May 25, 2021

Professor Roy Simon
Chair, Committee on Standards of Attorney Conduct
New York State Bar Association

By email (roy.simon@hofstra.edu)

Dear Professor Simon:

Thank you for taking comments on COSAC's proposed amendments to current New York Rule 8.4(g). As you will recall, Christian Legal Society (CLS) submitted comments in February 2021 regarding COSAC's earlier proposal. Unfortunately, the current COSAC Proposal remains constitutionally problematic and should not be imposed on New York attorneys for the reasons below and in the attached letter dated May 18, 2021.

COSAC's Proposed New York Rule 8.4(g) ("COSAC's Proposed Rule") does not differ significantly from ABA Model Rule 8.4(g). For that reason, this comment letter on COSAC's Proposed Rule is augmented by CLS's comprehensive comment letter of May 18, 2021, to the Administrative Board of the Courts of the New York State Unified Court System's Office of Court Administration. That letter addresses the Administrative Board's proposal to substitute ABA Model Rule 8.4(g) for existing New York Rule of Professional Conduct 8.4(g). The numerous reasons for rejecting ABA Model Rule 8.4(g) that CLS discusses in its letter to the Administrative Board equally apply to COSAC's Proposed Rule which also would impose the substance of ABA Model Rule 8.4(g) on New York attorneys. Both rules will chill attorneys' free speech, despite wishful claims to the contrary.

This letter provides additional reasons why COSAC's Proposed Rule specifically should not be adopted, including:

1. COSAC's Proposed Rule 8.4(g) has basically the same scope as ABA Model Rule 8.4(g) and, therefore, will similarly chill New York attorneys' free speech. ABA Model Rule 8.4(g) applies to "conduct related to the practice of law," while COSAC's Proposed Rule 8.4(g) applies to "conduct in the practice of law." Despite the minor difference in language, ABA Model Rule 8.4(g) defines "conduct related to the practice of law" virtually identically to the way in which COSAC's Proposed Rule defines "conduct in the practice of law." That is, COSAC's Proposed Rule defines "conduct in the practice of law" to "include[]":

- "representing clients;"
- "interacting with witnesses, coworkers, court personnel, lawyers, and others, while engaging 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."

ABA Model Rule 8.4(g) defines "conduct related to the practice of law," in its Comment [4], to "include[]":

- "representing clients"—(same as COSAC's Proposed Rule);
- "interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law"—(same as COSAC's Proposed Rule);
- "operating or managing a law firm or law practice"—(same as COSAC's Proposed Rule); and
- "participating in bar association, business or social activities in connection with the practice of law"—(COSAC's Proposed Rule exchanges "social" for "professional" and inserts "or events" after "activities").

Given that these two definitions are nearly identical, it is unclear how the scope of COSAC's Proposed Rule differs from the scope of ABA Model Rule 8.4(g). Both apply to the same range of conduct. A primary criticism leveled at ABA Model Rule 8.4(g) is that its scope is far too broad, a criticism equally applicable to COSAC's Proposed Rule. (See May 18 Letter at 10-19.)

2. Because of their equally broad scope, both COSAC's Proposed Rule and ABA Model Rule 8.4(g) will chill New York attorneys' speech. The United States Supreme Court has issued three recent decisions with analyses that make clear that ABA Model Rule 8.4(g) is an unconstitutional content-based and viewpoint-based restriction on attorneys' speech. Those decisions are *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). (See May 18 Letter at 20-26.)

Proponents of ABA Model Rule 8.4(g) often rely on ABA Formal Opinion 493, but this reliance is misplaced. For reasons that are hard to fathom, Formal Opinion 493 not only fails to distinguish these recent Supreme Court decisions; *it fails to mention them at all*. And, of course, Formal Opinion 493 was issued before the federal district court's decision in *Greenberg v. Haggerty,* 491 F. Supp. 3d 12 (E.D. Pa. 2020), which renders Formal Opinion 493 obsolete. (See May 18 Letter at 21-23.)

In *Greenberg*, the Eastern District of Pennsylvania held that Pennsylvania's Rule 8.4(g), was facially unconstitutional because it violated attorneys' freedom of speech.[1] Pennsylvania had derived its rule from ABA Model Rule 8.4(g), with modifications aimed at narrowing it. In striking down the rule, the federal district court in *Greenberg* explained:

> *[The rule] will hang over Pennsylvania attorneys like the sword of Damocles.* This language will continuously threaten the speaker to self-censor and constantly mind what the speaker says and how

[1] *Greenberg v. Haggerty,* 491 F. Supp. 3d 12 (E.D. Pa. 2020), *appeal voluntarily dismissed*, No. 20-3602 (3d Cir. Mar. 17, 2021). The Disciplinary Board of the Pennsylvania Supreme Court initially appealed the decision but subsequently voluntarily dismissed its appeal.

> the speaker says it or the full apparatus and resources of the Commonwealth may be engaged to come swooping in to conduct an investigation. Defendants dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive. . . .
>
> *Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing* into the Plaintiff's words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities. The government, as a result, de facto regulates speech by threat, thereby chilling speech.[2]

Many scholars concur that ABA Model Rule 8.4(g) should not be adopted because it will violate attorneys' freedom of speech. (See May 18 Letter at 6-9.) For example, Professor Michael McGinniss, Dean of the University of North Dakota School of Law, "examine[s] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."[3] Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019).

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that "[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers' First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants."[4] She insists that "lawyer speech, association, and petitioning" are "rights [that] must be protected" because they "play a major role in checking the use of governmental and non-governmental power in the United States."[5]

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to a civil society in which

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[2] *Id.* at 24-25 (emphasis supplied).

[3] https://law.und.edu/_files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlpp-2019.pdf.

[4] Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).

[5] *Id.*

freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, lawyers can ill-afford to wager their licenses on a rule that may be utilized to punish their speech. (See May 18 Letter at 3-6).

3. Because of their equally broad scope, both COSAC's Proposed Rule and ABA Model Rule 8.4(g) violate New York attorneys' free speech because they are viewpoint discriminatory. Both proposed rules define "harassment" using terms that are viewpoint discriminatory. As the Supreme Court made clear in *Matal*, a law or regulation that penalizes speech that is "derogatory or demeaning" is viewpoint discriminatory. 137 S. Ct. at 1753-54, 1765 (plurality op.); *id.* at 1766 (Kennedy, J., concurring). In its Comment [3], ABA Model Rule 8.4(g) defines "harassment" to include "derogatory or demeaning verbal . . . conduct."

In its subsection (3)(c)(ii), COSAC's Proposed Rule defines "harassment" to include "derogatory or demeaning verbal conduct." Its Comment [5C] further provides that "[s]evere or pervasive derogatory or demeaning conduct refers to degrading, repulsive, abusive, and disdainful conduct." This additional definition simply compounds the viewpoint discriminatory nature of the Proposed Rule for the same reasons that Justice Kagan, writing for the Court in *Iancu,* explained that the terms "immoral" and "scandalous" were facially viewpoint discriminatory. 139 S. Ct. 2294, 2300. (See May 18 Letter at 24- 25.) Separately and individually, the terms "degrading," "repulsive," or "disdainful" make COSAC's Proposed Rule viewpoint discriminatory. Government officials do not possess the authority to determine when speech is "degrading," "repulsive," or "disdainful." Such line-drawing would rely too much on the subjective viewpoints of the government officials and, therefore, would violate the First Amendment.

Finally, Comment [5C] raises further concerns when it states that "[p]etty slights, minor indignities and discourteous conduct *without more* do not constitute harassment." Rather than reassure, Comment [5C] actually suggests that "petty slights, minor indignities, and discourteous conduct" will sometimes be the basis for a finding of professional misconduct in certain circumstances in which "more"—however modest that "more" may be—occurs.

4. The existing Rule of Professional Conduct 8.4(g) covers unlawful harassment. The April 16, 2021, memorandum states that "[t]he current version of New York Rule 8.4(g) does not cover harassment at all." COSAC Memorandum at 8. But to the contrary, certain forms of harassment are unlawful under federal and state antidiscrimination laws and, therefore, are "unlawful discrimination" for purposes of existing New York Rule 8.4(g). Existing New York Rule 8.4(g) is looked to as a model of reasonableness and clarity by bar committees in many other states. A broader rule is unnecessary because current New York Rules of Professional Conduct 8.4(d) and 8.4(h), respectively, provide for discipline if a lawyer or law firm "engage[s] in conduct that is prejudicial to the administration of justice" or "engage[s] in any other conduct that adversely reflects on the lawyer's fitness as a lawyer." As the Connecticut Office of Chief Disciplinary Counsel and the Statewide Grievance Committee recently observed, a rule like 8.4(d) makes ABA Model Rule 8.4(g) unnecessary if the current rules of professional conduct

are "applied robustly" by committees and courts "to limit and deter [] conduct, bias or prejudice."[6]

5. Both ABA Model Rule 8.4(g) and COSAC's Proposed Rule would make it professional misconduct for attorneys to engage in hiring practices that favor persons because they are women or belong to racial, ethnic, or sexual minorities. Both proposed rules have "savings provisions" in Comment [4] and Comment [5E], respectively, to try to preserve practices aimed at increasing diversity among law firms' employees. But these "savings provisions" blatantly contradict the black-letter text, and text trumps comments.

A highly respected professional ethics expert has concluded that ABA Model Rule 8.4(g) "prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc." (See May 18 Letter at 3 n.8, 32-34.) As he explains, language in the comments is only guidance and not binding. Besides, the drafters of the rule "clearly knew how to include exceptions to the binding black letter anti-discrimination rule" because the black letter rule itself actually contains two exceptions: "If the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule."

These consequences for New York lawyers' and their firms' efforts to promote diversity, equity, and inclusion provide yet another reason to reject COSAC's Proposed Rule. The substantial value of firms' programs to promote diversity, equity, and inclusion, as well as the importance of affinity legal groups based on gender, race, sexual identity, or other protected classes, would seem to far outweigh any practical benefits likely to come from either COSAC's Proposed Rule or ABA Model Rule 8.4(g).

6. The basic presumption underlying both ABA Model Rule 8.4(g) and COSAC's Proposed Rule is that the government may regulate all attorneys' speech as long as it provides carve-outs for "protected speech;" but the Supreme Court made clear the opposite is true in *NIFLA v. Becerra*. The *NIFLA* Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech. The Court stressed that "*this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'*"[7] It rejected the idea that "professional speech" was an exception "from the rule that content-based regulations of speech are subject to strict scrutiny."[8] A State's regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its "precedents have long protected the First Amendment rights of professionals" and "has applied strict scrutiny to content-based laws that

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[6] Email from Brian B. Staines, Chief Disciplinary Counsel, to Rules Committee of the Superior Court (Dec. 31, 2020), https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20ggg%20-%20Comments%20from%20Chief%20Disciplinary%20Counsel.pdf. *See also*, Email from Michael Bowler, Statewide Bar Counsel, Statewide Grievance Committee, to Rules Committee for the Superior Court (Dec. 29, 2020), https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20fff%20-%20Comments%20from%20Statewide%20Grievance%20Comm.pdf.
[7] 138 S. Ct. at 2371-72 (emphasis added).
[8] *Id.* at 2371.

regulate the noncommercial speech of lawyers."[9] Subsequently, in striking down Pennsylvania's Rule 8.4(g), the *Greenberg* court relied on *NIFLA* to "find[] that Rule 8.4(g) does not cover 'professional speech' that is entitled to less protection" but instead "[t]he speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment."[10]

COSAC's Proposed Rule flies in the face of the Supreme Court's decision in *NIFLA.* Its assertion in subsection (4)(ii) that the rule does not limit a lawyer's ability "to express views on matters of public concern in the context of teaching, public speeches, or other forms of public advocacy" merely underscores that the proposed rule believes it can regulate a lawyer's expression of views on matters that are not "of public concern." But that turns the First Amendment on its head. Free speech about private matters is just as protected as free speech about public matters. Protection for lawyers' speech is not limited to "matters of public concern." (See May 18 Letter at 20-26.)

7. Despite its nod to speech concerns, COSAC's Proposed Rule will chill speech and cause lawyers to self-censor in order to avoid grievance complaints. COSAC's proposed rule itself recognizes its potential for silencing lawyers when Comment [5D] states that "[a] lawyer's conduct does not violate Rule 8.4(g) when the conduct in question is protected under the First Amendment of the Constitution of the United States or under Article I, Section 8 of the Constitution of the State of New York." Comment [5D] affords no substantive protection for attorneys' speech but merely asserts that COSAC's Proposed Rule does not do what it in fact does.

Nor is it enough for government officials to promise to be careful in their enforcement of a rule that lawyers have reason to fear will suppress their speech. As the Supreme Court has observed, "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."[11] Instead, the Court has rejected "[t]he Government's assurance that it will apply [a statute] far more restrictively than its language provides" because such an assurance "is pertinent only as an *implicit acknowledgment of the potential constitutional problems* with a more natural reading."[12]

The *Greenberg* court likewise rejected such assurances by observing that "[government officials] dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive." But given "the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the [lawyer's] words, speeches, notes, written materials, videos, mannerisms, and practice of law," the government is "de facto regulat[ing] speech by threat, thereby chilling speech."[13]

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[9] *Id.* at 2374.
[10] *Greenberg,* 491 F. Supp. 3d at 27-30.
[11] *United States v. Stevens*, 599 U.S. 460, 480 (2010).
[12] *Id.* (emphasis added).
[13] *Greenberg,* 491 F. Supp. 3d at 24-25.

In the landmark case, *National Association for the Advancement of Colored People v. Button*,[14] the Supreme Court ruled that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," explaining:

> If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.[15]

COSAC's Proposed Rule fails to protect a lawyer from complaints being filed against her based on her speech or from the investigations that will frequently follow such complaints. The provision fails to protect a lawyer from the expense of protracted litigation to defend her speech as protected speech. Litigation in free speech cases often lasts for years. It extracts great personal expense and a significant emotional toll. Even if the investigation or litigation eventually concludes that the lawyer's speech was protected by the First Amendment, the lawyer has had to inform courts that a complaint has been brought when she applies for admission to another bar or seeks to appear pro hac vice. In the meantime, her personal reputation and practice likely will suffer damage through media reports.

The process is the punishment. This brings us to the real problem with COSAC's Proposed Rule. Rather than risk a prolonged investigation with an uncertain outcome and potential lengthy litigation, a rational, risk-averse lawyer will self-censor. Because a lawyer's loss of her license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one's own speech than to risk a grievance complaint. The losers are not just the legal profession, but our free civil society, which depends on lawyers to protect—and contribute to—the free exchange of ideas that is its lifeblood.

8. Under COSAC's Proposed Rule, New York lawyers would be subject to different restrictions based on the locality in which they practice. COSAC's Proposed Rule will not apply uniformly to all New York attorneys. The inclusion of local statutes or ordinances means that COSAC's Proposed Rule 8.4(g) will apply to New York lawyers differently depending on where they live in New York. That is, speech spoken by a New York lawyer might or might not constitute professional misconduct, depending on whether the lawyer practices in New York City with its expansive nondiscrimination laws, or Geneseo with a less broad nondiscrimination ordinance.

A good rule promotes consistency in its application. But COSAC's Proposed Rule's application, by its very terms, will vary depending on the locality in which a lawyer practices. Such a rule is neither consistent nor fair to New York lawyers.

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[14] *NAACP v. Button,* 371 U.S. 415 (1963).
[15] *Id.* at 438-39.

We thank the Committee for its consideration of our views.

Respectfully submitted,

/s/ David Nammo

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Attachment: Christian Legal Society Letter of May 18, 2021, to Ms. Eileen D. Millett, Esq.