Del Ciampo, Joseph

From: Susan Patton Fox, JD <susanfoxlaw@aol.com>
Sent: Wednesday, November 11, 2020 2:55 PM
To: Rules Committee
Cc: Susan Patton Fox, JD
Subject: Comment on Proposed Rule 8.4(7)
Attachments: Comment on Proposed Rule 8.4(7) CONNECTICUT 2020.pdf

Dear Rules Committee:

On behalf of myself, and several other Connecticut Attorneys, please note the attached Commentary on Proposed Rule 8.4(7).

If possible, could you please respond so that I know you have received this?

Thank you and kind regards,

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IN THE CONNECTICUT SUPERIOR COURT
RULES COMMITTEE

Request for Public Comment on Proposed 2020 Amendment of Rule 8.4(7) of the Connecticut Rules of Professional Conduct	**)**	**Joint Comment in Opposition to Proposed 2020 Amendment of Rule 8.4(7) of the Connecticut Rules of Professional Conduct**

The Connecticut licensed attorneys listed below respectfully submit this Comment on the proposed amendment of Rule 8.4(7) of the Connecticut Rules of Professional Conduct.

I. The Proposed Amendment

It is being proposed that Rule 8.4 of the Connecticut Rules of Professional Conduct be amended by adding a subsection (7) to the Rule to read as follows:

It is professional misconduct for a lawyer to:

(7) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital 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 or to provide advice, assistance or advocacy consistent with these Rules.

The proposed amendment would also add the following Official Commentary to the proposed Rule:

[3] Discrimination and harassment in the practice of law undermine confidence in the legal profession and the legal system. Discrimination includes harmful verbal or physical conduct directed at an individual or individuals that manifests bias or prejudice on the basis of one or more of the protected categories. Not all conduct that involves consideration of these characteristics manifests bias or prejudice: there may be a legitimate nondiscriminatory basis for the conduct.

Harassment includes severe or pervasive derogatory or demeaning verbal or physical conduct. Harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

The substantive law of antidiscrimination and anti-harassment statutes and case law should guide application of paragraph (7), where applicable. Where the conduct in question is subject to federal or state antidiscrimination or antiharassment law, a lawyer's conduct does not violate paragraph (7) when the conduct does not violate such law. Moreover, an administrative or judicial finding of a violation of state or federal antidiscrimination or antiharassment laws does not alone establish a violation of paragraph (7).

A lawyer's conduct does not violate paragraph (7) when the conduct in question is protected under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution.

Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business, or professional activities or events in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity, equity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations.

A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). Moreover, no disciplinary violation may be found where a lawyer exercises a peremptory challenge on a basis that is permitted under substantive law. A lawyer does not violate paragraph (7) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(1), (2), and (3). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b)

II. Comments

A. The Proposed Rule Is Unconstitutional

1. Attorney Speech is Constitutionally Protected

Citizens do not surrender their First Amendment speech rights when they become attorneys, including when they are acting in their professional capacities as lawyers. *NAACP v.*

Button, 371 U.S. 415 (1963) (holding that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."); *see also Ramsey v. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn.*, 771 S.W.2d 116, 121 (Tenn. 1989) (holding that an attorney's statements that were disrespectful and in bad taste were nevertheless protected speech and use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney's First Amendment rights, and stating that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights."); *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995) (stating that the substantive evil must be extremely serious and the degree of imminence must be extremely high before an attorney's utterances can be punished under the First Amendment).

Indeed, the ABA itself has acknowledged this very principle in an *amicus* brief it filed in the case of *Wollschlaeger. v. Governor of the State of Fla.*, 797 F.3d 859 (11th Cir. 2015). In its brief the ABA denied that a law regulating speech should receive less scrutiny merely because it regulates "professional speech." "On the contrary" – the ABA stated – "much speech by . . . a lawyer . . . falls at the core of the First Amendment. The government should not, under the guise of regulating the profession, be permitted to silence a perceived 'political agenda' of which it disapproves. That is the central evil against which the First Amendment is designed to protect." "Simply put" – the ABA stated – "states should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession . . . Indeed," – the ABA stated – "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created."

The ABA is, of course, correct in stating that "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression." Indeed, the U.S. Supreme Court reiterated this principle in *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018), in which it devoted a part of its opinion to the subject of professional speech, stating: "[T]his Court's precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, . . .The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information" (internal citations omitted). The Court concluded that it was not presented with any persuasive reason for treating professional speech as a unique category of speech that is exempt from ordinary First Amendment principles.

In short, attorneys do not surrender their constitutional rights when they enter the legal profession – including with respect to their professional speech – and the state may not violate attorneys' constitutional rights under the guise of professional regulation.

2. The Proposed Rule Prohibits Constitutionally Protected Speech

Some proponents of professional Rules like the one proposed here claim that such Rules prohibit only conduct, not speech, and that any speech that is prohibited is speech that is merely incidental to the prohibited conduct. For that reason – they claim – these sorts of Rules do not violate the First Amendment free speech rights of lawyers.

But that is incorrect. The proposed Rule prohibits "harassment" and "discrimination," and

pure speech can constitute both harassment and discrimination under the Rule. The proposed Official Comments expressly prohibits what it calls "verbal conduct" – which is, of course, simply a euphemism for speech. The Comment elaborates that the Rule prohibits "derogatory," "demeaning," and "harmful" speech.

For that reason, the proposed Rule does not prohibit conduct that incidentally involves speech. Instead, the Rule prohibits speech that incidentally involves professional conduct. *See* Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harvard J. Law & Pub. Policy 173, 247 (2019).

An event in Minnesota illustrates the point. In May of 2018 the Minnesota Lavender Bar Association ("MLBA") – "a voluntary professional association of lesbian, gay, bisexual, transgender, gender queer, and allies, promoting fairness and equality for the LGBT community within the legal industry and for the Minnesota community" – objected to an accredited Continuing Legal Education presentation entitled "Understanding and Responding to the Transgender Moment/St. Paul," which was co-sponsored by a Roman Catholic law school and addressed transgender issues from a Roman Catholic perspective. The MLBA complained that the CLE – which was pure speech – was "discriminatory and transphobic," "encourages bias by arguing against the identities [of transgender people]," was contrary to the bar's diversity efforts, and constituted "harassing behavior" under Rule 8.4(g) of the Model Rules of Professional Conduct. The MLBA further characterized the presentation as "transphobic rhetoric" and stated that "Discrimination is not legal education." Minn. Lavender Bar Ass'n, https://gumroad.com/mlba (last visited Apr. 2, 2019). As a result of the MLBA's complaint, the CLE accrediting body of the Minnesota Bar revoked its CLE accreditation of the presentation – reportedly the first time such retroactive revocation of CLE credit had ever occurred in Minnesota. *See* Barbara L. Jones, *CLE*

credit revoked, Minnesota Lawyer (May 28, 2018).

In this real life example, the complained of behavior consisted of pure speech, was alleged to constitute "harassment" under Model Rule 8.4(g) – as well as discrimination – and was punished by the state.

Thus, it is clear that the proposed Rule does, in fact, prohibit lawyer speech. And, as is discussed below, much of that speech is constitutionally protected. By prohibiting and threatening to punish attorneys for engaging in constitutionally protected speech, the proposed Rule violates attorneys' free speech rights.

3. Many Authorities Have Expressed Concerns About The Constitutionality Of The Model Rule

According to the proponents of the proposed Rule – as set forth in its "Frequently Asked Questions" document dated 7.13.20 – "The proposed Connecticut Rule 8.4(7) is substantively the same as MRPC Rule 8.4(g)." But many authorities have pointed out the constitutional infirmities of ABA Model Rule 8.4(g).

When the ABA opened up Model Rule 8.4(g) for comment, a total of 481 comments were filed – and of those 481 comments, 470 of them opposed the Rule, many on the grounds that the Rule would be unconstitutional.

Indeed, the ABA's own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law Section, initially warned the ABA that Model Rule 8.4(g) may violate attorneys' First Amendment speech rights.

And prominent legal scholars, such as UCLA constitutional law professor Eugene Volokh and former U.S. Attorney General Edwin Meese, III, have opined that ABA Model Rule 8.4(g) is constitutionally infirm. *See* Eugene Volokh, "*A Speech Code for Lawyers, Banning Viewpoints*

that Express 'Bias,' Including in Law-Related Social Activities," Wash. Post, Aug. 10, 2016; *see also* Edwin Meese III, August Letter to ABA House of Delegates, http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf. Attorney General Meese wrote that ABA Model Rule 8.4(g) constitutes "a clear and extraordinary threat to free speech and religious liberty" and "an unprecedented violation of the First Amendment." *Id.*

Indeed, 52 law professors have signed a letter – titled *The Unconstitutionality of ABA Model Rule 8.4(g)* – in which they conclude that "the scholars who have signed this letter believe that ABA Model Rule 8.4(g) would, if adopted by any state, be clearly unconstitutional."

In addition, the authors of many law review articles have concluded that Model Rule 8.4(g) threatens attorneys' First Amendment rights. *See, e.g.*, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional & Blatantly Political*, 32 Notre Dame J.L. Ethics & Pub. Pol'y 135 (2018); Andrew F. Halaby and Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, & a Call For Scholarship*, 41 J. Legal Prof. 201 (2017) (the new Model Rule 8.4(g) has due process and First Amendment free expression infirmities); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment & "Conduct Related to the Practice of Law*," 30 Geo. J. Legal Ethics 241 (2017) (Model Rule 8.4(g) constitutes an unjustified incursion into constitutionally protected speech); Caleb C. Wolanek, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(G) Of The Model Rules of Professional Responsibility*, 40 Harv. J.L. & Pub. Policy 773 (June 2017) (Model Rule 8.4(g) goes too far and implicates the First Amendment); 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 (2018) (Model Rule 8.4(g) expands impulses within the legal profession to coerce viewpoint conformity and marginalize and deter dissenters); Bradley S.

Abramson, *ABA Model Rule 8.4(g): Constitutional and Other Concerns for Matrimonial Lawyers*, 31 J. Am. Acad. Matrim. Law. 283 (2019)(Model Rule 8.4(g) would appear to prohibit constitutionally protected speech, chill constitutionally protected speech, and interfere with attorneys' free exercise of religion rights). *See also* Lindsey Keiser, *Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 Geo. J. Legal Ethics 629 (Summer 2015) (rule violates attorneys' Free Speech rights); Dorothy Williams, *Attorney Association: Balancing Autonomy & Anti-Discrimination*, 40 J. Leg. Prof. 271 (Spring 2016) (rule violates attorneys' Free Association rights).

In several states that have considered adopting the Model Rule, important professional stakeholders have rejected it. For example, the Illinois State Bar Association, the Pennsylvania Supreme Court Disciplinary Board, the South Carolina Bar's Committee on Professional Responsibility, the Louisiana District Attorneys Association, the North Dakota Supreme Court Joint Commission on Attorney Standards, the Tennessee District Attorneys General Conference, and the Memphis Bar Association Professionalism Committee have all opposed the Rule.

The National Lawyers Association's Commission for the Protection of Constitutional Rights has issued a Statement that ABA Model Rule 8.4(g) would violate an attorney's free speech, free association, and free exercise rights under the First Amendment to the U.S. Constitution. National Lawyers Association, https://www.nla.org/nla-task-force-publishes-statement-on-new-aba-model-rule-8.4g/ (last visited on Apr. 2, 2019).[1]

Likewise, the national Catholic Bar Association has taken a public position that the Rule is unconstitutional.

[1] With respect to the constitutional issues raised by the new Model Rule, those filing this Joint Comment agree with the discussion, analysis and conclusions set forth in the National Lawyers Association's Statement, and have adopted, restated, and in some respects expanded upon much of that discussion and analysis in this Joint Comment.

In Montana the state legislature adopted a Joint Resolution – Montana Senate Resolution 15 – that, if the Supreme Court of Montana were to enact ABA Model Rule 8.4(g), such would constitute an unconstitutional act of legislation and violate the First Amendment rights of Montana lawyers. In response, the Montana Supreme Court declined to adopt the Rule.

Significantly, the Attorneys General of four States – Texas, South Carolina, Louisiana, and Tennessee – have issued official opinions that ABA Model Rule 8.4(g) is unconstitutionally vague and overbroad, and violates the free speech, free exercise of religion, and free association rights of attorneys. *See* Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016); S.C. Att'y Gen. Op. 14 (May 1, 2017); La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017); Tenn. Att'y Gen. Op. No. 18-11 (Mar. 16, 2018). In addition, the Attorney General of Arizona has written that the Rule "raises significant constitutional concerns, including potential infringement of speech and association rights." Ariz. Att'y Gen.'s Comment to Petition to Amend ER 8.4, Rule 42, Ariz. Rules of the Sup. Ct., R-17-0032 (May 21, 2018). And the Attorney General of Alaska has opined that the Rule would "violate First Amendment freedoms, including freedom of speech, free exercise of religion, and freedom of association . . . As a policy it is unwise, and as a law it is unconstitutional." Letter of Alaska Attorney General to the Board of Governors of the Alaska Bar Association (August 9, 2019).

4. The Proposed Rule Is Unconstitutionally Vague

Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. And the lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. For that reason, courts apply a more stringent vagueness test when a regulation interferes with the right of free speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

Vague laws present several due process problems. First, such laws may trap the innocent by not providing fair warning. Second, vague laws delegate policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. And third, such laws lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

(a) The Term "Harassment" is Unconstitutionally Vague

The proposed Rule prohibits attorneys from engaging in "harassment" on the basis of any of the protected classes. But the Rule itself does not define the term "harassment." Thus, the term "harassment" is subject to multiple interpretations – and no standard is provided by which an attorney can reasonably determine whether or not any particular speech or conduct might violate the Rule.

For example, can simply being offended by an attorney's expressions constitute harassment? Might an attorney violate the Rule merely by sharing her religious beliefs with another attorney who finds such religious beliefs – or their expression – offensive? Could an attorney's body language – such as a dismissive hand gesture, a turning of one's back, the shaking of one's head, or the rolling of one's eyes – constitute harassment? Could an attorney's clothing or apparel – such as wearing a "Make America Great Again" cap – violate the Rule? Or what if a lawyer had a Gadsden flag ("Don't Tread on Me") sticker on her briefcase – might that violate the Rule? If not, why not – since some would consider this speech derogatory or demeaning and, therefore, harassing.

Indeed, some courts have explicitly found that the term "harass" – in and of

itself – is unconstitutionally vague. *See, e.g., Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996) (holding that the term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague).

Because the term "harassment" as used in the proposed Rule is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid violating the Rule.

Further, the proposed Comment provides that harassment *includes derogatory or demeaning verbal or physical conduct*. It should be noted, first, that, as pointed out above, "verbal conduct" is simply a euphemism for speech. So what the Rule prohibits is "derogatory or demeaning" speech. But what exactly is encompassed by the words "derogatory" and "demeaning" speech? Courts have found terms such as these unconstitutionally vague. *See, e.g., Hinton v. Devine*, 633 F.Supp. 1023 (E.D. Pa. 1986) (holding that the term "derogatory" without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal. App. 4th 669 (Cal. App. 2012) (holding that a statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness). Second, this attempt at defining the vague term "harassment" is not an exclusive list of the sort of speech the proposed Rule prohibits, it is only an example of *one* sort of prohibited speech. What other sorts of speech can be considered "derogatory or demeaning" under the proposed Rule?

There's no way to tell. And, finally, the statement in the proposed Comment that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law *should* guide application of paragraph (7)" does not cure this vagueness defect because, first, the Comment does not identify which statutes and case law it is referring to and, second, it merely provides that such unidentified statutes and case law "*should* guide" application of the Rule. It does not provide that such law *must* guide application of the Rule – leaving open the very real possibility that the Rule will *not* be applied in accord with substantive antiharassment law. So the Comment provides attorneys with no real guidance as to what the Rule prohibits or how it will be applied.

(b) The Term "Discrimination" is Unconstitutionally Vague

The term "discrimination" is also unconstitutionally vague. Many proponents of professional rules such as the one proposed here contend that the word "discrimination" is widely used and easily understood. And it is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it is also true that such statutes and ordinances do not – as does the proposed Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

Title VII, for example, specifies what sorts of acts constitute discrimination under the statute. *See* 42 U.S.C. § 2000e-2. Similarly, the federal Fair Housing Act provides a detailed description of what, specifically, is prohibited under the Act. *See* 42 U.S.C. § 3604.

But the proposed Rule itself does not do that. It simply provides that "It is professional misconduct for a lawyer to: . . . engage in conduct that the lawyer knows

or reasonably should know is . . . discrimination on the basis of" a list of protected classes – thereby leaving to the attorney's imagination what sorts of speech and behavior might be encompassed in that proscription.

Again, if reference is made to the proposed Comments to the proposed Rule, the vagueness problem gets worse, because under the Comments the term "discrimination" "*includes harmful* verbal or physical conduct that *manifests bias or prejudice on the basis of one or more of the protected categories*" (our emphasis). The term "harmful" – standing alone – is unconstitutionally vague because attorneys cannot determine with any degree of reasonable certainty what speech and conduct may constitute "harmful" speech or conduct. Indeed, the word "harmful" simply means "causing or capable of causing harm." *Harmful*, Dictionary.com, http://www.dictionary.com/browse/harmful (last visited Apr. 4, 2019). And "harm" encompasses a wide range of injury, from "physical injury or mental damage" to "hurt" to "moral injury." *Harm*, Dicionary.com, http://www.dictionary.com/browse/harm (last visited Apr. 2, 2019). So "harmful" speech can encompass an almost limitless range of allegedly injurious effects on others. For that reason, mental injury or damage, for example, could easily be interpreted to include real, imagined, or even feigned, emotional distress at being exposed to expression someone finds offensive.

And for the same reasons it does not cure the vagueness defect of determining what constitutes harassing speech, the statement in the proposed Comments that "[t]he substantive law of antidiscrimination . . . statutes and case law *should* guide application of paragraph (7)" does not cure the vagueness defect of determining what constitutes discriminatory speech either, because the directive is not mandatory.

It is also important to emphasize that speech does not lose its constitutional protection just because it is "harmful." *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc*., 515 U.S. 557, 574 (1995) (stating that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (noting that an interest in protecting bystanders from feeling offended or angry is not sufficient to justify a ban on expression); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (striking down a ban on picketing near embassies where the purpose was to protect the emotions of those who reacted to the picket signs' message). *See also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011) (stating that "new categories of unprotected speech may not be added to the list [of unprotected speech – such as obscenity, incitement, and fighting words] by a legislature that concludes certain speech is *too harmful* to be tolerated") (emphasis added).

Indeed, the U.S. Supreme Court has stated that the idea that free speech protection should be subject to a balancing test that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test, is a "startling and dangerous" proposition. *Id.* at 792; *see also United States v. Stevens*, 559 U.S. 460, 470 (2010) (holding that "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government

outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.")

(c) The Phrase "in conduct related to the practice of law" is Unconstitutionally Vague

The proposed Rule applies to any conduct of an attorney which is "related to the practice of law," including, according to the proposed Comment, participating in bar association, business or professional activities or events *in connection* with the practice of law." It hardly need be said, though, that what conduct is conduct "related to" or "in connection with" the practice of law and what conduct is not, is vague and subject to reasonable dispute.

The phrase is vague, first, because what does and does not constitute the practice of law is, itself, somewhat vague. In fact, the Connecticut Supreme Court has refrained from even attempting an all-inclusive definition of what constitutes the practice of law. This is because "Attempts to define the practice of law have not been particularly successful." The most the Court has said is that the practice of law "embraces the giving of legal advice on a variety of subjects and the preparation of legal instruments covering an extensive field. . . [that] require in many aspects a high degree of legal skill and great capacity for adaptation to difficult and complex situations." *Statewide Grievance Committee v. Patton*, 683 A.2d 1359, 1361 (Conn. 1996).

The problem with the proposed Rule, however, is that it compounds the uncertainty of what constitutes the practice of law by sweeping in not just attorney conduct while engaged in the "practice of law," but attorney conduct that is merely "*related to*" or "*in connection with* the practice of law." Untethered, as it is, from any legal or historical understanding of what constitutes the "practice of law," the proposed Rule's use of the

phrases “related to” and “in connection with” the practice of law becomes nearly meaningless.

Considering some hypothetical situations brings the problem into focus. Would the Rule apply to comments made by an attorney while attending a law firm retirement party for a law firm co-worker, for example? If so, would it also include comments made while the attorneys are walking to their vehicles after the party has ended? Would it apply to comments one attorney makes to another while car-pooling to or from work? Would it include comments an attorney makes while teaching a religious liberty class at the attorney’s church? Or sitting on his church’s governing board, where he is sometimes asked for his professionally informed opinion on some matter before the board? Or when attending an alumni function at the law school the attorney attended? Or when publishing a letter to the editor of a newspaper when the author is identified therein as a lawyer? Or, for that matter, in any behavior in which the actor is identified as being a lawyer? The answers to these inquiries are far from self-evident.

And it is not just our opinion that the phrase “conduct related to the practice of law” is unconstitutionally vague. The Chair of the ABA Policy & Implementation Committee, which is charged with advocating for the Model Rules of Professional Conduct, while serving on an ABA CLE panel discussing Model Rule 8.4(g), was asked what the phrase “related to the practice of law” in the Model Rule meant? In response, he stated “I don’t have an answer for you.” “It is extraordinarily broad.” “I don’t know where it begins or where it ends.” *Model Rule 8.4 – Update, Discussion, and Best Practices in a #MeToo World,* August 2, 2018.

Because a lawyer cannot, with any degree of reasonable certainty, determine what

behavior of an attorney is conduct "related to" or "in connection with" the practice of law and what is not, the proposed Rule is unconstitutionally vague.

If attorneys face professional discipline for engaging in certain proscribed behavior, they are entitled to know, with reasonable precision, what behavior is being proscribed, and should not be left to speculate what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the Rule's essential terms, the proposed Rule is unconstitutional.

5. The Proposed Rule is Unconstitutionally Overbroad

Even if a law is clear and precise – thereby avoiding a vagueness challenge – it may nevertheless be unconstitutionally overbroad if it prohibits constitutionally protected speech.

Overbroad laws – like vague laws – deter protected activity. The crucial question in determining whether a law is unconstitutionally overbroad is whether the law sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. *Grayned,* 408 U.S. at 114-15.

Although some of the speech the proposed Rule prohibits might arguably be unprotected – such as speech that actually and substantially prejudices the administration of justice or speech that would actually and clearly render an attorney unfit to practice law (see a discussion of this issue under subsection C below) – the proposed Rule would also sweep within its prohibitions lawyer speech that is clearly protected by the First Amendment, such as speech that might be offensive, disparaging, or hurtful and, therefore, considered at least by some as constituting

discrimination or harassment, but that would not prejudice the administration of justice nor render the attorney unfit to practice law. *DeJohn v. Temple Univ.*, 537 F.3d 301 (2008) (holding that a University Policy on Sexual Harassment that prohibited "all forms of sexual harassment . . . including expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment" was unconstitutionally overbroad on its face).

Speech is not unprotected merely because it is harmful, derogatory, demeaning, or even discriminatory or harassing. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) (holding that there is no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs; harassing or discriminatory speech implicate First Amendment protections; there is no categorical rule divesting "harassing" speech of First Amendment protection).

Indeed, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder*, 562 U.S. at 458 (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley*, 515 U.S. at 574 (noting that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); s*ee also Johnson*, 491 U.S. at 414 (stating that "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *see also Matal v. Tam*, 137 Sup. Ct. 1744 (2017) (stating that the government's attempt to prevent speech expressing ideas that offend strikes at the heart of the First Amendment) and *Telescope Media Group v. Lucer*o, 936 F.3d 740 (8th Cir. 2019)(observing that "regulating

speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be").

In fact, courts have found that terms such as "derogatory" and "demeaning" – both of which are used in the proposed Comments of the proposed Rule to describe what the terms "discrimination" or "harassment" mean – are unconstitutionally overbroad. *Hinton*, 633 F.Supp. 1023 (holding that the term "derogatory information" is unconstitutionally overbroad); *Summit Bank*, 206 Cal. App. 4th 669 (finding that a statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech); s*ee also Saxe*, 240 F.3d 200 (holding that a school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional because it is overbroad).

The broad reach of the proposed Rule is well illustrated by the example that Senior Ethics Counsel Lisa Panahi and Ethics Counsel Ann Ching of the Arizona State Bar gave in their January 2017 article "Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g)," in the *Arizona Attorney*. They stated that an attorney could be professionally disciplined under Model Rule 8.4(g)'s prohibition on discriminatory or harassing conduct in activities "related to the practice of law" for telling an offensive joke at a law firm dinner party. Proponents of the proposed Rule might argue that an attorney would not be disciplined merely for telling an offensive joke at a law firm dinner party because the proposed Comments provide that "harassment" requires the conduct to be "severe or pervasive" – but that is, in fact, not clear at all. First, who's to determine whether a joke is or is not "severe"? Second, the Comment only provides that harassment

"includes" severe or pervasive derogatory or demeaning conduct; harassment is not limited to such conduct. And, third, *discriminatory* conduct under the Rule is not required to be either severe or pervasive – it is sufficient if it is merely "harmful." So, a joke that is considered "harmful" could, in fact, violate the Rule. And given the fact that an attorney could not know whether the joke he or she is about to tell might be considered a violation of the Rule, the attorney would censor him or herself and not tell it. Many might think such self-censorship is a good thing, but it is precisely what the overbreadth doctrine is designed to prevent. *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (noting that overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression.).

Therefore, because the proposed Rule will prohibit a broad swath of protected speech and would chill lawyers' speech, the Rule would not pass constitutional muster.

6. The Proposed Rule Will Constitute An Unconstitutional Content-Based Speech Restriction

By only proscribing speech that is derogatory, demeaning, or harmful toward members of certain designated classes, the proposed Rule will constitute an unconstitutional content-based speech restriction. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (explaining that government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.); *see also Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (holding that an ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

Indeed, the U.S. Supreme Court recently reiterated this principle in a case that is directly relevant when considering the constitutional infirmities of the proposed Rule. In *Tam*, the Court found that a Lanham Act provision – prohibiting the registration of trademarks that may "disparage" or bring a person "into contempt or disrepute" – facially unconstitutional, because such a disparagement provision – even when applied to a racially derogatory term – ". . . offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." 137 Sup. Ct. 1744. In a concurring opinion joined by four Justices, Justice Kennedy described the constitutional infirmity of the disparagement provision as "viewpoint discrimination" – "an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Id*. at 1766. The problem, he pointed out, was that, under the disparagement provision, "an applicant may register a positive or benign [trade]mark but not a derogatory one" and that "This is the essence of viewpoint discrimination." *Id*. Likewise, under the proposed Rule here, attorneys may engage in positive or benign speech with regard to the protected classes, but not derogatory, demeaning, or harmful speech. Under the Supreme Court's *Tam* decision, this is the essence of viewpoint discrimination, and presumptively unconstitutional.

The late Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provided a concrete example of how the proposed Rule may constitute an unconstitutional content-based speech restriction. Referring to Model Rule 8.4(g), he explained: "At another bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.' Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally, another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline." Ronald D. Rotunda, *The ABA Decision to Control*

What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought, Legal Memorandum No. 191 at 4, The Heritage Foundation (Oct. 6, 2016).

Under the proposed Rule, the content of a lawyer's speech will determine whether or not the lawyer has or has not violated the Rule. For example, a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that some consider to be discriminatory based on sexual orientation or marital status, while a lawyer who speaks in favor of same-sex marriage would not be. Or as the Minnesota case discussed above illustrates, one may speak favorably about transgender issues, but not unfavorably. These are classic examples of unconstitutional viewpoint-based speech restrictions. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (holding that the government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed). In *R.A.V.*, the Supreme Court struck down, as facially unconstitutional, the city of St. Paul's Bias-Motivated Crime Ordinance because it applied only to fighting words that insulted or provoked violence "on the basis of race, color, creed, religion or gender," whereas expressed hostility on the basis of other bases were not covered. *Id*. In striking down the Ordinance, the Court stated: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id*. at 390. That is precisely what the proposed Rule does. For that reason, commentators have described Model Rule 8.4(g) as a speech codes for lawyers.

For those who would deny that the proposed Rule creates an attorney speech code, we need only point them to Indiana, a state that has adopted a black letter non-discrimination Rule – albeit not as broad as the Rule being proposed here in Connecticut. In *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Ind. 2010), an Indiana attorney was professionally disciplined under Indiana's Rule 8.4(g) for merely asking someone if they were "gay." And in *In the Matter of Daniel C.*

McCarthy, 938 N.E.2d 698 (Ind. 2010), an attorney had his license suspended for applying a racially derogatory term to himself. In both cases, the attorneys were professionally disciplined merely for using certain disfavored speech.

Because it constitutes an unconstitutional speech code for lawyers, the proposed Rule should be rejected.

7. The Proposed Rule Will Violate Attorneys' Free Exercise of Religion and Free Association Rights

The proposed Rule will also violate attorneys' constitutional right of free religious exercise because the Rule prohibits religious expression if such expression could be considered discriminatory or harassing.

The ACLU of New Hampshire opposed a similar rule – considered but not adopted – in that state, noting correctly that such rules threaten religious liberty because "one person's religious tenet could be another person's manifestation of bias." American Civil Liberties Union of New Hampshire, Letter to Advisory Committee on Rules, New Hampshire Supreme Court (May 31, 2018).

As an illustration of this problem, the late Professor Rotunda posited the example of Catholic attorneys who are members of the St. Thomas More Society, an organization of Catholic lawyers and judges. If the St. Thomas More Society should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, Professor Rotunda explained that those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. In fact, Professor Rotunda pointed out that an attorney

might be in violation of the Rule merely for being a member of such an organization. Rotunda, *supra* at 4-5. The fact that the Rule may prohibit such speech or membership indicates that the Rule will be unconstitutional.

To those who might deny the proposed Rule could or would be applied in that way, one need only note the above-referenced action of the CLE accrediting authorities in Minnesota upon the Minnesota Lavender Bar Association's complaint that a CLE co-sponsored by a Roman Catholic law school, discussing transgender issues from a Roman Catholic perspective, constituted "harassment" under ABA Model Rule 8.4(g), stating that the religiously based discussion constituted "transphobic rhetoric" and "discrimination." In essence, that case stands for the proposition that the prohibition of "harassment" and "discrimination" as embodied in professional conduct rules, such as the one proposed here in Connecticut, will apply to and prohibit religious speech – speech that expresses a religious tenet of some, but to others is viewed as discrimination or harassment.

Religiously based legal organizations have consistently opposed professional conduct rules like the one being considered here in Connecticut on the ground that such rules threaten religious liberty. Those groups include the Catholic Bar Association – which has adopted a resolution stating that Model Rule 8.4(g) is not only unconstitutional, but that it is "incompatible with Catholic teaching and the obligations of Catholic lawyers" – as well as the Christian Legal Society. Both organizations have cause for concern because, as Professor Rotunda presciently warned, merely being members of those organizations would violate rules like the Rule proposed here. How so? Because both organizations limit their membership based on religion. The Christian Legal Society requires its members to subscribe to a Christian statement of faith. The Catholic Bar Association requires its members to be practicing Roman Catholics. Therefore, both legal organizations

"discriminate" on the basis of religion – something explicitly prohibited under the terms of the proposed Rule. The proposed Rule would, essentially, destroy both organizations.

Because the proposed Rule will violate attorneys' Free Exercise and Free Association rights, it should be rejected.

8. The Proposed Rule Will Result In The Suppression of Politically Incorrect Speech While Protecting Politically Correct Speech

Under a literal reading of the proposed Rule itself, a law firm's affirmative action hiring practices would constitute a violation of the Rule, because the Rule makes clear that it is professional misconduct for a lawyer operating or managing a law firm or law practice to discriminate on the basis of race, sex, national origin, ethnicity, sexual orientation, or gender identity. Therefore, any hiring or other employment practices that favor applicants or employees on the basis of any of those characteristics are forbidden.

But does anyone really believe that a lawyer will ever be prosecuted for favoring women or racial minorities in hiring or promotion decisions, undertaken in order to increase diversity in the legal profession? Of course not. In fact, discrimination for those purposes will actually be favored.

Indeed, the proposed Comment to the proposed Rule expressly makes this practice, of protecting favored speech and suppressing disfavored speech, explicit because the Comments to the Rule contain an express exception for "conduct undertaken to promote diversity, equity and inclusion without violating the Rule." And another Comment allows lawyers to limit their practices to certain clientele, as long as that clientele are "members of underserved populations" – whatever that may mean.

So, if an attorney engages in discriminatory conduct that furthers a *politically correct* interest, the disciplinary authority will find that the discrimination is undertaken to promote diversity, equity or inclusion, or to serve an underserved population – and for that reason does not violate the Rule. But if an attorney engages in discriminatory conduct that furthers a *politically incorrect* interest, the state will prosecute that attorney for violating the Rule. And because the terms "harassment" and "discrimination" are both vague and overbroad, professional disciplinary authorities will be able to interpret those terms in ways that result in selective prosecution of politically incorrect or disfavored speech, while protecting politically correct or favored speech.

This phenomenon has already been observed in other similar contexts. For example, a Civil Rights Commission in Colorado prosecuted a Christian baker for declining to bake a wedding cake for a same-sex couple, but refused to prosecute three other bakers who refused to bake a cake for a Christian, finding that the first constituted illegal discrimination but that the second did not. The reason underlying this disparate treatment was obvious – in the first the complaining party was a member of a politically favored class, while in the second the complaining party was a member of a disfavored one. The U.S. Supreme Court condemned that unequal treatment, stating that it constituted a "clear and impermissible hostility toward the religious beliefs" of the baker the Commission selectively chose to prosecute. *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).

These exceptions also render the proposed Rule unconstitutional because – by prohibiting only disfavored discriminatory messages, while allowing favored ones – the Rule creates a viewpoint-based speech restriction. *See R.A.V.*, 505 U.S. 377.

No rule of professional conduct should punish certain viewpoints while protecting and advancing others. In fact, to do so would be unconstitutional.

9. Provisions and Assurances That the Proposed Rule Will Not Be Applied in an Unconstitutional Manner Do Not Cure the Rule's Constitutional Infirmities

One of the proposed Comments to the proposed Rule anticipates constitutional challenges by providing that "A lawyer's conduct does not violate paragraph (7) when the conduct in question is protected under the First Amendment of the Constitution f the United States or Article First, Section 4 of the Connecticut Constitution." But this "disclaimer" does not remedy the Rule's constitutional infirmities.

First, the very fact that the proponents of the Rule felt it necessary to place such a disclaimer in the Rule is itself evidence that they believe that the Rule can, in fact, be read to apply so as to violate attorneys' constitutional rights.

Second, as the ACLU of New Hampshire pointed out when a similar proposal was made there, such boilerplate "savings clauses" cannot save unconstitutionally overbroad speech restrictions. *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 333 (4th Cir. 2001)(holding that a savings clause could not save regulatory statutes from a constitutional challenge, citing *Looney v. Com*, 133 S.E. 753, 755 (Va. 1926); *Fisher v. King*, 232 F.3d 391, 395 (4th Cir. 2000)(holding that a savings clause is disregarded as void when inconsistent with the body of the statute, citing *Sutherland on Statutory Construction* treatise); *State v. Malchholz*, 574 N.W.2d 415, 421 n. 4 (Minn. 1998)(same); *Long v. State*, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996)(same). That is because it cannot be presumed that people – including attorneys not specializing in constitutional law – are able to understand what the First Amendment does and does not protect to the degree of certainty required to provide adequate notice. *Long v. Stat*e, 931 S.W.2d 285, 295 (Tex. Crim. App. 1996)(holding that an affirmative defense approach to protecting First Amendment rights would relegate the First Amendment issue to a case-by-case

adjudication creating a vagueness problem because it would require people of ordinary intelligence to be First Amendment scholars); *id*. (holding that, because First Amendment doctrines are often intricate and/or amorphous, people should not be charged with notice of First Amendment jurisprudence and that a First Amendment defense cannot of itself provide adequate guidelines for law enforcement); *id*. (holding that an attempt to charge people with notice of First Amendment case law would undoubtedly serve to chill free expression). [American Civil Liberties Union of New Hampshire, Letter to Advisory Committee on Rules, New Hampshire Supreme Court (May 31, 2018)]. Indeed, the fact that professional rules like the one being proposed here, which violate the First Amendment rights of attorneys, are being proposed by those who are themselves attorneys, proves that even many attorneys do not adequately understand First Amendment law.

And third, in *Stevens*, supra, a case challenging the constitutionality of a statute criminalizing certain depictions of animal cruelty, the U.S. Supreme Court rejected the government's claim that the statute was not unconstitutionally overbroad because the government would interpret the statute in a restricted manner so as to reach only "extreme" acts of animal cruelty, and that the government would not bring an action under the statute for anything less. In response, the high court pointed out that "the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." The court pointed out the danger in putting faith in government representations of prosecutorial restraint, and stated that "The Government's assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." Id. at 480.

In other words, far from curing its constitutional defects, provisions and representations

that the proposed Rule will not be applied so as to violate the Constitution constitute indirect admissions that the proposed Rule is, in fact, constitutionally infirm, and are ineffective to cure the Rule's constitutional infirmities.

In arguing that the proposed Rule will not be applied unconstitutionally, proponents may also point to the Rule's provision that "This paragraph does not limit the ability of a lawyer to . . . provide advice, assistance or advocacy consistent with these Rules." But that provision does not cure the defects either.

It does not cure the defects, first, because the cited provision is circular. It requires that, in order to qualify as legitimate the advice or advocacy must be "consistent with these Rules." But in order to be consistent with the Rules (in particular with proposed Rule 8.4(7) itself), the advice, assistance or advocacy cannot be discriminatory or harassing. In other words, under the proposed Rule, advice or advocacy that constitutes "discrimination" or "harassment" can, by definition, never constitute legitimate advice, assistance or advocacy because "discriminatory" or "harassing" advice or advocacy is inconsistent with "these Rules" – which would include proposed Rule 8.4(7) itself.

If the proposed Rule is adopted, an attorney will need to worry whether her advice or advocacy might be considered discriminatory or harassing and, therefore, a violation of professional ethics. And having to worry about that will chill the lawyer's speech and interfere with the attorney's ability to provide her client with zealous representation.

Finally, who will determine whether an attorney's advice, assistance or advocacy does or does not constitute harassment – that is, derogatory or demeaning speech or conduct – or discrimination – that is, harmful speech or conduct? The disciplinary authorities, of course, will make that determination, in their unfettered discretion, after the fact and, potentially, on political

or ideological grounds.

10. The Proposed Rule Also Violates the Connecticut Constitution.

Like the United States Constitution, the Connecticut Constitution guarantees citizens the right to free speech without governmental infringement. C.G.S., Const. Art. 1, §§ 4 and 5. Indeed, the Connecticut Supreme Court has determined that the Connecticut Constitution provides greater speech protection than is provided under the U.S. Constitution. *State of Connecticut v. Linares*, 655 A.2d 737 (Ct. 1995).

Therefore, the proposed Rule is unconstitutional not only under the U.S. Constitution, but also under the Connecticut Constitution.

Given the proposed Rule's many constitutional defects, the proposed Rule should be rejected.

B. Only Two States Have Adopted Model Rule 8.4(g). All Other State Supreme Courts That Have Considered And Acted Upon the Rule Have Rejected It In Whole or In Part

The Court should note that – in the four years since the ABA adopted Model Rule 8.4(g) – although many states have considered it, only two states, Vermont and New Mexico, have adopted it. The supreme courts of six states – Arizona, Idaho, Montana, South Carolina, South Dakota, and Tennessee – have expressly rejected the Rule.

Indeed, the majority of states continue to have no blackletter nondiscrimination rule at all in their Rules of Professional Conduct.

In fact, not only do the majority of states have no blackletter antidiscrimination rule in their rules of professional conduct, but in those states that *do* have black letter antidiscrimination

provisions in their rules, no state's rule – other than Vermont's and New Mexico's – is comparable to Model Rule 8.4(g).

So, for example, aside from Vermont and New Mexico, none of the jurisdictions with blackletter anti-discrimination rules extends its rule to conduct related to the practice of law or conduct in connection with the practice of law – including bar association, business, and professional activities of attorneys – as does the Rule proposed here. (Although Maine's prohibition applies to "conduct related to the practice of law," it specifically declined to extend its prohibition to lawyers' bar association or business activities, as does the proposed Rule). Indeed, seven of those jurisdictions specifically limit their coverage to conduct "in the representation of a client" or "in the course of employment" (Florida, Idaho, Nebraska, Missouri, North Dakota, Oregon, and Washington State). Eight states limit the applicability of their nondiscrimination rules to conduct toward other counsel, litigants, court personnel, witnesses, judges, and others involved in the legal process (Colorado, Florida, Idaho, Michigan, Nebraska, and Washington State). And Massachusetts limits its Rule to conduct "before a tribunal."

And unlike the Rule proposed here, nine of the states with black letter antidiscrimination rules require that the alleged discrimination actually either prejudice the administration of justice or render the attorney unfit to practice law (Florida, Illinois, Maryland, Minnesota, Nebraska, North Dakota, Pennsylvania, Rhode Island, and Washington State).

Further, unlike the Rule being proposed here – which has a "know or reasonably should know" standard – four states with black letter rules require the discriminatory conduct to be "knowing," "intentional" or "willful" (Maryland, New Jersey, New Mexico, and Texas). Indeed, New Hampshire's rule only applies to attorney conduct when the attorney's "primary purpose" is to embarrass, harass or burden another person. As an explanatory comment to New Hampshire's

rule explains: "The rule does not prohibit conduct that lacks this primary purpose, even if the conduct incidentally produces, or has the effect or impact of producing" embarrassment, harassment, or a burden to another."

Finally, nine states (California, Minnesota, New Jersey, New York, Illinois, Ohio, Pennsylvania, Washington State, and Iowa) limit their antidiscrimination rules to "unlawful" discrimination or discrimination "prohibited by law." And of those nine states, nearly half of them (Illinois, New Jersey, New York, and Pennsylvania) actually require that, before any disciplinary claim can even be filed, a tribunal of competent jurisdiction *other than a disciplinary tribunal* must have found that the attorney has actually violated a federal, state, or local antidiscrimination statute or ordinance.

So, should this state adopt the proposed Rule, it will have adopted a Rule that impinges on attorney conduct in ways, and far more extensively, than any other jurisdictions – other than Vermont and New Mexico – have seen fit to do.

There are good reasons why the majority of jurisdictions have not adopted any blackletter nondiscrimination Rules in their Rules of Professional Conduct. And there are also good reasons why no state other than Vermont and New Mexico have adopted ABA Model Rule 8.4(g). And there are good reasons why the Supreme Courts of Arizona, Idaho, South Carolina, South Dakota, Tennessee, and Montana have all rejected ABA Model Rule 8.4(g). For these same reasons, Connecticut would be wise to reject the Rule as well.

C. The Proposed Rule Would, For The First Time, Sever The Rules From The Legitimate Regulatory Interests Of The Legal Profession

The legal profession has a legitimate interest in proscribing attorney conduct that – if not

proscribed – would either render an attorney unfit to practice law or that would prejudice the administration of justice. This state's current Rule 8.4 recognizes this principle by prohibiting attorneys from engaging in six types of conduct, all of which might either adversely impact an attorney's fitness to practice law or would prejudice the administration of justice. Those types of conduct are:

> (1) Violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another;
>
> (2) Committing criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (3) Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (4) Engaging in conduct that is prejudicial to the administration of justice;
>
> (5) Stating or implying an ability either to influence a government agency or official or to achieve results that violate the Rules of Professional Conduct or other law; or
>
> (6) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The first proscribed conduct – violating or assisting others in violating the Professional Conduct Rules – is self-explanatory and obvious, since the Rules are enacted for the precise purpose of regulating the conduct of attorneys as attorneys. The Rules would hardly serve their purpose if an attorney's violation of them did not constitute professional misconduct.

The second and third proscriptions are targeted at attorney conduct which directly impacts the attorney's ability to be entrusted with the professional obligations with which all attorneys are

entrusted – namely, to serve their clients and the legal system with honesty, competency, and trustworthiness. But – revealingly – those Rules do not proscribe conduct that, although perhaps not praiseworthy, does not warrant the conclusion that the attorney engaging in such conduct is unfit to practice law. Indeed, it is worth noting that Rule 8.4(2) does not even conclude that all *criminal* conduct is a violation of the Rules of Professional Conduct. Instead, the Rule proscribes only criminal conduct "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

The fourth proscription is limited to conduct that actually prejudices the administration of justice.

The fifth and sixth proscriptions in this state's current Rule 8.4 also target what is clearly attorney conduct that, if engaged in, would adversely affect the integral operation of the judicial system – namely, improperly influencing a government agency or official or knowingly assisting a judge or judicial officer in conduct that violates the rules of judicial conduct or other law.

In short, this state's Rule 8.4 has always – heretofore – been solely concerned with attorney conduct that would either adversely affect an attorney's fitness to practice law or that would seriously interfere with the proper and efficient operation of the judicial system.

The proposed Rule, however, takes this state's Rules in a completely new and different direction because, for the first time, the proposed Rule would subject attorneys to discipline for engaging in conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system. Indeed, because the proposed Rule would not require *any* showing that the proscribed conduct prejudices the administration of justice or that such conduct adversely affects the offending attorney's fitness to practice law, the Rule will constitute a free-floating nondiscrimination/anti-harassment provision.

To fully appreciate what this departure from the historic principles of attorney regulation will mean, we need only look to the two Indiana cases cited above – *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Ind. 2010) and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Ind. 2010). In neither case did the offending conduct have any demonstrable prejudicial effect on the administration of justice or render the attorneys unfit to practice law. In both cases, it was deemed sufficient that the attorneys had simply used certain offensive language.

Strikingly, if the proposed Rule is adopted, an attorney could actually engage in *criminal* conduct without violating the Rules (because Rule 8.4(b) only applies to a lawyer's "*criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*") but could be disciplined merely for engaging in politically incorrect speech. In that respect, the proposed Rule would create a sort of "super offense," because unlike Rule 8.4(b) – which only prohibits criminal conduct that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer – the proposed Rule would prohibit all discriminatory or harassing behavior, without regard to whether or not such conduct is unlawful or whether it reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer – thereby treating allegedly discriminatory or harassing conduct as being worse than *criminal* conduct.

Because the proposed Rule constitutes an extreme and dangerous departure from the principles and purposes historically underlying Connecticut's attorney misconduct rules and the legitimate interests of professional regulation, the proposed Rule should be rejected.

D. The Proposed Rule is Unnecessary, Will Not Remedy the Proponent's Concerns, and Will Unnecessarily Burden Iowa's Professional Disciplinary Authorities

Many of the circumstances the proposed Rule would address are already addressed by the

current Rules of Professional Conduct or other laws.

First, Rule 8.4(4) already prohibits attorney conduct that prejudices the administration of justice. And, in fact, sexual harassment has been professionally disciplined in other states under Rule 8.4(d). *See, e.g.*, *Attorney Grievance Comm'n of Md. v. Goldsborough*, 624 A.2d 503 (Ct. App. Maryland 1993) (holding that nonconsensual kissing of clients and spanking clients and employees can violate Rule 8.4(d) prohibiting lawyer from engaging in conduct that is prejudicial to the administration of justice). And harassing and discriminatory judicial behavior – as well as discriminatory and harassing conduct of attorneys in proceedings before judicial tribunals – are already addressed in the Connecticut Code of Judicial Conduct, Rule 2.3.

For all these reasons, the proposed Rule is redundant and unnecessary.

In addition, harassment and discrimination in the legal workplace are also already addressed in Title VII at the federal level, as well as in this state's employment nondiscrimination laws, including the Connecticut Fair Employment Practices Act, which covers all work places employing three or more people. So the proposed Rule would create an entirely new layer of nondiscrimination and anti-harassment laws, in addition to those already existing outside the Rules of Professional Conduct. By doing so, the Rule will burden professional disciplinary authorities with having to process very fact-intensive, jurisprudentially complicated, and duplicative cases – cases that could and should be processed under some other statute or ordinance, by judicial authorities better equipped to handle them.

Further, making discrimination and harassment a professional, as well as a statutory, offense, divorced from antidiscrimination and harassment laws, could very well subject attorneys to multiple prosecutions and inconsistent obligations and results. Lawyers could be forced to defend against parallel prosecutions, being pursued by different prosecutorial authorities, all at the

same time. And, because different legal and evidentiary standards may apply in different proceedings, attorneys could – under the same set of facts – be exonerated from allegations of having violated a nondiscrimination or harassment law, but still be found to have engaged in harassing or discriminatory conduct that violates the Rules of Professional Conduct, or vice versa. Indeed, as noted above, some states have recognized the importance of this issue by (a) prohibiting only "unlawful" harassment or discrimination and (b) requiring that any claim against an attorney for unlawful discrimination be brought for adjudication before a tribunal other than a disciplinary tribunal before being brought before a disciplinary tribunal. See, for example, Illinois Rules of Professional Conduct Rule 8.4(j) and New York Rules of Professional Conduct Rule 8.4(g).

So for all these reasons, too, the proposed Rule should be rejected.

III. Conclusion

The proposed Rule is unconstitutional. It is unconstitutionally vague. It is unconstitutionally overbroad. And it constitutes an unconstitutional content-based speech restriction. It also violates attorneys' Free Speech, Free Exercise, and Free Association rights.

In addition to being constitutionally infirm, the proposed Rule would sever Connecticut's Rules of Professional Conduct from the legitimate interests of the bar in regulating the legal profession, and would authorize professional disciplinary authorities to discipline lawyers for non-commercial speech and conduct that neither prejudices the administration of justice nor renders attorneys unfit to practice law. It would create a strict liability speech code for lawyers. The proposed Rule would also subject attorneys to duplicative prosecutions, as well as inconsistent obligations and results.

The many infirmities of the proposed Rule are evidenced by the fact that, in the four years since the ABA adopted Model Rule 8.4(g) – which is "substantively the same" as the Rule

proposed here – only two states have adopted it. All other state supreme courts that have considered and acted upon the rule have rejected it. So, should Connecticut adopt the Rule, it would be embarking on a path that all states, but two, have – for good reasons – rejected.

For all these reasons, the proposed amendment to Rule 8.4(7) of Connecticut's Rules of Professional Conduct should be rejected.

Respectfully submitted,

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