

Maintaining the Integrity of the Profession: Connecticut Rule of Professional Conduct 8.4(7)

In June of 2021, the judges of the Superior Court of Connecticut approved amended Connecticut Rule of Professional Conduct 8.4(7). The new rule, which goes into effect on January 1, 2022, defines discrimination, harassment, and sexual harassment in professional contexts as professional misconduct. CT Lawyer interviewed Cecil J. Thomas, CBA president and chair of the CBA 8.4(7) Working Group, to learn more about the rule. A reprint of the text of the new rule may be found on page 32.

Where did Connecticut Rule of Professional Conduct (RPC) 8.4(7) originate?

Like many of Connecticut's Rules of Professional Conduct, RPC 8.4(7) is adapted from the American Bar Association (ABA) Model Rules of Professional Conduct. In 2016, the ABA House of Delegates approved revisions to the Model Rules of Professional Conduct to add Rule 8.4(g), making discrimination and harassment in the practice of law a form of professional misconduct. The revision was approved by voice vote with overwhelming support, including the unanimous support of the ten-member Connecticut delegation.

The ABA was following the lead of the states in adopting this revision in 2016. Even before the ABA adopted Model Rule 8.4(g), 24 states had some form of antidiscrimination or antiharassment provision in the black letter of their versions of Rule 8.4. Connecticut, and at least 12 other states, included language regarding bias or prejudice on the basis of certain protected classes in the commentary to Rule

8.4, based on the pre-2016 Comment [3] to Model Rule 8.4.

How was RPC 8.4(7) introduced in Connecticut?

In June of 2020, Attorneys Aigné Goldsby and Megan Wade, acting on their own initiative, requested that the Rules Committee of the Superior Court of Connecticut adopt ABA Model Rule 8.4(g). The Rules Committee tabled the matter until the September 2020 Rules Committee meeting, with instructions to the proponents to "coordinate with the Connecticut Bar Association and to submit additional materials to the Committee for review." (Minutes of the Meeting, Rules Committee of the Superior Court, June 5, 2020).

How did the CBA respond to this request from the Rules Committee?

Attorneys Goldsby and Wade contacted then CBA president, the Honorable Ndidi N. Moses, and requested to be heard on the matter at the June 15, 2020 CBA House of Delegates meeting. Attorneys Goldsby and Wade, along with Attorney Marcy Stovall of the CBA Standing Committee on Professional Ethics, addressed the House of Delegates, and President Moses announced the formation of a CBA 8.4(7) Working Group. President Moses asked me to serve as chair of the 8.4(7) Working Group, which included CBA officers; several past CBA presidents; leaders of the Young Lawyers Section; employment lawyers; representatives of the CBA Diversity, Equity, and Inclusion Committee; and the Standing Committee on Professional Ethics, as well as Attorneys Goldsby and Wade.

What process did the Connecticut Bar Association 8.4(7) Working Group follow in considering and developing CBA Proposed Amended Rule 8.4(7)?

ABA Model Rule 8.4(g) has been regarded as controversial, so we took a very deliberate approach, first shaping and updating the CBA version of the rule to address common concerns, and to ensure its consistency with the substantive law of protected classes in Connecticut. The CBA 8.4(7) Working Group met almost weekly through the summer of 2020 to refine the rule, gather supporting materials, develop a survey to better understand the prevalence of harassment and discrimination in Connecticut, and presented the proposed rule to several CBA sections and committees for comment and potential sponsorship.

Most proposed changes to the Rules of Professional Conduct are sponsored by one or two CBA committees or sections. CBA Proposed Amended Rule 8.4(7) was sponsored by eight different CBA committees and sections before its submission to the CBA Legislative and Policy Review Committee (LPRC): the Diversity, Equity, and Inclusion Committee; Standing Committee on Professional Ethics; Young Lawyers Section; Human Rights and Responsibilities Section; LGBT Section; Women in the Law Section; Veterans and Military Affairs Section; and the Professionalism Committee. After the Rule was submitted to the LPRC, the rule was approved by the Professional Discipline Section, Litigation Section, and the Labor and Employment Section. Many of these approv-

als and sponsorships were unanimous or by a substantial majority. The LPRC and Executive Committee each unanimously approved the CBA version of the rule. The CBA House of Delegates then held a special meeting on September 10, 2020 to consider the rule, and after extensive debate, approved it, with 39 in favor, 11 opposed, and 1 abstention.

The CBA submitted its approved version of 8.4(7), along with supporting materials, to the Rules Committee in time for the September 2020 meeting, as requested. ABA Model Rule 8.4(g) was also withdrawn from consideration at this time.

You mentioned that ABA Model Rule 8.4(g) has been regarded as controversial. What are some of the common objections to the Rule?

Opponents of ABA Model Rule 8.4(g) commonly criticize it as violative of the First Amendment rights of lawyers, in particular freedom of speech. Opponents also allege that the rule is over-reaching, because it reaches conduct outside the traditional practice of law, such as conduct occurring at bar association events or in the workplace. Other common criticisms are that the rule is not specific enough, preventing lawyers from knowing what conduct is proscribed, or that the rule will cause a flood of grievances and disciplinary actions against lawyers.

How did the CBA 8.4(7) Working Group address these concerns in developing the Connecticut version of the rule?

The Connecticut version of the rule (reprinted on page 32 for reference) has a number of changes addressed to these concerns, for example: the language in the commentary confirming that the Rule does not reach conduct protected by the First Amendment; clarification that conduct must rise to a certain level, and be directed at an individual or individuals, to violate the rule; the addition of more specific standards to the definitions of dis-

crimination and harassment; and stronger links to the substantive law of antidiscrimination and antiharassment, among other changes.

The primary focus and greatest impact of the Rules is not found in the disciplinary context. This is borne out in the language of the Rules of Professional Conduct:

Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

CT RPC, Scope.

Ultimately, the Rule is addressed to the very real concerns of discrimination and harassment in the practice of law, conduct which can be deeply harmful to those who experience it. The Rules of Professional Conduct reflect our statement of values as a profession, and we should all agree that discrimination, harassment, and sexual harassment have no place in the professional and ethical practice of law.

How prevalent are discrimination and harassment in the practice of law?

Unfortunately, harassment and discrimination are still far too prevalent within the legal profession. The Working Group considered national and international surveys and reports on the subject, and also conducted its own brief survey of Connecticut attorneys.

For example, a 2020 study, conducted by Women Lawyers on Guard and Nextions, LLC, found that 75 percent of women

lawyer respondents had direct experience with sexual harassment or misconduct.¹ Twenty-five percent of respondents reported the frequency of such harassment as “often” and 48 percent as “somewhat” frequent currently, showing only modest changes from the culture of sexual harassment in the legal profession 30 years ago.² Eighty-six percent of respondents reported that they did not report their experiences, although 35 percent of respondents indicated that they wanted to report. “The results of this Survey,” the study concludes, “lead to the inescapable conclusion that the system for addressing sexual harassment in the legal profession is still broken.”³

Another 2020 study, conducted by the ABA and the Burton Blatt Institute at Syracuse University, found that nearly 40 percent of lawyers who identify as having disabilities and/or as LGBTQ+ reported experiencing discrimination, harassment, and bias in the workplace.⁴ A 2018 survey of attorneys, conducted by the American Bar Association’s Commission on Women in the Profession and the Minority Corporate Counsel Association, found that women and people of color reported higher levels of bias than white men in hiring processes, performance evaluations, mentoring, high-quality assignments, accessing networking opportunities, compensations, and promotions.⁵

Do we have any indication that this type of conduct occurs within the legal profession in Connecticut?

Unfortunately, yes. As part of its evaluation of CBA RPC 8.4(7), the CBA conducted its own survey of Connecticut attorneys to better understand the prevalence of discrimination, harassment, and sexual harassment in professional contexts in Connecticut. The survey, which was conducted from September 4, 2020 until September 9, 2020, was completed by 578 respondents, of which 564 (97.6%) identified as an attorney licensed to practice law in Connecticut. Of the respondents, 293 (51%) reported that they had experienced

discrimination, harassment, or sexual harassment based on membership in a protected class, in conduct related to the practice of law. Exactly 252 (44%) of the respondents reported that they had witnessed discrimination, harassment, or sexual harassment, based on membership in a protected class, in conduct related to the practice of law. Of those lawyers reporting experiences with discrimination and harassment, the most common were on the basis of sex or pregnancy (243 responses), followed by race, color, ancestry, national origin, and/or ethnicity (183 responses); age (93 responses); and sexual orientation, gender identity, and/or gender expression (30 responses).

Of those lawyers reporting experiences with discrimination, harassment, and sexual harassment, the majority reported these experiences as taking place in the workplace. Client representation; personnel decisions; other professional meetings; activities or events; and bar association meetings, activities, or events were identified as common contexts in which such experiences took place. Respondents identified managers, supervisors, and other superior colleagues; opposing counsel; and other lawyers as among the most common of those who had engaged in this conduct.

Accompanying these responses were hundreds of narrative descriptions of Con-

necticut attorneys' individual experiences with discrimination, harassment, and sexual harassment. Reading these narratives was truly heartbreaking, and further confirmed the importance of ensuring that our Rules of Professional Conduct reflect our clear stance against this type of conduct.

The Rule will become effective on January 1, 2022. Where can Connecticut attorneys learn more?

There are a wealth of training and informational resources available on discrimination, harassment, and sexual harassment, including past CLE presentations that are available in our CBA Education Portal, and resour-

RULE OF PROFESSIONAL CONDUCT RULE 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

- (1) 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;
- (2) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (4) Engage in conduct that is prejudicial to the administration of justice;
- (5) 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]
- (6) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law[.]; or
- (7) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital 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, or to provide advice, assistance or advocacy consistent with these Rules.

COMMENTARY: 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. Subdivision (1), however, does not

prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

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, which 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. Counseling or assisting a client with regard to conduct expressly permitted under Connecticut law is not conduct that reflects adversely on a lawyer's fitness notwithstanding any conflict with federal or other law. Nothing in this commentary shall be construed to provide a defense to a presentment filed pursuant to Practice Book Section 2-41.

[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 subdivision (4) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate subdivision (4).]

Discrimination and harassment in the practice of law undermine confidence in the legal profession and the legal system.

es made available by the Connecticut Commission on Human Rights and Opportunities⁶ and Equal Employment Opportunity Commission.⁷ Additionally, the CBA 8.4(7) Working Group hopes to put on some educational presentations in this bar year to help guide attorneys on the substance and scope of the new Rule.

Any closing words for our readers?

Our profession is one that upholds the equality of all people, as one of the cornerstones of our legal system. Discrimination, harassment, and sexual harassment demean the profession, and are deeply harmful to those who experience it.

This new Rule encompasses our profession's rejection of such conduct, and a reaffirmation of our commitment to integrity, professionalism, and ethical conduct in the practice of law. The Rules reflect our values as a profession, and I am proud that we have taken this important stance here in Connecticut. ■

NOTES

1. *Still Broken: Sexual Harassment and Misconduct in the Legal Profession* (2020) <https://womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf>; See also, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (May 2019) (International Bar

Association) <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>

2. *Id.*

3. *Id.*

4. *First Phase Findings From a National Study of Lawyers With Disabilities and Lawyers Who Identify as LGBTQ+* (2020) <https://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/bbi-survey-accessible.pdf>

5. *You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession* (ABA, MCCA 2018). Executive Summary: <https://www.americanbar.org/content/dam/aba/administrative/women/Updated%20Bias%20Interrupters.pdf>

6. See e.g., *Sexual Harassment Prevention Resources* (ct.gov)

7. See e.g., *EEOC Resources* | U.S. Equal Employment Opportunity Commission

Discrimination includes harmful verbal or physical conduct directed at an individual or individuals that manifests bias or prejudice on the basis of one or more of the protected categories. Not all conduct that involves consideration of these characteristics manifests bias or prejudice: there may be a legitimate nondiscriminatory basis for the conduct.

Harassment includes severe or pervasive derogatory or demeaning verbal or physical conduct. Harassment on the basis of sex 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 antiharassment statutes and case law should guide application of paragraph (7), where applicable. Where the conduct in question is subject to federal or state antidiscrimination or antiharassment law, a lawyer's conduct does not violate paragraph (7) when the conduct does not violate such law. Moreover, an administrative or judicial finding of a violation of state or federal antidiscrimination or antiharassment laws does not alone establish a violation of paragraph (7).

A lawyer's conduct does not violate paragraph (7) when the conduct in question is protected under the first amendment to the United States constitution or article first, § 4 of the Connecticut constitution.

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 professional activities or events in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity, equity 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.

A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (7). Moreover, no disciplinary violation may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law. A lawyer does not violate paragraph (7) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of a particular segment of the population 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 (1), (2) and (3). 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).

[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.

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 a lawyer. 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.

AMENDMENT NOTE: The amendment to this rule defines discrimination, harassment and sexual harassment as professional misconduct.