

# New York State Bar Association Health Law Section

Legal Ethics CLE

Stephen Gillers

January 24, 2018 / 10-10:50 a.m.

# Agenda (minutes)

- Introduction (5)
- Bias and Harassment in Law Practice– 20 minutes
  - The ABA’s new Rule 8.4(g)
  - The current New York rule
- “Slut-Shaming” in Chaz Reetz-Laiolo v. Emma Cline
  - That’s the charge – Is it Right? What Ethics Rules Apply – 15 minutes
- Q&A – 10 minutes

# Bias and Harassment in the Practice of Law

What Are the Rules?

What Should They Be?

# NY Rule 8.4(g)

- A lawyer or law firm shall not...
  - **unlawfully discriminate** in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation.
  - Where there is a tribunal with jurisdiction to hear a complaint, timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be brought before such tribunal in the **first instance**.
  - A certified copy of a determination by such a tribunal, which has become final and enforceable and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

# ABA Rule 8.4(g)

- It is professional misconduct for a lawyer to:...
- (g) 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 conduct related to the practice of law.
- This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

# Rule 8.4 comment

- [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. **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 antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

# Rule 8.4 comment

- [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

# Rule 8.4 comment

- [5] A trial judge's finding that **peremptory challenges** were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).



# ABA Code of Judicial Conduct 2.3

- (C) A judge shall require lawyers in proceedings before the court to refrain from **manifesting bias or prejudice, or engaging in harassment**, based upon attributes including but **not limited to** race, sex, gender, religion, national origin, **ethnicity**, disability, age, sexual orientation, marital status, **socioeconomic status, or political affiliation**, against parties, witnesses, lawyers, or others.

# Masterpiece Cakeshop v. Colorado Civil Rights Commission (Cert. granted. 6-26-17)

- Jack Phillips is a cake artist. The Colorado Civil Rights Commission and the state courts ruled that he engaged in sexual orientation discrimination under the Colorado Anti-Discrimination Act ("CADA") when he declined to design and create a custom cake honoring a same sex marriage because doing so conflicts with his sincerely held religious beliefs.
- The question presented is:
  - Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

# Other sources

- Stephen Gillers, A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 195 (2017).
- Josh Blackman, Reply: A Pause for State Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 241 (2017).

# “Slut-Shaming” In the Practice of Law

Or Not?

# REPRESENTATION OF PLAINTIFFS IN Chaz Reetz-Laiolo v. Emma Cline

- Alexandra Alter, *Sex, Plagiarism and Spyware. This Is Not Your Average Copyright Complaint* (NYT 12-2-17)
  - [https://www.nytimes.com/2017/12/01/books/emme-cline-lawsuit-boies.html?\\_r=0](https://www.nytimes.com/2017/12/01/books/emme-cline-lawsuit-boies.html?_r=0)
- Sheelah Kolhatkar, *How the Lawyer David Boies Turned a Young Novelist's Sexual Past Against Her* (New Yorker 12-1-17)
  - <https://www.newyorker.com/news/news-desk/how-the-super-lawyer-david-boies-turned-a-young-novelists-sexual-past-against-her>

# From the New Yorker...

- In the [Boies Schiller] letter [to Cline's lawyer], which also made allegations against Random House, Boies Schiller accused Cline of stealing fragments of written work from a former boyfriend and using them in a draft of her novel. Additionally, the letter said, Cline had spent years improperly snooping on the e-mail accounts of the ex-boyfriend, Chaz Reetz-Laiolo, and two of the former couple's female friends. [\*]
- Cline's attorneys argued that the plagiarism allegations were false, and asserted in a letter that Reetz-Laiolo—who was thirty-three-years old when the two started dating, while Cline was twenty—had been emotionally and physically abusive toward her, that he had cheated on her, and that she had installed the spyware in order to monitor his behavior and protect herself, not to steal his writing. (In a statement, Reetz-Laiolo said that Cline had made “false accusations of physical abuse against me,” and that she'd offered no defense for allegedly accessing his co-plaintiff's online accounts.)

[\*By putting spyware on her computer, which both used and which, after the relationship ended, she sold to Reetz-Laiolo.]

# From the New Yorker...

- On May 26th, Boies Schiller responded by sending a hundred-and-ten-page draft of a complaint that it said it was prepared to file in court if the two sides did not reach a settlement. David Boies's name appeared at the top of it. ...
- [It began by saying] that “evidence shows that Cline was not the innocent and inexperienced naïf she portrayed herself to be, and had instead for many years maintained numerous ‘relations’ with older men and others, from whom she extracted gifts and money.”
- [Complaint exhibits included] thirteen pages containing screenshots of explicit chat conversations with lovers, including one in which Cline had sent a naked photo of herself (the photo was blacked out in the letter) to a boyfriend, explicit banter with people she'd met online, and snippets of her most intimate diary entries. All of this material had been recorded by the spyware and remained on Cline's old laptop, which Reetz-Laiolo now had in his possession.

# From the New Yorker...

- A letter that Boies Schiller sent along with the draft complaint included even more graphic sexual details and screenshots pertaining to Cline's romantic relationships.
- The letter went on to state that Cline's arguments—that she had been abused by her former boyfriend, and that her concern about infidelity was the reason for her cyber-espionage—had “placed Ms. Cline's sexual conduct directly at issue.”



# From the New Yorker:

Carrie Goldberg, one of Cline's lawyers, told the New Yorker:

“Legal complaints are public record, and, basically, they're saying, ‘Hey, if you don't give us what our client wants, we're going to put this very personal information out into the open, and the whole world is going to know the inner workings of your sex life and your sexual history and every proclivity that you have.’ ”

# An Email to Me (1/4/18)

- Professor Gillers:
  - I am a member of the team representing Chaz Reetz-Laiolo, Kari Bernard, and Kristin Kiesel in litigation against Emma Cline and Random House. I attended your CLE at the New York City Bar Association addressing the case. Ms. Bernard and Ms. Kiesel have recently published a letter to the editor in *The New Yorker*, linked below, which I thought I might bring to your attention in case you had not already read it and are interested in reading their perspective:
  - <https://www.newyorker.com/magazine/2018/01/08/letters-from-the-january-8-2018-issue>

# NY Rule 4.4(a)

- (a) In representing a client, a lawyer shall not use means that have no **substantial** purpose other than to **embarrass or harm** a third person or use methods of obtaining evidence that violate the legal rights of such a person.

# NY Rule 1.2(a)

- (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

# NY Rule 1.16(c)

- (c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when:
  - (4) the client insists upon taking action with which the lawyer has a fundamental disagreement;