

**From:** Stephen Lyon <stephenmlyon@gmail.com>  
**Sent:** Wednesday, October 21, 2020 2:36 AM  
**To:** Rules Committee  
**Subject:** Comment in Opposition to Proposed Amendment to Rule 8.4(7)  
**Attachments:** Comment in Opposition to Proposed Amendment to Rule 8.4(7).pdf

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To Whom It May Concern

I have attached my comments in opposition to the Proposed Amendment to Rule 8.4(7), for the committee's review. If there's anything else I need to do, please let me know.

Sincerely,

Stephen

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III John 2, "Beloved I wish above all things that thou mayest prosper, and be in health, even as thy soul prospers."

Rules Committee of the Superior Court  
P.O. Box 150474  
Hartford, CT 06115  
Email: RulesCommittee@jud.ct.gov

October 21<sup>st</sup>, 2020

**Comment in Opposition to Proposed Amendment to Rule 8.4(7)**

My name is Stephen Lyon, and I am submitting this comment in opposition to the proposed amendment to Rule 8.4(7) of the Rules of Professional Conduct. I would like to begin by emphasizing that I appreciate the work of the committees and individuals who worked on drafting this proposal, and that I am making no accusations of nefarious motives in this proposal; I am sympathetic to the goals that are being pursued, but I believe that the proposal as drafted will run counter to those goals in the long run, and in the meantime will result in other important principles and rights being overlooked, and possibly even violated. I will begin my comments with the technical issues that I see with the current proposal, in hopes that we can find some agreement regarding additions/subtractions that would improve the proposal, and then finish with the reasons for my disagreement with speech regulations in general, as that section is likely to be a philosophical difference that I do not anticipate will change the minds of those who have drafted the proposal. In addition to my objections, I recommend that the Rules Committee read the comments submitted before the American Bar Association adopted Rule 8.4(g), upon which the rule at hand is based and inspired, which was overwhelmingly in opposition to the rule; I also recommend that the committee read the critical commentaries of this type of rule by professors Eugene Volokh<sup>1,2</sup>, of UCLA School of Law, and Josh Blackman<sup>3</sup>, of South Texas College of Law, who are more eloquent and knowledgeable on the subject.

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<sup>1</sup> <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/12/montana-legislature-expresses-opposition-to-aba-proposed-lawyer-speech-code/>

<sup>2</sup> Eugene Volokh, Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

The first issue the proposal has is that the wording is vague, leaves too much to interpretation, and is, at times, nonsensical. Beginning with the second sentence of the black-letter portion, the proposed rule states: “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.” This sentence is redundant at best, and nonsensical at worst. The clause “consistent with these rules” removes any meaning regarding the previous part of the sentence; obviously a lawyer can act in accordance with these rules – the only reason for having a sentence that begins “This paragraph does not limit...” would be if what followed was an exception to that rule. If the goal is to allow lawyers to continue to follow the rules in other sections, regarding the freedom to choose who they represent and the ways in which they will represent them, then those sections should be specifically mentioned, and not just the vague term “these Rules.”

The issues regarding vagueness continue in the commentary as well. In the first and second paragraphs, the word “includes” is used before listing actions that could constitute harassment and/or discrimination. The problem with this, is that the word “includes” does not mean “limited to;” while I understand not wanting to create ways to avoid disciplinary action by technicality, this also creates no limit to what the presiding authority may consider to be harassment or discrimination. This creates a chilling effect and may damage our legal discourse. For example, the word “includes” makes “severe or pervasive” meaningless, and may prevent lawyers from participating in debates, forums, and conferences, for fear that stating an academic, moral, philosophical, or pragmatic opinion, which happens to be unpopular, or even discriminatory, may result in professional misconduct charges. This, along with the fact that

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<sup>3</sup> Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and “Conduct Related to the Practice of Law,”* 30 *Geo. J. Legal Ethics* 241 (2017) (opposed to rule).

commentary is nonbinding on the arbiter (in fact, if there's a discrepancy between the black-letter rule and the commentary, the arbiter is required to follow the black-letter rule), makes it impossible for practitioners to truly know what the standard is.

I also object to the standard being adopted in the proposed rule. Changing the wording to a negligence standard, through the words "or reasonably should know," is a difficult standard to follow, and may result in the chilling of speech. The only section in the professional rules where such a standard is applied is in the trial setting, regarding extrajudicial communication by an attorney during a trial. In this example, the rule is narrow and involves someone who is trying a case, who therefore would have a basis for knowing what communication is acceptable, and access to rules and historical rulings in that particular situation. In the proposed rule, the type of activity being regulated is so vast, and can include so many things, it is nearly impossible for there to be a "reasonably should know standard" that can be enforced fairly and consistently.

The proposed rule creates inconsistencies within the rest of the Rules of Professional Conduct. One such example, is Rule 1.16(b)(4), which states that a lawyer may withdraw from representation when "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." It is very easy to see, based on the diverse cultural backgrounds and moral/religious beliefs of the members of the Connecticut Bar, how a withdrawal in accordance with this rule might be construed as a violation of the proposed rule.

There are several other areas where vagueness and over breadth is an issue, but the biggest area is the clause "related to the practice of law" in the proposed rule. Paragraph 5 of the commentary, which intends to define what this means, is unhelpful. First, it uses the word "includes" again, which has the same problem as it did in earlier mentioned paragraphs. Second,

it is so broad that it's hard to find an area where there is freedom for debate/discussion, specifically with the clause, "and participating in bar association, business or professional activities or events in connection with the practice of law." This would encompass CLE presentations, debates, publishing articles in legal journals, and classes taught in law schools by professors. It would also encompass memberships in racial affinity groups like the Black Bar Association, religious affinity groups like the Christian Legal Society, and political/philosophical groups like the Federalist Society; these groups all regularly have discussions and presentations where viewpoints that are expressed may be considered harassing or discriminatory toward those protected in the proposed rule. Many groups also have qualification requirements that would result in a violation of this rule; women's legal groups should not be punished for requiring their leadership to be female, religious legal groups should not be penalized for requiring that their leadership adhere to a statement of faith, and political/philosophical legal groups should not be prohibited from requiring that their leadership behave in a manner consistent with the ideals they uphold. This section should be narrowly tailored to serve the purposes that it's intended to serve; it should be possible to draft a rule that protects the rights of some without violating the rights of others.

The second part of paragraph 5 is problematic as well. While I appreciate the values of diversity, equity, and inclusion, as they are essential to a just legal system, there should not be exceptions made in pursuit of these values when similar exceptions are not given to the values of freedom of expression and association. Further, the terms "diversity, equity, and inclusion" are undefined and vague, and left up to the arbiter to determine; the example provided doesn't help, as the terms "diverse employees" and "diverse law student organizations" are not defined.

The final technical problem I will address, and maybe the most important, is that of constitutionality. I give the authors of this proposal credit for adding paragraph 4 to the commentary, specifically noting that these rules do not govern actions/activities protected by the first amendment. Unfortunately, I don't think this is enough. The concept of chilling speech is broadly condemned throughout our state and country's jurisprudence. It doesn't matter if there's a nod given to the constitutional rights of individuals; if a rule or law is written in such a way that it discourages individuals from expressing themselves through speech/assembly, because they may be unsure of their rights – graduating law school does not make one an expert on the First Amendment – or because they're simply unwilling to go through the hassle and cost of a lengthy disciplinary hearing and/or appeal (even if they would win). If this proposal is to be adopted, I would urge the committee to move the 1<sup>st</sup> Amendment language into the black-letter portion of the rule, and/or innumerate the actual rights that are protected by the United States and Connecticut Constitutions, instead of just referencing an amendment number.

I have concluded my technical issues, and will now finish with my philosophical reason for opposing this proposed rule, as drafted. Freedom of speech is a fundamental value that has allowed our state and country to move forward and grow. The classically liberal view has always been that the cure for speech we hate is more speech; we've always held out the importance of defending the right for speech that we hate – I can't remember the amount of times that I've heard some variation of the statement, "I disagree with what you said, but I'll defend to the death your right to say it." This value is not just a statement of morality, but it has pragmatic value that has allowed and promoted positive change in our country.

A major reason for this rule being proposed is the state of race relations in our state and country, and racism in the legal community specifically. Speech and conduct codes like the one

proposed here do not rid racists from the profession; regulations like these only drive them into silence. From a long-term perspective, this is not a good thing. If our goal is to rid our profession from racist behavior and beliefs, the only way is to expose them as the immoral, illogical ideals that they are. Public shame and discourse does more to eliminate offensive behavior than regulation ever does. In fact, regulation empowers offensive ideas like white supremacy and racism. It creates a feeling of oppression within the group, and gives them something to unite around and persevere. It also blocks off those who are capable of changing from ever having their beliefs challenged and being convinced of their wrong behavior; driving people underground results in polarization and a limited stream of information, so that alternative views are never heard, because there is less of a reason to express them. As a personal example, in law school and in professional, legal settings, I have participated in intense discussions on controversial topics with individuals who disagreed with me ardently; these discussions have helped me to change and narrow my thinking on important issues, and if I hadn't had the freedom to express opinions that some might find offensive, it would have kept me from participating in a discussion that resulted in changing some of those opinions. Shutting up offensive ideas does not make them go away, but free discourse often breeds change.

For the preceding reasons I ask that the amendment to Proposed Rule 8.4(7) not be adopted. At the very least, I would request that the committee refuse to grant "fast-track" approval, to allow for more time for public comment and discussion. Thank you for taking the time to consider my comments

Sincerely,

Stephen M. Lyon  
Juris #: 436510