

Q&A

LAWYER LIABILITY AND ETHICS



Dying Embers: Is ABA Model Rule 8.4(g) Still Alive?



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When ABA Model Rule 8.4(g) was originally proposed in 2016, it immediately sparked considerable debate. Advocates of the rule argued that it was necessary to prohibit lawyers from sexually harassing others, whether or not in the workplace or while representing clients. Opponents countered that the rule was extremely broad, broader than current federal or state anti-harassment statutes, and included vague terms such as “conduct related to the practice of law.”

The rule encountered resistance in some states and acceptance in others. Most states did not adopt it. Some, like New Mexico and Maine, adopted versions of the rule, using narrower language or defining more terms than the ABA Rule. Maine’s rule, for instance, defined discrimination and harassment and limited the rule’s scope to conduct inside the practice of law. A few states simply modified their existing misconduct rules without adopting 8.4(g). For example, in 2019, Colorado prohibited “conduct the lawyer knows or reasonably should know

constitutes sexual harassment where the conduct occurs in connection with the lawyer’s professional activities.”

By late 2020, Rule 8.4(g) seemed doomed to fail in a majority of states. While some, such as Vermont and New York, had adopted it, most had not. Several states had outright rejected the rule, including Arizona, Idaho, Louisiana, Montana, South Carolina, South Dakota, and Tennessee. (The Arizona rule proposal in 2017 generated a flurry of commentary, most of it opposing the rule: both national and local scholars, attorneys, and organizations argued against the adoption of the rule, including the Arizona Attorney General. The Arizona Supreme Court rejected the rule in August 2018.) With the onslaught of the COVID-19 pandemic in spring of 2020, attention on the rule faded.

The rule, however, is not completely dead. Since spring 2020, two new developments have emerged: an ABA ethics opinion and a federal case in Pennsylvania. Both may shed light on whether 8.4(g)—or a version of it—will eventually be adopted by a majority of states or will remain a minority rule.

In July 2020, the ABA issued a formal ethics opinion, attempting to refute some

of the criticisms of the rule. The opinion provided several examples of behavior that would constitute discrimination or harassment under the rule. To any reasonable reader, these examples would be clear—even shocking—examples of discrimination. The opinion referred to cases in which attorneys referred to other individuals using racial and anti-Semitic slurs, and a deposition in which a male attorney used derogatory sexual comments towards a female attorney.

How great of an impact will this opinion have? Probably not much. Given the volume of debate Rule 8.4(g) has already generated, another opinion from the ABA—rehashing arguments made since 2016—will likely do little to sway those who oppose the rule. And critically, the opinion did not address the central criticism of Rule 8.4(g), which is that Rule 8.4(g) would prevent legitimate debate and discourse on sensitive current topics. For instance, a prominent medical journal, the *Lancet*, recently published an article discussing periods in “bodies with vaginas.” Would it be misconduct under 8.4(g) for an attorney to sincerely argue at a CLE that the *Lancet* should have used the term “women” instead? The opinion’s failure to answer that type of question shows it will likely not influence the debate over Rule 8.4(g).

Relatedly, in June 2020, Pennsylvania adopted a version of Rule 8.4(g). The Pennsylvania rule prohibited attorneys from “knowingly” using “words” “manifest[ing] bias or prejudice.” Unlike the model rule, Pennsylvania’s rule was limited to “the practice of law.”

A Pennsylvania attorney sued the state board that adopted the rule, arguing that the

rule was an impermissible content- and viewpoint-based restriction on his First Amendment rights. In December 2020, the United States District Court for the Eastern District of Pennsylvania issued a preliminary injunction against the rule, holding it would “continuously threaten the speaker to self-censor.” The court relied on the rule’s specific prohibition of “words.” Pennsylvania appealed the decision, then dropped the appeal.

What does this case mean? At the least, it appears that courts will frown on versions of Rule 8.4(g) that prohibit speech, especially given the Supreme Court’s 2018 decision in *NIFLA v. Becerra*, which struck down California regulations compelling certain speech in pro-life advertising. (The Pennsylvania federal court relied on this decision.)

Seemingly undeterred, on July 27, 2021, Pennsylvania tried again, adopting a new version of Rule 8.4(g). This version removed the prohibition on “words,” although somewhat perplexingly, Comment 3 to the rule states that “conduct” includes “speeches, communications, debates, [and] presentations.” The 2020 plaintiff has filed another suit seeking to enjoin the new rule. Whether he is successful may have significant repercussions for the success of similar versions of Rule 8.4(g) in other states.

Overall, Rule 8.4(g) does not appear headed for widespread adoption. Given the recent federal decision in Pennsylvania, the rule’s prospects seem even more dim. ■

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Arizona Bar Exam Results

The Arizona Supreme Court released the results of the July 2021 Uniform Bar Exam on October 8, 2021. The July 2021 bar exam was administered remotely nationwide, through one third-party vendor. For the list of candidates who achieved Arizona’s minimum passing score, see <https://www.azcourts.gov/cld/Attorney-Admissions/Announcements>.

In Arizona, 531 candidates sat for the July 2021 exam and 346 achieved the minimum passing score. The 65% pass rate was consistent with prior exams. To address pandemic-related concerns, Arizona offered an in-person bar exam in July 2020 and, alternatively, a remote exam in October 2020. The pass

rate for the July 2020 exam was 81% and the pass rate for the October 2020 exam was 45%. Combined, the pass rate for the July/October 2020 exam was 63%.

The chart below reflects Arizona Bar Exam information for the last five years. The bar exam is a two-day event held twice a year on the last Tuesday and Wednesday of February and July nationwide. Arizona is one of forty jurisdictions that administer the Uniform Bar Exam (UBE). Participating states and jurisdictions will accept UBE score transfers that meet individual state and jurisdictions’ minimum score requirements for admission to practice law. ■

Bar Exam	No. of Test-Takers	No. Passed	Pass Percentage
July 2021	531	346	65%
October 2020*	189	85	45%
July 2020	399	322	81%
July 2019	525	347	66%
July 2018	581	344	59%
July 2017	549	311	57%

*The October 2020 remote bar exam—the first of its kind in Arizona—was not eligible for UBE score transfer by the National Conference of Bar Examiners. Candidates who achieved the minimum passing score would be eligible to apply for admission to practice law in Arizona.

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