CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

May 2, 2022

Nebraska Supreme Court
P.O. Box 98910
Lincoln, NE 68509-8910

By email to wendy.wussow@nebraska.gov

Re: Comment Letter Regarding the Proposal to Amend the Nebraska Rules of Professional Conduct, § 3-508.4

Dear Justices,

Christian Legal Society ("CLS") respectfully submits this comment letter to express opposition to the recently proposed amendment to § 3-508.4 of the Nebraska Rules of Professional Conduct ("the proposed rule" or "the proposed Nebraska rule"). The proposed rule is unconstitutional, does not comport with U.S. Supreme Court precedent, and will act as a speech code for Nebraska attorneys.

In many ways, the proposed rule resembles the highly criticized and deeply flawed ABA Model Rule 8.4(g), which the American Bar Association adopted at its annual meeting in August 2016. Since then, leading scholars have determined ABA Model Rule 8.4(g) to be a speech code for lawyers.[1] The late Professor Ronald Rotunda, a highly respected scholar in both legal ethicsa and constitutional law, 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 Responsibility*, "[t]he ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment."[3] In a thoughtful analysis, Professor Michael

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[1] Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, discusses why ABA Model Rule 8.4(g) would impose a speech code on lawyers, https://www.youtube.com/watch?v=AfpdWmlOXbA. Professor Volokh debated a proponent of ABA Model Rule 8.4(g) at the Federalist Society National Student Symposium in March 2017, https://www.youtube.com/watch?v=b074xW5kvB8&t=50s. Highly respected constitutional scholar and ethics expert, the late Professor Ronald Rotunda, and Texas Attorney General Ken Paxton debated two leading proponents of ABA Model Rule 8.4(g) at the Federalist Society National Lawyers Convention in November 2017, https://www.youtube.com/watch?v=V6rDPjqBcQg. Professor Rotunda also wrote a lengthy memorandum about the Rule's threat to lawyers' First Amendment rights. Ronald D. Rotunda, "*The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*," The Heritage Foundation, Oct. 6, 2016.

[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.

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

McGinniss, Dean of the University of North Dakota School of Law, raised similar concerns in a recent article.[4]

After five plus years of careful study by state supreme courts and state bar associations in many states across the country, at least thirteen states have abandoned ABA Model Rule 8.4(g), or a variant thereof, as unconstitutional or unworkable. Those states whose high court or state bar association has rejected ABA Model Rule 8.4(g) or a variant of 8.4(g) include: Arizona, Illinois, Louisiana, Minnesota, Montana, Nevada, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas. Utah has held two public comment periods but has not adopted it. Vermont and New Mexico are the only states to have adopted ABA Model Rule 8.4(g) in full. Maine, Connecticut, and Pennsylvania adopted variations of ABA Model Rule 8.4(g). A lawsuit alleging that the new rule in Connecticut violates the First Amendment and provisions of the Connecticut constitution is currently pending.[5] Pennsylvania's first version of the model rule was ruled unconstitutional in December 2020 in *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020).[6] After going back to the drawing board and coming up with another version of ABA Model Rule 8.4(g), a federal court ruled Pennsylvania's second version unconstitutional as well.[7]

Moreover, state attorneys general have issued opinions critical of ABA Model Rule 8.4(g) in Alaska, Arizona, Arkansas, Louisiana, South Carolina, and Texas. *See. e.g.*, Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016); S.C. Att'y Gen. Op. 14 (May 1, 2017); Alaska Att'y Gen. Op. (August 9, 2019); La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017); Ark. Att'y Gen. Op. No. 2020-055 (July 14, 2021). In fact, the Attorney General of Tennessee wrote that "the goal of the proposed rule is to subject to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment."[8] And, in 2017, the Montana Legislature passed a joint resolution condemning ABA Model Rule 8.4(g) when a version was under consideration by the Montana Supreme Court.[9]

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[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] Andrew Larson, "Tables Turned: Lawyers Sue Connecticut Disciplinarians Over New Rule Governing Attorney Speech," *Conn. Law Trib.* (Feb. 24, 2022), *available at* https://www.law.com/ctlawtribune/2022/02/24/tables-turned-lawyers-sue-connecticut-disciplinarians-overnew-rule-governing-attorney-speech/?cmp_share.

[6] The *Greenberg* decision is the only court decision regarding ABA Model Rule 8.4(g) or a variant thereof. The federal district court there struck down Pennsylvania's rule as facially unconstitutional. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), *appeal voluntarily dismissed*, No. 20-3602 (3d Cir. Mar. 17, 2021).

[7] *Greenberg v. Goodrich*, ___ F. Supp. 3d ___ (E.D. Pa. 2022).

[8] Tenn. Att'y Gen. Op. No. 18-11 at 7 (Mar. 16, 2018).

[9] *A Joint Resolution of the Senate and the House of Representatives of the State of Montana Making the Determination that it would be an Unconstitutional Act of Legislation, in Violation of the Constitution of the State of Montana, and would Violate the First Amendment Rights of the Citizens of Montana, Should the Supreme Court of the State of Montana Enact Proposed Model Rule of Professional Conduct 8.4(G)*, SJ 0015, 65th Legislature (Mont. Apr. 25, 2017).

The proposed rule, which is nothing more than a version of ABA Model Rule 8.4(g), should not be imposed on Nebraska lawyers for both constitutional and practical reasons.

1. The proposed rule is an unconstitutional content-based restriction.

The proposed rule expressly ignores recent U.S. Supreme Court precedent that demonstrates it is an unconstitutional restriction on attorneys' speech. In particular, *National Institute of Family and Life Advocates v. Becerra ("NIFLA")*, 138 S. Ct. 2361 (2018), protects lawyer's speech from content-based speech restrictions like the proposed Nebraska rule.

While *NIFLA* did not directly involve ABA Model Rule 8.4(g) or a version thereof, the Court's analysis makes clear that ABA Model Rule 8.4(g) and its variants are unconstitutional *content*-based restrictions on lawyers' speech. In *NIFLA*, the United States Supreme Court held that government restrictions on professionals' speech – including lawyers' professional speech – are generally subject to strict scrutiny review because they are content-based speech restrictions and, therefore, *presumptively unconstitutional*.

The Court explained that "[c]ontent-based regulations 'target speech based on its communicative content.'"[10] "[S]uch laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'"[11] The Court rejected the idea that "professional speech" was an exception "from the rule that content-based regulations of speech are subject to strict scrutiny."[12] The Court stressed that "*this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by* '*professionals.*'"[13] The Court reaffirmed that its "precedents have long protected the First Amendment rights of professionals" and "has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers."[14] As the Court observed, "[t]his stringent standard reflects the fundamental principle that governments have '"no power to restrict expression because of its message, its ideas, its subject matter, or its content."'"[15]

The operative assumption underlying both ABA Model Rule 8.4(g) and the proposed Nebraska rule is that professional speech is less protected by the First Amendment than other speech. But the Court rejected that basic premise. Indeed, in striking down Pennsylvania's first Rule 8.4(g), the federal district court relied on *NIFLA* to "find[] that Rule 8.4(g) does not cover 'professional speech' that is entitled to less protection," but instead "[t]he speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment."[16]

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[10] *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[11] *Id.*
[12] *Id.* at 2371.
[13] *Id.* at 2371-72 (emphasis added).
[14] *Id.* at 2374.
[15] *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[16] *Greenberg*, 491 F. Supp. 3d at 27-30.

2. Arguably, the proposed rule invites unconstitutional viewpoint discrimination.

The proposed rule also fails to meet the standards set forth in *Matal v. Tam*, 137 S. Ct. 1744 (2017). Nor does the proposed rule comport with the Supreme Court decision in *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), a case reinforcing *Matal*.[17]

The proposed Nebraska rule makes it professional misconduct to engage in conduct that is "harassment" without even defining that term. Lacking an actual definition, the temptation then is to look at how ABA Model Rule 8.4(g) defines it. According to ABA Model Rule 8.4(g), "[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct." This broad definition of "harassment" renders both the model rule and the proposed Nebraska rule unconstitutional under *Matal* and *Iancu*. The Supreme Court in *Matal* and again in *Iancu* ruled that government officials may not determine whether speech is "derogatory or demeaning" because that invites viewpoint discrimination. Laws or rules violate the First Amendment, therefore, if they create opportunities for viewpoint discrimination and chilling speech.

As the federal district court held in *Greenberg*, under the Court's analysis in *Matal*, ABA Model Rule 8.4(g) is an unconstitutional viewpoint-based restriction on lawyers' speech.[18] In *Matal*, a unanimous Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. In his concurrence, Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, observed that it is unconstitutional to suppress speech that "demeans or offends."[19] The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[20]

All nine justices agreed that a provision of a longstanding federal law, the Lanham Act, was unconstitutional because it allowed government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons. Allowing government officials to determine what words do and do not "disparage" a person "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[21] Justice Alito, writing for a plurality of the Court, noted that "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar

[17] In July 2020, the ABA issued Formal Opinion 493 in an attempt to "unstall" ABA Model Rule 8.4(g). Remarkably, ABA Formal Opinion 493 fails to mention, let alone explain how ABA Model Rule 8.4(g) survives constitutional analysis under, the United States Supreme Court decisions in *NIFLA*, *Matal*, and *Iancu*.
[18] *Id.* at 30-32.
[19] *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) (emphasis supplied).
[20] *Id.* at 1753-1754, 1765 (plurality op.).
[21] *Id.* at 1751 (quotation marks and ellipses omitted).

ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[22]

In his concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy stressed that "[t]he danger of viewpoint discrimination is that the government will remove certain ideas or perspectives from a broader debate," particularly "if the ideas or perspectives are ones a particular audience might think offensive."[23] Justice Kennedy closed with a sober warning:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.[24]

Justice Kennedy explained that the federal statute allowed unconstitutional viewpoint discrimination because the government permitted "a positive or benign mark but not a derogatory one," which "reflects the Government's disapproval of a subset of messages it finds offensive," which is "the essence of viewpoint discrimination."[25]

In 2019, in *Iancu v. Brunetti*, the Supreme Court reaffirmed its rigorous rejection of viewpoint discrimination in *Matal*. The challenged statutory terms in *Iancu* were "immoral" and "scandalous" and, once again, the Court found the terms were viewpoint discriminatory because they allowed government officials to pick and choose which speech to allow.

In her opinion for the Court, Justice Kagan explained that "immoral" and "scandalous" insert a "facial viewpoint bias in the law [that] results in viewpoint-discriminatory application."[26] The Lanham Act, was unconstitutional because:

> [I]t allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those

[22] *Id.* at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting) (emphasis supplied).
[23] *Id.* at 1767 (Kennedy, J., concurring).
[24] *Id.* at 1769 (Kennedy, J., concurring).
[25] *Id.* at 1766 (Kennedy, J., concurring) (emphasis supplied).
[26] *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019).

> provoking offense and condemnation. The statute favors the former, and disfavors the latter.[27]

Equally concerning, the proposed rule has no mens rea requirement. Indeed, the proposed rule merely adopts a negligence standard by using "knows or reasonably should know." A lawyer could violate the proposed rule without even realizing he or she has done so. This is particularly perilous as the list of words that are deemed "harassment" or "discrimination," including "implicit bias," is constantly expanding in novel and unanticipated ways.

3. The proposed rule would greatly expand the reach of the Nebraska Professional Rules of Professional Conduct and would regulate almost all of a Nebraska attorney's speech.

It is particularly important to understand just how broad in scope the proposed rule is. This rule, if adopted, would regulate attorneys' interactions with anyone while engaged in conduct related to the practice of law or when participating in business or social activities in connection with the practice of law.

The proposed Nebraska rule covers a lawyer's speech "in connection with the lawyer's professional activities." Yet, nowhere – in the black letter rule or the comment – is it defined precisely what is meant by a "lawyer's professional activities." Indeed, it could be argued that most of what lawyers do is "in connection with [their] professional activities." Lacking an actual definition, the temptation once again is to look at ABA Model Rule 8.4(g). Doing that, it is hard to see how the proposed rule's scope differs in any significant degree from ABA Model Rule 8.4(g)'s broad scope of regulating "conduct related to the practice of law."[28]

Simply put, the proposed Nebraska rule would regulate a lawyer's "conduct . . . while . . . *interacting with* . . . *others* while engaged in the practice of law . . . or participating in . . . bar association, business *or social activities in connection with the practice of law*." Indeed, proponents of ABA Model Rule 8.4(g) candidly observed that they sought a new black letter rule precisely because they wanted to regulate nonlitigating lawyers, such as "[a]cademics, nonprofit lawyers, and some government lawyers," as well as "[t]ax lawyers, real estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system."[29]

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[27] *Id.*

[28] "Conduct related to the practice of law," according to Comment [4] of ABA Model Rule 8.4(g), "includes 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."

[29] ABA Commission on Sexual Orientation and Gender Identity, *Memorandum to Standing Committee on Ethics and Professional Responsibility: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4*, at 5, 7 (Oct. 22, 2015), https://www.clsnet.org/document.doc?id=1125.

The compelling question becomes: What conduct would the proposed Nebraska rule *not* reach? Virtually everything a lawyer does can be characterized as "conduct . . . while . . . interacting with . . . others while engaged in the practice of law" or "participating in . . . business or social activities in connection with the practice of law."[30] Much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or potential future clients.

4. Practically speaking, it is unclear whether paragraph (i) covers all "discrimination" or just "unlawful discrimination."

Finally, there appears a discrepancy between paragraph (i)[31] and Comment [6][32] of the proposed rule, leaving it open as to whether the prohibited discrimination is any discrimination on the basis of the enumerated categories or only "unlawful discrimination" based on those categories. Paragraph (i) instructs that "whether the act is part of a pattern of prohibited conduct" should be considered in determining whether conduct "reflects adversely on the lawyer's fitness as a lawyer." Comment [6] specifically states "[w]hether an unlawful discriminatory act reflects adversely on fitness of a lawyer is determined after consideration of all relevant circumstances." Yet, nowhere is paragraph (i) restricted to "unlawful discrimination."

Assuming the discrimination is limited to "unlawful discrimination," the limitation raises concerns about the uniform application of the proposed rule. Discrimination laws can vary by locality. What constitutes discrimination for purposes of the proposed rule would vary depending on where a Nebraska attorney practices law.

Also assuming the discrimination is limited to "unlawful discrimination," the proposed rule fails to include protections found in other states that make it misconduct for an attorney to engage in "unlawful" discrimination. For example, Illinois requires that before a complaint against an attorney for unlawful discrimination can be brought, a tribunal other than a bar proceeding must have found that the attorney has violated anti-discrimination laws. Typically, these tribunals have stronger evidentiary and due process protections for the accused than do bar

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[30] 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, 226 (2017) ("The proposed comment of Version 3 expanded the ambit of 'conduct related to the practice of law' to include virtually anything a working lawyer might do.")

[31] Paragraph (i) makes it professional misconduct 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 that reflects adversely on the lawyer's fitness as a lawyer. Whether an act of discrimination or harassment reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including:1) the seriousness of the act; 2) whether the act was a part of a pattern of prohibited conduct; and 3) whether the act was committed in connection with a lawyer's professional activities.

[32] Comment [6] provides, in pertinent part, "[w]hether an unlawful discriminatory act reflects adversely on fitness as a lawyer is determined after consideration of all relevant circumstances, including the three factors listed in paragraph (i).

disciplinary proceedings. And bar counsel often is reluctant to see ABA Model Rule 8.4(g) or its variants adopted because they recognize that their workload and scarce enforcement resources will be overburdened if they are responsible for determining whether lawyers have violated complex nondiscrimination laws and regulations.

The proposed rule creates several other serious concerns, but the concerns already discussed adequately illustrate why this court should reject the proposed rule. Many state supreme courts have adopted the prudent course of waiting while other states experiment with ABA Model Rule 8.4(g) and its variants in order to evaluate its actual effect on the lawyers in those states before imposing it on lawyers in their states. Rejecting the proposed rule would seem a prudent and constitutionally wise course for the Nebraska Supreme Court to choose.

Conclusion

Attorneys who live in a free society should rightly insist upon the freedom to speak without fear in their social activities, their workplaces, and the public square. Because the proposed amendment to Nebraska Rules of Professional Conduct § 3-508.4 would drastically curtail that freedom, this Court should reject it. This proposed rule will irreparably harm Nebraska attorneys' First Amendment rights and, if adopted, would operate as a speech code for Nebraska attorneys. Unlike the proposed rule, the current rule and accompanying comment strike the appropriate balance between disciplinary concerns and a Nebraska attorney's First Amendment rights.

We thank the Court for its consideration of these comments.

Respectfully submitted,

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