

Responding to the Call to Action for Equality in the Practice of Law in Nebraska: Proposed Change to the Nebraska Rules of Professional Conduct § 3-508.4

by Chloe Kuehner and Gretchen McGill

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

- Preamble, Nebraska Rules of Professional Conduct.

In the November/December 2018 issue of *The Nebraska Lawyer*, Megan Belcher published an article entitled, *A Call to Action in Pursuit of Gender Equality in the Practice of Law in Nebraska*. The article highlighted the startling discrimination, bias, and harassment lawyers face in Nebraska on a regular basis. Ms. Belcher issued a call to action:

For many, the question remains, how can we as a collective, and as individuals, drive impact towards equality of opportunity for all genders, as well as races, orientations, and categories of inclusion as we seek to achieve that goal. The answer comes in many actions, focused on thoughtful change management on the micro and macro level, and

each and every lawyer in our community acting as a culture creator.¹

I am proud to report that the Nebraska State Bar Association (“NSBA”) Women in the Law Section accepted that call to action and spearheaded an effort to revise the Nebraska Rules of Professional Conduct, Rule § 3-508.4, to more specifically prohibit discrimination and harassment in connection with a lawyer’s professional activities. The proposed revisions should not be considered groundbreaking or controversial. The American Bar Association (“ABA”) similarly changed the ABA’s Model Rules of Professional Misconduct in 2016. As of September 2021, 22 states have admitted the ABA’s Model Rule 8.4(g) or a modified version. Now in 2022, Nebraska lawyers have the unique opportunity to respond to the call for action and rally to support a change to our rules of professional conduct that will better ensure equality and justice within our profession.



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Chloe Kuehner is an associate in the litigation department at Dvorak Law Group. Chloe graduated from Creighton Law School in 2021 and has enjoyed lending her support to the Women in the Law Section’s efforts related to the rule change.

Gretchen McGill



Gretchen McGill is a partner at Dvorak Law Group, where she maintains a busy practice in general civil litigation. Gretchen is Chair of the NSBA’s Women in the Law Section and a member of the Executive Committee of the Nebraska Legal Diversity Counsel. Since her days prosecuting domestic violence crimes, Gretchen is passionate about advocating for the rights of women to be free from abuse, discrimination and gender bias.

What You Can Do

If you are interested in the history of the proposed revisions to the Nebraska Rules of Professional Conduct Rule § 3-508.4 and the data that supports it, read on. However, if you want to quickly know what you can do to respond to the call for action, the Nebraska Supreme Court has posted the NSBA's proposed revisions to Rule § 3-508.4 for comment. Please do your part by leaving a comment for the Supreme Court's consideration by emailing your comments to Wendy.wussow@nebraska.gov with the subject line: Neb. Ct. R. of Prof. Cond. § 3-508.4. Misconduct. Comments will be accepted through May 2, 2022.

The Evolution of Rule 8.4

The ABA developed the Model Rules of Professional Conduct ("Model Rules") as a guide for states to promulgate rules governing the practice of law. Largely as a response to Watergate, in 1977, the ABA formed the American Bar Association Commission on Evaluation of Professional Standards and named Nebraska's own Robert J. Kutak as Chairman of the Commission.² In its initial form, Model Rule 8.4 prohibited lawyers from, among other things, engaging "in conduct that is prejudicial to the administration of justice."³ As such, from their inception, the Model Rules recognized the need to govern lawyers' conduct beyond the courtroom and the relationship between lawyer and client. Indeed, a sig-

nificant core value in the Model Rules "was the concept that lawyers have obligations relating to the greater social interest in addition to the singular alliance a lawyer traditionally owes to clients."⁴

Since their adoption in 1983, all states have followed suit by adopting their own rules of professional conduct, which are similar or nearly identical to the Model Rules. The Model Rules have been amended numerous times, but the core values have remained the same. The Model Rules serve as an invaluable tool through which the ABA has led the way to ensure a lawyer's conduct confirms "to the requirements of the law, both in professional service to the clients and in the lawyers' business and personal affairs."⁵

In 2016, a significant amendment was made to Model Rule 8.4(g), Misconduct. The 2016 amendment made three key changes:

- A knowledge component was added by prohibiting conduct that a lawyer "knows or reasonably should know" is harassment or discrimination. "Know," "reasonably," and "reasonably should know" are defined in Model Rule 1.0 (f), (h), and (j), respectively.
- The list of protected classes was expanded to include ethnicity, gender identity, and marital status.
- Application to lawyers' "conduct related to practice of law," rather than the original Rule's focus on conduct related to the "administration of justice," was increased.⁶

If a lawyer is unfamiliar with the definition of "harassment or discrimination," the comments to Model Rule 8.4 provide further clarification:

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 anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (g).⁷

In other words, Model Rule 8.4(g) expanded the protections of anti-discrimination and anti-harassment laws to the legal profession. As lawyers, we have special responsibility for the administration of justice. Tolerating conduct by lawyers that violates anti-discrimination and anti-harassment laws clearly undermines confidence in the legal professional and the legal system.⁸

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EQUALITY IN THE PRACTICE OF LAW IN NEBRASKA

As stated above, 22 states have admitted Model Rule 8.4(g) or a substantially similar version. Although Nebraska's Rule of Professional Conduct § 3-508.4 prohibits lawyers, "in the course of their employment," from engaging in "adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socioeconomic status," it leaves a loophole that has allowed legal professionals in Nebraska to engage in discriminatory and harassing conduct against each other.

The Status of Harassment and Discrimination in the Nebraska Legal Profession

In order to gauge the status of discrimination and harassment in the legal profession in Nebraska, in 2018, the Women in the Law Section issued a survey to all members of the Nebraska Bar. The survey provided five multiple-choice questions and two essay questions, which allowed survey responders to safely report and share examples of gender-based inappropriate conduct, harassment, discrimination, and biased behavior they had experienced in their legal career. More than 500 lawyers from both genders responded to the survey. Unfortunately, the survey results solidified that gender-based inappropriate conduct and gender-based harassment and discrimination is occurring in Nebraska's legal communities and workplaces at alarming rates:

- Nearly 70% of respondents have personally experienced or witnessed conduct that demonstrated inappropriate behavior, harassment, and/or discrimination on the basis of gender or other forms of gender bias.
- Over one-third of respondents did not believe they had adequate reporting mechanisms in their places of employment or within the practice to report gender-based harassment, discrimination, and/or biased behavior.
- Over one-quarter of respondents believe that, even if they reported misconduct, their workplace and/or the legal community would not effectively respond to a report of gender-based harassment, discrimination, and/or biased behavior.⁹

Nearly 70% of respondents have personally experienced or witnessed conduct that demonstrated inappropriate behavior, harassment, and/or discrimination on the basis of gender or other forms of gender bias.

Respondents to the survey reported experiencing:

Physical assaults, inappropriate touching, and grabbing;
Sexual invitations from attorneys (including supervising attorneys) in the workplace and/or while making hiring decisions;
Loss of promotion and/or advancement opportunities because of gender;
Compensation that is less than male colleagues of similar skill level and experience;
and more.

In addition, responses to the essay questions described gut-wrenching conduct experienced by our legal colleagues:

- Physical assaults, inappropriate touching, and grabbing;
- Sexual invitations from attorneys (including supervising attorneys) in the workplace and/or while making hiring decisions;
- Wide-ranging and inappropriate comments on female lawyers' physical appearance;
- Questions about marital status and/or plans to have children when making hiring and/or promotional decisions;
- Disparate and/or dismissive treatment by opposing counsel and/or judges with gender-based undertones;
- Gender-based inappropriate "nicknames" from members of the bar, ranging from "missy," "honey," "sweetie," and "little lady" to more aggressive and gender-derogatory names;
- More nuanced forms of bias against women that include failure to provide an opportunity to participate in meetings, social outings, or making decisions about opportunities that would not be offered because of notions about family status or parental status;
- When advocating on behalf of oneself and/or a client, labeling female attorneys as "emotional," "hormonal," or "angry;"
- Treating female lawyers as if they are incapable of and/or creating workplace cultures where women must over-perform to demonstrate they are meeting expectations;
- A belief that the legal community in Nebraska is an "old boys' network" and you have to "act like one of the guys" to get ahead;



EQUALITY IN THE PRACTICE OF LAW IN NEBRASKA

- Loss of promotion and/or advancement opportunities because of gender;
- Compensation that is less than male colleagues of similar skill level and experience; and
- An absence of extensive diversity in judiciary, law firm leadership, in-house leadership, governmental agency leadership, and a belief that inclusion is not a truly broad priority in our legal community.¹⁰

As I am not sure it has been said, THANK YOU to those of you who responded to the survey. We heard you and took your comments and stories to heart. We also know there are many other instances of harassment and discrimination in the Nebraska legal profession that were not reflected in the survey results. This knowledge is the driving force behind our efforts to change the professional rules of conduct that govern lawyers' conduct in Nebraska.

The Proposed Changes to Rule 3-508.4

In its current form Rule 3-508.4 states:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct knowingly assist or induce another to do so or to do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socioeconomic status. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

- (g) willfully refuse, as determined by a court of competent jurisdiction, to timely pay a support order, as such order is defined by Nebraska law.

There has been input from many stakeholders that contributed to the proposed changes to Rule 3-508.4. First, the Women in Law Section conducted extensive research into the status of other states' similar rules. After drafting the proposed changes to Rule 3-804.5, representatives of the Women in the Law Section met with the Counsel for Discipline, who agreed such change was necessary and supported the proposed changes. Next, the NSBA's Professional Enhancement Committee reviewed a draft of the petition and rule change. In September 2021, the petition and proposed rule change was presented to the NSBA Executive Committee. Finally, in October 2021, the NSBA House of Delegates voted to petition to the Nebraska Supreme Court to consider the revisions. The final version, which has been presented to the Nebraska Supreme Court, is as follows:

§ 3-508.4. Misconduct.

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct knowingly assist or induce another to do so or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (g) willfully refuse, as determined by a court of competent jurisdiction, to timely pay a support order, as such order is defined by Nebraska law;
- (h) 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 connection with a lawyer's professional activities; or

EQUALITY IN THE PRACTICE OF LAW IN NEBRASKA

(i) 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 that reflects adversely on the lawyer's fitness as a lawyer. Whether an act of discrimination or harassment reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including:

- 1) the seriousness of the act;
- 2) whether the act was part of a pattern of prohibited conduct; and
- 3) whether the act was committed in connection with the lawyer's professional activities.

(j) Subsections (h) and (i) do not preclude legal advice and advocacy when harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status are at issue.

In sum, the changes remove language from subsection (d) and add subsections (h) through (j). The additional subsections merely extend the protections of antidiscrimination and harassment laws to the legal profession in Nebraska. As members of the legal profession, we have the advantage of legal training, which gives us the skills to analyze, interpret, and advise on many aspects of the law. That privilege should not be abused to subject our colleagues to discriminatory and harassing behavior. Instead, the privilege of a law degree, legal training, and membership to our bar comes with the responsibility to “foster and maintain high standards of conduct, integrity [and] confidence”¹¹ in the practice of law, which includes refraining from the conduct prohibited by proposed subsections (h) and (i).

Constitutional Concerns

Since Nebraska is not the first state to propose a change to its professional rule governing misconduct for lawyers, it has the benefit of other states' trial and error.¹² The drafters of the modifications to Rule 3-508.4 took careful consideration to narrowly tailor the revisions to govern conduct and not speech, which is consistent with prohibitions already contained in the rule. For example, subsection (c) already prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation.” Likewise, subsection (d) prohibits “conduct that is prejudicial to the administration of justice.” Similarly, both new subsections (h) and (i) prohibit conduct that a lawyer knows, or reasonably should know, is harassment or discrimination. Further, new subsection (j) provides an exception for attorneys who are providing legal advice and advocacy when harassment or discrimination are at issue.

In short, the proposed changes to Rule 3-508.4 are consistent with constitutional requirements and achieve the compel-

ling state interest to ensure the high standards of conduct and integrity among the members of the NSBA.

Continued Call to Action

“[T]he concept of human equality lies at the very heart of our legal system.”¹³ The proposed rule change is just one step in the right direction to build a legal profession in Nebraska that is free from discriminatory and harassing conduct and provides equal opportunity for every lawyer, regardless of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. Please make the first step in effectuating this change by leaving a comment for the Supreme Court's consideration on Rule 3-508.4 as outlined above.

But do not stop there. Educate yourself on the experiences of the marginalized in our profession and our society. Seek out points of view from your colleagues with different backgrounds than your own. Get involved in the efforts of the Nebraska Legal Diversity Council. Be a leader in your workplace, and do not tolerate any harassing or discriminatory conduct—from disproportionate opportunities and pay to “locker room” jokes. Only with a collective effort can we ensure that the next survey on the status of discrimination and harassment in the legal profession in Nebraska produces much different results. 

Endnotes

- ¹ Megan Belcher, *A Call to Action in Pursuit of Gender Equality in the Practice of Law in Nebraska*, 21 *The Nebraska Lawyer*, 25, 28 (2018).
- ² The Kutak Commission, <https://www.kutakrock.com/general-content/the-kutak-commission>.
- ³ Kristine A. Kubes, Cara D. Davis, and Mary E. Schwind, *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, 20 *Under Construction* (March 2019) https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/.
- ⁴ *See supra*, n.2.
- ⁵ MODEL RULES OF PROF'L CONDUCT: Preamble & Scope (Am. Bar Ass'n 2000). This statement is also contained in the Preamble to the Nebraska Rules of Professional Conduct.
- ⁶ *See supra*, n.3.
- ⁷ MODEL RULES OF PROF'L CONDUCT R. 8.4(g), cmt. 3 (2016).
- ⁸ *Id.*
- ⁹ *See id.* n.1 at 26.
- ¹⁰ *Id.*
- ¹¹ Neb. Sup. Ct. R. § 3-802.
- ¹² After Pennsylvania's proposed changes to its rule governing misconduct were struck down as unconstitutional (*see Greenberg v. Haggerty*, Civil Action No. 20-3822 (E.D. Penn. Dec. 7, 2020)), on July 26, 2021, the Supreme Court of Pennsylvania approved a new amendment to the rule with similar language to the proposed modifications to Rule 3-508.4; *see also In the Matter of Robert E. Abrams*, Supreme Court Case No. 20SA81 (Colo. June 7, 2021) (upholding the constitutionality of Colorado's Rule 8.4(g)).
- ¹³ Minnesota Rules of Professional Conduct, Rule 8.4(g), cmt. [6].