

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE PROPOSED)
AMENDMENT OF SDCL 15-5A-1;)
AMENDMENT OF SDCL 15-26A-87.1;)
AMENDMENT OF SDCL 15-30-1;)
AMENDMENT OF THE COMMENTARY TO CANON)
3(B) (5) AND (6) CONTAINED IN APPENDIX)
A TO SDCL CHAPTER 16-2 SOUTH DAKOTA)
CODE OF JUDICIAL CONDUCT;)
A PROPOSAL TO MANDATE SEXUAL)
HARASSMENT PREVENTION TRAINING FOR)
JUDGES BE ADDED TO A NEW SECTION TO)
SDCL CHAPTER 16-14;)
A PROPOSAL TO MANDATE SEXUAL)
HARASSMENT PREVENTION TRAINING FOR)
LAWYERS BE ADDED TO A NEW SECTION TO)
SDCL CHAPTER 16-18)

NOTICE OF SPECIAL
RULES HEARING

NO. 146

Petitions for amendments of existing sections of the South
Dakota Codified Laws and adoptions of new rules having been filed
with the Court, and the Court having determined that the proposed
amendments and adoptions should be noticed for hearing, now
therefore,

NOTICE IS HEREBY GIVEN THAT ON November 9, 2021, at
11:00 A.M., C.T., at the Courtroom of the Supreme Court in the
Capitol Building, Pierre, South Dakota, the Court will consider
the following:

1. Proposed Amendment of SDCL 15-5A-1. General provisions.

Whenever a proceeding in civil or criminal court is permitted under these rules to be conducted by interactive audiovisual device, the device shall enable a judge or magistrate to see and converse simultaneously with the parties, their counsel or other persons including witnesses. The interactive audiovisual signal shall be transmitted live and shall be secure from interception through lawful means by anyone other than the persons participating in the proceeding.

Parties and witnesses appearing by means of an interactive audiovisual device at proceedings authorized under this chapter to be conducted by such device are deemed to be present at the proceedings. Proceedings conducted by interactive audiovisual device under this chapter are also deemed to be conducted in open court unless otherwise closed to the public pursuant to statute.

A judge or any other person authorized by law to administer oaths may administer an oath to a witness who is not personally present but who is appearing by means of the interactive audiovisual device. The provisions of SDCL § 22-29-1 shall apply even though the person taking the oath was not personally present before the person administering the oath, and prosecution for perjury shall take place in the jurisdiction of the tribunal receiving the interactive audiovisual testimony.

If ~~a party~~ parties and their counsel are at different locations, arrangements must be made so that they can communicate privately. Facilities must be available so that any documents filed or referred to during the interactive audiovisual communication, or required to be provided to a ~~defendant~~ party, his or her counsel, or a witness prior to or during the proceeding, may be transmitted electronically, including, but not limited to, facsimile, personal computers, other terminal devices, and local, state, and national data networks. Any documents furnished by means of such an electronic data transmission may be served or executed by the person to whom it is sent, and returned in the same manner, and with the same force, effect, authority, and liability as an original document. All signatures on the electronic data transmissions shall be treated as original signatures.

Nothing contained herein shall be construed as affecting a defendant's right to waive counsel.

Explanation for Proposal

In 2007, the Court enacted the rules in SDCL chapter 15-5A authorizing the use of interactive audiovisual devices for certain types of court proceedings and under certain conditions. The proposed amendments are intended to clarify that the appearance or participation of a party or witness in a proceeding conducted via an interactive audiovisual device as authorized in chapter 15-5A constitutes presence in open court. The following provisions in criminal procedure statutes in Title 23A require a defendant to be "present" in "open court":

SDCL 23A-39-1 (Rule 43 (a)) Presence required at all times except as provided.

A defendant shall be present at his arraignment, at the time of his plea, at every stage of his trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as provided by §§ 23A-39-2 and 23A-39-3.

SDCL 23A-7-1 (Rule 10) Arraignment in open court-- Procedure--Verification or correction of name--Copy given to defendant.

An arraignment shall be conducted in open court, except that an arraignment for a Class 2 misdemeanor may be conducted in chambers, and shall consist of reading the indictment, information, or complaint, as is applicable, to the defendant or stating to him the substance of the charge and calling on him to plead thereto.

SDCL 23A-7-2 (Rule 11(a)) Pleas permitted to defendant--Requirements for plea of guilty or nolo contendere.

Except as otherwise specifically provided, a plea of guilty or nolo contendere can only be entered by a defendant himself in open court.

In addition, the following rules of civil procedure also contain references to "open court":

SDCL 15-6-77(b). Trials and hearings--Orders in chambers.

All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers, without the

attendance of the clerk or other court officials and at any place either within or without the circuit; but no hearing, other than one ex parte, shall be conducted outside the circuit without the consent of all parties affected thereby.

SDCL 15-6-43(a). Forms and admissibility of evidence.

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by this chapter or by the South Dakota Rules of Evidence.

2. Proposed Amendment of SDCL 15-26A-87.1. Disposition on briefs and record--Grounds--Citation of decisions restricted.

(A) After all briefs have been filed in any appeal, the Supreme Court by unanimous action may, sua sponte, enter an order or memorandum opinion affirming the judgment or order of the trial court for the reason that it is manifest on the face of the briefs and the record that the appeal is without merit because:

- (1) The issues are clearly controlled by settled South Dakota law or federal law binding upon the states;
- (2) The issues are factual and there clearly is sufficient evidence to support the jury verdict or findings of fact below; ~~or~~
- (3) The issues are ones of judicial discretion and there clearly was not an abuse of discretion; or
- (4) Other good cause exists for summary affirmance, in which case the order or memorandum shall contain a succinct statement of the reason for affirmance.

(B) Notwithstanding the provision in section (A) requiring unanimous action, an order or memorandum opinion affirming the judgment or order of the trial court may be entered pursuant to subsections (1) through ~~(3)~~ (4) of section (A) on a majority vote, even though the claim may have merit in the view of the minority, provided that all justices participating in the action shall agree that such summary disposition of the action may be made.

(C) After all briefs have been filed in any appeal, the Supreme Court by unanimous action may, sua sponte, enter an order or memorandum opinion reversing the judgment or order of the trial court for the reason that it is manifest on the face of the briefs and the record that it is clear the order or judgment is ~~clearly~~ erroneous for one or more of the following reasons:

- (1) Summary judgment was erroneously granted because a genuine issue of material fact exists;
- (2) The judgment or order was clearly contrary to settled South Dakota law or federal law binding upon the states; ~~or~~
- (3) The issue on appeal is one of judicial discretion and there clearly was an abuse of discretion; or
- (4) Other good cause exists for summary reversal, in which case the order or memorandum shall contain a succinct statement of the reason for reversal.

(D) Notwithstanding the provision in section (C) requiring unanimous action, an order or memorandum opinion reversing the judgment or order of the trial court may be entered pursuant to subsections (1) through ~~(3)~~ (4) of section (C) on a majority vote, even though the claim may have merit in the view of the minority, provided that all justices participating in the action shall agree that such summary disposition of the action may be made.

(E) A list indicating the disposition of all decisions rendered by the Supreme Court under this section shall be published quarterly in the Northwestern Reporter. Such decisions shall not be cited or relied upon as authority in any litigation in any court in South Dakota except when the decision establishes the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same person.

A petition for rehearing of a cause decided under this section may be served and filed pursuant to the provisions of § 15-30-4.

Costs in favor of the prevailing party shall be assessed as provided in chapter 15-30.

Explanation for Proposal

The proposal by the State Court Administrator's Office amends SDCL 15-26A-87.1 to include an "other good cause" reason for the Supreme Court to summarily affirm or reverse a judgment or order of the trial court provided that a succinct statement of the reason for affirmance or reversal is included in the order or memorandum opinion. In addition, the introductory paragraph for subsection (C) is amended to avoid confusion over the manner in which the existing phrase "clearly erroneous" is used to refer to multiple ways in which an error is clear.

3. Proposed Amendment of 15-30-1. Remand to trial court to permit motion for new trial.

Whenever, after appeal to the Supreme Court, it shall appear to the satisfaction of the Supreme Court upon application of a party that the ends of justice require that such party should be permitted to make a motion for a new trial for a cause set forth in subdivision 15-6-59(a)(1), (2), (3), or (4), and that sufficient excuse exists for not having made said motion prior to the appeal, the Supreme Court may remand the record to the trial court for the purpose of making such motion, but no such remand shall be made unless such motion can be made and hearing thereon had in the trial court within sixty days from and after the date on which the time for appeal commences unless the Supreme Court extends the time for good cause shown.

Explanation for Proposal

The proposal by the State Court Administrator's Office is intended to allow flexibility if good cause is demonstrated to the Supreme Court for a remand to the trial court to consider a motion for new trial and a hearing thereon pursuant to this rule. The proposal is not based on any other state or federal rule.

4. Proposed Amendment of the Commentary to Canon 3(B) (5) and (6) Contained in Appendix A to SDCL Chapter 16-2 South Dakota Code of Judicial Conduct.

CANON 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

B. Adjudicative Responsibilities.

Canon 3(B) (5) and (6)

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability or age, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability or age, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability or age, or other similar factors, are issues in the proceeding.

B(5) and (6) COMMENTARY

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment or sexual misconduct and must require the same standard of conduct of others subject to the judge's direction and control. Sexual harassment or sexual misconduct by a judge while engaging in judicial or administrative responsibilities or any law-related functions undermines the confidence in the legal profession and the legal system and, as a result, is prejudicial to the administration of justice. Sexual harassment or sexual misconduct includes unwelcome sexual advances, requests for sexual favors, and other objectively offensive verbal or physical conduct or communications sexual in nature.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Explanation for Proposal

The Supreme Court's Commission on Sexual Harassment in the Legal Profession proposes additional commentary to the Code of Judicial Conduct to further define the expectations for judicial officers. Reciprocal language will also be proposed to the State Bar Ethics Committee for inclusion in the Commentary to Rule of Professional Conduct 8.4 for lawyers. The additional language was recommended by the Commission after studying how best to prevent and address sexual harassment within the South Dakota legal profession. The Commission's full report is attached as an Appendix to this rule proposal. See *Recommendation Twelve*. The proposed language identifying what sexual harassment or sexual misconduct includes comes primarily from the language in 29 C.F.R. § 1604.11(a). The proposed language should not affect existing rules or statutes.

5. Proposed adoption to Mandate Sexual Harassment Prevention Training for Judges to be Added to a New Section to SDCL Chapter 16-14 Judicial Conference.

Every judge or retired judge acting pursuant to an appointment by the Chief Justice shall complete sexual harassment prevention training offered by the Unified Judicial System or approved by the Chief Justice within two years after the enactment of this rule or after beginning judicial service and at least once

every three years thereafter. Completion of sexual harassment prevention training approved by the State Bar will meet the requirements of this rule. Failure to complete such required training may be grounds for disciplinary action.

6. Proposed adoption to Mandate Sexual Harassment Prevention Training for Lawyers to be Added to a New Section to SDCL Chapter 16-18 Powers and Duties of Attorneys.

Each active member of the State Bar of South Dakota shall complete sexual harassment prevention training offered or approved by the State Bar of South Dakota within two years following admission to the practice of law or within two years after the enactment of this rule, and once every three years thereafter. Failure to complete such required training will result in the member being placed on inactive status and may be grounds for disciplinary action.

Explanation for Proposals

The Supreme Court's Commission on Sexual Harassment in the Legal Profession proposes these rules mandating sexual harassment prevention training for lawyers and judges. The proposed rules were recommended by the Commission after studying how best to prevent and address sexual harassment within the South Dakota legal profession. The Commission's full report is attached as an Appendix to this rule proposal. See *Recommendation Three*. The proposed rules are not directly based on federal or state law, and the rules should not affect existing rules or statutes.

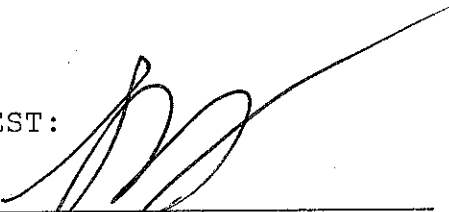
Any person interested may appear at the hearing and be heard, provided that all objections or proposed amendments shall be reduced to writing and the original and five copies thereof filed with the Clerk of the Supreme Court no later than October 25, 2021. Subsequent to the hearing, the Court may reject or adopt the proposed amendments or adoption of any rule germane to the subject thereof.

Notice of this hearing shall be made to the members of the State Bar by electronic mail notification, by posting notice at the Unified Judicial System's website at <https://uj.s.sd.gov/Supreme Court/Hearings.aspx> or the State Bar of South Dakota's website <https://www.statebarofsouthdakota.com>.

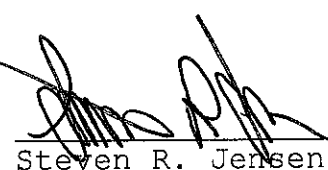
DATED at Pierre, South Dakota this 27th day of September, 2021.

BY THE COURT:

ATTEST:



Clerk of the Supreme Court
(SEAL)



Steven R. Jensen, Chief Justice

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

SEP 27 2021


Clerk

Justice for All • Justice for All • Justice for All

Supreme Court Commission on Sexual Harassment in the Legal Profession

Justice for All • Justice for All • Justice for All



March 18, 2021

INTRODUCTION

On March 9, 2020, Chief Justice David Gilbertson sent a letter to all members of the South Dakota State Bar concerning the subject of sexual harassment in the legal profession. *Appendix A*. That letter detailed the background related to a proposal submitted to the South Dakota Supreme Court concerning modifications to the Rules of Professional Conduct for lawyers. While that rule proposal was not ultimately adopted by the Supreme Court, one of the submissions provided to the Supreme Court during that process included a survey of the State Bar membership from 2018. *Appendix B*. That survey showed that 23% of the respondents indicated they had experienced some form of sexual harassment in the legal profession.

This information raised a significant concern with the Supreme Court relating to the prevalence of sexual harassment in the legal profession. As such, the Supreme Court appointed a Commission of justices, judges, lawyers, and others working in the justice system to study the issue and make recommendations to the Supreme Court concerning how best to prevent and address sexual harassment within the South Dakota legal profession. This report and these recommendations are the product of the Commission's work.

MEMBERSHIP

Honorable Patricia DeVaney, Justice, Pierre (Co-Chair)
Honorable Mark Salter, Justice, Sioux Falls (Co-Chair)
Honorable Cheryl Gering, Circuit Judge, Yankton
Honorable Jon Sogn, Circuit Judge, Sioux Falls
Andrew Fergel, State Bar of South Dakota, Executive Director, Pierre
Reed Rasmussen, Attorney, Aberdeen
Bill Garry, Attorney, Sioux Falls
Heather Lammers Bogard, Attorney, Rapid City
Lisa Hansen Marso, Attorney, Sioux Falls
Alecia Fuller, Attorney, Rapid City
Dean Neil Fulton, Dean of USD Knudson School of Law, Vermillion
Diana Ryan, Attorney, Sioux Falls
Tamara Nash, Attorney, Sioux Falls
Carla Bachand, Court Reporter, Pierre
Jennifer Pravecek, Paralegal, Sioux Falls
Jenny Hammrich, Third Circuit Court Administrator, Brookings
Barbara McKean, Davison County Clerk of Courts, Mitchell
Charles Frieberg, Director of Court Services, Pierre

BACKGROUND

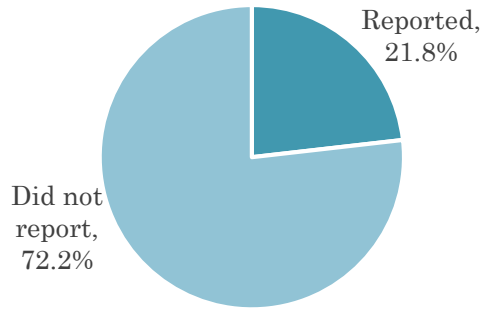
In February 2020, the State Bar submitted a proposed amendment to Rule 8.4 of the South Dakota Rules of Professional Conduct for lawyers. The proposed amendment sought to add a section to Rule 8.4 prohibiting certain harassing or discriminatory conduct. The proposal generated significant input from State Bar members who submitted comments as part of the rule-making process. Following the hearing on the proposed rule, the State Bar provided the Supreme Court, pursuant to its request, the membership survey from 2018 that was part of the background leading to the proposed amendment. There were 413 members responding to the survey, and the responses to questions relating to sexual harassment showed the following:

23% of respondents have experienced either sexual harassment or assault while working in the profession

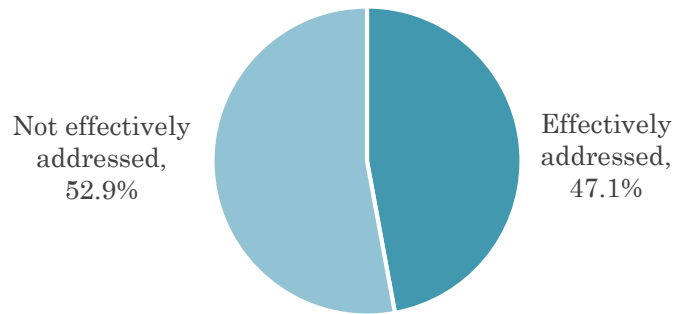


- I have experienced sexual harassment while working in the profession
- I have experienced sexual assault while working in the profession
- I have not experienced sexual assault or harassment while working in the profession

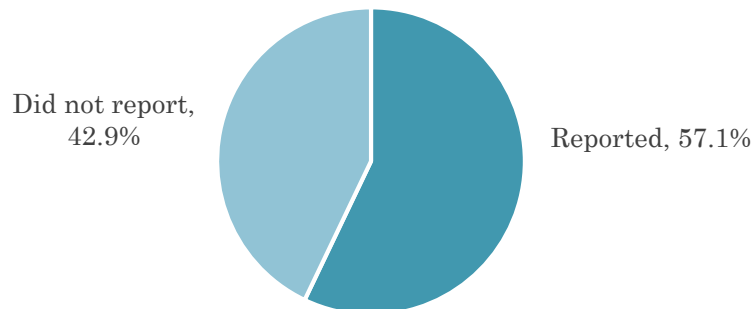
Only 21.8% of those who responded “yes” to experiencing sexual harassment reported it to someone they believed could effectively address the issue
(N=78)



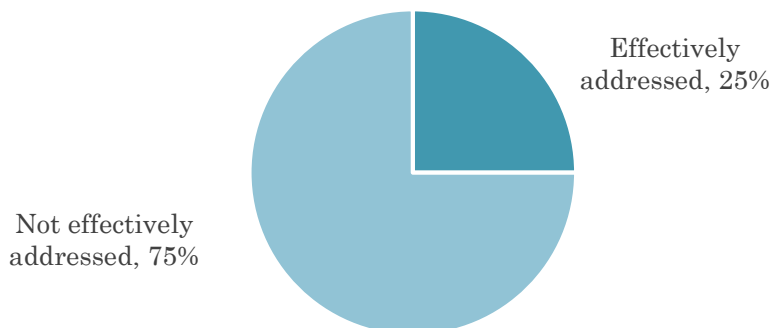
52.9% of those who reported their harassment felt that the issue was not effectively addressed
(N=17)



57.1% of those who responded “yes” to experiencing sexual assault reported it to someone they believed could effectively address the issue
(N=7)



Only 25% of those who indicated "yes" to reporting the sexual assault felt that the issue was effectively addressed
(N=4)



These survey results, in part, prompted the Supreme Court to appoint this Commission to study the topic of sexual harassment and submit recommendations to promote a culture within the South Dakota legal profession free from this type of conduct.

Commission Goals

During its initial meetings, the Commission discussed the scope of its work. Although the Commission recognized that identifying and preventing other types of workplace harassment is important, sexual harassment was viewed as a distinct type of conduct directly implicated by the recent survey results and not expressly addressed within the Rules of Professional Conduct. Given the specific charge from the Supreme Court, the Commission limited its work to assessing the topic of sexual harassment in the legal profession and making appropriate recommendations. The Commission contemplated recommendations that could include the development of rules, standards, or procedures for education, training, and addressing reports of sexual harassment in a manner that encourages those who may be otherwise reluctant to report their concerns.

Commission Findings

As the Commission reviewed the literature and information available concerning sexual harassment in the workplace, it became evident that in most respects, the legal profession shares many characteristics with other professions that have also grappled with this important topic. However, the Commission's work also reinforced the notion that in order to achieve justice for all, the legal profession must hold itself to the highest standards of professionalism and conduct.

The Commission's research revealed that South Dakota is not unique in perceiving the need to address sexual harassment in the legal profession. *See Report of the*

Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States (2018); Wisconsin Workgroup on Sexual Harassment (2018); Breaking the Silence: Holding Texas Lawyers Accountable for Sexual Harassment, St. Mary's University Journal on Legal Malpractice & Ethics (2018); Sexual Harassment in the Victorian Legal Sector (2019); Us Too? Bullying and Sexual Harassment in the Legal Profession, International Bar Association (2019); Still Broken, Sexual Harassment and Misconduct in the Legal Profession, Women Lawyers on Guard (2020). For example, similar to the incidence of sexual harassment indicated by South Dakota's membership survey, the Wisconsin Bar's Workgroup on Sexual Harassment discovered that "21.56% of respondents said they had experienced or witnessed unwelcome physical contact at work." Wisconsin Workgroup on Sexual Harassment, page 31 (2018).

Other groups have reported an even higher incidence of sexual harassment. The Report of the Federal Judiciary Workplace Conduct Working Group indicated "that between 25 percent and 85 percent of women in the private sector and federal sector workplace experienced sexual harassment, depending on how that term is defined." See Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States, page 6 (citing the US Equal Emp. Opportunity Comm'n Select Task Force on the Study of Harassment in the Workplace, Report of Co-chairs Chai R. Feldblum and Victoria A. Lipnic, 2016. "Around one in three (36%) legal professionals said they had personally experienced sexual harassment while working in the legal sector." Sexual Harassment in the Victorian Legal Sector, page vii (2018). "Today some 40% of women (and 16% of men) say they've been sexually harassed at work— a number that, remarkably, has not changed since the 1980s." Why Sexual Harassment Programs Backfire, Frank Dobbin and Alexandra Kalev, Harvard Business Review (May-June 2020).

Sexual harassment is the most common type of workplace harassment. While it typically occurs in the employment relationship, similar conduct may occur outside the employment relationship, but within the legal profession among lawyers, judges, legal professionals, and court personnel. Sexual harassment within the legal profession creates adverse effects both for those individuals directly impacted and for the profession more broadly. Tolerating sexual harassment within the legal profession can lead to diminished productivity, poor morale, and a negative professional culture. Sexual harassment within the legal profession can also impact the public's perception of the profession and the effectiveness of its efforts to regulate itself.

Further, sexual harassment may not be restricted to isolated incidents. Therefore, a wholesale cultural shift where inclusion, diversity, and equality are valued and respected is paramount. Absent such a culture shift, sexual harassment in the legal profession will persist, negatively impacting not only individual lives, but also the profession and the way the public perceives it. It is also important to recognize that

the methods entities have historically used for sexual harassment prevention training have been called into question.

A recent article in the *Harvard Business Review* summarizes the results of a study of more than 800 domestic companies to assess the effectiveness of the programs and procedures commonly employed to combat sexual harassment between the 1970s and the early 2000s. See *Why Sexual Harassment Programs Backfire, Frank Dobbin and Alexandra Kalev, Harvard Business Review (May-June 2020)*. After concluding that many of the common training programs and grievance procedures have not effectively solved the problem, those undertaking this study offered a number of alternatives that are consistent with our Commission's recommendations. These include the implementation of bystander intervention training; the use of an ombuds office or position outside the organizational chain of command to independently resolve complaints; and the open publication of the number of complaints reported so that solving the problem will become part of the organizational culture.

With respect to training, simply offering or even mandating more training is not enough to achieve better results. In light of the current research, entities must be willing to refocus not only sexual harassment prevention training, but also the methods utilized for complaint resolution. In this regard, the research shows that shifting the focus toward a different type of conflict resolution outside the traditional formal complaint and disciplinary process may produce more effective outcomes.

One such informal process used by other organizations includes creating an ombuds position.¹ An ombuds can provide a confidential, off-the-record resource to address concerns involving sexual harassment. The ombuds position is intended to provide a forum to voice concerns and allow for candid conversations about sensitive issues outside the formal disciplinary structure. Ideally, providing a mechanism to address issues early and prevent them from escalating promotes the goals of the legal profession to ensure the core values of professionalism, respect, human dignity, and civility.

Commission Workplan

After reviewing the literature, drawing on the experience of Commission members, and reviewing the results of the 2018 survey of State Bar members and similar studies from other groups showing the continued prevalence of sexual harassment

¹ Further information on the role and standards of an ombuds or ombudsman can be obtained at www.ombudsassociation.org. While many corporate organizations use an ombuds to address issues of sexual harassment in the employment context, the use of an ombuds by a bar association as a method of curbing sexual harassment in the legal profession as a whole appears to be a new concept.

in professional settings, the Commission determined as part of its workplan that it was not necessary to gather further information from the bar membership at large. The Commission decided to break into two working groups, each with a different focus. The first group focused on education, training, and resources to address sexual harassment in the legal profession; and the second group focused on policies and procedures for reporting sexual harassment and potential levels of intervention to address the conduct. The working groups met several times to discuss and develop proposals to share with the full Commission. The full Commission then reviewed, discussed, and made modifications to the two groups' proposals to form the following set of findings and recommendations to be submitted to the Supreme Court in the form of policy changes, educational plans, resource recommendations, and rule proposals.

RECOMMENDATIONS

Recommendation One: Sexual Harassment Training Should be Required for Judges, Lawyers, and Unified Judicial System Employees.

The first essential step toward preventing and eliminating sexual harassment in all professional settings within the legal profession involves education.² The Commission recommends mandatory training for all attorneys, judges, and UJS employees within two years of the enactment of a rule adopting this recommendation. For newly admitted attorneys and newly hired UJS employees, the training should be required within two years after admission to the State Bar or within two years after being hired. After this initial training, all members of the Bar and employees of UJS should receive additional training once every three years.

The Commission does not make this recommendation lightly. South Dakota has traditionally not required mandatory training for members of the State Bar,³ and it is one of only a handful of jurisdictions or states that do not have mandatory continuing legal education training. The others are the District of Columbia, Massachusetts, Maryland, and Michigan. *See* https://www.aclea.org/page/mcle_rules. South Dakota does, however, require certain targeted training for lawyers engaged in specific practice areas. *See* SDCL 23-3-39.6 (requiring evidence-based practice, mental health, and domestic abuse training for state's attorneys and deputy state's attorneys); SDCL 23A-40-21 (mandating that each court-appointed defense attorney receive training on

² For further discussion on sexual harassment training generally, see the 2016 Equal Employment Opportunity Commission's (EEOC) Study of Harassment in the Workplace Report. <https://www.eeoc.gov/select-task-force-study-harassment-workplace>.

³ The last time the State Bar held training related to sexual harassment was an elective session conducted in February 2018. *See* (Steve Bogue) <https://www.youtube.com/watch?v=1KSdF8BEIDY>.

representing clients with a potential mental illness); 1 Presiding Judge Policy 19 (requiring an attorney representing abused or neglected children or appointed as guardian ad litem to complete the abuse and neglect attorney training developed by the Unified Judicial System). Given the importance of preventing sexual harassment in the legal profession, the Commission strongly feels that without mandating training, individuals who need it the most will not complete the training. Requiring sexual harassment prevention training also makes it clear that the South Dakota legal profession considers the issue a priority and an important topic for the entire State Bar. Ideally, this training will become the foundation for a culture shift in the legal profession concerning sexual harassment.

Recommendation Two: Sexual Harassment Prevention Training Should be Targeted to Produce the Greatest Possible Impact.

The Commission recommends that the State Bar engage regional or national experts to provide training consisting of both a summary of the current legal landscape and compliance training. The training should address issues within both the employment setting (law firms, in-house, public sector, etc.) and the legal profession as a whole (interactions between and among attorneys, paralegals, court reporters, judges, and court personnel).

Training should be offered by the State Bar on at least an annual basis in several different formats. These can include the traditional in-person presentation, virtual platforms, or web-based courses. The Commission specifically recommends training modules that engage the attendee with questions related to the information presented so that the attendee cannot advance through the training without active engagement. Virtual training can be offered on-demand and will minimize the time commitment associated with in-person training. The State Bar should identify when any such training is offered that meets the requirements of the proposed rule discussed in Recommendation Three and then track the training and participation by members of the State Bar. The State Bar could adopt rules and practices for determining whether sexual harassment training offered by another organization would satisfy the recommended training requirement.

In more recent years, the focus of training has shifted away from targeting the harassers, which research has shown to be an ineffective approach. Therefore, the training offered by the State Bar should include bystander intervention training, which is now widely used in the business sector, colleges, universities, and by the military. This type of training emphasizes that sexual harassment is not just a problem for the individuals being targeted, but rather a problem we must all work collectively to solve. It is designed to give individuals the necessary tools to

intervene if they witness harassment against another individual.⁴ Generally, bystander intervention training includes four goals:

- Create awareness—enable bystanders to recognize potentially problematic behaviors;
- Create a sense of collective responsibility—motivate bystanders to step in and act when they observe problematic behaviors;
- Create a sense of empowerment—conduct skills-building exercises to provide bystanders with the skills and confidence to intervene as appropriate; and
- Provide resources—provide bystanders with resources they can call upon to support their intervention.

Bystander intervention training equips *everyone* in the legal profession with the strategies and methods to stop harassment.⁵ These tools are necessary. When bystanders are silent, victims are expected to self-advocate and reject offensive behavior themselves. As a result, victims can become isolated and the behavior may become perceived as accepted or normal, which allows sexual harassment to gain a foothold within the profession.

Recommendation Three: The Commission Recommends Court Rules Mandating Sexual Harassment Prevention Training for Lawyers and Judges.

To adopt the mandatory training requirement, the Commission recommends that a new section be added to SDCL chapter 16-18 to require training, as follows:

Each active member of the State Bar of South Dakota shall complete sexual harassment prevention training offered or approved by the State Bar of South Dakota within two years following admission to the Bar or within two years after the enactment of this rule, and once every three years thereafter. Failure to complete such required training will result in the member being placed on inactive status and may be grounds for disciplinary action.

The Commission likewise recommends that a new section be added to SDCL chapter 16-14 to require training for the judiciary, as follows:

⁴ See Harvard Business Review, *Why Sexual Harassment Programs Backfire*, (May-June 2020) (discussing why traditional sexual harassment training has been largely unsuccessful).

⁵ The case for bystander intervention training has been furthered by the EEOC's 2016 Study of Harassment in the workplace, in which the EEOC recommends this new model (among others), which has demonstrated success in other settings (i.e. college campuses). See <https://www.eeoc.gov/select-task-force-study-harassment-workplace>. To explore a further discussion on the history of and current use of bystander intervention training, visit: <https://hbr.org/2018/10/to-combat-harassment-more-companies-should-try-bystander-training>.

Every judge shall complete sexual harassment prevention training offered by the Unified Judicial System or approved by the Chief Justice within two years after the enactment of this rule or after beginning judicial service and at least once every three years thereafter. Failure to complete such required training may be grounds for disciplinary action.

Recommendation Four: Unified Judicial System Employees Should Receive Sexual Harassment Prevention Training.

The Commission recommends the Supreme Court amend Internal Procedure Rule 2019-04 (Standards for the Education and Professional Development of Judicial and Non-Judicial Personnel) to require sexual harassment prevention training for all non-judicial or non-lawyer UJS employees within two years of enactment of the changes to the Internal Procedural Rule. Any non-judicial or non-lawyer newly hired UJS employee shall also complete this training within two years after their initial hire date. After this initial training, all non-judicial or non-lawyer employees of UJS shall complete sexual harassment prevention training once every three years.

Recommendation Five: Compile a Sexual Harassment Prevention Guide that Contains Training Models, Resources, and Checklists.

The State Bar should develop easy-to-understand, written resources and other messaging materials (such as videos, posters, info graphics, etc.) that will help employers and employees and those in the legal profession understand their rights and responsibilities related to sexual harassment. The State Bar website should be the central repository for information related to the prevention of sexual harassment in the legal profession.

Recommendation Six: Actively Promote and Assess the Current Culture of the State Bar to Identify Areas Needing Improvement.

The State Bar should foster and actively pursue a culture in which sexual harassment is not tolerated. This should include top-down buy-in and support from the judiciary, State Bar leaders, and employers of those engaged in the legal profession. The State Bar should conduct targeted outreach to employers explaining the “business case” for mandated harassment prevention, policies, and procedures by educating employers on the importance of creating a culture free from sexual harassment.⁶

Recommendation Seven: Create an Ombuds Position Within the State Bar to Receive Complaints Alleging Sexual Harassment.

⁶ The South Dakota State Bar does have an Anti-Harassment/Discrimination Policy, but that policy is only applicable to employees of the State Bar.

An ombuds position created by the State Bar would further the Commission's goals of creating an informal avenue to address sexual harassment within the legal profession and would provide a process for early intervention to assist, where possible, with quicker, more effective resolution of complaints. The ombuds would not be an advocate for any individual or the organization and would not be an investigator on behalf of the State Bar, Disciplinary Board, or Judicial Qualifications Commission. As such, an ombuds would not make binding decisions, mandate actions, or adjudicate claims. Instead, an ombuds could provide an informal, limited, and neutral process that may be in addition to, or in lieu of, more formal processes that a person subject to sexual harassment may pursue.

Creating an ombuds position does not replace or eliminate the ability of a complainant to utilize the formal complaint process that currently exists for reporting violations of professional standards of conduct by members of the State Bar or judiciary, nor would it preclude a complainant from seeking redress through the Equal Employment Opportunity Commission or Department of Labor. The ombuds should be structured as an independent position within the State Bar that is free from the control or influence, both real or perceived, of the organizational hierarchy.

An ombuds position in the State Bar could be established several ways. The available options would include a paid employee position; a contract position; a volunteer position; or a pool of volunteers that could fill such a role. Given the uncertainties associated with the creation of a new position, it may be advisable to conduct a pilot program to gauge the workload demands and to assist in establishing the needs and scope associated with the position. If funding is needed for the pilot program, the Commission recommends pursuing any available grant opportunities. Regardless of structure, once the position is created it will be important to ensure that the ombuds receives appropriate, suitable, and continued training to be effective.

Recommendation Eight: The Commission Recommends that Information Reported to the Ombuds Remains Confidential.

Any information identifying complainants or alleged offending parties, including information that could lead to identification of the individuals involved, should be kept confidential. The ombuds should be required to obtain permission from a complainant before contacting an accused or any other person or entity concerning a complaint. The ombuds should also keep a record of the number of complaints and the general nature of the conduct reported to identify trends, issues, and concerns. This information can be used to provide recommendations to the State Bar to address conduct within the profession.

To support these objectives, the Commission recommends the following proposed rule relating to confidentiality.

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) Paragraphs (a) and (b) shall not apply to information obtained by a lawyer or judge as a member of a committee, organization or related group established or approved by the State Bar or the Supreme Court to assist lawyers, judges or law students with a medical condition as defined in § 16-19-29(1), including the name of any individual in contact with the member and sources of information or information obtained therefrom. Any such information shall be deemed privileged on the same basis as provided by law between attorney and client.

(d) Paragraph (a) and (b) shall not apply to information obtained by an ombuds or member of a committee or related group established or approved by the State Bar or the Supreme Court to receive complaints related to sexual harassment or sexual misconduct in the legal profession, including the name of any individual in contact with the member and sources of information or information obtained therefrom. Any such information shall be deemed privileged on the same basis as provided by law between attorney and client.

(d~~e~~) A member of an entity described in paragraph (c) or (d) shall not be required to treat as confidential, communications that cause him or her to believe a person intends or contemplates causing harm to himself, herself or a reasonably identifiable person and that disclosure of the communications to the potential victim or individuals or entities reasonably believed to be able to assist in preventing the harm is necessary.

Recommendation Nine: The Ombuds Position Should be a Resource to Resolve Complaints but Cannot Replace the Formal Disciplinary Process.

The ombuds should have no formal disciplinary authority. The ombuds should operate informally by listening to complaints and developing a range of possible options in response to a complaint. The ombuds may also engage in third-party intervention or identify other ways to address a problem without resorting to the formal disciplinary process for lawyers and judges. The ombuds duties may include:

- Listening and asking questions to gain an understanding of the issues presented while remaining neutral with respect to the facts.
- Conducting a limited factual investigation to obtain the perspective and objectives of the person or persons involved for the purpose of ascertaining what, if any, type of resolution is requested and warranted.
- Developing a range of potential options to address the alleged conduct and helping the complainant evaluate each option so that he or she can determine whether or how to proceed.
- Guiding or coaching a complainant on how to address the conduct directly with the party or parties involved.
- Arranging an informal mediation with the ombuds acting as an intermediary or, with the agreement of the parties, referring the matter to one or more third-party mediators for an alternative dispute resolution.
- Discussing with the complainant the process for a referral to the State Bar's Disciplinary Board or the Judicial Qualifications Commission or for filing a complaint with the Equal Employment Opportunity Commission, Department of Labor, or appropriate federal Equal Employment Opportunity Office.
- Maintaining a record of the number of complaints and the general nature of the conduct reported.

Recommendation Ten: Utilize an Ombuds Position to Identify Trainings and Presentations Concerning the Prevention of Sexual Harassment.

In carrying out the duties outlined in Recommendation Ten, the ombuds will be uniquely situated to identify broader systemic issues based on aggregate reporting of the complaints received. The ombuds should then be able to identify targeted training to address commonly heard complaints. The ombuds will also “market” the functions of the position and raise awareness of the issue of sexual harassment within the legal profession. This would include the promotion of additional training opportunities.

Recommendation Eleven: The Commission Recommends the Following Changes and Additions to the Commentary to the Rules of Professional Conduct to Clarify the Responsibilities and Expectations for Members of the State Bar.⁷

The Rules of Professional Conduct represent the expectations concerning the conduct of members of the profession. It is important that the Rules and any related Commentary also reflect the importance of addressing the issue of sexual harassment. The Commission noted that the existing commentary to Rule 8.4 (comment 3) addresses bias and prejudice “in the course of representing a client,” but does not mention harassment per se, which often occurs in various professional settings. Because sexual harassment is not so clearly captured by this comment, the Commission proposes the following additions to the Rule 8.4 commentary:

Rule 8.4 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; or
- (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

⁷ With regard to the proposed changes to the Commentary to the Rules of Professional Conduct, the Commission acknowledges that traditionally the Supreme Court has not adopted Commentary or modified Commentary pursuant to its rule-making authority. This concept is embedded in the Code Commission’s note appearing in the Appendix to Chapter 16-18:

The Supreme Court Rules that adopted and amended the South Dakota Rules of Professional Conduct did not include the Preamble, Scope, and Comments included with these rules. The Preamble, Scope, and comments were adapted by the Ethics Committee of the State Bar of South Dakota from the *American Bar Association Model Rules of Professional Conduct*. Reprinted with permission of the American Bar Association.

Regardless of whether it is adopted by the Supreme Court or included via a recommendation from the Ethics Committee, the Commission recommends the proposed additions be incorporated into the Commentary to the Rules of Professional Conduct. The Commentary should also be made available to members of the State Bar through that organization’s website.

COMMENT:

[1] Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] Sexual harassment or sexual misconduct by a lawyer, while engaging in the practice of law or any law-related functions, undermines the confidence in the legal profession and the legal system and, as a result, is prejudicial to the administration of justice. Sexual harassment or sexual misconduct includes unwelcomed sexual advances, requests for sexual favors, and other objectively offensive verbal or physical conduct or communications of a sexual nature.

[4] [5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or

application of the law apply to challenges of legal regulation of the practice of law.

~~[5]~~ [6] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Recommendation Twelve: The Commission Recommends the Following Addition to the Commentary to the Code of Judicial Conduct to Clarify the Responsibilities and Expectations for Members of the Judiciary.

While the Code of Judicial Conduct already contains commentary regarding sexual harassment, the Commission recommends adding the following language to the Canon 3(B) commentary to further define the conduct consistent with the proposed commentary recommended above for Rule 8.4.

Canon 3(B)(5) and (6)

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability or age, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability or age, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability or age, or other similar factors, are issues in the proceeding.

B(5) and (6) COMMENTARY

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment or sexual misconduct and must require the same standard of conduct of others subject to the judge's direction and control. Sexual harassment or sexual misconduct by a judge while engaging in judicial or administrative responsibilities or any law-related functions undermines the confidence in the legal profession and the legal system and, as a result, is prejudicial to the administration of justice. Sexual harassment or sexual misconduct includes unwelcomed sexual

advances, requests for sexual favors, and other objectively offensive verbal or physical conduct or communications sexual in nature.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

CONCLUDING REMARKS

The Commission believes its recommendations create a solid foundation to begin addressing the important topic of preventing sexual harassment in the legal profession. While some of these recommendations may be met with resistance by members of the judiciary or the State Bar, it is important that the legal profession as a whole and the leaders of the judiciary and the State Bar take ownership over this issue to effect real change. Turning a blind eye to the occurrence of sexual harassment within the legal profession not only harms individuals, but also undermines the integrity of our system and the public's perception of the important work that we do every day. The South Dakota legal profession can and should be a leader in addressing this nationwide issue.

APPENDIX

- Letter to the State Bar Membership Concerning Sexual Harassment
- 2018 State Bar Membership Survey