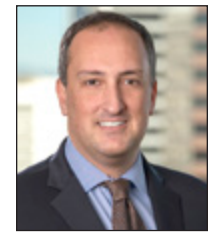
Q&A

LAWYER LIABILITY AND ETHICS

Rule 8.4(g) Upheld



Joseph Brophy

ABA Model Rule 8.4(g) has lived a brief but tortured life. Many states, including Arizona, declined to adopt it for a myriad of reasons, including being vague, overbroad, unnecessary, easy to abuse and violating the 1st Amendment. However, last year, after being struck down by a federal court, the Third Circuit upheld the rule.

ER 8.4, in Arizona and most jurisdictions, specifies, among other things, that it is "professional misconduct for a lawyer to ... engage in conduct that is prejudicial to the administration of justice." The comments to the rule clarify that professional misconduct includes "knowingly manifest[ing] by words or conduct, bias or prejudice" based on certain protected characteristics. The rule only applies "in the scope of representing a client."

In 2016, the ABA adopted Model Rule 8.4(g). The rule provides that it is "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." "Harassment" means "conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g)."

The ABA's changes moved the discrimination/prejudice provisions from the rule's comments to the text. They also expand the rule's scope from conduct "in the scope of representing a client" to conduct "related to the practice of law." This means the rule applies at law firm dinners, CLEs, speeches to legal organizations/conferences, and bar association events.

The ABA justified the change based on "a need for a cultural shift in understanding the inherent integrity of people." If the ABA concluded that there is an epidemic of CLEs where the people's inherent integrity was misunderstood, it did not say so or how it reached that conclusion. Everyone seemed fine at my last CLE, although people's inherent integrity does not often come up in the context of payment and performance bond claims.

Contrary to popular belief, lawyers have the same 1st Amendment rights as anyone else, unless they are participating in the judicial process or representing a client. That is why Rule 8.4 refers to "conduct" and does not purport to regulate attorney speech. It is only where the proper functioning of the judicial process provides the required compelling government interest that the content of attorney speech may be regulated. That is why the only rule regulating the content of a lawyer's extrajudicial statements, ER 3.6, applies to those statements that might affect a judicial proceeding.

Central to the debate over Model Rule 8.4(g) is the possibility that attorneys who speak on controversial subjects that touch on the issues or people identified in the rule (i.e., immigration, gender identity issues, LGBTQ+ rights, race conscious or race blind policies) could find themselves at odds with a state bar that believes the attorney's statements have denigrated or expressed an aversion to groups that the rule seeks to protect, which qualifies as "harassment" under the rule. This concern is not trivial given the rule's wide scope, the number of topics and groups it covers, and the fact that the rule was not written to address specified problems in lawyer conduct.

After Pennsylvania adopted Model Rule 8.4(g), Zachary Greenberg, a Pennsylvania lawyer who fancies himself a 1st Amendment activist and speaker on controversial matters, challenged the rule as viewpoint discrimination and an impermissible regulation of attorney speech. Mr. Greenberg cited what he called politically motivated complaints of "bias" against speakers on legal issues, including a bar complaint against a federal circuit judge for a speech given at the University of Pennsylvania Law School.

A federal district court in Pennsylvania agreed. The court held that the rule exceeded the Pennsylvania bar's authority, regulated speech and not just conduct, and sought to remove certain ideas or perspectives from the broader debate. Notably, when the judge questioned the Pennsylvania bar's attorney about the specific issue the rule sought to address, the attorney conceded that the rule was "somewhat of a prophylactic." The district court held that Pennsylvania's professed interest in improving public trust and confidence in the legal system was too "unfocused" and "amorphous" to qualify as compelling, particularly since the rule reaches well beyond matters involving the courts.

The Third Circuit reversed for lack of standing. The court accepted the Pennsylvania bar's representation that it interpreted Rule 8.4(g) "as encompassing only conduct which targets individuals by harassing or discriminating against an identifiable person," and "does not interpret Rule 8.4(g) as prohibiting general discussions of case law or 'controversial' positions or ideas." Because Mr. Greenberg failed to establish a credible threat of enforcement, he lacked the injury-in-fact required for Article III standing.

The Third Circuit's standing analysis may be correct. But it had the added benefit of allowing the court to avoid the merits of the district court's ruling. It is easy to baldly assert that Rule 8.4(g) only applies to conduct, not speech. However, it is much more difficult to explain how prohibiting "denigrat[ing] or show[ing] hostility or aversion toward a person on any of the [enumerated] bases" does not necessarily regulate speech and particular viewpoints.

The elephant in the room is this country's long and ignominious tradition of using professional licensure to silence political dissidents. For over 100 years, the legal profession has been at

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established two different subsections for mobile homes, one addressing the real property under which a mobile home is situated and the other excluding that real property? Beene acknowledged that these differences "might suggest that § 33-1101(A)(3) could include a mobile home *without* any significant connection to land." But he rejected that suggestion, saying that it "would be a misreading of subsection (A)(3) considering the nature of mobile home ownership."

Beene explained that Arizona property law allows mobile home owners to "permanently situate their homes upon leased—rather than owned—land," and may "connect their homes to utilities, rendering them difficult to move, and thus establish permanent connections with land." Owners who only lease the land under their mobile homes would not be entitled to an exemption under subsection (A)(4) "because they do not *own* the land." Thus, subsection (A)(3) provides those owners with the desired exemption.

Beene contrasted the permanency factor that he detected in subsections (A)(1) through (4) against the inherent mobility of motor homes. The legislature also has not defined "motor home," at least not in Title 33, dealing with property. But a provision in Title 28 — Transportation — defines it as "a motor vehicle that is primarily designed as temporary living quarters and that [i]s built onto as an integral part of, or is permanently attached to, a motor vehicle chassis." This definition, he wrote, "suggests that a 'motor home' is a vehicle and is therefore readily and inherently movable."

Beene contrasted this inherent mobility against three of the exemption statute's categories and found the difference significant. "Residential structures that are not readily movable and are tied to a permanent location is the context establishing subsection (A)(3)'s meaning because these characteristics are common among § 33-1101(A)'s subsections." He concluded that given this context, "a 'mobile home' under subsection (A)(3) describes a dwelling that is not intended to be moved once placed and physically attached to property." Joining him in rejecting the Drummonds' claimed exemption for their home were Chief Justice Robert M. Brutinel and Justices Clint Bolick, John R. Lopez IV, William G. Montgomery, and Kathryn H. King.

Vice Chief Justice Ann A. Scott Timmer dissented. She noted that Arizona has provided a homestead exemption since statehood, seeking "to prevent families from being rendered homeless by the debt collection process." People have a variety of choices for home ownership: "Many people live in traditional single-family homes, condominiums, cooperatives, and permanently affixed manufactured homes. But others live in non-traditional portable housing, like houseboats, motor homes, and even tiny houses on wheels."

She took issue with the majority's conclusion that the term "mobile home" is unambiguous. "If the provision has only one reasonable meaning, we apply it without further discussion." But when "the provision has more than one reasonable meaning, we apply secondary principles to determine the legislature's intended meaning, like examining the statute's historical background, its effects and consequences, and its spirit and purpose."

Contrary to the majority's holding, she wrote, "no language in § 33-1101(A)(3) or (A)(4) suggests that a 'mobile home' must be designed to stay in one location or be physically attached to land." And in subsection (A)(3), "Nothing indicates whether the legislature used 'mobile home' as a term of art referring to a manufactured home, which is generally designed to stay in one place once installed, or merely to describe a 'home' that is 'mobile.'" Consequently, she wrote, "Either interpretation is reasonable."

Regarding the majority's conclusion that because the traditional dwellings in the first two subsection are permanently affixed to real property, a mobile home must be similarly affixed, she asked, "Why? A mobile home is inherently different from traditional dwellings." She wrote, "There are too many differences between traditional homes and mobile homes to infer the latter necessarily must be designed to remain in one location and be permanently attached to land."

Timmer wrote that in 1971, when the legislature added mobile homes to the exemption statute, then-current dictionaries defined it in various ways, including definitions that "could include motor homes" and did not "confine[] that definition to non-self-propelled or difficult-to move homes."

She also noted a statute, A.R.S. § 33-1409(14)(b)(i), that specifically excludes motor homes from the definition of mobile home. "This exclusion," she wrote, "would not have been necessary if, as the majority posits, a 'mobile home' plainly excludes motor homes."

Finding the exemption statute does not unambiguously exclude a motor home from being a mobile home, Timmer turned to the purpose behind the statute. The supreme court "has consistently found that the purpose of the homestead exemption is to ensure that 'individuals whose property is subject to foreclosure are not rendered homeless,'" she noted, quoting a 2022 opinion. Thus, she wrote, "we 'liberally construe[] our exemption laws so as to preserve the homestead,'" quoting an opinion from 1898.

"Interpreting 'mobile home' as including self-propelled vehicles that are actually used as the owner's permanent residence fulfills this purpose," Timmer added, alluding to the uncontested fact that the Drummonds actually used the RV as their permanent home. "In other words," she added, "whether or not a home has a motor, the homestead exemption fulfills its purpose by protecting the family's interest in that home."

Beene rejected Timmer's approach: "Ultimately, the dissent elevates the policy interests purportedly served by the statute over what we view as the best reading of subsection (A)(3) in its proper context," he wrote. He asserted that her approach to statutory construction was improper, and that it was up to the legislature to provide clarity, if indeed it intended the exemption to protect motor homes: "We defer to the legislature to exercise its prerogative to modify the statute to better align with its policy objectives if it disagrees with our interpretation of the statute."

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The majority conceded—at least tacitly—that its restrictive approach to statutory construction did not advance the legislature's policy of protecting homes under the exemption statute. Its refusal to view a motor home as a mobile home appears based on a principle that courts should not read substance into statutes that the legislature has not explicitly included, even when doing so would advance legislative policy.

But what if the legislature has rejected that approach? What if the legislature has unambiguously directed courts to carry out its policy choices even in novel situations? What if the legislature has specifically told courts to construe its statutes liberally? Wouldn't that free the court to recognize that motor homes are mobile homes because they are, indeed, homes that are mobile, and that debtors who use motor homes as their homesteads need and deserve the same protections afforded other homeowners?

There is indeed, such a legislative directive. In A.R.S. § 1-211(B) the legislature decreed, "Statutes shall be liberally construed to effect their objects and to promote justice."

So how did this statute figure into the analysis? It didn't. Timmer quoted it once parenthetically, without any analysis. For its part, the majority did not even acknowledge the statute's existence. ■

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the vanguard of employing these tactics.

Lawyers who advocated for civil disobedience to conscription in World War I were disciplined. Lawyers who represented communists and civil rights activists in the 1950s and 60s were disciplined so often that members of those groups could not find counsel. Lawyers with the temerity to represent prisoners in Guantanamo Bay were sanctioned and disbarred. The practice continues today with lawyers who have been censured or disbarred for statements made to the media or on social media regarding the 2020 presidential election, despite having no connection to judicial proceedings, and resulting from complaints filed by political organizations with the express purpose of denying legal counsel to their political opponents.

Courts and state bars always justify their complicity in these tactics on the same basis that Pennsylvania defended Model Rule 8.4(g), which is a professed concern for public trust and confidence in the legal profession.

Lawyers are often rabble rousers and leaders of the opposition. They can be horribly inconvenient to the powers that be. The temptation to shut them up, and the value of the power to do so, is simply too great for a rule like Model Rule 8.4(g) to not be abused. In concept, the distinction between conduct and speech is valid. In practice, history suggests that the ability of state bars to toe that line is questionable at best.

But the beauty of federalism is that it allows sister states like New Mexico, Vermont and Pennsylvania, the only states to enact Model Rule 8.4(g) without significantly narrowing its scope, to walk the plank while the rest of us get to watch. For those of you licensed in American Samoa, the Northern Mariana Islands and the U.S. Virgin Islands (jurisdictions where the Maricopa Lawyer is especially popular), Model Rule 8.4(g) also applies. It should not be long before we see the results. ■

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