CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

May 29, 2019

The Honorable Robert J. Lynn, Chief Justice
The Honorable Gary E. Hicks, Senior Associate Justice
The Honorable James P. Bassett, Associate Justice
The Honorable Anna Barbara Hantz Marconi, Associate Justice
The Honorable Patrick E. Donovan, Associate Justice
The Supreme Court of New Hampshire
One Charles Doe Drive
Concord, NH 03301
Attn: Eileen Fox, Clerk of Court
By email: rulescomment@courts.state.nh.us

Re: Christian Legal Society Comment Letter Regarding Amending Rule of Professional Conduct 8.4

Dear Chief Justice Lynn, Justice Hicks, Justice Bassett, Justice Hantz Marconi, and Justice Donovan:

This comment letter is filed pursuant to this Court's Order dated May 17, 2019, announcing a public comment period on a proposal to amend Rule of Professional Conduct 8.4.

We are grateful that the Court has abandoned earlier proposals from the Advisory Committee on Rules that essentially would have adopted the widely-criticized ABA Model Rule 8.4(g). As the Court likely is aware, a number of scholars have accurately characterized ABA Model Rule 8.4(g) as a speech code for lawyers. For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has summarized his view that ABA Model Rule 8.4(g) is a speech code that will have a serious impact on attorneys' speech in a short video for the Federalist Society.[1]

Likewise, the late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics, early warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.[2] Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of *Legal Ethics: The Lawyer's Deskbook on Professional*

[1] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA. Professor Volokh expanded on the many problems of ABA Model Rule 8.4(g) in a debate at the Federalist Society National Student Symposium. *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=b074xW5kvB8&t=50s.

[2] Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf. Professor Rotunda and Texas Attorney General Ken Paxton debated two proponents of Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention. *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, The Federalist Society (Nov. 20, 2017), https://www.youtube.com/watch?v=V6rDPjqBcQg.

Responsibility, "[t]he ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment."[3]

Dean Michael S. McGinniss, who teaches professional responsibility, recently "examine[d] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."[4] Professor Josh Blackman has explained that "Rule 8.4(g) is unprecedented, as it extends a disciplinary committee's jurisdiction to conduct merely 'related to the practice of law,' with only the most tenuous connection to representation of clients, a lawyer's fitness, or the administration of justice."[5]

In a thoughtful examination of the rule's legislative history, practitioners Andrew Halaby and Brianna Long concluded that ABA Model Rule 8.4(g) "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 the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities."[6] 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."[7] 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."[8]

Scholarly criticisms of the unconstitutionality of ABA Model Rule 8.4(g) have been reinforced by two recent Supreme Court decisions. First, under the Court's analysis in *National Institute of Family and Life Advocates ("NIFLA") v. Becerra*, 138 S. Ct. 2361 (2018), Model Rule 8.4(g) 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. Second, under the Court's analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), ABA Model Rule 8.4(g) is an unconstitutional *viewpoint*-based restriction on lawyers' speech that cannot survive the strict scrutiny triggered by viewpoint discrimination.

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[3] Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017 [hereinafter "Rotunda & Dzienkowski"], "§ 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."

[4] 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, 173 (2019).

[5] Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 241, 243 (2017).

[6] Andrew F. Halaby & Brianna L. Long, *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) (a thorough examination of the problematic process by which the ABA adopted Model Rule 8.4(g)).

[7] *Id.*

[8] *Id.* at 204.

Recently the ABA Section of Litigation published an article confirming that several section members see the Court's *NIFLA* decision as raising serious concerns about the overall constitutionality of ABA Model Rule 8.4(g)[9]:

> Model Rule 8.4(g) "is intended to combat discrimination and harassment and to ensure equal treatment under the law," notes Cassandra Burke Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section's Civil Rights Litigation Committee. While it serves important goals, "the biggest question about Rule 8.4(g) has been whether it unconstitutionally infringes on lawyers' speech rights—and after the Court's decision in *Becerra*, it increasingly looks like the answer is yes," Robertson concludes.

ABA Model Rule 8.4(g) would inevitably chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues. Because lawyers often are the spokespersons for political, social, and cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected because it constitutes a serious threat to maintaining a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, lawyers can ill-afford to wager their licenses on a rule that can be used to punish their speech.

The Court's proposal on May 17, 2019, to amend Professional Rule of Conduct 8.4 ["the May 2019 Proposal"] is not ABA Model Rule 8.4(g). A comparison of the two reveals that they are substantively different in significant ways, including:

1. ABA Model Rule 8.4(g) regulates conduct "related to the practice of law" and, in its Comment [3], defines "conduct" to include "speech." Specifically, it defines "discrimination" to "include[] harmful *verbal* or physical conduct that manifests bias or prejudice towards others," and "[h]arassment" to "include[] . . . derogatory or demeaning *verbal* or physical conduct." (Emphasis supplied.) "Verbal conduct" is, of course, a euphemism for speech.

By contrast, the May 2019 Proposal does not define "conduct" to include "speech." Instead, its text makes clear that "conduct" does not include "speech" when it states that it does not "preclude a lawyer from engaging in *conduct or speech* or from maintaining associations that

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[9] C. Thea Pitzen, *First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g) Constitutional?*, ABA Section of Litigation Top Story, Apr. 3, 2019, https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond/.

are constitutionally protected." (Emphasis supplied.) The use of the disjunctive between "conduct" and "speech" indicates that "conduct" and "speech" are separate. Unlike ABA Model Rule 8.4(g), in the May 2019 Proposal, "conduct" does not include "speech."

2. The May 2019 Proposal is also substantively different from ABA Model Rule 8.4(g) because it requires that "the lawyer's primary purpose is to embarrass, harass or burden another person, including conduct primarily motivated by animus." This is a significant distinction because ABA Model Rule 8.4(g) regulates *any* conduct "related to the practice of law" -- including "verbal conduct" -- that the lawyer "knows or reasonably should know is harassment or discrimination." Unlike ABA Model Rule 8.4(g), which does not require that a lawyer have actual intent to harass or discriminate, the May 2019 Proposal requires actual intent. It regulates only conduct that has the "primary purpose to embarrass, harass, or burden another person, including conduct primarily motivated by animus." Its use of a negligence standard makes ABA Model Rule 8.4(g) a sword of Damocles hanging over every lawyer's head, ready to drop if a single word is misinterpreted by any listener.

3. The May 2019 Proposal differs structurally from ABA Model Rule 8.4(g). The May 2019 Proposal protects all persons from conduct for which "the lawyer's primary purpose is to embarrass, harass or burden another person." This protection includes, but is not limited to, protection for ten categories of persons. By contrast, ABA Model Rule 8.4(g) protects a person *only* if he or she belongs to one of twelve categories.

Indeed, because the overall prohibition on "conduct for which the lawyer's primary purpose is to embarrass, harass or burden another person" necessarily subsumes the descriptive phrase "including conduct primarily motivated by animus against the other person based upon [ten enumerated categories]," we recommend that the descriptive phrase be removed from the black letter rule as redundant and moved to the comment section. A period would thus be placed after " . . . burden another person."

The May 2019 Proposal cannot be confused with ABA Model Rule 8.4(g) because it: 1) does not regulate speech; 2) protects all persons rather than just certain categories of persons; and 3) requires a specific, primary intent.

While a significantly better option than ABA Model Rule 8.4(g), the May 2019 Proposal nevertheless raises concerns, including:

1. The May 2019 Proposal would cover all conduct "while acting as a lawyer *in any context*." We would urge the Court to retain current Rule 4.4's more appropriate and manageable scope of "[i]n representing a client." The more limited scope of "in representing a client" is frequently found in analogous rules of professional conduct in other states. Otherwise virtually everything a lawyer does can be characterized as "conduct related to the practice of law" or

"conduct while acting as a lawyer in any context." Professor Rotunda and Professor Dzienkowski have noted that similarly broad language in ABA Model Rule 8.4(g) "applies to lawyers chatting around the water cooler, participating on a CLE panel, or hiring a law firm messenger."[10]

2. Like ABA Model Rule 8.4(g), the May 2019 Proposal could limit New Hampshire lawyers' ability to accept, decline, or withdraw from a representation. When the proponents of ABA Rule 8.4(g) claim that it will not affect a lawyer's ability to refuse to represent a client, they point to its language that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16." But when it adopted ABA Model Rule 8.4(g), the Vermont Supreme Court explained in its accompanying Comment [4] that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." The Vermont Supreme Court further explained that, *under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g).*"[11]

Professional ethics experts agree that this is a genuine concern with ABA Model Rule 8.4(g) despite its inclusion of reassuring language. As Professor Rotunda and Professor Dzienkowski explain, Rule 1.16 actually "deals with when a lawyer must or may *reject* a client or *withdraw* from representation."[12] Rule 1.16 does not address *accepting* clients. Professor Michael McGinniss, who teaches professional responsibility, agrees that "[d]espite its ostensible nod of non-limitation, Model Rule 8.4(g) offers lawyers no actual protection against charges of 'discrimination' based on their *discretionary* decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer."[13] Because Model Rule 1.16 "addresses only when lawyers *must* decline representation, or when they may or must *withdraw* from representation" but not when they "are *permitted* to decline client representation," Model Rule 8.4(g) seems to only allow what was already required, not declinations that are discretionary. Professor McGinniss warns that "if state bar authorities consider a lawyer's declining representation . . . as 'manifest[ing] bias or prejudice,' they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g)."[14]

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[10] Rotunda & Dzienkowski, *supra* note 3, in "§ 8.4-2(j)-1. Introduction."
[11] Vermont Supreme Court, *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, July 14, 2017, at 3, https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf (emphasis supplied).
[12] Rotunda & Dzienkowski, *supra* note 3, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis supplied by the authors).
[13] McGinniss, *supra* note 4, at 207-209.
[14] *Id.* at 207-208 & n.146 (citing Professor Stephen Gillers as, in Professor McGinniss' words, "conceding that the United States Conference of Catholic Bishops' concerns about religious lawyers' loss of freedom in client selection under Model Rule 8.4(g) are well founded, though not a basis for objecting to the rule") (citing Stephen Gillers, *A*

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that "[a] lawyer is under no obligation to accept every person who may wish to become a client *unless the refusal to accept a person amounts to unlawful discrimination*."[15] The facts before the Committee were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of "unlawful discrimination" for purposes of New York's Rule 8.4(g) a question of law beyond its jurisdiction, the Committee declined to "opine on whether a lawyer's refusal to represent a prospective client in a suit against the lawyer's own religious institution constitutes 'unlawful discrimination'" for purposes of New York's Rule 8.4(g).[16]

To be completely clear that lawyers retain their traditional discretion to decide when to accept, decline, or withdraw from a representation, we recommend that the words "consistent with other Rules of Professional Conduct" be deleted.

3. The last clause of the May 2019 proposal needs to be strengthened in order to clarify its protection of lawyers' speech, association, and exercise of religion. To that end, the clause "nor does it preclude a lawyer from engaging in conduct or speech . . ." should be replaced with ""nor shall it be used to discipline a lawyer for engaging in conduct or speech or for maintaining associations that are constitutionally protected, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client."

With these changes, the proposal would read as follows:

[(g) in representing a client, engage in conduct for which the lawyer's primary purpose is to embarrass, harass or burden another person. This paragraph shall not limit the ability of the lawyer to accept, decline, or withdraw from representation, nor shall it be used to discipline a lawyer for engaging in conduct or speech or for maintaining associations that are constitutionally protected, including advocacy on matters of public policy, the exercise of religion, or a lawyer's right to advocate for a client.]

[Comment

By requiring that the proscribed action have the primary purpose or primary motive of embarrassing, harassing, or burdening another person, which includes action motivated by animus against the other person based upon the other person's race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender, the rule

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Rule to Forbid Bias and Harassment in Law Practice: A guide for State Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 195, 231-232 (2017)).

[15] N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).

[16] *Id.* New York's Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is significantly narrower.

is intended to cover only deliberate conduct that is intended to cause the described result. The rule does not prohibit conduct that lacks such deliberate motivation, even if the conduct incidentally produces, or has the effect or impact of producing, the described result.]"

Conclusion

For the reasons discussed above, we believe that the May 2019 Proposal is a material improvement over previous proposals upon which the Court or the Advisory Committee on Rules has sought public comment. We would recommend certain modifications to the May 2019 Proposal.

Christian Legal Society thanks the Court for holding this public comment period and considering its comments.

Respectfully submitted,

/s/ David Nammo

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