New Civil Liberties Alliance

January 13, 2025

Filed via Email (rules@dcappeals.gov)
The Honorable Anna Blackburne-Rigsby
c/o Clerk of Court
D.C. Court of Appeals
430 E Street, N.W.
Washington, D.C. 20001

Re: Proposed Inclusion of Rule 8.4(h), District of Columbia Rules of Professional Conduct (No. M286-24)

Dear Chief Judge Anna Blackburne-Rigsby,

The New Civil Liberties Alliance (NCLA) is pleased to submit these comments in connection with the Court's consideration of a proposal to amend Rule 8.4 of the District of Columbia Rules of Professional Conduct to include Rule 8.4(h). The proposed rule, which largely mirrors Rule 8.4(g) of the American Bar Association's Model Rules of Professional Conduct, would subject attorneys to discipline for engaging in harassing or discriminatory speech or conduct. NCLA strongly urges the Court not to adopt Rule 8.4(h). There is no need for an additional rule governing discrimination-based misconduct by District of Columbia attorneys; such misconduct is already adequately addressed by Rule 8.4(d) of the District of Columbia Rules.[1]

More importantly, the Proposed Rule raises significant constitutional concerns. It authorizes the District of Columbia 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 and/or speech one "reasonably should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status" as proposed by the new Rule. Moreover, imposing content- and viewpoint-based restrictions on attorney speech (by declaring that certain expressions constitute "harassment" or "discrimination") violates clearly established First Amendment norms.

ABA Model Rule 8.4(g) has been widely criticized by leading constitutional scholars as an unwarranted speech code for lawyers. As Eugene Volokh, former UCLA law professor and Thomas M. Siebel Senior Fellow, Hoover Institution, Stanford University, has explained, adoption of rules substantially similar to ABA Model Rule 8.4(g) (such as Rule 8.4(h)) 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 or discrimination on the basis of one of the listed

[1] Rule 8.4(d) states that it is "professional misconduct for a lawyer to … [e]ngage in conduct that seriously interferes with the administration of justice."

characteristics.[2] 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.

The District of Columbia Bar's Proposal argues that such free-speech concerns are overblown. The D.C. Bar contends that its officials can be trusted to confine enforcement of the proposal to cases of egregious attorney misconduct. They also cite ABA's Formal Opinion 493 to suggest that proposed Rule 8.4(h), like the ABA's Model Rule 8.4(g), would be applied in a particular manner that will not chill speech. But attorneys should not be required to entrust their livelihoods to the ostensible self-restraint of bar authorities who, under proposed Rule 8.4(h), would be afforded broad discretion to determine what constitutes sanctionable "harassment" or "discrimination." And recent history indicates that they would be pressured to define those terms 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. Here, the D.C. Bar's proposed rule would violate First Amendment principles.

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.

Furthermore, a majority of NCLA's attorneys are barred in the District of Columbia, many of whom have done so to establish and maintain admission to the United States District Court for the District of Columbia, which is often the "home" venue in suits against federal government agencies. This letter is specifically submitted on behalf of Mark Chenoweth, Gregory Dolin, John Vecchione, Margaret A. Little, Andrew J. Morris, Sheng Li, Russell G. Ryan, Katherine Norman, Andreia Trifoi, and the undersigned, Kara M. Rollins.

II. Proposed Rule 8.4(h)

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

> [E]ngage in conduct directed at another person, with respect to the practice of law, that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic

[2] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://youtu.be/AfpdWmlOXbA?si=JlT8dhQNZR3KXAwN.

> status. This Rule does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from a representation. This Rule does not preclude providing legitimate advice of engaging in legitimate 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 Committee found the ABA's report "both persuasive and equally applicable to the proposal for D.C. Rule 8.4(h)," noting that:

> [C]onduct 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 nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer.

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

> [D]erogatory or demeaning verbal or physical conduct based on the characteristics enumerated in the Rule. In addition, sexual harassment includes unwanted sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. Anti-discrimination and anti-harassment statutes and case law may guide application of paragraph (h).

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 biological boys should not be allowed in girls' locker rooms, 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 and the Committee's attempt to address this concern by adding a directionality requirement to proposed Rule 8.4(h) cannot override that prohibition.

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. The Committee has not made such a showing, despite its post-comment revisions to the Proposed Rule.

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).

The Committee's weak substantiation for using the phrase "reasonably should know" does not pass constitutional muster. That the "the phrase 'reasonably should know' is used throughout the D.C. Rules and its scope and applicability has never been questioned" has no bearing on whether the challenged provision is permissible. *Cf. McGirt v. Oklahoma*, 591 U.S. 894 (2020) ("Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.").

The District of Columbia 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 the District of Columbia may be 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 13 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 leading role in airing views on both sides of controversial issues.

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.

V. Federal Court Challenges to Similar Rules of Professional Conduct

Challenge to Pennsylvania Rule of Professional Conduct 8.4(g)

The District of Columbia Bar initially proposed the addition of Rule 8.4(h) in 2019. It transmitted its proposed amendment to the Court on April 15, 2021. As noted in the Committee's Proposal, Pennsylvania amended its Rule of Professional Conduct to include a version of ABA Model Rule 8.4(g). That rule was challenged, and the court preliminarily enjoined the rule, holding that the rule violated attorneys' First Amendment rights. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 27 (E.D. Pa. 2020). There is no consideration of that decision in the Committee's Proposal, and this Court ought to carefully reflect on that court's cogent constitutional analysis before recommending adoption of a similar bar rule in the District of Columbia, 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 District of Columbia 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 District of Columbia 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 that is 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).

Pennsylvania initially appealed the ruling but voluntarily dismissed the matter. *See Greenberg v. Haggerty*, No. 20-3602, 2021 WL 2577514 (3d Cir. Mar. 17, 2021). The Pennsylvania Supreme Court adopted a new version of the rule, and the plaintiff amended his complaint. The court entered

summary judgment for Mr. Greenberg and held that Pennsylvania's rule was "an unconstitutional infringement of free speech according to the protections provided by the First Amendment" and "unconstitutionally vague under the Fourteenth Amendment." *Greenberg v. Goodrich*, 593 F. Supp. 3d 174, 225 (E.D. Pa. 2022), *rev'd sub nom. Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. 2023) (*cert. denied* 144 S.Ct. 1393 (2024)). The Third Circuit reversed on the grounds that Mr. Greenberg lacked standing but "express[ed] no opinion on the merits of his suit." *Greenberg v. Lehocky*, 81 F.4th at 389. Judge Ambro concurred but wrote separately to observe "that someday an attorney with standing will challenge Pennsylvania Rule of Professional Responsibility 8.4(g)" and that "[w]hen that day comes, the existing Rule and its commentary may be marching uphill needlessly." *Id.* at 390 (Ambro, J., concurring).

Challenge to Connecticut Rule of Professional Conduct 8.4(7)

On December 9, 2024, the United States Court of Appeals for the Second Circuit reversed a district court opinion that had dismissed a challenge to Connecticut Rule of Professional Conduct 8.4(7) for lack of standing. *See Cerame v. Slack*, 123 F.4th 72 (2d Cir. 2024).[3] Connecticut Rule 8.4(7) is substantially similar to ABA Model Rule 8.4(g), and the D.C. Bar's Proposed Rule 8.4(h). The Second Circuit determined that the plaintiffs had standing because they plausibly alleged that "that they intend to engage in speech proscribed, at least arguably, by a recently enacted, focused regulation" that "gives rise to a credible threat of enforcement." *Id.* at 87.

Read together, the *Cerame* and *Greenberg* cases strongly suggest that if adopted, proposed Rule 8.4(h) is vulnerable to challenge due to its constitutional infirmities. The New Civil Liberties Alliance, as it has done in the past, would feel compelled to bring a lawsuit against this rule, if it is adopted, to enjoin its implementation and vindicate the First Amendment principles at stake.

CONCLUSION

NCLA respectfully requests that the District of Columbia Court of Appeals spare the time, trouble, and resources the D.C. Bar would waste in defending this unlawful proposal, by not adopting Rule 8.4(h) as an amendment to the D.C. Rules of Professional Conduct in the first place.

Sincerely,

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[3] NCLA is counsel to plaintiffs Mario Cerame and Timothy Moynahan in that matter.