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November 13, 2020

Rules Committee of the Superior Court
P.O. Box 150474
Hartford, CT 06115-0474

Re: Opposition Proposed Adoption of Model Rule 8.4(g)

May It Please the Honorable Members of the Rules Committee,

I am a Connecticut attorney who practices first amendment law in our state. In this letter, I express my opposition to adoption of ABA Model Rule 8.4(g) ("model rule"). However well intentioned, it would be a mistake to adopt the rule and its commentary.

First I discuss the text. Then I explain (1) the first amendment problem; (2) the *R.A.V.* v. *St. Paul*, 505 U.S. 377 (1992) problem; (3) the vagueness problem; and (4) what other states did.

TEXT

The proposed rule would make it 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, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. . . . This paragraph does not preclude legitimate advice or advocacy consistent with these Rules."

(Emphasis added.) The ABA model rule is presently accompanied by comments. Comment 3 in particular states, in relevant part:

> "[S]uch discrimination includes **harmful verbal** . . . conduct that manifests **bias** or prejudice towards others. Harassment includes sexual harassment and derogatory or **demeaning** verbal . . . conduct. . . . The substantive law of antidiscrimination and anti-harassment statutes and case law **may** guide application of paragraph (g).

(Emphasis added.) These are read in conjunction with Comment 4, which states, in relevant part:

> 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 . . . and participating in bar association, business or **social activities** in connection with the practice of law. Lawyers may engage in conduct undertaken to **promote diversity** 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.

(Emphasis added.) A portion of Comment 5 is also relevant, which states, in relevant part:

> A trial judge's finding that peremptory challenges were exercised on a discriminatory basis **does not alone** establish a violation of paragraph (g). A lawyer does not violate paragraph (g) 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. . . .

(Emphasis added.)

THE FIRST AMENDMENT PROBLEM

The problem is that content-based speech regulations violate the first amendment. The model rule is plainly a content-based restriction on speech. It proscribes *speech* that is *harmful* or *demeaning*. That such a regulation is facially unconstitutional is not an especially close question.

> "The [f]irst [a]mendment . . . prohibits the enactment of laws 'abridging the freedom of speech.' . . . Under that [c]lause, a government . . . has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . Content-based laws—those that target speech based on its communicative content—are **presumptively unconstitutional** . . . ."

(Citations omitted; emphasis added; internal quotation marks omitted.) *Reed* v. *Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218 (2015).

The first amendment protects crude and offensive speech, and truly vituperous invective if it does not fall within a speech exception. *State* v. *Baccala*, 326 Conn. 232, 236, 163 A.3d 1 (2017) (crude and low insults concerning gender protected); *State* v. *Krijger*, 313 Conn. 434, 456, 97 A.3d 946 (2014) (crude, offensive, hurtful speech protected). There is no recognized speech exception at play here.

THE *R.A.V.* PROBLEM

The problem is that, even if the rule is otherwise permissible, the rule discriminates on viewpoint, which is illegal.

For the sake of the argument, let's assume that somehow the speech does fall within an

exception. Assuming that the regulation is otherwise permissible, the regulation would be illegal as viewpoint discrimination under *R.A.V.* v. *St. Paul*, supra, 505 U.S. 377. Even speech that falls within an exception cannot be regulated by the government in a viewpoint-based way.

The ordinance at issue in *R.A.V.* was directed at fighting words, which ordinarily are unprotected. But it only proscribed those fighting words "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380. There are strong parallels with the model rule.

Now, ordinarily fighting words are unprotected—as advocates of the rule claim this class of attorney speech may be. But that changes when the nature of the proscription is based on viewpoint. Justice Scalia noted in *R.A.V.* that the state "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id*. 392. He further explained the inequity in taking sides by silencing one side:

> "[F]ighting words' that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents."

Id. 391. And the Court's reasoning goes on to point out how this is the government improperly restricting the speech on one side of a political dispute.

> "A [s]tate might choose to prohibit only that obscenity which is the most patently offensive in its prurience—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive political messages. . . . And the [f]ederal [g]overnment can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the [f]irst [a]mendment . . . have special force when applied to the person of the President. . . . But the [f]ederal [g]overnment may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example . . . a [s]tate may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there. . . . But a [s]tate may not prohibit only that commercial advertising that depicts men in a demeaning fashion."

(Citations omitted; internal quotation marks omitted.) *Id.* 388–89.

However well-meaning the model may be, the means is illegal. The State can take sides, on the political issue underlying the rule. Absolutely. Unquestionably. But the *means* by which it takes sides cannot be by restricting speech. Although the government can *add* speech do a debate, the government cannot *silence one side*. Accordingly, even if the rule applies to speech outside of usual first amendment protections, the rule is facially unconstitutional under *R.A.V.* because of its impermissible viewpoint discrimination.

THE VAGUENESS PROBLEM

The problem is that the rule does not have a "discernable core." There is no exact measure for what a lawyer "reasonably should know" constitutes "harmful verbal . . . . conduct that manifests bias . . . ." What constitutes "harmful" verbal conduct is not self-defining. Reasonable minds may disagree. This makes the rule facially vague. And in Connecticut, test for vagueness is elevated in this context.[1] The controlling cases are *State* v. *Indrisano*, 228 Conn. 795 (1994) and *Coates* v. *Cincinnati*, 402 U.S. 611 (1971), which *Indrisano* is based on.

Coates concerned the word "annoying" in a criminal statute. The statute prohibited conduct on a sidewalk in a manner "annoying" to passersby. The U.S. Supreme Court held that the statute was facially vague because it depended upon an "unascertainable standard":

> "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning."

Coates v. *Cincinnati*, supra, 402 U.S. at 614.

In *State* v. *Indrisano*, supra, 228 Conn. 795, our Supreme Court followed the reasoning of *Coates*. In addition to the word "annoy," the Court concluded that:

> "[T]he phrase 'offensive or disorderly conduct,' is equally facially vague in the absence of some authoritative gloss that would have rendered it more specific. Conduct that is 'offensive' to or would be considered 'disorderly' by some people would not be so considered by others."

State v. *Indrisano*, supra, 228 Conn. at 818. To save the statute, the Court added an exacting judicial gloss—it narrowed how the statute could be applied, almost-but-not-quite-rewriting it.

Here, "harmful conduct" that is "verbal" in nature is similarly without a discernable core. There is no objective standard to what are harmful words. Like the term "annoy," speech that is harmful to some would not be considered harmful to others.

Accordingly, for the same reason that "annoy" and "offensive and disorderly conduct" in General Statutes § 53a-182 were held to be facially vague in *Coates* v. *Cincinnati*, supra, 402 U.S. 611 and *State* v. *Indrisano*, supra, 228 Conn. 795, the language in the model rule with its

[1]See *State* v. *Indrisano*, 228 Conn. 795, 802–804, 640 A.2d 986 (1994). ("perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply. . . ." [citations omitted; emphasis added; internal quotation marks omitted]).

commentary is facially vague.

THE LEAST SPEECH RESTRICTIVE ALTERNATIVE PROBLEM

There is no reason to believe that present law is inadequate to regulate our profession. State and federal law prohibit discrimination in providing services based on race or national origin. There is no evidence that the model rule is necessary in Connecticut.

OTHER STATES

All states except one have rejected the rule.

In December, 2016, the Texas Attorney General issued a formal opinion stating that the model rule would violate the first amendment.[2] In January, 2017, Pennsylvania's Disciplinary Board explicitly rejected the language of the model rule, adopting instead a rule limiting misconduct to violation of a statute prohibiting discrimination.[3] In April, 2017, the Montana legislature passed a joint resolution condemning the model rule as unconstitutional.[4] In September, 2017, the Nevada Bar withdrew a petition to adopt the model rule in the face of criticism of constitutionality. [5] In March, 2018, the Tennessee Attorney General issued an opinion letter stating that the model rule would be unconstitutional.[6] In August, 2018, the Arizona Supreme Court rejected the model rule after numerous comments concerning its unconstitutionality.[7] In September, 2018, the Idaho Supreme Court rejected the model rule, noting that it did not comport with Supreme Court precedent.[8] These and other states rejected the rule because it is unconstitutional.

Vermont, which did accept the rule, did so only before the aforementioned comments existed. Furthermore, in Vermont, no one filed any comments in opposition to adopting the rule.

CONCLUSION

For the foregoing reasons, the Committee should reject the proposed adoption of model rule 8.4(g).

Yours faithfully,

Mario Cerame

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[2] See https://www.texasattorneygeneral.gov/opinion/ken-paxton-opinions.
[3] See http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#8.4.
[4] See http://leg.mt.gov/bills/2017/billhtml/SJ0015.htm.
[5] C.f. https://nvcourts.gov/EventDetails.aspx?eventID=218268 (order granting withdrawal).
[6] See https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf.
[7] See https://www.clsnet.org/document.doc?id=1164.
[8] See https://www.clsnet.org/document.doc?id=1169.