BIAS RISKY TERRITORY FOR ERs

Ann Ching's and Lisa Panahi's "Rooting Out Bias in the Legal Profession" (January 2017) tackles a complex and, to many, sensitive subject: the ABA's adoption of new Model Rule 8.4(g).

The authors correctly imply that Arizona's current rules regime contains a framework for addressing bias-motivated lawyer conduct. They also correctly note that opponents of the ABA model rule change invoked substantial vagueness, due process, and free exercise concerns.

These concerns persist. As close watchers of (and, in Andy's case, a participant in) the events at the ABA that culminated in the new model rule's passage, we offer a few related observations.

First, the ABA model rule change process was not robust. Material changes were added hastily and at the last minute, without any opportunity for comment by the public, in order to secure passage. The process was political. The presumptions of neutrality, thoroughness and rigor that usually attend ABA model ethics rule-making do not apply here.

Rooting Out Bias in the Legal Profession

The Path to ABA Model Rule 8.4(g)

BY ANN CHING & LISA M. PANAHI

YOU are mentoring a recent law school graduate who works as an associate at a Phoenix law firm. On Monday morning, he calls you to seek your confidential advice. Over the weekend, the associate attended a firm-sponsored dinner party for new associates, along with several other associates and partners from the firm. During dinner, one of the partners made a racist and sexist joke about a member of the U.S. women's national soccer team. After some awkward silence, the moment passed and the dinner concluded without further incident, but the associate was deeply offended.

During your phone conversation, the associate asks you a simple question. He knows the partner's joke was inappropriate, but was his conduct unethical?

Under the current Arizona Rules of Professional Conduct, the answer would be no. Although Comment [3] to Ethical Rule (ER) 8.4 refers to conduct that manifests bias or prejudice, such conduct violates the Rule only when it is prejudicial to the administration of justice.[1] Similarly, although Rule 41(g) of the Rules of the Supreme Court places a duty on members to "avoid engaging in unprofessional conduct,"[2] such conduct can result in discipline under Rule 41 only when it occurs "during the practice of law."[3]

Until recently, the answer would be the same under the American Bar Association (ABA) Model Rules of Professional Conduct. Like Arizona's ER 8.4, Model Rule 8.4 used to prohibit discriminatory conduct only when prejudicial to the administration of justice.[4] However, in August 2016 the ABA amended Model Rule 8.4 to add an antidiscrimination subsection as part of the black-letter language of the Rule.[5]

This article discusses the development and implementation of Model Rule 8.4(g), explains what conduct is prohibited by it, and explores how this amendment may affect Arizona lawyers.

Background of Model Rule 8.4(g)

The effort to incorporate an antidiscrimination provision into the Model Rules began in 1998, when the ABA Criminal Justice Section and the ABA Standing Committee on Ethics and Professional Responsibility ("Ethics Committee") separately developed proposals for this provision.[6] These proposals were combined and adopted at the ABA's 1998 annual meeting as Comment [3] to Rule 8.4:

> [3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.[7]

Although a laudatory first step, adoption of this Comment fell short of imposing an actual obligation on lawyers to refrain from discriminatory conduct.[8] Furthermore, the guidance in the Comment pertained only to discriminatory conduct that is prejudicial to the administration of justice. In that sense, Comment [3] provided only additional guidance to complying with Model Rule 8.4(d), which proscribes conduct prejudicial to the administration of justice.

The drive to adopt a black-letter antidiscrimination rule began in earnest in 2014, when the ABA Ethics Committee convened a working group to consider such a rule.[9] In December 2015, the Committee issued a memorandum[10] and draft proposal[11] for Model Rule 8.4(g):

> It is professional misconduct for a lawyer to:
> ****
> (g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

The draft proposal also included a revision to Comment [3] clarifying that the "operation and management of a law firm or law practice" is included in conduct related to the practice of law. The revised Comment further noted that the Rule does not require a lawyer to represent any particular person or entity, and it does not alter a lawyer's obligations under Rule 1.16 regarding withdrawing from or declining to accept representation.

The ABA published online all public comments received on the December 22 draft proposal. Although the draft proposal garnered some public support,[12] it also drew a great deal of criticism. One oft-repeated criticism was that the proposed Rule infringed on a lawyer's right to choose whether to represent a client.[13] Certain religious organizations objected to the proposal, citing concerns that

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Second, by an overwhelming margin, the many dozens of comments the ABA *did* receive expressed opposition, not support. Opposition was not so much "quelled" as ignored.

Third, many opposing commenters invoked free speech concerns. While an earlier draft of the proposal credited these concerns, alluding to First Amendment interests in a proposed comment, that language was excised. One will search the new model rule and related comments in vain for any reference to protection of free speech interests. The end result is that lawyers in states that adopt the new model rule may well be subjected to bar complaints and discipline as a mechanism to enforce "political correctness." One need only read the new model rule and comments themselves—as opposed to the gloss offered by proponents—to see this.

Fourth, the assertion that the new model rule protects diversity and inclusion initiatives derives from just such gloss, not the actual language of the rule or comments. A principal rationale advanced by the proponents was that anti-bias content should be elevated from the comment (where it resided before, and currently resides under Arizona ER 8.4) to the rule. Yet under the new model rule, "discrimination" based on categories including gender and ethnicity is barred, while the purported exclusion for diversity and inclusion initiatives appears in the comments. One need not think very hard or long, especially given that "discrimination" is not defined in the new model rule, to see the problem. The temptation to wish this problem away is powerful. But the struggles of the federal judiciary to decide consistently what "benign" race-based classifications are and are not constitutional show that the problem is real, and that bar complainants and others may take different views than those who would maintain such initiatives.

Finally, while the ABA has sought to rush states including Arizona into adopting the new model rule, to our knowledge that push has not found footing here. This is a good thing, for two distinctively Arizonan reasons among many others.

One is separation of powers. When the ABA expanded the model rule's anti-bias proscriptions beyond conduct prejudicial to the administration of justice, it ventured into territory that may well lie beyond the purview of the judiciary, as opposed to the legislature together with the executive, to regulate. Arizonans take separation of powers seriously.

The other is that the ABA sanctions standards, which Arizona's lawyer discipline rules incorporate, contain no sanction for a violation of the new model rule that does not also prejudice the administration of justice. (As the article authors point out, conduct prejudicing the administration of justice already was covered by the pre-amendment ABA model rule, and is covered by current Arizona ER 8.4.) The ABA may have been comfortable adopting a model rule for disciplining lawyers without telling lawyers what fate might befall a violator. Arizona is smarter, and its lawyers deserve better, than that.

Whatever one thinks of the politics that drove the proposal through to adoption by the ABA, these and other issues with the new model rule deserve searching scrutiny before attempting to apply it to real-world

working lawyers. The old adage, "If it ain't broke, don't fix it," deserves equal consideration.

—Andrew F. Halaby
Brianna L. Long
Phoenix

> "What should ye do then, should ye suppress all this flowery crop of knowledge and new light sprung up and yet springing daily in this city? Should ye set an oligarchy of twenty engrossers over it, to bring a famine upon our minds again, when we shall know nothing but what is measured to us by their bushel? … Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." – John Milton

John Milton's 20 engrossers are at it again. This time they're the 589 members of the ABA's policy-making House of Delegates. And two Ethics Counsel of the State Bar of Arizona.

In January's Arizona Attorney, after pages of analysis, Ethics Counsel matter-of-factly advise us that a "racist and sexist joke about a member of the U.S. women's national soccer team" told by a partner in a law firm at a firm-sponsored dinner party would "clearly be prohibited" by new Section 8.4(g) of the ABA's Model Rules of Professional Conduct. That is to say, if Section 8.4(g) of the Model Rules were the law in Arizona (which, thankfully, it is not … yet), you or I could be subject to complaint, hearing, discipline and possible disbarment … for telling a joke.

To refresh your recollection, the new Model Rule makes it 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."

The hypothetical offered by Ethics Counsel has a law firm associate (whom you, the reader, mentor) attending the aforementioned dinner party. After the joke is told, awkward silence ensues, the moment passes, and the dinner concludes without incident, except that the associate is *deeply* offended (emphasis added). The associate, as your mentee, wants your opinion as to whether the partner's conduct is unethical under the Model Rule.

I submit that Ethics Counsel's conclusion that it *clearly* is, is

clear as mud.

Since the Model Rule proscribes only “conduct,” it is fair to ask if speech is even covered. Comment 3 to the Model Rule answers that question, uncorking the spectacular euphemism “verbal … conduct.” We are all familiar with Supreme Court cases holding that conduct (e.g., flag burning) is speech in order to *gain* the protection of the First Amendment. Here, drafters of the Model Rule have perversely concocted “verbal … conduct” in an apparent attempt to ***avoid*** the protection of the First Amendment. (It should be noted that the specious turn of phrase actually used in Comment 3 is “verbal or physical conduct,” obscuring all the more the sinister ultimate objective of suppressing free speech.)

The tenuousness of this ruse is exposed by merely substituting “speech” for “verbal … conduct” in the text of Comment 3: “[D]iscrimination includes harmful speech … that manifests bias or prejudice towards others. Harassment includes … derogatory or demeaning speech.” This is just another attempt by end-around to punish “hate speech.” But “hate speech” (as commonly understood), last I checked, is still eminently protected by the First Amendment, as are lawyers from attempts by government to limit their speech via bar rules. See *Shapero v. Ky. Bar Ass’n,* 486 U.S. 466, 469 (1988).

What a joke. What a joke it must be. Let’s hear the joke. I challenge Ethics Counsel, for our compleat edification, to tell us all the joke that Ethics Counsel considers so odious as to warrant bar discipline under the Model Rule. And then tell us who decides what constitutes a racist or sexist joke, or racist *and* sexist (presumably twice as reprehensible)? All hearers? A majority by show of hands? The listener with the most delicate sensibilities? A judge who tells us “I know it when I hear it”? Are listener(s) the victim(s)? (Who else? Humankind? Womankind? Soccerkind? (the WNBA?)) To complain, must the listener(s) be the same race and gender as the soccer player (who is presumably the butt of the joke)—otherwise, is there standing? What if the listener is only mildly offended rather than deeply offended (or more likely (excuse my cynicism) feigning deep offense in order to sanctimoniously virtue-signal by punishing others for bad taste or thinking out loud)? What if the partner telling the joke is the same race and gender as the soccer player? What if the joke’s butt is instead a male, white, Christian chess player? What if the joke is an adept double entendre that is merely misconstrued? What if instead of awkward silence, a suppressed chuckle or a hearty guffaw is heard? Is mirth a defense?

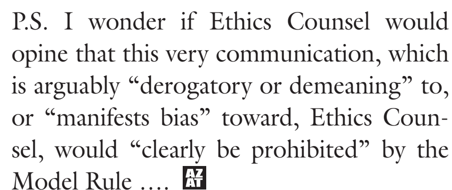
The enduring beauty of the First Amendment is that none of this nonsense matters. A mere joke, howsoever heinous, is protected speech in the United States of America. And a lawyer’s free speech should be no less protected than that of any other citizen. Why didn’t this niggling detail cross the minds of the Delegates, or enter into Ethics Counsels’ calculus?

And what about harm? Where is the harm? On pain of bar discipline and possible disbarment, shouldn’t the harm be severe, pervasive, lasting, objectively damaging harm? Harm prejudicial to the administration of justice? What have we here? Deep offense? That’s it? What we might call in today’s vernacular “snowflake hurt”? Snowflake hurt is no harm at all, or nominal harm at most, and is merely the acceptable consequence of the robust verbal rough and tumble that accompanies our revered foundational principle of free speech. Snowflake hurt, which must be endured by each of us willingly if not cheerfully, daily, is part and parcel of the free society we enjoy as Americans.

My advice to the associate? #chilloutbro (I try to speak their language.) Find a safe space and wait quietly until the sensation of deep offense completely subsides. If it happens within a reasonable time, congratulations, success in the legal profession is yet thinkable. And it’ll get easier with practice. But if it does not go away, or takes inordinately long, consider a move to China or North Korea, where “the birds have ears and the bees have eyes,” and even family members routinely rat each other out to the thought police. See *Life and Death in Shanghai* by Nien Cheng, or *In Order To Live* by Yeonmi Park.

John Milton ran afoul of government censors in 1644 and chose at considerable personal risk to directly challenge his masters in a speech before Parliament, quoted in part above. Now nearly 400 years later, nothing has changed. Powerful lawyers whose core function is to protect your rights meet on weekends in vacation destinations scheming to take them away. And minions across the land back them up. When Section 8.4(g) of the Model Rules comes to a theater near you, as it inevitably will, resist it. And if it is adopted in Arizona, as it full well may someday be, defy it. Let John Milton’s fine example be your guide.

—Stephen W. Baum
Phoenix



P.S. I wonder if Ethics Counsel would opine that this very communication, which is arguably “derogatory or demeaning” to, or “manifests bias” toward, Ethics Counsel, would “clearly be prohibited” by the Model Rule ….

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