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Sent: Friday, December 4, 2020 4:58 PM
To: Rules Committee; Del Ciampo, Joseph
Cc: amy@almesq.com; 'Megan Wade'; 'Stovall, Marcy'; Keith Soressi; Chapman, Bill (bchapman@ctbar.org)
Subject: Rules Committee Agenda Item 2020-12, Proposal to Amend Rule 8.4 of the Connecticut Rules of Professional Conduct to define discrimination, harassment and sexual harassment in conduct related to the practice of law as professional misconduct
Attachments: CBA 8.4(7) Follow Up Comments 12.4.20.pdf; CBA HOD Presentation 8.4(7) Amended 12.4.20.pdf

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Dear Justice McDonald and the Members of the Rules Committee,

Attached please find further comments from the Connecticut Bar Association regarding Committee Agenda Item 2020-12, regarding the proposal to amend Rule 8.4.

Attached please also find an updated version of the CBA presentation on CBA Proposed Amended Rule 8.4(7) and the results of the CBA survey on discrimination and harassment in conduct related to the practice of law.

Respectfully submitted,

Cecil J. Thomas
2020-21 CBA President-elect
Chair, CBA 8.4(7) Working Group



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Sent Via Email (RulesCommittee@jud.ct.gov; Joseph.DelCiampo@jud.ct.gov)

December 4, 2020

The Honorable Justice Andrew J. McDonald
Connecticut Supreme Court
Chair, Superior Court Rules Committee
231 Capitol Avenue
Hartford, CT 06106

Re: Rules Committee Agenda Item 2020-12, Proposal to Amend Rule 8.4 of the Connecticut Rules of Professional Conduct to define discrimination, harassment and sexual harassment in conduct related to the practice of law as professional misconduct

Dear Justice McDonald,

The Connecticut Bar Association (CBA) respectfully submits this letter in support of CBA Proposed Amended Rule of Professional Conduct 8.4(7) and Proposed Commentary (CBA RPC 8.4(7)) and in response to various comments submitted regarding the proposed amendment and American Bar Association (ABA) Model Rule 8.4(g).

In 2016, the ABA revised the Model Rules of Professional Conduct (MPRC) to add Rule 8.4(g), making discrimination and harassment in the practice of law a form of professional misconduct. In adopting Rule 8.4(g), the ABA did not, however, take the rules governing professional conduct in a novel direction. It was, rather, following the lead of the states in adopting antidiscrimination and antiharassment provisions. Even before the ABA's adoption of MPRC 8.4(g), 24 states had some form of antidiscrimination and antiharassment provision within the black letter of their various versions of Rule 8.4. Connecticut has long been among a minority of states that address issues of bias or prejudice only within the Commentary to Rule

8.4. Since 2016, 4 states, Maine, New Mexico, Pennsylvania, and Vermont, have adopted Model Rule 8.4(g) wholly, or with some revisions. Additionally, a number of other states are currently considering ABA Model Rule 8.4(g) or a version of that rule. Connecticut's legal profession should be a model and a leader in addressing issues of discrimination, harassment and sexual harassment in professional contexts, to inspire and assure public faith in lawyers, the legal system, and the rule of law.

CBA RPC 8.4(7) addresses the very real issues of discrimination, harassment, and sexual harassment within the practice of law in Connecticut. Such conduct is deeply harmful both to those who are its targets and to the integrity, image, and standing of our profession. These harms should be addressed within the black letter of our Rules of Professional Conduct. The Preamble to the Rules of Professional Conduct reminds us that, “[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Connecticut Rules of Professional Conduct (CT RPC), Preamble. We are called to “demonstrate respect for the legal system and those who serve it,” and to maintain “a professional, courteous and civil attitude toward all persons involved in the legal system.” *Id.* Harmful discrimination, severe or pervasive harassment, and sexual harassment, directed at members of protected classes, have no place in conduct related to the practice of law, particularly in light of the stated commitments of our profession.

In developing CBA RPC 8.4(7), significant care and attention were given to addressing two concerns commonly raised regarding ABA Model Rule 8.4(g): (1) overbreadth and overreach; and (2) the potential for imposition on First Amendment rights. In weighing these respective concerns, we were guided by the privileges of our profession, and our obligations of self-regulation. “The legal profession’s relative autonomy carries with it special responsibilities

of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.” CT RPC Preamble (2020). We sought to understand and respond to the concerns of those fellow members of the bar who have experienced discrimination, harassment, and sexual harassment in professional contexts, as well as concerns regarding possible improper or excessive reach. This balancing of concerns within the proposed rule amendment replicates a similar balance struck within our founding and fundamental principles of law, as well as within the substantive law of antidiscrimination and antiharassment. The proposed rule amendment reaches conduct that all lawyers should find objectionable, without being so narrowly drawn and protective of lawyers as to have little practical effect.

Our system of laws is founded on a deep and fundamental commitment to equality. Equality, as a self-evident truth, is just as hallowed as are our various freedoms, including freedoms of speech, expression, association, and religion. Ultimately, the conduct that CBA RPC 8.4(7) seeks to address – harmful discrimination, severe or pervasive harassment, and sexual harassment, directed at an individual or individuals on the basis of one or more protected statuses – is not protected conduct. Our federal and state antidiscrimination, antiharassment, and civil rights laws define this type of conduct as unlawful and contrary to the public interest. Lawyers, as a learned profession, as officers of the Court, as public citizens with special responsibilities for the quality of justice, are well-qualified to know and understand the difference between protected speech, and that type of unacceptable and egregious behavior that will violate the proposed Rule. While these may sometimes raise complex and difficult questions, the same is true for many of the Rules of Professional Conduct, which have been amended and expanded over time to better address difficult ethical questions, or to respond to

new professional concerns. The proposed amendment of Rule 8.4 and its Commentary is long overdue. If adopted, Rule 8.4(7) would provide a clear statement of our profession's commitment to equality, antidiscrimination, and antiharassment, while also containing meaningful protections and safe harbors for lawyers who are concerned about possible imposition on constitutional rights, or overbreadth or overreach in potential enforcement.

Many of the comments offered in opposition to the proposed amendment focus excessively on potential enforcement, and raise concerns that the proposed rule change will cause a flood of frivolous complaints, or will invite "cancel culture" to the practice of law in Connecticut. This undue emphasis on the disciplinary process fails to recognize the true focus of the Rules, which is to provide an aspirational guide to the ethical practice of law:

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. Grievances do not require any particular pleading standard, and are often presented without reference to any particular Rule or Commentary. But there has been no "cancel culture" flood of grievances against attorneys. The current Commentary to Rule 8.4(4), in existence since 1986, identifies bias or prejudice based upon "race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status" as conduct prohibited as prejudicial to the administration of justice. But the Grievance Committee has not been burdened with a flood of grievance complaints premised on that provision of the Commentary. There is no reason to expect that such a flood will arise under the proposed amendment of Rule 8.4. Rather, the adoption of Rule 8.4(7) will serve to confirm the Connecticut legal profession's commitment

to combatting discrimination and harassment directed against members of protected classes, who remain significantly underrepresented within our profession, and who continue to face significant hate, discrimination and harassment in society at large.

Harmful discrimination, severe or pervasive harassment, and sexual harassment, can be devastating to those who are the targets of such conduct. Harmful discrimination, severe or pervasive harassment, and sexual harassment seek to rob an individual of his or her equality, dignity, self-worth, and sense of personhood, and may result in loss of opportunity or other economic loss. Our profession must recognize the insidious effects of discriminatory or harassing conduct, both among our fellow attorneys and as it affects the public. We should ensure that when lawyers engage in such conduct, our mechanisms of self-regulation are sufficient to address the misconduct.

Discrimination, Harassment and Sexual Harassment in the Practice of Law:

Unfortunately, harassment and discrimination are far too prevalent within the legal profession. For example, a 2020 study, conducted by Women Lawyers on Guard and Nextions, LLC, found that 75% of women lawyer respondents had direct experience with sexual harassment or misconduct.¹ 25% of respondents reported the frequency of such harassment as “often” and 48% as “somewhat” frequent currently, showing only modest changes from the culture of sexual harassment in the legal profession 30 years ago.² 86% of respondents reported that they did not report their experiences, although 35% of respondents indicated that they wanted to report. “The results of this Survey,” the study concludes, “lead to the inescapable

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.*

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% 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, receipt of high-quality assignments, access to networking opportunities, compensation, and promotions.⁵

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 to September 9, 2020, was completed by 578 respondents, of which 564 (97.6%) identified as an attorney licensed to practice law in Connecticut. 293 of the respondents (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. 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 reported categories were on the basis of sex or pregnancy (243 responses); followed by race,

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>

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 the most 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.

The CBA, as part of its brief survey, also collected numerous narrative responses from attorneys who voluntarily shared their experiences, or witness accounts, of discrimination, harassment and/or sexual harassment in professional contexts. A selection of those narrative responses have been previously submitted (2020-12 I), and an updated version of that survey presentation, with an expanded selection of the narrative responses, is attached. These narrative responses, along with the data revealing the prevalence of these experiences, are deeply troubling, and highlight the importance of addressing discrimination, harassment and sexual harassment within the text of our Rules of Professional Conduct. CBA RPC 8.4(7) responds to a very real and present problem within our profession.

Opposition to CBA RPC 8.4(7) and ABA Model Rule 8.4(g)

Despite the prevalence of these issues, a number of comments have been submitted in opposition to the proposed rule change. Many of the comments in opposition appear to be directed primarily at ABA Model Rule 8.4(g), and raise issues that we believe have been

addressed in the drafting of CBA RPC 8.4(7). The following sections provide a response to common themes within the opposition submissions.

First Amendment Concerns:

A number of comments have suggested that the proposed rule will impinge on First Amendment rights, amounts to an unconstitutional viewpoint based “speech code” for lawyers, and will have a chilling effect on freedom of speech and expression.

CBA RPC 8.4(7) has been narrowly tailored to address discrimination, harassment and sexual harassment in professional contexts. It is well-settled that “statutes are to be read so as to avoid, rather than create, constitutional questions.” *Clark v. Comm’r of Correction*, 281 Conn. 380, 404 (2007). *See also, Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (“where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”). The proposed definition of discrimination includes⁶ “*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.” Harassment is defined to include “*severe or pervasive derogatory or demeaning verbal or physical conduct*” while sexual harassment is defined to include “*unwelcome sexual advances, requests for sexual favors and other unwelcome verbal or physical conduct of a sexual nature.*” (emphasis added). CBA RPC 8.4(7) proscribes conduct.

⁶ The use of the word “includes” within the commentary to CBA RPC 8.4(7) “makes clear that the examples enumerated in the text are intended to be illustrative, not exhaustive.” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012). CBA RPC 8.4(7) further provides that “the substantive law of antidiscrimination and antiharassment statutes and caselaw should guide application of paragraph (7), where applicable” to provide clarity on the types of discrimination and harassment that will violate the rule. The use of the word “includes” provides that misconduct will arise from similar types of conduct, as further defined within the substantive law of antidiscrimination and antiharassment. For example, the definition of “harassment on the basis of sex” is by no means an exhaustive list of behaviors that constitute proscribed sexual harassment, but provides sufficient context to illustrate the type of conduct that will violate the rule.

The mere fact that discrimination, harassment and sexual harassment are often accomplished by means of speech does not automatically implicate freedom of speech concerns. “It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978). *Accord, Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (“[U]nder our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech.”)

Many of the comments cite to two U.S. Supreme Court cases, *NIFLA v. Becerra*, and *Matal v. Tam*, to suggest that ABA Model Rule 8.4(g) and/or CBA RPC 8.4(7) are unconstitutional.⁷ *Becerra*, 138 S. Ct. 2361 (2018); *Matal v. Tam*, 137 S. Ct. 1744 (2017). *Becerra* and *Tam* are inapplicable to CBA RPC 8.4(7). *Becerra* involved a claim that state-mandated notices, required of licensed and unlicensed pregnancy clinics, violated freedom of speech. The notices at issue in *Becerra* were found to be unconstitutional as “content-based regulation of speech.... compelling individuals to speak a particular message.” *Becerra*, 138 S. Ct. at 2371. In *Becerra*, the Court expressly noted that its line of cases concerning regulation of attorney conduct was not implicated in the decision. *Id.* at 2372. In *Tam*, a band sought to register “the Slants,” a name offensive to many Asian-Americans, as a trademark, but was barred from doing so because of a trademark registration law. That particular provision was held to be unconstitutional viewpoint discrimination, because it “denies registration to any mark that is offensive to a substantial percentage of the members of any group.” *Matal*, 137 S. Ct. at 1763. *Becerra* and *Tam* are inapplicable here, as CT RPC 8.4(7) does not compel speech, nor does it

⁷ As noted previously, many of these comments appear to be entirely or substantially directed at ABA Model Rule 8.4(g).

regulate offensive speech or viewpoints alone. CBA RPC 8.4(7) regulates very specific conduct: discriminatory conduct that is harmful and “directed at an individual or individuals,” harassment that is “severe or pervasive,” and sexual harassment. Though such conduct may incidentally involve speech, such conduct does not involve protected speech.

CBA RPC 8.4(7) defines “conduct related to the practice of law” to include “participating in bar association, business or professional activities or events in connection with the practice of law” to ensure that harmful discrimination, severe or pervasive harassment and sexual harassment occurring within such contexts are proscribed by the Rule.⁸ As evidenced by the studies and CBA survey results described previously, discrimination, harassment and sexual harassment occur within these contexts, and should be addressed within Rule 8.4. This does not mean that participating in a spirited bar association debate, expressing a controversial or unpopular opinion, or presentation of a controversial topic in a continuing legal education event, will violate the Rule. Such activities do not fall within the scope of proposed 8.4(7) because they do not meet the requisite standard of being “harmful” and “directed at an individual or individuals,” nor are they “severe or pervasive derogatory or demeaning verbal or physical conduct,” or “unwelcome verbal or physical conduct of a sexual nature.” For the same reasons, proposed Rule 8.4(7) will not reach lawyers’ participation as members or board members of religious organizations or same-sex fraternal orders. Finally, CBA RPC 8.4(7) does not reach a lawyer’s otherwise-ethical conduct or actions in advising, assisting, or advocating for his or her client. The Rule provides that it 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

⁸ One difference between ABA MRPC 8.4(g) and proposed CT RPC 8.4(7) is that the Connecticut version does not include participation in “social activities” in the list of what constitutes “conduct related to the practice of law,” thus making the scope of proposed 8.4(7) somewhat narrower than that of Rule 8.4(g).

these Rules.” The Commentary also provides, with reference to Rule 1.2(b), that “[a] lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities.”

CBA RPC 8.4(7) further provides that “the substantive law of antidiscrimination and antiharassment statutes and caselaw should guide application of paragraph (7), where applicable.” This provision further defines and limits the scope of CBA RPC 8.4(7). The substantive laws of antidiscrimination and antiharassment do not establish a “general civility code.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). The conduct must be both subjectively and objectively offensive and go beyond “discourtesy or rudeness.” *Id.* at 787-88. “[L]ack of racial sensitivity” and/or “offhand comments, and isolated incidents (unless extremely serious)” are insufficient to establish a violation. *Id.* at 787-788. *See also, Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (“mere utterance of an ... epithet which engenders offensive feelings” insufficient to support a cause of action). Violations of such substantive law are determined by “looking at all of the circumstances.” *Harris* 510 U.S. at 23. The proposed Rule and Commentary have been drafted to proscribe conduct that has little, if any, constitutional protection, and that the substantive law of antidiscrimination and antiharassment has long defined as violations of public policy.

CBA RPC 8.4(7) expressly addresses First Amendment concerns within the text of the proposed new Commentary, which provides: “A lawyer’s conduct does not violate paragraph (7) when the conduct in question is protected under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution.” Some commentators critical of proposed Rule 8.7(7) have suggested that the inclusion of this language in the Commentary is ineffective to counter First Amendment concerns because only the Rule itself is

authoritative. While it is correct that the language of the Rule is authoritative in identifying the proscribed conduct, the Commentary provides essential guidance in interpreting the Rules. As the Scope section of the Rules of Professional Conduct provides:

The Commentary accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Commentaries are intended as guides to interpretation, but the text of each Rule is authoritative. Commentaries do not add obligations⁹ to the Rules but provide guidance for practicing in compliance with the Rules. The Commentaries are sometimes used to alert lawyers to their responsibilities under other law, such as court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.

CT Rules of Professional Conduct, Scope (emphasis added).

The Commentary may not be disregarded in the interpretation of the Rules, and the inclusion of the First Amendment safe harbor provision in the proposed new Commentary is not rendered superfluous or meaningless because it appears in the Commentary and not in the Rule itself. The existing subsections of RPC 8.4 provide succinct descriptions of misconduct, broadly stated, and the Commentary serves as an interpretive guide. *See e.g.*, RPC 8.4 (3) (“engage in conduct involving dishonesty, fraud, deceit or misrepresentation”); (4) (“engage in conduct that is prejudicial to the administration of justice.”). Many other provisions of the Rules rely upon extensive commentary to provide guidance on extremely complex issues. *See* RPC 1.6 (Confidentiality of Information); Rule 1.7 (Conflict of Interest: Current Client); Rule 1.8 (Conflict of Interest: Prohibited Transactions). The structure of the Rules does not permit

⁹ Numerous comments in opposition to CBA RPC 8.4(7) and ABA Model Rule 8.4(g) suggest that the existing reference to bias and prejudice, in the commentary to 8.4(4), is sufficient. The existing language is insufficient for a number of reasons. The Rules note that the Commentary alone cannot “add obligations to the Rules” but is only intended for interpretation, raising questions about the enforceability of the Commentary alone. Additionally, the protected statuses identified in the existing Commentary are inconsistent with the substantive law of protected classes in Connecticut, and the existing comment does not reference harassment or sexual harassment. Additionally, an attorney or other member of the public seeking to raise an issue of harmful discrimination, severe or pervasive harassment or sexual harassment would have to prove not only the alleged conduct, but also that the misconduct was “prejudicial to the administration of justice.”

identification in the Rule of every nuance of prohibited or prescribed conduct, making the extensive Commentary essential to the interpretation of the Rule. Further, as noted in the Scope provisions cited above, interpretation of the Rules often requires reference to other rules, statutes, and case law. The Commentary alone cannot establish what conduct is permitted and proscribed, but it is essential to the interpretation of the Rules.

Other Concerns:

CBA RPC 8.4(7) defines conduct that the lawyer “knows or reasonably should know” is harassment or discrimination as misconduct. Some commentators have expressed objection to the inclusion of “or reasonably should know.” The Rules of Professional Conduct provides that this standard, “when used in reference to a lawyer, denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.” Rules of Professional Conduct Rule 1.0 (k). This is an objective standard,¹⁰ and one used consistently within the Rules of Professional Conduct. *See e.g.*, 1.13(f), 2.3(b), 2.4(b), 3.6(a), 4.3, 4.4, 7.3(a) and (c)(1). The standard is also consistent with the substantive law of antidiscrimination and antiharassment. *See, e.g., Brittell v. Dep't of Correction*, 247 Conn. 148, 167–68 (1998) (“once an employer has knowledge of a racially [or sexually] combative atmosphere in the work-place, he [or she] has a duty to take reasonable steps to eliminate it” (internal citations and quotations omitted)).

¹⁰ The standard is also consistent with the standard imposed upon the general public:

The familiar legal maxims, that everyone is presumed to know the law, and that ignorance of the law excuses no one, are founded upon public policy and in necessity, and the idea [behind] them is that one's acts must be considered as having been done with knowledge of the law, for otherwise its evasion would be facilitated and the courts burdened with collateral inquiries into the content of men's minds.... This rule of public policy has been repeatedly applied by [our Supreme Court].

Provident Bank v. Lewitt, 84 Conn. App. 204, 209–10 (2004).

Many Connecticut lawyers own, operate, manage, or are employed by law firms, corporations, government agencies, and other legal organizations that maintain antidiscrimination, antiharassment, and equal employment opportunity policies. These substantive laws have been in effect for many decades, and there is ample guidance available as to what constitutes harmful discrimination, severe or pervasive harassment, or sexual harassment. It is, in fact, a reasonable assumption that “a lawyer of reasonable prudence and competence” has sufficient understanding of the law of discrimination and harassment to understand what would and would not be within the scope of the Rule

The Code of Judicial Conduct dictates not only that judges “shall not . . . manifest bias or prejudice or engage in harassment . . .” but “shall require lawyers . . . to refrain from manifesting bias or prejudice or engaging in harassment.” Code of Judicial Conduct, Rule 2.3(b) and (c) (Bias, Prejudice, and Harassment). Proposed Rule 8.4(7) is entirely consistent with these judicial obligations.

Some of the comments reference the CBA’s internal “fast track” protocol. By way of brief clarification, this is an internal CBA designation only, commonly used when submitting position requests to the CBA Legislative and Policy Review Committee. The fact that the sponsors of the proposal requested “fast track” approval does not mean that the process was rushed or without due consideration. Various constituencies within the CBA undertook a lengthy and very deliberative approach, from June to September of 2020, before bringing the RPC 8.4(7) proposal to the CBA’s governing bodies for approval. CBA RPC 8.4(7) was co-sponsored by eight different CBA sections and committees before it was submitted as a position request. After its submission to the Legislative and Policy Review Committee, CBA RPC 8.4(7), three additional sections voted approval of the proposed amendment. Only one section voted to

oppose the proposed amendment. CBA RPC 8.4(7) was then unanimously approved by the CBA Executive Committee, before approval by a substantial majority of the CBA House of Delegates, in a vote of 39 in favor, 11 opposed, and 1 abstention, on September 10, 2020. A full timeline of the CBA process of consideration and approval of Rule 8.4(7) is contained within the attached.

Conclusion

Thank you for the Rules Committee's consideration of the proposed amendment of Rule 8.4. Please do not hesitate to let me know if there is additional information I could provide or if the Rules Committee has questions about any other matters raised in the various submissions concerning proposed Rule 8.4(7). I will, of course be present to respond to questions at the January 11, 2021 Rules Committee meeting.

Respectfully submitted,



Cecil J. Thomas
2020-21 President-elect
Connecticut Bar Association

Encl.: CBA Proposed Amended Rules of Professional Conduct Presentation (Updated)

cc: Amy Lin Meyerson, 2020-21 CBA President (via email)
Megan Wade (via email)
Marcy Stovall (via email)
Keith Soressi, CBA Executive Director (via email)
Bill Chapman, CBA Director of Government and Community Relations (via email)



Proposed Amended Rules of Professional Conduct 8.4(7)

CONNECTICUT BAR ASSOCIATION
HOUSE OF DELEGATES MEETING

CECIL J. THOMAS

CBA 2020-21 PRESIDENT-ELECT

CHAIR, CBA 8.4(7) WORKING GROUP

ORIGINALLY PRESENTED SEPTEMBER 10, 2020

AMENDED AS OF DECEMBER 4, 2020

CBA 8.4(7) Working Group Members

Cindy Cieslak
Chair, Young Lawyers Section

Karen DeMeola
Past President

Monte Frank
Past President

Aigné Goldsby
YLS Diversity Director

Daniel Horgan
Vice President

Amy Lin Meyerson
President

Ndidi Moses
Immediate Past President

Amanda Schreiber
Asst. Secretary-Treasurer

Daniel Schwartz
ABA Delegate

Jonathan Shapiro
Past President

Marcy Stovall
Standing Committee on Professional
Ethics

Cecil J. Thomas
President-elect

Neeta Vatti
Co-Chair, Diversity and Inclusion
Committee

Megan Wade
Co-Chair, YLS Appellate Advocacy
Section

Kean Zimmerman
Co-Chair, Diversity and Inclusion
Committee

Staff Liaisons:

Amani Edwards, Director of Diversity
and Human Resources

Keith Soressi, Executive Director

CBA RPC 8.4(7) Timeline

June 5, 2020: ABA Model Rule 8.4(g) Presented to the Rules Committee. June 5, 2020 Rules Committee Minutes: “After discussion, the Committee decided to table this proposal to the September meeting to allow Attorney Wade to coordinate with the Connecticut Bar Association and to submit additional materials to the Committee for review.”

June 15: Attorneys Aigné Goldsby, Megan Wade and Marcy Stovall address the House of Delegates regarding ABA 8.4(g). CBA 8.4(7) working group announced.

June – Present: CBA 8.4(7) working group and subcommittees thereof meet at least 12 times to discuss and develop Proposed Amended RPC 8.4(7)

CBA RPC 8.4(7) Timeline

- July 7, 2020: **Diversity and Inclusion Committee (unanimous approval)**
- July 15: **Standing Committee on Professional Ethics (unanimous approval)**
- July 16: **Young Lawyers Section (unanimous approval, two abstentions)**
- July 17: **Human Rights and Responsibilities (approval)**
- July 29-31: **LGBT Section (unanimous approval)**
- July 31-Aug. 4: **Women in the Law Section (unanimous approval)**
- August 12-13: **Veterans and Military Affairs Section (approval)**
- August 17: **Professionalism Committee (approval)**

CBA RPC 8.4(7) Timeline

- August 21: **Legislative and Policy Review Committee (LPRC) Position Request**
- August 25: **Professional Discipline Section (approval)**
- August 27: **Litigation Section (approval)**
- August 31: **Disability Law (opposed)**
- August 31: **Labor and Employment Law Section (approval)**
- Sept. 1: **Real Property (no position)**
- Sept. 2: **LPRC Committee (unanimous, one abstention)**
- Sept. 4: **Executive Committee (unanimous approval)**

CBA RPC 8.4(7) Timeline

Sept. 10: **CBA House of Delegates: 39 in favor, 11 opposed, 1 abstention**

Sept. 14: **Rules Committee Meeting**
Agenda Item No. 14:

“Proposal from Attorney Megan Wade to adopt the American Bar Association's Rule of Professional Conduct 8.4, subsection g, regarding harassing or discriminatory conduct. This proposal was made at the June 5, 2020 public hearing and was discussed at the meeting after the public hearing.”

Rules Committee has tabled consideration of Proposed Amended Connecticut Rules of Professional Conduct 8.4(7), and has requested comment from a broad range of state, local and affinity bar associations by November 6, 2020

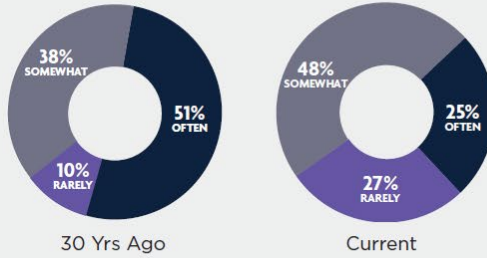
Studies and Surveys of
Discrimination, Harassment and
Sexual Harassment in the Legal
Profession

SURVEY AT A GLANCE*

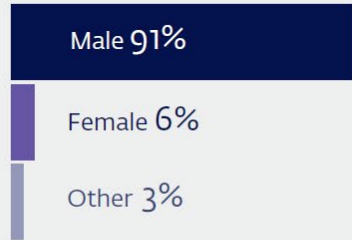
Women Lawyers On Guard's *Still Broken: Sexual Harassment and Misconduct in the Legal Profession*, a report on its national survey, reflects significant, current evidence of sexual misconduct and harassment. The system of addressing sexual harassment in the legal profession is "still broken."

Culture

By Frequency of Harassment
30 Years Ago and Current

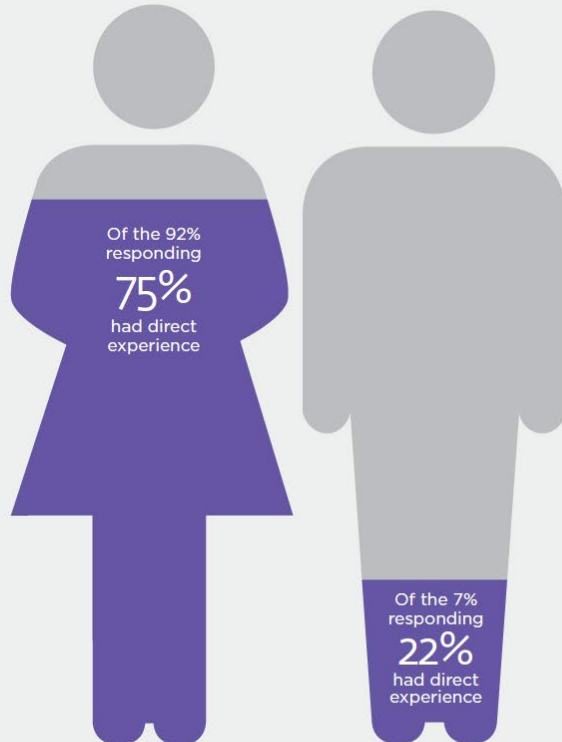


Harasser Gender

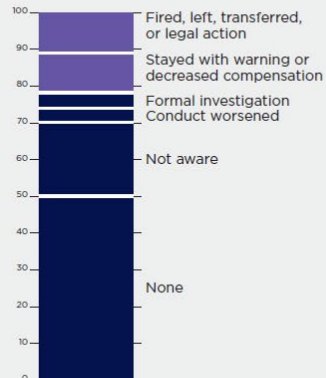


Respondents Direct Experience

By Gender



Harasser Consequences

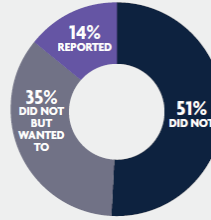


Culture By Behavior

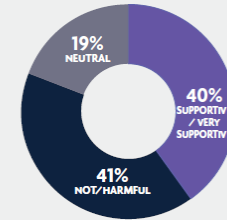
Sexual Ridicule
Sexualized Name-Calling
Unwanted Requests for Dates
Unwanted Communications of a Sexual Nature
Intrusive Sexually Explicit Questions
Offensive jokes
Attractiveness Ratings
Sexual Sounds or Gestures
Ogling/Leering
Attempted or Actual Sexual Assault

Direct or Indirect Threats/Bribes
Displays of Explicit Materials
Stalking

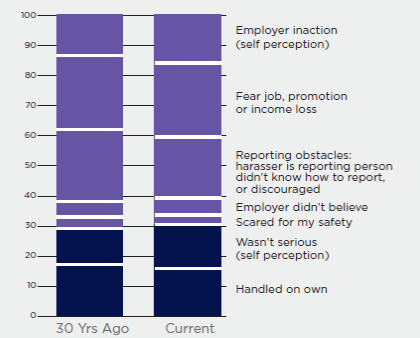
Reporting By Respondents



Reporting By Support Level



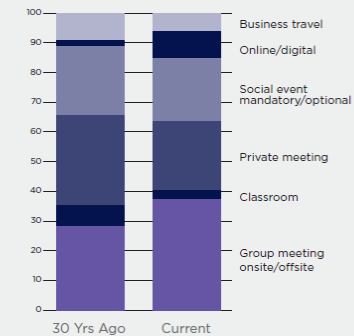
Reporting Barriers



Reporting Impact on Respondents



Incidents By Setting



A brief discussion of the Survey's six most salient findings and its conclusion can be found in the Executive Summary.

* For ease of presentation, all percentages in the Report have been rounded to the nearest whole number.

National and International Studies on Bias, Discrimination and Harassment in the Legal Profession (References)

Still Broken: Sexual Harassment and Misconduct in the Legal Profession (2020):

<https://womenlawyersonguard.org/wp-content/uploads/2020/07/Still-Broken-Full-Report.pdf>

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>

Us Too? Bullying and Sexual Harassment in the Legal Profession (May 2019) (International Bar Association)

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

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>

CBA “Maintaining the Integrity of the Profession” Survey Responses

Survey Dates: September 4, 2020 to September 9, 2020.

Survey Release: Survey circulated to the Connecticut Bar Association membership, as well as other Connecticut bar associations.

Response: 578 total respondents, of which 564 identified as an attorney licensed to practice law in Connecticut. (97.6%)

293 respondents 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.

252 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.

Maintaining the Integrity of the Profession: Survey Responses

Of the 293 respondents who reported experiencing discrimination, harassment or sexual harassment:

78.5% reported experiencing discrimination (230 respondents)

31.4% harassment (92 respondents)

41.3% sexual harassment (121 respondents).

Maintaining the Integrity of the Profession: Survey Responses

Experiences with discrimination, harassment or sexual harassment, directed at membership in a protected class, in conduct related to the practice of law (highest numerical categories):

243 responses identified sex and/or pregnancy as the protected class(es) to which discrimination or harassment were directed.

183 responses identified race, color, ancestry, national origin, and/or ethnicity as the protected class(es) to which discrimination or harassment were directed.

93 respondents identified age as the protected class to which discrimination or harassment were directed.

30 respondents identified sexual orientation, gender identity or gender expression as the protected class(es) to which discrimination or harassment were directed.

Maintaining the Integrity of the Profession: Survey Responses

I have experienced discrimination, harassment, and/or sexual harassment in the following contexts:

ANSWER CHOICES	RESPONSES	
Workplace	63.49%	193
Client representation	41.12%	125
Bar association meetings, activities or events	12.83%	39
Virtual/online (e.g., professional social media, online forums or e-mail lists)	3.62%	11
Personnel (e.g. hiring, promotion, discipline or discharge)	35.53%	108
Other professional meetings, activities or events	24.34%	74
Other	16.12%	49
Total Respondents: 304		

Maintaining the Integrity of the Profession: Survey Responses

I have experienced discrimination, harassment, and/or sexual harassment by the following:

ANSWER CHOICES	RESPONSES	
Co-worker	28.48%	86
Client	32.12%	97
Opposing counsel	41.72%	126
Manager/Supervisor/Senior Colleague/Higher-Ranking Individual	47.35%	143
Judge or Other Decision-Maker	26.49%	80
Another lawyer (not a co-worker)	37.09%	112
Business professional (not a lawyer, e.g., vendor, court personnel, other legal staff)	22.85%	69
Other	7.95%	24
Total Respondents: 302		

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses:

I graduated from [Law School], cum laude, with honors in I then earned my LLM ... the next year. I was 56. I interviewed at several law firms, including large firms [and a corporate legal department]. Every interview asked if I got along with "younger" lawyers, and a few asked my age. I was qualified for [the] position. I was interviewed by partners who asked my age.

During a lengthy trial, a ... judge told me my facial expressions and hand gestures were "off putting". I am Black and everyone else in the court was white. The trial was horrendously hard because of comments such as these. 2. I am often mistaken for the court reporter or witness. 3. At a law firm I was constantly micromanaged by the managing partner. My white counterparts were not subjected to such treatment. 4. At that same law firm another partner complained that my then infant daughter was "always sick".

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

I was supposed to have a change of assignment, but, after I said that I was pregnant and would be taking maternity leave, the assignment was revoked. I also was told that, for me to receive a reduced schedule upon my return from maternity leave, they would have to add time to other people's schedules. They also said that I could work from home for a certain amount of hours per week but that I would not be paid for that time and that my caseload would not be decreased.

My client made inappropriate sex-based and ethnicity/race-based comments to me. When I notified my partners, I did not feel like they responded appropriately. I also experienced race/ethnicity-based inappropriate comments by a partner and by staff. While these wouldn't rise to a viable HWE or discrimination claim, they do not make me feel comfortable at work. I did speak with the partner, and my feedback was well received and these particular microaggressions from the partner haven't happened again. In general, I do not feel supported as a minority race in the firm.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

I was let go wrongfully from a job when I told my supervisor I had to have a medical procedure that would require 3-5 days of hospitalization. On the advice of the paralegal, who knew about my diagnosis, I waited to tell my boss. I gave him four weeks' notice (I could have given him two months' but she expressed concern he would let me go upon learning this information [she'd worked with him for many years]). He did in fact let me go, without cause, a few days after I informed him I would need one week of medical leave.

My compensation has not been commensurate with male colleagues similarly situated.

Opposing Counsel and other attorneys have called me bitch, dike, cunt, and other offensive names ... in courthouses and professional meetings....

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

... shortly after being hired at a firm, the managing partner (who hired me), "turned" on me out of the blue ... He would literally scream at/about me on a daily basis in the hallways (so the entire firm heard) saying things like "banging my head against the wall is less painful than dealing with [your] stupidity" and similarly debasing, harassing, insulting comments and degrading slurs ... Other attorneys became so uncomfortable they began closing their doors during when there was an "eruption" from this attorney, and would later stop by my office to "check" on me after he'd left for the day, and kindly offered advice and encouraging words. What this person screamed about/to me was heard daily by over 30 attorneys and about 15 staff members. It was a nightmare I have pretty much blocked from my memory... It was traumatizing and I was, and still am, simply flummoxed at the experience.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

As a second year associate had a senior equity partner stop me in a hallway, late at night, and insist on a one sided "hug" while telling me his wife was away and he was struggling with being "good". I pushed him away from me hard and told him not to ever touch me again quite loudly. Other people in the vicinity were working late too. I reported him to a trusted equity member and it ultimately turned out he had been "handsy" with support staff and was known for his blatant self manipulation when speaking one on one with support staff. I was told he was told to knock it off and he left me alone and, reportedly, support staff. No other consequences to behavior.

I have had male co-workers comment on my clothes being tight or discussing how I looked in clothes right in front of me.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

I was paid less than other male colleagues with the same amount of years barred and less trial experience, paid less than white female attorneys with much less time practicing law and no trial experience, [and] paid less than a paralegal with no specialty /practice area... I have also received emails sent to me in error from opposing counsel thinking it was going to their male colleagues calling me a ditz / other derogatory words for females etc.

I had a pretrial conference with Judge _____. Present were opposing counsel: male partner, female associate and me (female). The judge took both sides individually into chambers then convened both of us. He said he wanted us to return the next day. He instructed the male attorney to bring the female associate: "Be sure you bring that pretty associate of yours." The male partner, said he had other plans for her. The judge: "I bet you do!" I was mortified, paralyzed.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

My supervising attorney was well known for many years to make intensely personal remarks about most of the female staff members of the firm. I was an associate in his department. He was intensely interested in who I talked to during the day, and which other attorneys assigned me work projects. One day, after a firm holiday lunch, he came to my office and complained that I had not "paid him enough attention" at the lunch, and that I "did not make enough eye contact with him." That was the last straw for me when, for the previous two years, I had been subjected to personal comments, and berated for not answering his emails fast enough. I complained to the firm "human resources" partners. That was a waste of time. They sent my supervisor and me to a psychologist to "work out our differences." Absurd response. This was extremely damaging for my career at the firm, and within a year I left because my supervisor retaliated against me and did not assign me any work after the complaint. The other partners did absolutely nothing to help me. I was not the first female associate to leave this firm after complaints of sexual harassment. Absolutely nothing was ever addressed and my supervisor remained unscathed. Very very difficult times.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

I have had multiple occasions where I have had white male opposing counsel attempt to bully or intimidate me, including occasions where male opposing counsel raised their voices and yelled, pounded tables, or literally got physically close to me in an attempt to intimidate. There are certain male attorneys in this state who if I am in a deposition with them I always request a video deposition because this helps to prevent them from engaging of intimidation and harassment of me and my witnesses (especially female witnesses). This leads to costs for my clients that absolutely should not be necessary.

I was sexually harassed by an employer who noticed a tattoo I have on my chest. The only way to see this is if he was looking down my shirt. And when he found out I was gay asked if I wanted to have sex with a man. I did not and quit thereafter.

[An attorney] sexually harassed a female associate at my firm at a [bar association] event. [Another attorney] gave [him] a high-five after [he did this].

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

At a previous law firm, the firm refused to honor their written paid leave policy when I was pregnant and instead violated their own policies and treated the leave as unpaid because they felt my taking leave didn't show dedication to the firm. They also told me that if I requested any sort of reduced hours, I would be taken off the partnership track completely.

When I was a young junior associate (at a former firm), I once had a male partner (at least 30 years older than me) ask me to sleep in his hotel room with him and comment repeatedly on my outfits and how I looked. On a smaller, but still harmful, scale, over the years, in various contexts, I've been called rude, mean, bitchy and comparable insults by opposing counsel on multiple occasions when they would never treat my male colleagues that way. I've frequently been asked to get coffee for the group, take notes, or serve food in meetings when none of the males present were asked to do the same. Law firm salaries are still on average significantly lower for women than for men.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

At a prior firm, I witnessed harassment based on gender, race and sexual orientation. The incidents were reported and/or witnessed by management and no action was taken.

I'm genuinely worried about disclosing this information. I have been reprimanded for the smallest "mistakes" and I can't risk my job.

I saw black attorneys held to higher standards of practice than white attorneys

[I have witnessed] My attorney colleagues of color routinely being directed to move out of the 'attorney' bench while in court (within the last 4 years).

This was in a large firm and happened to a Black female colleague. Blatant discrimination against a brilliant lawyer, leaving her out of meetings, not giving her good assignments. Nothing was done, and she left the firm. Heartbreaking.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

I'm in my late 50s and can't find a job as an attorney. I'm a recent graduate. Can't even get a court clerk role.

I had an medical issue which required several surgeries. Prior to this my billable hours were fine. After this, I was bullied and threatened about my low billable hours, and ultimately I am losing my job at year end. I am in my 60's.

... a job offer with [a law firm] was withdrawn when I came out as a lesbian.

Women are routinely discriminated against in terms of assignments, client contact and recognition for work. Pregnancy leave is actually work full time from home. Alcohol is a large part of mandatory "social" events and this results in more bad behavior. The rules do not apply to lawyers or law firms.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

While in court, I had opposing counsel tell me he was disappointed that we settled our matter because he was looking forward to seeing my legs wearing heels during a trial. On another occasion, I had a Magistrate tell me to "sit down and only speak when spoken to" while representing my client.

opposing counsel making overt sexual comments regarding my body.... more than one interviewer for a job commenting that as a married female with children I should be at home ... [and] I did not need health benefits as my spouse should provide those.

I have had an employer make inappropriate comments such as, "if you wear pants like that again you will definitely get a raise." It is not uncommon for client's to assume I'm the paralegal and not the lawyer. I had an employer allude to the fact that because my husband has a good job, I don't need a raise...

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

It's hard for a Connecticut lawyer to report discrimination and other unlawful treatment because of the fear of likelihood of retaliation. The bar is quite small and full with many senior and powerful lawyers who will not hesitate to have you blacklisted. I believe some improvement is on the way as more and more firms have been conducting training related to discrimination and harassment.

Serious pay gap affecting the past decade of my career. I am a single mother and the need to earn to support my family has been unrecognized and/or dismissed despite my meeting the goals of the firm. I have not received a pay increase since 2007.

As a summer associate, the male partner in charge of hiring me flat out said "women are overly emotional and can't think rationally."

[A] lucrative male partner sexually harassed me, female partner reported it, I suddenly out of nowhere had a poor performance review and was let go, he got a slap on the wrist.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

It's happened so many times over the course of my career and life that there's no single answer. There have been times where I have taken personal action through admonishment or similar action and I'm sorry to say that there are times when I have not done anything but bite my tongue.

no one is going to do anything about male attorneys getting so close to me that when they yell I can feel the spit on my face. No one is going to do anything about male attorneys belittling female attorneys and laughing and swearing at them in front of the clients to diminish their authority. It is not zealous it is abusive. If these male attorneys behaves that way in a corporation they would be fired in a second. Female attorneys are open season and have no protection anywhere.

No actions were ever taken [regarding sexual harassment/discrimination on the basis of sex and pregnancy]. Men always get away with it and the few women in power are willing to help them.... I don't think this is ever going to get better.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

A partner with authority to review associates' performances crudely came on to me (made suggestive comments and facial expressions) at firm events, in plain view of colleagues; came into my office uninvited and discussed personal issues (example: when I became engaged, he encouraged me not to get married). He attempted to flirt with many, if not all, female associates. When I rebuffed him he was aggressive and rude towards me in front of colleagues.

Former colleagues were told to accept sexual harassment for the sake of good client relations, and were sexually harassed by superiors.

Over the many years of my career, I have never seen any actions taken against people (typically older male partners) who treat women or minorities poorly or illegally. Instead, I've seen many associates leave law firms or the practice of law entirely after being treated unfairly.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

I was propositioned by a partner at a firm event while an associate (both verbally and groped)... The groping incident was resolved eventually with that partner's departure, but only after it came to light that he had done this to two other associates in the same evening.

There are so many levels of discrimination/racism/sexism. I had a negotiation session once with a male attorney who was black and I got angry at him personally because he was not agreeing. When I walked out of the room, I asked myself why I had had that reaction, and I concluded that it was because I had an expectation that he would defer to me and I was angry that he didn't.

Large firms can have great programs and training, but the reality is that there are some bad actors, usually those who bring in big business, and their behavior is tolerated. Worse, those who raise issues about such people are punished.

Maintaining the Integrity of the Profession: Survey Responses

Selected Narrative Responses (cont'd):

The legal world has made tremendous strides, but anyone that thinks we've solved issues related to inequality and discrimination isn't paying attention or is missing the perspective of a large segment of the legal world.

I have routinely received derogatory comments related to [organizational leadership by a diverse individual] or comments that presume that our work product is not good.

In a medium to small law firm setting where the partners are focused on their own productivity it is almost impossible to expect they will respond to sexual harassment complaints in a way that will upset the partners' own bottom line.

We cannot continue to expect those being "victimized" to be able to fix the problems. Those in power have to get on board and carry the load.