

ARPC Committee Proposal 8.4(f)

It is professional misconduct for a lawyer to:

(f) engage in conduct that the lawyer knows is harassment or invidious discrimination during the lawyer's professional relations with (1) officers or employees of a tribunal; (2) lawyers, paralegals, and others working for other law firms; (3) parties, regardless of whether they are represented by counsel; (4) witnesses; or (5) seated jurors.

In addition, it is professional misconduct for a lawyer to knowingly engage in harassment or invidious discrimination in the lawyer's dealings with the lawyers, paralegals, and others working for that lawyer or for that lawyer's law firm, if the lawyer's conduct results in a final agency or judicial determination of employment misconduct or discrimination.

This rule does not prohibit a lawyer from engaging in legitimate counseling or advocacy when a person's membership in a protected class is material.

This rule does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.

(g) For purposes of paragraph (f)

(1) "Harassment" means unwelcome conduct, whether verbal or physical, that has no reasonable relation to a legitimate purpose and is so severe or sustained that a reasonable person would consider the conduct intimidating or abusive.

(2) "Invidious discrimination" means unequal treatment of a person because of their membership in a protected class when that unequal treatment has no reasonable relation to a legitimate purpose.

(3) "Protected class" refers to a person's race, color, gender, sexual identity or orientation, religion, ethnicity or national origin, disability, age, marital status, pregnancy or parenthood, or status as a veteran.

(4) "Witness" includes any person who is contacted in connection with a matter because that person may have knowledge or information pertinent to the matter.

COMMENT

Rules 8.4(f) and (g) are intended to be a counterpart to Rules 3.4 and 4.4(a), which declare that, in representing a client, a lawyer shall not use means that lack any substantial purpose other than to embarrass, delay, or burden a third person.

Harassment and invidious discrimination are intolerable because of their adverse effect on the proper administration of justice. The administration of justice is impeded when a lawyer engages in conduct that has no legitimate purpose other than to intimidate or distract those who have independent responsibilities and roles in the justice system.

For instance, our justice system depends on the effectiveness of adversary counsel. One of the fundamental aims of our court rules, including the Rules of Professional Conduct, is to assure that adversaries have an equal opportunity to prepare and present their case, so as to advance the achievement of a just result. A lawyer's harassment or invidious discrimination against other participants in a matter can impair their effectiveness, whether as advocates for opposing views or as officers of the court. An attorney who knowingly engages in such conduct perverts advocacy, obstructs the proper administration of justice, and undermines public respect for, and acceptance of, our adversary system and the legal profession.

The persons who are protected from a lawyer's harassment or invidious discrimination under this rule include seated jurors, that is, jurors who have gone through the selection process and have been sworn to adjudicate a case. Allegations of harassment or invidious discrimination against *prospective* jurors should be handled by trial judges through the procedures developed under *Batson v. Kentucky*, 476 U.S. 79 (1986).

A lawyer's harassing or invidiously discriminatory conduct directed to persons working for the lawyer or the lawyer's firm adversely affects the proper administration of justice by undermining confidence in the legal profession. Because agencies and courts routinely adjudicate disputes arising out of allegations of harassment and invidious discrimination in the workplace, the existence of such misconduct should be determined, in the first instance, by an agency or court before it may be the subject of professional discipline.

Related Amendments to Professional Conduct Rule 9.1: Definitions

(j) “Party” denotes any person who participates in, and who has a legal interest in the outcome of, any matter for which the lawyer has been engaged.

COMMENT

Parties

In a lawsuit or proceeding before a tribunal, the parties include plaintiffs and defendants, petitioners and respondents, complainants, cross-complainants, cross-defendants, and all other persons with equivalent roles in the lawsuit or proceeding, no matter how they are denominated. In the negotiation, drafting, or action to enforce or alter a contract or other agreement, the parties include all individuals who are bound, or will be bound, by the terms of the agreement. If the matter for which the lawyer has been engaged concerns only giving advice without interaction with third parties, then the only parties are the lawyer’s clients.

Throughout the Rules of Professional Conduct, words in the singular include the plural and words in the plural include the singular.