

RESOLUTION _____

[Amendment to Idaho Rule of Professional Conduct (I.R.C.P.) 8.4]

- WHEREAS: The Idaho Rules of Professional Conduct are modeled on the American Bar Association (“ABA”) Model Rules of Professional Conduct; and
- WHEREAS: From 2014 through 2016, the ABA Standing Committee on Ethics and Professional Responsibility (“SCEPR”) publicly investigated how the Model Rules of Professional Conduct should be amended to reflect changes in the practice of law and proposed amending Model Rule 8.4 to include an anti-discrimination and anti-harassment provision; and
- WHEREAS: The ABA House of Delegates voted to amend Model Rule of Professional Conduct 8.4 by adding a new subsection (g) in August 2016; and
- WHEREAS: Since ABA approval of Model Rule 8.4, a number of states have since amended their Rules of Professional Conduct to include a prohibition against discrimination and/or harassment; and
- WHEREAS: In September 2016, the Board of Commissioners requested the Professionalism and Ethics Section of the Idaho State Bar to study the proposed ABA Model Rule of Professional Conduct 8.4(g) and make a recommendation about that Rule to the Board; and
- WHEREAS: The Professionalism and Ethics Section created what is now known as the Anti-Discrimination Anti-Harassment Committee (“Committee”) to study the ABA Model Rule of Professional Conduct 8.4(g) and offer recommendations about a potential rule change; and
- WHEREAS: Based on the Committee’s recommendation, the Professionalism and Ethics Section and the Board of Commissioners co-sponsored a proposed Rule 8.4 amendment via Resolution No. 17-01, which passed a vote of the Idaho State Bar membership with 62% approval; and
- WHEREAS: The Idaho Supreme Court ultimately rejected Resolution No. 17-01 on September 6, 2018, but encouraged the Idaho State Bar to “revisit this matter in hopes of narrowing the rule to comport with new United States Supreme Court cases”; and
- WHEREAS: Since 2018, the Committee, which is now comprised of Committee Chair Catherine Freeman, Former Chair Cathy Silak, Jodi Nafzger, Larry Hunter, Robert Aldridge, Mark Freeman, Benjamin Cover, Laurie Litster Frost, Fafa Alidjani, Edith Pacillo, Greg LeDonne, Erica White, Terry Pickens Manweiler, Abby McCleery, and Alaina Heuring, has continued researching and drafting potential anti-discrimination and anti-harassment rules with the objective of proposing a narrower recommendation that comports with relevant caselaw and advisory opinions; and

WHEREAS: Since September 2018, the 2017 Proposed Rule has undergone several rounds of revision to account for new authority regarding the constitutionality of similar anti-discrimination and anti-harassment rules; and

WHEREAS: Based on the Committee's extensive research on various versions of Rule 8.4, the Committee believes the resulting proposed amendments ("2021 Proposed Rule") appropriately balances preserving First Amendment protections and guarding individuals from discrimination and harassment; and

WHEREAS: On September 22, 2021, the Committee voted to recommend the adoption of the 2021 Proposed Rule, subject to the Professionalism and Ethics Section ratification, which is set to occur October 5, 2021.

NOW, THEREFORE, BE IT RESOLVED THAT the Committee and the Professionalism and Ethics Section recommend that the members of the Idaho State Bar recommend to the Idaho Supreme Court that Idaho Rule of Professional Conduct 8.4, as set forth below, be amended.

[Current I.R.P.C. 8.4 in black, **proposed revisions in red**]

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;**
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;**
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;**
- (d) engage in conduct that is prejudicial to the administration of justice;**
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~**
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or;**
- (g) Engage in discrimination or harassment, as follows:
 - (1) in representing a client or operating or managing a law practice or in the course and scope of employment in a law practice, engage in conduct that the lawyer knows or reasonably should know is unlawful discrimination. This****

subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules; and

- (2) in representing a client or operating or managing a law practice or in the course and scope of employment in a law practice, engage in conduct that the lawyer knows or reasonably should know is harassment. Harassment is derogatory or demeaning verbal, written, or physical conduct toward a person based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. To constitute a violation of this subsection, the harassment must be severe or pervasive enough to create an environment that is intimidating or hostile to a reasonable person. This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules.

Commentary

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[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes sexual harassment such as unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal, written, or physical conduct of a sexual nature. Factors to be considered to determine whether conduct rises to the level of harassment under paragraph (g)(2) of this Rule include: the frequency of the harassing conduct; its severity; whether it is threatening or humiliating, or a mere offensive utterance; whether it is harmful to another person; or whether it unreasonably interferes with conduct related to the practice of law. Petty slights, annoyances, and isolated incidents, unless extremely serious, will not rise to the level of harassment under paragraph (g)(2). The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

~~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.~~

[4] “In representing a client or operating or managing a law practice or in the course and scope of employment in a law practice” does not include participation in bar association, business, or social activities outside the context of representing a client or operating or managing a law practice or acting in the course and scope of employment in a law practice.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice in accordance with these Rules and other law.

A lawyer may charge and collect reasonable fees and expenses for a representation consistent with Rule 1.5(a). Lawyers 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. 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).

[46] 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.

[57] 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.