

Mary Vandennack provides the transcript from Legal Visionaries podcast on Equality in the Practice of Law

TRANSCRIPT:

Mary:

On today's episode, my guest is Gretchen McGill. Gretchen is a partner at Dvorak Law Group in Omaha, Nebraska where she practices civil litigation. Gretchen is also the former chair of the women in the law section of the Nebraska State Bar Association and a member of the Executive Committee of the Nebraska Diversity Legal Council. Gretchen has been involved in advocating for changes to the rules of professional conduct and has written on the topic, including an article for the Nebraska State Bar Association Journal. Thanks for joining me today, Gretchen.

Gretchen: Thank you for having me, Mary.

Mary: You've been involved in trying to achieve change in the Nebraska Rules of professional conduct, specifically 3-508.4. Because our audience is national, I'm going to refer to the ABA Model Rule 8.4 (g) which you referred to in your article. Can you explain what that rule is and its purpose and a little bit about what you're trying to achieve by changing the Nebraska rule?

Gretchen: Absolutely. First of all, the ABA Model Rules are based on the concept that lawyers have obligations relating to the greater social interest in addition to the singular allegiance that lawyers traditionally have to their clients. Both the Model Rules and the Nebraska Rules of Professional Conduct make it clear that the rules serve as an invaluable tool through which the ABA has led the way to ensure lawyers' conduct conforms to the requirements of both the law in their professional service to the clients and in a lawyer's business and personal affairs. I just mentioned that because as you'll see, 8.4 (g) extends beyond the typical client-attorney relationship into the attorney's conduct outside of that relationship. So 8.4 (g) is one of the rules that governs a lawyer's conduct and prohibits them from engaging 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 the conduct related to the practice of law. There's a comment to this paragraph that makes it clear that Rule 8.4 (g) does not limit the ability of a lawyer to accept, decline, or withdraw from representation based on these characteristics of a client in accordance with Rule 1.16 which governs a lawyer's professional responsibility in terminating a client. But what we are trying to do is, in Nebraska, adopt a rule similar to 8.4 (g) that extends prohibition on lawyers engaging in harassing and discriminatory conduct related to the practice of law.

Mary: Can you speak a little bit more about the history of the rule and the recent changes?

Gretchen: Yes. In 1977, a commission of the American Bar Association was created and tasked with an initial review and eventually a complete restatement of the then existing Code of Responsibility. The rules which existed at that time were more or less canons, and they had been adopted in 1887, so they were quite out of date. In 1977, it was mainly motivated by Watergate and the desire to govern attorney's conduct. Actually, the chairman of that commission was Robert Kutak, who was an attorney located here in Nebraska. In its initial form, Rule 8.4, prohibited lawyers from, among other things, engaging in conduct that is prejudicial to

the administration of justice. So it was much more vague, didn't list the classes of protected individuals, and in general was not that specific in terms of discrimination and harassing behavior. So the 2016 amendment adopted on August 8th, 2016 maintained many of the sections of Rule 8.4, but added paragraph (g) which specifically prohibited harassment and discrimination based on those protected categories that I listed in a lawyer's conduct related to the practice of law. That phrase, related to the practice of law, is a key phrase because again, it goes beyond the lawyer's typical obligation just to the client and includes other people such as coworkers, opposing counsel, staff, et cetera, in the lawyer's office. So it again is governing the lawyer's behavior outside the typical attorney-client privilege. The 2016 amendment made three significant changes. It added a knowledge component that the attorney knows or reasonably know that the conduct should be harassing or discriminatory. It expanded the list of protected classes. Then again, it applied broadly to a lawyer's conduct related to the practice of law. The comments address what the rule means by conduct related to the practice of law. That can include representing clients, interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law, operating or managing a law firm, participating in Bar Association events, business or social activities in conjunction with that lawyer's practice.

Mary: So, I just have a side question in terms of something that came up this morning. You litigate by day, and I don't. I'm a planner, so most of the time I'm dealing with clients and not so much if I'm collaborating with other attorneys on projects that might happen. But I did have a situation today as we're talking about this where I got an email from another lawyer in town who is a litigator in reference to a client who said something like, "Went out and read my profile and then insulted me with something from my profile." Just as a generality, without getting into more specifically what we're going to talk about, that's maybe conduct that we really don't want as professionals. Because I think one of the great things about our profession is I was recently at an event where politics came up. It was all lawyers. And I was freaking out thinking I need to leave the room. This is going to get so ugly. Instead, it actually was very ... 90 minutes later, not one person had sent a nasty tweet, had cut anybody off, had insulted anybody. I recall that that's actually one of the things that I really value about our profession, is the ability to have different views and be respectful about it. I know that with you litigating, that's part of your everyday life. As a non-litigator, I used to watch you go out with the person on the opposing side. How can you do that after you were just in court battling it out? To me, the conduct of us as a profession is really important. Model Rule 8.4 defines, and you mentioned the harassment and discrimination. Can you speak to that definition a little bit and provide some examples?

Gretchen: Absolutely. The definition of those terms is actually addressed in the comment. The comment recognizes that discrimination and harassment by lawyers undermine the confidence in the legal profession and the legal system. I do think just like your experience, I think for the most part, lawyers do treat each other with respect. But there are loopholes in our professional rules of misconduct. That's what I think needs to be closed. So, the comments state that discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. That goes on to state that harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Specifically with respect to sexual harassment, that includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of sexual nature. Let's not forget that we are governing the conduct of lawyers who are uniquely trained and have advanced skills in interpreting the law. So, the comments also make it clear that in determining how to apply paragraph (g), the substantive law of anti-discrimination and anti-harassment statutes and case law can provide guidance.

In terms of examples, there's many states that have already adopted this rule and cases that have come out of enforcement of that rule. There are two cases in Iowa that come to mind, one where a male lawyer in an office was sneaking into female lawyers' offices and getting into their gym bags and stealing their undergarments for his personal gratification. Those were all found in his office. Obviously, the women whose undergarments he had felt very violated by that. In a separate case in Iowa, there was a male lawyer who regularly came to work in his boxers, would make lots of sexual jokes and comments. So, it made the women in the office, most of which were staff people, because I think he was a solo practitioner, very uncomfortable. So, we're talking about egregious behavior in the states where this rule has been adopted. We're not talking about minor violations. We're talking about the type of harassment and discrimination that we're already reading about in the news. We're just trying to make sure that lawyers in Nebraska don't engage in that conduct without any penalty or risk to their license because of their heightened status as an attorney,

Mary: We are going to take a brief break from our episode for a word from one of our sponsors.

Mary: Okay, let's continue our episode. I know you're saying the tendency is to focus on the egregious behavior, but I think about the email I received this morning. Was it egregious? No, but it was kind of offensive. I looked at that and say on the one situation, whereas I really would prefer to see lawyers, and that's why I think the rules are really important, as a generality setting a really good standard in terms of behavior. But definitely, we need to address the egregious type of behavior. My personal goal would be to see more of the experience I shared where I saw, oh, yeah, this is what I really like about our profession as opposed to the stories that you're sharing, which are like nobody should ever experience that. Particularly as those of us who uphold the law, that just seems to be something we should be focusing on. So, as I understand it, the ABA Rules, that comes from the American Bar Association. Each state has the ability to adopt it. Not all states have. So why does it matter whether or not the most recent ABA Rule has been adopted by a state?

Gretchen: Well, it matters because as you referenced, every state license its own attorneys. They govern their own attorneys' conduct in respect to that license and they handle the disciplinary actions that would result in attorneys practicing in that state losing their license. In many states, there's a loophole to the rules of professional conduct that allow attorneys, unfortunately, to engage in harassing and discriminatory behavior without any consequences. I think it's important that we close that loophole. I just want to share the story that got me to start working in this area, is when I became the chair of the Women in the Law Section for the Nebraska Bar Association, I had a woman email me confidentially and tell me the story of how she was working on this case and her opposing counsel was a man. The man made some advances toward her which she rejected, and the man did not accept her rejection. So he kept showing up at her place of employment, making it past reception into her office where she felt cornered to the point where she left her place of employment to go work somewhere else that had better front desk security. She called the Nebraska Council for Discipline and was rightfully told, "Well, we'll take down your complaint, but there's not technically a violation of our Rules of Misconduct." So, she was contacting me to see if we could do anything, advocate to the Council of Discipline on her behalf. And we did talk to the Council of Discipline, and they did remember her case. They were frustrated that their hands were tied as well. The Council for Discipline supported this rule change, is supporting this rule change because they want the tools to be able to enforce it when it is violated in a situation like this. So that's why it's important. Because without it, there's a loophole.

Mary: And I recall, just like you were chairing that section, I'm involved in the American Bar Association and I'm currently the incoming chair of the Law Practice Division. I remember representing that division. I served on a ABA-level commission at one point and I was in a room full of women. All of them were people that I was in awe of, going, "How did I manage to sit in this room full of these amazing women?" The topic of some of the things that people have been through in terms of harassment and discrimination came up. I'm thinking, looking at all these women in their perfect suits with great careers who have really great positions, and they all started to share some of the things that had happened to them and were still going on in their careers. That became to me, wow, okay, I thought we'd really, really come a long way and there's still work to be done. So, in advocating for the change, that's some of the where I've run into it. You've run into it in your work. There is actually a survey that provided some very specific data. That was Nebraska specific, but I'm sharing my experience at a national meeting because I think the situation is likely similar in a lot of other states. But would you share the key findings of the Nebraska survey?

Gretchen: Absolutely. Our survey was completed, and the Women in the Law sent it out in July of 2018. More than 500 active license lawyers participated in the survey from both genders. The main findings were with respect to our question of whether the responding attorney thought gender base, inappropriate conduct, harassment, discrimination, or bias behavior occurs in Nebraska's legal profession. Over 80% of the respondents said yes. In our question to whether in their particular practice, had they ever experienced or witnessed behavior that they felt demonstrated inappropriate conduct, harassment, or discrimination on the basis of gender or other forms of gender bias, almost 70% of the respondents said yes. Then with respect to adequate reporting procedures, over 41% of the respondent said they did not believe there were adequate reporting procedures in their place of employment. That kind of goes to the loophole that I've spoke about. Then with respect to when the respondents actually reported the behavior, did they believe that their place of employment or the practice of law effectively responded? Here, there was 40% of people that said no, that there wasn't an appropriate response. I think that's largely due to, in some ways, hands are tied because of the loophole contained in our rules of professional conduct.

Mary: So, in the article that you authored, you noted that some of the essays that you reviewed provided gut-wrenching conduct that were experienced by legal professionals, and you've shared a couple of those stories. Are there any others that particularly impacted you?

Gretchen: There were so many of the comments that I could just feel a sense of exhaustion from the responding lawyers that discrimination and harassment in the legal community in Nebraska is just the way it is because it's an old boys club. The comments were frequent that the responding attorneys said, "I've just grown thick skin. I've learned how to put up with it." So, it was just a sense of really feeling like the responding attorneys were sad about the state of this topic and issue in our legal profession. Some provided more specific comments. There was one respondent who said, less than a week ago, she had a judge in chambers tell her, "I'm just an old sexist man." One of the respondents said that they were told in an interview, "If you get this job, you can't sleep with married men." I personally get this all the time. I'm not sure if you do, opposing counsel oftentimes referring to me as young lady.

Mary: Yeah, actually I do still get that, despite not being so young anymore.

Gretchen: I'm not young either, but I just personally find that very offensive. So overall, it was just a sense of really heavy responses of people feeling just burnout and lack of hope that the

situation is going to change, that there can be this kind of behavior eradicated from our profession.

Mary: I know there's been a lot of studies on women particularly leaving the profession and the high rate of burnout generally in our profession. I think that really speaks to the rules should be revised in a way that it's an important profession. We want people to stay in it. We want it to be a diverse population in the profession. What are the key changes that should really be considered by states that have not adopted the ABA version of Modern Rule 8.4?

Gretchen: I think that the states that have not adopted this should consider doing so. And the rule really needs to be amended to more specifically prohibit discrimination and harassment in connection with the lawyers' professional activities. We cannot just limit this rule to a lawyer's interaction with his or her client. We've got to expand it to, like the ABA Rule states, to a lawyer's professional activities, whether they be at an ABA event, in their management of their firm, in their interaction with opposing counsel, in their interaction with their staff. To say this problem doesn't exist ignores the data that exists, the data, the stories that we all have today. At my last check, 22 other states have adopted similar rules, some as early as 1990 and 1991. Some states have had challenges to these rules. They have had those rules upheld. I'm going to, I think, get to later, to a case in Pennsylvania that is currently in limbo, but it is just very important that this rule be expanded beyond just prohibiting discriminatory and harassing conduct with a lawyer's client. I think a simple way of putting it is we are extending the respect that a client is owed, that a colleague, that everyone, every lawyer's colleague is also owed.

Mary: So, as I understand it, Nebraska has not yet made a change, despite having support from the Women's Bar, the Council for Discipline, and the Nebraska State Bar's House of Delegates. With respect to Nebraska and any other states that have not updated the rules, is there anything that can be done?

Gretchen: Well, first of all, I don't think the Nebraska Supreme Court is going to take any action until this case in Pennsylvania is decided which I referenced in my last answer. The State of Pennsylvania adopted a rule that was somewhat similar to the ABA Rule, but it referenced conduct and speech. So, a man by the name of Zachary Greenberg who was actually just admitted to the Pennsylvania Bar in 2016, so he's been quite busy, he works as a program director at the Foundation for Individual Rights and in the course of his employment, talks on a number of topics including freedom of speech, freedom of association, due process. So, he took it upon himself to challenge the original rule and he won in the District Court of Pennsylvania. So, the Council for Discipline in Pennsylvania amended their rule to actually quite closely represent the proposed rule that is in front of the Nebraska Supreme Court. So that was passed by the Council for Discipline in Pennsylvania. But Mr. Greenberg didn't like that rule either, so he again made a constitutional challenge to that rule and won again in the District Court of Pennsylvania. That case is currently on appeal with the Third Circuit Court of Appeals and oral arguments are set to occur on April 11th of this year. So, with the original case and the original rule, the District Court said, "Obviously, we can't regulate speech." So that's why they struck down the original rule. The proposed Nebraska rule does not anywhere attempt to regulate speech. It's purely regulating conduct. So, in terms of what people can do, it's kind of in the hands of our Supreme Court now. There was a period of public comment which has ended, but as I called for in my article, I would encourage everyone to educate yourself on the experience of marginalized people in our professional society. Seek out points of view from your colleagues that have different backgrounds than your own. Get involved in the efforts of the Nebraska Legal Diversity Council. They're making wide strides to get our legal community more diverse and

inclusive. And be a leader in your workplace. Do not tolerate this behavior. When it does occur, speak out, speak up, and report it to the Council of Discipline. They can't do anything, but we need to document this behavior. Because many of the comments submitted to the Supreme Court in opposition to this rule were that we're looking for a problem that doesn't exist. We are not looking for a problem that doesn't exist. This problem exists.

Mary: And I think that's a really important point. I remember, and I'm just going to do an example that's not necessarily the same, but to say sometimes I think you have to really develop an awareness of exactly what is inappropriate. So, you mentioned the concept, idea of being called a young lady. A lot of people are so used to that. They've heard it so long; it doesn't even occur to them that might be inappropriate. So, there's things that even just have been part of your life and you just don't see them. My example would be recently working with somebody where there was somebody in a firm that had an alcohol problem. Two of the members were really supportive, but they both had grown up seeing alcoholism. You talk to the Council of Discipline, said, "This is the way that's going down. This person's going to not show up, not return client calls. You've got to see that." So, if you've seen something that's not appropriate, it can seem normal to you. So, you have to really become aware that there's behaviors that aren't normal. That's why I really like your suggestion of being in parts of groups that are talking about that so that sometimes you'll go, "Oh wow, that's right. That's really not appropriate, what I'm experiencing in that situation." You mentioned that Pennsylvania case and the constitutional challenges. Do you want to elaborate on that case anymore?

Gretchen: Yeah, and many of the comments submitted to the Supreme Court of Nebraska referenced a constitutional challenge, that the proposed rule, our proposed rule was constitutionally deficient. The basic reasoning behind the constitutional challenge is the right to free speech. Actually, the rule has a comment that somewhat addresses this challenge that states, "A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists." Basically, what that means is we are not trying to regulate a person's religious beliefs or their freedom of speech. Professor Kyle Langvardt from the University of Nebraska Law School gave a great CLE on this at the Nebraska Bar Association's Annual Conference in October of 2022. He is a constitutional law professor, and he took a look at our rule and opined that it does not violate the right to free speech. We all can think of constitutional horrors where people are doing offensive or doing things that we might find offensive, but that would not rise to a level of violating the rule. For example, we currently have legislation pending in the Nebraska legislature that would ban the right for transgender youth to receive gender-affirming care. Maybe a lawyer spoke out in favor of that law. Could that technically be interpreted as a violation of the rule as proposed? Yes. Is that speech absolutely protected by the First Amendment? Yes. So to claim that the rule is just over-broad ignores the doctrine that you have to do an as applied analysis, which we would never claim that someone affiliating with their church who might have a religious belief against homosexuality would violate the rule. They have a constitutional right. That's not the kind of conduct that the rule is meant to prohibit. Moreover, it's not constitutionally invalid just because you can think of these hypotheticals that may be a violation of it. Until it is applied in that unconstitutional manner, the rule doesn't risk a constitutional facial challenge to it being facially invalid on constitutional basis.

Mary: But sometimes when we're trying to achieve change that we perceive as positive and others perceive as not so positive, there's a lot of red herrings that get thrown out like that. Do you have any last thoughts today, Gretchen?

Gretchen: Well, I just want to say thank you again to all the participants of our survey because that really was kind of the spark that led us to do a lot of this work. I want to want to make sure that everyone and anyone who has ever experienced harassment or discrimination as a member of the Nebraska legal community feels heard and knows that the work on this rule change is fueled and motivated by our support for you.

Mary: Well, thanks for joining me today. As we reach the end of our episode, I want to thank our sponsors, InterActive Legal, Foster Group, and Carson Private Client. That's all for now. Thanks for listening to today's episode and stay tuned for our weekly releases.