New Civil Liberties Alliance

June 18, 2021

Filed Via Email (rulecomments@nycourts.gov)
Administrative Board of the Courts
Office of Court Administration
New York State Unified Court System
Attn: Eileen D. Millett, Esq.

Re: Proposed Revision to Rule 8.4(g), New York Rules of Professional Conduct

Dear Ms. Millett:

The New Civil Liberties Alliance (NCLA) is pleased to submit these comments in connection with the Administrative Board's consideration of a proposal (from the New York City Bar's Professional Responsibility Committee; hereinafter, the "Proposed Rule") to adopt ABA Model Rule 8.4(g) to replace current Rule 8.4(g) of the New York Rules of Professional Conduct (the "New York Rules"). NCLA strongly urges the Board not to recommend adoption of the Proposed Rule. There is no need for an additional rule governing discrimination-based misconduct by New York attorneys; such misconduct is already adequately addressed by Rule 8.4(g) of the New York Rules.

More importantly, the Proposed Rule raises significant constitutional concerns. It authorizes New York to discipline lawyers (including imposing sanctions that deprive lawyers of the ability to earn a livelihood) based on overly vague standards. Recent history demonstrates widespread disagreement over what conduct/speech one "reasonably should know is harassment or discrimination on the basis of race, sex, religion [etc.]." Moreover, imposing content-based restrictions on attorney speech (by declaring that certain expressions constitute "harassment") violates clearly established First Amendment norms. The U.S. Supreme Court has repeatedly held that attorneys are entitled to the same free-speech protections enjoyed by all other citizens.

ABA Model Rule 8.4(g) has been widely criticized by leading constitutional scholars as an unwarranted speech code for lawyers. As UCLA law professor Eugene Volokh has explained, adoption of rules substantially similar to ABA Model Rule 8.4(g) (such as the Proposed Rule) is likely to deter lawyers from speaking out on important legal issues, for fear that they will face severe sanctions if someone later concludes that their speech constitutes harassment on the basis of one of the 12 listed characteristics.[1] Such chilling of speech is intolerable; our free society cannot function effectively unless attorneys can speak their minds openly without fear of losing their law licenses.

[1] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017) (available at https://www.youtube.com/watch?v=AfpdWmlOXba).

Supporters of the Proposed Rule argue that such free-speech concerns are overblown. They contend that bar officials can be trusted to confine enforcement of the Proposed Rule to cases of egregious attorney misconduct. But attorneys should not be required to entrust their livelihoods to the self-restraint of bar authorities who, under the Proposed Rule, would be afforded broad discretion to determine what constitutes sanctionable "harassment." And recent history indicates that they would be pressured to define that term expansively.

I. Interests of NCLA

The New Civil Liberties Alliance is a nonpartisan, nonprofit civil rights group devoted to defending civil liberties. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as freedom of speech, due process of law, the right to be tried by an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because legislatures, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

New York promulgates Rules of Professional Conduct that govern the practice of law by attorneys within the State. Those rules are administered by local Committees, which are authorized to investigate alleged rule violations; if a Committee finds probable cause, formal disciplinary proceedings are conducted in the Appellate Division, as set forth in 22 NYCRR 1240.8. NCLA is concerned that the Proposed Rule, by delegating to Committees broad authority to define sanctionable misconduct, will inappropriately transform them into unelected policymaking bodies.

II. Proposed Rule 8.4(g)

Under Proposed Rule 8.4(g), a lawyer or law firm shall not:

> Engage in conduct related to the practice of law 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 or expression, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

One striking feature of the Proposed Rule is that it does not require a showing that the lawyer *intended* to discriminate against or harass anyone; it is enough that the lawyer "reasonably should know" that (s)he has engaged in harassment or discrimination. The conduct at issue must be "related to the

practice of law," but the official Comments accompanying the Proposed Rule confirms that the drafters intend that phrase to be construed quite broadly:

> Conduct related to the practice of law includes representing clients, interacting with witnesses, co-workers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or professional activities or events in connection with the practice of law.

The official Comments to the Proposed Rule provide a similarly broad definition of "harassment." It is defined as including:

> [H]armful, derogatory, or demeaning verbal or physical conduct that manifests bias or prejudice towards others and includes conduct that creates an environment that a reasonable person would consider intimidating, hostile, or abusive. Typically, a single incident involving a petty slight, unless intended to cause harm, would not rise to the level of harassment under this paragraph. Harassment also includes sexual harassment, which involves unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

III. The Proposed Rule Violates First Amendment Rights

The Proposed Rule exposes attorneys to discipline for harassing another—for example, subjecting another to "derogatory or demeaning verbal … conduct"—on the basis of one of the protected categories. That rule runs headlong into numerous U.S. Supreme Court decisions that grant First Amendment protection to "disparaging" speech. *See, e.g., Matal v. Tam*, 137 S. Ct. 1744 (2017) (unanimously declaring unconstitutional federal statute that permitted government officials to penalize "disparaging" speech); *id.* at 1766 (Kennedy, J., concurring) (stating that First Amendment does not permit suppression of speech that "demeans or offends"). Individuals may feel demeaned if a lawyer, speaking at a bar-sanctioned forum, tells them that homosexual conduct is immoral or that employers should ask prospective employees about their salary histories (despite claims by some that such questions tend to perpetuate sex-based salary disparities). But the First Amendment prohibits States from sanctioning lawyers for expressing such views.

That the lawyer utters the "derogatory" or "demeaning" words in a setting "related to the practice of law" does not diminish the First Amendment protections to which the speaker is entitled. The Supreme Court held in *Nat'l Inst. of Family and Life Advocates v. Becerra* ["*NIFLA*"], 138 S. Ct. 2361 (2018), that the First Amendment protects "professional speech" just as fully as other forms of speech. When (as here) the government is proposing to restrict speech based on its content, the restriction is subject to strict constitutional scrutiny—meaning that the restriction will be found unconstitutional unless the government demonstrates that it is "narrowly tailored to serve compelling state interests." *Id.* at 2371. Proponents of the Proposed Rule have not attempted to make such a showing.

Other features of the Proposed Rule are even more disturbing. Attorneys can be sanctioned even when they lack any intent to discriminate against or harass others. It is sufficient to show that the attorney "reasonably should know" that his or her conduct constitutes discrimination or harassment. The problem is compounded by the inherent vagueness of the terms "discrimination"

and "harassment." Because "harassment" has no fixed meaning, bar officials are free to adopt an expansive definition in cases involving speech they find distasteful, declare that the speaker "reasonably" should have been aware of that definition, and impose career-ending sanctions on the speaker. A law that deprives someone of life, liberty, or property is constitutionally problematic when "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015).

New York must be particularly vigilant in guarding against infringement of First Amendment rights in the attorney-discipline context because the consequences of an ethics violation finding can be so severe, including the loss of the right to earn a livelihood in one's chosen profession. As the U.S. Supreme Court has recognized:

> Without doubt, [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, *to engage in any of the common occupations of life*, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added). While New York is entitled to impose reasonable licensing requirements on the practice of law, it may not rescind or impair the licenses of those whose speech it finds objectionable.

IV. The Proposed Rule Will Chill Speech

Adoption of the Proposed Rule will inevitably lead to the chilling of attorney speech. Few attorneys will be willing to speak out on topics related to the 12 protected categories if they know that doing so could jeopardize their careers. Society as a whole will suffer from such self-censorship; we depend on lawyers to play a lead role in airing views on both sides of controversial issues.

There can be little doubt, moreover, that the Proposed Rule takes sides on at least some of those issues. For example, the Comments on the Proposed Rule state, "Paragraph (g) does not prohibit conduct undertaken to promote diversity and inclusion by, for example, implementing initiatives aimed at recruiting, retaining and advancing diverse employees or sponsoring diverse law student organizations." No similar exemption is provided to lawyers who publicly oppose explicit efforts to "promote diversity" and who instead advocate hiring the employees deemed most qualified—without regard to their race, sex, religion, or sexual orientation.

Assurances from bar officials that they will adopt "reasonable" enforcement policies are unlikely to reduce the Proposed Rule's chilling effect on attorney speech. Those officials may insist that they will proceed only against the most egregious violators, but attorneys who read the Proposed Rule's broad language are unlikely to rely on vague and unenforceable promises of that nature.

Moreover, if bar officials are really interested in disciplining only the most egregious offenders (and are not seeking to establish a "speech code" for the legal profession), then existing rules suffice for that purpose. Rule 8.4(g) states that a lawyer or law firm shall not "unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment

on the basis of age, race, creed, color, national origin, sex, disability, marital status, sexual orientation, gender identity, or gender expression."

Rule 8.4(g) permits the bar to impose discipline on those attorneys whose egregious conduct constitutes a clear violation of civil rights laws. At the same time, however, it reduces the chilling effect on speech by restricting disciplinary proceedings to those who act "knowingly." The New York City Bar asserts that the current rule fails to address "harassment." That assertion is false. The Supreme Court has repeatedly held, for example, that the discrimination prohibited by Title VII of the Civil Rights Act of 1964 includes harassment. *See, e.g., Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998). The New York City Bar also faults current Rule 8.4(g) for limiting the prohibition to "unlawful" discrimination; it would prefer a rule that would permit attorney speech to be sanctioned as "discrimination" or "harassment" even if it does not violate any existing legal standard. On the contrary, NCLA views the current Rule's limitation to "unlawful" discrimination as an essential bulwark against speech control of the sort antithetical to our free society. The chill on free speech will become a deep freeze if bar authorities are authorized to expand the definition of "harassment" to include speech not sanctionable under existing law.

V. Federal Court Strikes Down Pennsylvania's Version of Rule 8.4(g)

The New York City Bar submitted its Proposed Rule in October 2020. One month later, a federal court struck down Pennsylvania's version of ABA Model Rule 8.4(g), holding that the rule violated attorneys' First Amendment rights. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 27 (E.D. Pa. 2020). The Administrative Board ought to carefully reflect on that court's cogent constitutional analysis before recommending adoption of a similar bar rule in New York, a rule that is certain to spawn judicial challenges. Particularly striking is that the invalidated Pennsylvania rule had a narrower scope than both ABA Model Rule 8.4(g) and the rule proposed by the New York City Bar. Unlike the latter two rules, Pennsylvania Rule 8.4(g) limited its reach to attorneys who "*knowingly* manifest bias or prejudice, or engage in harassment or discrimination." (Emphasis added.) If a rule limited to "knowing" harassment or discrimination cannot pass First Amendment muster, it is highly unlikely that federal courts will uphold the broader version of the rule proposed by the ABA and the New York City Bar.

Greenberg explicitly rejected Pennsylvania's claim that its rule was entitled to deference because attorneys, as professionals engaged in the administration of justice, are subject to heightened regulation. 491 F. Supp. 3d at 27-28. While acknowledging that the First Amendment does not proscribe close regulation of attorneys when (1) their speech is "commercial" in nature or (2) a State is "regulat[ing] professional conduct, even though that conduct incidentally involves speech," the court determined that "Rule 8.4(g) does not fall into either of those categories." *Id.* at 27. The court held that "the drafters of Rule 8.4(g) intended to explicitly restrict offensive words," an intent anathema to the First Amendment. *Id.* at 28. It explained,

> 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 poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information. … States cannot choose the protection that speech receives under the

> First Amendment [by imposing a licensing requirement], as that would give them a powerful tool to impose invidious discrimination of disfavored subjects.

Id. at 29 (quoting *NIFLA*, 138 S. Ct. at 2374).

CONCLUSION

In light of ABA Model Rule 8.4(g)'s infringement on free-speech rights, it is unsurprising that the rule has been rejected by virtually all the States that have considered its adoption. Only Vermont, New Mexico, and Maine have fully adopted ABA Model Rule 8.4(g). Nearly 20 States have either completely or largely rejected the Model Rule. At the very least, New York should defer consideration of the Proposed Rule until after Vermont, New Mexico, and Maine have had enough experience with their new rules to see what effect those rules have on attorney conduct and speech.

NCLA respectfully requests that the Administrative Board of the Courts recommend against adoption of Proposed Rule 8.4(g) as an amendment to the New York Rules of Professional Conduct.

Sincerely,

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