

Chicago Daily Law Bulletin®

Volume 162, No. 123

Serving Chicago's legal community for 161 years



The ABA Model Rules and sexual harassment

Putting the sexual harassment, bias issue in black and white

Have you seen the movie “Legally Blonde” starring Reese Witherspoon? She plays a character named Elle Woods, an attractive sorority girl with a high sense of fashion who is rejected by her boyfriend right before he heads off to Harvard Law School.

She devises a plan to apply to Harvard so she can follow him and win him back. No one believes she can do this, but to everyone's astonishment, she does.

The movie is light and comical as we watch Elle navigate law school while wearing pink skirts and high heels and carrying her dog around in a pink purse. She stumbles at first (and who didn't stumble in the first year of law school), but then she starts to do well and we watch her evolve into a committed, hard-working student.

She is selected by Professor Callahan (along with a few other students) to work at his law firm to compete for a coveted internship. One day, while at the firm, the professor calls her into his office to tell her what a great job she is doing. Elle is happy that her hard work has been recognized.

Her happiness is abruptly cut short. The professor puts his hand on her thigh and offers her the internship if she will sleep with him. She rejects the offer and storms out in tears.

Currently, there is no meaningful prohibition against this kind of conduct in the ethics rules. Rule 8.4 of the American Bar Association's Model Rules is the provision that contains a list of categories that constitute professional misconduct. It is, for example, professional misconduct for a lawyer to (a) violate the ethics rules; (b) commit a criminal act; (c) engage in conduct involving

dishonesty, fraud, deceit or misrepresentation; or (d) engage in conduct that is prejudicial to the administration of justice.

Comment 3 to the ABA Model Rules states that lawyers who “knowingly manifests by words or conduct, bias or prejudice against” protected groups “violates Paragraph (d) when such actions are prejudicial to the administration of justice.”

Notably, Paragraph 21 of the preamble to the ABA Model Rules states in part, that the comments are “intended as guides to interpretation, but the text of each rule is authoritative.”

The ABA Standing Committee on Ethics and Professional Responsibility has spent the better part of two years working on a proposed amendment — Rule 8.4(g) — that would eliminate Comment 3 and provide an authoritative rule that expressly prohibits harassment or discrimination against protected groups in conduct related to the practice of law. (In full disclosure, I am a member of the committee, but the views expressed here are my own).

There have been a series of lengthy and thoughtful discussions about how phrases are worded, whether comments will provide sufficient guidance and various scenarios where application of the rule would be warranted.

Later, comments and concerns advanced by other committees and bar groups are considered, and additional modifications are made. The proposed amendment will be presented to the ABA House of Delegates for approval when they convene for the annual meeting in San Francisco in August.

As of this writing, at least 23 states have jumped ahead of the



Allison L. Wood formerly served as a hearing board chair and as litigation counsel with the Illinois Attorney Registration & Disciplinary Commission. She is principal of Legal Ethics Consulting PC, where she provides ARDC defense and ethics evaluations for malpractice cases. Her website is legalethicsconsulting.com; her e-mail is aw@legalethicsconsulting.com; and she's on Twitter at @WoodWiseEthics.

ABA and modified their ethics rules to add an express prohibition against harassment and discrimination.

In Minnesota, for example, the Minnesota Supreme Court imposed a 90-day suspension on a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student's appearance and engaged in unwelcome physical contact of a

One of the root causes of harassment and discrimination is the lack of diversity in the legal profession.

sexual nature with the student. *In re Griffin*, 838 N.W.2d 792 (2013).

One of the root causes of harassment and discrimination is the lack of diversity in the legal profession. According to the ABA lawyer demographics for 2016, the legal profession is 64 percent male

and 36 percent female. The most recent figures for racial demographics are from the 2010 census showing 88 percent white, 5 percent black, 4 percent Hispanic and 3 percent Asian Pacific with all other ethnic groups less than 1 percent.

ABA President Paulette Brown has made it a priority to address the lack of diversity in the legal profession. Brown recently launched the portal for the ABA Commission on Diversity and Inclusion 360 that she created to “formulate methods, policy standards and best practices to advance diversity and inclusion over the next 10 years.”

In addition to the portal, lawyers and firms seeking to learn more about these issues may want to review “A Current Glance at Women in the Law 2016” by the ABA Commission on Women in the Profession and “Racial Discrimination in the Legal Profession” prepared by the Society of American Law Teachers in June 2014.

Wendi S. Lazar, in her article “Sexual Harassment in the Legal Profession: It is Time to Make It Stop” in the *New York Law Journal* (March 4, 2016), and Deborah L. Rhode, in her article “Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That” in the *Washington Post* (March 27, 2015), highlight the need for the legal profession to address these issues.

The proposed amendment of Rule 8.4(g) sends a message to the public that the legal profession takes self-regulation seriously; that it will not tolerate harassment and discrimination; and that efforts are being made to welcome and retain the next generation of diverse practitioners.