

Proposed Amended Connecticut Rules of Professional Conduct 8.4(7)
Frequently Asked Questions
7.13.20

Q. What is the purpose of the proposed amendment of Rule 8.4?

- A. This is a watershed moment for addressing systemic racial injustice. The purpose of the proposed Rule change is to make clear to our profession and the public that lawyers, as a self-regulating profession, do not, and will not, tolerate prejudice, bias, discrimination, or harassment in the practice of law.

Q. What is the difference between Connecticut’s current Rule 8.4 and the proposed amendment?

- A. The key differences between Connecticut’s current Rule 8.4 and the proposed amended Rule 8.4 are:
1. The proposed amendment would move the provision concerning bias and prejudice from the Commentary to the Rule itself. The Commentary provides guidance in interpreting the Rule, but only the Rule itself is authoritative and enforceable.
 2. The current Rule 8.4 Commentary does not reference either harassment or discrimination. The proposed Rule would establish that it is professional misconduct for a lawyer to engage in conduct that the lawyer knows or should know is discrimination or harassment.
 3. The scope of the amended Rule is broader than that of the current Commentary, which addresses only conduct occurring “in the course of representing a client.” By contrast, the amended Rule would address “conduct related to the practice of law,” which, as defined in the proposed new Commentary “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 and events in connection with the practice of law.”
 4. The proposed new Commentary to Rule 8.4 includes explanations of what types of conduct amount to “discrimination” and “harassment” within the meaning of the Rule.
 5. The mens rea element of the current Rule 8.4 Commentary uses the term “knowingly.” The mens rea element of proposed amended Rule 8.4 is “knows or reasonably should know.”

Q. How does the proposed Connecticut Rule 8.4(7) differ from ABA MRPC 8.4(g)?

- A. The proposed Connecticut Rule 8.4(7) is substantively the same as MRPC Rule 8.4(g). For the sake of clarity, there is a minor adjustment of the structure and some additional terms. In addition, in order to make the Connecticut Rule consistent with state substantive law, there are changes to the list of protected categories contained in the Rule.

The proposed amendment of the Rule 8.4 Commentary differs in a number of respects from the Commentary to MRPC 8.4(g).

1. The primary criticism of MRPC 8.4(g) and its Commentary is that 8.4(g) is overbroad in ways that could potentially infringe on First Amendment rights. The proposed amendment of Connecticut's Rule 8.4 reflects the drafters' efforts to address those concerns. Unlike MRPC 8.4(g) and its Commentary, the proposed 8.4(7) Commentary provides that for discriminatory conduct to come within the reach of the Rule, it must be "conduct directed at an individual or individuals," and the definition of "harassment" clarifies that only severe or pervasive conduct comes within the reach of the rule. In addition, the 8.4(7) proposal expressly provides that conduct protected under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution will not violate the Rule.
2. The 8.4(7) proposal includes this additional language: "Not all conduct that involves consideration of these characteristics manifests bias or prejudice: there may be a legitimate nondiscriminatory basis for the conduct."
3. The proposed Commentary to Rule 8.4(7) contains a fuller explanation of the interplay between the Rule and substantive law than does the Commentary to MRPC 8.4(g).
4. The 8.4(g) Commentary provides that "[c]onduct related to the practice of law includes . . . participating in bar association, business or social activities in connection with the practice of law." The proposed new Commentary deletes "social" and rephrases the definition to provide that "[c]onduct related to the practice of law includes . . . participating in bar association, business or professional activities or events in connection with the practice of law."

Q. What is the history of ABA MRPC 8.4(g)?

- A. In August 2016, by voice vote with overwhelming support in the American Bar Association House of Delegates, including the unanimous support of the ten member Connecticut delegation, in the 598-member House of Delegates.

Q. What have other states done in terms of addressing bias and prejudice in the Rules of Professional Conduct?

- A. Nearly half the states addressed bias, prejudice, discrimination, and/or harassment in their Rules of Professional Conduct prior to the adoption of ABA MRPC 8.4(g). Five states

(including Connecticut) and the District of Columbia currently are considering adopting in substance ABA MRPC 8.4 (g). Four states have adopted ABA MRPC 8.4 (g) in full, in substance, or with revisions, including Maine and Vermont.

Q. Doesn't this rule infringe on freedom of speech first amendment rights?

- A.** The ABA has addressed that concern about ABA MRPC 8.4(g). With multiple citations to case decisions, the ABA pointed to the following: (1) existing precedent in the states supports the MRPC 8.4(g); (2) the States' interest in this regulation is compelling; (3) States have historically enacted and upheld ethical regulations of the legal profession's speech and conduct—regulations that often impose restrictions significantly beyond those imposed on other citizens; (4) MRPC 8.4(g) provides adequate notice of the proscribed conduct and is not overly broad, and vagueness and overbreadth challenges to similar ethical rules have generally failed; (5) attorneys have no significant interest in engaging in the proscribed conduct, especially as their conduct relates to the practice of law; (6) MRPC 8.4(g) does not infringe on attorneys' associational rights, if anything the Rule broadens those rights.

In addition, the proposed amendment of Connecticut's Rule 8.4 reflects the drafters' efforts to address concerns that a Rule concerning discrimination and harassment could infringe First Amendment rights. The proposed 8.4(7) Commentary provides that for discriminatory conduct to come within the reach of the Rule, it must be "conduct directed at an individual or individuals," and the definition of "harassment" clarifies that only severe or pervasive conduct comes within the reach of the Rule. In addition, the 8.4(7) proposal expressly provides that conduct protected under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution will not violate the Rule.