

## **PROPOSED RULE 8.4(h) AND COMMENTS**

### **8.4 MISCONDUCT**

It is professional misconduct for a lawyer to:

...

(h) engage in conduct that the lawyer knows or reasonably should know is discrimination or harassment based on race, color, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status that (1) violates a federal, state or local statute or ordinance that prohibits discrimination or harassment or (2) reflects adversely on the lawyer's fitness as a lawyer.

For purposes of this paragraph, whether conduct reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of the totality of the circumstances.

Circumstances that may be relevant include: (1) the seriousness of the conduct; (2) whether the conduct was knowing or intentional; (3) whether the lawyer knew that the conduct was prohibited by statute or ordinance; (4) whether the conduct was part of a pattern of prohibited conduct; or (5) whether the conduct was committed in connection with the lawyer's professional activities.

### **Comments**

...

[5] "Discrimination" means unjust or prejudicial treatment based on the grounds of race, color, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status, and may include harmful verbal or physical conduct that manifests bias or prejudice toward others.

[6] "Harassment" means a pattern of intentional, substantial, and unreasonable intrusion into the private or professional life of a targeted person or group that serves no legitimate purpose and would cause a reasonable person or group member to suffer mental or emotional distress, and may include harmful verbal or physical conduct that manifests bias or prejudice toward others.

[7] The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (h).

[8] Declining representation, limiting one's practice to particular clients or types of clients, and advocacy of policy positions or changes in the law are not regulated by paragraph (h).

[9] Nothing in paragraph (h) limits a lawyer's ability to advocate fully and zealously on behalf of a client. However, full and zealous advocacy does not encompass and will not excuse conduct that exploits any characteristic or status that the lawyer knows or reasonably should know is not relevant to any legal or factual issue in dispute, including race, color, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. Legitimate

advocacy respecting the foregoing factors does not violate paragraph (h).

[10] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (h).

[11] Paragraph (h) does not limit the ability of lawyers to engage in constitutionally protected activities, including expressing opinions about controversial and/or political topics; however, a lawyer cannot invoke the constitutional right of free speech to immunize the lawyer from evenhanded discipline for proven unethical conduct.

[12] "Professional activities" encompasses a lawyer's role as a representative of clients and an officer of the legal system. Such role includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; attendance or participation in continuing legal education programs; and operating or managing a law firm.