

From: Cecil Thomas <CThomas@ghla.org>
Sent: Friday, September 11, 2020 5:31 PM
To: Del Ciampo, Joseph; McDonald, Andrew
Cc: amy@almesq.com; Megan Wade; Stovall, Marcy; 'Keith Soressi'; Chapman, Bill (bchapman@ctbar.org)
Subject: Connecticut Bar Association Proposed Amended Rules of Professional Conduct 8.4(7)
Attachments: CBACorrespondenceJusticeMcDonald8.4(7).pdf

Dear Attorney DelCiampo,

Attached please find correspondence from the Connecticut Bar Association, regarding the September 14, 2020 Rules Committee Supplemental Agenda Item No. 14 (American Bar Association Model Rule 8.4(g)).

Thank you for your consideration.

Sincerely yours,

Cecil J. Thomas
President-elect
Connecticut Bar Association



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

September 11, 2020

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

Re: 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,

I write on behalf of the Connecticut Bar Association to propose an amendment to Rule 8.4 of the Connecticut Rules of Professional Conduct that would define discrimination, harassment and sexual harassment as professional misconduct. Proposed Amended Rule 8.4(7) was approved by a substantial majority of the Connecticut Bar Association House of Delegates at a special meeting held on September 10, 2020. I respectfully request that the proposal be placed on the Rules Committee's agenda for September 14, 2020.

On June 5, 2020, the Rules Committee considered a proposal, submitted by Attorney Megan Wade, to adopt American Bar Association Model Rule 8.4(g). "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." Minutes of the Meeting, Rules Committee of the Superior Court, June 5, 2020.

On June 15, 2020, the Connecticut Bar Association presented this request to its House of Delegates, and announced the formation of a CBA working group to consider the matter. I served as the chair of that working group, as President-elect of the Connecticut Bar Association and co-chair of its Diversity and Inclusion Committee. The CBA 8.4(7) Working Group met numerous times to develop Proposed Amended Rule 8.4(7). In doing so, the Working Group took significant care in ensuring that the Proposed Amended Rule addressed discrimination, harassment and sexual harassment in conduct related to the practice of law, while also addressing common concerns and criticisms of American Bar Association Model Rule 8.4(g).

Discrimination, harassment, and sexual harassment on the basis of protected statuses should have no place in the practice of law, particularly in the context of a profession that

struggles so significantly with achieving meaningful diversity and inclusion. We are a self-regulated profession, one that aspires to the highest levels of ethics and adherence to the rule of law. The pursuit of justice, equity, and equality are among the most ancient and highest principles of our profession. The inclusion of a prohibition on discrimination, harassment and sexual harassment, within our Rules of Professional Conduct and not solely in the commentary, is long overdue.

More than half the states now include provisions addressing bias, prejudice, discrimination, and/or harassment in their black letter Rules. The Rules of Professional Conduct have been in effect in Connecticut since 1986. Thirty-four years later, it is time to amend Connecticut's Rule 8.4 to squarely address discrimination and harassment as a matter of professional conduct.

The Connecticut Bar Association has undertaken an effort to survey members of the profession to understand attorneys' experience with discrimination, harassment and sexual harassment. In just a few days since opening this survey, hundreds of respondents have reported that they have experienced or witnessed discrimination, harassment or sexual harassment in conduct related to the practice of law. Many have chosen to share their stories, in anonymous form, recounting difficult experiences with discrimination, harassment or sexual harassment on the basis of one or more protected statuses in professional contexts.

The Connecticut Bar Association's Proposed Amended Rule 8.4(7) and Amended Commentary addresses the same subject matter as American Bar Association Model Rule 8.4(g): discrimination, harassment and sexual harassment in conduct related to the practice of law. We have made adjustments to the text of the rule, for the sake of clarity, and revised the rule to ensure that the protected statuses listed are consistent with Connecticut state law. The proposed amendment of the Commentary differs in a number of respects from MRPC 8.4(g). Those differences reflect the Working Group's efforts to tailor the reach of the Rule so that it does not circumscribe lawyers' rights under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution, and to make clear that only harmful discrimination, or severe or pervasive harassment in a professional setting come within the reach of the rule.

Between June 15th and September 1st, 2020, the Connecticut Bar Association Diversity and Inclusion Committee, Standing Committee on Professional Ethics, Young Lawyers Section, Human Rights and Responsibilities Section, LGBT Section, Women in the Law Section, Veterans and Military Affairs Section, Professionalism Committee, Professional Discipline Section, Litigation Section, and Labor and Employment Section voted approval of Proposed Amended Rule 8.4(7). On September 2, 2020, the Connecticut Bar Association Legislative and Policy Review Committee voted unanimously, with one abstention, that the proposal had merit and should be referred to the Connecticut Bar Association House of Delegates. The Connecticut Bar Association House of Delegates, at a special meeting on September 10, 2020, voted approval of Proposed Amended Rule 8.4(7), in a vote of 39 in favor, 11 opposed, and 1 abstention.

I have attached the Proposed Amended Rule 8.4 (7) and the Proposed Commentary as those changes would appear in the Rules of Professional Conduct, as well as a comparison

between the Connecticut Bar Association Proposed Amended Rule 8.4(7) and Commentary and the American Bar Association Model Rule 8.4(g).

Thank you for your consideration of this request.

Respectfully submitted,



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

Enclosure

cc: Amy Lin Meyerson (via email)
Megan Wade (via email)
Marcy Stovall (via email)
Keith Soressi (via email)
Bill Chapman (via email)

Proposed Amendment of Connecticut Rule 8.4 and Official Commentary, showing variations from current Rule 8.4 and related Commentary (additions to current version underlined; [deletions from current version in brackets])

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

- (1) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- 2) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (4) Engage in conduct that is prejudicial to the administration of justice;
- (5) State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; [or]
- (6) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law[.]; or
- (7) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation, or to provide advice, assistance or advocacy consistent with these Rules.

Official Commentary:

Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Subdivision (1), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of wilful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is personally

answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. Counseling or assisting a client with regard to conduct expressly permitted under Connecticut law is not conduct that reflects adversely on a lawyer's fitness notwithstanding any conflict with federal or other law. Nothing in this commentary shall be construed to provide a defense to a presentment filed pursuant to Practice Book Section 2-41.

[A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates subdivision (4) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate subdivision (4). A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.]

Discrimination and harassment in the practice of law undermine confidence in the legal profession and the legal system. Discrimination includes harmful verbal or physical conduct directed at an individual or individuals that manifests bias or prejudice on the basis of one or more of the protected categories. Not all conduct that involves consideration of these characteristics manifests bias or prejudice: there may be a legitimate nondiscriminatory basis for the conduct.

Harassment includes severe or pervasive derogatory or demeaning verbal or physical conduct. Harassment on the basis of sex includes unwelcome sexual advances, requests for sexual favors and other unwelcome verbal or physical conduct of a sexual nature.

The substantive law of antidiscrimination and antiharassment statutes and case law should guide application of paragraph (7), where applicable. Where the conduct in question is subject to federal or state antidiscrimination or antiharassment law, a lawyer's conduct does not violate paragraph (7) when the conduct does not violate such law. Moreover, an administrative or judicial finding of a violation of state or federal antidiscrimination or antiharassment laws does not alone establish a violation of paragraph (7).

A lawyer's conduct does not violate paragraph (7) when the conduct in question is protected under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution.

Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or professional activities or events in connection with the practice of law. Lawyers may engage in

conduct undertaken to promote diversity, equity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (7). Moreover, no disciplinary violation may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law. A lawyer does not violate paragraph (7) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of a particular segment of the population in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(1), (2) and (3). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

The provisions of Rule 1.2 (d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of a lawyer. The same is true of abuse of positions of private trust, such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

1 **September 11, 2020**

2
3 **Proposed Amendment of Connecticut Rule 8.4(7) and Official Commentary**
4 **(Showing differences between MPRC 8.4(g) and proposed Connecticut RPC 8.4(7)**
5 **(additions to MPRC 8.4(g) underlined;[deletions from MPRC 8.4(g) in brackets]),)**
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7 **Rule 8.4. Misconduct**

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9 It is professional misconduct for a lawyer to:

10 . . .

11
12 (7) Engage in conduct that the lawyer knows or reasonably should know is harassment or
13 discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin,
14 ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender
15 expression or marital status [or socioeconomic status] in conduct related to the practice of law.
16 This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a
17 representation [in accordance with Rule 1.16. This paragraph does not preclude] or to provide
18 [legitimate] advice, assistance or advocacy consistent with these Rules.
19
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22 OFFICIAL COMMENTARY

23 . . .

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25
26 Discrimination and harassment[by lawyers in violation of paragraph (g)] in the practice of law
27 undermine confidence in the legal profession and the legal system. [Such d]Discrimination
28 includes harmful verbal or physical conduct directed at an individual or individuals that
29 manifests bias or prejudice [toward others] on the basis of one or more of the protected
30 categories. Not all conduct that involves consideration of these characteristics manifests bias or
31 prejudice: there may be a legitimate nondiscriminatory basis for the conduct.
32

33 Harassment includes [sexual harassment and] severe or pervasive derogatory or demeaning
34 verbal or physical conduct. [Sexual h]Harassment [on the basis of sex] includes unwelcome
35 sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a
36 sexual nature.
37

38 The substantive law of antidiscrimination and antiharassment statutes and case law [may] should
39 guide application of paragraph (7), where applicable. Where the conduct in question is subject to
40 federal or state antidiscrimination or antiharassment law, a lawyer's conduct does not violate
41 paragraph (7) when the conduct does not violate such law. Moreover, an administrative or
42 judicial finding of a violation of state or federal antidiscrimination or antiharassment laws does
43 not alone establish a violation of paragraph (7).
44

45 A lawyer's conduct does not violate paragraph (7) when the conduct in question is protected
46 under the First Amendment of the Constitution of the United States or Article First, Section 4 of
47 the Connecticut Constitution.

48
49 Conduct related to the practice of law includes representing clients; interacting with witnesses,
50 coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or
51 managing a law firm or law practice; and participating in bar association, business or [social]
52 professional activities or events in connection with the practice of law. Lawyers may engage in
53 conduct undertaken to promote diversity, equity and inclusion without violating this Rule by, for
54 example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse
55 employees or sponsoring diverse law student organizations.

56
57 A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does
58 not alone establish a violation of paragraph (7). Moreover, no disciplinary violation may be
59 found where a lawyer exercises a peremptory challenge on a basis that is permitted under
60 substantive law. A lawyer does not violate paragraph (7) by limiting the scope or subject matter
61 of the lawyer's practice or by limiting the lawyer's practice to members of [underserved] a
62 particular segment of the population[s] in accordance with these Rules and other law. A lawyer
63 may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers
64 also should be mindful of their professional obligations under Rule 6.1 to provide legal services
65 to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments
66 from a tribunal except for good cause. *See* Rule 6.2(1), (2) and (3). A lawyer's representation of
67 a client does not constitute an endorsement by the lawyer of the client's views or activities. *See*
68 Rule 1.2(b).