

Q&A



LAWYER LIABILITY AND ETHICS

Should Arizona Adopt ABA Rule 8.4(g)



Joseph Brophy

May 21, 2018 marked the deadline for public comments to the Arizona Supreme Court on whether Arizona should incorporate the ABA's model rule 8.4(g) of professional conduct. The rule, adopted by the ABA in 2016, considers 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." Currently, Arizona's ER 8.4 prohibits only bias or prejudice that is "prejudicial to the administration of justice." See ER 8.4(d) and comment.

On the surface, the proposed rule sounds appealing – harassment and discrimination are not desirable practices. And, according to the ABA's report in support of the passage of Rule 8.4(g), the legal profession has problems with sexual harassment and gender discrimination, although there is no claim that Arizona has a particular problem in those areas. However, there is a great deal of debate over whether this seemingly good idea has a place in Arizona's Rules of Professional Conduct.

Criticism of ABA Rule 8.4(g) centers on the fact that it applies to any conduct, including verbal conduct, also known as "speech," that is "related to the practice of law." That would include speech or conduct at law firm dinners, while participating in a CLE, while speaking to a legal organization, while teaching a law school class, or writing a law review article. While the Arizona Supreme Court's authority to regulate the practice of law is not in dispute – that is why it can regulate speech that is prejudicial to the administration of justice – it is far from clear that it has the authority to regulate lawyer activities that are merely "related to" the practice of law.

ABA Rule 8.4(g)'s critics also argue that the rule creates a speech code for lawyers that would violate the First Amendment and encourage, rather than prevent, discrimination by suppressing particular viewpoints on controversial issues. Any speech/conduct that could be considered

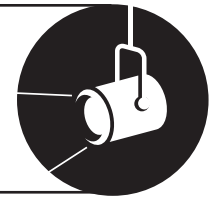
"harmful," "derogatory," or "demeaning" (those are the words used in the comments to Model Rule 8.4(g)) would constitute professional misconduct within the meaning of the rule. It is well settled that the government, including the Arizona Supreme Court, may not prohibit an expression of an idea simply because society finds the idea itself offensive or disagreeable. The ABA's report in support of the rule does not mention the First Amendment. To the extent there is discrimination or sexual harassment in the law firm workplace, existing federal and state discrimination laws already provide recourse for the victims.

There is also no way to tell from the rule's text whether certain speech or conduct will be deemed harassing or discriminatory, or what the standard is for deeming an activity sufficiently "related to the practice of law" to fall within the scope of the rule. Would a lawyer participating in a debate on economic inequality at the local law school be subject to discipline for making negative remarks about the "one percent" because he made derogatory comments based on socioeconomic status? Would a lawyer who speaks at a CLE on immigration law be subject to discipline for making demeaning comments based on national origin for saying that illegal immigration drains public resources? Would a family law lawyer writing an article in a legal publication be subject to discipline for harmful comments regarding marital status for writing that children of same sex couples are harmed much less by divorce than children of heterosexual couples? There is no way to tell from the text of the rule or its comments.

Rule 8.4(g) is a well-intentioned attempt to address the real problems of discrimination and sexual harassment, but it is also very broad in its scope, vague in its drafting and constitutionally dubious. For now, when lawyers speak in the workplace or elsewhere, they would be well advised to follow the admonition of the great Dan Baird, lead singer of the Georgia Satellites: "Don't tell me no lines and keep your hands to yourself." ■

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SPOTLIGHT ON 1700 WEST WASHINGTON



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Primary Season Looms



Barrett Marson

Before being inundated with television ads, Facebooks videos, and radio spots featuring marquee matchups between Republicans and Democrats, voters get to endure primary season.

There are a few big races coming up on the August primary ballot for the Legislature, statewide offices and Congress. In some legislative and congressional districts, the primary determines the winner on the November ballot.

U.S. Rep. Ruben Gallego faces state Sen. Catherine Miranda in the 7th Congressional District Democratic primary. The winner faces no competition in the general election.

And in the Southeast Valley, state Rep. Eddie Farnsworth squares off against Jimmy Lindblom in the GOP primary for senate. The winner faces just token opposition in the heavily Republican district.

But two heavyweight matchups will overshadow all other Maricopa County legislative races and will bring significant attention and quite possibly unprecedented levels of spending.

Don Shooter, evicted from the Arizona House earlier this year after numerous accusations of sexual harassment and inappropriate behavior, looks to regain the Senate seat he held for six years in District 13. He faces the current senator, Sine Kerr, who was appointed to seat, and Brent Backus. Shooter's comeback attempt was almost cut short because of allegations he didn't live in the district. The state Supreme Court sided with Shooter.

The woman who precipitated Shooter's downfall, Michelle Ugenti-Rita, faces a tough battle as she also tries to win a Senate seat.

In District 23, fired Department of Economic Security director Tim Jeffries seeks redemption and a spot in the Legislature.

Kristina Kelly, a newcomer to politics, plays the outsider untouched by controversy.

But these primary battles are just the warm-up to heated battles on the November ballot. In every statewide office, a Democrat is challenging the Republican officeholder. A very competitive U.S. Senate race and several tight congressional races also will crowd your mailboxes and show up in the middle of your favorite cable and broadcast television shows. In addition to the candidate races, expect spirited debates on as many as four ballot initiatives. It's unclear how many propositions will eventually qualify for the ballot – several will be challenged as backers and foes square off in court to determine if they will duel at the ballot box.

The August primary in full swing now is just the prelude to the bigger battles that lie ahead in November. Get ready to be inundated with information – or misinformation. ■



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