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July 13, 2018

Office of the Secretary
The Disciplinary Board of the Supreme Court of Pennsylvania
601 Commonwealth Avenue
Suite 5600
PO Box 62625
Harrisburg, PA 17106-2625
By email: Dboard.comments@pacourts.us

Re: Proposed Amendments to the Pennsylvania Rules of Professional Conduct Regarding Misconduct

To the Secretary:

On May 19, 2018, the Disciplinary Board of the Supreme Court of Pennsylvania invited comments on the proposed amendment to Pennsylvania Rule of Professional Conduct ("'RPC"') 8.4 relating to misconduct. Unlike Vermont, which adopted Model Rule 8.4(g), the Board did not recommend adopting the rule "wholesale." Why? The Board recognized that, as drafted, Model Rule 8.4(g) is "susceptible to challenges related to constitutional rights of lawyers, such as freedom of speech, association and religion." Therefore, the Board proposed the adoption of ABA Model Rule 8.4(g) with several modifications. These changes are a step in the right direction, but do not cure its constitutional faults.

This letter is based on arguments I advanced in *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law*," 30 GEORGETOWN JOURNAL OF LEGAL ETHICS 241 (2017). For your convenience, I have attached a copy of the article, which can also be downloaded at https://ssrn.com/abstract=2888204. This article has been useful to deliberations in other states. For example, the Tennessee Bar Association adopted several of my proposals to address the First Amendment problems raised by a modified version of Rule 8.4(g).[1] Ultimately, the Tennessee Supreme Court rejected the rule altogether.[2] I hope the comments in this letter are helpful to the Board.

[1] Mindy Rattan, Tennessee Again Rejects Anti-Discrimination Ethics Rule, Bloomberg BNA (May 1, 2018), https://www.bna.com/tennessee-again-rejects-n57982091727/ ("In response to the comments, particularly those from Blackman, the board and Tennessee bar proposed modifications to the revised Rule 8.4(g) on the day the public comment period closed. Those revisions focused on trying to avoid confusion and clarify the legitimate advocacy exception and that the rule does not apply to conduct protected by the First Amendment.").
[2] *Id.*

"In The Practice of Law"

The Board recognized that the "broad scope of the language 'conduct related to the practice of law'" in the Model Rule could extend to "lawyers 'participating in bar association, business or social activities in connection with the practice of law.'" Specifically, the Board expressed "grave concerns that adoption of such language would unconstitutionally chill lawyers' speech in forums disconnected from the provision of legal services." Therefore, the Board proposed an alternative: "'in the practice of law' as a more narrowly-tailored scope of prohibited conduct." The Board "conclude[d] that private activities are not intended to be covered by this proposed rule amendment, since to do so would increase the likelihood of infringing on constitutional rights of lawyers."

This modification is a positive development. By narrowing the scope of Rule 8.4(g), the Board has expressly excluded speech that may arise in "conduct related to the practice of law," such as "social activities." Yet, this modification still raises constitutional concerns. And these concerns were highlighted by the Supreme Court's recent decision in *National Institute of Family and Life Advocates v. Becerra*. 138 S.Ct. 2361 (June 26, 2018) (*NIFLA*). *NIFLA* considered whether California could require certain medical facilities (both licensed and unlicensed) to display messages concerning the availability of public funding for abortions.

In recent years, several circuit courts of appeals have strictly regulated speech associated with a regulated profession—that is "professional speech"—when "it involves personalized services and requires a professional license from the State." *Id.* at 2375. However, such a regime, the Supreme Court explained, "gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id.* The Court expressed caution with applying laxer scrutiny to so-called "professional speech," as that standard "would cover a wide array of individuals—doctors, *lawyers*, nurses, physical therapists, truck drivers, bartenders, barbers, and many others." *Id.* at 2375 (emphasis added). Stated simply, the government lacks an "unfettered power" to regulate the speech of "lawyers," simply because they provide "personalize services" after receiving a "professional license."

The Court identified two narrow exceptions to this rule, neither of which turned on the fact that professionals were speaking." *Id.* at 2372. In the first circumstance, the Court has "applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* at 2372 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 651 (1985)). This first condition is not relevant to the Proposed Amendments: Speech uttered "in the practice of law" does not "require professionals to disclose factual, noncontroversial information."

Second, the Court noted that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372. This standard is directly relevant to the proposed rule: the state can "regulate professional conduct . . . that . . . incidentally involves speech," but it cannot regulate speech that incidentally involves professional conduct. The Proposed Amendment, by its own terms, straddles that line. It applies to *both* "conduct" "in the practice of law" *and* "words" (that is speech|) "in the practice of law." If the Board struck the phrase "words," and focused solely on "conduct" "in the practice of law," the Proposed Rule would potentially fall within the second exception identified in *NIFLA*. But as drafted, the regulation of "words" would be subject to traditional strict scrutiny.

Given that this Proposed Rule is subject to strict scrutiny, members of the Bar would be faced with a notoriously vague standard: Specifically, what "words" are "in the practice of law"? The Bulletin explains, "Pennsylvania RPC and the Pennsylvania Rules of Disciplinary Enforcement do not define what constitutes the practice of law." Rather, "the Supreme Court of Pennsylvania has explained what specific activities constitute the practice of law on a case-by-case basis." Relying on a "case-by-case" regime is the very sort of ad hoc standard that cannot meet strict scrutiny under the First Amendment.

In light of *NIFLA*, a content-based restriction applied to "words" "in the practice of law" cannot satisfy the rigorous requirements of strict scrutiny. This rule could possibly be cured by limiting its reach to "conduct in the practice of law" (that is, excluding mere "words"). A more precise fix would limit the Rule's reach to "conduct in the representation of a client." This approach, which has been adopted in other jurisdictions, would further shrink the nexus between the conduct at issue, and the scope of the Bar's jurisdiction. Both of these standards would "regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 138 S.Ct. at 2372. They would not regulate speech, that incidentally involves "professional conduct."

Bias, Prejudice, and Harassment

The proposed rule does not define the terms *bias*, *prejudice*, and *harassment*. Indeed, it defines those terms by repeating those terms: "in the practice of law, by words or conduct, knowingly manifest *bias* or *prejudice*, or engage in *harassment*, including but not limited to *bias*, *prejudice*, or *harassment*." There is no way for a member of the Bar, to know, in advance, whether his or her speech manifests "bias," "prejudice," or "harassment," since those terms are not defined in the rule itself. Proposed comment three offers "examples of manifestations of bias or prejudice," but notes that the list is not comprehensive. (Indeed, several of the items listed, such as "demeaning nicknames" and "attempted humor based on stereotypes" would be expressly protected by the First Amendment.) Proposed comment four defines *harassment* as "verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." The comment provides no guidance of what renders "[v]erbal" "conduct," that is speech, "denigrat[ing]" or "show[ing] hostility or aversion." Given that this rule, as interpreted by the comments, is regulating not only "professional conduct," but also "words," this content-based restriction would fail the void-for-vagueness standard.

"*Knowingly* Manifest Bias or Prejudice"

ABA Model Rule 8.4(g) applies to those who "engage in conduct that the lawyer knows or reasonably should know is harassment." The proposed Amendment applies a more stringent *mens rea* standard: one who "*knowingly* manifest bias or prejudice, or engage in harassment." This is a positive development, and would exclude situations where the subjective feelings of a listener may result in an ethics violation. The misconduct must be knowing, and deliberate. However, this change does not cure the Proposed Amendment's other constitutional faults discussed *supra*.

It would be my pleasure to provide any further insights to inform your deliberations. I apologize for filing this letter out of time. I only became aware of the Bulletin in the past week.

Sincerely,

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