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From: Mark Dost <MDost@tnrdlaw.com>
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To: Rules Committee
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Attachments: Comments of Attorney Mark W. Dost 12-04-2020.pdf

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I am attaching for the Committee's consideration my comments to proposed rule 8.4(7).

Respectfully,

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Comments of Attorney Mark W. Dost on
Proposed Rule 8.4(7)

To: Members of the Rules Committee of the Superior Court
Hon. Andrew J. McDonald, Chair, Hon. Holly Abery-Wetstone, Hon. Barbara N. Bellis, Hon. Susan Quinn Cobb, Hon. John B. Farley, Hon. Alex V. Hernandez, Hon. Tammy T. Nguyen-O'Dowd, Hon. Sheila M. Prats, Hon. Anthony D. Truglia, Jr.

By way of introduction, I have practiced as a Connecticut lawyer for nearly 40 years. I am a member of the Executive Committees of the Estates and Probate Section, Elder Law Section, and Human Rights and Responsibilities Section of the Connecticut Bar Association, and a past Chair of the Elder Law Section. I oppose Proposed Rule 8.4(7) in its current form.

Proposed Rule 8.4(7) in its current form targets speech by social conservatives and those holding to teachings informed or prescribed by their faith. Although ostensibly promoting diversity, the proposed rule does not promote diversity of thought. It is intended to create a forum, through the professional discipline process, to punish lawyers who cross the line on expressing certain views that challenge progressive orthodoxies and to provide a safe harbor to social conservatives who keep quiet.

Proposed Rule 8.4(7), drawn from ABA Model Rule 8.4(g), is not a "model" rule. It was born in politics and since being passed by the ABA, has been extensively critiqued. Only two states, Vermont and New Mexico, have adopted it substantially unchanged. Six states have rejected the rule or versions modeled closely after the rule. Many states, before and after passage of the rule by the ABA, have taken their own path in dealing with harassment and discriminatory conduct and with better results.

Four years ago, the president of the CBA spearheaded an effort to promote the adoption of Rule 8.4(g) in Connecticut. At that time, grave concerns about the rule were expressed by the Professional Discipline Section of the Bar Association. Instead, the section suggested that the CBA consider Rule 8.4(j) in Illinois, which pre-existed the ABA rule. The Illinois rule provides that "It is professional misconduct for a lawyer to: ***

"(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has

engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted."

Interestingly, when adoption of the ABA model rule was debated in the Illinois State Bar Association Assembly in December 2016, the Assembly voted overwhelmingly to reject the model rule in favor of its own existing rule. The Illinois rule, which targets unlawful conduct that has already been established in courts or administrative proceedings, makes more sense than the ABA rule.

Among the problems with the proposed ABA rule:

1. Absence of First Amendment protections for lawyers in the rule. Although the proposed rule appears to target only "conduct," the proposed commentary makes it clear that it targets "verbal" conduct, in other words speech. The rule contains no exception for speech protected under the federal and state constitutions and offers no guidance to anyone on what constitutes protected speech. The proposed commentary does state that the rule does not apply to protected speech; that is really all it has to say about protected speech. To those who consider the tossing of that crumb into the commentary sufficient, consider this: the promoters of the rule themselves are emphatic that commentary accompanying a rule is NOT sufficient. They say that a black-letter antidiscrimination rule is required, because the current antidiscrimination language in our Connecticut professional rules is found only in the commentary. Yet they don't apply the same reasoning to First Amendment concerns. They should. The proposed black-letter rule itself needs to be narrowed and tailored to ensure that the focus of the rule is on conduct and that attorneys are not targeted for expression of views. The black-letter rule, and not just the commentary itself, should contain robust free-speech protections that go beyond the minimum protected by federal and state constitutions.
2. Unsuitability of local grievance committees to undertake investigations and determine difficult issues of law. Local grievance panels consist of two lawyers and one lay person. Can we imagine a local panel being called upon to investigate a charge that a lawyer may have engaged in discriminatory conduct? Exactly what resources would be available to the local panel to conduct this investigation? Would the lay person – or the lawyers – on the panel be fully trained in antidiscrimination law? And even if they were, what would they make of this suggestion from the commentary: "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)."
3. One of the virtues of the Illinois rule is that it puts the onus of investigating complaints of discrimination with courts and administrative agencies charged with investigating

complaints and equipped with the resources to carry out such an investigation, with due process rights afforded to the person accused.

4. "Related to the practice of law." This provision was intentionally designed to go well beyond conduct in the courts or even in the office. The ABA commentary accompanying the model rule was clear that "related to the practice of law" could involve social gatherings. The proposed CBA rule cuts that back a bit, but does not exempt anything one might say or do at a bar association or business event.
5. Vagueness. The rule is intentionally vague. If a law firm takes its associates on an outing to the "Book of Mormon," which ridicules Mormons – this actually happened – is that discrimination against a person's or group's religion in violation of the rule? In response to that question, an attorney once told me, "Of course not. It's a funny musical," which was not a satisfying response. This issue cries out for a principled line of demarcation. If the rule does not communicate a principle that clearly divides ethical from unethical conduct, then the rule is unworkable. Moreover, since a disciplinary action affects a lawyer's protected property interest in the right to practice his or her profession and since the proposed rule encumbers free speech rights, a rule which does not clearly identify the proscribed conduct is void for vagueness.
6. Protected Classes. Do we really need to have in our canon of ethics a rule that prohibits discriminatory conduct and speech on the basis of "status as a veteran?" I fully believe in honoring veterans and protecting them from discrimination. There is nothing silly about discrimination against veterans. But is this a real issue in the practice of law, and if it is not an actual problem in the practice of law, why is it included in the proposed ethical rule?

This is a partial list of the problems arising from this proposed rule. I hope the list at least underscores that this rule should not be placed on a fast track by the Rules Committee.

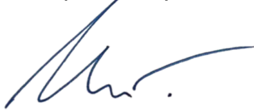
The rule being proposed to the Committee by CBA leadership does not take seriously enough our rights as lawyers and individuals to think freely and express ourselves freely. It was developed this summer behind the scenes over a very short period of time and, in its drafting stage, with no discernible input from those who had questioned the rule four years earlier. In response to the Committee's request for comments at its June 5 meeting, the CBA leadership could have asked that it be given more time to consider the proposed rule and alternatives to the proposal. It could also have established a working committee that represented greater diversity of thought and provided an opportunity for reflection, input, revision, and the building of consensus within the community of lawyers.

I hope that the Committee either rejects Proposed Rule 8.4(7) or forms a working group to modify this rule in a manner that recognizes the attorney's right to free thought and expression of thought, a right fundamental to the practice of our profession.

In conclusion, I offer the perspective of Justice Holmes in his dissent a century ago in *Abrams*:

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."

Respectfully,



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