From: Rules Committee
To: Paul E. Knag
Subject: RE: Rule 8.4(7)

From: Paul E. Knag <PKNAG@murthalaw.com>
Sent: Monday, September 14, 2020 1:12 PM
To: Rules Committee <RulesCommittee@jud.ct.gov>
Subject: Rule 8.4(7)

Please vote down the proposed Rule 8.4(7) for the reasons stated below. I believe that the bar association's approval was without full understanding of the constitutional and other infirmities of the proposed rule.

PAUL E. KNAG | PARTNER
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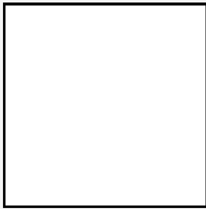
From: Danielle Edwards via Connecticut Bar Association [mailto:Mail@ConnectedCommunity.org]
Sent: Thursday, September 10, 2020 1:00 PM
To: Paul E. Knag

Subject: RE: District 2 : We want your input for the Special Meeting of the CBA House of Delegates

Good afternoon: Thank you for inviting comment regarding this important issue. I am writing regarding this evening's scheduled meeting of...



District 2

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Re: We want your input for the Special Meeting of the CBA House of Delegates

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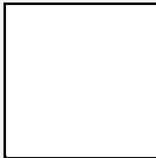


Sep 10, 2020 1:00 PM | ☐ view attached
Danielle Edwards

Good afternoon:

Thank you for inviting comment regarding this important issue.

I am writing regarding this evening's scheduled meeting of the House of Delegates, to express my opposition to Proposed CRPC 8.4 (7), which is mod3eled on ABA MRPC 8.4 (g). I believe that the proposal should not be supported because it imposes an unconstitutional speech code on lawyers. In explanation of this, I attach the following two documents:

- Why ABA Model Rule 8.4 (g) Should Not Be Adopted; and
- An ABA Magazine article about a recent decision of the United States Supreme Court (*NIFLA v. Becerra*), with which 8.4 (g) and its localized progeny directly conflict.

To expand a bit, *NIFLA v. Becerra* was decided *after* the ABA promulgated 8.4 (g), and it holds that the First Amendment protects professional speech, which is not a separate category of speech exempt from the rule that content-based regulations of speech are subject to strict scrutiny. The Court specifically stated that "[s]peech is not unprotected merely because it is uttered by professionals." *National Institute of Family ad Life Advocates v. Becerra*, 138 S. Ct. 2361, 2365 (2018).

The proscriptions of this draft rule subject attorneys to potential discipline for any speech or other act that could be offensive to another, based on race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, veteran status, age, sexual orientation, gender identity, gender expression, or marital status, in conduct related to the practice of law. This is troubling both in merit and scope.

For example, an attorney could be punished for commenting on *Soule v. Connecticut Association of Schools*, with female athletes on one side and transgender athletes on the other, regardless of which side the attorney favors since both sides involve protected classes. In the religious context, for example, an attorney sitting on the board of a Mosque might be punished for positions taken by the Mosque regarding women, while an attorney speaking out against Sharia law might also be punished. The scenarios that might result in punishment are endless. The point is that lawyers should be active in the marketplace of ideas regarding challenging issues, and this would take them out of that space.

In conversation with one of the proponents of this proposal, I expressed concern that attorneys might be punished for even representing clients in cases involving issues like this. In response, the proponent told me that there is a carve-out for representation. This response confirms, though, that the drafters envision that an attorney could be punished for speaking on such issues in their own capacity. Thus, the intent of the rule is absolutely to chill speech.

The proscriptions of the rule conflict directly with the holding of *NIFLA v. Becerra*, supra, 138 S. Ct. 2361, 2365, that "[s]peech is not unprotected merely because it is uttered by professionals." It also has a breathtakingly wide scope. Practice Book § 2-44A defines the practice of law broadly. In accordance with this rule, nearly any conversation that an attorney has regarding the law may fall within the ambit of the "practice of law." This proposal, however, extends even further, encompassing "conduct related to the practice of law." Thus, it is difficult to imagine any legal or civic engagement that an attorney could engage in that would not fall within the scope of this rule: teaching CLE courses; engaging in public or private discourse regarding law or politics; and serving on boards of foundations, businesses, non-profit organizations, and religious institutions - including Mosques, Temples, Synagogues, and Churches.

Writers of the proposal seek to avoid the problem of this unconstitutional mandate through the inclusion of official commentary citing the authority of the First Amendment. Nevertheless, this is insufficient for at least two reasons. First, as the September 13, 2020 8.47 (g) FAQ prepared by the proposal's proponents states: "The Commentary provides guidance in interpreting the Rule, but only the Rule itself is authoritative and enforceable." The proponents cite no authority for the proposition that the rule may be legally limited by commentary. Thus, the proposal is unconstitutional on its face.

Secondly, regardless of the commentary, the rule will undoubtedly have a chilling effect on the free speech of attorneys. A potential grievant who has been offended by an attorney will not be dissuaded from filing a grievance simply because the rule they cite "might" fall afoul of the Constitution, either on its face or as applied. Rather, upon offense being taken, they will file a grievance and let the committee sort it out. In the meantime, the filing would have a reputational and financially devastating effect on the attorney. They would have to disclose the complaint every time they seek to appear pro hoc vice. They would become unemployable. It could take years to be vindicated, through proceedings before the tribunal, and then appeals in the courts. In such a case, vindication would be pyrrhic.

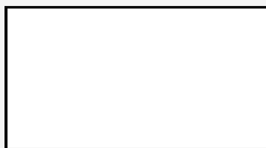
It becomes apparent that the process is the punishment. Even after vindication, a lawyer will have been ruined by the process. This is what chills speech.

Additional problems with the proposal included:

- The First Amendment is Constitutional Law. This proposal would transform grievance committees into a situs for First Amendment Litigation. The tribunals are not comprised of vetted judges or elected officials. Members are not sworn to protect the constitution, they are not trained to handle such matters, and they do not have the resources to handle such matters. Indeed, in one recent case out of Maryland, a grievance panel issued a 47-page decision punishing attorneys for violating this rule and made no mention of *NIFLA*. Indeed, the entire analysis was devoid of constitutional analysis. We would expect the same here in Connecticut.
- The proposal has been rejected by numerous other jurisdictions for good cause.

I believe that, as attorneys, we all have the duty and honor to defend the Constitution. I also believe that now is one of those times. Accordingly, I write to request that this proposal be declined.

Very truly yours,
Danielle Edwards



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Original Message:
Sent: 9/3/2020 10:01:00 AM
From: Stephen Conover
Subject: We want your input for the Special Meeting of the CBA House of Delegates

You are receiving this email because you are a CBA member located in District #2. We are th
Delegates to the CBA House of Delegates who represent District #2, and we wanted to alert y
to recent development and a CBA event next week. A Special Session of the House of Deleg
is now scheduled for September 10, 2020, with a single item agenda, and as Delegates, we w
be asked to vote. We want your input on this agenda item, and here is a summary of the topic

Attached is the Position Request that was submitted to the CBA Legislative Policy and Revie
Committee (LPRC) seeking adoption of Proposed Amended Rules of Professional Conduct
(RPC) 8.4(7). This lengthy attachment was sent to us as Delegates to prepare for next week's
Special Session of the House of Delegates. The Proposed Amended RPC 8.4(7) defines
discrimination, harassment and sexual harassment in conduct related to the practice of law as
professional misconduct. The Proposed Amended RPC 8.4(7) is modeled on the ABA Model
Rule 8.4(g).

The LPRC met yesterday and decided that the proposal has merit and should be placed on a
agenda for a Special Session of the House of Delegates.

As background, the Proposed Amended RPC 8.4(7) was developed by a CBA working group
has been considering this matter since June. The Proposed Amended RPC 8.4(7) was prese
to the sponsoring CBA sections and committees for consideration in July and August.

The Rules Committee of the Superior Court considered ABA Model Rule 8.4(g) at its June
meeting, and tabled consideration until its September 14, 2020 meeting, with instructions to th
proponents of that rule to coordinate with the CBA on the proposed rule.

As your Delegates on the House of Delegates, we want your input. Please contact us by ema
individually or collectively using the CBA SideBar Message format or directly with our address
below.

Thank you for your assistance on this urgent matter.

Regards,

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Taruna Garg: tgarg@murthalaw.com

Diana Carlino: DCarlino@RosenblumNewfield.com

Scott Harrington: SHarrington@dmoc.com

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