A Legislative History of District of Columbia Rule 9.1 (Nondiscrimination)

This document summarizes the legislative history of D.C. Rule 9.1 and as such, attempts to respond to Dennis Rendleman’s recent request on behalf of the ABA Standing Committee on Ethics and Professional Responsibility.

Shortly after adoption of the American Bar Association Model Rules of Professional Conduct in August 1983, the District of Columbia Bar appointed a special committee to consider and make recommendations to the Bar and the District of Columbia Court of Appeals regarding adoption of the ABA Model Rules. The District of Columbia Bar Model Rules of Professional Conduct Committee (“Jordan Committee”) was chaired by Robert E. Jordan, III. On November 19, 1986, after a three year process that included a public comment period, the D.C. Bar Board of Governors approved and forwarded the Jordan Committee’s report and recommendations to the D.C. Court of Appeals.1 Between November 19, 1986 and March 1, 1990, when the District of Columbia Court of Appeals promulgated the D.C. Rules of Professional Conduct, effective January 1, 1991, correspondence occurred between judges of the D.C. Court of Appeals and the D.C. Bar and/or Robert Jordan on various proposed rule recommendations.2 The correspondence and Board of Governors discussions (as reflected in the BOG Meeting Minutes) are part of the official legislative history of the D.C. Rules, are public documents, and are available upon request.

Genesis of D.C. Rule 9.1

D.C.’s anti-discrimination rule was first proposed by D.C. Court of Appeals Judge Ted R. Newman, as reflected in a letter from Judge John M. Ferren to Robert Jordan dated March 22, 1988. Judge Newman proposed an additional rule, not included in the 1986 Jordan Report, making various types of discrimination an ethical violation, based on rules adopted in Vermont and New York and modeled after the D.C. Human Rights Act.3 The rule as originally proposed by Judge Newman stated:

A lawyer shall not discriminate against any individual in conditions of employment because of his or her race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

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1 In the District of Columbia, the District of Columbia Court of Appeals (the highest court in the jurisdiction) has sole authority to promulgate attorney ethics rules. The final report and proposed recommendations of the Jordan Committee as approved by the D.C. Bar Board of Governors on November 19, 1986, was officially entitled Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended By The District of Columbia Bar Model Rules Of Professional Conduct Committee, and Changes Recommended By The Board of Governors of the District of Columbia Bar. It is more commonly referred to as the “Jordan Report.”

2 On September 1, 1988, the D.C. Court of Appeals published the proposed D.C. Rules of Professional Conduct for further public comment, in the Bar Report (then-official newspaper of the D.C. Bar). The 1988 proposed D.C. Rules primarily reflected the Jordan Report recommendations, however, for some provisions, including initial proposed Rule 9.1, the Court proposed its own formulation.

3 Judge Newman wrote in a memo to his colleagues dated March 14, 1988: “As drafted by me, the provision basically tracks Section 1-2512 of the D.C. Human Rights Act excluding personal appearance, matriculation, or political affiliation.”
In the BOG Meeting Minutes from April 12, 1988, Robert Jordan reported that “he discussed with members of the Court the outstanding issues on the Model Rules that had been listed in Judge Ferren’s letter of March 22, 1988” including “whether the Rules of Professional Conduct should include an anti-discrimination provision.” Mr. Jordan opined that he was not sure that an ethics rule was needed, given that D.C. already had a broad anti-discrimination law. Mr. Jordan’s concern (no disagreement on principle) was that the rule “might have a negative impact on the work of the Office of Bar Counsel and the Board on Professional Responsibility because of the resulting increase in the amount of cases they would need to process.”

1988 Publication of Initial Proposed Rule 9.1

The District of Columbia Court of Appeals published the proposed D.C. Rules in the Bar Report on September 1, 1988, and included the following:

**Rule 9.1 Discrimination in Employment**

A lawyer shall not discriminate against any individual in conditions of employment because of the individual’s race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

**Comment**

[1] This provision is modeled after the D.C. Human Rights Act, D.C. Code sec. 1-2512 (1981). A similar rule of professional responsibility has been adopted by the highest courts of Vermont and New York.

Public Comments Received on Initial Proposed Rule 9.1

In addition to the letter from the D.C. Bar Board of Governors (discussed below), the Court received four public comments on its initial proposed Rule 9.1 summarized below.


As a general statement of social or political policy, Rule 9.1 may deserve accolades. However, as an attorney who has represented both plaintiffs and defendants in cases involving alleged employment discrimination and also has experience with enforcement of standards of professional conduct, I am forced to conclude that Rule 9.1 is unnecessary, misguided and fraught with unwarranted difficulties.

Mr. Norton supported his opposition by noting, for example, that “as employers, members of the District of Columbia Bar are already subject to extensive prohibitions and remedies of the D.C. Human Rights Act, the federal civil rights law and other laws concerning discrimination.”

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4 Judge Ferren’s March 22, 1988 letter and Judge Newman’s March 13, 1988 memo had previously been distributed to Board members.
also notes the failure of the rule to provide for any limitations, such as those provided at law, and
he highlights the often slow disciplinary process versus deadline driven administrative and
litigation remedies. He suggests disciplinary complaints will be “easy to commence and difficult
to conclude,” and notes that New York and Vermont have little experience with their rules.
Finally, he concludes that the D.C. Bar has neither the “resources nor the expertise to deal with
discrimination issues.”

Letter from the Washington Bar Association (largest affiliate of the National Bar Association)

The language of proposed Rule 9.1 mirrors the language commonly employed in
state and federal statutes prohibiting discrimination in employment, education and
housing. This prohibition against discrimination has become a part of the
collective consciousness of our society and it has evolved in large part due to the
hard work and persistence of attorneys involved in the struggle for equality.
Unfortunately, the hiring practices of many of the law firms practicing in the
District of Columbia vividly demonstrate that the struggle for equality is far from
over...Rule 9.1 is an affirmative and explicit statement of the Washington Bar
Association’s belief that the procedures for recruitment, hiring, and retention of
minority attorneys are inadequate and as a result guidance in this matter is sorely
needed in the District of Columbia... the Washington Bar Association firmly
supports the adoption of Rule 9.1 as an effective tool in the struggle for equal
opportunity.

Letter from the Women’s Division of the National Bar Association, Greater Washington Area
Chapter (GWAC) dated December 1, 1988. GWAC supported proposed Rule 9.1.

This organization of minority women lawyers applauds the inclusion of Rule 9.1
which precludes discrimination in conditions of employment which is consistent
with the D.C. Human Rights Act. GWAC views this provision as an important
measure in the eradication of discrimination in the legal profession, as well as a
comment by the bench and bar formally to embrace a policy of great significance.
We hardily support the inclusion of Rule 9.1 in the Rules of Professional
Conduct.

Letter from John T. Rooney, Esq., dated December 1, 1988. Mr. Rooney supported proposed
Rule 9.1, but proposed deletion of comment [1], noting “it is conceivable that through
congressional mandate the District of Columbia Human Rights Act will be revised. In my
opinion the deletion of comment [1] will insulate Rule 9.1 from congressional action which
might otherwise have the effect of limiting the scope of this disciplinary rule.”
Further Considerations of the District of Columbia Bar and D.C. Court of Appeals

In a letter dated December 1, 1988, then D.C. Bar President Philip A. Lacovara outlines the central concerns of the D.C. Bar Board of Governors regarding the initial proposed Rule 9.1, and offers the Court of Appeals further assistance in drafting amendments to the rule and comments that might address those concerns. Mr. Lacovara’s letter was aptly summarized in a memo from Katherine Mazzaferri, D.C. Bar Executive Director, to the Board of Governors dated December 4, 1989:

[Mr. Lacovara] explained [to the Court] the Board of Governors’ recommendation that, if Rule 9.1 is adopted, it include an abstention provision when a governmental agency exists which can address the claimed discrimination. The Board’s position stemmed from the recognition that there are agencies which have a great deal of expertise in employment discrimination and that the Bar Counsel and the BPR are not expert in this area of law. Another concern of the Board was that it would be resource intensive for the Bar Counsel to conduct investigations of the kind anticipated by 9.1.

Between December 4, 1989 and the promulgation of Rule 9.1 on March 1, 1990, conversations and correspondence between the D.C. Bar and Court of Appeals focused on whether and under what circumstances Bar Counsel would have the ability to defer complaints under this rule that were pending before other organizations such as the D.C. Office of Human Rights or the EEOC. These discussions and deliberations resulted in amendments to the comments to final Rule 9.1, which became effective on January 1, 1991 and stated:

**Rule 9.1 Discrimination in Employment**

A lawyer shall not discriminate against any individual in conditions of employment because of the individual’s race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

**Comment**

[1] This provision is modeled after the D.C. Human Rights Act, D.C. Code § 1-2512 (1981), though in some respects is more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.

[2] A similar rule has been adopted by the highest court in Vermont. A similar rule is also under consideration for adoption by the courts in New York based on recommendations of the New York State Bar Association.

[3] The investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission. Such experience may
involve, among other things, methods of analysis of statistical data regarding discrimination claims. These agencies also have, in appropriate circumstances, the power to award remedies to the victims of discrimination, such as reinstatement or back pay, which extend beyond the remedies that are available through the disciplinary process. Remedies available through the disciplinary process include such sanctions as disbarment, suspension, censure, and admonition, but do not extend to monetary awards or other remedies that could alter the employment status to take into account the impact of prior acts of discrimination.

[4] If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Bar Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Bar Counsel and material allegations involved in such other proceedings. See §19(d) of Rule XI of the District of Columbia Court of Appeals.

Post-Adoption Amendments

D.C. Rule 9.1 and comments remained unchanged from January 1, 1991 until February 1, 2007, when on recommendation of the D.C. Bar Rules of Professional Conduct Review Committee, chaired by Leah Wortham, the Court of Appeals 1) amended the title of the rule and Comment [1] to include the current D.C. Code citation; 2) eliminated the original Comment [2], noting that the reference to Vermont and New York rules was no longer necessary; and 3) revised the reference to the Rule XI in Comment [4] to reflect its accurate citation.

D.C. Rule 9.1 currently provides:

**Rule 9.1—Nondiscrimination**

A lawyer shall not discriminate against any individual in conditions of employment because of the individual’s race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

**Comment**

[1] This provision is modeled after the D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), though in some respects is more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.

[2] The investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission. Such experience may involve, among other things, methods of analysis of statistical data regarding
discrimination claims. These agencies also have, in appropriate circumstances, the power to award remedies to the victims of discrimination, such as reinstatement or back pay, which extend beyond the remedies that are available through the disciplinary process. Remedies available through the disciplinary process include such sanctions as disbarment, suspension, censure, and admonition, but do not extend to monetary awards or other remedies that could alter the employment status to take into account the impact of prior acts of discrimination.

[3] If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Bar Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Bar Counsel and material allegations involved in such other proceedings. See §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.

Other Provisions of the D.C. Rules Addressing Discrimination

Effective February 1, 2007, on recommendation of the D.C. Bar Rules of Professional Conduct Review Committee, the Court of Appeals amended D.C. Rule 8.4, adding “new Comment[3], a modified version of ABA Comment[3]. To emphasize that offensive, abusive, or harassing conduct that seriously interferes with the administration of justice may include words or actions manifesting bias or prejudice.” The Court also added new provision Rule 3.4(g) and explanatory Comment [10], “to prohibit any lawyer from making peremptory strikes to prospective jurors based on impermissible factors.” Previously, D.C. Rule 3.8(h) had prohibited similar conduct by prosecutors only. The respective rules are set forth below.

Rule 8.4--Misconduct

It is professional misconduct for a lawyer to:

(d) Engage in conduct that seriously interferes with the administration of justice;

Comment

[3] A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

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6 “Currently, Rule 3.8(h) addresses this issue, and the prohibition applies only to prosecutors. In the Committee’s view, no lawyer— not only prosecutors-- should engage in discriminatory use of peremptory challenges.” Wortham Report, January 2005, page 136.
Rule 3.4—Fairness to Opposing Party and Counsel

A lawyer shall not:

(g) Peremptorily strike jurors for any reason prohibited by law.

Comment

[10] Paragraph (g) prohibits any lawyer from exercising peremptory challenges to prospective jurors on any impermissible ground. Impermissible grounds include race, sex, and other factors that have been determined in binding judicial decisions to be discriminatory in jury selection.

Prepared on November 6, 2014
Hope C. Todd
Asst. Director for Legal Ethics,
Regulation Counsel, District of Columbia Bar

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