RC # 2020-012 e

O'Donnell, Shanna

From: Paul Michalski <pmichalski@integriosity.com>
Sent: Saturday, September 12, 2020 3:04 PM
To: Rules Committee
Subject: Please REJECT or TABLE Proposed CRPC 8.4 (7) on the Basis of Flawed Substance and Process

Ladies and Gentlemen of the Rules Committee,

I just learned that you are scheduled to consider Proposed CRPC 8.4 (7) at a meeting on September 14, 2020. For several reasons, I respectfully urge you to REJECT the Proposal or TABLE the Proposal until there has been a full and fair opportunity for CBA members to comment upon it. If you TABLE the Proposal instead of REJECTING it, I would also ask you to instruct the House of Delegates to send it out for comment to all CBA members and then hold new discussion and a NEW VOTE in the House of Delegates.

Please consider the following:

FLAWED SUBSTANCE

1. Below are very well-reasoned and persuasive comments submitted this week by one CBA member explaining why the Proposal is unconstitutional and otherwise ill-advised (I suspect she may submit these comments separately, but I have omitted her identity in copying them below to respect her privacy).
2. Similar proposals have been rejected by numerous other jurisdictions for good cause.

FLAWED PROCESS

1. Although I have been aware of ABA model Rule 8.4(g), as a CBA member, I first learned just LAST WEEK that this proposal was being fast tracked for adoption in Connecticut. I only learned about it because one of our District 2 Delegates decided to send it out to the entire District membership for comment.
2. The rapid and impressive response from District 2 CBA members was OVERWHELMINGLY OPPOSED to the Proposal.
3. I do not know whether any other District Delegates informed their constituents of the Proposal and its timing and sought feedback, but the overwhelming and immediate opposition in just one District suggests that membership in other Districts may have been KEPT IN THE DARK by their Delegates. Did some Delegates forget they are representing members?
4. FAST TRACKING such a controversial proposal in the middle of the COVID pandemic has the odor of proponents pushing a political agenda and hoping it slides through before the general CBA membership evens knows it is being voted upon. In my view, that is not due process.

Again, I respectfully urge you to REJECT the Proposal or TABLE it until the House of Delegates can seek comments from all CBA members and reconsider the Proposal in light of the feedback they receive.

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Good afternoon:

Thank you for inviting comment regarding this important issue.

I am writing regarding this evening's scheduled meeting of the House of Delegates, to express my opposition to Proposed CRPC 8.4 (7), which is modeled on ABA MRPC 8.4 (g). I believe that the proposal should not be supported because it imposes an unconstitutional speech code on lawyers. In explanation of this, I attach the following two documents:

- Why ABA Model Rule 8.4 (g) Should Not Be Adopted; and
- An ABA Magazine article about a recent decision of the United States Supreme Court (*NIFLA v. Becerra*), with which 8.4 (g) and its localized progeny directly conflict.

To expand a bit, *NIFLA v. Becerra* was decided *after* the ABA promulgated 8.4 (g), and it holds that the First Amendment protects professional speech, which is not a separate category of speech exempt from the rule that content-based regulations of speech are subject to strict scrutiny. The Court specifically stated that "[s]peech is not unprotected merely because it is uttered by professionals." *National Institute of Family ad Life Advocates v. Becerra*, 138 S. Ct. 2361, 2365 (2018).

The proscriptions of this draft rule subject attorneys to potential discipline for any speech or other act that could be offensive to another, based on race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, veteran status, age, sexual orientation, gender identity, gender expression, or marital status, in conduct related to the practice of law. This is troubling both in merit and scope.

For example, an attorney could be punished for commenting on *Soule v. Connecticut Association of Schools*, with female athletes on one side and transgender athletes on the other, regardless of which side the attorney favors since both sides involve protected classes. In the religious context, for example, an attorney sitting on the board of a Mosque might be punished for positions taken by the Mosque regarding women, while an attorney speaking out against Sharia law might also be punished. The scenarios that might result in punishment are endless. The point is that lawyers should be active in the marketplace of ideas regarding challenging issues, and this would take them out of that space.

In conversation with one of the proponents of this proposal, I expressed concern that attorneys might be punished for even representing clients in cases involving issues like this. In response, the proponent told me that there is a carve-out for representation. This response confirms, though, that the drafters envision that an attorney could be punished for speaking on such issues in their own capacity. Thus, the intent of the rule is absolutely to chill speech.

The proscriptions of the rule conflict directly with the holding of *NIFLA v. Becerra*, supra, 138 S. Ct. 2361, 2365, that "[s]peech is not unprotected merely because it is uttered by professionals." It also has a breathtakingly wide scope. Practice Book § 2-44A defines the practice of law broadly. In accordance with this rule, nearly any conversation that an attorney has regarding the law may fall within the ambit of the "practice of law." This proposal, however, extends

even further, encompassing "conduct related to the practice of law." Thus, it is difficult to imagine any legal or civic engagement that an attorney could engage in that would not fall within the scope of this rule: teaching CLE courses; engaging in public or private discourse regarding law or politics; and serving on boards of foundations, businesses, non-profit organizations, and religious institutions - including Mosques, Temples, Synagogues, and Churches.

Writers of the proposal seek to avoid the problem of this unconstitutional mandate through the inclusion of official commentary citing the authority of the First Amendment. Nevertheless, this is insufficient for at least two reasons. First, as the September 13, 2020 8.47 (g) FAQ prepared by the proposal's proponents states: "The Commentary provides guidance in interpreting the Rule, but only the Rule itself is authoritative and enforceable." The proponents cite no authority for the proposition that the rule may be legally limited by commentary. Thus, the proposal is unconstitutional on its face.

Secondly, regardless of the commentary, the rule will undoubtedly have a chilling effect on the free speech of attorneys. A potential grievant who has been offended by an attorney will not be dissuaded from filing a grievance simply because the rule they cite "might" fall afoul of the Constitution, either on its face or as applied. Rather, upon offense being taken, they will file a grievance and let the committee sort it out. In the meantime, the filing would have a reputational and financially devastating effect on the attorney. They would have to disclose the complaint every time they seek to appear pro hoc vice. They would become unemployable. It could take years to be vindicated, through proceedings before the tribunal, and then appeals in the courts. In such a case, vindication would be pyrrhic.

It becomes apparent that the process is the punishment. Even after vindication, a lawyer will have been ruined by the process. This is what chills speech.

Additional problems with the proposal included:

- The First Amendment is Constitutional Law. This proposal would transform grievance committees into a situs for First Amendment Litigation. The tribunals are not comprised of vetted judges or elected officials. Members are not sworn to protect the constitution, they are not trained to handle such matters, and they do not have the resources to handle such matters. Indeed, in one recent case out of Maryland, a grievance panel issued a 47-page decision punishing attorneys for violating this rule and made no mention of *NIFLA*. Indeed, the entire analysis was devoid of constitutional analysis. We would expect the same here in Connecticut.
- The proposal has been rejected by numerous other jurisdictions for good cause.

I believe that, as attorneys, we all have the duty and honor to defend the Constitution. I also believe that now is one of those times. Accordingly, I write to request that this proposal be declined.

Very truly yours,