



September 6, 2018

The Honorable Chief Justice Robert J. Lynn, Chairperson
New Hampshire Supreme Court
Advisory Committee on Rules
One Charles Doe Drive
Concord, New Hampshire 03301

Attn: Ms. Carolyn Koegler, Secretary

By email: rulescomment@courts.state.nh.us

**Re: Christian Legal Society Supplemental Comment Letter Regarding
Proposed Rule 8.4(g)**

Dear Chief Justice Lynn and Members of the Advisory Committee on Rules:

Christian Legal Society (CLS) submitted comments regarding Proposed Rule 8.4(g) on May 25, 2018. The purpose of this letter is to supplement those comments by bringing to the Committee's attention the United States Supreme Court's recent decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (U.S. June 26, 2018) ("NIFLA").

CLS would also bring to the Committee's attention the fact that the Arizona Supreme Court recently rejected ABA Model Rule 8.4(g). After a public comment period, the Arizona Supreme Court rejected adoption of ABA Model Rule 8.4(g) in an Order dated August 30, 2018.¹

In the *NIFLA* decision, the United States Supreme Court held that government restrictions on professionals' speech – including lawyers' professional speech – are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, presumptively unconstitutional. That is, a government regulation that targets speech must survive strict scrutiny – a close examination of whether the regulation is narrowly tailored to achieve a compelling government interest.

Under the Supreme Court's analysis in *NIFLA*, ABA Model Rule 8.4(g) is a content-based speech restriction that violates the First Amendment. The Court explained that "[c]ontent-based regulations 'target speech based on its communicative content.'" *NIFLA*, 138 S. Ct. at 2371, quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). "[S]uch laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" *Ibid.* As the Court observed, "[t]his

¹ A copy of the Arizona Supreme Court Order rejecting ABA Model Rule 8.4(g) is at <https://www.clsnet.org/document.doc?id=1164>.

stringent standard reflects the fundamental principle that governments have “no power to restrict expression because of its message, its ideas, its subject matter, or its content.”” *Ibid.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Most importantly to any consideration of ABA Model Rule 8.4(g) or a similar rule, the Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech. Recently, three federal courts of appeals had ruled that “‘professional speech’ [w]as a separate category of speech that is subject to different rules” and, therefore, less protected by the First Amendment. *NIFLA*, 138 S. Ct. at 2371.

In abrogating those decisions, 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.’*” *Id.* at 2371-72 (emphasis added). The Court resolutely rejected the idea that “professional speech” was an exception “from the rule that content-based regulations of speech are subject to strict scrutiny.” *Id.* at 2371.

The Court observed that there were “two circumstances” in which it “afforded less protection for professional speech” but “neither [circumstance] turned on the fact that professionals were speaking.” *Id.* at 2372. One circumstance in which it “applied more deferential review” involved “laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’” *Id.* As the Court explained, professional speech is not commercial speech, except in the “advertising” context, in which the disclosure of “factual, noncontroversial information” may be required by the government. *Id.* Obviously, ABA Model Rule 8.4(g) is not primarily concerned with advertising. The second circumstance arises when States “regulate professional conduct, even though that conduct *incidentally* involves speech.” *Id.* at 2372 (emphasis added). But again, ABA Model Rule 8.4(g) targets speech – “verbal conduct” – and is not aimed solely at conduct that incidentally involves speech. As the Court concluded in *NIFLA*, “neither line of precedents is implicated here.” *Id.*

Instead, the Court was clear that 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 regulate the noncommercial speech of lawyers.” *Id.* at 2374. Indeed, in a landmark case, the 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.

Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 438-39 (1963).

Because it would censor or chill lawyers' protected speech, ABA Model Rule 8.4(g) fails strict scrutiny. Of course, an unconstitutional regulation cannot be saved by the inclusion of an assertion that it does not infringe on a constitutional right. If a regulation infringes on a constitutional right, as ABA Model Rule 8.4(g) most certainly does, then it cannot be salvaged by an assertion that it does not infringe on a constitutional right.

The *NIFLA* decision is the second major decision handed down by the Supreme Court after the ABA adopted Model Rule 8.4(g) that makes clear that the proposed rule violates the First Amendment. In *Matal v. Tam*, 137 S. Ct. 1744 (2017), a unanimous Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional. *Id.* at 1753-1754, 1765; *see also, id.* at 1766 (unconstitutional to suppress speech that "demeans or offends") (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).

All of the Justices agreed in *Matal* that a provision of a longstanding federal law allowing government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons, including on racial or ethnic grounds, was unconstitutional because "[i]t offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Id.* at 1751 (quotation marks and ellipses omitted). Justice Alito, writing for a plurality of the Court, noted that "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

In his concurrence, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, Justice Kennedy explained that the federal statute was unconstitutional viewpoint discrimination because the government permitted "a positive or benign mark but not a derogatory one," which "reflects the Government's disapproval of a subset of messages it finds offensive," which is "the essence of viewpoint discrimination." *Id.* at 1766 (Kennedy, J., concurring). And it was viewpoint discriminatory even if it "applies in equal measure to any trademark that demeans or offends." *Id.*

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Justice Kennedy stressed that “[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate,” particularly “if the ideas or perspectives are ones a particular audience might think offensive.” *Id.* at 1767. Justice Kennedy closed with a sober warning:

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.

Id. at 1769 (Kennedy, J., concurring).

Christian Legal Society thanks the Committee for considering these supplemental comments.

Respectfully submitted,

/s/ David Nammo

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