

By SUSAN HUMISTON

Harassment and attorney ethics

Time's 2017 Person of the Year was the "Silence Breakers," women who courageously went public with allegations of sexual misconduct against powerful men. These individuals, and the #MeToo movement they spawned, were honored because they, and the media covering their stories, set in motion a high-velocity cultural shift by effectively "pushing us all to stop accepting the unacceptable."¹ The movement has initially caused powerful men—primarily in entertainment, media, and politics—to lose their positions of power. How far-reaching the cultural shift will be is an open question. Whether more women will feel like they can come forward and be believed, without seeing their careers suffer as a result, remains unknown. As we watch how our culture handles these issues moving forward, it is a good time to remind those in the legal profession about the ethical rules in place on this topic.

Minnesota's ethics rules

It has long been professional misconduct in Minnesota for a lawyer

to "harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer's professional activities."² It is also professional misconduct for a lawyer to "commit a discriminatory act prohibited by federal, state, or local statute or ordinance that reflects adversely on the lawyer's fitness

as a lawyer."³ This latter rule applies irrespective of whether the act was committed in connection with the lawyer's professional activities, although that is one factor to be considered in determining whether the act reflects adversely on a lawyer's fitness to practice.⁴

Minnesota adopted these rules in 1990 and 1991, and in many respects led the country in this area. Over the years, an additional 13 states added anti-harassment or anti-discrimination requirements to their ethics rules.



As the comments to Minnesota's rule make clear, the anti-discrimination rules in particular are based upon the premise that "human equality lies at the very heart of our legal system."⁵ "A lawyer whose behavior demonstrates hostility toward or indifference to the policy of equal justice under the law may thereby manifest a lack of character required of members of the legal profession."⁶

National progress on this front has been slow. In 2016, the ABA finally approved an amendment to Model Rule 8.4 to add subparagraph (g), which is similar but not identical to Minnesota's long-existing Rule 8.4(g), but limits misconduct to the practice of law.⁷ Only a few states have subsequently adopted Rule 8.4(g) that did not already have some form of anti-harassment or anti-discrimination rule (specifically, Vermont and the U.S. Virgin Islands); other states are studying the proposed rule. This still leaves the vast majority of U.S. states without a specific rule to

address discrimination or harassment by lawyers. It will be interesting to see if the current cultural climate changes that fact.

Discipline in Minnesota

In 1988, even before Minnesota had specific rules prohibiting discriminatory and harassing conduct, the court publicly disciplined Geoffrey Peters, then dean of the William Mitchell College of Law, for repeatedly engaging in unwelcome physical contact and verbal communications of a sexual nature with four women employees, two of whom were also law students.⁸ In that case, Dean Peters argued that he was merely a "tactile" man and that his conduct was misunderstood by "overly sensitive" individuals. The court disagreed, appropriately finding his actions (such as walking up to a student, placing his hand on the back of her head, running his fingers through her hair and down to her waist, and letting his hand come to rest on the small of her back, among other examples of unwelcome physical touching) harassment.⁹

An attorney, Thomas Ward, received public discipline for making unwanted physical contact of a sexual nature with an applicant for employment in his office; the applicant was a 20-year-old recent business school graduate.¹⁰ Clark Griffith, while an adjunct at William Mitchell College of Law, engaged in sexual harassment of a law student, and entered an *Alford* plea to indecent exposure for conduct involving that same student.¹¹ Mr. Griffith also attempted to pressure the student to withdraw her complaint once made (with suggestions of assistance with future employment) and continued to contact the student despite being specifically instructed by law school administration and the student herself to cease all communications.¹²

Other forms of harassment and discrimination also subject attorneys to discipline. Rebekah Nett, in a series of bizarre court filings, called a bankruptcy judge a "Catholic Knight Witch Hunter," the Chapter 7 trustee a "Jesuitess," and the U.S. trustee a "priest's boy." The filings also asserted that "these dirty Catholics have conspired to hurt Debtor."¹³



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Securities Board. She has more than 20 years of litigation experience, as well as a strong ethics and compliance background. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

An attorney has also been transferred to disability status after making a series of 12 calls to a client within 60 minutes, which calls included harassing statements on the basis of religion and national origin.¹⁴

And do not forget...

There are other rules attorneys should note. Sex with clients is wrong, unless a consensual sexual relationship existed prior to the attorney-client relationship.¹⁵ Sex with witnesses can also present a conflict. Attorneys also cannot, in representing a client, use means that have no substantial purpose other than to embarrass, delay, or burden a third party.¹⁶

Minnesotans should be proud that the state has been a leader in implementing strong ethics rules designed to prevent harassment and discrimination by lawyers. Lawyers hold positions of power in law firms, in courtrooms, in politics, and in corporations, and abuse of those positions by conduct that harasses or discriminates should be and is professional misconduct. Thank you to the "Silence Breakers" who have courageously stepped forward to speak out, whether against a national figure or a local attorney. ▲

Notes

¹ "The Choice" by Edward Felsenthal, *Time*, at <http://time.com/time-person-of-the-year-2017-silence-breakers-choice> (last visited 12/11/2017).

² Rule 8.4(g), Minnesota Rules of Professional Conduct (MRPC).

³ Rule 8.4(h), MRPC.

⁴ Rule 8.4(h)(4), MRPC.

⁵ Rule 8.4(h), MRPC, Comment [6].

⁶ *Id.*

⁷ ABA Model Rule 8.4(g), Revised Resolution 109, August 8, 2016.

⁸ *In re Peters*, 428 N.W.2d 375 (Minn. 1988).

⁹ *Id.* at 376.

¹⁰ *In re Ward*, 726 N.W.2d 497 (Minn. 2007).

¹¹ *In re Griffith II*, 838 N.W.2d 792 (Minn. 2013).

¹² *Id.* at 797.

¹³ *In re Nett*, 839 N.W.2d 716 (Minn. 2013).

¹⁴ *In re Woroby*, 779 N.W.2d 825 (Minn. 2010).

¹⁵ Rule 1.8(j), MRPC.

¹⁶ Rule 4.4(a), MRPC.