

**From:** Josh Blackman <joshblackman@gmail.com>  
**Sent:** Friday, May 7, 2021 12:55 PM  
**To:** Rules Committee  
**Cc:** Volokh, Eugene  
**Subject:** Comment for Rule 8.4(7)  
**Attachments:** 2020-11-06-CT-Letter.pdf

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Dear Rules Committee,

I recently became aware that the Rules Committee will be conducting a public hearing on Rule 8.4(7).

In November 2020, Professor Volokh and I submitted the attached comment. We hope you can consider this comment in your further deliberations.

Sincerely,  
Josh Blackman

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Josh Blackman

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November 6, 2020

Attn: Joseph DelCiampo, Esq.  
By email ([RulesCommittee@jud.ct.gov](mailto:RulesCommittee@jud.ct.gov))

RE: Connecticut Proposed Rule of Professional Conduct 8.4(7)

Dear Justice McDonald, Judge Abery-Wetstone, Judge Bellis, Judge Cobb, Judge Farley, Judge Hernandez, Judge Nguyen-O'Dowd, Judge Prats, and Judge Truglia:

We write to specifically respond to the ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 493 on the purpose, scope, and application of ABA Model Rule 8.4(g).

#### **The “Severe or Pervasive” Standard Does Not Apply**

The opinion makes clear that the “severe or pervasive” standard does not apply to Rule 8.4(g). A single incident could amount to misconduct:

For example, a **single instance** of a lawyer making a derogatory sexual comment directed towards another individual in connection with the practice of law would likely not be severe or pervasive enough to violate Title VII, but would violate Rule 8.4(g). The isolated nature of the conduct, however, could be a mitigating factor in the disciplinary process.

And in a footnote, the opinion lists 5 factors to consider with respect to discipline:

Whether discipline is imposed for any particular violation of Rule 8.4(g) will depend on a variety of factors, including, for example: (1) severity of the violation; (2) prior record of discipline or lack thereof; (3) level of cooperation with disciplinary counsel; (4) character or reputation; and (5) whether or not remorse is expressed.

The capacious nature of the fourth factor will likely swallow all others. And the fifth factor will likely be used to cow attorneys into admitting their fault.

#### **Rule 8.4(g) Applies an “Objective Reasonableness” Standard**

The opinion applies an “objective reasonableness” standard:

The existence of the requisite harm is assessed using a standard of objective reasonableness. In addition, a lawyer need only know or reasonably should know that the conduct in question constitutes discrimination or harassment. Even so, the most common violations will likely involve conduct that is intentionally discriminatory or harassing.

In other words, an attorney does not need to intentionally engage in misconduct. It is enough to know that an “objective” observer would know that his conduct amounts to harassment. In our divided society, we do not know what an “objective” standard is with respect to public comments about race, sex, and other protected factors. Comments that were once thought to be innocuous have led to outrage and firing.

## “Harassment”

The opinion states that the term “harassment” is a well understood term:

Harassment is a term of common meaning and usage under the Model Rules.

The opinion relies on two dictionaries:

[Harassment] refers to conduct that is aggressively invasive, pressuring, or intimidating.

[Footnote:] *See, e.g.*, NEW OXFORD AMERICAN DICTIONARY 790 (3d ed. 2010) (defining “harassment” as “aggressive pressure or intimidation”); MERRIAM-WEBSTER DICTIONARY (defining “harass” as meaning “to annoy persistently”; “to create an unpleasant or hostile situation for, especially by uninvited and unwelcome verbal or physical conduct”), <https://www.merriam-webster.com/dictionary/harass> (last visited June 23, 2020).

The opinion cites two instances where the word “harassment” is used in the model rules. First, Model Rule 3.5(c)(3) states:

“A lawyer shall not ... communicate with a juror or prospective juror after discharge of the jury if ... the communication involves misrepresentation, coercion, duress or **harassment**.”

Here, the word “harassment” seems to resemble its neighbors: “misrepresentation, coercion, [and] duress.” The committee, however, reads the word “harassment” far more broadly:

Here, the term “harassment,” as in Rule 8.4(g), refers to conduct that is aggressively invasive, pressuring, or intimidating, including that which is reasonably perceived to be **demeaning or derogatory**, as demonstrated in *In re Panetta*.

*Panetta* relied on New York Rule of Professional Conduct that mirrors 3.5(c)(3) almost verbatim: it refers to “misrepresentation, coercion, duress or harassment.” *Panetta* did not discuss harassment in particular. It merely sustained the Special Referee’s report. We agree with the Committee that Panetta’s conduct was “insulting, badgering, and threatening.” But that standard is far more severe than “demeaning or derogatory.” The Committee errs by trying to extend prohibitions on truly threatening behavior to speech that is merely viewed as “demeaning” by bar authorities purporting to apply the standard of a “reasonable” observer.

Second, the opinion relies on Model Rule 7.3(c)(2):

[a] lawyer shall not solicit professional employment ... if ... the solicitation involves coercion, duress or **harassment**.

Again, the phrase “harassment” seems to resemble “coercion” or “duress.” But the Committee reads the phrase in a different fashion:

As with other uses of “harassment” in the Model Rules, a rational reading of the term includes badgering or invasive behavior, as well as conduct that is **demeaning or derogatory**.

The first half of the sentence does not support the second half. There is a huge difference between “invasive” threats and “demeaning” comments. The Committee made the same analytical leap twice, without sufficient reasoning. The opinion adds in a footnote:

Consistent with the guiding principle that the Model Rules are rules of reason and “should be interpreted with reference to the purposes of legal representation and of the law itself,” the term “harassment” in Rule 8.4(g) must be construed and applied in a reasonable manner. *See* MODEL RULES Scope [14].

But this offers no meaningful guidance either to enforcement authorities or to lawyers who are deciding what they can freely say.

## “Discrimination”

Rule 8.4(g) prohibits both harassment and discrimination. The Committee explains that the terms overlap:

Bias or prejudice can be exhibited in any number of ways, some **overlapping** with conduct that also constitutes harassment. Use of a racist or sexist epithet with the intent to disparage an individual or group of individuals demonstrates bias or prejudice.

The committee cites *In re McCarthy* (Indiana 2010) to support its definition of “discrimination.” But that case did not involve “discrimination.” *McCarthy* did involve an interpretation of “bias or prejudice,” relying on an earlier version of Rule 8.4(g) that banned “conduct, in a professional capacity, manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, sexual orientation, age, socioeconomic status, or similar factors.”

The word “discrimination” has a far more settled interpretation, especially in the employment context, so we are less troubled by this element of the rule in that context. But extending the concept of “bias” to the more nebulous harassment context, outside the practice of law, creates a considerably broader and vague rule, and one much more likely to chill constitutionally protected speech.

### “Constitutional Principles”

It appears that the Committee views constitutional law questions as outside its purview; but the opinion does consider two “constitutional principles.”

The Committee does not address constitutional issues, but analysis of Rule 8.4(g), as with our analysis of other rules, is aided by constitutional context. For Rule 8.4(g), two important constitutional principles guide and constrain its application. **First**, an ethical duty that can result in discipline must be sufficiently clear to give notice of the conduct that is required or forbidden. **Second**, the rule must not be overbroad such that it sweeps within its prohibition conduct that the law protects.

The Committee cites recent articles which rejected any possible First Amendment problems with Rule 8.4(g). But the Committee did not cite any contrary authority, including the opinions of several attorneys general.

The Committee then considers several attorney discipline cases that all arise in the practice of law. But the Bar’s power to punish dissipates as the regulated activity moves further away from the core legal practice. The Committee does not address that important limitation imposed by state constitutional law.

The Committee also fails to discuss recent precedent, such as *NIFLA v. Becerra*, which held that the government lacks an “unfettered power” to regulate the speech of “lawyers,” simply because they provide “personalized services” after receiving a “professional license.” 138 S. Ct. 2361, 2375 (2018). The failure to grapple with *NIFLA* undermines the entire constitutional law analysis.

### Hypotheticals

The opinion closes with five hypotheticals, the second of which confirms that Rule 8.4(g) applies to CLE programs:

A lawyer participating as a speaker at a CLE program on affirmative action in higher education expresses the view that rather than using a race-conscious process in admitting African-American students to highly-ranked colleges and universities, those students would be better off attending lower-ranked schools where they would be more likely to excel. Would the lawyer’s remarks violate Rule 8.4(g)?

The committee responds to the hypothetical thus:

No. While a CLE program would fall within Comment [3]’s description of what constitutes “conduct related to the practice of law,” the viewpoint expressed by the lawyer would not violate Rule 8.4(g). Specifically, the lawyer’s remarks, without more, would not constitute “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . race.” A general point of view, even a controversial one, cannot reasonably be understood as harassment or discrimination contemplated by Rule 8.4(g). The fact

that others may find a lawyer's expression of social or political views to be inaccurate, offensive, or upsetting is not the type of "harm" required for a violation.

We are grateful that the Committee thinks "inaccurate, offensive, or upsetting" views are outside the ambit of Rule 8.4(g)—but we cannot see how it can confidently assume that this is how the Rule would be interpreted. The opinion defined "harassment" as "aggressively invasive, pressuring, or intimidating, including that which is reasonably perceived to be demeaning or derogatory." Many people are quite upset by opposition to race-based affirmative action, and in particular by the view that certain African-American students do belong in lower-ranked schools. Those people do consider speech expressing such a view to be "demeaning or derogatory."

In the words of Justice Brennan, "If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights." *NAACP v. Button*, 371 U.S. 415 (1963). This wisdom applies equally to Rule 8.4(g), which includes plenty of reason to worry about excessive proscription, notwithstanding the Committee's assurances of protection. That is especially so given the Committee's hedge that, "the lawyer's remarks, **without more**, would not constitute" misconduct. There will always be something "more." And of course even if a lawyer's speech ultimately does not support discipline, lawyers may still have to litigate the proceedings for months and years. The complaints that may be filed by people who take a broader view of Rule 8.4(g) may themselves result in the chilling effect on speech.

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It would be our pleasure to provide any further comments that you might find helpful.

Sincerely,

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