

**STATE OF VERMONT  
VERMONT SUPREME COURT  
\_\_\_\_\_ TERM, 2017**

**Order Promulgating Amendments to the Vermont Rules of Professional Conduct**

Pursuant to the Vermont Constitution, Chapter II, Section 37, it is hereby ordered:

1. That Rule 8.4(g) of the Vermont Rules of Professional Conduct and Comment be amended to read as follows (deleted matter struck through; new matter underlined):

**Rule 8.4. MISCONDUCT**

It is professional misconduct for a lawyer to:

\* \* \* \* \*

~~(g) discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual. engage in~~ conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, creed, color, sex, religion, national origin, ethnicity, ancestry, place of birth, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, or other grounds that are illegal or prohibited under federal or state 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] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination 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 antiharassment statutes and case law may guide application of paragraph (g).

[4] 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. Paragraph (g) does not prohibit conduct undertaken to promote diversity. Lawyers may engage in 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.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). 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. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

~~[4]~~ [6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

~~[5]~~ [7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

### **Reporter's Notes—2017 Amendment**

Rule 8.4(g) and new Comments [3]-[5] are amended to adopt, with minor verbal changes, amendments to the American Bar Association's Model Rules of Professional Conduct approved by the ABA on August 8, 2016. See ABA, House of Delegates 2016 Annual Meeting Daily Journal, at 5. Former Comment [3] is deleted and replaced by new Comment [3]. Former Comments [4] and [5] are renumbered [6] and [7].

Despite prior unsuccessful amendment efforts, the Model Rules had not previously contained a specific provision prohibiting discrimination and harassment. Former Comment [3], adopted in 1988, had stated that discrimination and harassment could violate Rule 8.4(d) if they constituted conduct prejudicial to the administration of justice. That Comment, however, was only a guide to interpretation and was of narrow scope. See, generally, ABA Revised Report 109 (House of Delegates, August 2016). New Model Rule 8.4(g) was adopted to fill this void with a black letter rule. Its purpose is to fulfill the ABA's responsibility to "lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but wherever it occurs in conduct by lawyers related to the practice of law. The public expects no less of us." *Id.* at 15.

Vermont originally adopted V.R.Pr.C. 8.4(g) in 1986, becoming one of a group of 25 states frustrated by ABA inaction. ABA Revised Report 109, at 5 n.11. In addition, 13 states have adopted language similar to former Comment [3]; only 14 states do not address the matter at all in their Rules of Professional Conduct. *Id.* at 5-6 nn.13, 14. The present amendment of V.R.Pr.C. 8.4(g) supersedes the 1986 language, both for uniformity with the amended ABA Model Rule and to incorporate the more specific and detailed language of the ABA amendment and its additions to the Comment.

The amended rule prohibits conduct in the practice of law that discriminates or harasses on the basis of a lengthy list of characteristics. In line with the last sentence of amended Comment [3], the Vermont rule adds to the list “ancestry” and “place of birth,” which are included in the anti-discrimination provision of the Vermont Fair Employment Practices Act, 21 V.S.A. § 495(a)(1), and “religious creed” and “color” from the Vermont Public Accommodations Act’s sections prohibiting discrimination, 9 V.S.A. §§ 4502(a), 4503(a)(1). The addition in the Vermont rule of “other grounds that are illegal or prohibited under federal or state law” includes provisions such as 21 V.S.A. § 495(a)(5) (discrimination on the basis of HIV), 39 U.S.C. § 4301 et seq. (discrimination on the basis of veteran status), and 42 U.S.C. § 2000 et seq. (discrimination on the basis of genetic information).

Comment [4] makes clear that “conduct in the practice of law” is to be understood broadly to include many activities beyond the confines of traditional client representation, including law practice management and bar association or other practice-related activities including social occasions.

The rule also makes clear that it does not affect the provisions of Rule 1.16 concerning mandatory or optional refusal or optional withdrawal from representation. Rule 1.16(a) requires withdrawal if the representation would lead to a violation of the Rules of Conduct or other law. Thus, a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g). The optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule.

Finally, Rule 8.4(g) permits “legitimate advice or advocacy” consistent with the rules. Essentially, as new Comment [5] suggests, this language calls on the lawyer not to forget that even the client whose views or conduct would violate legal prohibitions against discrimination and harassment applicable to him or her may deserve representation under Rules 6.1 and 6.2. As Rule 1.2 makes clear, representation does not constitute endorsement of a client’s views and may include efforts to assist the client to avoid unlawful activity. The effect of Rule 8.4(g) is to prohibit the lawyer from expressing views as his own that would violate that rule.

2. That this rule and comments, as amended, are prescribed and promulgated effective \_\_\_\_\_, 2017. The Reporter’s Notes are advisory.

Dated in Chambers at Montpelier, Vermont, this \_\_\_ day of \_\_\_\_\_, 2017.

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

Proposed