

From: Bowler, Michael
Sent: Tuesday, December 29, 2020 12:39 PM
To: Rules Committee; Staines, Brian
Cc: Del Ciampo, Joseph; 'MATTHEW BERGER'; Slack, Christopher
Subject: RE: Rules Committee Proposal concerning Rule 8.4 (RC ID # 2020-012)

Importance: High

Dear Attorney Del Ciampo,

At a meeting on December 17, 2020, the Statewide Grievance Committee (“SGC”) reviewed the proposal submitted by the Connecticut Bar Association (“CBA”) dated September 11, 2020, to amend Rule 8.4 of the Rules of Professional Conduct to add a new subsection 7 (“the proposal”):

It is professional misconduct for a lawyer to:

...

(7) Engage in conduct that the lawyer knows or reasonably 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 a lawyer to accept, decline or withdraw from a representation, or to provide advice, assistance or advocacy consistent with these rules.

The proposal was referred to the SGC for comment by the Rules Committee of the Superior Court (“Rules Committee”) following the Rules Committee’s December meeting. Additionally, the SGC reviewed the comments on the proposal submitted by various interested stakeholders. At the time of the referral, those comments ranged from exhibit a to qq, but Counsel to the SGC provided the SGC members with the link <https://www.jud.ct.gov/Committees/rules/proposals.htm> so the members could review additional submissions, which stretched to eee by the time of the SGC meeting.

After discussion, the SGC unanimously voted to take no position on the proposal but made the following observations about it:

1. Other than to observe that the proposal is constitutionally charged, the SGC will not comment on whether the proposal is constitutional under either the United States or Connecticut constitutions. The SGC noted that a substantial portion of the submissions to the Rules Committee are a back and forth among commenters regarding the constitutionality of the proposal. The SGC is certain that the Rules Committee is well aware of the issue and determined that the SGC was not in a position to advise the Rules Committee on the matter.

2. The SGC had concerns about the breadth and clarity of the rule and looked to the proposal’s commentary for guidance. The SGC noted that the three major terms in the proposal are “discrimination,” “harassment,” and “conduct related to the practice of law.” In the SGC’s opinion, the terms are not clearly defined in either the proposal or its commentary. The SGC was especially concerned that in attempting to define these terms the commentary noted that proscribed conduct “includes” certain things, but the SGC noted that “includes” begs the follow up: “includes, but is not limited to” The SGC determined that a rule of this significance should have its most important terms defined more specifically. Accordingly, the SGC concluded that neither the proposal nor its commentary provided sufficient guidance to the bar and bar regulators on exactly what is meant by “discrimination,” “harassment,” or “conduct related to the practice of law.” The SGC observed that Maine added more concrete definitions for “discrimination,” “harassment,” and

“related to the practice of law” in the rule itself (Exhibit a, p. 38), see [https://mebaroverseers.org/regulation/bar_rules.html?id=88291#:~:text=8.4%20Misconduct&text=\(g\)%20engage%20in%20conduct%20or,sexual%20orientation%2C%20or%20gender%20identity](https://mebaroverseers.org/regulation/bar_rules.html?id=88291#:~:text=8.4%20Misconduct&text=(g)%20engage%20in%20conduct%20or,sexual%20orientation%2C%20or%20gender%20identity), and the SGC recommended that the Rules Committee consider a similar approach.

Finally, the SGC noted that in the commentary “conduct related to the practice of law:”

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 or events in connection with the practice of law.

The proposed commentary implies that the term “conduct related to the practice of law” applies both at work and at any work-related or quasi work-related event, such as a bar association social event, a law firm function, or even a continuing legal education activity. The SGC was concerned that Rule 8.4(7) was too sweeping in its proposed application.

3. Generally, the SGC questioned the need for the proposal. In other words, the SGC asked: does Connecticut need a new rule to address instances of misconduct that are going unchecked because there are no other Rules of Professional Conduct that address them? Connecticut has several rules that arguably control discriminatory, harassing, and otherwise inappropriately lewd behavior. Rules 1.7 and 1.8 prohibit conflicts of interest, Rule 1.8(j) specifically prohibiting a sexual relationship with a client. Rule 3.1 prohibits frivolous pleadings and is applicable to litigants who abuse process to harass an opponent. Rule 3.4 requires an attorney to act fairly to an opposing party and counsel. Rule 3.5 prohibits conduct meant to “disrupt a tribunal or ancillary proceeding.” Rule 4.4 prohibits a lawyer from “us[ing] means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person.”

Admittedly, the application of Rules 1.7, 1.8, 3.1, 3.4, 3.5, and 4.4 is much narrower than the scope of the proposal. These existing rules generally apply to situations involving the representation of clients (see e.g. Rule 4.4(a), “[i]n representing a client . . .”). One other rule that applies, however, without such restrictive language is Rule 8.4(4):

It is professional misconduct for a lawyer to:

...

(4) Engage in conduct that is prejudicial to the administration of justice.

In theory, Rule 8.4(4) applies to an attorney’s discriminatory and harassing conduct arising from the practice of law. The SGC noted that in the proposed commentary the CBA deleted the following existing commentary to Rule 8.4(4):

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates subdivision (4) when such actions are prejudicial to the administration of justice.

It appears that in theory Rule 8.4(4) already applies to much of what Rule 8.4(7) tries to prevent, albeit in a fashion that the ABA and CBA believes is too narrow. In application, Rule 8.4(4) has been used by the SGC and the Superior Courts to proscribe all manners of conduct that are unbecoming to the legal profession.

Finally, the following is a digest of some cases where current Rules of Professional Conduct were applied in situations that might be covered by the proposal.

Gina Bunch v. Steven Levy, Grievance #04-0871

During a settlement conference of a marriage dissolution, the Complainant questioned the need for psychological evaluations. The Respondent replied to this stating that someone in the room has a psychological problem while staring

at the Complainant. He then began to hum the theme from the “Twilight Zone”. Later when walking past the complainant in the courtroom, the Respondent began humming the “Twilight Zone” theme again. The reviewing committee concluded “[t]he Respondent’s humming of the ‘Twilight Zone’ theme toward the Complainant, on two separate occasions, had no substantial purpose other than to embarrass or burden the Complainant, in violation of Rule 4.4 of the Rules of Professional Conduct.” The Respondent was reprimanded.

Newson v. Rana, Grievance Complaint #16-0722

The Respondent was in the courthouse and told female court staff he would be waiting for a court ruling in his office “jerking off”, he shouted obscenities in the courthouse and gave court staff the middle finger. The Respondent agreed to continuing mental health treatment and continuing legal education as discipline. Rule 8.4(4).

Danbury JD Grievance Panel v. David Holzbach, Grievance Complaint #12-0702

The Respondent prosecutor was accused of voyeurism and taking inappropriate pictures of women at the courthouse without their knowledge. Probable cause of misconduct was found. The Respondent requested that the Superior Court place him on inactive status due to disability, which is his current status.

Chief Disciplinary Counsel v. Zelotes, 152 Conn. App. 380 (2014)

Attorney suspended five months for consensual relationship with client. Attorney initiated friendship with client and her husband who had marital difficulties. Attorney inserted himself into a dating relationship with the client and began to represent her in a dissolution. Attorney’s failure to understand why his relationship was inappropriate was an aggravating factor in the case.

Berchem Moses & Devlin v. Kovack, Grievance Complaint #15-0759

The Respondent entered into a secret romantic relationship with an opposing party in a legal matter. The Respondent violated Rules Rule 1.7(d). He agreed to a reprimand, CLE and psychiatric treatment.

Waterbury JD Grievance Panel v. Robert Serafinowicz, Grievance Complaint #15-0599

The Respondent violated Rule 8.4(2) by pursuing a harassment campaign against a former friend and colleague. He was warned by both the police and the court to stop, but failed to do so. He was ordered presented to Court. The Respondent was suspended for 120 days, suspended after ten days.

Cherie Cioffi v. Prescott May, Grievance Complaint #18-0582

The Respondent resigned and waived his right to reinstatement to the Bar before the Superior Court, in part because he was accused of improperly touching his client and propositioning her. He was charged with violating Rules 8.4(2) and (4).

Donnelly v. Fiedler, Grievance Complaint #18-0183

The Respondent was investigated by the Judicial Branch for making inappropriate comments to an employee of the court service center. The Respondent was reprimanded for violating Rule 8.4(4).

Ansonia Milford JD Grievance Panel v. Jonathan Garow, Grievance Complaint #20-0002 (pending)

The Respondent allegedly sexually harassed subordinates at work in the courthouse over many years. On December 15, 2020, the Superior Court (Sheridan, J.) suspended the Respondent for six months and found that the conduct violated Rule 8.4(4) of the Rules of Professional Conduct.

Heena Kapadia v. Andrew Bottinick, Grievance #97-0350

Complainant and Respondent were opposing counsel in a case. The Respondent trapped the Complainant in the revolving door at the Danbury Superior Court. The Respondent screamed and yelled at the Complainant while she was trapped in the revolving door. The reviewing committee concluded that the Respondent violated Rule 8.4(4), an act prejudicial to the administration of justice, because his conduct was an act of violence and abuse, occurred on court property, occurred in connection with a pending case, and offended his opposing counsel and placed her in fear. The Respondent was reprimanded.

Fairfield Judicial District Grievance Panel v. Joseph Mirsky, Grievance #95-0968

At a pretrial, the Respondent showed up with alcohol on his breath, rudely interrupted opposing counsel and made an obscene hand gesture indicating male masturbation during opposing counsel's presentation. The Respondent's conduct continued even after opposing counsel indicated his behavior was offensive. The family services counselor ended the pretrial because he was personally offended. The Respondent had an in camera meeting with Judge Mintz where he apologized to opposing counsel and later sent her an apology letter. Judge Mintz also referred him to the Statewide Grievance Committee. The reviewing committee concluded that the Respondent had no substantial purpose other than to embarrass opposing counsel and the family services counselor in violation of Rule 4.4. They also concluded that the Respondent engaged in conduct that was intended to disrupt a tribunal in violation of Rule 3.5(c). The Respondent was reprimanded.

Susan Patton Fox v. Mark H. Swerdloff, Grievance #99-0680

During a deposition, the Respondent stated: "What, are you kidding? Get out of my office if you're going to talk during my deposition. You're a moron. Get out. You keep your mouth shut, understand that?" He referred to the deponent as pal and the deponent objected. He then said: "Pal. Would you prefer chump?" The Respondent was standing up and yelling at the deponent during the exchange. The Respondent then pulled the Complainant, opposing counsel, aside after the deposition. He threatened to ruin her career and sue her personally unless she withdrew the case. He also told her that this was a bad way to start her career. The court reporter overheard this conversation and testified that she had never seen such hostile behavior from an attorney and that the Respondent concluded by approaching the complainant very closely and screaming at her to get her things and get out. The reviewing committee concluded the Respondent violated Rule 4.4 because his threats had no substantial purpose other than to embarrass, delay, or burden the Complainant. The committee also found that this conduct violated Rule 8.4(4) since it occurred during a deposition. The Respondent was reprimanded and ordered to take a continuing legal education (CLE) course in legal ethics.

Farid v. David Gussak, Grievance #11-0850

On cross-examination at trial, the Respondent referred to the Complainant as "you Arab piece of shit." The Respondent was ordered to take a continuing legal education course. Rule 3.5(4).

Matters Involving Suspended Attorney Ira Mayo

- A. Constantine v. Ira Mayo, Grievance Complaint #02-0799
- B. Hubert v. Ira Mayo, Grievance Complaint #13-0058
- C. Humphrey v. Ira Mayo, Grievance Complaint #03-0209
- D. Birch v. Ira Mayo, Grievance Complaint #04-0295
- E. Anthony v. Ira Mayo, Grievance Complaint #05-0710
- F. Fuentes v. Ira Mayo, Grievance Complaint #05-0781
- G. Litchfield JD Grievance Panel v. v. Ira Mayo, Grievance Complaint #08-0767
- H. Castro v. Ira Mayo, Grievance Complaint #14-0190

- I. Linda Mayo v. v. Ira Mayo, Grievance Complaint #16-0290
- J. Memorandum of Decision, Disciplinary Counsel v. Ira Mayo, Docket Number MMX-CV-04-4001322-S, Judicial District of Middlesex at Middletown (Sept. 30, 2005).
- K. Order, Disciplinary Counsel v. Mayo, MMX-CV-09-6001189-S (Holzberg, J.) (July 13, 2010)
- L. Order, Chief Disciplinary Counsel v. Ira Mayo, Docket No. MMX-CV09-6001189, (Aurigemma, J) (July 2, 2014).
- M. Order, Chief Disciplinary Counsel v. Ira Mayo, Docket No. MMX-CV09-6001189, (Domnarski, J.) J.D. of Middlesex at Middletown (December 3, 2014)
- N. Office of Chief Disciplinary Counsel v. Ira Mayo, Docket Number UWY-CV16-6032650-S (Taylor, J.) (January 1, 2016).

In the Ira Mayo cases, the Respondent attorney was alleged to have repeatedly sexually harassed clients and some court staff including exchanging sex for legal services. He originally received a suspension with an automatic reinstatement and a restriction on his license that he no longer represent women. Eventually he violated the terms of his indefinite restriction and was again placed on suspension, but was required to apply for reinstatement. He has not successfully applied for reinstatement.

Conclusion

The SGC acknowledged that the CBA had the best of intentions with the proposal, hence the SGC is not taking a formal position opposing it. The type of misconduct proscribed by the proposal is odious to say the least, and has no place anywhere in society, and certainly not in a profession dedicated to fairness and justice. Nevertheless, the SGC had concerns over the clarity and scope of the rule and was concerned that its language may present more problems than solutions in its application. The SGC noted that the current Rules of Professional Conduct are applied robustly by the SGC and Superior Court to limit and deter the conduct described the proposal and its commentary.

The SGC thanked the Rules Committee for giving it the opportunity to comment on the proposal.

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From: Rules Committee <RulesCommittee@jud.ct.gov>
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Subject: Rules Committee Proposal concerning Rule 8.4 (RC ID # 2020-012)

At its meeting on November 16, 2020, the Rules Committee of the Superior Court considered a proposal to revise Rule 8.4, a substitute proposal, and various comments (RC ID # 2020-012).

After discussion, the Committee tabled the matter until its January 11, 2021 meeting and gave members of the public until 12/4/20 to submit their comments. The comments received to date have been posted to <https://jud.ct.gov/Committees/rules/proposals.htm>

While the Committee did not set a specific deadline for comments from your respective offices, please forward them to this email address (RulesCommittee@jud.ct.gov) as soon as possible, so that they may be circulated to the members of the Committee in advance of the meeting.

Thank you,

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