LIBERTY
JUSTICE CENTER

Via electronic mail

November 6, 2023

Committee Secretary
Supreme Court Rules Committee
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Chicago, Illinois 60601
RulesCommittee@illinoiscourts.gov

Re: Proposal 22-06

The Liberty Justice Center—a nonprofit public-interest litigation firm based in Chicago that defends constitutional rights— opposes the Illinois State Bar Association's proposed amendment to Illinois Rule of Professional Conduct 8.4(j), Proposal 22-06. The proposed amendment poses a substantial threat to lawyers' exercise of free speech in Illinois. Free speech is a foundational right, and our organization is dedicated to ensuring that advocates are free to express themselves and support issues that matter to them without the fear of reprisal. Lawyers do not forfeit their First Amendment rights simply because they are lawyers. Rather, under U.S. Supreme Court precedent, any restriction on lawyers' speech must closely serve a compelling government interest. Courts should not adopt and enforce professional conduct rules that deliberately and unnecessarily target constitutionally protected speech, however objectionable some may find it.

Proposal 22-06 largely adopts Model Rule of Professional Conduct 8.4(g), which has been rejected by several states since its promulgation—including Idaho, where the Supreme Court took the extraordinary step of writing a detailed opinion to explain why the proposed rule is unconstitutional. *In re* Idaho State Bar Resolution 21-01, January 20, 2023.[1] And Idaho's version of Rule 8.4(g) was arguably narrower than the version now proposed by Illinois. The Eastern District of Pennsylvania, meanwhile, has twice rejected versions adopted by Pennsylvania. *See Greenberg v. Goodrich*, 593 F. Supp. 3d 174 (E.D. Pa. 2022), reversed on other grounds 81 F.4th 376 (3rd Cir. 2023).

The proposed rule regulates speech, not simply conduct. Comment 3A defines "discrimination," in part, as "harmful *verbal* or physical conduct" (emphasis added). When speech causes emotional harm because of its offensive content, it is protected speech, not conduct. *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988).

Speech restrictions that discriminate based on the viewpoint expressed are presumptively unconstitutional. See *Matal v. Tam*, 582 U.S. 218, 234 (2017) ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") Viewpoint discrimination is "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Further, a law is also presumptively unconstitutional if it targets speech based on its content—even if it doesn't

[1] Available at https://isc.idaho.gov/opinions/50356.pdf

discriminate based on viewpoint. *See Brandenburg v. Ohio*, 395 U.S. 494, 447 (1969). A law targets the content of speech if it is directed at the idea or content of the message expressed. *Sorrel v. IMS Health Inc.*, 564 U.S. 552, 564-65 (2011).

The First Amendment fully protects offensive, derogatory, or demeaning speech and any state effort to single out such speech for sanction is a viewpoint-based speech restriction subject to strict scrutiny. *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal*, 582 U.S. 218. The Supreme Court in *Matal* stressed the First Amendment's longstanding and continuing protection offensive speech, citing more than 10 cases to illustrate the point: "We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Matal*, 582 U.S. 218, 244 (2017) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969).)

Further, there is no professional speech exception to First Amendment protection. As the Court confirmed in *National Institute of Family and Life Advocates v. Becerra*, the First Amendment protects "professional speech" as fully as speech by nonprofessionals; the Court "has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'" 138 S. Ct. 2361, 2371-72 (2018).

It is doubtful that the proposed rule serves a compelling interest in promoting public confidence in the legal profession or the legal system. If Proposal 22-06 advances these interests by targeting certain biased speech that derogates, demeans, or causes emotional harm, it is not because the particular speech itself undermines public confidence in the legal profession or the legal system—it is because the professional conduct rule itself makes a statement about the values of the profession. But states cannot condition access to a profession on agreement with the state's viewpoint, however noble or desirable that viewpoint may be. In the past, the bar has used rules that limit speech to deter or divest itself of lawyers with unpopular views and to persecute the most marginalized members of the legal profession under the guise of civility or preserving the reputation of the profession. See Jerold S. Auerbach, *Unequal Justice* (Oxford U. Pr. 1976). The best way to protect less powerful lawyers is to avoid aggressive use of speech restrictions, not to broaden discretion in the area.

Even if the proposed rule did serve a compelling state interest, Proposal 22-06 is not sufficiently narrowly tailored to that interest to pass strict scrutiny. Courts have broad authority to regulate speech in advocacy, and especially in court, to promote the administration of justice. *See, e.g., In re Williams*, 414 N.W.2d 394, 397 (Minn. 1987) ("[A]ppropriate rules of evidence, decorum, and professional conduct" governing lawyers' speech in the courtroom "do[] not offend the first amendment.") (citations omitted). In the context of advocacy, restrictions on gratuitously derogatory and demeaning speech would probably serve compelling purposes like other restrictions on attorneys' courtroom speech that are taken for granted. But the speech prohibited by Proposal 22-06 goes beyond this to prohibit speech that, while considered objectionable by some, does not undermine the administration of justice. Concern for the public perception of the legal system cannot justify restrictions on speech that have no effect on the proper functioning or fair outcomes of the legal system.

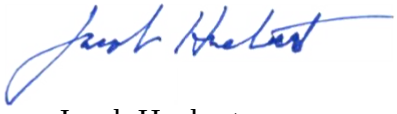
The proposed rule suffers from the same unconstitutional vagueness as the Idaho proposal and is thus likely to deter attorneys from speaking freely. The Idaho Supreme Court described the Idaho resolution as unconstitutionally vague because it "leaves a reasonably prudent attorney

with doubt about exactly what type of conduct or speech constitutes misconduct" and "could have a chilling effect on attorney speech." See *In re* Idaho State Bar Resolution 21-01, January 20, 2023. The guidance provided in the Comments to the Illinois proposal provides even less clarity than the Idaho resolution, but the Illinois proposal purports to cover a broader scope of activities as it explicitly includes "bar association educational or social events," which were at least partially excluded from the Idaho proposal. Comment 3 of the Illinois Proposed Rule states that "Conduct in the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others when representing clients; operating or managing a law firm or law practice; and participating in law-related professional activities or events, **including law firm or bar association educational or social events**" but "Conduct protected by the Constitutions of the United States or the State of Illinois, **including a lawyer's expression of views on matters of public concern in the context of teaching, public speaking, or other forms of public advocacy**, does not violate this paragraph."(emphasis added) The Illinois proposal comments fail to "narrowly define the situations where the rule applies, and therefore, clearly implicate[] a substantial amount of protected speech." See *In re* Idaho State Bar Resolution 21-01, January 20, 2023. Proposal 22-06 is unconstitutionally vague because it fails to provide a "narrow scope of applicability" making it likely to "chill" constitutionally protected speech. See *In re* Idaho State Bar Resolution 21-01, January 20, 2023.

In sum, Proposal 22-06 unconstitutionally restricts the free speech of attorneys and should be rejected. There are ways of promoting civility in the profession other than pushing the limits of the First Amendment, which will invariably chill debate. If lawyers cannot model the willingness to fight unpopular, even hateful views, by arguing with them rather than punishing them, then who can? Restraints on lawyers' speech should be reserved for speech that is not constitutionally protected—for example, biased or discriminatory speech that betrays the lawyer's fiduciary obligations, interferes with the administration of justice, or harms others in a concrete way beyond angering or saddening them.

All Illinois attorneys take an oath to uphold the Constitution of the United States, as well as the Illinois Constitution, which likewise protects the right to freedom of speech. To remain true to that oath, this Committee must reject Proposal 22-06.

Very truly yours,



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