O'Donnell, Shanna RC ID # 2020-012 q

From: Janice Ambruso <jlambruso@hartfordbar.org>
Sent: Tuesday, November 3, 2020 11:05 AM
To: Rules Committee
Subject: HCBA Comments
Attachments: TJR comments to Rules Committee.pdf

Dear Members of the Rules Committee of the Superior Court
Please see attached Hartford County Bar Association comments, by HCBA President, Thomas J. Rechen, Esq, regarding Proposed rule amendments.
Sincerely,
Jan Ambruso

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November 2, 2020

Rules Committee of the Superior Court
P.O. Box 150474
Hartford, CT 06115-0474

RulesCommittee@jud.ct.gov

RE: Comments regarding proposed rule amendments

Dear Members of the Rules Committee of the Superior Court:

The Hartford County Bar Association ("HCBA") recently received proposed: (a) amendments to Rules of Practice 2-27, 2-27A, 2-65 and a new 2-27B concerning mandatory continuing legal education (collectively, the "MCLE Proposal"); and (b) Rule of Professional Conduct 8.4(7) concerning harassment and discrimination (the "Rule 8.4 Proposal").

Under the circumstances, there was no opportunity for the HCBA to survey our general membership regarding these proposals. In lieu of a broader opportunity to circulate these proposals to our members and engage in a general discussion about these proposals, the HCBA Board of Directors formed a special Committee to quickly study and consider these proposals in order to report back to our Board, and by doing so, allow at least these comments to be passed on to you. Accordingly, this letter should not be interpreted as an Association endorsement of, or opposition to, either or both of the proposals. Rather, this letter represents our best deliberated input from our Committee on these important matters.

These comments are offered through the lens of the mission and purposes of the HCBA.

Comments to MCLE Proposal

The HCBA strongly supported the establishment of an MCLE requirement in Connecticut.

Without consequences for noncompliance, this important professional requirement is rendered meaningless.

With appropriate notice, suspension of the privilege to practice law for failure to comply with the MCLE requirement is a fair consequence of noncompliance. The current 12-hour CLE requirement is extraordinarily easy to fulfill under the Connecticut rule. There are ample opportunities and means for lawyers to meet their MCLE obligations, including through programs offered by the HCBA, clients, other professional associations, webinars, writing, and even self-study. Attaining the required 12 credits can be

achieved virtually without any expenditure of money, and obtained at almost any time during a lawyer's day. Lawyers who fail to keep current on developments in the law can harm clients, and do not honor our profession.

Previous comments on the new MCLE Proposal have focused on what notice and opportunity to cure should be provided to an attorney before license suspension relating to failure to meet our MCLE requirements.

The current proposal allows an attorney who has failed to obtain the required 12 hours of credits in a given year to avoid suspension by the further opportunity to complete the outstanding MCLE by December 31 of the year in which notice of noncompliance is sent to the attorney. That would mean, for example, that if a lawyer did not obtain the necessary 12 credits in 2020, he or she would then potentially have until December 31, 2021 (the following year) to obtain those necessary 2020 credits. We understand that this proposal is a change from an earlier 60-day notice proposal, which was rejected because of a concern that the notice period was too short.

Most likely through inadvertence, the current proposal may not address the concern that might arise if notice of noncompliance is sent late in the notice year. If for example, notice of non-compliance with respect to the 2020 requirement was not given until December 21, 2021, the lawyer would only have ten days remaining in 2021 to satisfy the remedial requirement. While a very unlikely timing scenario, such result would be possible. A simple potential remedy is to have the rule say that an attorney may avoid suspension by completing MCLE requirements by the later of: (a) December 31 of the year in which notice is sent; or (b) some fixed period of days after the notice is sent.

Comments to Rule 8.4 Proposal

We understand the current Rule 8.4 Proposal to have its genesis with ABA Model Rule 8.4(g), which makes discrimination and harassment professional misconduct. In Connecticut, the proposed rule has been modified, and commentary added, to address concerns raised during the Connecticut rulemaking process. These concerns include potential chilling of free speech, potential vagueness, and due process considerations.

The HCBA emphatically stands for the advancement of the cause of equality, fairness and justice. Discrimination and harassment have no place in the system of justice that lawyers have the privilege to serve. Professional discipline is an appropriate consequence for a lawyer who engages in this misconduct, and the Rules of Professional Conduct should be amended to make this clear.

We note that Connecticut State Court judges are already obligated to restrain attorney bias, prejudice, and harassment in court proceedings pursuant to Rule 2.3(c) of the Code of Judicial Conduct. Restraining similar misconduct in the broader practice of law outside the context of a court proceeding is appropriate.

Our system of justice also reflects that lawyers have rights, no less than non-lawyers. These include the right to speak freely on matters of public concern within the full scope of protection preserved in our state and federal constitutions. Lawyers also have the right to be informed clearly about what conduct might subject them to sanctions under the Rules of Professional Conduct.

While proposed Connecticut Rule 8.4(7) appears to be focused on conduct that has harmed disadvantaged groups, that Rule may also be the source of a grievance being filed against any lawyer. It must therefore be drafted carefully and precisely. No lawyer -- of any race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital status -- should forfeit constitutional rights of free expression, or the right to practice law, based on a rule that could have been more carefully drafted.

It will not further the purposes of Rule 8.4(7) if it is struck down as unconstitutional or vague.

With this background in mind, we offer the following comments.

1. The new commentary may not resolve the concerns about ABA Rule 8.4g raised during the rulemaking process.

The current Scope section of the Connecticut Rules of Professional Conduct provides, in pertinent part (emphasis added):

> The Commentary accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Commentaries are intended as guides to interpretation, but **the text of each Rule is authoritative**.

If it was the intent of the drafters of proposed Rule 8.4(7) to have the concepts in the new commentary limit the rule, this goal cannot be achieved in that manner, since the commentary is only guidance, not part of the Rule itself.

This may affect an accused lawyer's rights in a disciplinary proceeding. For example, a lawyer accused of a Rule 8.4(7) violation may point to language in the commentary in an attempt to say that the conduct in question is outside the scope of the rule. However, such a defense would not be effective, since the Scope section quoted above makes clear that the rule prevails over the comment.

If there is an enforceable way to make clear in the text of Rule 8.4(7) (and not the comments) that the comments are intended to modify the rule itself, and therefore prevail over the contrary rule of construction in the Scope provision noted above, it might address the issue.

2. Building further on comment 1, the free speech protections currently in the commentary must be included in the text of Rule 8.4(7) so that they prevail over all other provisions.

Public comments made during the current rulemaking discussions strongly suggest that people may challenge Rule 8.4(7) on constitutional grounds. A successful challenge would invalidate the rule and frustrate the goals it was designed to achieve. This unwelcome result can be avoided by making clear in the rule that the lawyer's constitutional rights prevail over all other provisions.

The current language of Rule 8.4(7) is vulnerable to a challenge. As currently drafted, it is focused on "conduct related to the practice of law." The commentary includes within"[c]onduct related to the practice of law . . . participating in bar association, business or professional activities."

At such bar, business, and professional activities lawyers often discuss difficult and controversial issues, including on matters of race, sex, sexual orientation, and gender expression.

No lawyer should have to fear that participating in a bar association debate on a difficult issue, or otherwise exercising rights of free speech, will result in a grievance. Recognizing this very real risk, the current version of the commentary to proposed Rule 8.4(7) includes language protecting speech. To be given effect, it should be in the rule, not the commentary.

Few things undermine confidence in a democracy more than the chilling of speech.

3. To avoid a vagueness challenge, the Rule should define clearly what conduct falls within the definitions of "discrimination," "harassment," and "[c]onduct related to the practice of law."

The commentary attempts to define "discrimination," "harassment" and "[c]onduct related to the practice of law" by saying that these terms "include" certain types of conduct. This fails to provide clear notice of what type of conduct is included or excluded. The word "include" is used to provide examples of things that fall within a category, but it does not define an entire category, or provide an exhaustive list of what falls within it. Scalia, Antonin, and Bryan A. Garner. 2012. *Reading Law: The Interpretation of Legal Texts* at § 12 ("The verb *to include* introduces examples, not an exhaustive list"). Rule 8.4(7) would be better drafted if it provided clear definitions of what it intends to cover instead of purporting to define terms by examples.

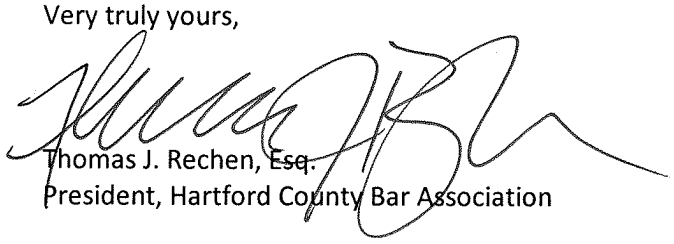
A redrafted rule should specify the nature of conduct that would be prohibited. For example, instead of saying that "[h]arassment *includes* severe or pervasive derogatory or demeaning verbal or physical conduct," the rule could say "'[h]arassment' *means* severe or pervasive derogatory or demeaning verbal or physical conduct." Similar edits could be made to the commentary concerning "discrimination" and "conduct related to the practice of law."

Other areas of the law provide clear notice about what conduct is prohibited; Rule 8.4(7) should do so also for the scope of the conduct it seeks to reach.

If and when Rule 8.4(7) is revised to address the issues raised in this letter, or any other issues, we will review the revision and may submit comments.

We hope these comments are helpful.

Very truly yours,



Thomas J. Rechen, Esq.
President, Hartford County Bar Association