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

To: Del Ciampo, Joseph
Subject: RE: Comments opposing Proposed Rule of Professional Conduct 8.4(7)

From: Steve Fitschen <sfitschen@nationallegalfoundation.org>
Sent: Friday, November 6, 2020 1:49 PM
To: Del Ciampo, Joseph <Joseph.DelCiampo@jud.ct.gov>
Subject: Comments opposing Proposed Rule of Professional Conduct 8.4(7)

Dear Mr. DelCiampo:

Attached please find the National Legal Foundation's comments opposing Proposed Rule of Professional Conduct 8.4(7).

Sincerely,

National Legal FOUNDATION

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November 6, 2020

The Honorable Andrew J. McDonald, Chair
The Honorable Holly Abery-Wetstone
The Honorable Barbara N. Bellis
The Honorable Susan Quinn Cobb
The Honorable John B. Farley
The Honorable Alex V. Hernandez
The Honorable Tammy T. Nguyen-O'Dowd
The Honorable Sheila M. Prats
The Honorable Anthony D. Truglia, Jr.
Rules Committee of the Superior Court

Attn: Joseph DelCiampo, Esq.

By email submission (joseph.DelCiampo@jud.ct.gov)

Re: Comment Letter Opposing Proposed Rule of Professional Conduct 8.4(7)

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

We file this comment letter pursuant to the Superior Court Rules Committee's request for public comment regarding the proposal to add proposed Rule 8.4(7) to the Connecticut Rules of Professional Conduct. The National Legal Foundation (NLF) opposes adoption of the proposed rule as drafted and the proposed comment because the proposed rule substantially follows the deeply flawed and much criticized ABA Model Rule 8.4(g) ("model rule").

NLF is a public interest law firm dedicated to the defense of First Amendment liberties. We write on behalf of ourselves and donors and supporters, including those in Connecticut. The NLF has had a significant federal and state court practice since 1985, including representing numerous parties and *amici* before the Supreme Court of the United States and the supreme courts of several states.

Deficiencies of ABA Model Rule 8.4(g) from Which the Connecticut Proposal Is Derived

We agree with much of what the Christian Legal Society (CLS) expressed in its comments, submitted to the committee on November 2, 2020. Those comments note the substantial body of scholarly and professional criticism focusing on the model rule's constitutional deficiencies. CLS also ably summarized the negative track record of the model rule to date, its potential for

censoring speech and debate that undergird a free society,[1] and its difficulty gaining traction because of its constitutional infirmities. Those infirmities are replicated in the proposed rule.

In considering the merits of Connecticut's proposed rule, the turbulence the model rule has encountered on its journey thus far is telling. The model rule is deeply flawed and is troublesome on multiple fronts.

The model rule has been widely criticized by scholars and practitioners.

From the outset, the constitutional deficiencies of the model rule were widely discussed and documented in a body of scholarly and professional criticism. For a partial list, see Professor Josh Blackman's article, "Reply: A Pause for State Courts Considering Model Rule 8.4(g)," in the *Georgetown Journal of Legal Ethics*, vol. 30 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888204; the late Professor Ronald Rotunda's articles, "The ABA Overrules the First Amendment: The Legal Trade Ass'n Adopts a Rule to Regulate Lawyers' Speech," (https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418, and *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought,* http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf (Oct. 6, 2016); and Professor Eugene Volokh's article, "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities," https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.601be9a57646.

Regarding the model rule, Professor Rotunda and Professor John S. Dzienkowski wrote in the 2017-2018 edition of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, "The ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment." ("§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech" & "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" in "§ 8.4-2 Categories of Disciplinable Conduct.")In the interim, nothing has changed to render the model rule less constitutionally infirm. This is catalogued by Professor Michael McGinniss in *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019), https://poseidon01.ssrn.com/delivery.php?ID=543090115005102089076119108088093031000088051011052055098092024112029117031087097022038102053054023043125069124122073019126095105039082035013126029089028074014108116038055022078090011125116095069115001092015020065116092065122004120028097068025008064022&EXT=pdf,

and the Alaska Attorney General in his letter analyzing the model rule for the Board of Governors of the Alaska Bar Association, http://www.law.state.ak.us/pdf/press/190809-Letter.pdf.

Andrew Halaby and Brianna Long, who are Arizona practitioners, thoroughly examined ABA Model Rule 8.4(g) and concluded that it "is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of

[1] As CLS notes, "we live at a time when many people, including lawyers, are increasingly willing to suppress the free speech of those with whom they disagree." (CLS Comment Letter, pg. 4 of 40.)

the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities." (*New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201, 257 (2017).) They recommend that "jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all." And they conclude that "the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected." (*Id.* at 204.)

The model rule fails to account for recent decisions by the U.S. Supreme Court.

Since the ABA's adoption of the model rule, the United States Supreme Court has issued two major free speech decisions that further demonstrate the model rule's unconstitutionality. Under the Court's analysis in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), the model rule is an unconstitutional, *content*-based restriction on lawyers' speech. The *NIFLA* Court held that state restrictions on "professional speech" are presumptively unconstitutional and subject to strict scrutiny. Under the Court's analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), the model rule is an unconstitutional, *viewpoint*-based restriction on lawyers' speech that cannot survive strict scrutiny. To the extent that the proposed rule, like the model rule, allows exceptions to the race discrimination prohibition by allowing quotas, affirmative action, equity and the like, but does not for SOGI discrimination based on sincerely held religious grounds, it also violates constitutional norms.

The model rule has not been adopted by most of the states that have considered it.

Official bodies in Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, New Hampshire, Nevada, North Dakota, South Carolina, South Dakota, Tennessee, and Texas have weighed the model rule and found it wanting. Only Vermont and New Mexico have adopted the rule.

The ABA's recent efforts to assuage concern about the model rule are not persuasive.

The ABA's recent Formal Opinion 493 ("Model Rule 8.4(g): Purpose, Scope, and Application" (https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf) endeavors to allay concern about whether the model rule is fair and passes constitutional muster. It fails on both counts. As Professor Blackman notes, "The [Committee] . . . cites recent articles which rejected any possible First Amendment problems with Rule 8.4(g). But the Committee did not cite any contrary authority, including the opinions of several attorneys general. . . . The Committee also does not discuss recent precedents, such as *NIFLA* . . .], which cast serious doubt on ABA Model Rule 8.4(g). That case held that the government lacks an 'unfettered power' to regulate the speech of 'lawyers,' simply because they provide 'personalized services' after receiving a 'professional license.' The failure to grapple with *NIFLA* undermines the entire constitutional law analysis [of the formal opinion]." https://reason.com/2020/07/15/aba-issues-formal-opinion-on-purpose-scope-and-application-of-aba-model-rule-8-4g/.

Concerns with Respect to Proposed Rule 8.4(7)

The current version of the proposed rule is virtually identical to the ABA's model rule. Thus, it presents many of the same problems as the ABA's Model Rule 8.4(g). The concerns with the

model rule, identified by academics, practitioners, and other states, apply to this proposed rule. The proposed rule will have a chilling effect, in that a lawyer who exercises her constitutionally protected rights to express a socially unpopular viewpoint will be more susceptible to unfounded charges (and associated time and effort to defend herself) of violating the rule, simply because others are offended by the message conveyed. As we discuss later, in today's social climate it is not difficult to imagine that those who are easily offended would use the rule to attack and chill Connecticut lawyers' constitutionally protected speech and conduct. The mere threat of an ethics investigation would have a chilling effect, regardless of whether exoneration followed.

Concerns with Respect to the Proposed Official Commentary to Proposed Rule 8.4(7)

The proposed Official Commentary that accompanies the proposed rule is replete with problems of overbreadth and ambiguity that do not assuage concerns that the proposed rule will be used to harass Connecticut lawyers who exercise their constitutionally protected speech and conduct.

1. The comment defines "discrimination" to include "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 motive for the action." What exactly is described here? Is it enough to run afoul of the proposed rule by failing to anticipate that someone else might interpret an ambiguous and subjectively innocent action to be "harmful" or "directed at [someone in] . . . one or more of the protected categories?" What would be required to demonstrate that conduct "may [have] . . . a legitimate nondiscriminatory motive?" This provision appears to create a presumption of discriminatory motive for any conduct that some aggrieved party contests under this proposed rule, inviting litigation.
2. The proposed comment's definition of "harassment" is vague and overbroad: "includes severe or pervasive derogatory or demeaning verbal or physical conduct." It is impossible to draw an objectively discernible line around these highly subjective terms. For example, who determines whether a behavior or utterance is "demeaning?" What is demeaning to one person might well be incisive for another. What is "severe" to a particularly sensitive person might seem quite ordinary to another.
3. The proposed comment defines "conduct related to the practice of law" to include, *inter alia*, "interacting with witnesses, coworkers, court personnel, lawyers **and others**, while engaged in the practice of law." (Emphasis added.) This definition is circular. The proposed comment also uses the same circular definition when it includes "or events in connection with the practice of law." The conduct covered by the proposed rule, as explained in the proposed changes to the Official Commentary, remains overbroad, vague, and constitutionally infirm.
4. The proposed comment further provides that "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." This aspirational language in the Official Commentary does not make it so and would be more meaningful and protective if included within the text of the proposed rule itself.

We recommend that the Official Commentary to the current rule be retained: "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)."

The Threat to Connecticut Lawyers' Constitutional Rights

Our concern about these proposed changes is not far-fetched. The desire of some to punish and drum out of the public conversation any who disagree with them is well documented. Consider a case in the United States District Court for the Middle District of Alabama, *Parker v. Judicial Inquiry Comm'n of the State of Ala.,* No. 2:16-CV-442-WKW, 2017 WL 3820958 (M.D. Ala., Aug. 31, 2017), and 295 F.Supp.3d 1292 (M.D. Ala. 2018). In that case, a sitting state Supreme Court justice running for reelection "expressed his personal views on a number of highly contentious legal and political issues that his constituents, and the country at large, are currently debating." *Id.*, 2017 WL 3820958 at *3. The Southern Poverty Law Center (SPLC) was offended by the justice's criticism of the majority opinion of the United States Supreme Court decision in *Obergefell v. Hodges,* 576 U.S. 644 (2015)—an opinion also strongly criticized by the four dissenting justices—and filed an ethics complaint against the justice for his "'assault [on] the authority and integrity of the federal judiciary,'" *id.*, which prompted an ethics investigation and ensuing litigation. The federal district court judge hearing the case "recognized the First Amendment issues implicated by SPLC's attempt to use a state agency to suppress speech . . . ." *Id.* (internal quotation and citation omitted).

In Alaska, the Anchorage Equal Rights Commission (AERC) filed a complaint against an Anchorage law firm alleging that the firm violated a municipal nondiscrimination law when it represented a religiously affiliated, private, nonprofit shelter for homeless women, many of whom had been abused by men. The firm represented the shelter in a proceeding arising from a discrimination complaint filed with the AERC alleging that the shelter had refused admission to a biological male who identified as female. The shelter denied the complaint, explaining that it had denied shelter to the individual because of, among other things, its policy against admitting persons who were inebriated, but also acknowledged its policy to refuse admission of biological men in its all-women facility. The law firm responded to an unsolicited request for a media interview. When the interview was published providing the shelter's version of the facts, the AERC brought a discrimination claim against the law firm alleging it had published a discriminatory policy. The AERC complaint was eventually dismissed, but only after several months of legal proceedings. *See Basler v. Downtown Hope Ctr.*, No. 18-167 (AERC May 15, 2018).

The proposed rule will encourage attacks on Connecticut lawyers' First Amendment rights similar to the attacks on Alabama Associate Justice Parker and the Alaska law firm. The proposed rule essentially replicates the model rule, which the ABA expressly stated was to put lawyers on one side of a cultural movement that is widely debated. The ABA's position gives the appearance of seeking to punish lawyers who take a principled position that differs from the ABA's. Connecticut should resist efforts to convince it to follow suit. Even if this cultural movement is justified, the proposed rule would undermine basic fairness and constitutionally protected, sincerely held religious beliefs and ethical standards.

Conclusion

We support the formulation of a black-letter ethics rule addressing inappropriate, invidious discrimination. However, for the reasons detailed above, we encourage the Court not to adopt the proposed rule and its comments as currently drafted.

Christians believe that all people are created equal by God, and they also believe that God has set moral absolutes for behavior for us, including that life is sacred from conception to natural death, that sexual intercourse is only ethical when between a man and woman married to each other, and that violating God's moral norms does not bring true liberty either to an individual or to a culture. Social science amply supports the wisdom of these religious principles.

The text of the proposed rule is susceptible of being used to attack those who sincerely hold religiously based views on, and object to, what they understand to be sexual libertinism. This is no idle threat, as the desire of some in the LGBTQ movement is quite evident to punish and drum out of the public conversation any who disagree with them and who express their religious beliefs that homosexual and transgender conduct is immoral and deleterious to our civil society, as well as to the individuals involved. Connecticut should not contribute to providing a platform for such actions by adopting the proposed rule. For these reasons, the Court should not adopt Proposed Rule 8.4(7) and the changes to the Official Commentary.

Thank you for the opportunity to provide these comments and for your consideration of them.

Sincerely,

Steven W. Fitschen
President, The National Legal Foundation