

IN SUPREME COURT
STATE OF WISCONSIN

In the Matter of the Amendment of

Supreme Court Rule SCR 20:8.4

PETITION

No. 22-02

The State Bar Standing Committee on Professional Ethics (hereinafter the Committee), respectfully petitions this court to replace SCR 20:8.4(i) with ABA Rule 8.4(g), a modification that will strengthen and improve how harassing and discriminatory conduct by Wisconsin lawyers is addressed and in support of this petition states as follows:

1. Among the responsibilities of the Committee is “[making] recommendations for appropriate amendments [to the Rules of Professional Conduct for Lawyers. . .]”, State Bar Bylaw Article IV, section 3;
2. This being so, the Committee regularly devotes time and attention to the changing landscape of our profession and the communities we serve to determine when modification of existing rules may improve the guidance provided;
3. One such area concerns disciplinary rules that enforce our duty to pursue equal justice for all;
4. At present, SCR 20:8.4(i), adopted by this Court in 2007, provides:

It is professional misconduct for a lawyer to ... (i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i).¹

¹ The Wisconsin Committee note explained:

Paragraphs (f) through (i) do not have counterparts in the Model Rule. What constitutes harassment under paragraph (i) may be determined with reference to anti-discrimination legislation and interpretive case law. Because of differences in content and numbering, care should be used when consulting the ABA Comment.

5. Although SCR 20:8.4(i) has served us well in the fifteen years since it was enacted, the Committee believes the guidance provided by the disciplinary rules can be improved by replacing it with ABA Model Rule 8.4(g), which provides:

It is professional misconduct for a lawyer to ... (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic 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 in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

6. This petition does not ask the Court to break new ground – Wisconsin has long demonstrated its commitment to equal justice under law, a commitment reflected in several ways:

7. Article I section 1 of our state constitution provides:

... [a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed ...

8. Realization that these rights depend on a legal system committed to equality, and, that our system is largely administered by lawyers, has led to several requirements for admission to practice and maintaining good standing within the bar;

9. Applicants for admission to the bar must establish “good general character and fitness to practice law” as a precondition to admission. SCR 40.06(1);

10. Applicants must also publicly swear to follow the Attorney’s Oath, which requires support for the Wisconsin and United States Constitutions and their commitment to equal justice for all. SCR 40.15; Wis. Const. Art. I sec. 1; U.S. Constitution, Amendments V, XIV;

11. The preamble to this court’s Rules of Professional Conduct for Attorneys also recognizes that “[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”²

12. Several disciplinary rules likewise require a commitment to equal treatment of others, including:

(a) SCR 20:8.4(i) (the current Wisconsin anti-discrimination rule);

(b) SCR 20:4.4(a) (prohibition against conduct that may delay, burden, or embarrass a third party);

(c) SCR 20:1.8(j) (prohibition against sexual relations with clients);

(d) SCR 20:8.4(g), 40.15 (prohibition against engaging in “offensive personality”);

(e) SCR 20:3.5(c)(3) (prohibition against coercion, misrepresentation, duress or harassment of jurors), and

(f) SCR 20:7.3(b)(3) (controls on solicitation of clients);

13. These provisions have been part of Chapter 20 of the Supreme Court Rules since at least 2007, and experience demonstrates they have functioned well in the service of Wisconsin lawyers, clients, and the public at large;

14. This Court has also recognized the importance of a fair and neutral judiciary, adopting an anti-discrimination provision more than twenty-five years ago. SCR 60.04(1)(e), (f);

15. Like the existing lawyer disciplinary rules, there is no indication that SCR 60.04(1)(e), (f) has been problematic or burdensome to judges, lawyers, or the public;

16. If adopted by the Court, the ABA rule, enacted in 2016 by the ABA House of Delegates, would make the following changes to our current rule:

² Wisconsin Rules for Professional Conduct for Attorneys – Preamble [1].

(a) it would prohibit “harassment or discrimination” whereas SCR 20:8.4(i) only prohibits “harassment”;

(b) it would narrow its application to situations in which the offending conduct was either intentional or negligent in contrast to SCR 20:8.4(i), which is a strict liability rule and permits discipline even if the lawyer was unaware they were engaging in prohibited conduct;

(c) it would modify the protected categories by deleting creed, color and sexual preference while adding ethnicity, gender identity, and sexual orientation;

(d) it would expand and clarify exceptions to the rule and would not limit a lawyer’s autonomy in accepting or declining representation or interfere with legitimate advice to or advocacy for a client;

17. Like SCR 20:8.4(i), ABA Model Rule 8.4(g) would apply only when a lawyer was acting in a professional capacity and not to personal conduct unrelated to their status as licensed attorneys;

18. Prior to submitting this petition, the committee spent more than a year reviewing the anti-discrimination rules of other jurisdictions, litigation regarding these rules, and soliciting input from State Bar Committees and other interested parties;

19. Following discussion and consideration, the State Bar Board of Governors has overwhelmingly supported the committee’s request to petition this Court to adopt the ABA rule;

20. For reasons developed in the accompanying Memorandum in Support of the Petition, the committee believes the proposed rule is constitutional, improves our existing rule, and would reaffirm Wisconsin’s commitment to a justice system that is fair and respectful to all our citizens.

21. The petitioner incorporates by reference the Memorandum in Support of the Petition and the appendix.

Wherefore, for the forgoing reasons the petitioner respectfully asks this Court to modify Chapter 20 by replacing current SCR 20:8.4(i) with ABA Model Rule 8.4(g).

Dated: March 25, 2022

Respectfully submitted,

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