

Adopting Proposed Amendment to Rule 8.4

The time has come, and the demands of justice call for, the Rules Committee to adopt the proposed amendment to Rule 8.4.

By **Connecticut Law Tribune Editorial Board** | September 17, 2020

In January 2020, we called for the expansion of Rule 8.4 of the Rules of Professional Conduct, stating that “harassment and discrimination should have no place in our profession.” Since our January editorial, a potential amendment to Rule 8.4(7) is now before the Rules Committee of the Superior Court.

On June 5, 2020, two attorneys presented the Rules Committee with American Bar Association (ABA) Model Rule 8.4(g), which addresses harassment and discrimination in professional contexts. ABA Model Rule 8.4(g) was adopted by the ABA with overwhelming approval in 2016, but is also frequently criticized as overbroad and presenting concerns under the First Amendment.

The Rules Committee tabled consideration of the ABA Model Rule until its September meeting, instructing the proponents to coordinate with the Connecticut Bar Association (CBA) in the interim. The CBA announced the formation of a working group to its House of Delegates in June, which engaged in significant efforts, between June and September, to develop an alternate version of Rule 8.4(7) that would proscribe discrimination and harassment in the practice of law, while also addressing the common criticisms of the ABA version of the Rule.

Eleven CBA Sections and Committees voted approval of the CBA Proposed Amended Rule 8.4(7) this summer, resulting in its unanimous recommendation by the CBA Legislative and Policy Review Committee, and unanimous approval by the CBA Executive Committee in September. On September 10, 2020, the CBA House of Delegates approved, with a substantial majority, the CBA Proposed Amended Rule 8.4(7). The proponents of the ABA Rule have now withdrawn that rule from consideration, in favor of the more carefully crafted CBA Proposed Amended Rule 8.4(7).

On September 14, the Rules Committee began consideration of the CBA proposed amendment to Rule 8.4 of the Rules of Professional Conduct (“the Rules”) that would make it misconduct for a lawyer to engage in discrimination or harassment in the practice of law. The amendment adds the following paragraph to Rule 8.4:

It is professional misconduct for a lawyer to: [7] engage in conduct that the lawyer knows or reasonable 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 the lawyer to accept, decline or withdraw from a representation, or to provide advice, assistance or advocacy consistent with these Rules.

The proposed Amendment is not without controversy. Some opponents argue that it is unnecessary because the current commentary addressed discrimination. The flaws with this argument are three-fold. First, what is called “Comment 3” only addresses discrimination occurring during the representation of a client and only when it is prejudicial to the administration of justice. Comment 3

would not cover a myriad of scenarios where discrimination, harassment and sexual harassment takes place in the practice of law, and is not consistent with Connecticut's substantive law on protected classes. Second, Comment 3 does not address harassment. Third, Comment 3 is a comment and not a Rule. Comments are not authoritative under the Rules. As the preamble to the Rules provides, "comments are intended as guides to the interpretation, but the text of each Rule is authoritative."

Yes, the Statewide Grievance Committee has prosecuted lawyers under Comment 3. But a capable defense lawyer could seriously call into question the validity of such a prosecution. Some argue that we do not need yet another rule to ensnare lawyers, that this amendment sweeps too wide, and that it is a genuflection to political correctness. But those making such an argument fail to appreciate the precarious position we are in as a self-regulated profession. We have to hold ourselves accountable through the Rules.

We have seen instances in which a lawyer acts outrageously in a biased and discriminatory fashion against someone in a protected class and then that mistreatment goes viral and is widely publicized. Such instances will only amplify the calls for change, and reflect poorly on our profession as a whole. As a profession, we are called to the highest levels of professionalism and decorum, to advance the rule of law and its commitment to equality and justice. Harmful discrimination, severe or pervasive harassment, and sexual harassment, directed against protected statuses in professional contexts, are inconsistent with the ideals and aspirations of our profession.

The concerns regarding the sweep of the proposed amendment are aptly addressed by the new comments to the Rule. The comments make sure that the sweep of the proposed amendment does not abridge any free speech rights and only covers "harmful" and "severe or pervasive" conduct, directed at individuals on the basis of Connecticut's legally-recognized protected status, in conduct related to the practice of law.

Some say timing in life is everything. The timing is right for this Rule change. Half of the states address bias, prejudice, harassment and/or discrimination in their Rules. Four states, including Pennsylvania in June, have adopted a version of ABA Model Rule 8.4(g). Several states are currently considering ABA Model Rule 8.4(g) in some form. Events of late have highlighted the need to address the serious problems with unlawful discrimination and harassment.

The CBA has conducted a survey of the issue, collecting, in just a few short days, numerous painful accounts by Connecticut attorneys who have experienced harassment, discrimination, and sexual harassment in professional contexts. The Connecticut Bar Association's extensive efforts have vastly improved on the ABA's version of the amendment. The time has come, and the demands of justice call for, the Rules Committee to adopt the proposed amendment to Rule 8.4.