

Opinion No. 1 of 2015

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Issue

Does an Indiana attorney violate Rule 8.4(g) of the Rules of Professional Conduct by participating as a leader of a nonprofit organization that has gender, religious or racial requirements for membership?

Brief answer

An attorney's active participation in an organization that has gender, religious or racial requirements for membership is not an inherent violation of Rule 8.4(g) of the Indiana Rules of Professional Conduct. But, there may be particular circumstances where an attorney's participation in such organizations may be viewed as misconduct when he or she acts in a "professional capacity." As the Indiana Supreme Court has yet to define the exact scope and meaning of "professional capacity," lawyers should be attentive to the mission and nature of such an organization and the role(s) the lawyer may be asked to fulfill for the organization.

Hypothetical facts

Attorney A is a member of a nonprofit organization that excludes women from membership and admits only white men who practice a certain religion. The attorney is asked to assume a position on the governing board of the organization and to serve as one of its officers.

Analysis

Setting aside constitutional issues involving freedom of association and freedom of speech, the

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issue presented by this hypothetical calls for an interpretation of Rule 8.4(g) of the Indiana Rules of Professional Conduct, which broadly proscribes various forms of speech and conduct perceived as being antithetical to a lawyer's role in our legal system. Rule 8.4(g) states:

It is professional misconduct for a lawyer to engage in conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors. Legitimate advocacy respecting the foregoing factors does not violate this subsection. A trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

Rule 8.4(g) is part of a rule that prohibits other forms of professional misconduct, including, among other behaviors, criminal activity reflecting on a lawyer's honesty and conduct prejudicial to the administration of justice. (See Rule 8.4 (b), (d)). Indiana is one of 10 states¹ that includes a separate anti-discrimination clause in their rules governing misconduct.

There is similar language in Comment [3] to ABA Model Rule 8.4 suggesting that discriminatory speech is "prejudicial to the administration of justice" in violation of Rule 8.4(d), but the ABA comment limits application to actions that occur while "in the course of representing a client." One commentator

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has correctly noted that the distinction between acting “in a professional capacity” and “in the course of representing a client” is not clear.² Nevertheless, it seems reasonably obvious that “acting in a professional capacity,” as that term is used in Rule 8.4(g) is at least as broad and perhaps broader than “while representing a client.”

In Indiana the phrase “in representing a client” goes far beyond representation in the context of litigation or other disputes. The Preamble to the Rules of Professional Conduct indicates that the process of representing a client may include work as an advisor, an advocate, a negotiator, an intermediary and an evaluator.³ So, it seems fair to conclude that the scope of Rule 8.4(g) is intended to include at least these functions if they take place in the context of an attorney-client relationship. Similarly, a letter written on an attorney’s professional letterhead that identifies the author as an attorney and contains discriminatory comments will likely be sufficient to meet the “professional capacity” test. *See Notopoulos v. Statewide Grievance Committee*, 857 A.2d 857 (Conn. App. 2004). But the hypothetical facts presented above do not assume any of those situations.

If Rule 8.4(g) were limited to behavior occurring “in the course of representing a client,” as the ABA comment is limited, the Committee’s analysis would end with the observation that in the absence of an attorney-client relationship with the organization no violation of Rule 8.4(g) could occur. However, Indiana’s version of 8.4(g) is not limited in this way, so it is necessary to consider whether Rule 8.4(g) has any application to situations outside of those that involve representing a client.

There are six Indiana cases that have applied Rule 8.4(g), but the scope of “in a professional capacity” is still not clear. The first case was in 2005 and dealt with racial bias. *In the Matter of Thomsen*, 837 N.E.2d 1011 (Ind. 2005). The second was in 2009 and considered discrimination on the basis of national origin and socioeconomic status. *In the Matter of Campiti*, 905 N.E.2d 408 (Ind. 2009). In both of these cases, the Indiana Supreme Court did not need to discuss the meaning of “professional capacity” since the lawyer’s speech occurred while representing clients in open court.

Two cases applied Rule 8.4(g) in 2010: *In the Matter of McCarthy*, 938 N.E.2d 698 (Ind. 2010) and *In the Matter of Kelley*, 925 N.E.2d 1279 (Ind. 2010). The *McCarthy* case involved a lawyer who, in the course of representing a client, sent an email that displayed discrimina-

tion on the basis of race. In the *Kelley* case, Respondent began receiving pre-recorded messages from a company seeking to speak with her husband. Respondent and her husband agreed that she would call the company at the toll-free number to remedy the situation. Respondent then spoke to a male representative of the company, identifying herself as a lawyer representing her husband. Noting what she thought was a feminine-sounding voice, Respondent asked the company’s representative if he was gay. The company representative commented on the unprofessional nature of this inquiry, and Respondent admitted the violation of Indiana Rule 8.4(g). The Indiana Supreme Court once again did not have to define the scope of “professional capacity” in either of these cases because both attorneys were

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acting while in the course of representing a client.

Two Indiana cases addressed Rule 8.4(g) in 2013: *In the Matter of Dempsey*, 986 N.E.2d 816 (Ind. 2013) and *In the Matter of Usher*, 987 N.E.2d 1080 (Ind. 2013). In *Dempsey*, the Indiana Supreme Court held that Respondent violated Rule 8.4(g) by distributing flyers in downtown Indianapolis, based on his personal bankruptcy case. The flyers “made free-ranging disparaging remarks about Jews generally, from the fall of Jericho, through 1925 Berlin, to their alleged involvement in the 9/11 attacks,” which the Court classified as “scurrilous and repugnant attacks.” *Id.* 817. The Court said that these violations were not the type of communications that fall within an attorney’s broad constitutional right to freedom of speech. *Id.* In *Usher*, a male partner in a law firm sent out a fabricated email about a female intern with whom he was pursuing a romantic relationship. The male attorney was charged with violating Rule 8.4(g), but that charge was rejected, not because the attorney was acting in a non-professional capacity, but because the Court found that his email was motivated by personal anger at the female intern in particular rather than by bias against women in general.

Even though 8.4(g) was deemed inapplicable to the respondent in *Usher* the holding is instructive for our hypothetical because it confirms that Rule 8.4, in general, extends well beyond behavior involved in representing a client. Responding to the attorney’s contention that the rules did not apply because “his actions ... were not done in a professional capacity,” the Indiana Supreme Court stated: “This Court has imposed discipline on lawyers for speech found to violate their professional

duties, as well as for unethical activities outside the professional arena. We conclude that Respondent’s actions regarding the email are not beyond this Court’s disciplinary authority.” The Court made a similar point earlier in *In re Quinn*, 696 N.E.2d 863 (Ind. 1998), which indicated that indifference to legal standards of conduct reflected adversely on one’s fitness as an attorney. Examples of disciplinary actions against lawyers for conduct unrelated to the representation of clients are easy to find, both within and outside of Indiana. *See, e.g., In re Conn*, 715 N.E.2d 379 (Ind. 1999) (child pornography conviction); *In re Peterson*, 718 N.W. 2d 849 (Minn. 2006) (tax evasion); *Fla. Bar. v. Bartholf*, 775 So. 2d 957 (Fla. 2000) (lawyer assaulted victim with a golf cart). While the violation in *Dempsey* bore some relationship to a legal proceeding involving the lawyer being disciplined, no such claim can be made based on the facts of *Usher*. In *Usher* no client was involved, so it is clear that the Court intends that Rule 8.4 in general has application beyond the boundaries of an attorney-client relationship. The question is how far those boundaries go in the context of Rule 8.4(g).

Some further information about the scope of Rule 8.4(g) can be found in Comment [2] to Rule 8.4, which states:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving “moral turpitude.” That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is personally

answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category.

While the Indiana Supreme Court has not clearly defined the scope of “in a professional capacity” as used in Rule 8.4(g), the New Jersey Supreme Court’s interpretation of its rule offers some guidance.⁴ The New Jersey Disciplinary Rules of Professional Conduct Rule 8.4(g) states:

It is professional misconduct for a lawyer to: engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

In its comments to the rule, the New Jersey Supreme Court noted that the addition of paragraph (g) was intended “to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity.”⁵ The comment further notes that the rule covers activities in the courthouse, treatment of court staff, conduct related to litigation, treatment of other attorneys and related staff, bar association activities, and activities sponsored by a lawyer’s firm.⁶ The comments further state that “purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule.”⁷ Due to numerous suggestions received by the New Jersey Supreme Court following the initial publication of paragraph (g), the Court revised the proposed amendment by making explicit its

intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, and to restrict the scope of the Rule to conduct intended or likely to cause harm. The Court noted that the intent was to cover only discrimination where the attorney intentionally causes harm or inflicts emotional distress. This clarifica-

tion is more than simply interesting, as it seems to align well with the decision in *Usher* to the extent that for 8.4(g) purposes, the Court looked to the existence or absence of discriminatory intent. Likewise, *Usher* involved “treatment of other attorneys and their staff” – conduct the New Jersey comment expressly

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brings within the ambit of the term “in a professional capacity.”

For the sake of comparison, Indiana’s Model Code of Judicial Conduct, Rule 3.6 states that “[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.” Further, a judge may not be a member or benefit from an organization if the judge knows or should know that the organization practices “invidious discrimination.” Comment [2] to Rule 3.6 defines invidious discrimination as arbitrarily excluding persons from membership who would otherwise be eligible for admission on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation. This will depend not only on how the organization selects members, but “whether

the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.”⁸ Comment [4] notes that a judge’s membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of Rule 3.6.

Since judges must be perceived as impartial, it follows that their personal activities may be more controlled in order to avoid the appearance of impropriety. Lawyers, on the other hand, are not under that same obligation. Whereas the language of the judicial rule explicitly applies to membership in discriminatory organizations, there is no such language in Rule 8.4(g), which perhaps suggests

that no restriction was intended. But the distinction between the Rules of Professional Conduct and the Model Code of Judicial Conduct is not conclusive on the question of whether mere membership in a discriminatory organization or performance of a leadership role in such an organization can constitute a violation of Rule 8.4(g).

Unfortunately, there is simply not enough direction from the Indiana Supreme Court to allow any firm conclusions as to precisely how far Rule 8.4(g) may reach. Certainly it touches all activity by an attorney arising out of the broad representative functions describe in the Preamble to the Rules so long as a client is involved while simultaneously allowing an exemption for legitimate advocacy. But when there is no client involved, the Rule still has some application to behavior where the lawyer’s status as a lawyer is a relevant part of the picture and the lawyer can be deemed to have intentionally engaged in types of discriminatory behavior proscribed by the Rule, as *Dempsey* and *Usher* show.

As acknowledged above, there are constitutional issues that cannot be avoided in addressing the question presented by this hypothetical. As the Committee has already noted, the character of the organization seeking Attorney A’s leadership services is critical in determining the extent to which any constitutional freedom of association may have application to A’s situation. In *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Court held that Minnesota human rights law could prevent the exclusion of female members by an organization in order to support important public policies aimed at eliminating invidious discrimination in access to publicly available goods, services and other advantages. *Id.* 628.

The Jaycees' "freedom of association" argument was rejected, in part due to the large and public nature of the organization, in contrast to the sort of smaller, more intimate and selective organization seen as more deserving of constitutional protection. *Id.* 620 -621. Whether Attorney A could claim constitutional protection from Rule 8.4(g) based on freedom of association would seemingly depend, at least in part, on the nature of the organization he is asked to help lead. The Court in the *Jaycees* case also made it clear that a more stringent test would be applied if the goal of the organization involved other recognized freedoms such as freedom to worship, to speak or to petition the government for redress of grievances. *Id.* 622. These pronouncements underscore the Committee's point that Attorney A

needs to be sensitive to the nature of the organization in evaluating the scope and effect of Rule 8.4(g). In contrast to the similar New Jersey rule, cited above, the Indiana version of Rule 8.4(g) specifically mentions discriminatory "words or conduct." The decision in *Kelley*, *supra*, seems to make the point that discriminatory speech alone is enough to create a violation of 8.4(g) if it occurs while the lawyer is representing a client, unless it amounts to legitimate advocacy. Further, *Dempsey*, *supra*, seems to indicate that statements made by a lawyer about a proceeding that has concluded will fall within the scope of Rule 8.4(g) if the lawyer was involved, even on a *pro se* basis. The Committee notes that "a lawyer's right to free speech is extremely circumscribed in the courtroom" *Gentile v. State Bar*

of Nevada, 501 U.S. 1030, 1031 (1991), but outside the courtroom the standards are different. *Berry v. Schmitt*, 688 F. 3d 290, 304-305 (6th Cir. 2012), *see also Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F. 3d 1430 (9th Cir. 1995). Rule 8.4(g) makes no obvious distinction between discriminatory statements inside or outside a courtroom, and this Committee will draw no conclusions concerning the constitutionality of Rule 8.4(g) since doing so is not required by the hypothetical presented to the Committee. But it is clear that Rule 8.4 in general and Rule 8.4(g) in particular as interpreted by the Indiana Supreme Court both have application well beyond any

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remarks made by a lawyer in the middle of a court proceeding.

Conclusion

An attorney who merely participates in his personal capacity in an organization that has gender, religious or racial requirements for membership and does not participate in his or her capacity as a lawyer would not be in violation of Rule 8.4(g) of the Indiana Rules of Professional Conduct simply by virtue of the connection to such an association.

The Committee also does not believe that a lawyer violates Rule 8.4(g) merely by providing legal representation to an organization with discriminatory requirements, policies or beliefs, both because such representation can often be

accomplished without the lawyer personally making discriminatory comments or engaging in discriminatory conduct and because the “legitimate advocacy” exception is likely to cover situations where the lawyer cannot avoid such statements or conduct. Gratuitous discriminatory statements or conduct in the course of a representation stand on a different footing.

However, participation is different from representation in this context. So, a lawyer should be mindful of the particular practices of such an organization if the lawyer intends to personally participate in activities that advance any of its discriminatory requirements, policies or beliefs. The lawyer should proceed with particular caution if the lawyer’s status as

a lawyer is connected to his or her participation in the organization’s activities. Accepting a leadership role in such an organization or using one’s status as a lawyer in support of the organization creates more ethical risk than mere membership. But in either case, the nature of the organization and the lawyer’s role in the organization are critical to the outcome of any ethical analysis. In light of the delicate balance between constitutional rights and the necessity of fairness in the administration of justice, it is the Committee’s hope that the Indiana Supreme Court may offer further clarification on the scope of “professional capacity” by way of an official Comment to Rule 8.4(g). 

1. Other states include Colorado, Florida, Illinois, Missouri, Nebraska, New Jersey, North Dakota, Ohio and Washington.
2. Lundberg, Donald R., “Of Telephonic Homophobia and Pigeon-Hunting Misogyny: Some Thoughts on Lawyer Speech,” 53 *Res Gestae* 164 (June, 2010).
3. Indiana Rules of Professional Conduct, Preamble, para. [2].
4. Out of the 10 states with anti-discrimination clauses in their rules governing misconduct, just four use the phrase “in a professional capacity” (Indiana, Nebraska, New Jersey and Ohio). Only the comments to New Jersey’s rule address the interpretation of professional capacity.
5. Official Comment by New Jersey Supreme Court (May 3, 1994). Available at http://www.law.cornell.edu/ethics/nj/code/CRule_8.4.htm.
6. *Id.*
7. *Id.*
8. Indiana Model Code of Judicial Conduct, Rule 3.6, Comment [2].