Thomas More SOCIETY

November 8, 2023

Committee Secretary
Supreme Court Rules Committee
222 N. LaSalle Street, 13th Floor
Chicago, Illinois 60601
By email to RulesCommittee@illinoiscourts.gov

Re: Public Comment Letter Opposing Adoption of Proposal 22-06 Amending Illinois Rule of Professional Conduct 8.4

Dear Rules Committee:

This letter is submitted on behalf of the undersigned Illinois attorneys and on behalf of the Thomas More Society ("TMS"), a 501(c)(3) charitable organization that advocates on behalf of, among other things, the sanctity of life from conception to natural death, religious freedom and traditional family values. It has a long history of representing clients before courts throughout Illinois, and the rest of the United States, who seek to uphold and promote those causes.

Particularly in view of TMS' advocacy in support of Christian principles generally, and Catholic principles more specifically, Thomas More Society attorneys seek always to treat clients, colleagues, opposing counsel, and opposing parties, with courtesy and respect. TMS certainly agrees with the idea that all people should treat one another as they would like to be treated and that harassment and discrimination in the legal profession should not be countenanced. However, Proposed Rule 8.4(j) is not a viable manner in which to promote those values.

As the U.S. Supreme Court explained in *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. __, 138 S. Ct. 2361, 2371 (2018):

> The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations "target speech based on its communicative content." As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." This 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.'"
> [Citations omitted throughout.]

The Court recognized, "Speech is not unprotected merely because it is uttered by "professionals." *Id.* at 2371-2372. Further, the Court acknowledged, "The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" *Id.* at 2374.

Proposed Rule 8.4(j), which tracks the language of ABA Proposed Model Rule 8.4(g)[1] prohibits:

> (j) engag[ing] in conduct in the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, military or veteran status, pregnancy, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from a representation. This paragraph does not preclude or limit the giving of advice, assistance, or advocacy consistent with these Rules.

The Comments to Proposed Rule 8.4(j) make clear that it broadly defines "conduct in the practice of law" to include conduct that has nothing to do with representing clients or appearing before a court or other tribunal; Comment 3 to Proposed Rule 8.4(j) provides, 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."

Further, Comment 3A acknowledges that the terms "harassment" and "discrimination" include "harmful" speech ("verbal conduct") that "manifests bias or prejudice" on the basis of any of the enumerated characteristics ("discrimination") or that is "invasive, pressuring, or intimidating in relation to any characteristic identified in paragraph (j)" ("harassment").

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[1] ABA Model Rule 8.4(g) provides that 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.

Proposed Rule 8.4(j) vaguely defines the terms "harassment" and "discrimination" expressly with reference to their impact upon listeners, and further does not give constitutionally required fair notice of what is prohibited.

Despite definitions of "harassment" and "discrimination" that delineate the meanings of those terms with reference to the impact of speech on listeners, as used in Proposed Rule 8.4(j), Comment 3A seeks to ameliorate the impermissibly vague contours of those definitions by stating that the Rules of Professional Conduct "are rules of reason, and whether conduct violates paragraph (j) must be judged in context from an objectively reasonable perspective." But stating that that an objective standard is the standard that will be used to determine the propriety of speech does not provide fair notice of what is prohibited. Asserting that the standard is "objectively reasonable" ignores that what is "objectively reasonable" must be determined after the fact, by fact finders who necessarily bring their own views and belief systems to bear in determining whether the content of speech is "objectively reasonable."

Similarly ineffective is Comment 3A's disclaimer that, "[c]onduct 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." That qualification does nothing more than make clear that, as written, the definitions of "harassment" and "discrimination" are vague, overbroad and encompass constitutionally protected speech. Only *after* attorneys are charged with a disciplinary offense, and their speech is ultimately determined to be constitutionally protected, will they be able to determine whether their speech was prohibited by Proposed Rule 8.4(j). That is not fair notice.

Further, regardless of whether attorneys are ultimately prosecuted under the proposed Rule for engaging in protected speech, the proposed Rule is constitutionally infirm because of the chilling effect it will have on attorney speech. As the U.S. Supreme Court explained in *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 807 (2011):

> Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. The lack of such notice in a law that regulates expression "raises special First Amendment concerns because of its obvious chilling effect on free speech." Vague laws force potential speakers to "'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." While "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity," "government may regulate in the area" of First Amendment freedoms "only with narrow specificity[.]" [Citations omitted throughout.]

Acknowledging that speech found to be constitutionally protected cannot constitute a basis for attorney discipline does nothing to fix the unconstitutionally vague and overbroad language of the proposed Rule in the first instance, and, in the second instance, nothing to cure the chilling effect on First Amendment-protected attorney speech on highly controversial subjects including, for example, traditional marriage and transgender issues. Illinois attorneys

should not be at risk of or subject to professional discipline for speaking their conscience even if their words offend those who disagree.[2]

Moreover, the prevention of harassment and discrimination by attorneys is already appropriately (and constitutionally) addressed by existing Rule 8.4 generally, and, specifically with respect to harassment and discrimination, existing Rule 8.4(j). As the Rules Committee is well aware, existing Rule 8.4(j) makes it professional misconduct to:

> violate a federal, state or local statute or ordinance including, but not limited to, the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.) that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. Illinois Rules of Professional Conduct, Rule 8.4(j).

Existing Rule 8.4(j) further provides, "No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted."

As detailed in other comments previously submitted for consideration, numerous other states have rejected adopting versions of ABA Model Rule 8.4(g), and it has been criticized at length by respected legal scholars as an unconstitutional "speech code" for attorneys and an otherwise unconstitutional infringement of the First Amendment rights of attorneys. All that adoption of Proposed Rule 8.4(j) will accomplish is the consumption of already scarce State resources defending against constitutional challenges to an unnecessary and unconstitutional

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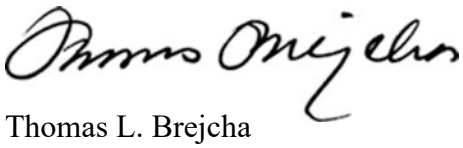
[2] Undersigned counsel recently secured a preliminary injunction against a new Illinois law subjecting certain controversial (pro-life) speech to additional scrutiny under the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2BBBB. *Nat'l Inst. of Family & Life Advocates v. Raoul*, Case No. 23 CV 50279, 2023 WL 5367336 (N.D. Ill. Aug. 4, 2023). Rejecting the State's argument that the statute was a permissible regulation of "professional" speech, the Court held that, "To some extent, government can require professionals to disclose factual, uncontroversial information in their commercial speech . . . . SB 1909 does not require a professional to disclose factual, uncontroversial information. Of course, the type of speech at issue in this case is extremely controversial. SB 1909 is not a constitutional regulation of professional speech." *Id.* at *10 (citing *Becerra*, 138 S. Ct. at 2372). The proposed Rule also regulates speech on highly controversial topics, just like the unconstitutional statute in *Raoul*.

amendment to a rule that already adequately addresses the concerns that underlie the amended rule.

For all of the foregoing reasons, the Proposed Rule 8.4(j) should be rejected.

Respectfully submitted,



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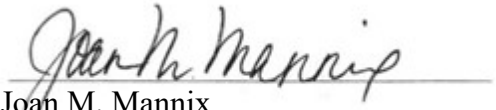

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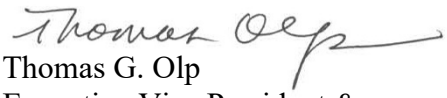

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