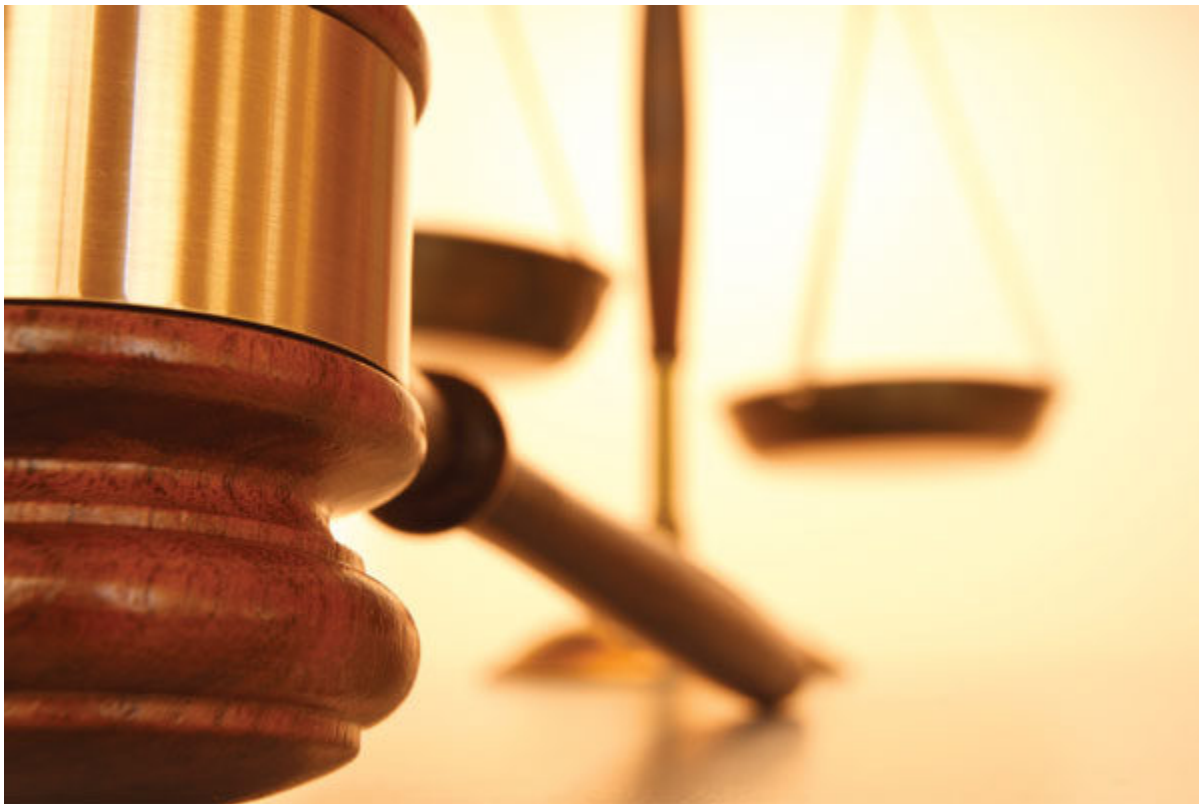


ETHICS COLUMN: ABA Model Rule 8.4(g): Should Discriminatory Conduct or Remarks Outside the Representation of a Client have Disciplinary Consequences? ~ By Alec Rothrock

February 7, 2017



To understand the new Model Rule 8.4(g) to the American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules), it is necessary to describe the disciplinary treatment of discriminatory conduct under the Colorado Rules of Professional Conduct (Colorado Rules) and the Model Rules.

Effective January 1, 1993, the Colorado Supreme Court repealed the Colorado Code of Professional Responsibility (Code) and adopted the Colorado Rules, which are based on the ABA Model Rules. One Rule, however, did not derive from either the Code or the Model Rules. It prohibited a lawyer from engaging in "conduct [in the representation of a client] that exhibits or is intended to appeal to or engender bias against a person on the basis of the person's race, gender,

religion, national origin, disability, age, sexual orientation, or socioeconomic status [...]” [Colo. RPC 1.2\(f\) \(1993\)](#). [1]

In 2008, the Court moved the Rule to Colo. RPC 8.4(g) and adopted a related Comment almost identical to a Comment to Model Rule 8.4, which, unlike Colo. RPC 8.4, did not contain a specific anti-discrimination Rule but instead treated such conduct as a potential violation of Model Rule 8.4(d), which prohibits “conduct prejudicial to the administration of justice.” The Colorado Comment describes the prohibited conduct in terms slightly different than Colo. RPC 8.4(g) and states that a violation of that Rule may also include “conduct prejudicial to the administration of justice” in violation of Colo. RPC 8.4(d). [Cmt. \[3\]](#), [Colo. RPC 8.4](#). [2]

Colo. RPC 8.4(g) has been the subject of one published decision. In 2011, a disciplinary hearing board publicly censured a lawyer for violating Colo. RPC 8.4(g) for referring to a female judge as a “c**t” in the course of negotiating a plea deal with prosecutors. [People v. Gilbert, Case No. 10PDJ067, 40 The Colorado Lawyer 132 \(May 2011\) \(Colo. PDJ Jan. 14, 2011\)](#). Interestingly, the hearing board found that the Office of Attorney Regulation Counsel did not prove that the remark “exhibit[ed] or [was] intended to appeal to or engender bias,” in the words of Colo. RPC 8.4(g) itself, but that OARC did prove that the remark exhibited bias by knowingly manifesting it by word, in the language of the related Comment to Colo. RPC 8.4. [Id. at 135](#). The hearing board evidently concluded that the Comment reflected an appropriate interpretation of Colo. RPC 8.4(g), even if its language did not track with that of that Rule. The hearing board also found that the remark did not constitute “conduct prejudicial to the administration of justice” in violation of Colo. RPC 8.4(d) because the respondent lawyer directed it to such a limited audience. [Id.](#); [see also People v. Sharpe, 781 P.2d 659, 660 \(Colo. 1989\) \(publicly censuring district attorney under Rule prohibiting highly inappropriate, offensive conduct for referring to Hispanic witness as “chili eating bastard”\)](#). Indiana, in contrast, has disciplined several lawyers under a Rule that tracks Comment [3] to Colo. RPC and Model Rule 8.4 by prohibiting lawyers from manifesting bias by words. [3]

In August 2016, after considerable debate, the ABA adopted subsection (g) to Model Rule 8.4 and three related Comments. In relevant part, Model Rule 8.4(g) prohibits a lawyer from engaging 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 conduct” that is “related to the practice of law.” [Model Rule 8.4\(g\)](#). [4] As of this writing, there has been no formal request to the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct to recommend Model Rule 8.4(g) to the Court for adoption in the Colorado Rules.

What Difference Would the Adoption of Model Rule 8.4(g) Make in Colorado?

There are two critical differences between Colo. RPC 8.4(g) and Model Rule 8.4(g). First, Model Rule 8.4(g) contains three protected categories not found in Colo. RPC 8.4(g): ethnicity, gender identity and marital status. The Report accompanying the ABA Resolution adopting Model Rule 8.4(g) (Report) states that “gender identity” includes “gender expression,” which refers to “persons whose current gender identity and expression are different from their designations at birth.” [Report, p. 12](#).

Second, and most critically, Colo. RPC 8.4(g) is limited to conduct that occurs in the representation of a client, whereas Model Rule 8.4(g) covers any conduct that is “related to the practice of law.” A Comment accompanying Model Rule 8.4(g) explains what conduct is “related to the practice of law.” It begins by stating that this phrase includes “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law.” [Cmt. \[4\], Model Rule 8.4](#). Most of this conduct occurs in the representation of a client. To this extent, Model Rule 8.4(g) covers about the same territory as Colo. RPC 8.4(g) as interpreted in *Gilbert, supra*.

However, the ABA Comment goes on to state that conduct “related to the practice of law” also includes conduct in “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.” *Id.* The Report indicates that this language includes “bias or prejudice in other professional capacities (including attorneys as advisors, counselors and lobbyists) or other professional settings (such as law schools, corporate law departments and employer–employee relationships within law firms),” including conduct that occurs at “law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law.” [Report, pp. 2, 11](#). Most, if not all, of this conduct occurs when a lawyer is not representing a client. This is where Model Rule 8.4(g) represents a significant departure from Colo. RPC 8.4(g).

Model Rule 8.4(g) and its Comments limit, or purport to limit, the application of Model Rule 8.4(g) by stating that it does not:

- “limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.” [Model Rule 8.4\(g\) \(emphasis added\)](#). The Report states that the Rule would “not change the circumstances under which a lawyer may accept, decline or withdraw from a representation. To the contrary, the proposal makes clear that Model Rule 1.16 addresses such conduct.” [Report, p. 8](#). This is a debatable point. Model Rule 1.16 and its Colorado counterpart specify when a lawyer must decline a representation but do not specify when a lawyer may decline a representation.
- limit the “scope or subject matter of the lawyer’s practice” or prevent the lawyer from limiting her practice to “members of underserved populations in accordance with these Rules and other law.” [Cmt. \[5\], Model Rule 8.4](#). Prosecutorial discretion aside, Model Rule 8.4(g) can be read to subject a lawyer to discipline for declining a representation on grounds prohibited by that Rule. Colorado law may prohibit such conduct anyway. [See C.R.S. § 24-34-601\(1\)\(a\) \(prohibiting discrimination in places of public accommodation\); Nathanson v. Commonwealth of Massachusetts, 16 Mass.L.Rptr. 761 \(Mass. Super. 2003\) \(affirming lower tribunal’s decision that law firm specializing in representing women in dissolution of marriage cases violated antidiscrimination law by refusing to represent prospective male client\)](#).
- “preclude legitimate advice or advocacy consistent with these Rules.” [Model Rule 8.4\(g\)](#). A Comment states that a “trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).” [Cmt. \[5\], Model Rule 8.4](#).
- apply to “conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.” [Cmt. \[4\]](#),

[Model Rule 8.4](#). One commentator criticizes this language as authorizing reverse discrimination. [R. Rotunda, “The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ but not Diversity of Thought,” 191 *Legal Memorandum* 7 \(Heritage Foundation Oct. 6, 2016\).](#)

Model Rule 8.4(g) also contains a knowledge or mens rea requirement, which the ABA incorporated at the eleventh hour to gain the support of some ABA groups. [A. Mattson, *Litigation News* \(Dec. 6, 2016\)](#). In order to prove a violation of this Rule, bar counsel would be required to prove that the lawyer knew, or reasonably should have known, that his or her conduct constituted harassment or discrimination based on one of the categories enumerated in the Rule. The Report states that this alternative knowledge requirement provides a “safeguard for lawyers against overaggressive prosecutions for conduct they could not have known was harassment or discrimination, as well as a safeguard against evasive defenses of conduct that any reasonable lawyer would have known is harassment or discrimination.” [Report, p. 8](#). The phrase “reasonably should know” means whatever a “lawyer of reasonable prudence and competence” would have known. [Colo. RPC 1.0\(j\)](#). As a practical matter, this standard would be far more effective as a safeguard against “evasive defenses” than it would be against “overaggressive prosecutions.”

It is also important, in determining the degree to which Model Rule 8.4(g) would expand lawyer disciplinary exposure, to know whether any conduct prohibited by Model Rule 8.4(g) but not by Colo. RPC 8.4(g) would be prohibited under other ethics rules. This is almost certainly the case for at least some conduct constituting “harassment,” which on its face Colo. RPC 8.4(g) does not reach. Model Rule 8.4(g), on the other hand, expressly prohibits harassment, which it defines to include “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.” [Cmt. \[3\], Model Rule 8.4](#).

In *People v. Lowery*, 894 P.2d 858 (Colo. 1995), a hearing board found that a lawyer engaged in “sexually provocative conduct” with three female employees of his firm, including making “numerous lewd, sexually graphic remarks,” groping private body parts and kissing, and commenting on the sexual abilities of himself and others. *Id.* at 759. The Court suspended the lawyer for a year and a day for violating a Disciplinary Rule under the Code that prohibited “conduct that adversely reflects on the lawyer’s fitness to practice law.” [See *Id.* \(violating DR 1-102\(A\)\(6\)\)](#). Although DR 1-102(A)(6) is long gone, the same conduct would almost certainly violate Colo. RPC 8.4(h), which prohibits “conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer’s fitness to practice law.” [Colo. RPC 8.4\(h\)](#).

Should Colorado adopt Model Rule 8.4(g)?

Some critics of Model Rule 8.4(g) claim that it would stifle free speech over “viewpoints expressed, for example, at a CLE or during a hot-topic social conversation, a sporting event, or firm outing.” [A. Mattson, *Litigation News* \(Dec. 6, 2016\)](#). Another commentator condemns what he describes as a Rule that would prohibit “certain opinions on matters of race and socioeconomics, certain religious-based beliefs on marriage, abortion, and moral judgments on various subjects.” [N. Madden, “Amended Bar Association Rule is a Nightmare for Religious Liberty,” *Conservative Review*, Aug. 9, 2016](#). Some groups have promised challenges to the constitutionality of Model Rule 8.4(g) if it is adopted by the states. *Id.*

The constitutionality of Model Rule 8.4(g) is sure to be challenged in court. Those challenges, if successful, could derail some or all of the Rule. [See generally R. Rotunda, “The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ but not Diversity of Thought,” 191 Legal Memorandum \(Heritage Foundation Oct. 6, 2016\).](#) Opponents of Model Rule 8.4(g) have offered a variety of examples of how lawyers could be disciplined for expressing sincerely-held opinions on issues of public policy.

Constitutional questions aside, the following remarks by former ABA Section of Litigation Chair Don Bivens give a realistic and balanced assessment of Model Rule 8.4(g):

Amended Model Rule 8.4 is intended [...] to give women, among others, a hammer to address potentially unlawful conduct and conduct that casts the profession in an inappropriate light, says Bivens. “You can go to any church. You can belong to any club you want to belong to. [The amended Model Rule] does not prohibit you from doing that. Is there a gray area? Yes, to some degree,” Bivens says. But those involved in the revision process wanted to leave decisions about exactly what “relates the practice of law” to state regulators, Bivens explains. [A. Mattson, Litigation News \(Dec. 6, 2016\).](#)

Whether it is a good thing to give people a disciplinary “hammer” against lawyers for engaging in harassment or discrimination within the meaning of Model Rule 8.4(g) remains to be seen. The core conduct targeted by the Rule is indefensible. But the law already provides relief for it. One commentator remarked that there was “no clamor among state bar disciplinary counsels for adoption of this rule change, in part because egregious instances of misconduct already tend to result in harassment lawsuits and employment law claims.” [A. Mattson, Litigation News \(Dec. 6, 2016\).](#)

Indeed, a Comment related to Model Rule 8.4(g) states that the “substantive law of antidiscrimination and anti-harassment statutes and case law may guide” its application. [Cmt. \[3\], Model Rule 8.4\(g\).](#) The Report notes, by way of example, that under the “Americans with Disabilities Act discrimination against persons with disabilities includes the failure to make the reasonable accommodations necessary for such person to function in a work environment.” [Report, p. 13.](#) Disciplinary proceedings alleging violations of Model Rule 8.4(g) would necessarily mirror antidiscrimination and anti-harassment proceedings.

This would not be the first instance of attorney regulation of conduct falling outside the representation of a client. Colorado lawyers are subject to discipline for committing a “criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects,” Colo. RPC 8.4(b), and for engaging in conduct involving “dishonesty, fraud, deceit or misrepresentation,” Colo. RPC 8.4(c), even when the conduct is wholly unrelated to the practice of law. [E.g., *People v. Hickox*, 57 P.3d 403 \(Colo. 2002\) \(six-month suspension for, among other things, conviction of disturbing the peace, assault, and domestic violence\); *People v. Rishel*, 50 P.3d 938 \(Colo. PDJ July 8, 2002\) \(finding violations of Colo. RPC 8.4\(b\), 8.4\(c\) and 1.15\(b\) \(requiring lawyers to deliver and account for funds and property\) in connection with lawyer’s dishonest handling of pool of funds used for Colorado Rockies season tickets\).](#) Colorado lawyers are also subject to discipline for failure to pay maintenance and child support. [E.g., *In re Green*, 982 P.2d 838 \(Colo. 1999\).](#) [See generally P. O’Rourke, Discipline Against Lawyers for Conduct](#)

[Outside the Practice of Law](#), 32 *The Colorado Lawyer* 75 (April 2003). At least Model Rule 8.4(g) would require the conduct to relate, in some way, to the practice of law.

Former ABA Section of Litigation Chair Don Bivens was correct in stating that there are “gray areas” in Model Rule 8.4(g), and that what “relates the practice of law” will be left to state regulators. *See A. Mattson, supra*. One ethics committee went through this exercise when it interpreted a Rule prohibiting discriminatory conduct that occurs in a “professional capacity” not to prohibit a lawyer’s membership in an organization with “gender, religious or racial requirements for membership,” but likely to prohibit a lawyer’s personal participation in “activities that advance any of [the organization’s] discriminatory requirements, policies or beliefs,” particularly in a leadership role. *Ind. Op. 1 of 2015, “Participation in Discriminatory Organizations — The Scope of Rule 8.4(g),” April 2015*. As another commentator has stated, “Admittedly ‘not everyone is going to agree with where the lines are drawn. [...] The amendments are designed to be a statement that the profession takes its responsibility not to engage in this conduct very seriously.’” *Id.*

Conclusion

Without question, Model Rule 8.4(g) would, if adopted in Colorado, expand the scope of activities for which lawyers can be disciplined. The objectives of the Rule are laudable, but it would be a mistake to think that the Rule should concern only bigoted lawyers. Especially in determining whether a lawyer’s conduct “relates to the practice of law,” bar counsel will have plenty of room in which to exercise its prosecutorial discretion.

Disciplinary proceedings almost always cause tremendous anxiety, distraction and expense, and sometimes the allegations are completely unfounded. Perhaps there was no better way to write such an ambitious Rule. If Model Rule 8.4(g) is adopted here, Colorado’s Office of Attorney Regulation Counsel will have to construe it conservatively to avoid the parade of horrors depicted by its opponents. **D**

Alec Rothrock is a shareholder with the Greenwood Village law firm of Burns Figa & Will, P.C. and an adjunct professor of legal ethics at the University of Denver Sturm College of Law. Rothrock is a former chair of the Colorado Bar Association Ethics Committee and can be reached at arothrock@bfwlaw.com.

1 It is professional misconduct for a lawyer to:

(f) engage in conduct [in the representation of a client] that exhibits or is intended to appeal to or engender bias against a person on account of that person’s race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process. [...] [Colo. RPC 1.2\(f\) \(1993\)](#).

2 [3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion,

national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule. [Cmt. \[3\], Colo. RPC 8.4.](#)

3 *See, e.g., In re McCarthy*, 938 N.E.2d 698 (Ind. 2010) (30-day suspension for lawyer who, taking offense to a demand that lawyer arrange a meeting to resolve a dispute, responded by email that he was not anyone's "nigger"); *In re Kelley*, 925 N.E.2d 1279 (Ind. 2010) (public reprimand for lawyer who, on behalf of husband, asked representative of company leaving pre-recorded messages asking for husband if he was "gay" or "sweet"); *In re Thomsen*, 837 N.E.2d 1011 (Ind. 2005) (public reprimand for lawyer who, while representing husband in child custody matter, by innuendo suggested that wife was unfit parent because she was dating a black man).

4 It is professional misconduct for a lawyer to:

(g) 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. [Model Rule 8.4\(g\).](#)