SUPREME COURT
STATE OF ILLINOIS

RULE PROPOSAL 22-06 (P.R. 00309)

Request for Comment on Proposal 22-06 (P.R. 00309) to Amend Illinois Rule of Professional Conduct 8.4(j) to Conform to ABA Model Rule 8.4(g)	**)**	**Joint Comment in Opposition to Proposal to Amend Illinois Rule of Professional Conduct 8.4(j) to Conform to ABA Model Rule 8.4(g)**

The 58 Illinois-licensed attorneys listed below respectfully submit this Comment in opposition to the proposal to amend Illinois Rule of Professional Conduct 8.4(j) to conform more closely to ABA Model Rule 8.4(g).

I. The Proposed Amendment

It is being proposed that Illinois Supreme Court Rule 8.4(j) be amended to conform more closely to ABA Model Rule 8.4(g). Under that proposal, Supreme Court Rule 8.4(j) would be amended to read as follows:

> *It is professional misconduct for a lawyer to:*
>
> *(i) engage 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 proposed amendment would also add three new Comments to the Rule, as follows:

> *[3] Discrimination and harassment by lawyers in violation of paragraph (j) undermines confidence in the legal profession and the legal system. 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. 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.

[3A] The Rules of Professional Conduct are rules of reason, and whether conduct violates paragraph (j) must be judged in context and from an objectively reasonable perspective. See Scope, paragraph [14]. Discrimination means harmful verbal or physical conduct directed at another person or group that manifests bias or prejudice on the basis of any characteristics identified in paragraph (j). Harassment includes conduct directed at another person or group that is invasive, pressuring, or intimidating in relation to any characteristic identified in paragraph (j). It 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 or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide the application of paragraph (j) and the evaluation of whether specific conduct constitutes discrimination or harassment. In addition, any judicial or administrative tribunal findings involving the same conduct may be considered in assessing whether a lawyer has violated paragraph (j). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (j).

[3B] Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating paragraph (j) by, for example, implementing initiatives to encourage recruiting, hiring, retaining, and advancing diverse employees or sponsoring diverse law student organizations. A lawyer does not violate paragraph (j) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. See Rule 1.5(a). Lawyers should be mindful of their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

The proposed amendment adopts much of ABA Model Rule 8.4(g) and will hereafter sometimes be referred to as "the proposed Rule." The Illinois Supreme Court's Rules will sometimes hereafter be referred to as the "Rules of Professional Conduct" or "Rules."

II. Comments

A. The Proposed Rule Is Unconstitutional

The Illinois Supreme Court Rules Committee states that the proposed amendments to Illinois RPC 8.4(j) are "modeled after the ABA's model rule on discrimination." However, ABA Model Rule 8.4(g) – on which the current proposal is based – has been extensively criticized on constitutional grounds. Indeed, allegations that the Model Rule is unconstitutional have dogged the Rule since before it was adopted. The only federal court to have substantively considered the issue has found – twice – that professional rules adopted in Pennsylvania that are based on Model Rule 8.4(g) – are unconstitutional as a violation of the First Amendment of the U.S. Constitution. *Greenberg v. Haggerty,* 491 F.Supp.3d 12 (E.D.Pa. 2020); *Greenberg v. Goodrich*, 593 FSupp.3d 174 (2022)(rev'd for lack of standing, *Greenberg v. Lehocky*, __ 4th ___, 2003 WL 5539272 (3rd Cir. 2023)).

1. Attorney Speech Is Constitutionally Protected

Citizens do not surrender their First Amendment speech rights when they become attorneys, including when they are acting in their professional capacities as lawyers. *NAACP v. Button*, 371 U.S. 415 (1963) (holding that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."); *see also Ramsey v. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn.*, 771 S.W.2d 116, 121 (Tenn. 1989) (holding that an attorney's statements that were disrespectful and in bad taste were nevertheless protected speech and that use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney's First Amendment rights, stating that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First

Amendment rights."); *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995) (stating that the substantive evil must be extremely serious and the degree of imminence must be extremely high before an attorney's utterances can be punished under the First Amendment).

Indeed, the ABA itself has acknowledged this very principle in an *amicus* brief it filed in the case of *Wollschlaeger. v. Governor of the State of Fla.*, 797 F.3d 859 (11th Cir. 2015). In its brief the ABA denied that a law regulating speech should receive less scrutiny merely because it regulates "professional speech." "On the contrary" – the ABA stated – "much speech by . . . a lawyer . . . falls at the core of the First Amendment. The government should not, under the guise of regulating the profession, be permitted to silence a perceived 'political agenda' of which it disapproves. That is the central evil against which the First Amendment is designed to protect." "Simply put" – the ABA stated – "states should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession . . . Indeed," – the ABA stated – "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created."

The ABA is, of course, correct in stating that "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression." Indeed, the U.S. Supreme Court reiterated this principle in *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018), in which it devoted a significant part of its opinion to the subject of professional speech, stating: "[T]his Court's precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, . . .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" (internal citations omitted). The Court concluded that it was not presented with any persuasive reason for treating professional speech as a unique category of speech that is exempt from ordinary First Amendment principles.

In short, attorneys do not surrender their constitutional rights when they enter the legal profession – including when they are speaking in their professional capacities – and the state may not violate attorneys' constitutional rights under the guise of professional regulation.

2. The Proposed Rule Prohibits Constitutionally Protected Speech

Some proponents of the proposed Rule may claim that the Rule prohibits only conduct, not speech, and that any speech that is prohibited is speech that is merely incidental to the prohibited conduct. For that reason, they may claim that the proposed Rule does not violate the First Amendment free speech rights of lawyers.

But that is incorrect. The proposed Rule prohibits "harassment" and "discrimination," and under the proposed Rule pure speech can constitute both harassment and discrimination. Indeed, Comment [3A] of the proposed Rule expressly prohibits what it calls "verbal conduct" – which is, of course, simply a euphemism for speech. The Comment elaborates that the Rule prohibits "derogatory," "demeaning," and "harmful" speech.

For that reason, the proposed Rule does not prohibit conduct that only incidentally involves speech. Instead, the proposed Rule prohibits speech that incidentally involves professional conduct. *See* Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and*

First Freedoms in the Legal Profession, 42 Harvard J. Law & Pub. Policy 173, 247 (2019).

Courts have rejected the attempt to avoid First Amendment violations by the expedient of characterizing speech as "conduct," *Otto, et al. v. City of Boca Raton, Florida, et al,* 981 F.3d 854 (11th Cir. 2020)(stating that the government cannot regulate speech by labeling it as conduct), citing *Wollschlaeger v. Gov., Fla*, at 1308, for the proposition that "the enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and subject to manipulation."

An event in Minnesota illustrates the point. In May of 2018 the Minnesota Lavender Bar Association ("MLBA") – "a voluntary professional association of lesbian, gay, bisexual, transgender, gender queer, and allies, promoting fairness and equality for the LGBT community within the legal industry and for the Minnesota community" – objected to an accredited Continuing Legal Education presentation entitled "Understanding and Responding to the Transgender Moment/St. Paul," which was co-sponsored by a Roman Catholic law school and addressed transgender issues from a Roman Catholic perspective. The MLBA complained that the CLE – which was pure speech – was "discriminatory and transphobic," "encourages bias by arguing against the identities [of transgender people]," was contrary to the bar's diversity efforts, and constituted "harassing behavior" under Rule 8.4(g) of the Model Rules of Professional Conduct. The MLBA further characterized the presentation as "transphobic rhetoric" and stated that "Discrimination is not legal education." Minn. Lavender Bar Ass'n, https://gumroad.com/mlba (last visited Apr. 2, 2019). As a result of the MLBA's complaint, the CLE accrediting body of the Minnesota Bar revoked its CLE accreditation of the presentation – reportedly the first time such retroactive revocation of CLE credit had ever occurred in Minnesota. *See* Barbara L. Jones, *CLE credit revoked*, Minnesota Lawyer (May 28, 2018).

In this real-life example, the complained behavior consisted of pure speech, was alleged to constitute "harassment" under Model Rule 8.4(g) – as well as discrimination – and was punished by the state by retroactively stripping the presentation of accreditation.

Thus, it is clear that the proposed Rule does, in fact, prohibit lawyer speech. And, as is discussed below, much of that speech is constitutionally protected. By prohibiting and threatening to punish attorneys for engaging in constitutionally protected speech, the proposed Rule violates attorneys' free speech rights.

3. Many Authorities Have Expressed Concerns About The Constitutionality Of Model Rule 8.4(g) Upon Which The Current Proposed Rule Is Based.

Many authorities have pointed out the constitutional infirmities of ABA Model Rule 8.4(g), upon which the proposed Rule is based.

Indeed, when the ABA opened up Model Rule 8.4(g) for comment, a total of 481 comments were filed – and of those 481 comments, 470 of them opposed the Rule, most on the grounds that the Rule would be unconstitutional.

In fact, the ABA's own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law Section, initially warned the ABA that Model Rule 8.4(g) may violate attorneys' First Amendment speech rights.

Prominent legal scholars, such as UCLA constitutional law professor Eugene Volokh and former U.S. Attorney General Edwin Meese, III, have opined that ABA Model Rule 8.4(g) is constitutionally infirm. *See* Eugene Volokh, "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities,*" Wash. Post, Aug. 10, 2016; *see also* Edwin Meese III, August Letter to ABA House of Delegates, http://firstliberty.org/wp-

content/uploads/2016/08/ABA-Letter_08.08.16.pdf. Attorney General Meese wrote that ABA Model Rule 8.4(g) constitutes "a clear and extraordinary threat to free speech and religious liberty" and "an unprecedented violation of the First Amendment." *Id.*

Fifty-two law professors have signed a letter – titled *The Unconstitutionality of ABA Model Rule 8.4(g)* – in which they conclude that "the scholars who have signed this letter believe that ABA Model Rule 8.4(g) would, if adopted by any state, be clearly unconstitutional."

In addition, the authors of many law review articles have concluded that Model Rule 8.4(g) – and Rules like it – threaten attorneys' First Amendment rights. *See, e.g.*, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional & Blatantly Political*, 32 Notre Dame J.L. Ethics & Pub. Pol'y 135 (2018); Andrew F. Halaby and Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, & a Call For Scholarship*, 41 J. Legal Prof. 201 (2017) (the new Model Rule 8.4(g) has due process and First Amendment free expression infirmities); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment & "Conduct Related to the Practice of Law*," 30 Geo. J. Legal Ethics 241 (2017) (Model Rule 8.4(g) constitutes an unjustified incursion into constitutionally protected speech); Caleb C. Wolanek, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(G) Of The Model Rules of Professional Responsibility*, 40 Harv. J.L. & Pub. Policy 773 (June 2017) (Model Rule 8.4(g) goes too far and implicates the First Amendment); 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 (2018) (Model Rule 8.4(g) expands impulses within the legal profession to coerce viewpoint conformity and marginalize and deter dissenters); Bradley S. Abramson, *ABA Model Rule 8.4(g): Constitutional and Other Concerns for Matrimonial Lawyers*, 31 J. Am. Acad. Matrim. Law. 283 (2019)(Model Rule 8.4(g) would appear to prohibit

constitutionally protected speech, chill constitutionally protected speech, and interfere with attorneys' free exercise of religion rights). *See also* Lindsey Keiser, *Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights,* 28 Geo. J. Legal Ethics 629 (Summer 2015) (rule violates attorneys' Free Speech rights); Dorothy Williams, *Attorney Association: Balancing Autonomy & Anti-Discrimination*, 40 J. Leg. Prof. 271 (Spring 2016) (rule violates attorneys' Free Association rights).

The National Lawyers Association's Commission for the Protection of Constitutional Rights has issued a Statement that ABA Model Rule 8.4(g) would violate an attorney's free speech, free association, and free exercise rights under the First Amendment to the U.S. Constitution. National Lawyers Association, https://www.nla.org/nla-task-force-publishes-statement-on-new-aba-model-rule-8.4g/ (last visited on Apr. 2, 2019).[1]

Likewise, the Catholic Bar Association has taken a public position that the Rule is unconstitutional.

In Montana the state legislature adopted a Joint Resolution – Montana Senate Resolution 15 – that, if the Supreme Court of Montana were to enact ABA Model Rule 8.4(g), such would constitute an unconstitutional act of legislation and violate the First Amendment rights of Montana lawyers. In response, the Montana Supreme Court declined to adopt the Rule.

Significantly, the Attorneys General of five States – Texas, South Carolina, Louisiana, Tennessee, and Arkansas – have issued official opinions that ABA Model Rule 8.4(g) is unconstitutionally vague and overbroad, and violates the free speech, free exercise of religion, and free association rights of attorneys. *See* Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016); S.C. Att'y

[1] With respect to the constitutional issues raised by the new Model Rule, those filing this Joint Comment agree with the discussion, analysis and conclusions set forth in the National Lawyers Association's Statement, and have adopted, restated, and in some respects expanded upon much of that discussion and analysis in this Joint Comment.

Gen. Op. 14 (May 1, 2017); La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017); Tenn. Att'y Gen. Op. No. 18-11 (Mar. 16, 2018); Ark. Att'y Gen. Op. 2020-055 (July 14, 2021). In addition, the Attorney General of Arizona has written that the Rule "raises significant constitutional concerns, including potential infringement of speech and association rights." Ariz. Att'y Gen.'s Comment to Petition to Amend ER 8.4, Rule 42, Ariz. Rules of the Sup. Ct., R-17-0032 (May 21, 2018). The Attorney General of Alaska has opined that the Rule would "violate First Amendment freedoms, including freedom of speech, free exercise of religion, and freedom of association . . . As a policy it is unwise, and as a law it is unconstitutional." Letter of Alaska Attorney General to the Board of Governors of the Alaska Bar Association (August 9, 2019). Finally, the Attorney General of Nebraska has opined that "[o]ur office has concluded that the proposed rule violates freedom of speech under the federal and state constitutions." Letter of Nebraska Attorney General to the Clerk of the Supreme Court and Court of Appeals of Nebraska (May 2, 2022).

4. The Proposed Rule Is Unconstitutionally Vague

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. For that reason, courts apply a more stringent vagueness test when a regulation interferes with the right of free speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

Vague laws present several due process problems. First, such laws trap the innocent by not providing fair warning. Second, vague laws delegate policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, such laws lead citizens to steer far wider of the unlawful zone than if the

boundaries of the forbidden areas were clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

(a) The Term "Harassment" Is Unconstitutionally Vague

The proposed Rule prohibits attorneys from engaging in "harassment" on the basis of any of the protected classes. However, the proposed Rule does not define the term "harassment." Thus, the term "harassment" is subject to multiple interpretations – and no standard is provided by which an attorney can reasonably determine whether any particular speech or conduct might violate the proposed Rule.

For example, can simply being offended by an attorney's expressions constitute harassment? Might an attorney violate the proposed Rule merely by sharing her religious beliefs with another attorney who finds such religious beliefs – or their expression – offensive? Could an attorney's body language – such as a dismissive hand gesture, a turning of one's back, the shaking of one's head, or the rolling of one's eyes – constitute harassment? Could an attorney's clothing or apparel – such as wearing a "Make America Great Again" cap – violate the proposed Rule? Or what if a lawyer had a Gadsden flag ("Don't Tread on Me") sticker on her briefcase? Might that violate the proposed Rule? If not, why not – because someone could consider this speech derogatory or demeaning speech directed at another person or group and, therefore, harassing.

Indeed, some courts have explicitly found that the term "harass" – in and of itself – is unconstitutionally vague. *See, e.g.*, *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996) (holding that the term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague).

Because the term "harassment" as used in the proposed Rule is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to enforce the proposed Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid violating the proposed Rule.

Further, Comment [3A] of the proposed Rule provides that harassment includes *derogatory or demeaning* speech. But what exactly is encompassed by the words "derogatory" and "demeaning"? Courts have found such terms unconstitutionally vague. *See, e.g.*, *Hinton v. Devine*, 633 F.Supp. 1023 (E.D. Pa. 1986) (holding that the term "derogatory" without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal. App. 4th 669 (Cal. App. 2012) (holding that a statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

Finally, the statement in proposed Comment [3A] that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (j)" does not cure the vagueness defect, first because the Comment does not identify which statutes and case law it is referring to; second, it merely provides that such unidentified statutes and case law "*may* guide" application of the proposed Rule, leaving open the very real possibility that the proposed Rule will *not* be applied in accord with substantive anti-harassment law; and, third, it provides no guidance whatsoever to the myriad applications of "harassment" that do not fall under any

particular statute or ordinance. Therefore, the Comment provides attorneys with no real guidance as to what the proposed Rule prohibits or how it will be applied.

(b) The Term "Discrimination" Is Unconstitutionally Vague

The term "discrimination" is also unconstitutionally vague. Many proponents of the proposed Rule may contend that the word "discrimination" is widely used and easily understood. And it is certainly true that many statutes and ordinances prohibit discrimination in a variety of contexts. However, it is also true that such statutes and ordinances do not – as does the proposed Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

Title VII, for example, specifies what sorts of acts constitute employment discrimination under the statute. *See* 42 U.S.C. § 2000e-2. Similarly, the federal Fair Housing Act provides a detailed description of what specifically constitutes housing discrimination under the Act. *See* 42 U.S.C. § 3604.

The proposed Rule does not do that. It simply provides that "It is professional misconduct for a lawyer to: . . . engage in conduct that the lawyer knows or reasonably should know is . . . 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" – thereby leaving to the attorney's imagination what sorts of speech and behavior might be proscribed.

Again, when reference is made to proposed Comment [3A] to the proposed Rule the vagueness problem gets worse, because under Comment [3A] the term "discrimination" includes "*harmful* verbal or physical conduct directed at another

person or group that manifests bias or prejudice on the basis of any characteristics identified in paragraph (j).” The term “harmful” – standing alone – is unconstitutionally vague because attorneys cannot determine with any degree of reasonable certainty what speech and conduct may constitute “harmful” speech or conduct. Indeed, the word “harmful” simply means “causing or capable of causing harm.” *Harmful*, Dictionary.com, http://www.dictionary.com/browse/harmful (last visited Apr. 4, 2019). And “harm” encompasses a wide range of injury, from “physical injury or mental damage” to “hurt” to “moral injury.” *Harm*, Dictionary.com, http://www.dictionary.com/browse/harm (last visited Apr. 2, 2019). So “harmful” speech can encompass an almost limitless range of allegedly injurious effects on others. Mental injury or damage, for example, could easily be interpreted to include real, imagined, or even feigned, emotional distress at being exposed to another’s expression someone finds offensive.

For the same reasons addressed above under the discussion of the term “harassment,” the statement in proposed Comment [3A] that “[t]he substantive law of antidiscrimination . . . statutes and case law *may* guide application of paragraph (j)” does not cure the vagueness defect of determining what constitutes “discriminatory” speech.

It is also important to emphasize that speech does not lose its constitutional protection just because it is “harmful.” Indeed, speech that others may find harmful or offensive is precisely the sort of speech the First Amendment protects. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-Am. Gay,*

Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 574 (1995) (stating that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (noting that interest in protecting bystanders from feeling offended or angry is not sufficient to justify a ban on expression); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (striking down a ban on picketing near embassies where the purpose was to protect the emotions of those who reacted to the picket signs' message). *See also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011) (stating that "new categories of unprotected speech may not be added to the list [of unprotected speech – such as obscenity, incitement, and fighting words] by a legislature that concludes certain speech is *too harmful* to be tolerated") (emphasis added).

(c) The Phrase "in the practice of law" Is Unconstitutionally Vague

The proposed Rule applies to any speech or conduct in which an attorney engages while "in the practice of law." However, it appears that, under the proposed Rule, that phrase encompasses much more than is usually understood to be "the practice of law." For example, according to proposed Comment [4] not only does the "practice of law" include those sorts of activities most lawyers would consider "practicing law", such as representing clients, including interacting with witnesses coworkers, court personnel, lawyers, and others when representing clients, it also includes operating or managing a law practice (thereby sweeping into the proposed Rule employment activity) as well as all "law-related activities or events", including even "educational or social events". This is very similar to what ABA Model Rule 8.4(g) provides when it applies to any attorney conduct "related to the practice of law" including "participating in bar

association, business or social activities in connection with the practice of law."

What conduct is "law-related" (or as the Model Rule states, speech that is "related to the practice of law") and what conduct is not, is vague and subject to reasonable dispute.

The phrase is vague, first, because what does and does not constitute the practice of law is, itself, vague and ill-defined. In fact, the Appellate Court of Illinois has stated that "no all-embracing definition defines [the] meaning" of "practice of law." *Clark v. Gannett Co., Inc.*, 122 N.E.3d 376, 390 (Ill.App. 2018). However, the court did state that "A 'generally accepted definition of the term exists,' . . . as 'the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill.'" *Clark*, supra, at 90.

The proposed Rule compounds the uncertainty of what constitutes the "practice of law" by sweeping into its maw not just attorney conduct while an attorney is engaged in the "practice of law" – as such phrase is "generally accepted" – but also attorney conduct merely "*related*" to the practice of law, including employment, bar association, business, and even social activities, that are not within the "generally accepted" definition of "practice of law". Therein lies the problem.

Untethered, as it is, from any legal or historical understanding of what constitutes the "practice of law," the proposed Rule's use of the phrase "law-related professional activity" becomes nearly meaningless.

The consideration of some hypothetical situations brings the problem into focus. Would the proposed Rule apply to comments made by an attorney while attending a

law firm retirement party for a law firm co-worker? If so, would it also include comments made while the attorneys are walking to their vehicles after the party has ended? Would it apply to comments one attorney makes to another while car-pooling to or from work? Would it include an attorney's conduct while attending a cocktail party the attorney is attending, at least in part, to generate business for the lawyer's law practice? Would it include comments an attorney makes while teaching a religious liberty class at the attorney's church? Or sitting on his church's governing board, where he is sometimes asked for his professionally informed opinion on some matter before the board? Or when attending an alumni function at the law school the attorney attended? Or when publishing a letter to the editor of a newspaper when the author is identified therein as a lawyer? Or, for that matter, in any behavior in which the actor is identified as being a lawyer? The answers to these inquiries are far from self-evident.

And it is not just our opinion that the phrase "law-related professional activity" is unconstitutionally vague. The Chair of the ABA Policy & Implementation Committee, which is charged with advocating for the Model Rules of Professional Conduct, while serving on an ABA CLE panel discussing Model Rule 8.4(g), was asked what the Model Rule's similar phrase "related to the practice of law" meant? In response, he stated, "I don't have an answer for you." "It is extraordinarily broad." "I don't know where it begins or where it ends." *Model Rule 8.4 – Update, Discussion, and Best Practices in a #MeToo World*, August 2, 2018.

Because a lawyer cannot, with any degree of reasonable certainty, determine what behavior of an attorney is "law-related professional activity" and what is not, the proposed Rule is unconstitutionally vague.

If attorneys face professional discipline for engaging in certain proscribed behavior, they are entitled to know, with reasonable precision, what behavior is being proscribed, and should not be left to speculate what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the proposed Rule's essential terms, the proposed Rule is unconstitutional.

5. The Proposed Rule Is Unconstitutionally Overbroad

Even if a law is clear and precise – thereby avoiding a vagueness challenge – it may nevertheless be unconstitutionally overbroad if it prohibits constitutionally protected speech.

Overbroad laws – like vague laws – deter protected activity. The crucial question in determining whether a law is unconstitutionally overbroad is whether the law sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. *Grayned*, 408 U.S. at 114-15.

Although some of the speech the proposed Rule prohibits might arguably be unprotected – such as speech that actually and substantially prejudices the administration of justice or speech that would actually and clearly render an attorney unfit to practice law – the proposed Rule would also sweep within its prohibitions lawyer speech that is clearly protected by the First Amendment, such as speech that might be offensive, disparaging, or hurtful and, therefore, considered, at least by some, as constituting discrimination or harassment ("derogatory", "demeaning", or "harmful" speech), but that would not prejudice the administration of justice nor render the attorney unfit to practice law. *DeJohn v. Temple Univ.*, 537 F.3d 301 (2008) (holding that a University Policy on

Sexual Harassment that prohibited "all forms of sexual harassment . . . including expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment" was unconstitutionally overbroad on its face).

Speech is not unprotected merely because it is harmful, derogatory, demeaning, or even discriminatory or harassing. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) (holding that there is no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs; harassing or discriminatory speech implicate First Amendment protections; there is no categorical rule divesting "harassing" speech of First Amendment protection).

Indeed, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder*, 562 U.S. at 458 (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley*, 515 U.S. at 574 (noting that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); s*ee also Johnson*, 491 U.S. at 414 (stating that "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *see also Matal v. Tam*, 137 Sup. Ct. 1744 (2017) (stating that the government's attempt to prevent speech expressing ideas that offend strikes at the heart of the First Amendment); and *Telescope Media Group v. Lucer*o, 936 F.3d 740 (8th Cir. 2019)(observing that "regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be").

In fact, courts have found that terms such as "derogatory" and "demeaning" – both of which are used in the proposed Comment [3A] of the proposed Rule to describe what the word "harassment" means – are unconstitutionally overbroad. *Hinton*, 633 F.Supp. 1023 (holding that the term "derogatory information" is unconstitutionally overbroad); *Summit Bank*, 206 Cal. App. 4th 669 (finding that a statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech); s*ee also Saxe*, 240 F.3d 200 (holding that a school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional because it is overbroad).

The broad reach of the proposed Rule is well illustrated by the example that Senior Ethics Counsel Lisa Panahi and Ethics Counsel Ann Ching of the Arizona State Bar gave in their January 2017 article "Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g)," in the *Arizona Attorney*. They stated that an attorney could be professionally disciplined under Model Rule 8.4(g)'s prohibition on discriminatory or harassing conduct in business or social activities "related to the practice of law" for telling an offensive joke at a law firm dinner party. The late Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provided another example of the broad reach of these sorts of professional non-discrimination, non-harassment rules. He wrote: "If one lawyer tells another, at the water cooler or a bar association meeting on tax reform, 'I abhor the idle rich. We should raise capital gains taxes,' he has just violated the ABA rule by manifesting bias based on socioeconomic status." Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But*

Not Diversity of Thought, Legal Memorandum No. 191 at 4, The Heritage Foundation (Oct. 6, 2016). Socioeconomic status is also a protected characteristic under the proposed Rule.

But the speech in both these examples would clearly be constitutionally protected. The fact that such constitutionally protected speech would violate the proposed Rule demonstrates that the Rule is unconstitutionally overbroad.

Indeed, regardless of whether any attorney is ultimately prosecuted under the proposed Rule for engaging in protected speech, the mere possibility that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – which is precisely what the overbreadth doctrine is designed to prevent. *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (noting that overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression.).

Therefore, because the proposed Rule will prohibit a broad swath of protected speech and would chill lawyers' constitutionally protected speech, the proposed Rule would not pass constitutional muster.

6. The Proposed Rule Will Constitute An Unconstitutional Content-Based Speech Restriction

By only proscribing speech that is derogatory, demeaning, or harmful toward members of certain designated classes, the proposed Rule will constitute an unconstitutional content-based speech restriction. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (explaining that government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed.); *see also Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (holding that an ordinance prohibiting

demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability, or sexual orientation is an unconstitutional content-based violation of the First Amendment).

Indeed, the U.S. Supreme Court reiterated this principle in a case that is directly relevant when considering the constitutional infirmities of the proposed Rule. In *Tam*, supra, the Court found that a Lanham Act provision – prohibiting the registration of trademarks that may "disparage" or bring a person "into contempt or disrepute" – was facially unconstitutional because such a disparagement provision – even when applied to a racially derogatory term – "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." 137 Sup. Ct. 1744. In a concurring opinion joined by four Justices, Justice Kennedy described the constitutional infirmity of the disparagement provision as "viewpoint discrimination" – "an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Id*. at 1766. The problem, he pointed out, was that, under the disparagement provision, "an applicant may register a positive or benign [trade]mark but not a derogatory one" and that "This is the essence of viewpoint discrimination." *Id*. Likewise, under the proposed Rule attorneys may engage in positive or benign speech with regard to the protected classes, but not derogatory, demeaning, or harmful speech. Under the Supreme Court's *Tam* decision, this is the essence of viewpoint discrimination, and presumptively unconstitutional.

The late Professor Rotunda provided a concrete example of how the proposed Rule may constitute an unconstitutional content-based speech restriction. Referring to Model Rule 8.4(g), he explained: "At another bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.' Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally,

another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline." Rotunda, *supra*.

"One reliable way to tell whether a law restricting speech is content-based is to ask whether enforcement authorities must 'examine the content of the message that is conveyed' to know whether the law has been violated." *Otto*, supra, at 862, citing *McCullen v. Coakley*, 573 U.S. 464, 479 (2014), quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984). That is precisely what enforcement authorities would have to do under the proposed Rule because the content of a lawyer's speech will determine whether the lawyer has or has not violated the proposed Rule. Enforcement authorities will have to examine the content of the complained-of speech to determine whether the speech manifests bias or prejudice. For example, a lawyer who speaks against same-sex marriage may be in violation of the proposed Rule for engaging in speech that some consider to be discriminatory based on sexual orientation or marital status, while a lawyer who speaks in favor of same-sex marriage would not be. Or as the Minnesota case discussed above illustrates, one may speak favorably about transgender issues, but not unfavorably. These are classic examples of unconstitutional viewpoint-based speech restrictions. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (holding that the government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed). In *R.A.V.*, the Supreme Court struck down, as facially unconstitutional, the city of St. Paul's Bias-Motivated Crime Ordinance because it applied only to fighting words that insulted or provoked violence "on the basis of race, color, creed, religion or gender," whereas expressed hostility on the basis of other bases were not covered. *Id*. In striking down the Ordinance, the Court stated: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id*. at 390. That is precisely what the proposed Rule does. For that

reason, commentators have described Rules like the proposed Rule as speech codes for lawyers.

For those who would deny that the proposed Rule creates an attorney speech code, we need only point them to Indiana, a state that has adopted a black letter non-discrimination Rule – albeit not as broad as the Rule being proposed here. In *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Ind. 2010) an Indiana attorney was professionally disciplined under Indiana's Rule 8.4(g) for merely asking someone if they were "gay." And in *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Ind. 2010) an attorney had his license suspended for applying a racially derogatory term to himself. In both cases, the attorneys were professionally disciplined merely for using certain disfavored speech.

Because it constitutes an unconstitutional speech code for lawyers the proposed Rule should be rejected.

7. The Proposed Rule Will Violate Attorneys' Free Exercise of Religion And Free Association Rights

The proposed Rule will also violate attorneys' constitutional right of free religious exercise because the Rule prohibits religious expression if such expression could be considered discriminatory or harassing.

The ACLU of New Hampshire opposed a similar rule – considered but not adopted – in that state, noting correctly that such rules threaten religious liberty because "one person's religious tenet could be another person's manifestation of bias." American Civil Liberties Union of New Hampshire, Letter to Advisory Committee on Rules, New Hampshire Supreme Court (May 31, 2018).

As an illustration of this problem, the late Professor Rotunda posited the example of

Catholic attorneys who are members of the St. Thomas More Society, an organization of Catholic lawyers and judges. If the St. Thomas More Society should host a CLE program in which members discuss and, based on Catholic teaching, voice objections to the Supreme Court's same-sex marriage rulings, Professor Rotunda explained that those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. In fact, Professor Rotunda pointed out that an attorney might be in violation of the Rule merely for being a member of such an organization. Rotunda, *supra* at 4-5. The fact that the Rule may prohibit such speech or membership indicates that the Rule will be unconstitutional.

To those who might deny the proposed Rule could or would be applied in that way, one need only note the above-referenced action of the CLE accrediting authorities in Minnesota upon the Minnesota Lavender Bar Association's complaint that a CLE co-sponsored by a Roman Catholic law school, discussing transgender issues from a Roman Catholic perspective, constituted "harassment" under ABA Model Rule 8.4(g), stating that the religiously based discussion constituted "transphobic rhetoric" and "discrimination." In essence, that case stands for the proposition that the prohibition of "harassment" and "discrimination" as embodied in professional conduct rules, such as the one proposed here, will apply to and prohibit religious speech – speech that expresses a religious tenet of some, but to others is viewed as discrimination or harassment.

Religiously based legal organizations have consistently opposed professional conduct rules like the one under consideration here on the ground that such rules threaten religious liberty. Those groups include the Catholic Bar Association – which has adopted a resolution stating that Model Rule 8.4(g) is not only unconstitutional but is "incompatible with Catholic teaching and the obligations of Catholic lawyers" – as well as the Christian Legal Society. Both organizations have

cause for concern because, as Professor Rotunda presciently warned, merely being members of those organizations would violate rules like the Rule proposed here. How so? Because both organizations limit their membership based on religion. The Christian Legal Society requires its members to subscribe to a Christian statement of faith. The Catholic Bar Association requires its members to be practicing Roman Catholics. Therefore, both legal organizations "discriminate" on the basis of religion – something explicitly prohibited under the terms of the proposed Rule. The proposed Rule would destroy both organizations.

Because the proposed Rule will violate attorneys' Free Exercise and Free Association rights it should be rejected.

8. The Proposed Rule Will Result In The Suppression Of Politically Incorrect Speech While Protecting Politically Correct Speech

Under a literal reading of the proposed Rule, a law firm's affirmative action hiring practices would constitute a violation of the Rule, because the proposed Rule makes clear that it is professional misconduct for a lawyer operating or managing a law firm or law practice to discriminate 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. Therefore, any hiring or other employment practices that favor applicants or employees on the basis of any of those characteristics are forbidden.

But does anyone really believe that a lawyer will ever be prosecuted for favoring women or racial minorities in hiring or promotion decisions undertaken in order to increase diversity in the legal profession? Of course not. In fact, discrimination for those purposes will actually be favored.

Indeed, proposed Comment [3B] to the proposed Rule makes this practice, of protecting favored speech and suppressing disfavored speech, explicit because Comment [3B] contains an express exception for "conduct undertaken to promote diversity and inclusion" and for "members of underserved populations."

So, if an attorney engages in discriminatory conduct that furthers a *politically correct* interest, the disciplinary authority will find that the discrimination is undertaken to promote diversity or inclusion or to serve an underserved population, and for that reason does not violate the proposed Rule. But if an attorney engages in discriminatory conduct that furthers a *politically incorrect* interest, the state will prosecute that attorney for violating the Rule. And because the terms "harassment" and "discrimination" are both vague and overbroad, professional disciplinary authorities will be able to interpret those terms in ways that result in selective prosecution of politically incorrect or disfavored speech, while protecting politically correct or favored speech.

This phenomenon has already been observed in other similar contexts. For example, a Civil Rights Commission in Colorado prosecuted a Christian baker for declining to bake a wedding cake for a same-sex couple but refused to prosecute three other bakers who refused to bake a cake for a Christian, finding that the first constituted illegal discrimination but that the second did not. The reason underlying this disparate treatment was obvious. In the first situation, the complaining party was a member of a politically favored class, while in the second the complaining party was a member of a disfavored one. The U.S. Supreme Court condemned that unequal treatment, stating that it constituted a "clear and impermissible hostility toward the religious beliefs" of the baker the Commission selectively chose to prosecute. *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1729 (2018).

These exceptions also render the proposed Rule unconstitutional because – by prohibiting

only disfavored discriminatory messages while allowing favored ones, the Rule creates a viewpoint-based speech restriction. *See R.A.V.*, 505 U.S. 377.

No rule of professional conduct should punish certain viewpoints while protecting and advancing others. In fact, to do so is unconstitutional.

9. Assurances That The Proposed Rule Will Not Be Applied In An Unconstitutional Manner Do Not Cure The Rule's Constitutional Infirmities

Supporters of the proposed Rule may argue that, although the Rule could be applied in an unconstitutional manner, it will not be. However, such representations do not remedy the Rule's constitutional infirmities.

First, proponents of the proposed Rule do not have the authority to speak on behalf of a state's professional disciplinary authorities. Proponents of the proposed Rule cannot say how the disciplinary authorities will interpret or apply the Rule.

And second, this very argument was made and rejected in *Stevens*, supra. There, in a case challenging the constitutionality of a statute criminalizing certain depictions of animal cruelty, the U.S. Supreme Court addressed the government's claim that the statute was not unconstitutionally overbroad because the government would interpret the statute in a restricted manner so as to reach only "extreme" acts of animal cruelty and that the government would not bring an action under the statute for anything less. In response, the high court pointed out that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." The court pointed out the danger in putting faith in government representations of prosecutorial restraint, and stated that "The Government's assurance that it will apply § 48 far more restrictively

than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." *Id*. at 480.

In other words, far from curing its constitutional defects, representations that the proposed Rule will not be applied so as to violate the Constitution constitute indirect admissions that the proposed Rule is, in fact, constitutionally infirm.

For this reason, the proposed Rule's provision that "Conduct protected by the Constitutions of the United States or the State of Illinois, . . . does not violate this paragraph" is unavailing and fails to save the proposed Rule from constitutional challenge. In fact, that "saving" provision constitutes an admission that under a "natural reading" of the proposed Rule, the Rule could violate an attorney's constitutional rights. It serves as nothing more than a statement that, if the proposed Rule is applied in an unconstitutional manner, attorneys can raise their constitutional rights as a defense against such a prosecution. But because that would be true with or without the provision, the provision is illusory. The proponents of the proposed Rule know the Rule is unconstitutional and have inserted this "saving" provision in an indefensible attempt to save it.

10. The Proposed Rule Also Violates The Constitution Of The State Of Illinois.

Like the United States Constitution, the Illinois Constitution guarantees citizens the right to free speech without governmental infringement. Ill. Const. Art. I, § 4 (providing that "All persons may speak, write and publish freely"). The Illinois Constitution provides at least the same freedom of speech rights as the U.S. Constitution – and perhaps more. *People v. DiGuida*, 6470 N.E.2d 336, 343-44 (Ill. 1992)(noting that "we reject any contention that free speech rights under the Illinois Constitution are in all circumstances limited to those afforded by the Federal Constitution".).

Like the U.S. Constitution, the Illinois Constitution also guarantees citizens the right to freely exercise their religion. Ill. Const. Art. I, § 3 (providing that "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed").

Therefore, for the same reasons discussed above, the proposed Rule is unconstitutional not only under the U.S. Constitution but also under the Illinois Constitution.

11. The Only Court To Have Substantively Ruled On The Issue Found Professional Anti-Discrimination Rules Based On The Model Rule Unconstitutional.

On December 7, 2020, the Court, in *Greenberg v. Haggerty* (2020 WL 7227251) enjoined enforcement of a Rule of Professional Conduct adopted by Pennsylvania based on ABA Model Rule 8.4(g). Many of the Court's findings echo what critics of the Rule have contended.

In particular, the Court held that the Plaintiff attorney – who intended to discuss controversial topics in a CLE presentation that he believed might facially violate the Rule – successfully carried his burden in showing that the Rule chilled his constitutionally protected speech. The Court stated that if Pennsylvania's Rule 8.4(g) went into effect – which prohibited attorneys from using "words . . . manifesting bias or prejudice," "it will hang over Pennsylvania attorneys like the sword of Damocles."

The Court found, first, that – as set forth in the Supreme Court's *NIFLA* case – a lawyer's professional speech is protected First Amendment speech, even when the attorney is speaking in a professional capacity.

Second, the Court found that the Rule prohibited speech, not mere conduct, because it specifically applied to "words" (just as ABA Model Rule 8.4(g) and the proposed Rule here specifically applies to "verbal conduct" – a euphemism for "speech).

Third, the Court rejected the state's argument that the Rule was a legitimate exercise of its broad authority to regulate attorney speech under its professional regulatory authority.

And fourth – citing the *Tam* case – the Court determined that the Rule constituted unconstitutional viewpoint-based discrimination because the Rule allows attorneys to speak favorably about the protected classes but not unfavorably.

In its conclusion, the Court stated: "There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance."

After the court's ruling in *Greenberg v. Haggerty*, the Supreme Court of Pennsylvania, attempting to cure the previous rule's constitutional infirmities, unilaterally adopted a second rule. But that rule was also struck down as unconstitutional. *Greenberg v. Goodrich*, 593 FSupp.3d 174 (2022). The state appealed that ruling and on April 13, 2023, the U.S. Court of Appeals for the Third Circuit reversed the District Court, but not on substance. The Court of Appeals dismissed the case for lack of standing and stated that "If facts develop that validate Greenberg's fears of enforcement, then he may bring a new suit to vindicate his constitutional rights . . . we express no opinion on the merits of his suit." *Greenberg v. Lehocky*, supra.

B. Only Two States Have Adopted Model Rule 8.4(g) and Comments. All Other State Supreme Courts That Have Considered And Acted Upon the Rule Have Rejected It In Whole or In Part

In the seven years since the ABA adopted Model Rule 8.4(g) – although many states have considered it – only two states, Vermont and New Mexico, have adopted it and its model comments. The supreme courts of seven states – Arizona, Idaho, Montana, South Carolina, South Dakota, Tennessee, and Wisconsin – have all expressly rejected the Rule.

Indeed, many states continue to have no blackletter nondiscrimination rule at all in their Rules of Professional Conduct.

In fact, not only do the many states have no blackletter anti-discrimination rule in their rules of professional conduct, but in those states that *do* have blackletter antidiscrimination provisions in their rules, no state's rule – other than Vermont's and New Mexico's – is comparable to Model Rule 8.4(g) and its comments.

Aside from Vermont and New Mexico, none of the jurisdictions with blackletter anti-discrimination rules extends its rule to conduct "related to the practice of law" or to conduct "in connection with the practice of law" or to "law-related professional activities" – including bar association, business, and social activities of attorneys – as does the Model Rule and the Rule proposed here. (Although Maine's and Connecticut's prohibitions apply to "conduct related to the practice of law," Maine specifically declined to extend its prohibition to a lawyer's bar association, business, or social activities and Connecticut declined to extend its prohibition to a lawyer's social activities). Indeed, seven of those jurisdictions specifically limit their coverage to conduct "in the representation of a client" or "in the course of employment" (Florida, Idaho, Nebraska, Missouri, North Dakota, Oregon, and Washington State). Eight states limit the applicability of their

nondiscrimination rules to conduct toward other counsel, litigants, court personnel, witnesses, judges, and others involved in the legal process (Colorado, Florida, Idaho, Michigan, Nebraska, and Washington State). Massachusetts limits its Rule to conduct "before a tribunal."

And unlike the Rule proposed here, nine of the states with black letter antidiscrimination rules require that the alleged discrimination actually either prejudice the administration of justice or render the attorney unfit to practice law (Florida, Illinois, Maryland, Minnesota, Nebraska, North Dakota, Pennsylvania, Rhode Island, and Washington State).

Further, unlike Model Rule 8.4(g) and the Rule being proposed here – which has a "know or reasonably should know" standard – four states with black letter rules require the discriminatory conduct to be "knowing," "intentional" or "willful" (Maryland, New Jersey, New Mexico, and Texas). Indeed, New Hampshire's rule only applies to attorney conduct when the attorney's "primary purpose" is to embarrass, harass, or burden another person. As an explanatory comment to New Hampshire's rule explains: "The rule does not prohibit conduct that lacks this primary purpose, even if the conduct incidentally produces, or has the effect or impact of producing" embarrassment, harassment, or a burden to another."

Finally, nine states (California, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Washington State, Iowa, and currently Illinois) limit their antidiscrimination rules to "unlawful" discrimination or discrimination "prohibited by law." And of those nine states, nearly half of them (Illinois, New Jersey, New York, and Pennsylvania) actually require that, before any disciplinary claim can even be filed, a tribunal of competent jurisdiction *other than a disciplinary tribunal* must have found that the attorney has actually violated a federal, state, or local antidiscrimination statute or ordinance.

So, should Illinois adopt the proposed Rule, it will have adopted a Rule that impinges on attorney conduct in ways, and far more extensively, than any other jurisdictions – other than Vermont and New Mexico – have seen fit to do.

There are good reasons why the majority of jurisdictions have not adopted any blackletter nondiscrimination Rules in their Rules of Professional Conduct. And there are also good reasons why no states other than Vermont and New Mexico have adopted ABA Model Rule 8.4(g). There are also good reasons why the Supreme Courts of Arizona, Idaho, South Carolina, South Dakota, Tennessee, and Montana have all expressly rejected ABA Model Rule 8.4(g). For these same reasons, Illinois would be wise to reject the proposed Rule as well.

C. The Proposed Rule is Unnecessary, Will Not Remedy the Proponent's Concerns, and Will Unnecessarily Burden Illinois's Professional Disciplinary Authorities

Many of the circumstances the proposed Rule would address are already addressed by Illinois's current Rules of Professional Conduct or other laws.

First, Rule 8.4(d) of the Illinois Rules of Professional Conduct already prohibits attorney conduct that prejudices the administration of justice. In fact, sexual harassment has been professionally disciplined in other states under Rule 8.4(d). *See, e.g.*, *Attorney Grievance Comm'n of Md. v. Goldsborough*, 624 A.2d 503 (Ct. App. Maryland 1993) (holding that nonconsensual kissing of clients and spanking clients and employees can violate Rule 8.4(d) prohibiting lawyers from engaging in conduct that is prejudicial to the administration of justice).

Likewise, harassing and discriminatory judicial behavior – as well as discriminatory and harassing conduct of attorneys in proceedings before judicial tribunals – are already addressed in Illinois's Code of Judicial Conduct, Rule 2.3.

For these reasons, the proposed Rule is redundant and unnecessary.

In addition, harassment and discrimination in the legal workplace are also already addressed in Title VII at the federal level, as well as in Illinois's employment nondiscrimination laws, including Article 2 of the Illinois Human Rights Act, which covers all workplaces regardless of the number of employees employed. So, the proposed Rule would create an entirely new layer of nondiscrimination and anti-harassment laws in the legal workplace, in addition to those already existing outside the Rules of Professional Conduct. By doing so, the Rule will burden professional disciplinary authorities with having to process very fact-intensive, jurisprudentially complicated, and duplicative cases – cases that could and should be processed under some other statute or ordinance, by judicial authorities better informed and equipped to handle them.

Further, making discrimination and harassment a professional, as well as a statutory, offense, divorced from specific anti-discrimination and harassment laws, could very well subject attorneys to multiple prosecutions and inconsistent obligations and results. Lawyers could be forced to defend against parallel prosecutions, being pursued by different prosecutorial authorities, all at the same time. And, because different legal and evidentiary standards may apply in different proceedings, attorneys could – under the same set of facts – be exonerated from allegations of having violated a nondiscrimination or harassment law, but still be found to have engaged in harassing or discriminatory conduct that violates the Rules of Professional Conduct, or vice versa. Indeed, as noted above, several states – including Illinois – have recognized the importance of this concern by (a) prohibiting only "unlawful" harassment or discrimination and (b) requiring that any claim against an attorney for unlawful discrimination be brought for adjudication before a tribunal other than a disciplinary tribunal before being brought before a disciplinary tribunal. See, for example, Illinois Rules of Professional Conduct Rule 8.4(j) and New York Rules of Professional

Conduct Rule 8.4(g).

So for all these reasons, too, the proposed Rule should be rejected.

III. Conclusion

The proposed Rule is unconstitutional. It is unconstitutionally vague. It is unconstitutionally overbroad. And it constitutes an unconstitutional content-based speech restriction. It violates attorneys' Free Speech, Free Exercise, and Free Association rights.

The proposed Rule would also authorize professional disciplinary authorities to discipline lawyers for non-commercial speech and conduct that neither prejudices the administration of justice nor renders attorneys unfit to practice law. It would create a strict liability speech code for lawyers. The proposed Rule would also subject attorneys to duplicative prosecutions, as well as inconsistent obligations and results.

The proposed Rule's many infirmities are evidenced by the fact that, in the seven years since the ABA adopted Model Rule 8.4(g), only two states have adopted it. All other state supreme courts that have considered and acted upon the Rule have rejected it. So, should Illinois adopt the proposed Rule, which is based on ABA Model Rule 8.4(g), it would be embarking on a path that most other states have – for good reasons – rejected.

For all these reasons, the proposal to amend Rule 8.4(j) of the Illinois Supreme Court Rules to conform more closely to ABA Model Rule 8.4(g) should be rejected.

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