



The Pennsylvania Interbranch Commission  
for Gender, Racial and Ethnic Fairness

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September 27, 2019

Jesse G. Hereda, Executive Director  
Executive Office, Disciplinary Board of the Supreme Court of Pennsylvania  
601 Commonwealth Avenue, Suite 5600  
P.O. Box 62625  
Harrisburg, PA 17106-2625

Re: Comments on the August 31, 2019 Version of Proposed Amendments to  
Proposed Rule 8.4(g) of the Pennsylvania Rules of Professional Conduct

Dear Executive Director Hereda:

On behalf of the Pennsylvania Interbranch Commission for Gender, Racial and Ethnic Fairness ("Commission"), we thank you for the opportunity to submit the following comments on the Disciplinary Board's proposed amendments to its proposal to add new Rule 8.4(g) to the Pennsylvania Rules of Professional Conduct ("RPC"). The proposed amendments we are commenting upon were published by the Board in the Pennsylvania Bulletin on August 31, 2019.

The Commission would like to commend the Board's laudable efforts in amending its proposals for a new Rule 8.4(g). The current proposal represents a significant improvement from the two previously proposed versions of Rule 8.4(g). As it is currently written, this new version alleviates many of the concerns the Commission raised previously with the Board regarding the restrictive prior formulations of this Rule. However, the Commission has two remaining concerns with the revised proposal, which we believe may be remedied by inclusion of a phrase into the substantive language of Rule 8.4(g) set forth below in bold:

It is professional misconduct for a lawyer to:

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, **federal and state administrative agency decisions and guidance, and case law**, including but not limited to bias,



prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

### **Brief Historical Background**

As we indicated in our comments to the Board's previously proposed amendments, our Commission was established in 2005 by the three branches of Pennsylvania government to implement the recommendations from a Pennsylvania Supreme Court study on racial and gender bias in the justice system. The final report from the study<sup>1</sup> was completed in 2003. Among other findings, the study revealed widespread evidence of discriminatory and offensive conduct by Pennsylvania attorneys and judges, levelled at plaintiffs, defendants, clients, court employees, counsel and even presiding judges throughout the Commonwealth. In order to address this problem, the report recommended several actions to be taken by the Supreme Court of Pennsylvania, including the modification of "...all relevant ethical and civility codes to state clearly that racial, ethnic and gender-biased speech and conduct are violations of these codes".<sup>2</sup>

Since its inception, the Commission has been working to implement these recommendations. To this end, the Commission drafted and submitted to the Court a proposed Policy on Non-Discrimination and Equal Employment Opportunity ("UJS Policy"), along with grievance procedures, for the Pennsylvania Unified Judicial System. The Court adopted the Policy and procedures in 2007.<sup>3</sup> The Commission also drafted and submitted proposed amendments to both the existing Code of Judicial Conduct and to the Rules of Professional Conduct, to specifically prohibit discrimination and harassment by Pennsylvania judges and attorneys. The Court enacted the Judicial Conduct Code amendments in 2014, but not the proposed corresponding changes to the Rules of Professional Conduct.

Over the past two years, the Commission has submitted comments to several versions of the Board's proposed amendments to Rule 8.4(g) of the Rules of Professional Conduct. The Commission's comments on the Board's most recent draft of Rule 8.4(g) are set forth below.

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<sup>1</sup> See Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System, <http://www.pa-interbranchcommission.com>.

<sup>2</sup> *Id.* at 372.

<sup>3</sup> See UJS Policy on Non-Discrimination and Equal Employment Opportunity, PA.R.J.A. No. R. 201-11, 42 Pa.C.S.A.



**Definition of the Term “Harassment” is not Included in any Applicable Federal,  
State or Local Statutes or Ordinances that Outlaw Discrimination**

The Commission’s first concern with the current proposed version of Rule 8.4(g) pertains to the language regarding the definition of harassment. In the proposed version of Rule 8.4(g), the language makes it professional misconduct for a lawyer to, “knowingly ... engage in harassment or discrimination, **as those terms are defined in applicable federal, state or local statutes or ordinances ....**” The problem the Commission perceives with this definition of harassment is that the term “harassment” is not defined by federal, state or local statutes or ordinances that prohibit discrimination on the basis of the protected classes enumerated in the proposed Rule.<sup>4</sup> Rather, the term “harassment” has been defined by case law interpreting federal, state, or local statutes or ordinances that outlaw discrimination, as well as by federal and state administrative agency decisions and guidance interpreting the same statutes or ordinances.<sup>5</sup> By defining the term “harassment” in accordance only with the applicable federal, state or

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<sup>4</sup> We are cognizant that 18 Pa.C.S.A. § 2709 defines the criminal offense of harassment. Federal, state, and local statutes or ordinances that outlaw discrimination, however, do not explicitly define the term “harassment” in the context of discriminatory conduct. See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (federal statute prohibiting discrimination in employment on the basis of disability); Age Discrimination Act of 1967, 29 U.S.C. §§ 621 *et seq.* (federal statute prohibiting discrimination in employment on the basis of age); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (federal statute prohibiting discrimination in employment on the basis of race, color, religion, sex, or national origin); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (federal statute prohibiting discrimination on the basis of sex in the payment of wages); Pennsylvania Human Relations Act, 43 P.S. §§ 951-963 (1997, *as amended*) (state statute prohibiting discrimination in employment, housing, and use of public accommodations on the basis of race, color, religious creed, ancestry, age, national origin, sex, familial status, handicap or disability, use of guide or support animals because of blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals).

<sup>5</sup> See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (holding that sexual harassment is a form of sex discrimination proscribed by Title VII of the Civil Rights Act of 1964 and deferring to the United States Equal Opportunity Commission’s 1980 Guidelines defining sexual harassment in concluding that sexual harassment is a form of sex discrimination under Title VII of the Civil Rights Act of 1964); *Hoy v. Angelone*, 720 A.2d 745 (Pa. 1998) (holding that a claim of sexual harassment is actionable under the Pennsylvania Human Relations Act (“PHRA”) as a form of sex discrimination, but rejecting the notion a plaintiff may recover punitive damages under the PHRA for having suffered discrimination); U.S. Equal Opportunity Commission, *Harassment*, <https://www1.eeoc.gov/laws/types/harassment.cfm?renderforprint=1> (last visited Sept. 13, 2019); U.S. Equal Opportunity Commission, *Policy Guidance on Current Issues of Sexual Harassment*, No. N-915-050 (1990), <https://www.eeoc.gov/policy/docs/currentissues.html>; Pennsylvania Human Relations Commission, *Guidelines on Sexual Harassment*, Pa.B. Dec. No. 81-201 (Jan. 30, 1981), <https://www.phrc.pa.gov/Resources/Law-andLegal/Documents/Policies%20and%20Guidelines/Sexual%20Harassment%20Guidelines.pdf>.



local statutes or ordinances, the current Rule 8.4(g) proposal will likely have the unintended consequence of allowing lawyers, who engage in harassment, to successfully claim that they lacked notice of the conduct that constituted harassment, on the basis that the term is not defined by any “applicable federal, state or local statutes or ordinances[.]”

To remedy this concern, the Commission proposes that the phrase, “**federal and state administrative agency decisions and guidance, and case law,**” be added to the definition of terms in Rule 8.4(g). We believe that inclusion of this phrase into the substantive language of Rule 8.4(g) will give lawyers proper notice of the conduct that constitutes harassment, while also effectuating the intent of the Board in defining the term “harassment” in Rule 8.4 (g).

**Discrimination on the Bases of Sexual Orientation and Gender Identity or Expression is not Defined as Discrimination in any Applicable Federal or Statewide Statutes or Ordinances**

The Commission’s second concern with the proposed Rule 8.4(g) language pertains to the lack of a federal or statewide statute or ordinance defining discrimination on the bases of sexual orientation and gender identity or expression as proscribed conduct. While bills are currently being considered by the United States Congress and the Pennsylvania General Assembly to make discrimination on the bases of sexual orientation and gender identity or expression illegal, there is no current federal or statewide statute or ordinance that specifically prohibits discrimination on these bases. Moreover, only three Pennsylvania counties and 53 Pennsylvania cities, boroughs, townships, and municipalities proscribe discrimination on the bases of sexual orientation and gender identity or expression by ordinance.<sup>6</sup> Of those local governmental entities, the vast majority are located in the southeast region of the state. Consequently, defining the term “discrimination” as it is defined in “applicable federal, state or local statutes or ordinances” may lead to Rule 8.4(g) being inconsistently applied throughout the state in cases involving discrimination on the bases of sexual orientation or gender identity or expression.

While there is a lack of uniformity in prohibiting discrimination on the bases of sexual orientation and gender identity or expression among applicable federal, state or local statutes and ordinances, there are federal and state administrative agency decisions and guidance that define discrimination on the bases of sexual orientation and gender identity or expression and that declare it prohibited conduct under federal and Pennsylvania law.<sup>7</sup>

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<sup>6</sup> See Movement Advancement Project, *Pennsylvania’s Equality Profile*, [http://www.lgbtmap.org/equality-maps/profile\\_state/PA](http://www.lgbtmap.org/equality-maps/profile_state/PA) (last visited Sept. 13, 2019).

<sup>7</sup> See U.S. Equal Employment Opportunity Commission, *Sex-Based Discrimination*, <https://www.eeoc.gov/laws/types/sex.cfm> (last visited Sept. 13, 2019) (defining discrimination based on an



In order to ensure that discrimination on these bases is appropriately defined as professional misconduct, as contemplated in the current Rule 8.4 (g) proposal, the Commission urges the Board to define discrimination as we are proposing above. Expanding the definition of discrimination in this manner will help lawyers to understand what conduct constitutes discrimination on the bases of sexual orientation and gender identity or expression and will carry out the intent of the Board in proscribing this type of conduct.

In closing, we thank you for your interest in promoting fairness and civility in our justice system and legal profession. We also appreciate the opportunity to comment upon the Board's proposal. If you have any questions concerning this matter, we would be happy to discuss them at your convenience.

Respectfully,

Nora Winkelman, Esq.  
Co-Chair

Rhonda Hill Wilson, Esq.  
Co-Chair

Lisette M. McCormick, Esq.  
Executive Director

cc: Andrew J. Trevelise, Esq., Board Chair of the Disciplinary Board of the Supreme Court of Pennsylvania  
Julia M. Frankston-Morris, Esq., Special Counsel to the Disciplinary Board of the Supreme Court of Pennsylvania  
Pennsylvania Supreme Court Justices  
Pennsylvania Interbranch Commission Members and its Equal Opportunity and Diversity Committee

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individual's gender identity or sexual orientation is a form of sex discrimination under Title VII of the Civil Rights Act of 1964); *Baldwin v. Dep't of Transportation*, EEOC Appeal 0120133080 (July 15, 2015); *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (discrimination based on an individual's transgender status is sex-based discrimination under Title VII of the Civil Rights Act of 1964); Pennsylvania Human Relations Commission, *Guidance On Discrimination On The Basis Of Sex Under The Pennsylvania Human Relations Act* (2018), <https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf>.