ETHICS AND PUBLIC POLICY CENTER

January 13, 2025

Via email: rules@dcappeals.gov

Clerk
D.C. Court of Appeals
430 E Street, N.W.
Washington, D.C. 20001

Re: Comment Letter Opposing Proposed D.C. Rule 8.4(h)

Dear Chief Judge Blackburne-Rigsby and Judges Beckwith, Easterly, McLeese, Deahl, Howard, and Shanker:

We are DC-barred attorneys, First Amendment experts, and scholars at the Ethics and Public Policy Center, based in Washington, D.C. One of us is a former attorney at the Department of Justice Civil Rights Division and another is a former attorney at the Equal Employment Opportunity Commission.

We write in strong opposition to proposed D.C. Rule 8.4(h), which would make it professional make it professional misconduct for a lawyer to

> (h) engage 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 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 or engaging in legitimate advocacy consistent with these Rules.

The proposed rule raises constitutional concerns.

The proposed rule is based on ABA Model Rule 8.4(g), which states

> It is professional misconduct for a lawyer to: … engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This

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paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Many constitutional scholars, including Professor Eugene Volokh and Professor Josh Blackman,[1] view ABA Model Rule 8.4(g) as unconstitutional because it is a vague, overbroad content- and viewpoint-based speech restriction that fails strict scrutiny and impermissibly chills protected speech in violation of the First Amendment. The modifications made by DC, such as the addition of the phrase "directed at another person," do not remedy those constitutional concerns.

Page 24 of the report from the Rule of Professional Conduct Review Committee to the Board of Governors of the D.C. Bar states that "the speech of lawyers acting in a professional capacity has long been subject to additional restrictions that are viewed as necessary to the integrity of the justice system," concluding that this proposal is constitutional. Yet the U.S. Supreme Court has "long protected the First Amendment rights of professionals," including attorneys. *Nat'l Inst. of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018). The U.S. Supreme Court rejected treating "professional speech" as a unique category of speech subject to lesser protection because, "[a]s with other kinds of speech, regulating the content of professionals' speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Id.* at 2374 (second alteration in original) (internal quotation marks omitted). Further, "content-based laws that regulate the noncommercial speech of lawyers" are subject to strict scrutiny. *Id.* And regulations of "professional misconduct" do not change this. *See NAACP v. Button*, 371 U.S. 415, 439 (1963).

"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." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The U.S. Supreme Court has repeatedly affirmed that even speech that is found to be offensive, disparaging, or even hurtful is entitled to First Amendment protection. *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995).

As such, it should come as no surprise that ABA Model Rule 8.4(g) has been soundly rejected or abandoned by multiple state supreme courts that have considered its adoption thus far.

It would be embarrassing for a top legal organization in the country to adopt an unconstitutional speech code. The D.C. Bar should be a model to other state bars and uphold the broad free speech rights of attorneys as guaranteed by the First Amendment.

The proposed rule fails to provide fair notice of prohibited speech and conduct.

The proposed rule is also unconstitutional because it does not provide fair notice of what speech and conduct is prohibited to both those subject to the rule and those enforcing the rule. Restrictions on speech are unconstitutionally vague if they fail to "provid[e] an ascertainable standard of conduct." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). The proposed rule fails this

[1] Josh Blackman, Eugene Volokh, and Nadine Strossen, Comment on Proposed New York Rule 8.4(g), May 28, 2021, https://drive.google.com/file/d/1Cb-L_vENAYIOR-ji8ozj7GS3OXNegmr2/view.

test. In our judgment, it would chill protected speech and expression and would be open to arbitrary, subjective, and potentially discriminatory enforcement.

Two examples suffice.

First, ***does the proposed rule address pronouns?***

Page 23 of the report states that "Harassment is a well-defined term in the employment law context." Yet this is far from true, especially as it related to gender identity (one of the proposed protected bases).[2]

The Equal Employment Opportunity Commission (EEOC), the federal agency tasked with preventing and remedying employment discrimination, recently updated its guidance on harassment.[3] It defined harassment based on sexual orientation or gender identity as including "outing (disclosure of an individual's sexual orientation or gender identity without permission); … repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity."[4] The EEOC has also brought several discrimination lawsuits, based in part on "misgendering" (i.e., using biologically-accurate pronouns) is unlawful harassment.[5]

EEOC's harassment guidance has been the subject of several lawsuits,[6] including an injunction,[7] leading to uncertainty of what is and is not considered legal harassment and prohibited under the proposal.

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[2] Title VII prohibits discrimination in employment on the basis of sex. In *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Supreme Court said that to refuse to hire or fire someone based on their sexual orientation or transgender status violated Title VII's prohibition against sex discrimination. Notably, the Court did not adopt gender identity (arguably a broader concept than transgender status) as a separate protected basis under Title VII.

[3] The guidance is technically not legally binding because Congress did not give EEOC substantive rulemaking authority under Title VII, but it is meant to serve "as a resource for employers, employees, and practitioners; for EEOC staff and the staff of other agencies that investigate, adjudicate, or litigate harassment claims or conduct outreach on the topic of workplace harassment; and for courts deciding harassment issues." EEOC, Enforcement Guidance on Harassment in the Workplace (Apr. 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace.

[4] *Id.*

[5] *See, e.g.*, Press Release, EEOC Sues Culver's for Discriminating Against Transgender Employee and Retaliating Against Him and His Co-Workers (Oct. 25, 2024), https://www.eeoc.gov/newsroom/eeoc-sues-culvers-discriminating-against-transgender-employee-and-retaliating-against-him; Press Release, EEOC Sues Two Employers for Sex Discrimination, (Oct. 1, 2024), https://www.eeoc.gov/newsroom/eeoc-sues-two-employers-sex-discrimination-0; Press Release, EEOC Sues Boxwood and Related Hotel Franchises for Discriminating Against Transgender Employee (Sept. 26, 2024), https://www.eeoc.gov/newsroom/eeoc-sues-boxwood-and-related-hotel-franchises-discriminating-against-transgender-employee; Press Release, EEOC Sues Reggio's Pizza for Retaliation (Sept. 25, 2024), https://www.eeoc.gov/newsroom/eeoc-sues-reggios-pizza-retaliation; Press Release, Columbia River Healthcare to Settle EEOC Harassment Charge (May 23, 2024), https://www.eeoc.gov/newsroom/columbia-river-healthcare-settle-eeoc-harassment-charge.

[6] *See Cath. Benefits Assoc. v. Burrows*, No. 24-142 (D. N.D.); *Texas v. EEOC*, No. 21-194 (N.D. Tex.); *Texas & Heritage Found. v. EEOC*, No. 24-173 (N.D. Tex.); *Tennessee v. EEOC*, No. 24-224 (E.D. Tenn.).

[7] *Cath. Benefits Assoc. v. Burrows*, No. 24-142 (D. N.D. Sept. 23, 2024).

Proposed comment 4 states: "Harassment includes derogatory or demeaning verbal … conduct based on the characteristics enumerated in the Rule…. Antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (h)." But this comment provides little clarity when there is disagreement in the case law over the required use of self-selected pronouns under nondiscrimination laws.

Given the uncertainty in the law, the proposed rule does not give D.C. barred attorneys adequate notice as to whether a failure to address someone by his or her personal pronouns could subject them to professional discipline.

Second, ***does the proposed rule apply to benefits covered by insurance?***

Proposed comment 5 clarifies that that "conduct with respect to the practice of law includes…. operating or managing a law firm or law practice." It is unclear whether this includes the benefits offered in insurance plans provided by a law firm or law practice.

Some have argued that it is discrimination not to provide coverage for contraception, abortion, interventions for a "gender transition," fertility treatments, or surrogacy. For instance, the EEOC has taken the position that Title VII and the Pregnancy Discrimination Act requires insurance coverage for contraception[8] and that it is sex (gender identity) discrimination not to provide coverage for gender transition medical interventions in an employer-sponsored health benefits plan.[9] But this theory of discrimination is not clearly established in statute or caselaw.

Without clear guidance, the proposed rule will have a chilling effect on lawfully protected and truthful speech and conduct.

The report from the Rule of Professional Conduct Review Committee to the Board of Governors of the D.C. Bar does little to assuage concerns that the proposed rule will not infringe on freedom of speech and freedom of religion and association.

[8] EEOC, Commission Decision on Coverage of Contraception (Dec. 14, 2000), https://www.eeoc.gov/commission-decision-coverage-contraception.

[9] Lawrence v. U.S. Office of Personnel Management, EEOC Appeal No. 0120162065 (May 30, 2024), *available at* https://www.eeoc.gov/sites/default/files/decisions/2024_06_04/0120162065 DEC.pdf.

Conclusion

We urge the Court to reject adoption of the proposed rule. Thank you for the opportunity to provide public comments and for your consideration.

Sincerely,

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