

Program Title: *Strategies to Combat Anti-LGBTQ+ Expression Within the Legal Profession: Balancing Respect and Speech*

Program Description: This workshop will provide a pragmatic discussion on ways to combat hateful speech and conduct when we see it within the legal profession, including a discussion on how these anti-LGBTQ+ and other hateful speech issues intersect with ABA Model Rule 8.4(g) (addressing discrimination, bias, and prejudice in the legal profession). Our panel will discuss:

- What is the increase we're seeing in harmful/hateful speech grounded in?
- What strategies may work to decrease hateful speech? What do they entail? How do they vary depending on where one sits? Why are they important to the legal profession?
- Do different state approaches to bias, prejudice, and discrimination in the legal system reach differing results, and what is working?
- Where is there room for improvement? In the legal profession? In schools/universities? On social media platforms? By companies?
- Does Model Rule 8.4(g) help with this struggle, or is it fundamentally flawed in ways that exacerbate the issues?
- How does allyship factor in?

Presentation Outline:

- I. What is happening in our world and why is there a renewed focus on hate speech issues
 - a. Statistics on the rise of hate speech
 - b. Anti-LGBTQ+ examples of hate speech and violence
 - i. Real world examples (i.e., murders of trans-women of color, statements by Colorado Springs shooter's father, etc.)
 - ii. Legislative examples (Don't Say Gay, banning gender affirming health care, bathroom bills, book bans)
 - c. Anti-Semitic examples of hate speech
 - i. Real world examples (i.e., synagogue security, college anti-demitic hate speech, etc.)
 - ii. Social media explosion (growth of anti-Semitic sentiment and tropes)
- II. Historical perspective
 - a. We have seen this before

- i. Openly anti-Semitic speech around WWI – Germany and U.S.
- ii. Openly anti-LGBTQ+ speech – classification of homosexuality as a psychiatric disorder, treatment of persons living with HIV, events leading to Stonewall

III. Societal shift and impact on diverse communities

- a. Only years ago, it seems we had made such progress. What are the drivers of change?
 - i. Political realities
 - ii. Social media
- b. Impact – “Sticks and stones may break my bones, but words will never hurt me.” Is that true?
 - i. LGBTQ+ suicide rates
 - ii. LGBTQ+ safe spaces (bars, drag shows)
 - iii. Security of other safe spaces (i.e., synagogues)
 - iv. Impacts on general feelings of safety

IV. Balancing free speech with protection of marginalized communities

- a. Free speech does not equal freedom of consequences from free speech
- b. How do we draw lines to protect both?
- c. Importance of free speech in both directions

V. What role can the legal profession play?

- a. Many roles lawyers can play
- b. Our focus – ABA Model Rule 8.4(g)

RULE: It is professional misconduct for a lawyer to:

(g) 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. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

- c. Comment 3: Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).
- d. Comment 4: Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.
- e. How the Model Rule changed
 - i. Moved prohibition from Comment to Rule
 - ii. Previously limited to acts “prejudicial to the administration of justice”
 - iii. Changed from “in the course of representing the client” to conduct “related to the practice of law”
 - iv. Protected classes expanded: ethnicity, gender identity, and marital status
- f. State’s Treatment of the Model Rule
 - i. Only Vermont has adopted exact ABA version
 - ii. 34 states have adopted some form of the rule to address discrimination and harassment as professional misconduct
 - iii. 16 states have no such rule (more to come on this)

VI. Does this model rule establish DEI as a lawyer’s ethical obligation?

- a. Missouri Rule 15.05(a)(2): “At least one of the three basic ethics credit hours ... must be devoted exclusively to explicit or implicit bias, diversity, inclusion or cultural competency.” – Adopted November 15, 2019
- b. Other states with this requirement: California, Florida, Illinois, Maine, Minnesota, New Hampshire, New York, Oregon, and West Virginia.

VII. Criticisms of the Model Rule

- a. First Amendment concerns (religious freedom, freedom of speech)
- b. Scope of application
- c. Problems with vagueness, subjectivity, over-inclusion, and under-inclusion
- d. Why is citizenship or immigration status not included?

VIII. Some states are moving affirmatively against Model Rule

- a. Texas – HB2846/SB559:

A rule or policy adopted or a penalty imposed under this chapter may not:

Limit an applicant's ability to obtain a license to practice law in this state, or a state bar member's ability to maintain or renew the license, based on a sincerely held religious belief of the applicant or state bar member; or

Burden an applicant's or state bar member's

Free exercise of religion, regardless of whether the burden is the result of a rule or policy generally applicable to all applicants or state bar members;

Freedom of speech or expression that is protected by the United States or Texas Constitution, including speech regarding a sincerely held religious belief, a political ideology, or a societal view, and of expressive conduct;

Membership in any religious organization; or

Freedom of association.

- b. Other states concluding Model Rule is unconstitutional: South Carolina, Louisiana, Tennessee (also Texas)

IX. Scenarios for discussion

- a. Bob is the Hiring Committee Chair for his organization and during a meeting to review potential candidates for an open entry-level attorney position, he raised concern over whether one of the candidates, who was highly qualified and met all of the objective criteria stated in the position description, would be a “good fit.” When pressed by committee members as to what specifically caused Bob to believe the candidate should not be hired, he states that hiring someone who does not exercise (the candidate is by all standards overweight) might not be in the best interest of the candidate because so much of the team’s social interaction is based upon physical fitness activities. As a result, the candidate, if hired, could be set up for failure because he would not be able to take advantage of the necessary relationship building that often stems from the physical fitness social activities.
- b. Brenda, an African American and the first in her family to practice law, is a litigation Associate lateral hire at an AmLaw 100 law firm who is excited about her new role after spending the prior two years as a federal court judicial clerk. The first assignment she receives in her new role is for a high power Shareholder who asks her to research a legal issue and draft a memo regarding her findings. Brenda completes the work in a timely manner and sends it to the Shareholder for review. Brenda does not receive any feedback from the Shareholder until she receives her mid-year review. During the mid-year review, the Shareholder is extremely critical of the memo Brenda wrote. All of the other Shareholders Brenda worked for were highly complementary of her written work product.
- c. Betty is a junior Associate at a mid-size law firm. She complains to HR about what she believes is inappropriate behavior by a more senior attorney, named Bill, at the firm. Specifically, she complains that Bill frequently invites her to attend out of town business development meetings and compliments her on her attire which makes her feel uncomfortable. During one social outing, Bill asked Betty if she was dating anyone and shared with her that he was having marital problems. Bill’s nickname around the office is “the Bear” because he regularly greets women colleagues with a hug.
- d. Each year the Mega Company in-house legal department, which is comprised of the best talent known to corporate America, hosts an internal competition to determine who will first chair the first trial handled by the legal department for the new fiscal year. The competition includes both physical and memory challenges and none of the skills required to win correlate with the competitor’s ability to lead the trial. Brad has the most seniority in the legal department, having been with the company for over 30 years, and has yet to win the challenge despite giving his all year after year. Although he has never won the coveted first chair assignment, Brad has been assigned meaningful work within the department.

- e. Becky is an attendee at a CLE program on the topic of the legal implications of the assignment of bathrooms based on gender identity versus biological sex. During the Q&A section of the program, she shares her belief that biological sex should determine the bathroom a person should use and that she believes the same based on biblical principles. One of the attendees at the program is highly offended by Betty's remarks and lodges a Rule 8.4(g) complaint against her.
- f. Brilliant Corporation is defending a race discrimination class action lawsuit that could result in financial ruin for the company if the jury finds in the plaintiffs' favor. The lead defense attorney for the case employs the services of a jury consultant in an attempt to make sure only jurors sympathetic to the company's position on the case are selected to serve. Relying upon the jury consultant's advice, the defense strikes all jurors of color that do not hold management-level positions and earn less than \$40,000 per year.

X. Takeaways

- a. No rule is going to fix the issue
- b. The LGBTQ+ community and other marginalized communities will continue to be aware of the rules and stand up for ourselves and others (both lawyers and clients)
- c. Possible actions
 - i. Be an upstander – learn about your own and other communities and speak up and out when you can do so safely
 - ii. Educate and encourage allyship
 - iii. Get involved in (and get to know) bar leadership in your state

ETHICS CREDIT NOTE: This program will focus on the interaction of ABA Model Rule 8.4(g), governing an attorney's professional and ethical obligations to avoid bias, discrimination, and harassment in the practice of law. Specifically, the discussion of Rule 8.4(g) as making Diversity, Equity, and Inclusion a part of a lawyer's ethical duties (Section VI of the outline, comprising 10 minutes of the program) and the scenarios for discussion that require analysis of the applicability of Model Rule 8.4(g) as a part of a lawyer's ethical duties in their law practice (Section IX of the outline, comprising 20 minutes of the program) should entitle the program to .50 hours of ethics credit.