one's subjective view of what are appropriate societal values; values not all of which will be shared by every member of the public. In other words, the application of the Rule could be subject to the tyranny of the majority belief system; a concept that is antithetical to the opportunity

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for effective advocacy and the role of attorneys on behalf of persons or groups holding minority beliefs.)

We all should appreciate the wisdom and restraint of our Supreme Court in requiring closer scrutiny of both the advisability and language of the earlier proposed amendment to RPC 8.4. But while the latest version may avoid some constitutional issues created by the earlier language, it raises a number of issues, which still need to be thoroughly debated. The more members of OADC who are willing to share their insights and comments, either for, against, or for a modified version of the proposed amendment, the better the end result will be for all members of the Bar.

If you wish to provide input, contact your Board of Governors member or a member of the House of Delegates in your region. Both can be found on the Bar's website under Member Groups.¹⁰

Endnotes

1. The full text of Rule of Professional Conduct 8.4 ("Misconduct") is as follows with the proposed amendment as of November 1, 2013 in bold:
 - (a) It is professional misconduct for a lawyer to:
 - (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
 - (2) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
 - (3) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness to practice law;
 - (4) engage in conduct that is

prejudicial to the administration of justice;

(5) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate these Rules or other law; [or]

(6) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law[.]; or

(7) in the course of representing a client, engage in conduct that knowingly manifests bias or prejudice based upon race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, disability or socioeconomic status.

...

(c) Notwithstanding paragraph (a)(7), a lawyer shall not be prohibited from engaging in legitimate advocacy with respect to the bases set forth therein, or from declining, accepting, or withdrawing from representation of a client in accordance with Rule 1.16.

See Exhibit A to the "Summary of 2013 House of Delegates Actions November 1, 2013" found at (http://www.osbar.org/_docs/leadership/hod/2013/13HODActions.pdf)

2. To see proposed rule changes and amendments to the disciplinary rules see the "Oregon State Bar, 2013 House of Delegates Meeting Agenda" (http://www.osbar.org/_docs/leadership/hod/2013/13HODagenda.pdf).

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3. There are official court reporters at the House of Delegates annual meetings creating a record. A transcript of the debate is available free of charge from the OSB.
4. See Report of the Oregon State Bar Board of Governors RPC 8.4 Drafting Committee, June 2014, Pg. 2 (<http://bog11.homestead.com/RPC/2014.06.27.Report.pdf>)
5. Staff counsel for the Oregon Supreme Court prepared a memo to the OSB setting forth a number of issues regarding the language of the proposed amendment, found at <http://bog11.homestead.com/RPC/Homepage.pdf> (click the link titled "Supreme Court Comment on 8.4 Proposal (12.20.2013).")
6. See Report of the Oregon State Bar Board of Governors RPC 8.4 Drafting Committee, June 2014, Pg. 2 (<http://bog11.homestead.com/RPC/2014.06.27.Report.pdf>).
7. We currently have an absolute privilege with regard to statements made within a judicial proceeding, including demand letters. See e.g. *Ghard v. Galton*, 277 Or 109 (1977) (upholding an attorney's absolute privilege to assert in a demand letter that plaintiff was previously involved in a fatal accident while in "a drunken stupor").
8. See ORS 166.065 and ORS 166.155.
9. The latest amendment removes from the protected class "socioeconomic status" and removes language contained in the previous proposed amendment that "a lawyer shall not be prohibited from declining, accepting or withdrawing from representation of a client in accordance with Rule 1.6."
10. If you do not know what region you belong to, a Region map is found under "Member Groups" and the tab "BOG Home."



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