

**Carolyn A. Koegler**

---

**From:** Eugene Van Loan <evan@wadleighlaw.com>  
**Sent:** Thursday, May 31, 2018 2:24 PM  
**To:** RulesComment  
**Subject:** Proposed amendments to Rule 8.4, Rules of Professional Conduct

I object to all 3 alternative proposed amendments to Rule 8.4, in each case adding some variant of the ABA Model Code as subsection (g). So as not to duplicate objections that the Committee will receive from Attorneys James Shirley, Sara Shirley and Michael Tierney, please be advised that I join in their comments.

Nevertheless, I wish to amplify one point. My biggest objection is that the terms "harassment" and "discrimination" currently have no objective content. Although Option M purports to deal with this issue by stipulating that harassing and discriminatory conduct violative of the Rule shall be defined by the substantive state or federal laws governing such matters, this hardly addresses the issue adequately. Although there may well be state or federal laws which are more vague in terms of failing to define what conduct they prohibit (the antitrust laws come to mind), the laws dealing with harassment and discrimination are surely close to the top of the list of culprits. Take, for example, the current debate about whether the various federal laws and implementing regulations dealing with the administration of federal programs which prohibit discrimination against certain specified identity groups require intentional discrimination or are satisfied by evidence that that the administration of those programs has had a "disparate impact" upon the members of the favored groups.

Even more egregious in this politically correct environment is the fact that harassment and discrimination are increasingly defined by the subjective views of the putative victims of such conduct. Although admittedly anecdotal, I call your attention to an article in the May 30, 2018 edition of the Manchester Union Leader reporting on the resignation of the Governor's policy advisor on the opioid crisis because of complaints by some of his co-workers that they felt "uncomfortable" about the way he interacted with them. I have no idea what the individual in question said or did, but it appears that he was passionate about his job, perhaps a little rough around the edges, and "rubbed people the wrong way" (again quoting the article). If this is to be the test of harassing conduct which subjects New Hampshire lawyers to professional discipline, most of us should consider a different career.

Moreover, in case someone thinks that this issue is all about protecting lawyers from dubious claims, I respectfully suggest that it's more serious adverse consequence is upon the delivery of justice. Whether it is due to nature or nurture, lawyers are wont to exploit every opportunity to take advantage of their adversary, whether it be in the courtroom or in transactional negotiations. Accordingly, if an adversary's untoward remark could conceivably be the basis for making or threatening to make a claim of professional misconduct, some lawyers WILL raise the issue in order to obtain an edge. Suffice it to say that the leverage which will thus be exerted will have nothing to do with the merits of any of the claims of the lawyers' clients. In a word, if our Rules of Professional Conduct are intended to promote justice, any form of the proposed amendment will be counter-productive.

Eugene M. Van Loan III , bar #2610  
Wadleigh, Starr & Peters (of counsel)  
95 Market Street  
Manchester, NH 03101