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Attached are the comments of the New Civil Liberties Alliance in connection with the proposed adoption of new Rule 8.4(7) of the Connecticut Rules of Professional Conduct.

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Filed Via Email (RulesCommittee@jud.ct.gov and joseph.delciampo@jud.ct.gov)

Rules Committee of the Superior Court

Attn: Joseph DelCiampo, Esq.

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.

Re: Proposed Rule 8.4(7), Connecticut Rules of Professional Conduct

Dear Justice McDonald, Judge Abery-Wetstone, Judge Bellis, Judge Cobb, Judge Farley, Judge Hernandez, Judge Nguyen-O'Dowd, Judge Prats, and Judge Truglia:

The New Civil Liberties Alliance (NCLA) is pleased to submit these comments in connection with the Rules Committee's consideration of amending the Connecticut Rules of Professional Conduct (the "Connecticut Rules") to include Proposed Rule 8.4(7). NCLA strongly urges the Committee not to recommend adoption of the Proposed Rule, which largely mirrors the highly controversial Rule 8.4(g) of the American Bar Association's (ABA) Model Rules of Professional Conduct. There is no need for an additional rule governing discrimination-based misconduct by Connecticut attorneys; such misconduct is already adequately addressed by Rule 8.4(4) of the Connecticut Rules.

More importantly, the Proposed Rule raises significant constitutional concerns. It authorizes administrators to discipline lawyers (including imposing sanctions that deprive lawyers of the ability to earn a livelihood) based on overly vague standards. Recent history demonstrates widespread disagreement over what conduct/speech one "reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, [etc.]." Moreover, imposing content-based restrictions on attorney speech (by declaring that certain expressions constitute "harassment") violates clearly established First Amendment norms. The U.S. Supreme Court has repeatedly held that attorneys are entitled to the same free-speech protections enjoyed by all other citizens.

ABA Model Rule 8.4(g) has been widely criticized by leading constitutional scholars as an unwarranted speech code for lawyers. As UCLA law professor Eugene Volokh has explained, adoption of rules substantially similar to ABA Model Rule 8.4(g)—such as the Proposed Rule—is likely to deter lawyers from speaking out on important legal issues, for fear that they will face severe sanctions if someone later concludes that their speech constitutes harassment on the basis of one of the 15 listed characteristics.¹ Such chilling of speech is intolerable; our free society cannot function effectively unless attorneys can speak their minds openly without fear of losing their law licenses.

Supporters of the Proposed Rule argue that such free-speech concerns are overblown. They contend that bar officials can be trusted to confine enforcement of the Proposed Rule to cases of egregious attorney misconduct. But attorneys should not be required to entrust their livelihoods to the self-restraint of bar authorities who, under the Proposed Rule, would be afforded broad discretion to determine what constitutes sanctionable “harassment.” And recent history indicates that they would be pressured to define that term expansively.

I. Interests of NCLA

The New Civil Liberties Alliance is a nonpartisan, nonprofit civil rights group devoted to defending civil liberties. The “civil liberties” of the organization’s name include rights at least as old as the U.S. Constitution itself, such as freedom of speech, due process of law, the right to be tried by an impartial and independent judge, and the right to live under laws made by the nation’s elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because legislatures, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of the Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent. This unconstitutional administrative state within the Constitution’s United States is the focus of NCLA’s concern.

The Connecticut Supreme Court promulgates Rules of Professional Conduct that govern the practice of law by attorneys within the State. Those rules are administered by local grievance panels, which are authorized to investigate alleged rule violations; and, if a local panel finds probable cause, by a state-wide Grievance Committee, which may further investigate and impose disciplinary sanctions based on findings of violations. The Committee and the local panels are authorized to act as factfinders. NCLA is concerned that

¹ Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017) (available at <https://www.youtube.com/watch?v=AfpdWmlOXba>).

the Proposed Rule, by delegating to the Committee and local panels broad authority to define sanctionable misconduct, will inappropriately transform them into unelected policymaking bodies.

II. Proposed Rule 8.4(7)

Under Proposed Rule 8.4(7), it is “professional misconduct” for a lawyer to:

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, sexual orientation, gender identity, gender expression or marital status in conduct related to the practice of law.

One striking feature of the Proposed Rule is that it does not require a showing that the lawyer *intended* to discriminate against or harass anyone; it is enough that the lawyer “reasonably should know” that (s)he has engaged in harassment or discrimination. The conduct at issue must be “related to the practice of law,” but the Official Commentary accompanying the Proposed Rule confirms that the drafters intend that phrase to be construed quite broadly:

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.

The Official Commentary provides similarly broad definitions of “discrimination” (it “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”) and “harassment” (it “includes severe or pervasive derogatory or demeaning verbal or physical conduct”).

III. The Proposed Rule Violates First Amendment Rights

The Proposed Rule exposes attorneys to discipline for harassing another—for example, subjecting another to “pervasive derogatory or demeaning verbal ... conduct”—on the basis of one of the protected categories. That rule runs headlong into numerous U.S. Supreme Court decisions that grant First Amendment protection to “disparaging” speech. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744 (2017) (unanimously declaring unconstitutional federal statute that permitted government officials to penalize “disparaging” speech); *id.* at 1766 (Kennedy, J., concurring) (stating that First Amendment does not permit suppression of speech that “demeans or offends”). Individuals may feel demeaned if a lawyer, speaking

at a bar-sanctioned forum, tells them that homosexual conduct is immoral or that employers should ask prospective employees about their salary histories (despite claims by some that such questions tend to perpetuate sex-based salary disparities). But the First Amendment prohibits States from sanctioning lawyers for expressing such views.

That the lawyer utters the “derogatory” or “demeaning” words in a setting “related to the practice of law” does not diminish the First Amendment protections to which the speaker is entitled. The Supreme Court held in *Nat’l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), that the First Amendment protects “professional speech” just as fully as other forms of speech. When (as here) the government is proposing to restrict speech based on its content, the restriction is subject to strict constitutional scrutiny—meaning that the restriction will be found unconstitutional unless the government demonstrates that it is “narrowly tailored to serve compelling state interests.” *Id.* at 2371. Proponents of the Proposed Rule have not attempted to make such a showing.

Other features of the Proposed Rule are even more disturbing. Attorneys can be sanctioned even when they lack any intent to discriminate against or harass others. It is sufficient to show that the attorney “reasonably should know” that his or her conduct constitutes discrimination or harassment. The problem is compounded by the inherent vagueness of the terms “discrimination” and “harassment.” Because “harassment” has no fixed meaning, members of the Grievance Committee and local panels are free to adopt an expansive definition in cases involving speech they find distasteful, declare that the speaker “reasonably” should have been aware of that definition, and impose career-ending sanctions on the speaker. A law that deprives someone of life, liberty, or property is constitutionally problematic when “it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

Connecticut must be particularly vigilant in guarding against infringement of First Amendment rights in the attorney-discipline context because the consequences of an ethics violation finding can be so severe, including the loss of the right to earn a livelihood in one’s chosen profession. As the U.S. Court has recognized:

Without doubt, [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, *to engage in any of the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added). While Connecticut is entitled to impose reasonable licensing requirements on the practice of law, it may not rescind or impair the licenses of those whose speech it finds objectionable.

IV. The Proposed Rule Will Chill Speech

Adoption of the Proposed Rule will inevitably lead to the chilling of attorney speech. Few attorneys will be willing to speak out on topics related to the 15 protected categories if they know that doing so could jeopardize their careers. Society as a whole will suffer from such self-censorship; we depend on lawyers to play a lead role in airing views on both sides of controversial issues.

There can be little doubt, moreover, that the Proposed Rule takes sides on at least some of those issues. For example, the Official Commentary to the Proposed Rule states, “Lawyers also may engage in conduct undertaken to promote diversity, equity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, retaining and advancing diverse employees or sponsoring diverse law student organizations.” No similar exemption is provided to lawyers who publicly oppose explicit efforts to “promote diversity” and who instead advocate hiring the employees deemed most qualified—without regard to their race, sex, religion, or sexual orientation.

Assurances from bar officials that they will adopt “reasonable” enforcement policies are unlikely to reduce the Proposed Rule’s chilling effect on attorney speech. Those officials may insist that they will proceed only against the most egregious violators, but attorneys who read the Proposed Rule’s broad language are unlikely to rely on vague and unenforceable promises of that nature.

Moreover, if bar officials are really interested in disciplining only the most egregious offenders (and are not seeking to establish a “speech code” for the legal profession), then an existing rule suffices for that purpose. Rule 8.4(4) states that it is “professional misconduct” for a lawyer to “[e]ngage in conduct that is prejudicial to the administration of justice.” Its accompanying Commentary states:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates subdivision (4) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate subdivision (4).

Rule 8.4(4) permits the bar to impose discipline on those attorneys whose egregious conduct constitutes a clear violation of civil rights laws. At the same time, however, it reduces the

chilling effect on speech by restricting disciplinary proceedings to those who act “knowingly” and by broadly exempting “[l]egitimate advocacy” from its purview.

In light of ABA Model Rule 8.4(g)’s infringement on free-speech rights, it is unsurprising that the rule has been rejected by virtually all the States that have considered its adoption. Only Vermont and New Mexico have fully adopted ABA Model Rule 8.4(g). Nearly 20 States have either completely or largely rejected the Model Rule. At the very least, Connecticut should defer consideration of the Proposed Rule until after Vermont and New Mexico have had enough experience with their new rules to see what effect those rules have on attorney conduct.

CONCLUSION

NCLA respectfully requests that the Rules Committee recommend against adoption of Proposed Rule 8.4(7) as an amendment to the Connecticut Rules.

Sincerely,

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