

#MeToo – Sexual Harassment and Discrimination

The #MeToo movement has been an important wake up call to all of America, bringing to light that many workplaces are not safe or respectful towards women.

- Recent events in the legal community, including Indian country, have shown the necessity for all attorneys to assess their conduct as well as the conduct of others around them in the workplace and beyond
- Many states have taken steps to combat sexual harassment and discrimination in the workplace, including through imposition of ethical obligations on attorneys. These ethical obligations make it a violation for an attorney to engage in discrimination in the practice of law.
 - E.g., 22 NYCRR §1200.00, Rule 8.4(g)

In 2016, the American Bar Association's House of Delegates adopted a new provision to Rule 8.4, which governs an attorney's misconduct.

Old Rule 8.4:

It is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice

New Rule 8.4:

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.

Prior to the adoption of this rule in 2016 the ABA Model Rules did not contain any express "black letter" prohibition on lawyers engaging in workplace harassment or discrimination. The only reference to harassment or discrimination was contained in a comment to the Model Rules. Comment 3 of the Old Rule read:

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 (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.

ABA's Reasons for the Change:

- Comments to the rule are only guidance, black letter law needed for enforcement/disciplinary proceedings
- “Prejudicial to the Administration of Justice” no longer a limiting factor
- No longer limited to the relationship to client representation
- Addition of ethnicity, marital status, and gender identity
- New focus on “harassment” and “discrimination,” not “bias and prejudice”

Along with the amendment to Model Rule 8.4(g), Comment 3 was also added:

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 anti-harassment statutes and case law may guide application of paragraph (g).

Comment 4 of the New Rule specifies what encompasses conduct related to the practice of law: ...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.

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.

Those who are against inclusion of the New Rule in their jurisdictions’ rules of professions conduct have critiqued the Rule as possibly violating freedom of speech when applied to discriminatory speech that does not rise to the level of harassment, intimidation, or threats. But a state’s interest in regulating the bar and promoting equal access to justice may justify such a restriction.

- So far, only one state (Vermont) has adopted the provision

What consider Model Rule 8.4(g)?

- Lawyers should be held to a higher standard
- The Rule also serves as a message to the general public that the lawyering community is committed to serving justice equally.
- LGBTQ lawyers, female lawyers, and lawyers of color are underrepresented in the profession and need protection.
- “[W]omen need protection, and they need a remedy, . . . Firms don’t want to punish their partners, and judges often are reluctant to police their own. So in the end there is no justice for victims of discrimination.”
- Considerations and impacts on Indian County

- The need to protect all of the workforce (and clients) that comprise Indian law in order to foster a diverse pool of thought and expression
- The Violence Against Women Act, while targeted towards all women, includes special provisions to combat violence against Native women, demonstrating a particular vulnerability to native women.

Takeaways:

- Self-regulation of lawyers is important for the perception of the profession.
- Be mindful in practicing law of your conduct and the conduct of those around you
- Keep apprised of the professional responsibility rules in your jurisdiction
- Law firms, tribal governments, the federal government, and organizations do – or should – have ethical codes that will also need to be followed
- Don't be afraid to report misconduct or pursue other avenues when dealing with or observing the professional misconduct of others, whether as a victim or a bystander
- From an institutional standpoint, make sure that you have sound policies and practices that address discrimination in the workplace and ensure that those processes, once in place, are followed everytime.