

From: Cecil Thomas <CThomas@ghla.org>
Sent: Monday, January 4, 2021 4:36 PM
To: Rules Committee; Del Ciampo, Joseph; McDonald, Andrew
Cc: amy@almesq.com; 'Stovall, Marcy'; 'Megan Wade'; Chapman, Bill
(bchapman@ctbar.org); Keith Soressi
Subject: CBA 8.4(7) Further Comments
Attachments: CBA 8.4(7) Comments 1.4.21.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear Justice McDonald and the Members of the Rules Committee of the Connecticut Superior Court,

Attached please find additional comments, from the Connecticut Bar Association, regarding the proposed changes to Rule 8.4(7). These are responsive to those comments that have raised the *Greenberg* preliminary injunction ruling, issued in the Eastern District of Pennsylvania on December 8, 2020, regarding Pennsylvania Rule of Professional Conduct 8.4(g).

Best regards,

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



30 Bank Street
PO Box 350
New Britain
CT 06050-0350
06051 for 30 Bank Street
P: (860) 223-4400
F: (860) 223-4488

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

January 4, 2021

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

Re: Proposal to Amend Rule 8.4 of the Connecticut Rules of Professional Conduct to include 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 to address recent submissions concerning the Rules Committee of the Superior Court's consideration of CBA Proposed Amended Rule of Professional Conduct 8.4(7) and related Commentary ("proposed 8.4(7)"). Submissions 2020-12 BBB through EEE all ask the Rules Committee to take note of a recent decision from the United States District Court for the Eastern District of Pennsylvania: *Greenberg v. Haggerty*, 2:20-cv-03822-CFK, 2020 WL 7227251 (E.D.Penn. December 8, 2020) (Kenney, J.) (copy submitted as 2020-12 EEE).

The *Greenberg* decision concerns Pennsylvania's Rule of Professional Conduct 8.4(g), adopted in mid-2020 and scheduled to go into effect on December 8, 2020 ("PA RPC 8.4(g)"). In *Greenberg*, the court has temporarily enjoined enforcement of PA RPC 8.4(g), and the new submissions to the Rules Committee suggest that the *Greenberg* decision is pertinent to the Committee's consideration of proposed 8.4(7). But because the language of PA RPC 8.4(g)

differs significantly from that of proposed 8.4(7), the court's First Amendment analysis in *Greenberg* is not applicable to proposed Rule 8.4(7).

PA RPC 8.4(g) is substantially different from both ABA Model Rule 8.4(g) and proposed 8.4(7). PA RPC 8.4(g) is broader in scope and reach than either ABA Model Rule 8.4(g) or proposed 8.4(7), and the Commentary to PA RPC 8.4(g) does not include the extensive interpretive guidance that the drafters of proposed 8.4(7) have included in the proposed new Commentary. PA RPC 8.4(g) provides as follows, in pertinent part:

Pennsylvania Rules of Professional Conduct
Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

...

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

Comment:

...

[3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

Pennsylvania Rules of Professional Conduct 8.4(g) (December 8, 2020).

The court in *Greenberg* acknowledged that "... under [Supreme Court] precedents, States may regulate professional conduct, even though that conduct incidentally involves

speech.”” *Greenberg*, 2020 WL 7227251 at *11 (quoting *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018)). In the view of the court in *Greenberg*, PA RPC 8.4(g) failed constitutional muster because by its plain language its reach extended not just to conduct but to “words *or* conduct”:

Rule 8.4(g) does not regulate professional conduct that incidentally involves speech. The plain language of Rule 8.4(g) explicitly prohibits “words” that manifest bias or prejudice. Furthermore, a comment included in a May 2018 proposal of Rule 8.4(g) “explains and illustrates” that Rule 8.4(g) was intended to regulate speech. Pa.R.P.C., Preamble and Scope (“The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.”) This comment stated, “[e]xamples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.”⁷ 48 Pa.B. 2936. This proposed comment reveals that the drafters of Rule 8.4(g) intended to explicitly restrict offensive words in prohibiting an attorney from “manifest[ing] bias or prejudice.”

Although the final version of Rule 8.4(g) does not include this comment, *the fatal language, “by words . . . manifest bias or prejudice,” remains*. Removing this candid comment about the intent of the Rule does not also remove the intent of those words. That this language, “by words . . . manifest bias or prejudice,” remained in the final version of Rule 8.4(g) illustrates the Rule’s broad and chilling implications. *If the drafters wished to reform the Rule, they could have easily removed the offending language from the Rule as well the proposed comment*. Removing the comment alone did not rid Rule [8.4] (g) of its language specifically targeting speech.

Greenberg, 2020 WL 7227251 at * 13 (emphasis added).¹ The Pennsylvania rule, by separating “words” from “conduct,” and “words or conduct” from “harassment or discrimination” with the disjunctive “or” lends itself to an interpretation by which those terms could be viewed as separate and distinct. *See e.g., State v. Dennis*, 150 Conn. 245, 248 (1963) (“The use of the

¹ *See also, Greenberg*, 2020 WL 7227251 at * 12, 14 (“Rule 8.4(g)’s prohibition against using ‘words’ to ‘manifest bias or prejudice’ does not regulate conduct ‘carried out by means of language.’ *Rumsfeld*, 547 U.S. at 62. It simply regulates speech. Even if the Rule was intended to prohibit ‘harassment and discrimination . . . carried out by words,’ Rule 8.4(g) plainly prohibits ‘words . . . manifest[ing] bias or prejudice,’ which regulates a much broader category of speech than supposedly intended. . . . Defendants seek to remove certain ideas or perspectives from the broader debate by prohibiting words that manifest bias or prejudice. . . . Rule 8.4(g) explicitly prohibits words manifesting bias or prejudice, i.e., ‘offensive’ words.”).

disjunctive ‘or’ between the two parts of the statute indicates a clear legislative intent of separability.”)

In contrast to the Pennsylvania rule, proposed 8.4(7) is directed at “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of [Connecticut’s protected statuses] in conduct related to the practice of law.” The focus of proposed 8.4(7) is on *conduct* that rises to the level of harassment or discrimination. In contrast to PA RPC 8.4(g), the express language of proposed 8.4(7) may not be construed to reach words or speech alone.

The proposed new Commentary to 8.4(7) differs substantially from that of PA RPC 8.4(g), and further clarifies that the focus of the CBA’s proposed rule is on discriminatory or harassing conduct, and not protected speech. For example, the proposed new Commentary defines discrimination as conduct “directed at an individual or individuals.” This language is intended to *carve out* of the Rule’s prohibition such conduct as the expression of opinion, participation in CLE or other law related speaking events, and advocacy reflecting a particular viewpoint. And because the prohibition reaches only conduct directed at an individual, it would not reach statements made in addressing an audience *even if* a member of the audience considered the statements offensive.

In addition, unlike the recently-enjoined Pennsylvania rule, the Commentary to proposed 8.4(7) contains express interpretive guidance concerning the boundary between conduct prohibited under the Rule and conduct protected by the First Amendment. The Commentary to proposed 8.4(7) provides as follows: “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 the Connecticut Constitution.” Unlike the Pennsylvania rule,

proposed 8.4(7) is not subject to an interpretation that speech alone may be subject to the Rule, even if that speech could be considered offensive to others. Rather, the reach of proposed 8.4(7) extends only to verbal or physical conduct that rises to the level of harmful discrimination or severe or pervasive harassment or sexual harassment. Such conduct, it should go without saying, is not subject to constitutional protection.

The CBA's December 4, 2020 letter to the Rules Committee, Submission 2020-12 AAA, contains a further explanation of the various free speech protections and safe harbors built into proposed 8.4(7) and its Commentary. CBA 8.4(7) is fundamentally different from the Pennsylvania rule at issue in *Greenberg*, and is narrowly tailored to address wrongful conduct that has no place in the professional and ethical practice of law. For these reasons, the analysis underlying the *Greenberg* decision is not one that is applicable to the specific language of proposed Rule 8.4(7).

Respectfully submitted,



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

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)