

Q&A

LAWYER LIABILITY AND ETHICS



ABA Rule 8.4(g) Struck Down by Federal Court



Joseph Brophy

In 2016, the American Bar Association adopted Model Rule of Professional Conduct 8.4(g). The rule 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.” In 2018, Arizona’s Supreme Court considered and rejected the addition of this rule to Arizona’s Rules of Professional Conduct.

The Pennsylvania Supreme Court, however, adopted Rule 8.4(g), which was set to take effect on December 8, 2020. A Pennsylvania attorney sought a preliminary injunction in the United States District Court for the Eastern District of Pennsylvania seeking to enjoin the rule from taking effect.

The plaintiff claimed that he frequently spoke on a number of controversial topics (freedom of speech (particularly “hate speech” on campus), religious liberty, legal equality) and was a member of organizations that took strong positions on those topics. The subject matter of those speeches is always considered biased, prejudiced, offensive and hateful by some members of the audience and society at large. Plaintiff argued “it would be nearly impossible to illustrate United States First Amendment jurisprudence, such as by accurately citing and quoting precedent First Amendment cases, without engaging in speech that at least some members of his audience will perceive as biased, prejudiced, offensive, and potentially hateful.” In other words, every speaking engagement by the plaintiff would be potentially subject to a bar complaint under Model Rule 8.4(g).

The federal court granted injunctive relief primarily on First Amendment grounds. According to the court, Rule 8.4(g) would have a chilling effect on the speech of all Pennsylvania attorneys. The court found

that, despite defendants’ claims to the contrary, it would be perfectly reasonable for people who were offended by the speech of a Pennsylvania lawyer to file a bar complaint, because the plain language of Rule 8.4(g) permits them to do so.

The court further found that the state’s compelling interest in the administration of justice and the licensing of attorneys did not outweigh the First Amendment considerations at issue. While the speech of lawyers is heavily regulated in certain circumstances (in advertising, before a court, disclosure obligations), Rule 8.4(g) does not limit its regulation to speech that takes place in the context of the practice of law, but also regulates speech and conduct outside of the practice, such as in continuing legal education classes, seminars, or conventions. Rule 8.4(g) can even be read to regulate speech at a law firm dinner or in a law review article.

Finally, the court concluded that Rule 8.4(g) is viewpoint discrimination prohibited by the First Amendment. As every law student learns, the government cannot ban or regulate speech on the grounds that it expresses ideas that are offensive. Rule 8.4(g) states that it is professional misconduct for a lawyer, “in the practice of law, by words or conduct, to knowingly manifest bias or prejudice” based on race, sex, gender identity, religion, and national origin, while the rule also allows lawyers to express tolerance or respect on those very same statutes. Therefore, Rule 8.4(g) is, on its face, viewpoint discrimination.

The free speech issues identified by the Pennsylvania court are why few states have adopted Rule 8.4(g). The Pennsylvania case is the first court to address the rule’s constitutionality. Here in sunny Arizona, where we revere free speech, ER 8.4 prohibits bias or prejudice that is “prejudicial to the administration of justice,” but does not seek to limit speech about any particular group or topic. See ER 8.4(d) and comment. ■

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Arizona Promotes Access to Justice by Accepting Applications for Newly Authorized Alternative Business Structures

The Arizona Supreme Court announces the beginning of its revolutionary approach to providing legal services in Arizona. As Chief Justice Robert Brutinel noted in August when the Court voted unanimously to approve innovations in the delivery of legal services: “The Court’s goal is to improve access to justice and to encourage innovation in the delivery of legal services. The work of the task force adopted by the Court will make it possible for more people to access affordable legal services and for more individuals and families to get legal advice and help. These new rules will promote business innovation in providing legal services at affordable prices.”

One of the innovations adopted by the Court is allowing the delivery of legal services through Alternative Business Structures. An Alternative Business Structure, or ABS, is a business entity that includes nonlawyers who have an economic interest or decision-making authority in a firm that provides legal services under Arizona Supreme Court Rules 31 and 31.1(c). The purpose of the ABS program is “rooted in the idea that entrepreneurial lawyers and nonlawyers would pilot a range of different business forms” that will ultimately improve access to justice and the delivery of legal services. Alternative Business Structures were authorized by eliminating court rule ER 5.4, the rule barring nonlawyers from fee sharing and barring nonlawyers from having an economic interest in a law firm. The regulatory framework addressing this

change requires approved businesses to be licensed by the Court and to maintain compliance with standards to achieve specific objectives, including:

- Protecting and promoting the public interest
- Promoting access to legal services
- Advancing the administration of justice and rule of law
- Encouraging an independent, strong, diverse, and effective legal profession
- Promoting and maintaining adherence to professional principles

In part, the innovation opportunities created by these changes are intended to improve access to justice and to make access to legal documents and legal representation available to more members of the public. At the same time, the changes must maintain the professional independence of lawyers and protect the public from unethical and unprofessional conduct.

States around the nation are considering similar reforms to allow for more innovation and to make legal services more affordable while protecting the public. Those states will be watching how Alternative Business Structures develop and perform in Arizona.

For information on applying for licensure as an Alternative Business Structure, FAQs, the Supreme Court Task Force report, the Court’s recent order and more, see the Arizona Supreme Court Certification and Licensing webpage at <https://www.azcourts.gov/Licensing-Regulation/Alternative-Business-Structure>. ■

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Arbitration Fee Donations Help

Partnering with the Maricopa County Superior Court, the Maricopa County Bar Foundation (MCBF) is once again encouraging attorneys assigned to arbitration to donate the \$75 fee to the Foundation’s fundraising efforts.

It’s Easy to Contribute

The court has made it easy to contribute with a convenient “pro bono” check-off box located at the bottom of the Invoice in Support of Request for Warrant, a form provided in your arbitration packet. For more information, go to maricopabar.org and click on “About Us” on the top menu bar then “Maricopa County Bar Foundation.”

THANK YOU FOR MAKING A DIFFERENCE!

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