Order your Freedom Fries Before it's too Late: Maryland Considers Adopting an Attorney Speech Code

*By Scott R. Haiber**

Introduction

As I considered drafting an article regarding a proposed revision to the Maryland Rules of Professional Conduct, I had to suppress a strong urge to call the local courthouse cafeteria and request that they strike the term "French Fries" from their menu and replace it with "Freedom Fries." I should explain that I have no particular obsession with cafeteria food. Nor do I share the currently popular anti-Gallic sentiment that has swept the nation; if anything, I am something of a Francophile. No, the only reason I considered making a statement reflecting a prejudice against the French is that I soon may lose the right to make such a statement at all. For if a committee appointed by the Maryland Court of Appeals has its way, Maryland lawyers soon may find it impossible to express their true views regarding the French — or the rich, the poor, homosexuals, heterosexuals, the opposite sex, the same sex, the old, the young or any other of innumerable classes. Instead, Maryland soon may enact a comprehensive speech code regulating the opinions that Maryland lawyers may express when acting in a "professional capacity."

Surprisingly, there has been relatively little outcry from the Maryland Bar about the censorship that soon may be visited upon its members. This silence could indicate that a majority of the Maryland Bar acquiesces in the curtailment of its liberties. More likely, the relative quiet could reflect that most Maryland attorneys have absolutely no idea that their speech rights are threatened. Either way, it is profoundly disturbing that a proposal laden with such significant constitutional and public policy concerns should proceed with such little scrutiny or public debate.

The Proposed Speech Code for Maryland Lawyers

In July 2002, a Special Ethics 2002 Committee appointed by the Maryland Court of Appeals (commonly called the "Rodowsky Committee") circulated proposed amendments to the Maryland Rules of Professional Conduct.[1] Buried on page 141 of the Rodowsky Committee's 153 page draft rules is a little publicized proposal to revise Rule 8.4 to make it professional misconduct for a Maryland lawyer to "knowingly manifest when acting in a professional capacity, by *words or conduct*, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such actions are prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation . . .".[2] Notably, the existing Maryland rules already prohibit all *conduct* prejudicial to the administration of justice.[3] Thus, the sole effect of the proposed change will be to extend the reach of the disciplinary rules beyond conduct and into the realm of pure speech. Moreover, the proposed rule will regulate speech in a selective way that targets only certain viewpoints on certain topics. In other words, the Rodowsky Committee proposes the adoption of a comprehensive speech code for Maryland attorneys. Or, as a leading proponent of the proposed rule has stated, it would create "[a] black-letter ethics rule condemning bias as lawyer misconduct . . .".[4]

The origins of the proposed attorney speech code go back to 1994. At that time, the ABA's Young Lawyers' Division and its Standing Committee on Ethics and Professional Responsibility proposed alternative rules that would have barred certain forms of discriminatory speech.[5] Those proposals received a skeptical reception because of what many perceived to be serious First Amendment issues raised by outright restrictions on lawyer speech.[6] Eventually, even the Standing Committee itself acknowledged that an outright rule restricting speech might violate the First Amendment.[7] Accordingly, the ABA concluded that the wiser course was to implement only a policy statement. Although that policy statement essentially was incorporated into later commentary to Model Rule 8.4,[8] the ABA has steadfastly refused to place a restriction on discriminatory speech in an ethical rule itself.

Since 1995, a number of states have amended the commentary to their disciplinary rules to include language that tracks the revised commentary to Model Rule 8.4(d).[9] Maryland now may rush in where the ABA fears to tread by placing an attorney speech code not merely in a policy statement or official comment, but in the text of a disciplinary rule. In fact, a member of the Rodowsky Committee already has publicly indicated that the proposed attorney speech code will be recommended to the Maryland Court of Appeals.[10] That recommendation was forwarded to Maryland's highest court on December 16, 2003.[11]

Constitutional Issues Raised by the Proposed Speech Code

Although the ABA treaded cautiously with respect to Model Rule 8.4 because of a deep concern over the First Amendment implications of prohibiting views and opinions by attorneys, the proponents of the new Maryland rule have provided no evidence that they share such concerns over constitutional niceties. Instead, they point to evidence of continuing discrimination in the legal profession and argue that such conduct undermines respect for the entire legal profession and is inconsistent with a lawyer's commitment to justice.[12] Implicit in their argument is the suggestion that lawyers, as members of a regulated profession, have special duties and obligations that

allow for the curtailment of their speech rights.[13] Of course, the notion that lawyers have inferior First Amendment rights is, to put it lightly, highly suspect.[14] Indeed, although courts may enact reasonable restrictions designed to protect the judicial process and/or the right of an accused to a fair trial,[15] no court ever has suggested that broad viewpoint-based restrictions on attorney speech are permissible.[16]

Although the Rodowsky Committee seeks to further the worthy goal of eliminating discrimination in the legal profession, it has not explained how a speech code will further this goal in a constitutionally permissible manner. And the constitutional hurdles appear formidable. In the landmark case of *R.A.V. v. City of St. Paul*,[17] the United States Supreme Court set forth the constitutional principles applicable to speech codes in language that makes it difficult to understand how the Rodowsky Committee could expect its proposed rule to pass muster. In *R.A.V.,* the Court struck down an ordinance prohibiting the display of a symbol which a defendant would or should know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender."[18] Such a statute violated the fundamental principle that the government may not regulate speech based on either hostility or favoritism to the message expressed.[19] Moreover, the statute at issue could not be sustained as a valid restriction on "fighting words" because it did not prohibit all such expressions, but only those regarding certain topics.[20] Content-based selectivity, however, did not comport with the requirements of the Constitution: "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[21]

Following *R.A.V.,* federal courts repeatedly have struck down speech codes as violative of the First Amendment.[22] Most recently, a federal district court in Pennsylvania enjoined Shippensburg University from enforcing its campus speech code. [23] Although sympathetic to the University's objective of preventing discrimination, the court struck down the statute as overbroad and quoted Justice Jackson's famous statement on viewpoint-based speech restrictions:

> "[i]f there is any fixed star in our constitution, it is that no official, high or petty, can prescribe what will be orthodox in politics, nationalism, religion or matters of opinion or force citizens to confess by word or act their faith therein." [24]

The Rodowsky Committee appears to have lost sight of this fixed star.

In any event, in addition to concerns of overbreadth and viewpoint selectivity, the proposed Maryland rule, like all attorney speech codes, faces an additional constitutional problem: How do you draft such a rule in a way that adequately advises attorneys what speech is prohibited? Consider, for example, the problem a lawyer will face in trying to ascertain whether he is speaking in a "professional capacity" and therefore subject to the rule. Does a lawyer act in a "professional capacity" when he gives a speech at a Federalist Society debate? Does he do so when he testifies at judicial confirmation hearings? Or how about when he writes an article on a proposed speech code for *Engage*? A similar litany of questions could be raised over other imprecise terms in the proposed rule — most notably "legitimate advocacy" and "socio-economic status."[25] The result is that prudent Maryland lawyers, who can only guess at the meaning of the vague speech code, will both self-censor speech that is not prohibited by the rule and commit unwilling violations of a rule they do not understand. Thus, the proposed revision will cause precisely the kind of chilling effect that has led to the demise of other speech codes brought before the federal courts.

A Noble Profession that Censors its Own?

The constitutional issues raised by the proposed Maryland rule also suggest broader public policy concerns involved in the regulation of attorney speech. It seems inherently inappropriate for the legal profession to act as censor of its own members. Historically, courageous lawyers have protected the rights of socialists, anarchists, religious dissenters, racial bigots and other unpopular actors to express their views. Moreover, members of the bar perform this public service even when they are personally repelled by the underlying speech they help to protect. Jewish lawyers have defended the rights of Nazis to march in Illinois. African-American lawyers have defended the free expression rights of the Ku Klux Klan.

Of course, none of this means that lawyers condone offensive, hateful or prejudicial speech. Rather, it simply reflects a fundamental belief by many members of the profession that freedom of speech and conscience can survive only if we protect those freedoms even for the most despicable of actors seeking to peddle the most noxious of doctrines. As Ron Rotunda has explained, a rule that prevents Nazis from marching in Skokie could just as easily be manipulated by another jurisdiction into a rule that prohibits Martin Luther King, Jr., from marching in Selma.[26] Nadine Strossen, the President of the ACLU, made a similar point when she explained that organization's role in protecting free speech:

> "We don't defend the Klan. We defend the Klan's right to engage in peaceful protests or to express its own views. We would never substantively defend its ideas. It may seem like a small distinction, but it really is a significant difference."[27]

Nevertheless, one need not defend the rights of the Klan or Nazis to oppose the proposed rule revision under

consideration in Maryland. For the proposed speech code will stifle a much broader range of expression. For example, it will reach, on its face, expressions of opinion on topics as diverse as the propriety of same sex marriage, the inherent greed of the wealthy, or whether the Young Lawyer's Division of the Maryland State Bar Association should continue to have an age restriction. And because the proposed rule contains no exception for privileged communications, it could chill discussions between a lawyer and his client over such matters as venue selection or the fact that an octogenarian opposing counsel is not as formidable an attorney as he once may have been.

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As of the date this article is written, there is no way of knowing whether the Maryland Court of Appeals will follow the Rodowsky Committee's recommendation and adopt a speech code for Maryland attorneys. Hopefully, the Court of Appeals will recognize the dangers of silencing lawyers — professionals who traditionally have played a leading role in public debate. Or, at a minimum, perhaps the Court will note the long list of speech codes that have been invalidated on First Amendment grounds and decide that it is ill-advised to adopt an unconstitutional rule for Maryland attorneys. But just in case, I'd order those Freedom Fries before it's too late.

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Footnotes

[1] *See* www.msba.org/articles/archives.htm (proposed rules).
[2] *Id*. at pg. 141 (emphasis added).
[3] *See* Maryland Rule of Professional Conduct 8.4(d).
[4] Pamela J. White, *Holistic Approach to Professionalism*, XXXVI The Maryland Bar Journal No. 5, 23 (Sept./Oct. 2003).
[5] *See generally* Andrew E. Taslitz & Sharon Styles Anderson, *Still Officers Of The Court: Why The First Amendment Is No Bar To Challenging Racism, Sexism And Ethnic Bias In The Legal Profession*, 9 Geo. J. Leg. Ethics 781 (1996).
[6] *See Id.* at 795-80 (discussing First Amendment concerns raised in response to the proposals).
[7] *See* Taslitz & Anderson, *supra* note 5 at 801 (noting that Committee believed a disciplinary rule would undoubtedly run afoul of the First Amendment).
[8] *See* Geoffrey C. Hazard, Jr. & W. William Hodes, 2 The Law of Lawyering at 65-5. (3d Ed. 2003 Supp.) (describing adoption of language in official comment as a "compromise").
[9] Delaware, for example, recently amended its official commentary to track that of Rule 8.4. *See* Delaware Rule of Professional Conduct 8.4 (official comment).
[10] White, *supra* note 4 at 21.
[11] *See A Civil Debate*, The Daily Record, 1B (Dec. 12, 2003).
[12] *See generally* White, *supra* note 4 at 19-21.
[13] *See, e.g*., *A Civil Debate*, *supra* note 11 at 1B (quoting proponent of speech code as stating that "[l]awyers have a special responsibility to understand their obligation of nondiscrimination [because] they take an oath to act fairly as an attorney.")
[14] *See, e.g.,* NAACP v. Button, 371 U.S. 415, 439 1963) ("For a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"); Conant v. Walters, 309 F.3d 629, 637 (9th Cir. 2002) ("Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights").
[15] *See generally* Gentile v. State Bar of Nevada, 111 St. Ct. 2720 (1991).
[16] *See, e.g.,* In re Morissey, 168 F.3d 134, 140 (4th Cir. 1999) (restrictions on attorney speech must be viewpoint neutral).
[17] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
[18] *Id*. at 380.
[19] *Id*. at 382.
[20] *Id.* 387-88.
[21] *Id*.
[22] *See, e.g.,* Saxe v. State College Area School Dist., 240 F.3d 2000 (3d Cir. 2001); Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); UVW Post, Inc. v. Regents, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); *see also* IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an event with "racist and sexist" overtones).
[23] Bair v. Shippensburg University, 280 F. Supp. 2d 357 (M.D. Pa. 2003).
[24] *Id.* at 361 (quoting West Virginia Board of Ed. v. Barnette, 319 U.S. 624, 642 (1943)).
[25] As Professor Rotunda has noted, "[t]he neighbors of Atticus Finch, in *To Kill A Mockingbird*, no doubt thought that his advocacy was illegitimate." *See* Ronald D. Rotunda, *Racist Speech and Lawyer Discipline*, 6 Professional Lawyer 1 (No. 2, Feb. 1995).
[26] *See* Rotunda, *supra* note 25.
[27] *Nadine Strossen and Freedom of Expression: A Dialogue With The ACLU's Top noteCard-Carrying Member*, 13 Geo. Mason Civ. Rts. L.J. 185, 203 (2003).