

442 Brookhaven Court
Gainesville, GA 30501
May 21, 2018

Re: In the Matter of Petition R-17-0032, Petition to
Amend ER 8.4, Arizona Rules of the Supreme Court,
in the Supreme Court of Arizona

May It Please the Court:

Pursuant to this Court's Order of January 18, 2018, soliciting public comment on Petition R-17-0032, I wish to submit these comments in opposition to the proposed Rule change. In my judgment, the proposed Rule has substantial First Amendment problems of overbreadth and will have the related chilling effect.

I am a lawyer licensed in Virginia, Alabama, and Georgia. Before the proposed Rule becomes enforceable in any State, it will have to be affirmatively adopted by that State. I note that official entities in Nevada, Tennessee, Illinois, Maine, Montana, Pennsylvania, Texas, South Carolina, and Louisiana have each rejected the new Rule after weighing its merits and demerits, and I encourage this Court to do the same.

In this letter, I will make the following points:

1. In submitting these comments, I do not wish to be seen as endorsing harassment or discrimination. That said, in its recent decision in *Matal v. Tam*, the United States Supreme Court affirmed the decision of the Court of Appeals for the Federal Circuit declaring the Lanham Act's "disparagement clause," 15 U.S.C. § 1052(a) facially unconstitutional under the Free Speech Clause of the First Amendment to the Constitution of the United States. In his opinion, Justice Alito pointed out that the Government's assertion of "an interest in preventing speech expressing ideas that offend ... strikes at the heart of the First Amendment." Slip op. at 25. He explained that, while demeaning speech "is hateful[,] ... the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought

that we hate.” *Id.* (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929)(Holmes, J., dissenting)).

In his opinion, Justice Kennedy noted that the ban on viewpoint discrimination “is a fundamental principle of the First Amendment...” Slip op. at 2 (Opinion of Kennedy, J.). He observed, “A law found to discriminate based on viewpoint is an ‘egregious form of content discrimination,’ which is ‘presumptively unconstitutional.” *Id.* (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.* 515 U.S. 819, 829-30 (1995)).

I note that Comment 3 to the ABA’s Rule states that, in part, the rule “does not apply to ... conduct protected by the First Amendment.” In the light of *Matal v. Tam*, it is unclear whether the proposed Rule has any scope for operation with respect to speech.

2. Assuming that the Rule reaches speech that is not protected by the First Amendment, I note that the proposed Rule “applies to conduct related to a lawyer’s practice of law, including the operation and management of a law firm or law practice.” Comment 3. Comment 4 provides more detail:

Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, 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 social activities in connection with the practice of law.*

(Emphasis added). This scope represents an expansion of the scope of many present rules, which generally cover (1) conduct during the practice of law or representing a client; (2) conduct that reflects on a lawyer’s fitness to practice law; and (3) conduct prejudicial to the administration of justice. Indeed, the American Bar Association recognizes that new Rule 8.4(g) is “broader than the current provision.”

3. I am concerned that, insofar as the proposed Rule reaches bar association, business, and social activities, the range of potential complainants is enormous. Anyone can object to something that he or she deems to be “harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.”

Such a complaint would be within the facial scope of the Rule. Bar disciplinary committees would have no choice but to require a response from the lawyer involved because there would be no way to dismiss the claims on their face. In evaluating the proposed change, Pennsylvania’s response asserted that bar regulators have plenty to do and do not need to take on an elastic and undefined new workload policing speech or conduct that is claimed to be

In this regard, I note that the range of things that can be considered racist or otherwise derogatory is mind-boggling:

(a) In the last administration, the Equal Opportunity Employment Commission called for additional information to help it make a determination whether the Gadsden Flag, the Revolutionary era flag bearing the legend “Don’t Tread on Me,” was racist. The EEOC acknowledged that the flag originated “in a non-racial context,” and has “been used to express various non-racial sentiments.” Even so, it said the flag “has since been sometimes interpreted to convey racially-tinged messages in some contexts.”

(b) The Patent and Trademark Office, before it lost in *Matal v. Tam*, revoked the trademark of the Washington Redskins because it ran afoul of the Lanham Act’s disparagement clause. The PTO declared that the trademark “may disparage Native Americans and may bring them into contempt or disrepute.”

(c) A professor at Bethel University in St. Paul, MN, complained about a student’s wearing a Chicago Blackhawks sweatshirt to class.

These complaints raise hypothetical questions. Does a lawyer run afoul of Rule 8.4(g) by wearing a Washington Redskins Super Bowl

championship T-shirt (obviously one with some age on it, given that the team's championships were in 1983, 1987, and 1992) in a Bar Convention 5K? What about a Cleveland Indians T-shirt or a Chicago Blackhawks T-shirt? What about a Gadsden Flag bumper sticker on a lawyer's car?

What if a law firm has a box at the arena in Las Vegas and wears Blackhawks gear when they come to visit? That sounds like a law firm's social activity.

If these hypotheticals sound strained, they all originated in a complaint. Just as those complaints were within the jurisdiction of the EEOC or the PTO, they appear to be within the scope of Rule 8.4(g), and Bar disciplinary bodies will have to demand a response from the lawyer involved. That will take time and effort from the lawyer who must demonstrate that he or she did not violate the Rule.

Alternatively, if lawyers want to avoid running afoul of the Rule, they will have to suffer the chilling of their speech, actual or constructive. That is the First Amendment harm that flows from overbreadth.

Accordingly, this Court should deny the petition of the National Lawyers Guild to amend Rule of Professional Conduct 8.4 (Misconduct) to include the anti-harassment/ anti-discrimination provision approved by the American Bar Association and added to the ABA Model Rules of Professional Conduct.

Thank you for the opportunity to submit comments. I will be happy to answer any questions that the Court may have.

Respectfully submitted,

John J. Park Jr.