ALAN WILSON
ATTORNEY GENERAL

May 1, 2017

The Honorable John R. McCravy III, Member
South Carolina House of Representatives, District No. 13
420-A Blatt Building
Columbia, SC 29201

Dear Representative McCravy:

You seek an opinion regarding ABA Model Rule 8.4(g) and whether it should be adopted and enforced in South Carolina. By way of background, you state the following:

> [t]he South Carolina Supreme Court has decided to solicit public comment as to whether an amended version of ABA Model Rule 8.4 should be adopted and enforced in South Carolina. The proposed amended rule would govern the conduct of members of the South Carolina Bar, many of whom are my constituents. As the Court is open for public comment through March 29, time is of the essence.
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> It is my belief that this rule infringes upon the constitutional rights of attorneys in South Carolina, is overly vague and ambiguous, and may not be necessary. In fact, the Attorney General of Texas has issued an opinion on the same rule stating the following:
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> - the proposed Rule infringes upon the free speech rights of members of the State Bar,
> - it infringes upon an attorney's right to freedom of association,
> - the proposed Rule infringes upon an attorney's First Amendment right to free exercise of religion,
> - the proposed Rule attempts to prohibit constitutionally protected activities
> - the proposed Rule is void for vagueness;
> - the proposed Rule is not necessary insofar as the current rules of disciplinary conduct sufficiently address attorney misconduct to prohibit unlawful discrimination.
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> The essential legal questions for your office to address are (a) whether the proposed rule infringes upon the free speech rights of members of the State Bar; (b) whether it infringes upon an attorney's right to freedom of association; (c) whether it infringes upon an attorney's First Amendment right to free exercise of religion; (d) whether it attempts to prohibit constitutionally protected activities; (e) whether it is void for

> vagueness; and (f) whether the current rules of professional conduct sufficiently address attorney misconduct.

Law/Analysis

Model Rule 8.4(g) was approved by the American Bar Association last year and reads as follows:

> it is professional misconduct for a lawyer to . . . (g) 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 limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The ABA added pertinent Comments to the Rule which state:

> (3) Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).
>
> (4) Conduct related to the practice of law includes investigating 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 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.

Turning now to the analysis of Model Rule 8.4(g), we first note that our Supreme Court has decided a case involving application of the First Amendment to a lawyer disciplinary Rule. See In re Anonymous Member of South Carolina Bar, 392 S.C. 328, 709 S.E.2d 633 (2011). Anonymous resolved a First Amendment challenge to the lawyers' "civility oath" in favor of the constitutionality of that oath. There, the Court found that the requirement that all lawyers pledge to opposing parties and their counsel ". . . fairness, integrity and civility, not only in court, but also in all written and oral communications. . . ." was not unconstitutionally vague nor overbroad. 192 S.C. at 331, 729 S.E.2d at 637.

The Court in Anonymous first observed that

> [t]he United States Supreme Court has noted that lawyers are not entitled to the same First Amendment protections as laypeople. See In re Snyder, 472 U.S. 634, 644-45, 105 S.Ct. 2874, 2881, 86 L.Ed. 20504 (1985). Moreover, attorneys' "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." In re Sawyer, 360 U.S. 622, 646-47, 79 S.Ct. 1388, 3 L.Ed.2d 1473 (1959) (Stewart, J. concurring). "Even outside the courtroom ... lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen might not be." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071, 111 S.Ct. 2720, 2743, 115 L.Ed.2d 888 (1991).

With that background for analysis, as to the vagueness claim, the Court cited Grievance Administrator v. Fieger, 719 N.W.2d 123 (Mich. 2006), which had upheld Michigan's civility oath. Based upon the facts before the Anonymous Court -- the attorney in question had sent Attorney Doe a "Drug Dealer" e-mail accusing Doe's daughter of buying drugs from a "crack head" -- the Court thus stated:

> [I]n this case there is no question that even a casual reading of the attorney's oath would put a person on notice that the type of language used in Respondent's "Drug Dealer" e-mail violates the civility clause. Casting aspersions on an opposing counsel's offspring and questioning the manner in which an opposing attorney was rearing his or her own children does not even near the margins of the civility clause. While no one argued it in this case, it could be argued that the language used by the Respondent in the "Drug Dealer" e-mail constituted fighting words. Moreover, a person of common intelligence does not have to guess at the meaning of the civility oath. We hold, as the Court held in Fieger, that the civility oath is not unconstitutionally vague.

392 S.C. at 335-36, 709 S.E.2d at 637.

With respect the overbreadth doctrine and its relation to the First Amendment, the Anonymous Court noted that overbreadth is a departure from the usual rule that a party may facially challenge a law only as it relates to him, but instead "'is an exception to the standards for facial challenges.'" (quoting In re Amir, 371 S.C. 380, 384, 639 S.E.2d 144, 146 (2006)). The Court explained the rules governing overbreadth are as follow:

> [u]nder the overbreadth doctrine, "the party challenging a statute simply must demonstrate that the statute could cause someone else – anyone else – to refrain from constitutionally protected expression." Id. (citation omitted). The overbreadth doctrine has "been implemented out of concern that the threat of enforcement of an overly broad law may deter or "chill' constitutionally protected speech – especially when the overly broad law imposes criminal sanctions." Id. at 384-85, 639 S.E.2d at 146 (citation omitted). The overbreadth doctrine:

> . . . permits a court to wholly invalidate a statute only when the terms are so broad that they punish a substantial amount of protected free speech in relation to the statute's otherwise plainly legitimate sweep – until and unless a limiting construction or partial invalidation narrows it so as to remove the threat or deterrence to constitutionally protection.

> Id. at 385, 639 S.E.2d at 146-47 (citation omitted).

392 S.C. at 336, 709 S.E.2d at 637-38.

Next, Anonymous set forth the First Amendment standard for the discipline of lawyers, stating that "[a] court analyzing whether a disciplinary rule violates the First Amendment must balance 'the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest' in the kind of speech that was at issue." Id., quoting Gentile v. State Bar of Nevada, 501 U.S. 1030, 1073, 111 S.Ct. 2720, 2744, 115 L.Ed.2d 888 (1991). According to the Court, while "[a] layman may, perhaps pursue his theories of free speech . . . until he runs afoul of the penalties of libel or slander, or into some infraction of statutory law . . . a member of the bar can, and will be stopped at the point where he infringes our Canon of Ethics." 392 S.C. at 336-37, 709 S.E.2d at 638, quoting In re Woodward, 300 S.W.2d 385, 393-94 (Mo. 1957). Thus, in the view of the Court, the civility oath met the governing standards under the First Amendment:

> [t]he interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally in the manner in which Respondent attacked Attorney Roe. Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client. There is no substantial amount of protected free speech penalized by the civility oath in light of the oath's plainly legitimate sweep of supporting the administration of justice and the lawyer-client relationship. Thus, we find the civility oath is not unconstitutionally overbroad.

Id.

From this review of Anonymous, it can be seen that our Supreme Court, relying upon cases such as Gentile, requires a more painstaking standard for declaring a lawyer disciplinary rule unconstitutional on either vagueness or First Amendment grounds than would be the case with respect to a non-lawyer's First Amendment claim. In other words, the Court must balance the State's interest "'in the regulation of a specialized profession against a lawyer's First Amendment interest' in the kind of speech at issue." Anonymous, 392 S.C. at 336, 709 S.E.2d at 637-38.

Turning now to Model Rule 8.4(g), we are aware of no judicial decision which has addressed the constitutionality of such Model Rule. However, the proposed Rule has been surrounded by much controversy and has received considerable commentary. As you note, the Texas Attorney General recently concluded that the Rule is likely to be deemed by a court to be

unconstitutional on a number of grounds. See Tex. Att'y Gen. Op. KP-0123, 2016 WL 743186 (December 20, 2016). According to the Attorney General of Texas, the Model Rule prohibits the very core of a lawyer's Free Speech:

> [w]hile decisions of the United States Supreme Court have concluded that an attorney's free speech rights are circumscribed to some degree in the courtroom during a judicial proceeding and outside the courtroom when speaking about a pending case, Model Rule 8.4(g) extends far beyond the context of a judicial proceeding to restrict speech or conduct in any instance when it is related to the "practice of law."
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> . . .
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> See also Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991). Comment 4 to Model Rule 8.4(g) addresses the expanse of this phrase by explaining that conduct relating to the practice of law includes
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>> 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 social activities in connection with the practice of law. . . .
>>
>> Given the broad nature of this rule, a court could apply it to an attorney's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.

In his Opinion, the Texas Attorney General quoted noted Constitutional Law Professor Ronald D. Rotunda, co-author of a leading Treatise on Constitutional Law,[1] noting that "[o]ne commentator has suggested, for example, that at a bar meeting dealing with proposals to curb police excessiveness, a lawyer's statement: 'Blue lives [i.e. police] matter, and we should be more concerned about black-on-black crime,' could be subject to discipline under Model Rule 8.4(g)." See Ronald D. Rotunda, "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," The Heritage Foundation Legal Memorandum 4 (2016). Thus, according to the Attorney General of Texas,

> [i]n the same way, candid dialogues about illegal immigration, same-sex marriage, or restrictions on bathroom usage will likely involve discussions about national origin, sexual orientation and gender identity. Model Rule 8.4(g) would subject many participants in such dialogue to discipline, and will therefore suppress thoughtful and complete exchanges about these complex issues.
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> While federal and state law provide heightened protection to most of the classes identified in Model Rule 8.4(g), even in those instances, the law does not prohibit discrimination under all circumstances. Instead, a state action distinguishing between

[1] See Rotunda and Nowak's Treatise on Constitutional Law: Substance and Procedure (5th ed.).

> people on the basis of national origin, for example, must be "narrowly tailored to serve a compelling government interest." Richards v. League of United Latin Am. Citizens, 868 S.W.2d 306, 311 (Tex. 1993). Yet, an attorney operating under Model Rule 8.4(g) may feel restricted from taking a legally supportable position due to fear of reprimand for violating the rule. Such restrictions would infringe upon the free speech rights of members of the State Bar and a court would likely conclude that Model Rule 8.4(g) is unconstitutional.

The Texas Attorney General also concluded that the rule infringes upon the attorney's right to free exercise of religion, upon his or her right to freedom of association, is overbroad, and is void for vagueness. With respect to free exercise, the Attorney General quoted Obergefell v. Hodges, 135 S.Ct. 2584, 2607 (2015) that "'religious doctrines, may continue to advocate' their religious views on same-sex marriage and engage in an open and searching debate" on the issue. However, as the Texas Attorney General pointed out, Rule 8.4(g)'s operation

> . . . would stifle such a debate within the legal community for fear of disciplinary reprimand and would likely in some attorneys declining to represent clients involved in this issue for fear of disciplinary action. . . . "[D]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." Gentile, 501 U.S. at 1054. Given that Model Rule 8.4(g) attempts to do so, a court would likely conclude that it is unconstitutional.

Moreover, with regard to the attorney's freedom of association, the Attorney General of Texas cited from Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) and Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48 (2000), stating that:

> [c]ontrary to this constitutionally protected right, however, Model Rule 8.4(g) could be applied to restrict an attorney's freedom to associate with a number of political, social, or religious organizations. The Rule applies to an attorney's participation in "business or social activities in connection with the practice of law." . . . Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline. In addition, a number of other legal organizations advocate for specific political or social positions on issues related to race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. Were Texas to adopt Model Rule 8.4(g), it would likely inhibit attorneys' participation in these organizations and could be applied to unduly restrict their freedom of association.

In addition, the Texas Attorney General found Rule 8.4(g) to be overbroad because it "'sweeps within its scope a wide range of both protected and nonprotected expressive activity.'" (quoting Hobbs v. Thompson, 448 F.2d 456, 460 (5th Cir. 1971)). According to the Attorney General,

> [i]n the First Amendment context, a court will invalidate a statute as overbroad as to chill individual thought and expression of particular thought and expression such that

> it would effectively punish the expression of particular views. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 583 (1998). In the First Amendment context a court will invalidate a statute as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." United States v. Stevens, 559 U.S. 460, 473 (2010). . . . A law is not overbroad merely because one can think of a single impermissible application. See New York v. Ferber, 458 U.S. 747, 771-73 (1982). A finding of substantial overbreadth requires a court "to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court." N.Y. State Club Assn. v. City of N.Y., 487 U.S. 1, 11 (1988). . . .
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> Although courts infrequently invalidate a statute for overbreadth, Model Rule 8.4(g) is a circumstance where a court would be likely to do so. See Finley, 524 U.S. at 580 ("Facial invalidation is manifestly, strong medicine that has been employed by the Court sparingly[.]", ... Like those examples discussed above, numerous scenarios exist of how the rule could be applied to significantly infringe on the First Amendment rights of all members of the State Bar. A statute "found to be overbroad may not be enforced as all, even against speech that could constitutionally be prohibited by a more narrowly drawn statute," Comm'n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 435 (1998). Because Model Rule 8.4(g) substantially restricts constitutionally permissible speech and the free exercise of religion, a court would likely conclude it is overbroad and therefore unenforceable.

In addition, the Attorney General of Texas concluded that Model Rule 8.4(g) is void for vagueness. In the view of the Attorney General, "'[W]hen analyzing whether a disciplinary rule directed solely at lawyers is vague, courts will ask whether the ordinary lawyer, with the benefit of guidance provided by case law, court rules and the lore of the profession, could understand and comply with it.'" (quoting Benton, 980 S.W.2d at 437). The Attorney General further noted that "[w]hen a 'statute's language is capable of reaching protected speech or otherwise threatens to inhibit the exercise of constitutional rights, a stricter vagueness standard applies than when the statute regulates unprotected conduct.'" Id. at 438. With that in mind, the Attorney General reasoned as follows:

> Model Rule 8.4(g) lacks clear meaning and is capable of infringing upon multiple constitutionally protected rights, and it therefore likely to be found vague. In particular, the phrase "conduct related to the practice of law," while defined to some extent by the comment, still lacks sufficient specificity to understand what conduct is included and therefore "has the potential to chill some protected expression" by not defining the prohibited conduct with clarity. . . . Also the rule prohibits "discrimination" without clarifying whether it is limited to unlawful discrimination or extends to otherwise lawful conduct. It prohibits "harassment" without a clear definition to determine what conduct is or is not harassing. And it specifically protects "legitimate advance or advocacy consistent with these Rules" but does not provide any standard by which to determine what advice is or is not legitimate. . . . Each of these unclear terms leave Model Rule 8.4(g) open to invalidation on vagueness grounds as applied to specific circumstances.

The analysis of the Texas Attorney General, set forth above, is persuasive and we agree with the many constitutional concerns expressed in the Attorney General's opinion. However, there is much more than this one Attorney General's Opinion which would lead to the conclusion that the Model Rule is constitutionally suspect. As noted above, eminent law professor Ronald Rotunda has dissected the Rule in a paper entitled "Legal Memorandum," published by the Heritage Foundation in October, 2016. See www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought. According to Professor Rotunda,

> [t]he First Amendment even limits the EEOC. What is "harassment"? In the context of Title IX sexual harassment, the Supreme Court held in Davis Next Friend LaShonda D. v. Monroe City Board of Education, [526 U.S. 629 (1999)] that "an action will lie only for harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." [Id. at 633 (emphasis added by Rotunda)]. LaShonda insisted on a narrow definition to avoid a free speech violation. The EEOC was not listening to LaShonda when it decided the "Don't tread on me" case. [deciding that there can be racism and a hostile work environment for a Postal Service worker to wear a "Don't tread on me" cap].
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> LaShonda cited with approval other cases that invalidated actions that were not sensitive to free speech. For example, UWM Post, Inc. v. Board of Regents of University of Wisconsin System [774 F.Supp. 1163 (E.D. Wis. 1991)] . . . invalidated a university speech code that prohibited "discriminatory comments" directed at an individual that "intentionally . . . demean" the "sex . . . of the individual" and "[c]reate an intimidating, hostile or demeaning environment for education, university related work or other university-authorized activity."
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> One would think that the ABA, which exists to promote the rule of law (including the case law that interprets and applies the Constitution), would follow the holding in LaShonda, but the ABA nowhere embraces the limiting definition of LaShonda. It proudly goes far beyond even the EEOC's "Don't tread on me" case because the ABA rule bans a broader category of speech that is divorced from any action. The new list includes gender identity, marital status, and socioeconomic status. It also includes social activities at which no coworkers are present. Even "a sole practitioner could face discipline because something that he said at a law-related function offended someone employed by another law firm." (quoting Eugene Volokh, A Speech Code for Lawyers; Banning Viewpoints That Express "Bias," Including in Law-Related Social Activities, Washington Post (Aug. 10, 2016) www.washingtonpost.com/news/volokhconspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm-term=.094f10eab400.

In LaShonda, Justices Kennedy, Chief Justice Rehnquist, Justice Scalia and Justice Thomas elaborated upon the First Amendment's limitations upon school administrators. Justice Kennedy put it this way:

>]a] university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. . . . [citing numerous decisions]. The difficulties associated with speech codes simply underscore the limited nature of a university's control over student behavior that may be viewed as sexual harassment.

562 U.S. at 669. While the constraints of the First Amendment upon a "speech code" may not be the same upon lawyers as upon students, clearly there are limits to how far a Bar Rule can go.

We observe also that numerous other cases are in accord with LaShonda's analysis. Indeed, Justice Kennedy in LaShonda cited with approval Doe v. University of Michigan, 721 F.Supp. 852 (E.D. Mich. 1989). In Doe, the Court held that a University's policy on discrimination and harassment and the policy was so vague that its enforcement violated The Due Process Clause. The Policy prohibited individuals from "'stigmatizing or victimizing individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era status.'" According to the Doe Court, "[l]ooking at the plain language of the Policy, it was impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct." 721 F.Supp. at 867. Moreover, the Court emphasized that ". . . the State may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited. This was the fundamental infirmity of the Policy." Id. at 864. In addition, IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386 (4th Cir. 1993), which LaShonda also cited with approval, concluded that the University's sanctions of a fraternity for conducting an "ugly woman contest," being racist and sexist overtones, was protected by the First Amendment, despite its offensiveness.

Moreover, the Third Circuit in Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001) held that a school district's anti-harassment policy was unconstitutionally overbroad. The policy in question defined "harassment" as

> verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.

In addition, harassment could include "'any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of the characteristics described above.'" Then Judge Alito noted that

> [t]he Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is

> not sufficient justification for prohibiting it. See Tinker [v. Des Moines Ind. Comm. School Dist., 393 U.S. 503] at 509, 89 S.Ct. 733 (school may not prohibit speech based on the "mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint"); Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Street v. New York, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) ["It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.") see also Doe v. University of Michigan, 721F.Supp. 852, 863 (E.D. Mich. 1989) (striking down university speech code: "Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.").

240 F.3d at 215. Judge Alito sought a "reasonable limiting construction" with respect to the policy in question. However,

> . . . the Policy, even narrowly read, prohibits substantial amounts of non-vulgar, non-sponsored student speech. . . . [Therefore,] SCASD must . . . satisfy the Tinker test by showing that the Policy's restrictions are necessary to prevent substantial disruption or interference with the work of the school or the rights of other students. Applying this test, we conclude that the policy is substantially overbroad.

Id. at 216. Because the Policy "appears to cover substantially more speech than could be prohibited under Tinker's substantial disruption test, accordingly we hold that the Policy is unconstitutionally overbroad.

Turning now to the First Amendment's application to the regulation of lawyers, we note that Gentile v. State Bar of Nevada, supra is the seminal decision applying the First Amendment to lawyers' disciplinary rules. There, an attorney was disciplined for holding a press conference after his client was indicted. The Nevada bar filed a complaint alleging that statements made in the press conference violated Supreme Court Rule 177 prohibiting a lawyer from making extrajudicial statements that he knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding. The lawyer was found to have violated the Rule and subjected to a private reprimand. Gentile's claim that the Rule violated his right to Free Speech was rejected by the Nevada Supreme Court. In a plurality opinion, Justice Kennedy wrote the opinion for the Court that the Rule was void for vagueness. Chief Justice Rehnquist wrote the opinion concluding that the "substantial likelihood of material prejudice" standard satisfied the First Amendment.

The Chief Justice analyzed the First Amendment issue as follows:

> [w]hen a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question.

> . . . . the "substantial likelihood" test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. . . . The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.
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> The restraint on speech is narrowly tailored to achieve these objectives. The regulation of attorneys' speech is limited – it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

501 U.S. at 1077. On the other hand, Justice Kennedy concluded that "[t]here is not support for the conclusion that petitioner's statements created a likelihood of material prejudice, or indeed of any harm of sufficient magnitude or imminence to support a punishment for speech." Id. at 1048.

It is our understanding that the Professional Responsibility Committee of the South Carolina Bar has recently voted (in a non-unanimous vote) to send a legal Memorandum to the South Carolina Supreme Court opposing Proposed Rule 8.4(g). In that Memorandum, the Committee argued that the Rule is unconstitutionally vague, noting that the word "harassment" is a term "open to a multitude of interpretations." Further, the Committee stated:

> [t]he vagueness of this proposed amendment raises due process concerns. The United States Supreme Court [see In re Ruffalo, 390 U.S. 544 (1968)] has held that disciplinary measures are quasi-criminal and certain due process requirements apply including fair notice of the charges. . . . The Court [see Connally v. General Construction Co., 269 U.S. 385, 391 (1926) has also held that "[a] disciplinary rule that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . . [With respect to "harassment,"] . . . attorneys must guess the exact definition.

In addition, the Committee's Memorandum concluded that the Rule is unconstitutionally overbroad. The Memorandum further states:

> [t]he proposed model rule seeks to prohibit "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," . . . thereby making 8.4(g) overbroad and diluting the main justification of restricting attorney speech. Our current phrase in comment [3] to Rule 8.4 uses the language, "[i]n the course of representing a client . . .:" and requires that the manifestation of a bias or prejudice be ". . . prejudicial to the administration of justice."
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> Ostensibly, every word uttered by a lawyer, whether work-related or personal, may be considered related to the practice of law. "If every action an attorney makes is related to the practice of law, how does an attorney attend a rally that opposes or questions same-sex marriage or participate in a protest with a poster stating "He's not my President"? Another attorney, a client, or a potential client, may cite a violation of the proposed amendment based on these actions. At the end of the day, lawyers are also humans and have their own personal beliefs and causes outside the profession. The proposed rule, unlike the Civility Oath and Rule 8.4 and its comments, does not clearly contain its application to instances involving "the administration of justice and the integrity of the lawyer-client relationship . . . as noted by the South Carolina Supreme Court in addressing the specific application of the Civility Oath. [see the discussion of In re anonymous Member of South Carolina Bar, supra, above].

See January, 2017 Letter from Kirsten Small to House of Delegates, found www.sccourts.org/HOD2017/hod-materials-january-2017- extract.pdf.

We agree. It can be seen that then-Judge Alito's analysis in Saxe, supra, while rendered in a different context [schools] is very instructive here. The school policy creating a "speech code" in the school environment is quite similar to the "speech code" created by the Model Rule. As Judge Alito concluded,

> The "undifferentiated fear or apprehension of disturbance" is not enough to justify a restriction on student speech. Although SCASD correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the Policy.

240 F.3d at 217. See also Justice Kennedy's statement in LaShonda, infra.

While there are differences, of course, Judge Alito's analysis is even more applicable with respect to lawyers' speech. As Professor Rotunda has noted, the ABA has explained the reason for the Rule as follows:

> [t]here is a need for a cultural shift in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity,

> gender expression, sexual orientation, marital status, or disability, to be captured in the rules of professional conduct.

Comment (3) to the Rule also explains that "Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others." In our view, such a justification, particularly in light of the "substantial likelihood" test used by Chief Justice Rehnquist in Gentile, particularly with respect to "verbal" conduct, is not nearly sufficient to suppress the "broad swath" of lawyers' speech which application of the Model Rule would involve. Much of this speech would present no harm to the integrity of the profession at all. What is legitimate non-harmful speech by members of the Bar cannot be chilled in order to achieve the lofty goal of a "cultural shift" through enforcement of the Rules of Professional Conduct.

Conclusion

As Justice O'Connor wrote in her concurring opinion in Gentile, while a State "may regulate speech by lawyers representing clients more readily than it may regulate the press," nevertheless, legitimate regulation of the profession "does not mean, of course, that lawyers forfeit their First Amendment rights. . . ." Although we readily acknowledge that the adoption of Model Rule 8.4(g)[2] is a matter within the province of the Supreme Court of South Carolina, we believe the Rule is constitutionally suspect for the reasons discussed above. As the Attorney General of Texas found, a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of religion and is void for vagueness.

And, as our Supreme Court explained in Anonymous, supra, (quoting Gentile) "[a] court analyzing whether a disciplinary rule violates the First Amendment must balance 'the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue.'" In our view, the quantity of legitimate speech sacrificed at the expense of the Rule versus the State's interest in the enforcement of the Rule to ensure "confidence in the legal profession and the legal system," weighs heavily in favor of the First Amendment. As Justice Kennedy noted in Gentile, regardless of whether a disciplinary rule is subject to the standard of "serious and imminent threat" or "the more common formulation of substantial likelihood of material prejudice," the First Amendment requires an assessment of proximity and degree of harm." 501 U.S. at 1037 (Kennedy, J.). We discern little, if any harm to the legal profession by much of the speech which the Model Rule purports to regulate or prohibit. Thus, when the Model Rule's purpose of protecting the integrity of the legal profession is balanced against the lawyer's First Amendment interest in the kind of speech at issue, as Anonymous requires, it seems to us that the Rule severely infringes upon Free Speech. In the First Amendment context, "'a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep. '"

[2] See Art. V, § 4 and § 4A of the South Carolina Constitution (1895).

U.S. v. Stevens, 559 U.S. 460, 473 (2010), quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008).

In summary, we believe, if adopted, that the likelihood of a successful challenge to the Model Rule based upon the First Amendment and Due Process Clause is substantial and that a court could well conclude the Rule is unconstitutional.

Sincerely,

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Solicitor General