O'Donnell, Shanna RC ID # 2020-012 ooo

From: Daniel M. Ortner <DOrtner@pacificlegal.org>
Sent: Friday, May 7, 2021 1:28 PM
To: Rules Committee
Subject: Comment on Rule 8.4(7)
Attachments: Connecticut 8.4(7) Final Comment PLF.pdf

Hello,

In light of the upcoming hearing next week, I am resubmitting comments that I first submitted in November 2020 regarding Proposed Rule 8.4(7)

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PACIFIC LEGAL FOUNDATION

November 12, 2020

The Honorable Andrew J. McDonald, Chair
The Honorable Holly Abery-Wetstone
The Honorable Barbara N. Bellis
The Honorable Susan Quinn Cobb
The Honorable John B. Farley
The Honorable Alex V. Hernandez
The Honorable Tammy T. Nguyen-O'Dowd
The Honorable Sheila M. Prats
The Honorable Anthony D. Truglia, Jr.
Rules Committee of the Superior Court
Attn: Joseph DelCiampo, Esq.
By email (joseph.delciampo@jud.ct.gov)

Re: **Comment Letter Opposing Proposed 2020 Amendment of Connecticut Rule 8.4(7)**

Pacific Legal Foundation submits this comment letter in response to the Court's request for public comment regarding Proposed Rule 8.4(7).

Pacific Legal Foundation writes to express concerns regarding the First Amendment implications of Proposed Rule 8.4(7). The rule would impair freedom of speech and freedom of expression in the legal profession, and particularly penalize public interest lawyers who engage in litigation concerning controversial topics such as race and sex discrimination.

The Rejection of ABA Model Rule 8.4(g)

The Proposed Rule is closely modeled after ABA Model Rule 8.4(g), a proposal that has been rejected by nearly every state to consider it.

In 2016, the American Bar Association proposed Model Rule 8.4(g), which makes it professional misconduct to "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." Model Rules of Prof'l Conduct R.8.4: Misconduct (Am. Bar Ass'n 2016). The rule utilizes a broad definition of "conduct related to the practice of law," which includes not only "representing clients; interacting with witnesses" and other in court activities, but also "participating in bar association, business, or social activities in connection with the practice of law." *Id.* Comment 4.

After many years of intense deliberation, only two states—Vermont and New Mexico—have adopted Model Rule 8.4(g) in full into their own Rules of Professional Conduct, and Pennsylvania and Maine have adopted variations of the rule.[1] Pennsylvania is nevertheless facing a federal lawsuit challenging its milder rule.

On the other hand, many other states have expressly rejected the adoption of Model Rule 8.4(g). The Attorneys General of several states published opinions arguing that the rule would violate the Constitution.[2] For instance, Alaska Attorney General Kevin Clarkson filed a comment letter urging the Alaska Bar Association Board of Governors to reject Model Rule 8.4(g). Attorney General Clarkson raised a variety of serious First Amendment concerns, including the potential for the rule to intrude on freedom of association by penalizing lawyers who participate in private associations with exclusive membership practices or who advocate for policies that may be deemed discriminatory. Kevin Clarkson, Letter Re: Proposed Rule of Professional Conduct 8.4(f) submitted to the Alaska Bar Association (Aug. 9, 2019), http://www.law.state.ak.us/pdf/press/190809-Letter.pdf.

Problems with the Rule

A wide variety of First Amendment and Constitutional Law scholars have also written criticizing Model Rule 8.4(g) for its potential to stifle or censor attorney speech.[3]

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[1] Maine adopted a variation of Model Rule 8.4(g), which does not bar discrimination on the basis of marital status or socio-economic status and which does not extend to participation in bar association, business, or social activities. Pennsylvania also adopted a stripped down version of Model Rule 8.4(g) which is nevertheless currently being challenged in federal court. *Greenberg v. Hagerty*, 2:20-cv-03822 (filed Aug. 6, 2020).

[2] ABA Model Rule of Professional Conduct 8.4(g) and Louisiana State Bar Association proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution, La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017), https://perma.cc/9TWR-8GY9; S.C. Att'y Gen. Op. Letter to Hon. John R. McCravy III, S.C. House of Representatives (May 1, 2017), https://perma.cc/ED72-3UGM; American Bar Association's New Model Rule of Professional Conduct 8.4(g), Tenn. Att'y Gen. Op. 18-11 (Mar. 16, 2018), https://perma.cc/DZY2-YG23; whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney's statutory or constitutional rights (RQ-0128-KP), Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016), https://perma.cc/M248-HKGG.

[3] Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf; Andrew F. Halaby & Brianna L. Long, *New*

This scholarship raises a series of overlapping concerns which apply to Connecticut's Proposed Rule 8.4(7). First, the rule might penalize speech if it is seen as "derogatory," or "demeaning"—highly subjective terms that provide little guidance to Connecticut attorneys.[4] This might include, for instance, a presentation arguing against race-based affirmative action due to the impact of "mismatch theory," or a speaker who argues that "low-income individuals who receive public assistance should be subject to drug testing."[5]

Second, the rule will apply to CLE presentations, academic symposia, and even to conversations at a local bar dinner, which will stifle conversations about significant legal topics of controversy.[6] As Professor Eugene Volokh put it, the rule could be applied to dinner conversations "about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on."[7]

Third, the rule penalizes attorneys for speech that they "reasonably should know" would cause offense.[8] This mens rea requirement places attorneys at risk of discipline for speech that they were not aware would or could cause any offense, further exacerbating the chilling effect on attorney speech.[9]

These are just a few of the many well-founded criticisms of the rule.

Model Rule of Professional Conduct 8.4(G): Legislative History, Enforceability Questions, and a Call for Scholarship, 41 J. Legal. Prof. 201, 257 (2017).

[4] Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g) The First Amendment and 'Conduct Related to the Practice of Law,'* 30 Geo. J. Legal Ethics 241, 245 (2017).

[5] *Id.* at 246.

[6] Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, Volokh Conspiracy (Aug. 10, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?noredirect=on.

[7] *Id.*

[8] Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol'y 173, 205 (2019).

[9] *Id.*

Proposed Rule 8.4(7) does attempt to remedy some of the shortfalls of ABA Rule 8.4(g). In particular, the rule states that it does not "limit the ability of the lawyer to accept, decline, or withdraw from representation." And a lawyer's conduct that is "protected under the First Amendment" is not covered by the rule. The inclusion of this language is a significant improvement. Unfortunately, because the Proposed Rule still relies on highly subjective concepts such as "offensive" and has an extremely lax mens rea requirement, there is still significant risk that the Proposed Rule will create uncertainty and stifle speech on important matters of public policy. These caveats also fail to protect a lawyer from investigation for protected speech and would require lawyers to suffer reputational harm and a prolonged process before constitutional rights could be vindicated.

The Rule is Incompatible with Recent Supreme Court Precedent

In the last few years, the Supreme Court has issued several decisions which make it clear that the Proposed Rule would be presumptively unconstitutional and would likely be invalidated as a content-based and viewpoint-based restriction of professional speech. Its 2018 decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), is particularly on point. In that case, the Supreme Court invalidated a law which imposed speech requirements on clinics offering services to pregnant women. The Court explained that content-based regulations of professional speech "pose[] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information" and are accordingly subject to strict scrutiny. *Id.* at 2374. The Court emphasized that attorney speech cannot be regulated to impose "invidious discrimination of disfavored subjects." *Id*. at 2375.

In *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), the Supreme Court invalidated restrictions on the registration of "offensive," "immoral," and "scandalous" trademarks. The Court emphasized that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers," and that such restrictions are viewpoint-based and strongly disfavored. *Matal*, 137 S. Ct. at 1763. The First Amendment does not tolerate a "happy-talk" requirement. *Id*. at 1765.

If it was not clear beforehand, these cases make clear that a restriction on professional speech, merely because some may find it offensive, is unconstitutional.

The Rule Risks Stifling a Wide Variety of Lawyer Conduct and Expression

To illustrate some of the problems with the Proposed Rule, consider the following hypothetical scenarios. How would the proposed rule apply if someone who was offended by an attorney's speech filed a complaint? And how would a Connecticut attorney reading the vague and overly broad rule ever know?

1. A public interest lawyer in Connecticut brings a lawsuit on behalf of an Asian college student who argues that he was denied admission at the University of Connecticut because he alleges the school used race-based affirmative action and employed negative stereotypes about Asian-Americans. As part of that lawsuit, the Connecticut attorney also argues that the use of affirmative-action creates a "mismatch" and that therefore "racial preference policies often stigmatize minorities, reinforce pernicious stereotypes, and undermine the self-confidence of beneficiaries,"[10] which results in minority students performing worse while at the university. In arguing the case, the attorney writes an op-ed and appears in radio and television interviews arguing that the Supreme Court should outlaw all forms of affirmative action because these policies violate the ideal of equal protection under the law. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
2. Another Connecticut attorney intervenes on behalf of a group of African-American high school students who are likely to benefit from the affirmative action policies. He argues that because of the legacy of slavery and segregation that it is necessary for African-American students to be the beneficiaries of affirmative action policies, and affirmative action is needed to counteract systemic racism which favors white Americans. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
3. At a CLE event, two Connecticut attorneys agree to debate whether the state of Connecticut should introduce rent control legislation. The speaker arguing in favor of rent control argues that absentee landlords are profiteering off the poor and that rent control is needed to mitigate their greed. The speaker arguing against rent control extols the virtues of private property ownership and entrepreneurship and argues that renters need to work harder in order to meet the rising cost of rent rather than demand subsidies from landlords. How does the prohibition against discrimination on the basis of socioeconomic status in the Proposed Rule apply to either attorney's statements?
4. A Connecticut attorney files an amicus brief arguing that the President has plenary authority to exclude individuals from admission to this country on the basis of their

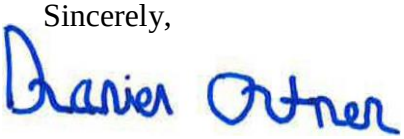
[10] Richard Sander and Stuart Taylor Jr., *The Painful Truth About Affirmative Action,* The Atlantic (Oct. 2, 2012).

ethnicity or religion. How does the prohibition against discrimination on the basis of religion and national origin in the Proposed Rule apply to this speech?

5. Relatedly, another Connecticut attorney writes an op-ed critiquing the attorney by name and calling her a racist and an islamophobe. How does the prohibition against discrimination on the basis of race and religion in the Proposed Rule apply to this speech?
6. A Connecticut attorney represents the KKK when their petition to hold a rally in a town in Connecticut is denied. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
7. Relatedly, a Connecticut attorney represents Antifa when their counter protest at the KKK rally is shut down due to security concerns. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
8. A Connecticut attorney attends a pro-life rally and shares a picture of her attending the rally on her social media feed which includes several other Connecticut attorneys that she knows are strongly pro-choice. How does the prohibition against discrimination on the basis of sex in the Proposed Rule apply to this speech?
9. A Connecticut attorney who is a member of the Boomer generation shares an article on social media which calls Millennials lazy and entitled. The following day in his law firm's lunch room the attorney discusses the article with another attorney within earshot of several young associates. How does the prohibition against discrimination on the basis of age in the Proposed Rule apply to this speech?
10. A Connecticut attorney wears a MAGA hat to a social event hosted by the Connecticut State Bar Association and refuses to take the hat off even after another attorney informs him that she is offended because she sees the hat as a symbol of racism and sexism. How does the prohibition against discrimination on the basis of race and sex in the Proposed Rule apply to this speech?

Whatever the answers to each of these real-world-based hypotheticals, they show that the broad and unclear scope of the Proposed Rule threatens to stifle attorney speech on a wide variety of important issues of public concern. The Proposed Rule should accordingly be rejected.

Sincerely,



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** Licensed to practice law in the Commonwealth of Virginia and in the State of California.*