

LSBA Rules of Professional Conduct Committee

Rule 8.4 Subcommittee Report (03/24/2017) – EXECUTIVE SUMMARY

This Subcommittee was formed and appointed following the 09/28/2016 meeting of the Rules of Professional Conduct Committee. For efficiency, the Subcommittee was then subdivided into two (2) “working groups”:

“Working Group A” was charged with reviewing disciplinary cases from around the U.S. involving some version of ABA Model Rule 8.4 to examine whether the conduct described in those cases truly merited regulatory intervention and whether that conduct could have otherwise been reported and/or sanctioned under the Rules absent the language in (or similar to) Model Rule 8.4. This in-depth review included examination of both case summaries and actual reported cases from across the country, derived primarily from a fifty-seven (57) page table of cases developed by the ABA Center for Professional Responsibility.

“Working Group B” conducted a thoughtful review of the rules of professional conduct for fifty (50) U.S. jurisdictions, revealing that, at present, twenty-one (21) of those jurisdictions¹ currently have some version of a rule that attempts to address some or all of the issues that current ABA Model Rule 8.4(g) is intended to address, namely “...*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...*”

Upon completion of the review of all this information, the Subcommittee concluded that there have been instances of serious misconduct exhibited by lawyers across the country that are not addressed by the existing Rules of Professional Conduct as adopted in Louisiana.

RECOMMENDATIONS

- The Subcommittee is not suggesting an amendment of current Rule 8.4(g) but is, instead, suggesting that the Court consider adding a brand-new sub-part designated Rule 8.4(h). The Subcommittee believes that it will likely be clearer for lawyers and those involved in the discipline system if the Court were to leave Rule 8.4(g) as it is so that applicable precedent would not be impacted. The Subcommittee believes it preferable to add another subsection [i.e., a new “(h)”] to the end of current Rule 8.4.

¹ California; Colorado; District of Columbia; Florida; Iowa; Indiana; Illinois; Massachusetts; Maryland; Minnesota; Missouri; Nebraska; New Jersey; New York; North Dakota; Ohio; Oregon; Rhode Island; Vermont; Washington; and Wisconsin.

- The Subcommittee believes that a Louisiana rule should: (1) contain language that clearly limits application of the rule to conduct of a lawyer “...*in connection with the practice of law...*”; and (2) be worded such that this limiting language (“...*in connection with the practice of law...*”) appears sooner, rather than later, within the rule. The intended impact is to guide lawyers better and to leave considerably less doubt as to the application and limits of the rule.
- The Subcommittee believes that those categories/bases of discrimination best suited to a Louisiana rule would be those that are well-recognized and reasonably defined by substantive law, rather than those for which there may be little to no substantive case law in existence.
- The Subcommittee recommends that the knowledge/intent component endorsed by the ABA in its current version of ABA Model Rule 8.4(g) should also be incorporated into a Louisiana rule.
- The Subcommittee believes including a specific cross-reference to Louisiana Rule 1.16 within an amended Louisiana Rule 8.4 would serve to avoid confusion or misunderstanding as to the intended impact of an amended Rule 8.4 with regard to declining, withdrawing from or terminating a representation.
- The Subcommittee believes that some form of a “legitimate advocacy” exception should be incorporated into a Louisiana rule. The Subcommittee would prefer that an amended Louisiana rule be clearer and less ambiguous in this regard than the language of the current ABA Model Rule.

Based on the foregoing, the Subcommittee believes an amended Louisiana Rule 8.4 could read: “...It is professional misconduct for a lawyer to: ...*(h) engage in conduct in connection with the practice of law that the lawyer knows or reasonably should know involves discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability. This Rule does not prohibit legitimate advocacy when race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability are issues, nor does it limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.*”