RC # 2020-012 b

O'Donnell, Shanna

From: Jay M. Wolman <jmw@randazza.com>
Sent: Thursday, September 10, 2020 10:32 PM
To: Rules Committee
Subject: Agenda Item 14--Rule 8.4g
Attachments: Arizona Comment.pdf; Exhibit 1.pdf; AZ Attorney General ER 8.4 Comment.pdf; Cmt Opposing Amdt to ER8.4.pdf; FALA Comment in Opposition to Rule 8.4(g)_1.pdf; Exhibit 2.pdf; R-17-0032 - Euchner comment.pdf; NLF-CPCF Letter re AZ Rule 8.4(h)_1.pdf; Letter re 8.4 (Volokh).pdf; Christian Legal Society Comment Letter on Model Rule 8.4(g) Filed.pdf; Comment Opposing Amendment to ER 8.4.pdf; NLA Model Rule 8.4g Statement.pdf; A-Pause-for-State-Courts-Considering-Rule-8.4_1.pdf; Arizona-Letter-Blackman.pdf; Exhibit 7.pdf; Exhibit 4.pdf; Exhibit 8 and 9.pdf; Exhibit 6.pdf; Exhibit 5.pdf; Exhibit 3.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Justice McDonald and the other Honorable Members of the Rules Committee,

I am writing with respect to Item 14 on the agenda for the meeting of September 14, 2020 and to urge the Committee deny the petition to adopt ABA Model Rule 8.4(g) in the State of Connecticut. I have just been made aware that the Connecticut Bar Association has lent its support to this rule, with minor variations, as reflected at https://www.ctbar.org/docs/default-source/lprc/september-2-2020/lprc-request-proposed-amended-ct-rpc-8-4(7)-8-21-20.pdf?sfvrsn=723148bf_2

Due to the short timeframe between now and ensuring you have a reasonable opportunity to consider the issues, I am unable to submit to you a formal brief setting forth why, however well-intentioned, the model rule should not be adopted.

Instead, I can provide to you the well-considered opinions and commentary of First Amendment practitioners and others who have considered the problems of this rule. This model rule has garnered opposition throughout the country because of its infringement on the First Amendment and the potential to chill otherwise protected speech.

The Connecticut proponents, in an effort to stave off a constitutional challenge, adapted the formal commentary to state that the rule would not infringe upon First Amendment-protected speech. The irony, of course, is that those same proponents, at Page 19 at the link above spell out "The Commentary provides guidance in interpreting the Rule, but only the Rule itself is authoritative and enforceable." That is an admission that the carve-out is no carve-out at all.

Moreover, even if it were an effective carve-out, the rule would nonetheless chill protected speech; lawyers with a right to speak would be afraid to say what they will for fear of a baseless bar complaint. As with a SLAPP suit, the damage is done upon the filing--the cost of defense and the risks of lengthy proceedings, along with the reputational harm of the complaint itself will cause members of the bar to wrongly self-censor. Can a lawyer tell a journalist who might ask about their work on a representative matter "I detest White nationalism" or "Mansplaining is condescending and has no place in the workplace"? On its face, those statements are discriminatory on the basis of race and sex, respectively. If the rule were adopted, any lawyer fighting bigotry could easily find themselves the recipient of a bar complaint by a disgruntled opponent.

Two years ago, my firm had the privilege of representing the First Amendment Lawyers Association in opposition to Rule 8.4(g)'s adoption in Arizona. Due to the time considerations noted above, I am submitting that comment, with exhibits 1-9, for the Committee's consideration. The overwhelming majority of what was stated therein is equally applicable to the Connecticut proposal.

In addition to my firm's representative commentary, I am also submitting for your consideration the comments of esteemed scholars, bar organizations, and attorneys who took the time to weigh in on the issue. This includes comments from 1) Josh Blackman, Associate Professor, South Texas College of Law; 2) the National Lawyers Association; 3) the Christian Legal Society; 4) Eugene Volokh, Professor, University of California, Los Angeles, School of Law; 5) the National Legal Foundation; and 6) Hon. Mark Brnovich, Attorney General, State of Arizona. It also includes comments from various ad hoc groups of attorneys.

The proponents of Rule 8.4(g) are likely well-intentioned. But, it is well known, Dr. Johnson once observed that "Hell is paved with good intentions." Boswell, Life of Samuel Johnson 257 (Great Books ed. 1952). The Committee should not run rough-shod over the fundamental right to free speech in service of punishing the bigots among us.

Thank you.

Sincerely,
Jay Wolman

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	No. R-17-0032
	)	
	)	**COMMENT OPPOSING PETITION**
Petition to Amend ER 8.4, Rule 42,	)	**TO AMEND ER 8.4, RULE 42,**
Arizona Rules of the Supreme Court	)	**ARIZONA RULES OF THE**
	)	**SUPREME COURT**
	)	
	)	
	)	
	)	

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, I wish to register my opposition to the petition to amend ER 8.4 by adopting ABA Model Rule 8.4(g) by appending it as Ariz. R. Sup. Ct. 42, ER 8.4(h).

I do not tolerate harassment, discrimination, or other bad behavior among members of the bar. Three years ago, I co-signed Petition R-15-0020, which sought to amend the Code of Judicial Conduct and expand the list of suspect classes that should be protected from discrimination by judges. What differentiates that petition from the current petition to adopt Model Rule 8.4(g) is the expansion of the scope of disciplinary authority over attorneys beyond anything previously contemplated.

I will not be repetitive of other comments that have been submitted. I concur entirely with the comments of Professors Volokh and Blackman, as well as all of the comment submitted by Snell & Wilmer except for what I consider to be its misapplication of article 2, section 8 of the Arizona Constitution to this issue. Andrew Halaby and Brianna Long's article "New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship," 41 *J. Legal Prof.* 201 (2017), which provides a thorough history of the adoption of the Model Rule by the ABA, makes the case for more study of this issue rather than rush ahead with a change that is far more expansive than is permitted either by separation of powers or the First Amendment.

I have a couple of additional thoughts to add. Professor Volokh accurately describes the inevitability of employment disputes within law firms morphing into bar complaints. Equally foreseeable is the likely increase in bar complaints against attorneys who choose to stand for political office. Any candidate who campaigns on, and any officeholder who votes on, a plan to cut economic benefits to some persons will undoubtedly receive bar complaints for discrimination based on socioeconomic status. Earlier this year Professor Blackman himself was recently loudly protested (and shouted down) by City University of New York students,[1] because they deemed

[1] https://reason.com/blog/2018/04/12/cuny-josh-blackman-students-speech (last visited May 21, 2018).

his views and those of the Federalist Society as a whole to be racist. Of course, such wrongheaded views were based on the refusal of said students to read Professor Blackman's writings on separation of powers, and for such persons it is easier to make false assumptions, but law students who are willing to shout down a lecture on the First Amendment would be no less willing to subject those speakers to bar complaints.

Given the lack of study of this issue, one cannot say at this time whether such complaints would be treated as meritorious or frivolous. But there is no consequence for filing a frivolous complaint due to absolute immunity, *see Drummond v. Stahl*, 127 Ariz. 122 (1980), and even frivolous complaints cause stress for the recipient. Particularly in such fractious times as these where partisans regularly compare political opponents to Hitler, the timing for such a petition could not possibly be more wrong.

The petition correctly points out that our profession suffers from implicit bias and prejudice. But when bias is subconscious, the solution is education, not discipline. I cannot discern how the petition would actually accomplish its stated goals; if anything, I fear a backlash and other unintended consequences.

DATED: May 21, 2018.

By /s/ David J. Euchner
David J. Euchner

This comment e-filed this date with:

Supreme Court of Arizona

Copy of this Comment
Mailed this date to:

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The National Legal Foundation

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May 21, 2018

The Honorable Scott Bales, Chief Justice
The Honorable Robert M. Brutinel, Vice Chief Justice
The Honorable John Pelander, Justice
The Honorable Ann A. Scott Timmer, Justice
The Honorable Clint Bolick, Justice
The Honorable Andrew Gould, Justice
The Honorable John R. Lopez IV, Justice

Attn: Clerk of the Supreme Court
(submitted electronically)

Re: Comment Letter of the National Legal Foundation and the Congressional Prayer Caucus Foundation Opposing Petition R-17-0032: National Lawyers Guild, Central Arizona Chapter, Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court

Dear Chief Justice Bales, Vice Chief Justice Brutinel, Justice Pelander, Justice Timmer, Justice Bolick, Justice Gould, and Justice Lopez:

The National Legal Foundation (NLF), joined by the Congressional Prayer Caucus Foundation (CPCF), writes in opposition to the adoption of proposed ER 8.4(h) ("proposed rule"), which substantially follows the ABA Model Rule 8.4(g) ("model rule"). The NLF is a public interest law firm dedicated to the defense of First Amendment liberties. We write on behalf of ourselves and donors and supporters, including those in Arizona. The NLF has had a significant federal and state court practice since 1985, including representing numerous parties and *amici* before the Supreme Court of the United States and the supreme courts of several states.

The Congressional Prayer Caucus Foundation (CPCF) is an organization established to protect religious freedom, preserve America's Judeo-Christian heritage, and promote prayer, including as it has traditionally been exercised in Congress and other public places. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. CPCF has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-one states, including Arizona.

We agree with much of what the Christian Legal Society (CLS) expressed in its comments, submitted to the Court on May 3, 2018. Those comments noted the substantial body of scholarly and professional criticism focusing on the model rule's Constitutional deficiencies. CLS also ably summarized the negative track record of the model rule to date, its potential for censoring

speech and debate that undergird a free society,[1] and its difficulty gaining traction because of its Constitutional infirmities. Those infirmities are regrettably present in the proposed rule submitted by Petitioners.

The model rule, replicated and augmented in the proposed rule, purports to put lawyers at the forefront of a cultural movement. Even if this cultural movement is justified, the model rule undermines basic fairness with respect to constitutionally protected, sincerely held religious beliefs and ethical standards.

Lest this concern be thought hypothetical, it is instructive to consider the ongoing litigation in the United States District Court for the Middle District of Alabama.[2] In that case, a sitting state Supreme Court justice running for reelection "expressed his personal views on a number of highly contentious legal and political issues that his constituents, and the country at large, are currently debating."[3] The Southern Poverty Law Center (SPLC) was offended by the justice's criticism of the majority opinion of the United States Supreme Court decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)—an opinion also strongly criticized by the four dissenting justices—and filed an ethics complaint against the Justice for his "'assault [on] the authority and integrity of the federal judiciary,'"[4] which prompted an ethics investigation and ensuing litigation. The federal district court judge hearing the case "recognized the First Amendment issues implicated by SPLC's attempt to use a state agency to suppress speech . . . ."[5]

The proposed change to Arizona's rule, as drafted, will encourage attacks on Arizona lawyers' First Amendment rights similar to the attacks on Alabama Associate Justice Parker. Petitioners suggest that the proposed change "can educate lawyers and make them stop and think."[6] The action of "stopping and thinking" is certainly laudable and prudent in many instances, but for purposes of the First Amendment this is known as a "chilling effect." The prospect that the change, if adopted, "may be infrequently enforced"[7] fails to eliminate its constitutional defect.

In considering the merits of the proposed rule, the turbulence encountered on the model rule's journey thus far is telling. As detailed in the CLS comments (at pages 4 and 11-15, submitted May 3, 2018), numerous jurisdictions have noted their grave reservations about the wisdom and constitutionality of the model rule. As CLS notes in its comments (at page 10), the ABA's claim that multiple jurisdictions have adopted this rule is factually incorrect; only one (Vermont) has

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[1] As CLS notes, "we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, ABA Model Rue 8.4(g) threatens to suffocate attorneys' speech." (CLS Comment Letter, p. 22 of 31)

[2] *Parker v. Judicial Inquiry Comm'n of the State of Ala.*, No. 2:16-CV-442-WKW, 2017 WL 3820958, (M.D. Ala., Aug. 31, 2017) and 2018 WL 1144981 (M.D. Ala., Mar. 2, 2018).

[3] *Id.*, 2017 WL 3820958 at 3 (quoting SPLC's complaint).

[4] *Id.*

[5] *Id.* (internal quotation and citation omitted).

[6] National Lawyers Guild Petition at 9.

[7] *Id.* at 10.

done so, and every state attorney general to have considered the proposed rule has found it constitutionally defective in multiple respects.

Much of the thinking and advocacy that undergird the push for the model rule's adoption also ignores credible and significant health and social science data that should signal skepticism in approaching the expansive scope of the proposed rule's language. There is well-founded concern that the proposed rule would align the State of Arizona behind those who are most actively pushing an expansive definition of "sexual orientation," "gender," "gender identity," and "marital status," to the degree that any such "discrimination," broadly defined, will override religious, speech, assembly, and other freedoms.

With respect to the categories of "sexual orientation," "gender identity," "gender," and "marital status," there are a number of relevant considerations that urge caution in their use in a rule of this sort. We outline several of them below, in part to explain more fully the key difference between homosexual and transgender *inclinations* and *conduct* and in part to reinforce that the public policy debate on such conduct is not closed but is still being informed by substantial health and social science evidence.[8]

Religiously Informed Views on Marital Status, Sexual Orientation, Gender, and Gender Identity

Christians are called to love and serve all persons, including those with a homosexual orientation or those who feel a closer association to the gender other than their biological sex. However, most orthodox Christians (and those of other religions) sincerely believe that their Holy Scriptures (not to mention biology) identify same-sex intercourse and rejection of one's birth gender as both unnatural and immoral. Thus, while Christian lawyers would not (and overwhelmingly do not) refuse to take work from persons who identify themselves as gay or transgender *when the work does not involve supporting that lifestyle* (e.g., representation as a victim of a car accident), many would have ethical qualms in working for such a person or organization if the representation directly or indirectly advanced the cause of such lifestyles or helped entrench their participants in it. It is not discrimination on the basis of sexual orientation or gender identity to refuse to approve or support same-sex intercourse or gender "transformations." Rather, it recognizes the difference between personhood and activity. Persons are just as much persons if they never engage in sexual intercourse, of whatever kind.

The orthodox Christian view that separates the person from the offensive activity is not generally accepted by either the LGBT community or, increasingly, administrative and judicial officials. *E.g., Christian Legal Soc'y Chapter v. Martinez*, 130 S. Ct. 2971, 2980 (2010) (recounting state university's labeling of CLS chapter's requirement that leaders not engage in sexual intercourse outside marriage between a man and a woman as "sexual orientation" and "religious" discrimination, although the case was decided on other grounds). Christian attorneys are often representing citizens whose refusals, made for religious reasons, to support the LGBT lifestyle or

[8] See, e.g., Mayer & McHugh, "Sexuality and Gender," 50 *The New Atlantis* 8 (Fall 2016), noting (1) that there is limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for non-heterosexual and transgender populations and (2) that more high-quality longitudinal studies are necessary for the "social stress model" to be a useful tool for understanding public health concerns.

participate in LGBT events are attacked as "sexual orientation" or "marital status" discrimination. *E.g., In re Klein*, Case Nos. 44-14 *et al.*, Final Order, Ore. Bureau of Labor and Indus. (July 2, 2015); *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n* (2015COA115), cert. granted, 137 S.Ct. 2290 (U.S. June 26, 2017) (No. 16-111) (argued Dec. 5, 2017). The proposed rule, if adopted without change, could be used in similar ways against attorneys acting in accord with their basic constitutional freedoms. And, of course, this could affect not just Christian attorneys, but also those of other faiths, such as Judaism and Islam, that teach the immorality of homosexual conduct.

The view that distinguishes the person from the activity may not be held currently by a majority of the ABA's or the National Lawyers Guild's leadership, but it is held by many lawyers in Arizona and nationwide and is religiously, scientifically, and logically informed. And to some degree, this view has informed legislators at all levels of our government—from federal to local—in rejecting the addition of "sexual orientation," "gender identity," "gender," and "marital status" to their non-discrimination laws and policies.

It appears that those who sponsor adoption of the model rule are not satisfied with the pace of change across the country. The ABA Ethics Committee in its December 22, 2015, memorandum ("ABA Memorandum") quoted (at 2) from the "eloquence" of the Oregon New Lawyers Division that "[t]here is a need for a cultural shift in understanding." In uncritically accepting that there is such a "need" for a "cultural shift" and in seeking to advance it, the proponents of the proposed rule have taken an unwise step that should not be endorsed and followed by Arizona. At a minimum, Arizona's approach to this subject should be more nuanced to recognize and exempt speech and conduct motivated by sincerely held religious beliefs and to clarify exactly what is being proscribed.

Suggested Revisions to the Proposed Rule

We support the formulation of a black-letter ethics rule addressing inappropriate, invidious discrimination. Such a provision would properly address discrimination based on uncontroversial and constitutionally protected categories, such as race, religion, national origin, and sex. However, the inclusion of "sexual orientation," "gender identity," "gender," and "marital status" as nondiscrimination categories is ill-advised unless those terms are more carefully defined and limitations more clearly specified to prevent an unconstitutional application of the proposed rule.

1. Proposed use of "sexual orientation"

The category of "sexual orientation" should not be included in the text of the rule. It is not a category uniformly recognized throughout the country, and it is subject to misinterpretation and abuse. *See* Todd A. Salzman & Michael G. Lawler, *The Sexual Person* 150 (2008) ("The meaning of the phrase 'sexual orientation' is complex and not universally agreed upon.") It is not a category in Arizona's civil rights laws, and the Supreme Court should not adopt it as a category in its ethics rules when the legislature has refused to do so for Arizona's citizens. Perhaps more importantly, the phrase "sexual orientation" should not encompass same-sex marriage, since the act of marriage, with its accompanying sexual intimacy, goes much beyond

whether an individual is simply attracted to another person of the same sex. Suitable clarifying language would be along these lines: "The [proposed] rule does not extend to a lawyer's refusal to approve or support same-sex conduct, refusal to represent an individual in a matter related to such conduct, or expressed opposition to such conduct."[9]

Without the clarification that "sexual orientation" discrimination does not encompass a lawyer's refusal to approve or support same-sex *conduct*, refusal to represent an individual in a matter related to such *conduct*, or expressed opposition to such *conduct*, lawyers could be driven out of the practice because of their sincerely held and constitutionally protected religious beliefs. To use the proposed rule to coerce an attorney to represent clients to support the advancing of conduct that the attorney considers harmful to both the individuals involved and to our society violates several constitutional protections, including compelled speech and assembly.

Finally, if "sexual orientation" is included, the rule also should clarify that the term does not include "gender identity" and that the category of "sex" does not include either "sexual orientation" or "gender identity." These positions have been put forward in proposed federal regulations by the EEOC in the prior administration and upheld as a reasonable reading of the term by two en banc federal courts of appeals over vigorous dissents, but, as both history and current dissenting opinions demonstrate, they are not universally accepted or approved expansions of the category of "sex."[10] The proposed inclusion of "gender identity" to the categories of "sexual orientation" and "sex" indicates that the terms do not include each other, but this point should be made explicit to address, in part, the vagueness of the term *sexual orientation* (and *gender identity*).

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[9] That such clarification is needed is demonstrated by *Ward v. Wilbanks*, No. 09-cv-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010), *rev'd sub nom.*, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), and other recent cases. Ward was dismissed from her graduate counseling program by a state university because, although she did not object to counseling homosexual individuals generally, she did not want to counsel them in preparation for a same-sex marriage, which she believed to be unethical. She, therefore, sought to refer such counseling to others instead. The school was not satisfied with this resolution and found her beliefs inconsistent with the American Counseling Association Code of Ethics, which prohibits discrimination on the basis of sexual orientation. The school (and the district court) rejected the distinction between personhood (which homosexuals share with all other persons) and conduct (such as same-sex marriage and relations). (The Sixth Circuit did not reach the issue, but reversed because the student was not given the opportunity to show that the refusal to allow her to refer was applied to her in a discriminatory manner due to her speech and faith.)

[10] With respect to whether Title VII of the Civil Rights Act of 1964 extends to "sexual orientation," there is a split among the U.S. Circuit Courts of Appeal. In *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (*en banc*) and *Zarda v. Altitude Express, Inc.*, 2018 WL 1040820 (2d Cir. 2018) (*en banc*), two Circuits overruled prior precedent in their courts and concluded that Title VII's protected categories include sexual orientation as a subset of discrimination on the basis of sex. In *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), however, an Eleventh Circuit panel held that the protected categories under Title VII do not include sexual orientation.

2. Proposed use of "gender identity"

"Gender identity" should not be included in the rule as a nondiscrimination category for several reasons.

- *The movement for official acknowledgement that taking transgender actions is "normal," and that such inclinations should even be encouraged, contrasts with social science studies documenting the dramatic, long-term deleterious effects on those who have elected to have transgender medical procedures performed.*[11] By including this term, the proposed rule helps perpetuate a pretense that ignores physical reality and social science results, unfairly and improperly accusing those who do not support transvestitism and gender transfers of "harassment" and "discrimination."
- *The term "gender identity" is unconstitutionally vague.* This term has no fixed meaning and, by definition, is the product of an individual, subjective determination that may conflict with how the individual objectively appears to others. Moreover, because of its subjectivity, the term is malleable and can even be used by an individual in a temporally inconsistent manner.[12] Needless to say, such ambiguity in the term raises serious vagueness concerns. In fact, the ABA Ethics Committee, which drafted the proposed rule, demonstrated the ambiguity of the term when it stated (December 22, 2015, memorandum, at 5) that the term *gender identity* recognizes that "a new social awareness of the individuality of gender has changed the traditional binary concept of sexuality." Any "identity" subject to changeable, subjective "individuality" untethered to time or objective biology is, by definition, vague and subject to abuse.

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[11] Dr. Paul McHugh, former Chief of Psychiatry at Johns Hopkins Hospital, noted that gender identity confusion is a mental disorder that deserves understanding, treatment, and prevention and that the suicide rate among those who had "reassignment" surgery is 20 times higher than that among non-transgender people. Dr. McHugh also noted studies show that 70% - 80% of children who express transgender feelings spontaneously lose such feelings over time. P. McHugh, "Transgender Surgery Isn't the Solution," 6/12/14 *Wall St. J.*, available at http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120 (last visited 5/11/18); *see also* Cal. Health Interview Study, *reported in* Center for American Progress, "How to Close the LGBT Health Disparities Gap," www.americanprogress.org/issues/lgbt/report/2009/12/21/7048 (last visited 5/11/18) ("[t]ransgender adults are much more likely to have suicide ideation" (2% heterosexual; 5% gay; 50% transgender)).

[12] "The term [transgender] includes androgynous and gender queer people, drag queens and drag kings, transsexual people, and those who identify as bi-gendered, third gender or two spirit. 'Gender identity' refers to one's inner sense of being female, male, or some other gender . . . . Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient . . ., individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities." *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 Tex. J. on C.L. & C.R. 101, 103-04 (2006). *See also DeJohn v. Temple Univ.*, 537 F.3d 301, 381 & n.20 (3d Cir. 2008) (noting fluidity of the term *gender*).

To reiterate, Christians (and others) do not believe those with transgender inclinations are any less persons for having such inclinations, but that is not the same as approving and being able to support or advocate for *actions* taken in furtherance of that inclination or to advance its spread. Christians recognize that they themselves and all other persons take immoral actions. Christians are enjoined by their Scriptures to love and serve all persons, even though they do not approve of the immoral actions persons perform.[13] At a minimum, if the proposed rule is adopted and this phrase is retained, the language suggested above for "sexual orientation" should be expanded to include "gender identity," i.e., "Paragraph (h) does not include a lawyer's refusal to approve or support same-sex or gender transfer conduct, refusal to represent an individual in a matter related to such conduct, or expressed opposition to such conduct."

3. Proposed use of "gender"

"Gender" is not in the ABA's model rule. Although "gender" apparently must mean something different from "sex" or "gender identity," exactly what it means is not clear.[14] Arizona lawyers, who could face discipline for allegations of "gender" discrimination, would be at risk without knowing what "gender" means or what constitutes discrimination on that basis. "Gender" suffers to an even greater extent the vagueness problems that characterize the other terms.

Arizona attorneys, under the language proposed in the petition, would have to guess at the meaning(s) of "gender." Possible meanings are described below, and all are problematic.

Perhaps "gender" refers to "gender expression," as illustrated by the well-known and ever-changing Gender Bread Person.[15] Under this meaning, a lawyer could be accused of gender discrimination if he or she objected to a male employee with a full beard coming to work in a dress, no matter how this might affect the lawyer's clientele and business.

[13] *See John 8:2-11* (New Int'l Version) (story of Jesus not condemning the woman caught in adultery but telling her "leave your life of sin").

[14] A comparison of the following discussion of "gender" with the preceding discussion of "gender identity" (especially footnote 14) demonstrates both the distinction between the two terms, but also their partially overly lapping nature. This exacerbates the vagueness problems inherent in both terms.

[15] For example, see https://www.genderbread.org/resource/genderbread-person-v3-3 for version 3.3.

Perhaps "gender" refers to one or many of the definitions adopted by the World Health Organization (WHO),[16] most of which apply not only within the health context, but more broadly, as well.[17] WHO also defines "gender analysis," "gender equality," and "gender equity."

Because "gender" (as defined by the WHO) "varies from society to society," its unsuitability for inclusion in an ethics rule is obvious. Matters are exacerbated by WHO's definition of "gender analysis," which provides that "[g]ender analysis identifies, assesses[,] and informs actions to address inequality that come from: 1) different gender norms, roles and relations; 2) unequal power relations between and among groups of men and women[;] and 3) the interaction of contextual factors with gender such as sexual orientation, ethnicity, education[,] or employment status." Imagine—for a simple example—a client couple, both of whom are from different societies, that is served by a law firm consisting of lawyers, paraprofessionals, and support staff coming from five, ten, or fifteen different cultures.

Perhaps, instead, "gender" means (or includes) the vague term "gender-expansive." The website https://www.genderspectrum.org defines it as follows:

> "gender-expansive" [is] an umbrella term for individuals that broaden their own culture's commonly held definitions of gender, including expectations for its expression, identities, and roles.
>
> Gender-expansive youth are expressing and/or identifying their gender in a way that broadens traditional, binary gender stereotypes. They may feel that that their birth sex doesn't reflect their internal Gender identity and possibly their outward expression. These youth may identify or express themselves in some conventional ways, yet in one or more important aspect of themselves, they fall outside expected gender norms. The term "gender-expansive" applies to a diverse set of gender experiences.
>
> Our use of this term is by no means an effort to constrain how youth describe themselves. We understand that when youth are asked how they identify their own gender, there's a rich array of different terms they may use, including Agender, androgynous, both genders, gender fluid, transgender, gender queer, genderless, neither, neutral, non-gender, or questioning. These terms, and the many others we know to exist,

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[16] World Health Organization, "Gender, Equality and Human Rights: Glossary of Terms and Tools," http://www.who.int/gender-equity-rights/knowledge/glossary/en/. All quotations and references to World Health Organization definitions can be found at the same web page.

[17] For example, "gender" itself is defined as follows: "Refers to the socially constructed characteristics of women and men—such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed. The concept of gender includes five important elements: relational, hierarchical, historical, contextual and institutional. While most people are born either male or female, they are taught appropriate norms and behaviours—including how they should interact with others of the same or opposite sex within households, communities and work places. When individuals or groups do not "fit" established gender norms they often face stigma, discriminatory practices or social exclusion—all of which adversely affect health."

> are wonderful examples of the ways that young people are reshaping understandings of gender, for themselves, their peers and the larger society around them. All of them are included under the umbrella that is "gender-expansive."[18]

If "gender" in the Petition means (or includes) ever-"broadening" categories, Arizona's lawyers could be accused of discriminating against self-identified groups of people who are unknown now and, in fact, unknown to anyone until they choose to reveal their self-identified "gender." To include such an elusive and shapeless concept as a protected category under the proposed rule would be unfair to Arizona's lawyers and unconstitutional.

4. Proposed use of "marital status"

The term *marital status* is hopelessly ambiguous. It is obviously not an inherent condition like race, ethnicity, or sex, but what exactly it covers is unclear, and its meaning is not well settled or accepted.

The ABA Ethics Committee indicated (ABA Memorandum, at 5) that it included this term based on the Supreme Court of the United States' *Obergefell* decision and on "the rise in single parenthood." This explanation provides more questions than answers. If the reference to *Obergefell* is meant to suggest that a lawyer could not discriminate against those in a same-sex marriage, "marital status" adds nothing to "sexual orientation." Moreover, *Obergefell* did not overturn the public policy of many States that still *disfavors* same-sex marriage, even though those States may no longer prohibit a civil ceremony.[19] To the extent "marital status" is intended to cover the same-sex marriage status, it runs directly contrary to the statements of public policy still common and effective throughout this country that *disfavor* same-sex marriage, including Arizona. Arizona's Constitution in Article XXX ("Marriage"), section 1, provides, "Only a union of one man and one woman shall be valid or recognized as a marriage in this state."

To the extent the ABA included "marital status" based on the implication that there is some kind of invidious discrimination against single parents, the support mustered for that was exactly zero. The reason why representation (or employment at a law firm) would be refused because a person is single but has a child goes unarticulated and its occurrence unproven. Nondiscrimination categories should not be proliferated without cause.

A broad reading of *marital status* could also intrude in law firm hiring decisions. Relational skills are of major importance in both client contacts and in the close working quarters of a law firm. If someone has been divorced repeatedly, it is a possible indicator of relational difficulties,

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[18] https://www.genderspectrum.org/blog/words-matter/.

[19] In this respect, the right of a same-sex couple to a civil marriage parallels the right of a woman to a pre-viability abortion. Although such abortions may not be prohibited by governments, *see Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833 (1992), the Supreme Court has repeatedly upheld the right of federal, state, and municipal governments to disfavor abortion and not to fund the practice. *E.g., Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989); *Williams v. Zbarez*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

failures to honor commitments, and other immaturities in that person. Would asking about the facts and circumstances of such a personal history, and/or basing a non-hiring decision in part on it, be "harassment" or "knowing discrimination" on the basis of "marital status?" Would that be true if the person's marital history was well known to the recruiter and in the community, and she based her refusal to hire in part on that knowledge? After all, the practice of law is not just a "big city" profession; it is also practiced in scores of small communities.

On its face, it is also conceivable that "marital status" discrimination would include, for example, when a Christian attorney, for religious reasons, refused to craft a prenuptial agreement for previously divorced individuals because the lawyer held the belief that the Bible disallows most remarriage after divorce if the divorced spouse is still alive. Similarly, would a family law attorney who refuses for religious reasons to assist a same-sex couple adopt a child have engaged in improper "marital status" discrimination?

The "marital status" category is simply too vague, pliable, and potentially subject to abuse to be used in the proposed rule. It fails due process analysis and could intrude on many decisions and actions that are constitutionally protected.

Conclusion

For the reasons detailed above, we encourage the Supreme Court of Arizona to reject adoption of this proposed rule. If the rule is adopted, we recommend the following revisions to the current text:

- Remove "sexual orientation" and "gender identity" as nondiscrimination categories. At a minimum:
    - add additional language to the rule that "this rule does not include a lawyer's refusal to approve or support same-sex or gender transfer conduct, refusal to represent an individual in a matter related to such conduct, or expressed opposition to such conduct;" and
    - add language to the rule that "the terms *sex* and *sexual orientation* do not overlap with each other and that neither of those terms overlaps with the term *gender identity*."
- Remove "gender" from the listed nondiscrimination categories. It is hopelessly vague and is not included in the ABA model rule's text.
- Remove "marital status" as a nondiscrimination category.

Christians do, indeed, believe that all people are created equal by God, and they also believe that God has set moral absolutes for behavior for those he has created, including that life is sacred from conception to natural death, that sexual intercourse is only ethical when between a man and woman married to each other, and that violating God's moral norms does not bring true liberty either to an individual or to a culture. Social science amply supports the wisdom of these religious principles.

The text of the proposed rule is susceptible of being used to attack those who sincerely hold religiously based views on and object to what they understand to be sexual libertinism. This is no idle threat, as the desire of some in the LGBT movement is quite evident to punish and drum out of the public conversation any who disagree with them and who express their religious beliefs that homosexual and transgender conduct are immoral and deleterious to our civil society, as well as to the individuals involved. (*See, e.g.*, *infra* at page 2, the details of the Alabama Judicial Inquiry Commission case.) The Arizona Supreme Court should not provide a platform for such actions by adopting this proposed rule.

Thank you for the opportunity to provide these comments and for your consideration of them.

Sincerely,

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For The First Amendment Lawyers Association

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	Supreme Court No. R- **COMMENT OF FIRST AMENDMENT LAWYERS ASSOCIATION IN OPPOSITION TO PETITION TO AMEND ER 8.4, RULE 42**

This comment is filed pursuant to this Court's Order of January 18, 2018, soliciting public comment on Petition R-17-0032. In its petition, the National Lawyers Guild, Central Arizona Chapter (the "Lawyers Guild"), urges this Court to amend Rule 42, ER 8.4, by adopting ABA Model Rule 8.4(g) ("Rule 8.4(g)"). Rule 8.4(g) is a

flawed rule that is offensive to the First Amendment rights of attorneys, and this Court should refuse to adopt it.

The First Amendment Lawyers Association ("FALA") is a national, non-profit organization of approximately 200 members who represent the vanguard of First Amendment lawyers. Its central mission is to protect and defend the First Amendment from attack by both private and public incursion. Since its founding in the late 1960s, FALA's membership has been involved in several cases at the forefront of defining the First Amendment's protections. FALA has a marked interest in opposing the adoption of Rule 8.4(g), as the proposed rule is unconstitutionally vague and violates the First Amendment, and would lead to the suppression of protected speech that is only tangentially related to the practice of law.

1.0 Contents of Rule 8.4(g)

The American Bar Association ("ABA") adopted Rule 8.4(g) in August of 2016. The Lawyers Guild's Petition to adopt Rule 8.4(g) would add a subsection (h) to Arizona Rule of Professional Conduct 8.4, which would provide that it is professional misconduct for a lawyer to:

> (g) 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, 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 paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

In addition to this subsection of existing Rule 8.4, Model Rule 8.4(g) includes three new accompanying comments defining various terms within Rule 8.4(g). The Petition does not explicitly include these new comments, but if the Rule were to be adopted these comments would assuredly be relied on for guidance. The most relevant of these are Comments 3 and 4.

Comment 3 defines "discrimination and harassment" under Rule 8.4(g) as including "harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature . . . ." The Comment also provides that

"[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)."

Comment 4 states that "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 associations, business or social activities in connection with the practice of law." It also specifies that "[l]awyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations." Model Rule 8.4(g) thus explicitly permits discrimination so long as it is done for the sake of "diversity."

2.0 Most Other States Have Rejected ABA Model Rule 8.4(g) as Written, and the Only State That Failed to Do So Acted in the Absence of *Any* Comment on the Rule

The Petition states that 24 other jurisdictions have adopted anti-discrimination rules, but this misleads the Court because *almost no other state has adopted this version of Model Rule 8.4(g)*. Rule 8.4(g)

is not a duplicate of any other state's version of a rule dealing with bias, and has broad implications. Anti-discrimination rules may be permissible and even desirable, but *this particular one is not*.

Several states have *rejected* Rule 8.4(g) because it violates the First Amendment:

- In December of 2016, the Texas Attorney General issued a formal opinion stating that Rule 8.4(g) would violate the First Amendment because it restricts speech and conduct far beyond the context of practice of law. (*See* TX A.G. Opinion No. KP-0123, attached as **Exhibit 1**.)[1]
- In January 2017, Pennsylvania's Disciplinary Board proposed an anti-discrimination amendment to the State's Rule 8.4, but Pennsylvania explicitly rejected the language of ABA Rule 8.4(g), adopting instead a rule similar to the narrower Illinois Rule 8.4(j), which states that it would be misconduct to violate a federal,

[1] Available at: <https://www.texasattorneygeneral.gov/opinion/ken-paxton-opinions> (last accessed May 15, 2018).

state, or local statute that prohibits discrimination. (*See* Illinois Rules of Professional Responsibility, attached as **Exhibit 2**.)[2]

- In April 2017, the Montana legislature passed a joint resolution condemning Rule 8.4(g) as an unconstitutional attempt to restrict the First Amendment rights of attorneys. (*See* Montana Senate Joint Resolution No. 15, attached as **Exhibit 3**.)[3]
- In 2017, the Nevada Bar filed a petition to adopt Rule 8.4(g), but in September of 2017 withdrew it in the face of criticism of its constitutionality. (*See* request to withdraw petition to adopt Rule 8.4(g), attached as **Exhibit 4**.)
- In March 2018, the Tennessee Attorney General issued a formal opinion stating that Rule 8.4(g) "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct." (*See* Tenn. AG Opinion No. 18-11, attached as **Exhibit 5**.)[4]

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[2] Available at: <http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#8.4> (last accessed May 15, 2018).

[3] Available at: http://leg.mt.gov/bills/2017/billhtml/SJ0015.htm (last accessed May 15, 2018).

[4] Available at: <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf> (last accessed May 15, 2018).

These states rejected Rule 8.4(g) because it is unconstitutional. The only state to adopt Rule 8.4(g) is Vermont, and it only did so because no one filed any comments in opposition to it. There is no reason for Arizona to follow suit.

3.0 Rule 8.4(g) Violates the First Amendment

Lawyers do not surrender their First Amendment Rights for the privilege of practicing law.[5] Rule 8.4(g) punishes and restricts speech if it is "harmful," "demeaning," or "derogatory."[6] What do those words mean? For example, the speech must be "derogatory" to whom? The Rule does not say, and the proposed comments fail to provide any meaningful guidance, ensuring that no attorney in Arizona will have any idea when their use of language might run afoul of the rule.

Worse still, the Rule is not being pushed in order to confront a real problem. Rather, it will do nothing but ensure there is always a speech-trap for any lawyer who sticks his or her neck out on issues that

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[5] *See Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1054 (1991) (the Nevada Bar could not punish free speech that is protected by the First Amendment); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 469 (1988) (the First Amendment applies to state bar disciplinary actions through the Fourteenth Amendment).

[6] See Model Rules of Prof'l Conduct. 8.4(g) Cmt. 3 (Am. Bar Ass'n 2016).

might be controversial. It chills advocacy, chills activism, and makes the Bar the would-be-censor of anyone who holds a bar license.

A restriction on speech is content-based when it either seeks to restrict, or on its face restricts, a particular subject matter.[7] Any restriction on speech based on the message conveyed is presumptively unconstitutional.[8] This presumption becomes stronger when a government restriction is based not just on subject matter, but on a particular viewpoint expressed about that subject.[9] The government cannot be allowed to impose restrictions on speech where the rationale for the restriction is the opinion or viewpoint of the speaker.[10]

Rule 8.4(g) is incredibly broad and is an unconstitutional viewpoint-based restriction on speech because it only restricts speech espousing certain viewpoints regarding certain topics about certain

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[7] *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). A facially content-based restriction must satisfy strict scrutiny regardless of an allegedly benign government motive. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228-29 (2015).

[8] *See Turner Broadcasting System, Inc., v. FCC*, 512 U.S. 622, 641-43 (1994).

[9] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

[10] *See Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983); *see also Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (finding bar on registration of "disparaging" trademarks unconstitutional viewpoint-based discrimination).

groups of people.[11] Attorneys can say that all women are beautiful, but not that all men are pigs. They can say that senior citizens are wise, but not that kids are stupid. Under a literal reading of the rule, an attorney could extoll the virtues of Mormonism but would face possible disbarment for calling Pastafarianism a joke.

This viewpoint-based restriction on attorney speech will have a chilling effect on an attorney's ability to engage in disfavored political dialogues or debates. A lawyer's trade is to speak for and represent others, but Rule 8.4(g) pits an attorney's ability to speak for others against a threat of a bar complaint if someone considers the speech "offensive." In fact, the rule is drafted so broadly it could even punish expression of popular, mainstream opinions that someone on the ideological fringe finds offensive.

The point of protecting free speech is to shield the speaker who may say something misguided or hurtful in another's eyes.[12] Rule

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[11] See *R.A.V.*, 505 U.S. 377 ("The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.")

[12] *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (*citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 574 (1995)); *see also Texas v. Johnson*, 491 U. S. 397, 414 (1989) ("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

8.4(g) does more than restrict what an attorney may say in open Court; its plain language restricts what an attorney may say in a multitude of social situations, as well. If the Bar wishes to govern attorney speech in a courtroom, that is perhaps reasonable (though even there viewpoint discrimination would be presumptively unconstitutional). But, this proposed rule does far more than that. It is a measure that seeks to govern attorney speech no matter where and when it might occur, unless that speech is 100% disassociated from any tangent of the lawyer's practice.

The ABA defines speech "related" to the practice of law as: (1) representing clients; (2) interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; and (3) participating in social activities, such as attending bar association meetings, or other business or social activities in connection with the practice of law.[13] Rule 8.4(g) contradicts paramount First Amendment protections because it restricts an

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disagreeable"); *and see Roth v. United States*, 354 U.S. 476, 484 (1957) ("All ideas having even the slightest redeeming social importance, e.g., unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – fall within the full protection of the First Amendment").

[13] See Model Rules of Prof'l Conduct. 8.4(g) Cmt. 4 (Am. Bar Ass'n 2016).

attorney's ability to express an opinion or engage in good faith debate at a local bar meeting, and it would chill law professors and practitioners alike from writing engaging law review articles that may offend some.

An attorney could risk disciplinary action simply for making an argument, supported by factual data, with an unpopular conclusion. For example, if a female plaintiff in a workplace discrimination suit claimed the court should presume a policy of gender discrimination because all her co-workers are men, the defendant's attorney could face Bar discipline for countering with a study showing that gender discrimination is more common in co-ed offices.[14] Rule 8.4(g) has the potential to limit the development of the legal profession and stymie the continuing legal education of attorneys in Arizona. Perhaps not every potentially controversial topic would run afoul of Rule 8.4(g), but the *possibility* of violating the rule would inevitably cause lawyers in

[14] This problem is not solved by the rule's allowance of otherwise objectionable conduct that constitutes "legitimate advice or advocacy consistent with these Rules," either. There is no guidance as to what makes advocacy under this rule "legitimate" or "illegitimate."

Arizona to shy away from addressing any controversial issue in any setting remotely connected to the practice of law.[15]

Even worse, Rule 8.4(g) could very well make it an ethical violation simply to *represent* clients who are being sued for speech that mainstream society does not consider acceptable. For example, say a female college professor is fired for espousing the viewpoint in class that women are genetically superior to men, and then files a suit against the college for wrongful termination. An attorney may risk discipline for representing the woman and, outside the courtroom, making any statement about her viewpoint that is not a full-throated condemnation of it.[16] This could very easily lead to an environment where citizens with unpopular opinions would be precluded from obtaining effective legal representation. This same reasoning applies to controversial religious organizations; attorneys would be wary of

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[15] *See*, *e.g.*, *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) ("indefinite statutes" with "uncertain meanings" require that speakers "steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked") (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (internal citation omitted).

[16] Arizona Rule 1.2(b) establishes that representing a client is not an endorsement of that client's views or activities, but it does not take much imagination to conceive of a situation where an attorney declining to condemn a client's "discriminatory" viewpoint could invoke a disciplinary proceeding under Rule 8.4(g).

representing controversial organizations such as the Westboro Baptist Church, for fear of violating Rule 8.4(g) by making any statement about the Church or its views in any context other than direct courtroom advocacy.

As discussed in more detail below, FALA is in no way opposed to the Arizona Bar adopting a content-neutral rule that curtails harassment and discrimination. In fact, FALA would support a rule that accomplishes these worthy goals if the rule does not violate the First Amendment or other protections provided by the U.S. Constitution, such as due process. FALA stands firm, however, that it does not support rule 8.4(g), because it will be used as a weapon to silence attorneys with diverse opinions.

4.0 Distinguished First Amendment Scholars Have Spoken Out Against ABA Model Rule 8.4(g)

Many First Amendment scholars have spoken out against Rule 8.4(g), including:

- Distinguished First Amendment Professor Eugene Volokh[17] has noted that passing a law that disciplines attorneys for speech

[17] Professor Volokh is the editor of the *Volokh Conspiracy* at the *Washington Post* and is the author of the treatise *The First Amendment and Related Statues*

would stifle debate within the legal community for fear of disciplinary reprimand. (*See* Eugene Volokh, "Texas AG: Lawyer speech code proposed by American Bar Association would violate the First Amendment," WASHINGTON POST (Dec. 20, 2016), attached as **Exhibit 6**.)[18]

- Professor Ronald Rotunda[19] noted that under the ABA Model Rule, if two attorneys spoke on a panel, and an attorney said "Black Lives Matter," the attorney who responds "Blue Lives Matter" could be subject to discipline under this Rule. Candid debates about illegal immigration or gender-neutral bathrooms would likely involve discussions about national origin, sexual orientation, and gender identity, which means that participants in the debate would be subject to discipline, depending entirely on the speaker's stance or viewpoint. (*See* Rebecca Messall, et

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(West 2013). He teaches at the University of California Los Angles School of Law <http://www2.law.ucla.edu/volokh/>.

[18] Available at: <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/20/texas-ag-lawyer-speech-code-proposed-by-american-bar-association-would-violate-the-first-amendment/> (last accessed May 15, 2018).

[19] Professor Rotunda is the author of the treatise *American Constitutional Law* (Volumes 1 & 2) (West 2016) and *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters 2016). He teaches at Chapman University <https://www.chapman.edu/our-faculty/ronald-rotunda>.

al., "Statement on ABA Model Rule 8.4(g)," NATIONAL LAWYERS ASSOCIATION (Mar. 7, 2017), attached as **Exhibit 7**.)[20]

- Professor Josh Blackman[21] has noted that Rule 8.4(g) will affect the types of hypotheticals and debates law school professors can pose to students, because law professors who have active law licenses could worry about offending a student and being faced with a bar complaint. (See Josh Blackman, "My Rejected Proposal for the AALS President's Program on Diversity: The Effect of Model Rule of Professional Conduct 8.4(g) and Law School Pedagogy and Academic Freedom" (Nov. 15, 2016), attached as **Exhibit 8**.)[22]

The Court should heed the warnings of these preeminent First Amendment scholars and note the serious consequences the passage of 8.4(g) would have on free speech and debate. We should

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[20] Available at: <http://www.nla.org/nla-task-force-publishes-statement-on-new-aba-model-rule-8-4g/> (last accessed May 15, 2018).

[21] Professor Blackman is the author of *Reply: A Pause for State Courts Considering Model Rule 8.4(G) The First Amendment and "Conduct Related to the Practice of Law"*, 30 GEO. J. LEGAL ETHICS (2017). He teaches at South Texas College of Law <http://www.stcl.edu/about-us/faculty/josh-blackman/>.

[22] Available at: <http://joshblackman.com/blog/2016/11/15/my-rejected-proposal-for-the-aals-presidents-program-on-diversity-the-effect-of-model-rule-of-professional-conduct-8-4g-and-law-school-pedagogy-and-academic-freedom/> (last accessed May 15, 2018).

not seek to censor lawyers who engage in debate at bar conferences, in law school classrooms, and in law review articles. Rather, we should engage people we do not agree with, and present them with better arguments. If someone holds an offensive viewpoint, it is better to try to change that person's mind than to shut them up.

5.0 ABA Model Rule 8.4(g) is Unconstitutionally Vague

The government violates the due process clause of the Fifth and Fourteenth Amendments when it takes someone's life, liberty, or property without due process by passing a law that is so vague that that it does not give ordinary people fair notice of the conduct it punishes, or is so standard-less that it invites arbitrary enforcement.[23] Rule 8.4(g) is unconstitutionally vague because it does not draw a clear line between what conduct is "related to the practice of law" and what conduct is not. There is no clear line regarding what is merely an unpopular opinion, and what is discriminatory. Conduct that is *related* to law is incredibly vague, and as analyzed above, could include a multitude of activities.

[23] *See Johnson v. United States*, 135 S. Ct. 2551, 2553 (2015); *see also Kolender v. Lawson*, 461 U.S. 352 (1983).

The term "[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct."[24] In addition to being a guaranteed chill on speech, there is no way for any member of the legal community to know prospectively what language may be "derogatory or demeaning." Is this judged from the subjective viewpoint of the speaker's audience, the subjective viewpoint of a third party who hears the speech afterward, or some objective standard that is applied regardless of whether anyone actually found the statements "derogatory or demeaning?"

Furthermore, words or conduct that potentially fit this terminology will necessarily change over time, unnecessarily burdening attorneys with the obligation to continue educating themselves on these constantly shifting definitions. As explained below, if this is the Bar's goal, it should instead impose elimination-of-bias MCLE requirements. *See* Section 6.0, *infra*.

The definition of "discrimination" is no clearer; it "includes harmful verbal or physical conduct that manifests bias or prejudice towards others." This is an utterly unintelligible standard that

[24] Comment 3 to Rule 8.4(g).

necessarily requires attorneys to guess which statements are permitted and which are not. With the possibility of disciplinary action for a wrong statement, lawyers will inevitably curb speech they have a right to express.

In particular, Rule 8.4(g) punishes speech that discriminates against "socioeconomic status," a term that is not defined by the ABA or any other anti-discrimination statute. Socio-economic status is vague because there is no bright line rule about what this entails. A lawyer could be subject to discipline for "discriminating" against someone who is unable to pay a retainer fee. A lawyer could also be subject to discipline for speaking out against "the 1%" – as this could be deemed discriminatory on this basis.

Professor Volokh notes that the socioeconomic discrimination language is so vague that there are many examples of conduct that could lead to attorney discipline:

- A law firm preferring more-educated employees over less educated ones.
- A law firm preferring employees who went to high status institutions, such as Ivy League schools, over Tier 4 law schools.

- A solo practitioner who prefers a would-be partner who has more resources to help weather hard times, over a would-be partner who has zero savings.
- A law firm contracting with an expert witness and/or an expert consultant who is especially well-educated or has an especially prestigious employer.

(*See* Eugene Volokh, "Banning Lawyers From Discriminating Based on 'Socioeconomic Status' in Choosing Partners, Employees or Experts," WASHINGTON POST (Aug. 10, 2016), attached as **Exhibit 9**.)[25]

An additional problem with the vagaries inherent in these terms is that they **beg** for selective enforcement. Without any intelligible definitions of "harassment" or "discrimination," the Bar would be free to prosecute any attorney at any time; no one on Earth has failed to make a statement at some point in their life that someone could find offensive. Furthermore, the Bar is the sole arbiter of what is "harassment" or "discrimination," which has the potential of leading

[25] Available at: <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/05/banning-lawyers-from-discriminating-based-on-socioeconomic-status-in-choosing-partners-employees-or experts/?utm_term=.beabb7cea8fe> (last accessed May 15, 2018).

to the absurd result of an attorney being disciplined for making a "disparaging" statement that the allegedly "disparaged" audience does not actually find "disparaging."

Rule 8.4(g) is unconstitutionally vague because an ordinary person - even one schooled in the practice of law - would not be able to read the rule and understand what is conduct related to the practice of law or what statements constitute discrimination or harassment, and it encourages (and even necessitates) selective enforcement. Arizona must reject Rule 8.4(g).

6.0 The Arizona Bar Should Adopt an Elimination of Bias Rule, Rather than ABA Model Rule 8.4(g)

Eliminating bias from the profession is a laudable goal – and one that can be achieved through constitutional and honest means that are not subject to abuse. The Court should reject Rule 8.4(g) for the reasons stated above, but the Court should consider that there are many different anti-harassment and anti-discrimination rules that have already been adopted by other states. None of the rules adopted in other states are as broad as Rule 8.4(g).

If the Arizona Bar wants to craft a bias rule modeled from another state, there are two major distinctions between the language in other states' rules and Model Rule 8.4(g). These distinctions also highlight the major deficiencies with Rule 8.4(g).

(1) **Conduct:** Most states have a narrow interpretation of "conduct" and restrict only conduct in the course of representing a client. (*See* "Anti-Bias Provisions in the State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Language Choices Narrative" (July 16, 2015).)[26] Rule 8.4(g) has a sweeping approach that exposes attorneys to discipline for any conduct *related* to the practice of law (such as speaking on a panel at a bar meeting or engaging in a debate with a colleague).

(2) **Breaking the Law:** Most states limit discrimination to an act that breaks a federal, state, or local law and requires that there be a finding by a court that the attorney engaged in discrimination. Rule 8.4(g) is subjective and allows anyone who

[26] Available at: <http://www.american bar.org/content /dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf> (last accessed May 15, 2018).

is offended by something an attorney says to file a bar complaint at their discretion. Comment 3 to Rule 8.4(g) provides only that state law "may guide application of paragraph (g)," not that it is determinative.

A better option Arizona could adopt is a carrot rather than a stick approach: it could make one credit of Eliminating Bias a Mandatory Continuing Legal Education . States like California and Minnesota require attorneys to take elimination-of-bias as a CLE every year. FALA has incorporated eliminating bias credits into both 2017 FALA meetings, not only for the benefit of the members who need the credit, but because it is important for all members.

Eliminating bias in the profession is a worthy policy to pursue. The Arizona Bar should take steps to eliminate bias. However, adopting Model Rule 8.4(g) is absolutely the wrong way to approach this problem because it is unconstitutional on its face and violates the First Amendment.

7.0 Conclusion

A lawyer who violates the Rules of Professional Conduct may suffer serious consequences, which can range from a letter of

reprimand to disbarment. Rule 8.4(g) is the only model rule that dictates an attorney can be disciplined for something that has nothing to do with that attorney's ability to practice law or handle client trust accounts. Rather, it dictates what types of views an attorney is allowed to have and say publicly. Attorneys should be free to practice law without fear of voicing an unpopular opinion. Rule 8.4(g) has no rational relationship to securing the integrity of the practice of law in Arizona, and instead is one step removed from legislating thoughtcrime.

The existing measures in the Arizona Rules satisfy any interests that the proponents of this rule have stated. If Arizona truly believes that the existing rules do not prohibit attorneys from true unlawful discrimination, then it should adopt *constitutional* remedial measures.

Arizona should not join the dubious company of Vermont as a state to adopt ABA Model Rule 8.4(g). Members of the Arizona Bar took an oath to uphold the Constitution of the United States, and have a duty not to adopt a rule that violates the Constitution. Arizona should follow the lead of other states and heed the advice of this

nation's First Amendment scholars: Arizona should reject this proposed rule.

Dated May 16, 2018. Randazza Legal Group, PLLC

/s/ Marc J. Randazza

Marc J. Randazza
(AZ Bar No. 027861)
2764 Lake Sahara Drive, Suite 109
Las Vegas, Nevada 89117

EXHIBIT 2

Illinois Rules of Professional Responsibility

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(d) engage in conduct that is prejudicial to the administration of justice.

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. Nor shall a lawyer give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge's family may receive under Rule 65(C)(4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to the order of an entity that the lawyer reasonably believes to be a political committee supporting such judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.

(g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good-faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good-faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Adopted July 1, 2009, effective January 1, 2010.

EXHIBIT 1

Texas AG Opinion No. KP-0123

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 20, 2016

The Honorable Charles Perry
Chair, Committee on Agriculture,
Water & Rural Affairs
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2548

Opinion No. KP-0123

Re: Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute a violation of an attorney's statutory or constitutional rights (RQ-0128-KP)

Dear Senator Perry:

You request an opinion concerning whether this State's adoption of the American Bar Association's new Model Ethics Rule 8.4(g), regarding attorney misconduct due to discrimination, "would constitute a violation of an individual attorney's rights under any applicable statute or constitutional provision."[1]

The American Bar Association ("ABA") is a voluntary organization that serves the legal profession. One of the many services it performs is to propose rules that may "serve as models for the ethics rules" of individual states.[2] The ABA House of Delegates originally adopted the Model Rules of Professional Conduct ("Model Rules") in 1983, and it has amended the Model Rules numerous times since. MODEL RULES OF PROF'L CONDUCT, Preface (AM. BAR ASS'N 2016). All states but one have patterned their rules of professional conduct for attorneys after the Model Rules, but the majority of states have not adopted rules identical to the Model Rules. Instead, states have modified the rules to varying degrees.

In August of 2016, the ABA House of Delegates amended Model Rule 8.4 to add subsection (g), which provides that it is professional misconduct for a lawyer to:

> (g) 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

[1]Letter from Honorable Charles Perry, Chair, Senate Comm. on Agric., Water & Rural Affairs, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Sept. 19, 2016), https://www.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs ("Request Letter").

[2]*See* AM. BAR ASS'N, MODEL RULES OF PROF'L CONDUCT, ABOUT THE MODEL RULES, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Dec. 8, 2016).

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

Id. r. 8.4(g). Two comments relevant to subsection (g) were also added to the Rule:

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. . . .
>
> [4] 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. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Id. r. 8.4(g) cmts. 3–4.

In Texas, the State's Supreme Court regulates the practice of law. TEX. GOV'T CODE § 81.011(c). Government Code section 81.024 authorizes the Court to prepare, propose, and adopt rules "governing the state bar," including rules related to "conduct of the state bar and the discipline of its members." *Id.* § 81.024(a)–(b). Before they are promulgated, however, such rules must be approved by members of the State Bar through a referendum. *Id.* § 81.024(g) ("A rule may not be promulgated unless it has been approved by the members of the state bar in the manner provided by this section."). Upon referendum by members of the State Bar, the Court adopted the Texas Disciplinary Rules of Professional Conduct ("Texas Rules").[3] The Court patterned the Texas Rules after the Model Rules to some extent, but it made a number of modifications with regard to certain specific rules and declined to adopt others altogether.

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[3]The Texas Rules became effective January 1, 1990, and replaced the Texas Code of Professional Responsibility. TEX. DISCIPLINARY RULES PROF'L CONDUCT preamble, *reprinted in* TEX. GOV'T CODE tit. 2, subtit. G, app. A (Editor's Notes). Over the past twenty-five years, the Texas Supreme Court and the State Bar have conducted five referenda to amend the Rules of Professional Conduct or the Rules of Disciplinary Procedure, and two of those referenda passed. *See* Sunset Advisory Comm'n Staff Report, State Bar of Texas Bd. of Law Exam'rs, 2016–2017, Eighty-fifth Legislature at 15, https://www.sunset.texas.gov (last visited Dec. 8, 2016).

Although the Texas Supreme Court adopts rules rather than the Legislature, the Court has emphasized that its rules should be construed as statutes. *O'Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 399 (Tex. 1988). A Texas lawyer who fails to conform his or her professional conduct to the Texas Rules commits professional misconduct and may lose his or her license to practice law in this State. *See* TEX. RULES DISCIPLINARY P. R. 1.06(W), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A-1 (defining "professional misconduct"). Relevant to your question, the Texas Supreme Court has not adopted Model Rule 8.4(g), and it is not currently part of the Texas Rules. However, if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent.

I. A court would likely conclude that Model Rule 8.4(g) infringes upon the free speech rights of members of the State Bar.

The Framers of the United States Constitution fashioned the constitutional safeguard of free speech to assure the "unfettered interchange of ideas" for bringing about "political and social changes desired by the people." *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion"—fall within the full protection of the First Amendment. *Roth v. United States*, 354 U.S. 476, 484 (1957). Contrary to these basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues.

While decisions of the United States Supreme Court have concluded that an attorney's free speech rights are circumscribed to some degree in the courtroom during a judicial proceeding and outside the courtroom when speaking about a pending case, Model Rule 8.4(g) extends far beyond the context of a judicial proceeding to restrict speech or conduct in any instance when it is "related to the practice of law." MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016); *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991). Comment 4 to Model Rule 8.4(g) addresses the expanse of this phrase by explaining that 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.

MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS'N 2016). Given the broad nature of this rule, a court could apply it to an attorney's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.

One commentator has suggested, for example, that at a bar meeting dealing with proposals to curb police excessiveness, a lawyer's statement, "Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime," could be subject to discipline under Model Rule

8.4(g).[4] In the same way, candid dialogues about illegal immigration, same-sex marriage, or restrictions on bathroom usage will likely involve discussions about national origin, sexual orientation, and gender identity. Model Rule 8.4(g) would subject many participants in such dialogue to discipline, and it will therefore suppress thoughtful and complete exchanges about these complex issues.

While federal and state law provide heightened protection to most of the classes identified in Model Rule 8.4(g), even in those instances, the law does not prohibit discrimination under all circumstances. Instead, a state action distinguishing between people on the basis of national origin, for example, must be "narrowly tailored to serve a compelling government interest." *Richards v. League of United Latin Am. Citizens*, 868 S.W.2d 306, 311 (Tex. 1993). Yet an attorney operating under Model Rule 8.4(g) may feel restricted from taking a legally supportable position due to fear of reprimand for violating the rule. Such restrictions would infringe upon the free speech rights of members of the State Bar, and a court would likely conclude that Model Rule 8.4(g) is unconstitutional.

II. A court would likely conclude that Model Rule 8.4(g) infringes upon an attorney's First Amendment right to free exercise of religion.

Model Rule 8.4(g) could also be applied to restrict an attorney's religious liberty and prohibit an attorney from zealously representing faith-based groups. For example, in the same-sex marriage context, the U.S. Supreme Court has emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). The Court has further encouraged "an open and searching debate" on the issue. *Id.* However, operation of Model Rule 8.4(g) would stifle such a debate within the legal community for fear of disciplinary reprimand and would likely result in some attorneys declining to represent clients involved in this issue for fear of disciplinary action. If an individual takes an action based on a sincerely-held religious belief and is sued for doing so, an attorney may be unwilling to represent that client in court for fear of being accused of discrimination under the rule. "[D]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." *Gentile*, 501 U.S. at 1054. Given that Model Rule 8.4(g) attempts to do so, a court would likely conclude that it is unconstitutional.

III. A court would likely conclude that Model Rule 8.4(g) infringes upon an attorney's right to freedom of association.

"[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000). Contrary to this constitutionally protected right, however, Model Rule 8.4(g)

[4]Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, The Heritage Foundation Legal Memorandum 4 (2016).

could be applied to restrict an attorney's freedom to associate with a number of political, social, or religious legal organizations. The Rule applies to an attorney's participation in "business or social activities in connection with the practice of law." MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS'N 2016). Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline. In addition, a number of other legal organizations advocate for specific political or social positions on issues related to race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. Were Texas to adopt Model Rule 8.4(g), it would likely inhibit attorneys' participation in these organizations and could be applied to unduly restrict their freedom of association.

IV. Because Model Rule 8.4(g) attempts to prohibit constitutionally protected activities, a court would likely conclude it is overbroad.

An overbroad statute "sweeps within its scope a wide range of both protected and non-protected expressive activity." *Hobbs v. Thompson*, 448 F.2d 456, 460 (5th Cir. 1971). A court will strike down a statute as unconstitutional if it is so overbroad as to chill individual thought and expression such that it would effectively punish the expression of particular views. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 583 (1998). In the First Amendment context, a court will invalidate a statute as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quotation marks omitted). A law is not overbroad merely because one can think of a single impermissible application. *See New York v. Ferber*, 458 U.S. 747, 771–73 (1982). A finding of substantial overbreadth requires a court "to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 11 (1988) (quotation marks omitted).

Although courts infrequently invalidate a statute for overbreadth, Model Rule 8.4(g) is a circumstance where a court would be likely to do so. *See Finley*, 524 U.S. at 580 ("Facial invalidation is, manifestly, strong medicine that has been employed by the Court sparingly[.]" (quotation marks omitted)). Like those examples discussed above, numerous scenarios exist of how the rule could be applied to significantly infringe on the First Amendment rights of all members of the State Bar. A statute "found to be overbroad may not be enforced at all, even against speech that could constitutionally be prohibited by a more narrowly drawn statute." *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 435 (1998). Because Model Rule 8.4(g) substantially restricts constitutionally permissible speech and the free exercise of religion, a court would likely conclude it is overbroad and therefore unenforceable.

V. As applied to specific circumstances, a court would likely also conclude that Model Rule 8.4(g) is void for vagueness.

A statute is void for vagueness when it "prohibits conduct that is not sufficiently defined." *Id.* at 437. A vague statute offends due process in two ways: (1) by failing to give fair notice of what conduct may be punished; and (2) inviting "arbitrary and discriminatory enforcement by

failing to establish guidelines for those charged with enforcing the law." *Id.* "To survive a vagueness challenge, a statute need not spell out with perfect precision what conduct it forbids." *Id.* But it must explain the prohibited conduct "in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973). When analyzing whether a disciplinary rule directed solely at lawyers is vague, courts will "ask whether the ordinary lawyer, with the benefit of guidance provided by case law, court rules and the lore of the profession, could understand and comply with it." *Benton*, 980 S.W.2d at 437 (quotation marks omitted).

When a "statute's language is capable of reaching protected speech or otherwise threatens to inhibit the exercise of constitutional rights, a stricter vagueness standard applies than when the statute regulates unprotected conduct." *Id.* at 438. Model Rule 8.4(g) lacks clear meaning and is capable of infringing upon multiple constitutionally protected rights, and it is therefore likely to be found vague. In particular, the phrase "conduct related to the practice of law," while defined to some extent by the comment, still lacks sufficient specificity to understand what conduct is included and therefore "has the potential to chill some protected expression" by not defining the prohibited conduct with clarity. *Id.*; MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016). Also, the rule prohibits "discrimination" without clarifying whether it is limited to unlawful discrimination or extends to otherwise lawful conduct. It prohibits "harassment" without a clear definition to determine what conduct is or is not harassing. And it specifically protects "legitimate advice or advocacy consistent with these Rules" but does not provide any standard by which to determine what advice is or is not legitimate. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016). Each of these unclear terms leave Model Rule 8.4(g) open to invalidation on vagueness grounds as applied to specific circumstances.

VI. The Texas Rules of Disciplinary Conduct sufficiently address attorney misconduct to prohibit unlawful discrimination.

Multiple aspects of Model Rule 8.4(g) present serious constitutional concerns that would likely result in its invalidation by a court. The Texas Disciplinary Rules of Professional Conduct, on the other hand, already address issues of attorney discrimination through narrower language that provides better clarification about the conduct prescribed. Texas Disciplinary Rule of Professional Conduct 5.08 provides:

> (a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.
>
> (b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as "confidential information" under these Rules. See Rule 1.05(a), (b). It also does not preclude

> advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:
>
> (i) is necessary in order to address any substantive or procedural issues raised in the proceeding; and
>
> (ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure.

TEX. DISCIPLINARY R. PROF'L CONDUCT R. 5.08 ("Prohibited Discriminatory Activities"). Model Rule 8.4(g) is therefore unnecessary to protect against prohibited discrimination in this State, and were it to be adopted, a court would likely invalidate it as unconstitutional.

SUMMARY

A court would likely conclude that the American Bar Association's Model Rule of Professional Conduct 8.4(g), if adopted in Texas, would unconstitutionally restrict freedom of speech, free exercise of religion, and freedom of association for members of the State Bar. In addition, a court would likely conclude that it was overbroad and void for vagueness.

Very truly yours,

Ken Paxton

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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:	**No. R-17-0032**
PETITION TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	**COMMENT OPPOSING AMENDMENT TO ER 8.4**

Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, we comment in opposition to the Petition to Amend Ethical Rule (ER) 8.4 of the Arizona Rules of Professional Conduct (the "Petition").

The proposed rule change is based on American Bar Association Model Rule 8.4(g) (the "Model Rule"). Below, we address two of the many reasons that this Court should reject the proposed rule change. First, the proposed rule change violates the right to free speech enjoyed by Arizona attorneys under both the U.S.

Constitution and the Arizona Constitution. Second, the proposed rule change will weaken the bar of this state by chilling the constitutionally-protected speech of its members.

I. The proposed rule change violates the free-speech rights of Arizona attorneys.

The bar's ability to limit lawyer speech is not limitless, and its power declines sharply the further it strays from its core function, which is regulating the practice of law—*i.e.*, actually representing clients. For example, no one disputes this Court's authority to punish attorneys who lie to their clients, make false representations in court, or attempt to communicate with a represented party without that party's attorney being present. But once the Court attempts to regulate other kinds of attorney speech, its constitutional authority decreases dramatically—and appropriately so. The Petition, which aims to add a new ER 8.4(h) by adopting the language of Model Rule 8.4, would give this Court the power to monitor and punish speech that is not related to the practice of law at all—the point at which this Court's regulatory authority is virtually non-existent.

In *Holder v. Humanitarian Law Project*, the U.S. Supreme Court made it clear that *any* restriction on attorney speech must be analyzed using strict scrutiny. 561 U.S. 1 (2010). *Holder* involved a federal statute that was being applied to prohibit attorneys from providing "material support" to terrorist organizations. While the Court did uphold the restrictions in that case, it did so using the highest

level of constitutional scrutiny. "[A]s applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message … and we must apply a more demanding standard" of review. *Id*. at 28 (cleaned up). Namely, strict scrutiny.

Holder demonstrates why this Court should reject the proposed rule. There, the U.S. Supreme Court applied strict scrutiny to uphold the statute because combatting terrorism is "an urgent objective of the highest order," and the material-support statute directly advanced that interest. *Id*. at 28. But despite the fact that it upheld the application of the law in *Holder*, the Court went out of its way to observe that:

> [T]his is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny. It is also not to say that any other statute relating to speech and terrorism would satisfy the First Amendment. In particular, *we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations*.

Id. at 39 (emphasis added) —which is to say that rules directly regulating the practice of law will often survive First Amendment scrutiny, but rules that regulate the "independent speech" of attorneys usually will not.

Under the Model Rule, which the Petition would have this Court adopt, "[i]t 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."[1] Comment 3 explains that a lawyer may be engaging in intimidation and harassment if she engages in "harmful verbal or physical conduct that manifests bias or prejudice towards others."[2] Comment 4 then explains that the proposed rule applies to a vast array of speech, including "participating in bar association, business or social activities in connection with the practice of law."[3] Thus, under this rule, an attorney who "manifest[ed] bias" toward a particular group at a bar function or social activity could be found guilty of *professional* misconduct.[4]

The rule being proposed by the Petition could not be any more distant from the rule at issue in *Holder*. That rule prohibited attorneys from giving advice that might ultimately benefit terrorist organizations. This rule applies to attorneys speaking at bar functions, meetings of the Federalist or American Constitution Societies, law schools, social clubs, or any other setting where they are speaking in their roles as attorneys. And it prohibits them from saying anything that might be perceived as harassing or discriminating against members of the listed protected

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1 goo.gl/CTdrpF
2 goo.gl/GvD2hR
3 *Id.*
4 *Id.*

classes. The speech at issue in *Holder* is precisely the kind of speech that the government is constitutionally permitted to regulate. The kind of speech at issue here is the kind of speech that the government has never been permitted to regulate.

If the First Amendment protects anything, it protects the right of Americans to come together and speak their minds about important issues of the day. And that protection is not diminished merely because the speaker happens to be an attorney. An attorney might wish to speak about laws affecting the classes listed in the proposed rule. Should employers be allowed to discriminate based on age? Should public-accommodation laws be extended to bakers who do not wish to make a cake for a gay wedding? How should a city combat the problem of homelessness (socio-economic status)? Attorneys will have opinions about these things, and people will sometimes want to listen to those opinions precisely because the speaker is an attorney. But the proposed rule chills speech about these topics because any attorney speaking about such things runs at least the possibility of being sanctioned for doing so.

The proposed rule unconstitutionally restricts the independent speech of Arizona attorneys. The government does not have a compelling interest in preventing attorneys from speaking about controversial topics—even if a listener might be offended. And even if the government could demonstrate such an

interest—which it cannot—this rule is far too broad and covers far too much constitutionally protected speech to survive any level of scrutiny, much less the strict scrutiny that *Holder* demands. *See also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1050–53 (1991) (rejecting a balancing test for cases involving independent, public speech of attorneys in favor of strict scrutiny); *Bates v. State Bar of Arizona*, 433 U.S. 350, 381–82 (1977) (First Amendment protects truthful, non-misleading attorney advertising); *In re Sawyer*, 360 U.S. 622, 631 (1959) ("lawyers are free to criticize the state of the law"); *but see Bridges v. California*, 314 U.S. 252, 271 (1941) (states can regulate attorney speech where, for example, "the substantive evil of unfair administration of justice [is] a likely consequence").

There is no doubt that "it is the responsibility, even the obligation, of diverse communities to confront [bigoted] notions in whatever form," but there is equally no doubt that "the manner of that confrontation cannot consist of selective limitations upon speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (cleaned up). Nor can this Court forget that freedom of speech applies to racist and sexist speech no less than to speech about inclusion and diversity. *See National Socialist Party of America v. Village of Skokie*, 434 U.S. 1327 (1977). A rule that deems it improper for an attorney even to associate at social functions with persons holding disapproved beliefs risks damaging our profession's bedrock principle that the law "protects all minorities, no matter how despised they are." *Communist*

Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 190 (1961) (Douglas, J., dissenting).

II. The proposed rule change will weaken the bar of this state by making its members afraid to speak about important topics.

Beyond the constitutional infirmities discussed above, the proposed rule is a bad idea because it will weaken the bar of this state, for at least two reasons. First, it will make Arizona attorneys afraid to speak about topics of the day, thus silencing these important voices. Second, the proposed rule will inevitably be used to silence ideological opponents, thus increasing the amount of discord and acrimony within the bar.

To the first point, the proposed rule will make Arizona attorneys less willing to speak at pubic functions, even if they possess expertise in a particular area. The risk of censure under the rule—while potentially remote—will nevertheless be ever-present. Bar activities, public discussions, and debates are important to attorneys, but not central to the practice of law. One can effectively practice law without doing any of these things, and more attorneys will choose to do so if the model rule is adopted. Why risk it? Why risk a blemish on one's record—particularly for discrimination or harassment—when one can simply choose to remain silent? Why risk offending one's attorney malpractice insurer simply to speak at a political debate or a controversial town-hall meeting?

The smart, self-interested choice will simply be for attorneys to remain silent. And when this happens, the Arizona bar will be poorer for it. The resulting information void will deprive listeners of attorney insight, allowing some voices to be amplified while others wisely choose silence. This will result in worse decision-making on important public issues, and it will result in a bar with less influence and respect as an important public voice.

The proposed rule is also bad public policy because it increases the likelihood of acrimony and "score settling" among members of the bar. The rules allow anyone to file a grievance on the basis that they found an attorney's *independent* speech to be intimidating or discriminatory. This could include anything from a debate about the best way to combat homelessness (socioeconomic discrimination) at a bar event to a speech about a pending Supreme Court ruling on gay marriage (harassment based on sexual orientation) at a political event.

Such grievances will certainly be filed. Sometimes it will happen because someone has honestly been offended by something an attorney has said. And sometimes it will be done by someone looking to settle a score or stir up trouble. In either case, the rule introduces a substantial likelihood of greater acrimony among members of the bar. This would be bad for Arizona. Honorable conduct and collegiality are hallmarks of a well-functioning legal system, and Arizona puts

a special emphasis on professionalism. Acrimony, intimidation, and score-settling will result in a worse state of affairs for both attorneys and their clients. The rules of professional conduct should ensure that attorneys behave honorably, but they should also allow for honest debate and disagreement, consistent with the First Amendment freedoms that all attorneys enjoy.

III. Conclusion

This Court should reject the Petition.

DATED this 21st day of May, 2018.

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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:	**No. R-17-0032**
PETITION TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 28(D), Rules of the Supreme Court, the Comment Opposing Amendment to ER 8.4 does not exceed 20 pages, and complies with the formatting requirements for filings in the Arizona Supreme Court because it contains text formatted in a proportionally spaced Times New Roman 14-point font, as required by Rule 14, Ariz. R. Civ. App. P.

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: PETITON TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	R-17-0032 **ATTORNEY GENERAL'S COMMENT TO PETITION TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT**

The Arizona Attorney General hereby submits this comment regarding the R-17-0032 Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court.

Respectfully submitted this 21st day of May, 2018.

MARK BRNOVICH
ARIZONA ATTORNEY GENERAL

BY: /s/ Angelina B. Nguyen
ANGELINA B. NGUYEN
ASSISTANT ATTORNEY GENERAL

MEMORANDUM OF POINTS AND AUTHORITIES

The Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court, R-17-0032 (the "Petition"), proposes adoption of a new Rule of Professional Conduct governing "harassment [and] discrimination" "related to the practice of law" that departs significantly from the current rule prohibiting Arizona attorneys from engaging in "professional misconduct . . . that is prejudicial to the administration of justice." Ariz. R. Sup. Ct. R. 42, ER 8.4(d).

There is no place for invidious, status-based, discrimination in the legal profession. The Petition, however, raises significant constitutional concerns, including potential infringement of speech and association rights. Content-based speech regulations require the most exacting level of constitutional scrutiny, *see Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011), and the government must abstain from viewpoint discrimination. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Also implicated is attorneys' First Amendment right to participate in expressive association. The Supreme Court has recognized that the First Amendment protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Freedom of expressive association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Id.* And it further

"prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). Like freedom of speech, the right of expressive association is not limitless, but any infringement of the right must "serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts* at 623.

The Court should consider these concerns, as well as the opposition from other states, state attorneys general, and state bar associations.[1]

Respectfully submitted this 21st day of May, 2018.

MARK BRNOVICH
ARIZONA ATTORNEY GENERAL

BY: /s/ Angelina B. Nguyen
ANGELINA B. NGUYEN
ASSISTANT ATTORNEY GENERAL

[1] In the majority of states where the Petition's language has been considered, the proposed rule has either been rejected (South Carolina, Tennessee); withdrawn after much opposition (Nevada); or—where it has not yet been decided—opposed by state attorneys general, bar associations or disciplinary boards, and/or the state legislature (Louisiana, Illinois, Pennsylvania, and Montana). The Texas Attorney General issued an opinion opposing the rule, even though it has not yet been formally proposed in Texas. Only one state, Vermont, has adopted the Petition's language into the state's ethical rules governing lawyers.

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.

NATIONAL LAWYERS ASSOCIATION

COMMISSION FOR THE PROTECTION OF CONSTITUTIONAL RIGHTS

STATEMENT ON ABA MODEL RULE 8.4(g)

The National Lawyers Association

The National Lawyers Association ("NLA") is a 501(c)(6) non-profit, non-partisan professional membership association founded in 1993 comprised of lawyers, legal scholars, professors, law students and other legal and policy professionals committed to expanding liberty, increasing individual freedom, promoting justice, and strengthening the rule of law in America. Since its founding, the NLA's membership has included thousands of attorneys in all 50 states.

On behalf of its members, the NLA's Commission for the Protection of Constitutional Rights established a special Task Force to closely examine the language of new Model Rule 8.4(g), the findings of which are summarized below. Based on this review, the NLA finds that Model Rule 8.4(g), if adopted by any state and enforced against any attorney, would violate the free speech, free association, and free exercise rights of that state's attorneys under the First Amendment to the Constitution of the United States.

The New ABA Model Rule 8.4(g)

The American Bar Association's House of Delegates adopted the ABA Model Rules of Professional Conduct, formerly known as the Model Rules of Professional Responsibility, in 1983. The Rules serve as models for the ethics rules of most states. In fact, the Model Rules have been adopted, in some form or another, by every state except California, as well as by the District of Columbia. Periodically, the ABA amends the Rules and encourages states to adopt the amended language as part of the states' Rules of Professional Conduct.

Given the fact that an attorney's violation of a state's ethics Rules has real consequences, which vary from state to state, but which can range from a reprimand to disbarment, it is critical that the constitutionality of any proposed amendment of the Rules be closely evaluated prior to state adoption - for once adopted by a state, the Rules have the force and effect of law.

On August 8, 2016, the American Bar Association's House of Delegates amended Model Rule 8.4 – the Attorney Misconduct Rule – of the Model Rules of Professional Conduct by adding a subsection (g) to the Rule.

The language of Model Rule 8.4(g) reads:

> *It is professional misconduct for a lawyer to: . . . (g) 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 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 paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The ABA also adopted three new Model Comments to the new Rule 8.4(g).

Model Comment [3] attempts to clarify what the new Model Rule means by prohibiting "discrimination" and "harassment." According to Comment [3], discrimination includes "harmful verbal…conduct that manifest bias or prejudice toward others." "Harassment includes…derogatory or demeaning verbal….conduct."

Model Comment [4] provides examples of the type of attorney speech and conduct which is "related to the practice of law." According to the Comment, such conduct includes, but is not limited to, "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."

FINDINGS OF THE NLA TASK FORCE ON MODEL RULE 8.4(g)

In accordance with its mandate, the NLA Task Force on Model Rule 8.4(g) focused only on the potential constitutional violations of the new Rule. The Task Force's findings are limited specifically to constitutional analysis. Other problems with the Rule, including that it, for the first time, expands attorney regulation and discipline into areas unconnected with prejudice to the administration of justice or conduct that renders an attorney unfit, and that it infringes upon attorneys' professional autonomy, are not addressed, only because such issues are outside the Task Force's mandate.

A. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of speech

Lawyers do not surrender their constitutional rights when they enter the legal profession. *In re Primus*, 436 U.S. 412, 432-33 (1978). See also *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991)(disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 469 (1988) (the First Amendment applies to state bar disciplinary actions through the Fourteenth Amendment).

Although decisions of the United States Supreme Court have held that an attorney's free speech rights may be circumscribed to some extent in the courtroom during a judicial proceeding, as well as outside the courtroom when speaking about a pending case, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991), Model Rule 8.4(g) extends far beyond the context of a judicial proceeding. It purports to restrict all speech that constitutes

"discrimination" or "harassment" whenever such speech is – however attenuated – "related to the practice of law." Model Comment [3] makes clear that this includes any so-called "harmful," "derogatory," or "demeaning" speech.

But speech is not unprotected merely because it is unpopular, harmful, derogatory or demeaning. In fact, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). See also, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("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"). Therefore, if an attorney engages in speech - although unpopular, derogatory, demeaning, or offensive – but the speech does not prejudice the administration of justice or render the attorney unfit, such speech is constitutionally protected.

"All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - fall within the full protection of the First Amendment." *Roth v. United States*, 354 U.S. 476, 484 (1957). Contrary to these basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues.

Furthermore, by only proscribing speech that is unpopular, derogatory, demeaning, or harmful *toward members of certain designated classes*, the new Model Rule constitutes an unconstitutional content-based speech restriction. *American Freedom Defense Initiative v. Metropolitan Transp. Authority*, 880 F.Supp.2d 456 (S.D.N.Y. 2012) (ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

For example, under the new Rule a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that manifests discrimination on the basis of sexual orientation, while a lawyer who speaks in favor of same-sex marriage would certainly not be in violation of the Rule. That is a classic example of an unconstitutional content-based speech restriction.

"Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provides a concrete example of how the new Model Rule may constitute an unconstitutional content-based speech restriction. He explains: "*At a . . .bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.'*

Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally, another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline." *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016.

In other words, whether a lawyer has or has not violated the new Model Rule will be determined solely by reference to the content of the speaker's speech. Although attorneys may be speaking on the same subject matter, whether their speech violates the Rule will depend entirely upon the content of their speech. Some of the attorneys will be immune, based solely upon the content of their speech. Others could be prosecuted, based solely upon the content of their speech.

Indeed, in the few states that have already modified their respective Rule 8.4 in similar ways, such Rules are being enforced as clearly unconstitutional free-standing speech codes. See, for example, *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Indiana Supreme Court 2010), in which an Indiana attorney was professionally disciplined for asking someone if they were "gay," and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Indiana 2010) in which an attorney had his license suspended for applying a racially derogatory term to himself.

B. Model Rule 8.4(g) violates attorneys' First Amendment right to free exercise of religion

Model Rule 8.4(g) would also infringe upon an attorney's First Amendment right to free exercise of religion. For example, in the same-sex marriage context, the U.S. Supreme Court has emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 135 S. Ct. 25 84, 2607 (2015).

The new Model Rule, however, would discipline attorneys for expressing their religiously based opinions concerning same-sex marriage.

Professor Rotunda posits the example of Catholic attorneys who are members of an organization of Catholic lawyers and judges, like the Catholic Bar Association. If the Catholic Bar Association should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. Indeed – he points out – attorneys might be in violation of the new Rule merely for being members of such an organization. *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage

Foundation, October 6, 2016, pp. 4-5. And yet, such speech and the right to belong to the Catholic Bar Association would both be constitutionally protected.

By prohibiting both, the new Rule would constitute an unconstitutional infringement on not only the free speech and free association rights of attorneys, but their free exercise rights as well.

C. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of association

"[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S.. Jaycees*, 468 U.S. 609, 622 (1984). "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000). The First Amendment protects rights of association and assembly.

The new Model Rule 8.4(g), however, would violate attorneys' constitutionally protected rights to associate freely.

Under the new Rule an attorney could not belong to a legal organization, such as the Christian Legal Society, that requires its attorney members to acknowledge and agree with a Christian Statement of Faith, because belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion. https://clsnet.org/page.aspx?pid=367. The Christian Legal Society also has a Community Life Statement in which members "renounce unbiblical behaviors, including . . . immoral conduct such as . . . engaging in sexual relations other than within a marriage between one man and one woman." https://clsnet.org/page.aspx?pid=494. An attorney belonging to such an organization would violate the new Model Rule because, again, such would constitute conduct related to the practice of law, and would "discriminate" on the basis of marital status and, some may argue, sexual orientation.

Nor would the new Model Rule allow attorneys to be members of the Catholic Bar Association, which requires its attorney members to be practicing Catholics because, again, belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion.

Clearly, however, attorneys have a constitutional right to freely associate with other attorneys in pursuit of a wide variety of ends – including religious ends. The new Model Rule would clearly violate that right.

D. Model Rule 8.4(g) is unconstitutionally vague

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Grayned*, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned*, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned*, supra, at 109.

The language of Rule 8.4(g) violates all these principles.

(a) The term "harassment" is unconstitutionally vague. The new Model Rule prohibits attorneys from engaging in harassment of anyone on the basis of one of the protected classes. But the term "harassment" is not defined in the Rule, is subject to varied interpretations, and no standard is provided to determine whether conduct is or is not harassing.

Does expressing disagreement with someone's religious beliefs constitute harassment based on religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment?

Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996) (holding that the term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague). *See also Are Stalking Laws Unconstitutionally Vague Or Overbroad*, 88 Nw. U. L. Rev. 769, 782 (1994) (the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass.").

Because the term "harass" is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to

enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid inadvertently violating the Rule.

The new Comments to the Rule attempt to define the term "harassment," but in doing so actually raise additional concerns. For example, Comment [3] to the new Rule provides that harassment includes *derogatory or demeaning verbal or physical conduct*. Unfortunately, rather than clarifying (let alone limiting) the meaning of the term "harassment," the terms "derogatory" and "demeaning" present the same vagueness issues as the term they are intended to define. Indeed, because it is not clear what speech is encompassed by the words "derogatory" and "demeaning," courts have found those terms to be unconstitutionally vague. *Hinton v. Devin*e, 633 F.Supp. 1023 (E.D. Pennsylvania 1986) (the term "derogatory" without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal.App.4th 669 (Cal.App. 2012) (statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

(b) The term "discrimination" is unconstitutionally vague. It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it's also true that such statutes and ordinances do not – as does the new Model Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

For example, Title VII does not merely provide that it shall be an unlawful employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that "It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2.

Likewise, the federal Fair Housing Act does not simply provide that one may not discriminate in housing based on race, color, religion, familial status, or national origin. It provides a description of what, specifically, is being prohibited: "[I]t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce

or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604. And the Act provides precise definitions of important terms used in the Act, such as "dwelling," "person," "to rent," and "familial status." 42 U.S.C. § 3602.

Unlike other non-discrimination enactments, however, the new Model Rule simply states that "It is professional misconduct for a lawyer to: . . . (g) knowingly . . . discriminate against persons, 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" – leaving to the attorney's imagination what sorts of speech and behavior might be encompassed in that proscription.

Making matters worse, Model Comments [3] to Model Rule 8.4(g) states that the term "discrimination" includes "harmful verbal or physical conduct that manifests bias or prejudice towards others." The term "harmful" – in the context of attorney speech and conduct – is unconstitutionally vague because attorneys cannot with any degree of reasonable certainty determine what speech and conduct may be prohibited and what may be allowed.

(c) The phrase "conduct related to the practice of law" is unconstitutionally vague. Whereas the previous Model Rule applied only to attorney conduct while the attorney is acting in the course of representing a client – a relatively narrow and reasonably determinable aspect of a lawyer's activities – the new Rule applies to any conduct of an attorney that is in any way "*related to the practice of law.*" What conduct is related to the practice of law and what conduct is unrelated to the practice of law, however, is vague and not readily determinable.

The new Comment [4] attempts to provide guidance as to what the phrase "related to the practice of law" means. But not only is the Comment's definition nearly limitless – including within it *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* – but its list of activities related to the practice of law is an expressly non-exclusive list. Activities other than those expressly included in the Comment could also qualify as being in connection with the practice of law. But what those activities may be is difficult to determine. For example, does the phrase include comments made by an attorney while attending a birthday celebration for a law firm co-worker; or a statement made by an attorney at a cocktail party that the attorney is attending – at least in part – in order to make connections that will hopefully result in future legal work; or comments an attorney makes while serving on the governing board of the attorney's church and to whom the board periodically looks for church-related legal advice?

Because no attorney, with any reasonable degree of certainty, can determine what speech

or conduct is or is not "related to the practice of law," the new Rule is unconstitutionally vague.

E. Model Rule 8.4(g) is unconstitutionally overbroad

Even if an enactment is otherwise clear and precise in what conduct it proscribes, the law may nevertheless still be unconstitutionally overbroad if its reach prohibits constitutionally protected conduct. *Grayned*, supra, at 114.

It is clear that the new Model Rule is not only unconstitutionally vague, it is also unconstitutionally overbroad because, although it may apply to attorney conduct that might be unprotected – such as conduct that actually and significantly prejudices the administration of justice or that would clearly render an attorney unfit to practice law – Model Rule 8.4(g) would also sweep within its orbit lawyer speech that is clearly protected by the First Amendment, such as speech that might be unpopular, offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit.

The terms "harmful verbal conduct" and "derogatory or demeaning verbal conduct" sweep into their ambit much speech that is clearly constitutionally protected. As noted above, speech is not unprotected merely because it is harmful, derogatory or demeaning. *Snyder v. Phelps*, supra at 458. In fact, that is precisely the sort of speech that is constitutionally protected. Speech that no one finds offensive needs no protection.

Courts have found terms such as "derogatory" and "demeaning" unconstitutionally overbroad. *Hinton v. Devine*, *supra* (the term "derogatory information" is unconstitutionally overbroad); *Summit Bank v. Roger*s, *supra* (statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech). *See also Saxe v. State College Area School Dist.*, 240 F.3d 200, 215 (3rd Cir. 2001) (school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional).

And it is irrelevant whether such speech would ever actually be prosecuted by disciplinary authorities under the new Rule. The fact that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – the very danger the overbreadth doctrine is designed to prevent.

CONCLUSION

After carefully reviewing the new ABA Model Rule 8.4(g) and its Comments, the National Lawyers Association finds that the new ABA Model Rule 8.4(g), if adopted by any state and enforced against any attorney, would violate an attorneys' free speech, free association, and free exercise rights under the First Amendment to the Constitution of the United States. Therefore, the National Lawyers Association recommends that no state adopt Model Rule 8.4(g), and that any state that might have adopted Model Rule 8.4(g) take all steps necessary to repeal and remove subsection (g) from its Rules of Professional Conduct.

Dated: March 7, 2017

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May 15, 2018

Arizona Supreme Court

Re: R-17-0032, In the Matter of: Petition to Amend ER 8.4, Rule 42

Dear Justices:

I am writing this to urge you to reject the proposed amendments to Rule of Professional Conduct 8.4. The proposed rule would (1) violate the First Amendment, (2) unnecessarily turn ordinary employment law disputes into bar discipline matters, and (3) unnecessarily limit lawyers' freedom to engage in perfectly proper discrimination based on socioeconomic status.

1. The proposal would violate the First Amendment

a. The proposal would punish and chill a wide range of speech on important topics

The proposal says (emphasis added),

> It is professional misconduct for a lawyer to . . . [e]ngage 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 . . . . This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

The ABA comments, which the petition expressly endorses, Petition at 11, go on to elaborate:

> Discrimination and harassment . . . includes *harmful verbal* or physical *conduct that manifests bias or prejudice* towards others. Harassment includes sexual harassment and *derogatory or demeaning verbal* or physical *conduct*. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).
>
> 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*. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for

example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Say, then, that some lawyers put on a Continuing Legal Education event that includes a debate on same-sex marriage, or on whether there should be limits on immigration from Muslim countries, or on whether people should be allowed to use the bathrooms that correspond to their gender identity rather than their biological sex. In the process, unsurprisingly, the debater on one side says something critical of gays, Muslims or transgender people. Under the Rule, the debater could well be disciplined by the state bar:

1. He has engaged in "verbal . . . conduct" that "manifests bias or prejudice" toward gays, Muslims, or transgender people.

2. Some people view such statements as "harmful"; those people may well include bar authorities.

3. This was done in an activity "in connection with the practice of law," a Continuing Legal Education event. (The event could also be a bar activity, if it's organized through a local bar association, or a business activity.)

4. The statement is not about one person in particular (though it could be—say the debater says something critical about a specific political activist or religious figure based on that person's sexual orientation, religion or gender identity). But "anti-harassment . . . case law" has read "harassment" as potentially covering statements that are offensive to a group generally, even when they are not said to or about a particular offended person. *See, e.g.*, *Sherman K. v. Brennan*, EEOC DOC 0120142089, 2016 WL 3662608 (EEOC) (coworkers' wearing Confederate flag T-shirts on occasion constituted racial harassment); *Shelton D. v. Brennan*, EEOC DOC 0520140441, 2016 WL 3361228 (EEOC) (remanding for fact-finding on whether coworker's repeatedly wearing cap with "Do not Tread On Me" flag constituted racial harassment); *Doe v. City of New York*, 583 F. Supp. 2d 444 (S.D.N.Y. 2008) (concluding that e-mails condemning Muslims and Arabs as supporters of terrorism constituted religious and racial harassment); *Pakizegi v. First Nat'l Bank*, 831 F. Supp. 901, 908 (D. Mass. 1993) (describing an employee's posting a photograph of the Ayatollah Khomeni and another "of an American flag burning in Iran" in his own cubicle as potentially "national-origin harassment" of coworkers who see the photographs). And the rule is broad enough to cover statements about "others" as groups and not just as individuals.

Indeed, one of the comments to the ABA rule originally read "Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct *towards a person who is, or is perceived to be, a member of one of the groups*."[1] But the italicized text was

[1] *See* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/draft_redline_04_12_2016.authcheckdam.pdf .

deleted, further reaffirming that the statement does not have to be focused on any particular person.

Or say that you are at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters—Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The State Bar, if this Rule is adopted, might thus discipline you for your "harassment." And, of course, the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you are fine; if you express the contrary viewpoints, you are risking disciplinary action.

b. There is no First Amendment exception for "hate speech" or advocacy that some may deem "harassing"

Yet such speech is constitutionally protected, when said by lawyers (again, outside the courtroom and similar contexts) or by others. Recent opinions from several state Attorneys General have expressly concluded that the ABA Model Rule is likely unconstitutionally overbroad, see Op. to Warren L. Montgomery, La. A.G. Op. No. 17-0114 (Sept. 8, 2017); Op. to John R. McCravy III, S.C. A.G. Op. (May 1, 2017); Tenn. A.G. Op. No 18-11 (Mar. 16, 2018); Op. to Charles Perry, Tex. A.G. Op. No. KP-0123 (Dec. 20, 2016). And the Supreme Court has repeatedly made clear that even much more offensive speech than the above is constitutionally protected.

As four Justices of the Supreme Court noted in *Matal v. Tam*, 137 S. Ct. 1744 (2017), "Speech 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 (Alito, J., lead opinion). four other Justices in the same case agreed, stressing that "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." *Id.* at 1769 (Kennedy, J., concurring in part and concurring in the judgment). Similarly, in *Christian Legal Society v. Martinez*, 561 U.S. 661, 696 n.26 (2010), the Supreme Court stressed the First Amendment's tradition of "protect[ing] the freedom to express 'the thought that we hate'" includes the right to express even "discriminatory" viewpoints. Nor can any proposed "hate speech" exception, rejected by the Supreme Court, be rescued by labeling it a ban on "harassment." As then-Judge Alito noted, "There is no categorical 'harassment exception' to the First

Amendment's free speech clause." *Saxe v. State Coll. Area School Dist.*, 240 F.3d 200, 204 (3d Cir 2001).

And the Court said all this in reaffirming speakers' viewpoint-neutral right of access even to relatively modest benefits (certain programs available to university student groups, and certain forms of trademark enforcement available to registered trademark owners). The First Amendment protection should be even clearer when it comes to freedom to be speak without jeopardy to one's license to practice a profession.

c. The proposed rule goes far beyond most existing professional conduct rules

The proposed rule goes well beyond the current Arizona Rule of Professional Conduct 8.4(d), which generally bars "conduct" "that is prejudicial to the administration of justice," including certain kinds of speech "in the course of representing a client" (comment to Ariz. R. Prof. Cond. 8.4). Courts can legitimately protect the administration of justice from interference, even by, for instance, restricting the speech of lawyers in the courtroom or in depositions. But the proposal deliberately goes vastly beyond such narrow restrictions, to apply even to "social activities."

Indeed, I have found only two states, Indiana and New Jersey, that forbid lawyer speech that "manifests bias or prejudice" or speech that is "derogatory or demeaning" outside the special context of speech in courtrooms, depositions, negotiations, and the like—interactions that are indeed likely to directly interfere with the administration of justice. *See* Ind. Rule Prof. Conduct 8.4(g); N.J. Rule Prof. Conduct 8.4 official comment. (Compare, e.g., Mass. R. Sup. Jud. Ct. 3.4(i) and Wash. R. Prof. Conduct 8.4(h), which forbid such speech only within such litigation or negotiation processes.) And even the Indiana and New Jersey rules do not go so far as to cover "social activities related to the practice of law."

The petition states that "Twenty-four U.S. jurisdictions have some type of antidiscrimination rule in their rules of professional conduct for lawyers," Petition at 7. But none of these jurisdictions' rules contains the specific speech-restrictive language offered in its proposal, and almost none includes anything that is even close.

The proposal also goes beyond existing hostile-work-environment harassment law under Title VII and similar state statutes. That law itself poses potential First Amendment problems if applied too broadly. *See, e.g., DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment.") (dictum); *Rodriguez v. Maricopa County Comm. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause."). And in any event, it is substantially narrower than the proposed rule: For instance, harassment law generally does not cover social activities at which coworkers are not present—yet under the proposed rule, even a solo practitioner could face discipline because something that he said at a law-related function offended someone employed by some other law firm.

Hostile-work-environment harassment law is also often defended (though in my view that defense is inadequate) on the grounds that it's limited to speech that is so "severe or pervasive" that it creates an "offensive work environment." This proposed rule conspicuously omits any such limitation. Though the statement in the ABA comments that "anti-harassment . . . case law may guide application of paragraph (g)" might be seen as implicitly incorporating a "severe or pervasive" requirement, that's not at all clear: That provision says only that the anti-harassment case law "may guide" the interpretation of the rule, and in any event the language of the comments (which, again the Arizona State Bar petition expressly adopts and endorses) seems to cover any "harmful verbal . . . conduct," including isolated statements.

Many people pointed out possible problems with this proposed rule, which is based on the ABA's new Model Rule, when the ABA was considering it—yet the ABA adopted it with only minor changes that do nothing to limit the rule's effect on speech. It seems that the ABA and the petitioners want to do exactly what the text calls for: limit lawyers' expression of viewpoints that the ABA and the Bar dislikes.

2. The proposal would turn ordinary employment disputes into disciplinary matters

Lawyers are rightly subjected to many special rules that have to do with the special power that they are granted, and the special relationships they enter into, with courts, with clients, with witnesses, and the like.

But lawyers can also wear many other hats: they can be drivers, they can be homeowners, they can be businesspeople, and they can be employers (including employers of nonlawyer staff). Of course, like all citizens, they ought to behave properly in those capacities: They should, for instance, be careful drivers; they should not play their music too loudly; they should comply with their contractual obligations. But we recognize that these matters should be left to the normal tort and contract law rules that apply to all people, lawyers or not (at least unless they involve outright criminality or fraud).

The same should apply to ordinary employment law disputes. If an accountant or an administrative assistant—or for that matter an associate—believes that he or she has been improperly fired or demoted, that person can sue, or file a charge with an administrative agency that deals with such matters, just as someone who works for a contractor or a dentist can do the same. There is no reason to also turn this into a matter of bar discipline.

Yet the proposal would likely do precisely this: After all, the employment of the employees of a law practice is "conduct related to the practice of law." Employees who feel themselves aggrieved by a lawyer-employer's decision could then retaliate by filing a bar complaint and not just a lawsuit, and indeed use the express or implied threat of a bar complaint as leverage to favorably settle even a meritless lawsuit. Many employers have comprehensive liability insurance policies that could be used to settle such a suit—but you ca

not insure yourself against the possible loss of a license, or the public opprobrium that would accompany even a lesser sanction, such as a public reprimand.

Indeed, even some of the broadest professional conduct rules, which do cover employment discrimination by lawyers, try to mitigate this danger by limiting themselves to "employment discrimination . . . resulting in a final agency or judicial determination," *e.g.*, N.J. R. Prof. Conduct 8.4(g). But the Arizona State Bar's proposal lacks such a limitation.

3. The proposal's ban on socioeconomic status discrimination is unjustifiable

Even apart from the above problems, consider how the discrimination ban would work as to "socioeconomic status." That term is not defined in the proposed rule or in Arizona law, but the definition that the legal system likely most often uses—one developed in dealing with a similar ban on socioeconomic-status discrimination in the federal Sentencing Guidelines—is "an individual's status in society as determined by objective criteria such as education, income, and employment." *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991); *see also United States v. Peltier*, 505 F.3d 389, 393 & n.14 (5th Cir. 2007) (likewise treating wealth as an element of socioeconomic status); *United States v. Graham*, 946 F.2d 19, 21 (4th Cir. 1991) (same).

All of the following, then, might well lead to discipline if the ABA adopts this rule as part of its influential Model Rules of Professional Conduct, and then states adopt it in turn:

- A law firm preferring more-educated employees—both as lawyers and as staffers—over less-educated ones.
- A law firm preferring employees who went to high-"status" institutions, such as Ivy League schools.
- A law firm contracting with expert witnesses and expert consultants who are especially well-educated or have had especially prestigious employment.
- A solo lawyer who, when considering whether to team up with another solo lawyer, preferring a wealthier would-be partner over a poorer one. (The solo might, for instance, want a partner who would have the resources to weather economic hard times and to help the firm do the same.)
- A solo lawyer who, when considering whether to team up with another solo lawyer, preferring a poorer would-be partner over a wealthier one. (The solo might, for instance, want a partner who would be hungry for success, rather than one whose past income or family wealth might make him too comfortable.)

If the rule were limited to actions that were "prejudicial to the administration of justice," and did not cover ordinary employment decisions, including socioeconomic status as one of the forbidden bases for discrimination may have made sense. For instance, insulting

a witness because of his poverty, where the poverty is not relevant to the case, might reasonably be condemned.

But the proposed rule goes far beyond this. And though people pointed out the breadth of the rule when the ABA was first considering it, the ABA did nothing to materially limit the scope of the rule—apparently, it and the State Bar of Arizona do indeed want to bar lawyers from discriminating based on socioeconomic status in choosing partners, employees and experts.

Nor is it enough to say that Bar authorities will act "reasonably" by not enforcing this rule as written. If the Supreme Court adopts the rule, then Bar authorities would have an obligation to implement it according to its terms.

And even if the rule is notoriously underenforced, ethical lawyers should be expected to abide by it even if they know of such underenforcement. Certainly that is how lawyers should be encouraged to behave. To promote such behavior, rules should be written carefully at the outset, rather than being framed in unjustifiably overbroad ways, with the expectation that their breadth will be ignored by Bar officials and Bar members.

Sincerely Yours,

Eugene Volokh
UCLA School of Law

EXHIBIT 7

Rebecca Messall, et al.,
"Statement on ABA Model Rule 8.4(g),"
NATIONAL LAWYERS ASSOCIATION (Mar. 7, 2017)

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NLA Task Force Publishes Statement on New ABA Model Rule 8.4(g)

For a .pdf of the statement, click here.

March 7, 2017

NATIONAL LAWYERS ASSOCIATION

COMMISSION FOR THE PROTECTION OF CONSTITUTIONAL RIGHTS

STATEMENT ON ABA MODEL RULE 8.4(g)

The National Lawyers Association

The National Lawyers Association ("NLA") is a 501(c)(6) non-profit, non-partisan professional membership association founded in 1993 comprised of lawyers, legal scholars, professors, law students and other legal and policy professionals committed to expanding liberty, increasing individual freedom, promoting justice, and strengthening the rule of law in America. Since its founding, the NLA's membership has included thousands of attorneys in all 50 states.

On behalf of its members, the NLA's Commission for the Protection of Constitutional Rights established a special Task Force to closely examine the language of new Model Rule 8.4(g), the findings of which are summarized below. Based on this review, the NLA finds that Model Rule 8.4(g), if adopted by any state and enforced against any attorney, would violate the free speech, free association, and free exercise rights of that state's attorneys under the First Amendment to the Constitution of the United States.

The New ABA Model Rule 8.4(g)

The American Bar Association's House of Delegates adopted the ABA Model Rules of Professional Conduct, formerly known as the Model Rules of Professional Responsibility, in 1983. The Rules serve as models for the ethics rules of most states. In fact, the Model Rules have been adopted, in some form or another, by every state except California, as well as by the District of Columbia. Periodically, the ABA amends the Rules and encourages states to adopt the amended language as part of the states' Rules of Professional Conduct.

Given the fact that an attorney's violation of a state's ethics Rules has real consequences, which vary from state to state, but which can range from a reprimand to disbarment, it is critical that the constitutionality of any proposed amendment of the Rules be closely evaluated prior to s adoption – for once adopted by a state, the Rules have the force and effect of law.

On August 8, 2016, the American Bar Association's House of Delegates amended Model Rule 8.4 – the Attorney Misconduct Rule – of the Model Rules of Professional Conduct by adding a subsection (g) to the Rule.

The language of Model Rule 8.4(g) reads:

It is professional misconduct for a lawyer to: . . . (g) 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 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 paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The ABA also adopted three new Model Comments to the new Rule 8.4(g).

Model Comment [3] attempts to clarify what the new Model Rule means by prohibiting "discrimination" and "harassment." According to Comment [3], discrimination includes "harmful verbal…conduct that manifest bias or prejudice toward others." "Harassment includes…derogatory or demeaning verbal….conduct."

Model Comment [4] provides examples of the type of attorney speech and conduct which is "related to the practice of law." According to the Comment, such conduct includes, but is not limited to, "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."

FINDINGS OF THE NLA TASK FORCE ON MODEL RULE 8.4(g)

In accordance with its mandate, the NLA Task Force on Model Rule 8.4(g) focused only on the potential constitutional violations of the new Rule. The Task Force's findings are limited specifically to constitutional analysis. Other problems with the Rule, including that it, for the first time, expands attorney regulation and discipline into areas unconnected with prejudice to the administration of justice or conduct that renders an attorney unfit, and that it infringes upon attorneys' professional autonomy, are not addressed, only because such issues are outside the Task Force's mandate.

A. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of speech

Lawyers do not surrender their constitutional rights when they enter the legal profession. In re Primus, 436 U.S. 412, 432-33 (1978). See also Gentile v. State Bar of Nevada, 501 U.S. 1030, 1054 (1991)(disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 469 (1988) (the First Amendment applies to state bar disciplinary actions through the Fourteenth Amendment).

Although decisions of the United States Supreme Court have held that an attorney's free speech rights may be circumscribed to some extent in the courtroom during a judicial proceeding, as well as outside the courtroom when speaking about a pending case, Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991), Model Rule 8.4(g) extends far beyond the context of a judicial proceeding. It purports to restrict all speech that constitutes "discrimination" or "harassment" whenever such speech is – however attenuated – "related to the practice of law." Model Comment [3] makes clear that this includes any so-called "harmful," "derogatory," or "demeaning" speech.

But speech is not unprotected merely because it is unpopular, harmful, derogatory or demeaning. In fact, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. Snyder v. Phelps, 562 U.S. 443, 458 (2011). See also, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("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"). Therefore, if an attorney engages in speech – although unpopular, derogatory, demeaning, or offensive – but the speech does not prejudice the administration of justice or render the attorney unfit, such speech is constitutionally protected.

"All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – fall within the full protection of the First Amendment." Roth v. United States, 354 U.S. 476, 484 (1957). Contrary to these basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues.

Furthermore, by only proscribing speech that is unpopular, derogatory, demeaning, or harmful toward members of certain designated classes, the new Model Rule constitutes an unconstitutional content-based speech restriction. American Freedom Defense Initiative v. Metropolitan Transp. Authority, 880 F.Supp.2d 456 (S.D.N.Y. 2012) (ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

For example, under the new Rule a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that manifests discrimination on the basis of sexual orientation, while a lawyer who speaks in favor of same-sex marriage would certainly not be in violation of the Rule. That is a classic example of an unconstitutional content-based speech restriction.
"Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995).

Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provides a concrete example of how the new Model Rule may constitute an unconstitutional content-based speech restriction. He explains: "At a . . .bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.' Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally, another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline." The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016.

In other words, whether a lawyer has or has not violated the new Model Rule will be determined solely by reference to the content of the speaker's speech. Although attorneys may be speaking on the same subject matter, whether their speech violates the Rule will depend entirely upon the content of their speech. Some of the attorneys will be immune, based solely upon the content of their speech. Others could be prosecuted, based solely upon the content of their speech.

Indeed, in the few states that have already modified their respective Rule 8.4 in similar ways, such Rules are being enforced as clearly unconstitutional free-standing speech codes. See, for example, In the Matter of Stacy L. Kelley, 925 N.E.2d 1279 (Indiana Supreme Court 2010), in which an Indiana attorney was professionally disciplined for asking someone if they were "gay," and In the Matter of Daniel C. McCarthy, 938 N.E.2d 698 (Indiana 2010) in which an attorney had his license suspended for applying a racially derogatory term to himself.

B. Model Rule 8.4(g) violates attorneys' First Amendment right to free exercise of religion

Model Rule 8.4(g) would also infringe upon an attorney's First Amendment right to free exercise of religion. For example, in the same-sex marriage context, the U.S. Supreme Court has emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." Obergefell v. Hodges, 135 S. Ct. 25 84, 2607 (2015).

The new Model Rule, however, would discipline attorneys for expressing their religiously based opinions concerning same-sex marriage.

Professor Rotunda posits the example of Catholic attorneys who are members of an organization of Catholic lawyers and judges, like the Catholic Bar Association. If the Catholic Bar Association should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. Indeed – he points out – attorneys might be in violation of the new Rule merely for being members of such an organization. The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, pp. 4-5. And yet, such speech and the right to belong to the Catholic Bar Association would both be constitutionally protected.

By prohibiting both, the new Rule would constitute an unconstitutional infringement on not only the free speech and free association rights of attorneys, but their free exercise rights as well.

C. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of association

"[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Roberts v. U.S.. Jaycees, 468 U.S. 609, 622 (1984). "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." Boy Scouts of America v. Dale, 530 U.S. 640, 647-48 (2000). The First Amendment protects rights of association and assembly.

The new Model Rule 8.4(g), however, would violate attorneys' constitutionally protected rights to associate freely.

Under the new Rule an attorney could not belong to a legal organization, such as the Christian Legal Society, that requires its attorney members to acknowledge and agree with a Christian Statement of Faith, because belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion. https://clsnet.org/page.aspx?pid=367. The Christian Legal Society also has a Community Life Statement in which members "renounce unbiblical behaviors, including . . . immoral conduct such

as . . . engaging in sexual relations other than within a marriage between one man and one woman." https://clsnet.org/page.aspx?pid=494. An attorney belonging to such an organization would violate the new Model Rule because, again, such would constitute conduct related to the practice of law, and would "discriminate" on the basis of marital status and, some may argue, sexual orientation.

Nor would the new Model Rule allow attorneys to be members of the Catholic Bar Association, which requires its attorney members to be practicing Catholics because, again, belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion.

Clearly, however, attorneys have a constitutional right to freely associate with other attorneys in pursuit of a wide variety of ends – including religious ends. The new Model Rule would clearly violate that right.

D. Model Rule 8.4(g) is unconstitutionally vague

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. Grayned, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Grayned, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. Grayned, supra, at 109.

The language of Rule 8.4(g) violates all these principles.

(a) The term "harassment" is unconstitutionally vague. The new Model Rule prohibits attorneys from engaging in harassment of anyone on the basis of one of the protected classes. But the term "harassment" is not defined in the Rule, is subject to varied interpretations, and no standard is provided to determine whether conduct is or is not harassing.

Does expressing disagreement with someone's religious beliefs constitute harassment based on religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment?

Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, Kansas v. Bryan, 910 P.2d 212 (Kan. 1996) (holding that the term "harasses," without any

sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague). See also Are Stalking Laws Unconstitutionally Vague Or Overbroad, 88 Nw. U. L. Rev. 769, 782 (1994) (the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass.").

Because the term "harass" is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid inadvertently violating the Rule.

The new Comments to the Rule attempt to define the term "harassment," but in doing so actually raise additional concerns. For example, Comment [3] to the new Rule provides that harassment includes derogatory or demeaning verbal or physical conduct. Unfortunately, rather than clarifying (let alone limiting) the meaning of the term "harassment," the terms "derogatory" and "demeaning" present the same vagueness issues as the term they are intended to define. Indeed, because it is not clear what speech is encompassed by the words "derogatory" and "demeaning," courts have found those terms to be unconstitutionally vague. Hinton v. Devine, 633 F.Supp. 1023 (E.D. Pennsylvania 1986) (the term "derogatory" without further definition is unconstitutionally vague); Summit Bank v. Rogers, 206 Cal.App.4th 669 (Cal.App. 2012) (statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

(b) The term "discrimination" is unconstitutionally vague. It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it's also true that such statutes and ordinances do not – as does the new Model Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.
For example, Title VII does not merely provide that it shall be an unlawful employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that "It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2.

Likewise, the federal Fair Housing Act does not simply provide that one may not discriminate in housing based on race, color, religion, familial status, or national origin. It provides a description of what, specifically, is being prohibited: "[I]t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604. And the Act provides precise definitions of important

terms used in the Act, such as "dwelling," "person," "to rent," and "familial status." 42 U.S.C. § 3602.

Unlike other non-discrimination enactments, however, the new Model Rule simply states that "It is professional misconduct for a lawyer to: . . . (g) knowingly . . . discriminate against persons, 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" – leaving to the attorney's imagination what sorts of speech and behavior might be encompassed in that proscription.

Making matters worse, Model Comments [3] to Model Rule 8.4(g) states that the term "discrimination" includes "harmful verbal or physical conduct that manifests bias or prejudice towards others." The term "harmful" – in the context of attorney speech and conduct – is unconstitutionally vague because attorneys cannot with any degree of reasonable certainty determine what speech and conduct may be prohibited and what may be allowed.

(c) The phrase "conduct related to the practice of law" is unconstitutionally vague. Whereas the previous Model Rule applied only to attorney conduct while the attorney is acting in the course of representing a client – a relatively narrow and reasonably determinable aspect of a lawyer's activities – the new Rule applies to any conduct of an attorney that is in any way "related to the practice of law." What conduct is related to the practice of law and what conduct is unrelated to the practice of law, however, is vague and not readily determinable.

The new Comment [4] attempts to provide guidance as to what the phrase "related to the practice of law" means. But not only is the Comment's definition nearly limitless – including within it 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 – but its list of activities related to the practice of law is an expressly non-exclusive list. Activities other than those expressly included in the Comment could also qualify as being in connection with the practice of law. But what those activities may be is difficult to determine. For example, does the phrase include comments made by an attorney while attending a birthday celebration for a law firm co-worker; or a statement made by an attorney at a cocktail party that the attorney is attending – at least in part – in order to make connections that will hopefully result in future legal work; or comments an attorney makes while serving on the governing board of the attorney's church and to whom the board periodically looks for church-related legal advice?

Because no attorney, with any reasonable degree of certainty, can determine what speech or conduct is or is not "related to the practice of law," the new Rule is unconstitutionally vague.

E. Model Rule 8.4(g) is unconstitutionally overbroad

Even if an enactment is otherwise clear and precise in what conduct it proscribes, the law may nevertheless still be unconstitutionally overbroad if its reach prohibits constitutionally protected conduct. Grayned, supra, at 114.

It is clear that the new Model Rule is not only unconstitutionally vague, it is also unconstitutionally overbroad because, although it may apply to attorney conduct that might be unprotected – such as conduct that actually and significantly prejudices the administration of justice or that would clearly render an attorney unfit to practice law – Model Rule 8.4(g) would also sweep within its orbit lawyer speech that is clearly protected by the First Amendment, such as speech that might be

unpopular, offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit.

The terms "harmful verbal conduct" and "derogatory or demeaning verbal conduct" sweep into their ambit much speech that is clearly constitutionally protected. As noted above, speech is not unprotected merely because it is harmful, derogatory or demeaning. Snyder v. Phelps, supra at 458. In fact, that is precisely the sort of speech that is constitutionally protected. Speech that no one finds offensive needs no protection.

Courts have found terms such as "derogatory" and "demeaning" unconstitutionally overbroad. Hinton v. Devine, supra (the term "derogatory information" is unconstitutionally overbroad); Summit Bank v. Rogers, supra (statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech). See also Saxe v. State College Area School Dist., 240 F.3d 200, 215 (3rd Cir. 2001) (school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional).

And it is irrelevant whether such speech would ever actually be prosecuted by disciplinary authorities under the new Rule. The fact that a lawyer could be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – the very danger the overbreadth doctrine is designed to prevent.

CONCLUSION

After carefully reviewing the new ABA Model Rule 8.4(g) and its Comments, the National Lawyers Association finds that the new ABA Model Rule 8.4(g), if adopted by any state and enforced against any attorney, would violate an attorneys' free speech, free association, and free exercise rights under the First Amendment to the Constitution of the United States. Therefore, the National Lawyers Association recommends that no state adopt Model Rule 8.4(g), and that any state that might have adopted Model Rule 8.4(g) take all steps necessary to repeal and remove subsection (g) from its Rules of Professional Conduct.

Dated: March 7, 2017

NLA CPCR Task Force Members:

Rebecca Messall
Joshua McCaig
Bradley Abramson
Joe Miller
Gualberto Garcia Jones
Andrew Bath
Marsha I. Stiles
Joseph Meissner

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EXHIBIT 4

Request to Withdraw Nevada
Petition to Adopt Rule 8.4(g)

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF AMENDMENTS TO RULE OF PROFESSIONAL CONDUCT 8.4

ADKT 526

FILED

SEP 25 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER

The Board of Governors of the State Bar of Nevada have filed a request to withdraw its petition filed on May 8, 2017, seeking to amend Professional Conduct 8.4 (Misconduct). Cause appearing, the request to withdraw the petition is granted.

It is so ORDERED.

Cherry, C.J.
Cherry

cc: Vernon Leverty, President, State Bar of Nevada
Kimberly Farmer, Executive Director, State Bar of Nevada
Administrative Office of the Courts

17-32294

STATE BAR OF NEVADA

FILED

SEP 22 2017

ELIZABETH A. BROWN
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BY
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September 6, 2017

Chief Justice Michael Cherry
Nevada Supreme Court
201 South Carson Street
Carson City, NV 89701-4702

RE: ADKT 0526 (In the Matter of Amendments to Rule of professional Conduct 8.4.)

Dear Chief Justice Cherry:

The Board of Governors filed ADKT 0526 (In the Matter of Amendments to Rule of professional Conduct 8.4.). This ADKT is scheduled for public hearing on November 6, 2017. Many comments were filed in opposition to the ADKT that causing the Board to pause. The Board of Governors appreciates the Court's willingness to move the initial public hearing date to November to allow for more discussion by the Board of Governors.

At the August 30, 2017 meeting of the Board of Governors they discussed the submitted comments regarding this ADKT. Additionally, they heard a report from Rew Goodenow, Nevada's Delegate to the ABA House of Delegates. Mr. Goodenow provided feedback regarding the ABA Model Rules of Professional Conduct covering Rule 8.4 Misconduct as to how other jurisdictions handled this rule. With the consensuses being that the language used in other jurisdictions was inconsistent and changing. Thus, the Board of Governors determined it prudent to retract ADKT 0526 with reservation to refile an ADKT when, and if the language in the rule sorts out in other jurisdictions.

Therefore, the Board of Governors respectfully requests that the Court withdraw ADKT 0526.

I am available to provide additional information as requested by the Court.

Respectfully,

Gene Leverty
State Bar of Nevada President

cc: Elizabeth Brown

17-32067

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Administrative Case: ADKT 0526

Short Caption:	IN RE: AMENDMENTS TO RULE OF PROF. CONDUCT 8.4	**Classification:**	Administrative - ADKT - ADKT
		Case Status:	Case Closed
Filed Date:	05/08/2017	**Public Hearing:**	11/06/2017 at 3:00 PM (Nevada Supreme Court Courtroom, Carson City)
Closed Date:	09/25/2017		

+ Party Information

Docket Entries

Date	Type	Description	Pending?	Document
05/08/2017	Administrative Case	Filed Petition.		17-15190
05/25/2017	Administrative Case	Filed Order Scheduling Public Hearing and Requesting Public Comment. Hearing will be held on Monday, July 17, 2017, at 2:30 p.m. in the Nevada Supreme Courtroom, Las Vegas, Video-conferenced to the Nevada Supreme Courtroom, Carson City. Written comments invited. Original and 8 copies due by July 5, 2017, at 5:00 p.m. Comments must be submitted in hard-copy format. Comments submitted electronically will not be docketed. Persons interested in participating in the hearing must notify the Clerk by July 5, 2017. (Exhibit A attached.)		17-17638
06/26/2017	Administrative Case	Filed Comments from Alan J Reinach with Church State Council.		17-21135
06/26/2017	Administrative Case	Filed Comments from Josh Blackman with South Texas College of Law.		17-21141
06/28/2017	Administrative Case	Filed Comments signed by numerous attorneys.		17-21641
06/28/2017	Administrative Case	Filed Comments from Alan J Lefebvre with Kolesar & Leatham.		17-21644
06/28/2017	Administrative Case	Filed Comments from Ronald D Rotunda with Chapman University Fowler School of Law.		17-21645
06/29/2017	Administrative Case	Filed Comments from David Nammo with Christian Legal Society.		17-21709
06/29/2017	Administrative Case	Filed Comments from attorney Jeremy McNeil.		17-21750
06/30/2017	Administrative Case	Filed Comments from Matthew D Saltzman with Kolesar & Leatham.		17-21901
06/30/2017	Administrative Case	Filed Comments from Joshua M McCaig with National Lawyers Association.		17-21902

06/30/2017	Administrative Case	Filed Comments from Eugene Volokh with University of California, Los Angeles.		17-21925
07/05/2017	Administrative Case	Filed Comments from Kolesar & Leatham. (numerous attorneys)		17-22061
07/05/2017	Administrative Case	Filed Comments from Alex L Fugazzi with Snell & Wilmer.		17-22063
07/05/2017	Administrative Case	Filed Comments from John R Bailey and Dennis L Kennedy with Bailey Kennedy.		17-22064
07/05/2017	Administrative Case	Filed Comments from John J Park Jr.		17-22078
07/05/2017	Administrative Case	Filed Comments signed by numerous attorneys.		17-22122
07/06/2017	Administrative Case	Filed Comments from Steven W Fitschen with The National Legal Foundation.		17-22237
07/07/2017	Administrative Case	Filed Order Rescheduling Public Hearing and Extending Period of Public Comment. The hearing will be continued until September 6, 2017, at 3:00 p.m. in the courtroom in Carson City. Video-conferenced to the courtroom in Las Vegas. Original and 8 copies of written comments due by 5:00 p.m., August 30, 2017.		17-22482
07/31/2017	Administrative Case	Filed Order Rescheduling Public Hearing and Extending Period of Public Comment. The hearing will be continued until November 6, 2017, at 3:00 p.m. in the courtroom in Carson City. Video-conferenced to the courtroom in Las Vegas. Original and 8 copies of written comments due by 5:00 p.m. on October 30, 2017.		17-25304
09/22/2017	Administrative Case	Filed Letter from Gene Leverty, President of the State Bar of Nevada regarding the withdraw of the petition.	Y	17-32067
09/25/2017	Administrative Case	Filed Order. The Board of Governors of the State Bar of Nevada have filed a request to withdraw its petition filed on May 8, 2017. The request to withdraw the petition is granted.		17-32294
09/25/2017	Administrative Case	Case Closed.		

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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of: PETITION TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	No. R-17-0032 **COMMENT OPPOSING AMENDMENT TO ER 8.4**

Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, we comment in opposition to the Petition to Amend Ethical Rule (ER) 8.4 of the Arizona Rules of Professional Conduct (the "Petition").

The proposed rule change is based on American Bar Association Model Rule 8.4(g) (the "Model Rule"). Adopting the Model Rule is a bad idea, for many reasons. *See generally* Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal Prof. 201 (2017) (hereinafter *History*). We here comment upon just two: that the proposed change to ER 8.4 would violate Arizona state constitutional separation-of-powers principles, and that to adopt the proposed change would be to adopt a rule of professional conduct lacking a corresponding

disciplinary sanction.

As to the former, the Arizona Supreme Court has the power to regulate the ***practice of law*** in this state. We do not read the Arizona Constitution as conferring on this Court the power to broadly regulate all attorney conduct which is merely ***related to*** the practice of law in some way. As to the latter, to adopt a rule governing lawyers' conduct, without also telling lawyers what fate might befall them for a violation, would amount to adopting a half-rule—and one fundamentally unfair to the practicing bar.

I. THE PROPOSED RULE CHANGE WOULD VIOLATE THE SEPARATION OF POWERS REQUIRED BY THE ARIZONA CONSTITUTION.

A. The Arizona Judiciary Is Constitutionally Authorized to Regulate the Practice of Law.

The Constitution divides the powers of the state's government into three departments: the legislative, executive, and judicial. The three departments "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. III. The judicial power is vested in the judicial department. Ariz. Const. art. VI § 1. The power to make laws is, with limited exceptions reserved to the people,[1] vested in the legislature, Ariz. Const. art. IV § 1, together with the executive. Ariz. Const. art. V § 7; *see also McDonald v. Frohmiller*, 63 Ariz. 479, 489, 163 P.2d 671, 675 (1945).

Among its other functions, the judicial department is constitutionally permitted to regulate the practice of law. As this Court has observed, "This court

[1] *See* Ariz. Const. art. IV, Pt. 1 § 1; *Cave Creek Unified Sch. Dist. v. Ducey*, 231 Ariz. 342, 347, 295 P.3d 440, 445 (Ct. App.) ("Through the Arizona Constitution, the people have delegated general lawmaking authority for the state to the legislature . . . However, the people have reserved to themselves the power to propose amendments to the constitution and laws through the rights of initiative and referendum."), *aff'd,* 233 Ariz. 1, 308 P.3d 1152 (2013).

has long recognized that under article III of the Constitution 'the practice of law is a matter exclusively within the authority of the Judiciary. The determination of who shall practice law in Arizona and under what condition is a function placed by the state constitution in this court.'" *In re Creasy*, 198 Ariz. 539, 541, 12 P.3d 214, 215 (2000) (quoting *Hunt v. Maricopa County Employees Merit Sys. Comm'n*, 127 Ariz. 259, 261-62, 619 P.2d 1036, 1038-39 (1980)).[2]

B. The Proposed Rule Would Exceed the Judicial Department's Constitutional Authority.

1. The Proposed Rule Would Regulate Lawyer Conduct Far Beyond the Practice of Law.

Petitioner aims to add a new ER 8.4(h), adopting the language of Model Rule 8.4(g). Doing so would exceed this Court's constitutional authority by legislating permissible conduct not only *in* the practice of law, but also attorneys' private conduct which is merely *"related to"* the practice of law.

Proposed ER 8.4(h), and ABA Model Rule 8.4(g), provide,

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

(Emphasis added.)

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[2] Arizona Supreme Court Rule 31(a)(1) echoes this statement of authority: "*Jurisdiction*. Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court's jurisdiction."

Regulating lawyer conduct that adversely affects the administration of justice is, undisputedly, within the judicial department's province. But unlike current ER 8.4 Comment [3],[3] the proposed rule—like the Model Rule—untethers the concept of lawyer bias from any impact on the administration of justice. *See History*, *supra*, at 203, 214.

Moreover, Comment 4 to the Model Rule confirms that the scope of conduct "related to the practice of law" within the proposed rule's[4] meaning is, indeed, vast. It includes not only "representing clients [and] interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law," but also "operating or managing a law firm or law practice" and even "***participating in bar association, business or social activities*** in connection with the practice of law." *Id.* cmt. [4] (emphasis added).

Serving clients, and maintaining preparedness to serve them, can be all-consuming—for many lawyers, occupying most if not all waking hours. It is no surprise, then, that many lawyers' entire lives are "related to" the practice of law in some way. Much or all of their activity—making friends, getting together for meals, meeting future spouses, collaborating in charitable endeavors, hosting and attending social events, spending time with their own and others' families, going and inviting people to church, playing sports, and so on—can be traced back to the

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[3] Comment [3] provides, "A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, violates paragraph (d) *when such actions are prejudicial to the administration of justice*." (Emphasis added.)

[4] The Petition does not explicitly advocate adopting the revisions to the Model Rule's comments that accompanied adoption of the Model Rule itself. But leaving the expression "conduct related to the practice of law" undefined would only exacerbate the vagueness and corresponding due process problems afflicting the Model Rule. *See History*, *supra*, at 248-49. Our separation-of-powers analysis here presumes that, as used in the Petition, that expression means what the ABA in Comment 4 says it means.

lawyer's work in some way.

2. The Judicial Department Regulates the Practice of Law, Not All Conduct that Is "Related to" the Practice.

Though "related," these activities are too attenuated from the practice of law legitimately to be regulated as part of the practice of law. They are not "the kind of core service that is and has 'been customarily given and performed from day to day [only] in the ordinary practice of members of the legal profession.'" *In re Creasy*, 198 Ariz. at 542, 12 P.3d at 217 (quoting *Arizona Land Title*, 90 Ariz. at 95). Indeed, doctors, clergy, accountants, and other learned professionals do all these things, similarly deriving directly or indirectly from their practices, as well.

This Court's own Rules make clear that the "practice of law" is limited. Arizona Supreme Court Rule 31(a)(2)(A) provides,

> "Practice of law" means providing legal advice or services to or for another by:
>
> (1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;
>
> (2) preparing or expressing legal opinions;
>
> (3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;
>
> (4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or
>
> (5) negotiating legal rights or responsibilities for a specific person or entity.

Ariz. R. Sup. Ct. 31(a)(2)(A).

In *In re Creasy*, the Arizona Supreme Court endorsed a definition of the "practice of law" first formulated in 1961:

> We long ago defined the practice of law as "those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries constitute the practice of law. Such acts . . . include rendering to another *any other advice or services* which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession . . . ."

In re Creasy, 198 Ariz. at 541-42, 12 P.3d at 216-217 (quoting (and adding emphasis to) *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 95, 366 P.2d 1, 14 (1961)).

Things like "operating or managing a law firm," not to mention "business or social activities," extend beyond this Court's definition of the "practice of law."

3. Current Attorney Regulation Beyond the Practice of Law Evinces Appropriate Respect for Other Branches' Lawmaking Functions. The Proposed Rule Would Not.

We acknowledge that this Court has, in certain limited contexts, asserted regulatory authority over lawyer conduct beyond the practice of law itself. These regulations evince respect for the judicial department's coequal branches of government in a way that the proposed rule does not.

First, Arizona attorneys are subject to professional discipline for committing certain crimes. *See* ER 8.4(b) ("It is professional misconduct for a lawyer to: commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."); Ariz. R. Sup. Ct. 54(g) (permitting discipline upon conviction of misdemeanor "involving a serious crime" or felony). Those circumstances feature a (constitutionally enacted) underlying

law—indeed, a criminal law—coupled with a determination by the judicial department that a violation of that law is sufficiently related to the practice of law to justify professional consequences. *Cf. Matter of Rivkind*, 164 Ariz. 154, 157, 791 P.2d 1037, 1040 (1990) ("Without doubt, respondent's [felony] conviction places in question his ability to respect and uphold the law. Obedience to the law by an attorney is crucially important." (internal citations omitted)). These rules thus demonstrate respect for the co-equal branches of government that passed the underlying laws. But the proposed rule makes no reference to substantive law; the ABA eschewed any such reference. *See, e.g.*, *History*, *supra*, at 226-27. It thus is subject to criticism, particularly as it relates to conduct merely "related to" the practice of law, for usurping lawmaking functions.

Second, this Court may discipline attorneys for "unprofessional conduct as defined in Rule 31(a)(2)(E)." Ariz. R. Sup. Ct. 54(i). "'Unprofessional conduct' means substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer's Creed of Professionalism of the State Bar of Arizona." Ariz. R. Sup. Ct. 31(a)(2)(E).

The Oath is brief, and carefully circumscribed. The overwhelming majority of its requirements fall within the practice of law, such as "treat[ing] the courts of justice and judicial officers with due respect." Beyond those, the Oath's only requirements consist of a commitment to support the constitution and laws of the United States and this state, which (as noted above) distinguishes the proposed rule, as well as commitments to "be honest in my dealings with others," to "avoid engaging in unprofessional conduct," and to "support . . . professionalism among lawyers." Honesty is uncontroversial; it has long been viewed a central character requirement for practicing lawyers. *See* 7 Am. Jur. 2d Attorneys at Law § 139 ("Honesty is basic to the practice of the law; clients must be able to rely unquestioningly on the truthfulness of their counsel."); *see also* Restatement (Third) of the Law Governing Lawyers § 98 (2000) ("The law governing

misrepresentation by a lawyer includes the criminal law (theft by deception), the law of misrepresentation in tort law and of mistake and fraud in contract law, and procedural law governing statements by an advocate. Compliance with those obligations meets social expectations of honesty and fair dealing and facilitates negotiation and adjudication, which are important professional functions of lawyers." (internal citation omitted)). As for professionalism, the Court's decision effective January 1, 2017, to excise the language, "I will abstain from all offensive conduct," signaled fitting restraint, avoiding social legislation by judicial decree. *See* Order Amending the Oath of Admission to the Bar and a Lawyer's Creed of Professionalism of the State Bar of Arizona, Rule 31, Rules of the Arizona Supreme Court, and Rule 41, Rules of the Arizona Supreme Court (Dec. 14, 2006).

The Creed too focuses on the practice of law, excepting only admonitions to "remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good"; to "be mindful of the need to protect the integrity of the legal profession"; and to "be mindful that the law is a learned profession and that among its desirable goals are devotion to public service" and contributions of time and influence on behalf of the poor. Nothing in these admonitions requires (or bars) any particular conduct, let alone expressive or associative conduct, *let alone* purports to do so independently of the lawmaking functions of the legislature and executive.

C. Arizona's Constitutional Right to Privacy Further Counsels Restraint in Asserting Regulatory Authority Beyond the Practice of Law.

Under Arizona Constitution article 2, section 8, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." To "'disturb' is '[t]o interfere with in the lawful enjoyment of a right.'" *State v. Jean*, 243 Ariz. 331, 407 P.3d 524, 547 (2018) (Bolick, J., concurring in part and dissenting in part) (quoting Webster's New Int'l Dictionary 757 (2d ed. 1944)).

This guarantee of "fundamental liberty"[5] in and for one's "private affairs" and "home"[6] may be impinged only where the lawmaking power properly has conferred authority to do so.

The separation-of-powers concerns described above gain still more force when considered in light of article 2, section 8, since questions regarding the judicial department's power to regulate conduct merely "related to" the practice of law implicate the individual liberty interests protected by this provision of the Arizona Constitution. Lawyers do much of what they do, including entertaining co-workers, clients, prospective clients, and other friends, privately and at home. Article 2, section 8, counsels great caution in extending the judicial department's regulatory reach to any and all such conduct just because it happens to be "related to" the practice of law.

II. TO ADOPT A HALF-RULE OF PROFESSIONAL CONDUCT—ONE LACKING A KNOWN DISCIPLINARY SANCTION—WOULD BE FUNDAMENTALLY UNFAIR TO ARIZONA'S LAWYERS, AND FURTHER STRAIN CONSTITUTIONAL SEPARATION OF POWERS.

This Court has adopted the ABA's *Standards for Imposing Lawyer Sanctions* for determining sanctions for a violation of the Ethics Rules. See Ariz. R. Sup. Ct. 58(k). But the *Standards* include no sanction that would apply to a violation of the proposed rule. *See History*, *supra*, at 246-47. To adopt the

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[5] *State v. Martin*, 139 Ariz. 466, 474, 679 P.2d 489, 497 (1984); *cf. Jean*, 243 Ariz. 331, 407 P.3d at 546 (Bolick, J.) ("[W]e frequently may find that our constitution provides greater protections of individual liberty and constraints on government power because of provisions that do not exist in its national counterpart . . . .").

[6] Ariz. Const. art. 2 § 8; *see also State v. Bolt*, 142 Ariz. 260, 264-65, 689 P.2d 519, 523-24 (1984) ("[W]e are . . . aware of our people's fundamental belief in the sanctity and privacy of the home . . . . While Arizona's constitutional provisions generally were intended to incorporate federal protections, they are specific in preserving the sanctity of homes and in creating a right of privacy." (citation omitted)).

proposed rule change would thus be inappropriate, for at least three reasons.

First, to impose an ethical obligation on Arizona's lawyers, without fair notice of what might happen to them in the event of a violation, raises fundamental fairness, and even due process, concerns. One may not fairly be disciplined for a wrong without advance notice of the discipline that might be imposed as a result. *See id.* at 249 nn. 252-53 and accompanying text; *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1082 (1991) (O'Connor, J., concurring) (observing, regarding invalidated Nevada rule of professional misconduct, that "a vague law offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement").

Second, adopting an ethics rule governing lawyer conduct, without also adopting a corresponding sanction or set of sanctions, amounts in effect to incomplete rulemaking. It is all well and good for the ABA to adopt Model Rule 8.4(g) for symbolic reasons, *see History* at 245-46 & nn. 65, 225, but symbolism is inadequate to sustain the proposed rule change in a real world setting with real world consequences for real world lawyers. And, though this Court need not consider what sanction or sanctions might be applied for a violation of the proposed rule, since none have been proposed,[7] the substantial First Amendment

[7] We honor the ABA's historical role in setting lawyer ethics standards, *see generally* American Bar Association, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005 (2006), and lament its more recent drift toward one-sided political activism—activism evidenced by, among other things, that the ABA adopted Model Rule 8.4(g) notwithstanding individual commenters' overwhelming opposition to the one and only version of the then-proposed model rule offered for public comment, *see History*, *supra*, at 221-23, and without taking any public comment on the final version. *See id.* at 235-36. This drift may well explain the ABA's membership challenges of late. *See* Aebra Coe, *ABA to Cut Staff and Restructure Amid Membership Slump*, Law360, April 6, 2018, *available at* law360.com/articles/1030411/aba-to-cut-staff-and-restructure-amid-membership-slump; Richard Cassidy, *What Does the Future Hold for the American Bar Association?*, LinkedIn, Sept. 25, 2015, *available at* linkedin.com/pulse/what-does-future-hold-american-bar-association-richard-

and other challenges that would confront determining how to sanction a violation—including violations consisting of private speech and private association—are, as best we can tell, intractable.[8] We respectfully submit that it would be inappropriate, given the absence of any extant or proposed disciplinary sanction for violating the proposed rule, for this Court to adopt it.

Finally, this defect in the proposed rule supplies an additional reason why it is a poor candidate on which to test the boundary between the powers of the judicial department, on the one hand, and those of its coequal branches of government, on the other. While the proposed rule provides no direct cause for this Court to determine whether its extant lawyer regulations beyond the practice of law, *see supra* Section I.B.3, let alone legislative attempts to regulate professional licensure,[9] are consistent with constitutional separation of powers, one

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cassidy/. Rejecting the proposal thus carries the potential additional benefit of helping the ABA see that its turn away from politically neutral advancement of the profession and the rule of law threatens its authority as an objective voice on these and related issues, including professional responsibility.

[8] *See, e.g.*, *History* at 249-55; Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Oct. 6, 2016, *available at* heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought; Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, The Washington Post, Aug. 10, 2016, *available at* washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.0ee45f00e1a8; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and "Conduct Related to the Practice of Law,"* 30 Georgetown J. Legal Ethics 241 (2017); George W. Dent Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, __ N.D. J. Law, Ethics & Pub. Pol'y __ (2018) (forthcoming); *available at* https://scholarlycommons.law.case.edu/faculty_publications/2012/.

[9] *See* A.R.S. § 41-1493.04(A) ("Government shall not deny, revoke or suspend a person's professional or occupational license, certificate or registration for any of the following and the following are not unprofessional conduct: [d]eclining to provide or participate in providing any service that violates the person's sincerely held religious beliefs… [or r]efusing to affirm a statement or

suspects that the assertion of expanded judicial power inherent in adopting the proposed rule would, in short order, lead those questions to be asked as well.

III. CONCLUSION.

This Court should reject the Petition.

DATED this 14th day of May, 2018.

SNELL & WILMER L.L.P.

By */s/ Lindsay L. Short*
John J. Bouma
Andrew F. Halaby
Lindsay L. Short

Electronic copy served this date upon Petitioner.

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oath that is contrary to the person's sincerely held religious beliefs . . . [or e]xpressing sincerely held religious beliefs in any context, including a professional context as long as the services provided otherwise meet the current standard of care or practice for the profession.").

CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

May 3, 2018

The Honorable Scott Bales, Chief Justice
The Honorable Robert M. Brutinel, Vice Chief Justice
The Honorable John Pelander, Justice
The Honorable Ann A. Scott Timmer, Justice
The Honorable Clint Bolick, Justice
The Honorable John R. Lopez, Justice
The Honorable Andrew Gould, Justice
The Arizona Supreme Court
1501 W. Washington St., Room 402
Phoenix, Arizona 85007

Attn: Clerk of the Supreme Court

Re: Christian Legal Society Comment Letter Opposing Adoption of Model Rule 8.4(g)
In the Matter of Petition R-17-0032: National Lawyers Guild, Central Arizona Chapter, Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court

Dear Chief Justice Bales, Vice Chief Justice Brutinel, Justice Pelander, Justice Timmer, Justice Bolick, Justice Lopez, and Justice Gould:

This comment letter is filed pursuant to this Court's Order of January 18, 2018, soliciting public comment on Petition R-17-0032. In its petition, the National Lawyers Guild, Central Arizona Chapter, urges this Court to amend Rule 42, ER 8.4, by adopting ABA Model Rule 8.4(g), a deeply flawed and rightly criticized black-letter rule recently formulated by the American Bar Association.[1]

Because ABA Model Rule 8.4(g) would operate as a speech code for Arizona attorneys, Christian Legal Society respectfully requests that this Court reject its adoption. A number of scholars have correctly characterized ABA Model Rule 8.4(g) as a speech code for lawyers. For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has summarized his concerns about ABA Model Rule 8.4(g) and its impact on attorneys' speech in a two-minute video released by the Federalist Society.[2]

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[1] The petition urges this Court to adopt ABA Model Rule 8.4(g) as Rule 42, ER 8.4(h) of this Court's Rules of Professional Conduct. To avoid semantic confusion, this comment letter will refer throughout to the proposed rule as "8.4(g)," but recognizes that, if adopted, the proposed rule would be designated as "ER 8.4(h)."

[2] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA (last visited May 1, 2018). Professor Volokh expanded on the many problems of ABA Model Rule 8.4(g) in a debate with a proponent of Model Rule 8.4(g) at the Federalist Society National Student Symposium in March 2017. *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=b074xW5kvB8&t=50s (last visited May 1, 2018).

The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.[3] Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, "[t]he ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment."[4]

In a thoughtful examination of the rule's legislative history, Arizona attorneys, Andrew Halaby and Brianna Long, conclude that ABA Model Rule 8.4(g) "is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities."[5] They recommend that "jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all."[6] In their view, "the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected."[7]

There are many areas of concern with the proposed rule. Perhaps the most troubling is the likelihood that it will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues. Because lawyers often 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 such issues should be rejected because it constitutes a serious threat to freedom of speech, free exercise of religion, and freedom of political belief.

ABA Model Rule 8.4(g) raises troubling new concerns for every Arizona attorney because its scope includes *all* "conduct related to the practice of law." According to its accompanying new Comment [3], conduct includes speech. That is, "discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others" and

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[3] Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought,* The Heritage Foundation (Oct. 6, 2016), http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf (last visited May 1, 2018). Professor Rotunda and Texas Attorney General Ken Paxton debated two leading proponents of Model Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention in a panel on *Using the Licensing Power of the Administrative State: Model Rule 8.4(g),* The Federalist Society (Nov. 20, 2017), https://www.youtube.com/watch?v=V6rDPjqBcQg (last visited May 1, 2018).

[4] Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017 [hereinafter "Rotunda & Dzienkowski"], "§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech" & "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" in "§ 8.4-2 Categories of Disciplinable Conduct."

[5] Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201, 257 (2017) (hereinafter "Halaby & Long").

[6] *Id.*

[7] *Id.* at 204.

"[h]arassment includes . . . derogatory or demeaning *verbal* or physical conduct." (Emphasis supplied.)

Furthermore, as its accompanying new Comment [4] states, "[c]onduct 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 supplied.) In plain English, regulated conduct "includes . . . interacting with . . . others while engaged in the practice of law . . . and participating in bar association, business or social activities in connection with the practice of law." (Emphasis supplied.)

The compelling question becomes: What conduct does ABA Model Rule 8.4(g) *not* reach? Virtually everything a lawyer does is "conduct related to the practice of law." Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Indeed, in a recent article in the *Arizona Attorney*, Ethics Counsel at the State Bar of Arizona stated that, if ABA Model Rule 8.4(g) were adopted, an attorney could be disciplined for telling an offensive joke at a law firm dinner.[8] Similarly, Professor Rotunda and Professor Dzienkowski have noted, "This Rule applies to lawyers chatting around the water cooler, participating on a CLE panel, or hiring a law firm messenger."[9]

Activities likely to fall within ABA Model Rule 8.4(g)'s broad scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- writing law review articles, blogposts or blog comments, and op-eds
- giving guest lectures at law school classes
- granting media interviews
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to nonprofits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues

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[8] Ann Ching, Ethics Counsel at the State Bar of Arizona, & Lisa M. Panahi, Senior Ethics Counsel, *Rooting Out Bias in the Legal Profession*, Arizona Attorney, Jan. 2017, at 34, 38 ("the partner's offensive joke would clearly be prohibited by Rule 8.4(g)"), http://www.azattorneymag-digital.com/azattorneymag/201701?folio=34&pg=37#pg37 (last visited April 21, 2018).

[9] Rotunda & Dzienkowski, *supra*, note 4, in "§ 8.4-2(j)-1. Introduction."

- testifying before a legislative body
- writing a letter to one's government representatives
- serving one's congregation
- serving one's alma mater if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, and other vulnerable populations
- serving on the board of a fraternity or sorority
- volunteering with or working for political parties
- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues

Proponents of ABA Model Rule 8.4(g) candidly observed that they sought a new black-letter rule precisely in order to regulate non-litigating lawyers, such as "[a]cademics, nonprofit lawyers, and some government lawyers," as well as "[t]ax lawyers, real estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system."[10]

Because of its expansive scope, several states have rejected or abandoned efforts to adopt ABA Model Rule 8.4(g). In the past 18 months, official entities in Nevada, Tennessee, Illinois, Maine, Montana, Pennsylvania, Texas, South Carolina, and Louisiana have weighed ABA Model Rule 8.4(g) and found it seriously wanting. *See infra* pp. 11-15. To date, only the Vermont Supreme Court has adopted it. Because Vermont implemented the rule quite recently, no empirical evidence yet exists as to its practical ramifications for Vermont attorneys.

Arizona attorneys should not be made the subjects of the novel experiment that ABA Model Rule 8.4(g) represents. This is particularly true when this Court has the prudent option of waiting to see what sister states decide to do. This Court should expressly reject ABA Model Rule 8.4(g). But at a minimum, this Court should wait to see whether other states adopt ABA Model Rule 8.4(g), and then observe the rule's practical consequences for attorneys in those states. There is no need for haste because current Arizona Rules of Professional Conduct, in the current Comment [3] to Rule 42, ER 8.4, already identify as professional misconduct bias and prejudice that occur in the course of representing a client if prejudicial to the administration of justice.

The rest of this letter provides greater detail about the flaws of ABA Model Rule 8.4(g), as follows:

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[10] ABA Commission on Sexual Orientation and Gender Identity, *Memorandum to Standing Committee on Ethics and Professional Responsibility: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4*, at 5, 7 (Oct. 22, 2015), https://www.clsnet.org/document.doc?id=1125.

- Part I compares current Comment [3] to Arizona Rule 42, ER 8.4, with ABA Model Rule 8.4(g), in order to understand the sweeping changes that its adoption would mean for Arizona attorneys. *See infra* pp. 5-10.

- Part II explains why the ABA's original claim that 24 states have a rule similar to ABA Model Rule 8.4(g) is not accurate. Other than Vermont, no state has a rule that is as expansive as ABA Model Rule 8.4(g). *See infra* at pp. 10-11.

- Part III summarizes why at least nine states have rejected or refrained from adopting Model Rule 8.4(g). *See infra* at pp. 11-15.

- Part IV details why ABA Model Rule 8.4(g) will have a substantial chilling effect on Arizona attorneys' freedom of speech. *See infra* at pp. 15-27.

- Part V notes that a lawyer could be disciplined for speech that he or she might not know would be considered a violation. *See infra* at pp. 27-28.

- Part VI explores the implications of ABA Model Rule 8.4(g) for a lawyer's traditional discretion to decide whether to represent a client. *See infra* at pp. 28-29.

- Part VII asks whether bar disciplinary processes provide adequate due process protections for lawyers and whether these offices have adequate financial and staff resources to become a primary and fair adjudicator of a higher volume of discrimination claims. *See infra* at pp. 29-30.

I. ABA Model Rule 8.4(g) Would Impose a Significantly Heavier Burden on Arizona Attorneys than Current Comment [3] Does.

A. The text of current Comment [3]

Current Arizona Comment [3] generally tracked the Comment [3] that previously accompanied ABA Model Rule 8.4(d) from 1998 to August 2016. Current Arizona Comment [3] reads as follows:

> [3] A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. This does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, or other similar factors, are issues in the proceeding. A trial judge's finding that

> peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.[11]

Note that current Arizona Comment [3] already includes "gender identity" as a protected category. In contrast, former ABA Comment [3] did not include "gender identity" as a protected category.

B. The text of ABA Model Rule 8.4(g)

Compare the narrow scope of current Arizona Comment [3] to the breadth of the proposed new rule, which reads as follows:

> It is professional misconduct for a lawyer to:
>
> ***
>
> (g) 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,[12] 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 paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Note that the National Lawyers Guild's Petition does not explicitly include the three new comments accompanying ABA Model Rule 8.4(g). These comments define various critical terms within the rule. We are certain that, even if the three new comments were not officially adopted by this Court, they will be utilized as guidance for interpreting and applying the rule.

ABA Model Rule 8.4(g)'s comments provide as follows:

> Comment [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and

[11] Ariz. Rules of Prof. Conduct, Rule 42, Ariz. R.S. Ct., ER 8.4 cmt. 3.
[12] Although it includes sex, sexual orientation, and gender identity among its protected categories, ABA Model Rule 8.4(g) does not include "gender" in its list of protected categories. But the National Lawyers Guild's Petition does. Pet. at 11-12. It is not clear whether this is a typographical error or intended to add a twelfth protected category.

> derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).
>
> Comment [4] 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 practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.
>
> Comment [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

C. In several core aspects, ABA Model Rule 8.4(g) reaches much further into lawyers' lives than current Arizona Comment [3] does.

The ABA intentionally drafted Model Rule 8.4(g) to be much broader than its former Comment [3]. Comparing former Comment [3] with black-letter ABA Model Rule 8.4(g), the Rule's proponents explained:

> [Comment [3]] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial

> to the administration of justice. This limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms).[13]

1. ABA Model Rule 8.4(g) is substantially broader as to the conduct it regulates: Current Comment [3] regulates conduct when a lawyer is acting "in the course of representing a client." In contrast, ABA Model Rule 8.4(g) applies when a lawyer is engaged "in conduct related to the practice of law," as defined in its accompanying Comment [4], which is quite broad.

Comment [4] defines the regulated conduct as broadly as possible. It includes not only "representing clients," but also "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 supplied.) As detailed *infra* at pp. 15-23, ABA Model Rule 8.4(g) applies to almost everything that a lawyer does, including social activities that are arguably related to the practice of law. It would also apply to *anyone* ("and others") that a lawyer interacts with during conduct related to the practice of law.

Indeed, without changing its substantive meaning, Comment [4]'s definition could be condensed to the following statement: "Conduct related to the practice of law includes . . . interacting with . . . others while engaged in the practice of law . . . and participating in . . . bar activities, business or social activities in connection with the practice of law." The rest of Comment [4] simply lists some examples of "interacting with others while engaged in the practice of law" and "participating in bar activities, business or social activities in connection with the practice of law."

2. ABA Model Rule 8.4(g) is not limited to conduct that is "prejudicial to the administration of justice": Current Comment [3] requires that a lawyer's actions be "prejudicial to the administration of justice" to qualify as professional misconduct. In contrast, ABA Model Rule 8.4(g) abandons this traditional limitation. As a result, an Arizona attorney would be subject to disciplinary liability even though his or her conduct had not prejudiced the administration of justice. Note that the National Lawyers Guild's Petition views it as a positive

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[13] Letter from James J.S. Holmes, Chair, ABA Commission on Sexual Orientation and Gender Identity, et al., to Paula Frederick, Chair, ABA Standing Committee on Ethics & Professional Responsibility (May 7, 2014), *in* ABA Standing Committee on Ethics and Professional Responsibility, *Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative* (July 16, 2105), App. A, at 7-9, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf (last visited May 1, 2018).

development for a finding of professional misconduct to be untethered from the requirement that a lawyer's conduct be "prejudicial to the administration of justice."[14]

In a recent opinion finding ABA Model Rule 8.4(g) to be unconstitutional, the Tennessee Attorney General enlarged on this distinction between his state's current Comment [3] and ABA Model Rule 8.4(g):

> Proposed Rule 8.4(g) is not limited to speech and conduct that pertains to a pending judicial proceeding or that actually prejudices the administration of justice; rather, it reaches all speech and conduct in any way "related to the practice of law" – speech that is entitled to full First Amendment protection.[15]

3. ABA Model Rule 8.4(g) dispenses with the mens rea requirement of current Comment [3]: Current comment [3] requires that a lawyer "knowingly" manifest bias or prejudice. In contrast, ABA Model Rule 8.4(g) substitutes a negligence standard and makes a lawyer liable for conduct that she "knows or reasonably should know" is "harassment or discrimination." Therefore, an Arizona attorney could violate Model Rule 8.4(g) without actually knowing she had done so.

This change in the knowledge requirement is particularly perilous because the list of words and conduct that are deemed "discriminatory" or "harassing" is ever expanding in often unanticipated ways. For example, the negligence standard of ABA Model Rule 8.4(g) might be interpreted to cover words or conduct that demonstrate "implicit bias"[16] or "intersectional discrimination."[17] Certainly nothing in ABA Model Rule 8.4(g) would prevent a charge of discrimination based on "implicit bias" or "intersectional discrimination" from being brought

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[14] National Lawyers Guild's Petition at 8.

[15] Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 7 (hereinafter "Tenn. Att'y Gen. Letter"), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf (last visited May 1, 2018). The letter is incorporated into Tennessee Attorney General Opinion 18-11; however, for purposes of quoting the letter, we will cite to the page numbers of the letter itself and not the opinion.

[16] In urging adoption of ABA Model Rule 8.4(g) in 2016, its proponents frequently emphasized their concerns about implicit bias, that is, discriminatory conduct that occurs despite a lawyer having no conscious awareness that his or her conduct is discriminatory. *See* Halaby & Long, *supra,* note 5, at 216-217, 243-245. However, Halaby & Long eventually conclude that implicit-bias conduct probably would not fall within the "reasonably should know" standard. *Id.* at 244-245. We are not so certain. While not disputing that implicit bias occurs, we do not think it should be grounds for discipline and are concerned that the Rule will be invoked for complaints of implicit bias.

[17] At its mid-year meeting in February 2018, the ABA adopted Resolution 302, a model policy that "urges . . . all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity." ABA Res. 302 (Feb. 5, 2018), https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/302.pdf (last visited May 1, 2018).

against an attorney. Such charges seem likely given that the rule's "proponents repeatedly invoked that concept [of implicit bias] in arguing against any knowledge qualifier at all."[18]

II. ABA Model Rule 8.4(g) is significantly broader than the various anti-bias black-letter rules adopted in twenty-four states.

When the ABA adopted Model Rule 8.4(g) in 2016, it claimed that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."[19] But this claim is factually incorrect because ABA Model Rule 8.4(g) has not been adopted by any state bar, except Vermont in 2017.

For that reason, no empirical evidence supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers. As even its proponents have had to concede, ABA Model Rule 8.4(g) does not replicate any prior black-letter rule adopted by a state supreme court. Before 2016, twenty-four states and the District of Columbia had adopted some version of a black-letter rule dealing with "bias" issues.[20] But each of these black-letter rules was narrower than ABA Model Rule 8.4(g).

Basic differences exist between state black-letter rules and ABA Model Rule 8.4(g):

- Several states' black-letter rules apply only to *unlawful discrimination* and require that another tribunal first find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.

- Many states limit their rules to "conduct in the course of representing a client," in contrast to ABA Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law."

- Many states require that the misconduct be "prejudicial to the administration of justice."

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[18] Halaby & Long, *supra*, note 5, at 244 ("When a new anti-bias rule proved unsaleable without a knowledge qualifier, one was added, but only with the alternative 'reasonably should know' qualifier alongside. That addition was not subjected to comment by the public or by the bar or the ABA's broader membership.")(footnote omitted).
[19] *See, e.g.*, Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, https://www.scbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf, at 56-57.
[20] *Working Discussion Draft, supra*, note 13, at 10-36, App. B, *Anti-Bias Provisions in State Rules of Professional Conduct*.

- Almost no state black-letter rule enumerates all eleven of the ABA Model Rule 8.4(g)'s protected characteristics.

- No black-letter rule utilizes ABA Model Rule 8.4(g)'s "circular non-protection" for "legitimate advocacy . . . consistent with these rules."

Thirteen states, including Arizona, have adopted a comment, rather than a black-letter rule, dealing with "bias" issues. Fourteen states have adopted neither a black-letter rule nor a comment addressing "bias" issues.

III. Official Entities in Illinois, Maine, Montana, Pennsylvania, Texas, South Carolina, and Tennessee Have Rejected ABA Model Rule 8.4(g), and Nevada and Louisiana Have Abandoned Efforts to Impose It on Their Attorneys.

Federalism's great advantage is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see whether states (besides Vermont) adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states. This is particularly true when ABA Model Rule 8.4(g) has failed close scrutiny by several official entities in other states.

State Supreme Courts: The Supreme Courts of **Tennessee, Maine,** and **South Carolina** have officially rejected adoption of ABA Model Rule 8.4(g). On April 23, 2018, the Supreme Court of **Tennessee** denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).[21] The petition had been filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility. The Tennessee Attorney General filed a comment letter, explaining that a black-letter rule based on ABA Model Rule 8.4(g) "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[22]

In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).[23] The Court acted after the state bar's House of Delegates, as well as the state

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[21] The Supreme Court of Tennessee, *In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, Order No. ADM2017-02244 (Apr. 23, 2018), https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf (last visited May 2, 2018).
[22] Tenn. Att'y Gen. Letter, *supra*, note 15, at 1.
[23] The Supreme Court of South Carolina, *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct Appellate Case No. 2017-000498*, Order (June 20, 2017), http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01 (if arrive at South Carolina Judicial Department homepage, select "2017" as year and then scroll down to "2017-06-20-01") (last visited May 2, 2018).

Attorney General, recommended against its adoption.[24] In November 2017, the Supreme Court of **Maine** announced that it had "considered, but not adopted, the ABA Model Rule 8.4(g)."[25]

On September 25, 2017, the Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g).[26] In a letter to the Court, dated September 6, 2017, the State Bar President explained that "the language used in other jurisdictions was inconsistent and changing," and, therefore, "the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions."[27]

State Attorney General Opinions: On March 16, 2018, the Attorney General of **Tennessee** filed Opinion 18-11, *American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g),* attaching his office's comment letter to the Supreme Court of Tennessee, opposing adoption of a proposed rule closely modeled on ABA Model Rule 8.4(g).[28] The Attorney General concluded that the proposed rule "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[29]

The opinion began by noting that the ABA Model Rule 8.4(g) "has been widely and justifiably criticized as creating a 'speech code for lawyers' that would constitute an 'unprecedented violation of the First Amendment' and encourage, rather than prevent, discrimination by suppressing particular viewpoints on controversial issues."[30] Noting the rule's application to "'verbal . . . conduct' – better known as speech,"[31] the opinion concluded that "any speech or conduct that could be considered 'harmful' or 'derogatory or demeaning' would constitute professional misconduct within the meaning of the proposed rule."[32]

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[24] South Carolina Op. Att'y Gen. (May 1, 2017) http://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf (last visited May 2, 2018).
[25] The Maine Supreme Judicial Court, *Proposed Amendment to the Maine Rules of Professional Conduct* (Nov. 30, 2017), http://www.courts.maine.gov/rules_adminorders/rules/proposed/mr_prof_conduct_proposed_amend_2017-11-30.pdf at 2 ("Maine has considered, but not adopted, the ABA Model Rule 8.4(g)" and announcing comment period on alternative language).
[26] The Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4,* Order (Sep. 25, 2017), https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf (last visited May 2, 2018).
[27] Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), https://www.clsnet.org/document.doc?id=1124 (last visited May 2, 2018).
[28] *American Bar Association's New Model Rule of Professional Conduct 8.4(g),* 18 Tenn. Att'y Gen. Op. 11 (Mar. 16, 2018), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf (last visited May 2, 2018).
[29] Tenn. Att'y Gen. Letter, *supra*, note 15, at 1.
[30] *Id.* at 1-2.
[31] *Id.* at 3.
[32] *Id.* at 4.

The Attorney General highlighted "several problematic features" of the proposed rule, including that:

> 1. "[T]he proposed rule would apply to virtually any speech or conduct that is even tangentially related to an individual's status as a lawyer, including, for example, a presentation at a CLE event, participation in a debate at an event sponsored by a law-related organization, the publication of a law review article, and even a casual remark at dinner with law firm colleagues."[33]
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> 2. "[T]he proposed rule would prohibit . . . a significant amount of speech and conduct that is not currently prohibited under federal or Tennessee antidiscrimination statutes."[34]
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> 3. "[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way."[35]

The Attorney General warned that the proposed rule "would profoundly transform the professional regulation of Tennessee attorneys." This transformation would occur because the rule "would regulate aspects of any attorney's life that are far removed from protecting clients, preventing interference with the administration of justice, ensuring attorneys' fitness to practice law, or other traditional goals of professional regulation."[36] That is, the ABA Model Rule 8.4(g) takes attorney regulation far beyond the traditional province of the rules of professional conduct.

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent."[37] The Attorney General declared that "[c]ontrary to . . . basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues."[38]

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[33] *Id.* at 3.
[34] *Id.* at 4.
[35] *Id.* at 5.
[36] *Id.* at 2.
[37] *Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney's statutory or constitutional rights (RQ-0128-KP),* Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016) at 3, https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf (last visited May 2, 2018).
[38] *Id.*

In September 2017, the **Louisiana** Attorney General concluded that "[t]he regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid."[39] Because of the "expansive definition of 'conduct related to the practice of law' and its "countless implications for a lawyer's personal life," the Attorney General found the Rule to be "unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct."[40]

Agreeing with the Texas Attorney General's assessment of the unconstitutionality of ABA Model Rule 8.4(g), the Attorney General of **South Carolina** determined that "a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of religion and is void for vagueness."[41]

State Legislature: On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).[42] The impact of Model Rule 8.4(g) on "the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees" greatly concerned the Montana Legislature.[43]

State Bar Associations: On December 10, 2016, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois."[44] On October 30, 2017, the **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying

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[39] *ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution*, 17 La. Att'y Gen. Op. 0114 (Sept. 8, 2017) at 4, https://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384 (last visited May 2, 2018).
[40] *Id.* at 6.
[41] South Carolina Att'y Gen. Op. (May 1, 2017) at 13, http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf (last visited May 2, 2018).
[42] *A Joint Resolution of the Senate and the House of Representatives of the State of Montana Making the Determination that it would be an Unconstitutional Act of Legislation, in Violation of the Constitution of the State of Montana, and would Violate the First Amendment Rights of the Citizens of Montana, Should the Supreme Court of the State of Montana Enact Proposed Model Rule of Professional Conduct 8.4(G)*, SJ 0015, 65th Legislature (Mont. Apr. 25, 2017), http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf (last visited May 2, 2018).
[43] *Id.* at 3. The Tennessee Attorney General likewise warned that "[e]ven statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra*, at 8 n.8.
[44] Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals*, Illinois Lawyer Now, Dec. 15, 2016, https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals (last visited May 2, 2018).

a proposal to adopt a version of Model Rule 8.4(g), voted "not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court."[45]

On December 2, 2016, the Disciplinary Board of the Supreme Court of **Pennsylvania** explained that ABA Model Rule 8.4(g) was too broad:

> It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.[46]

IV. Because of Its Expansive Scope, ABA Model Rule 8.4(g) Endangers Attorneys' First Amendment Rights.

In adopting its new model rule, the ABA largely ignored over 480 comment letters,[47] most opposed to the rule change. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability, although the Committee dropped its opposition immediately prior to the House of Delegates' vote.[48]

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.[49] But little was done to address these concerns. In

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[45] Louisiana State Bar Association, *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, Oct. 30, 2017, https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892 (last visited May 2, 2018).

[46] The Pennsylvania Bulletin, *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct*, 46 Pa. B. 7519 (Dec. 3, 2016), http://www.pabulletin.com/secure/data/vol46/46-49/2062.html.

[47] American Bar Association website, Comments to Model Rule 8.4 (last visited May 2, 2018). http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html (last visited May 2, 2018).

[48] Halaby & Long, *supra*, note 5, at 220 & n.97 (listing the Committee's concerns as including: lack of empirical evidence of need for Rule; vagueness of key terms; enforceability; constitutionality; coverage of employment discrimination complaints; mens rea requirement; and potential limitation on ability to decline representation), *citing* Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MABA MODEL RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

[49] Halaby & Long, *supra*, note 5, at 216-223 (summarizing concerns expressed at the only public hearing on an early version of ABA Model Rule 8.4A(g), as well as the main concerns expressed in the comment letters).

their scholarly examination of the legislative history of ABA Model Rule 8.4(g), Halaby and Long conclude that "the new model rule's afflictions derive in part from indifference on the part of rule change proponents, and in part from the hasty manner in which the rule change proposal was pushed through to passage."[50] In particular, the rule went through five versions, of which three versions evolved "in the two weeks before passage, none of these was subjected to review and comment by the ABA's broader membership, the bar at large, or the public."[51] Halaby and Long summarized the legislative history of the rule:

> Model Rule 8.4(g) and its associated comments evolved rapidly between the initial letter from the Goal III entities in July 2014, through initial circulation of Version 1 in July 2015, to final adoption of Version 5 the following August. There was solicitation of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.[52]

A. ABA Model Rule 8.4(g) Would Operate as a Speech Code for Attorneys.

There are many areas of concern with the proposed rule. Perhaps the most troubling is the likelihood that it will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues in the workplace and in the public square. Because lawyers often are the spokespersons and leaders in political, social, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on such issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief.

Two highly respected constitutional scholars have outlined their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. The late Professor Ronald Rotunda wrote a leading treatise on American constitutional law,[53] as well as co-authoring *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, co-published by the ABA.[54] In the 2017-2018 edition of the *Deskbook*, Professor Rotunda and Professor Dzienkowski observed that "[t]he language the ABA has adopted in Rule 8.4(g) and its associated Comments are similar to laws that the Supreme Court has invalidated on free speech grounds."[55]

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[50] Halaby & Long, *supra*, note 5, at 203.
[51] *Id.*
[52] *Id.* at 233.
[53] *See, e.g., American Constitutional Law: The Supreme Court in American History, Volumes I & II* (West Academic Publishing, St. Paul, MN. 2016); *Principles of Constitutional Law* (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).
[54] Rotunda & Dzienkowski, *supra*, note 4.
[55] *Id.* at "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

Professor Rotunda initially wrote about the problem ABA Model Rule 8.4(g) poses for lawyers' speech in a *Wall Street Journal* article entitled "The ABA Overrules the First Amendment," where he explained that:

> In the case of rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.[56]

Professor Rotunda also wrote a lengthy critique of ABA Model Rule 8.4(g) for the Heritage Foundation, entitled *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*.[57] At the Federalist Society's 2017 National Lawyers Convention, Professor Rotunda and Texas Attorney General Ken Paxton participated in a panel discussion on ABA Model Rule 8.4(g) with a former ABA President and a law professor.[58] Professor Rotunda and General Paxton highlighted the First Amendment problems with the Rule.

Prominent First Amendment scholar and editor of the daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has similarly warned that the new rule is a speech code for lawyers.[59] In a debate at the Federalist Society's 2017 National Student Symposium, Professor Volokh demonstrated the flaws of Model Rule 8.4(g), which the rule's proponent seemed unable to defend.[60]

Professor Volokh has also given examples of potential violations of Model Rule 8.4(g):

> Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

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[56] Ron Rotunda, "*The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech*," *The Wall Street Journal*, Aug. 16, 2016, http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.
[57] Rotunda, *supra*, note 3.
[58] The Federalist Society Debate (Nov. 20, 2017), *supra*, note 3.
[59] The Federalist Society video featuring Professor Volokh, *supra*, note 2.
[60] The Federalist Society Debate (Mar. 13, 2017), *supra*, note 2.

> Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."[61]

These scholars' red flags should not be ignored. The proposed rule would create a multitude of potential problems for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, grant media interviews, or otherwise engage in public discussions regarding current political, social, and religious questions.

1. By expanding its coverage to include all "conduct related to the practice of law," ABA Model Rule 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.

Because it expressly applies to all "conduct related to the practice of law," ABA Model Rule 8.4(g) raises troubling new concerns for every Arizona attorney. Its new accompanying Comment [3] makes clear that "conduct" includes "speech": "discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others" and "[h]arassment includes . . . derogatory or demeaning *verbal* or physical conduct." (Emphasis supplied.)

Comment [4] confirms the extensive overreach of proposed ABA Model Rule 8.4(g). It states that "[c]onduct 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 supplied.)

As already discussed *supra* at pp. 5-10, ABA Model Rule 8.4(g) greatly expands upon current Comment [3]. Proposed ABA Model Rule 8.4(g) is much broader in scope than current Comment [3], which applies only to conduct "in the course of representing a client." Furthermore, current Comment [3] conduct must be "prejudicial to the administration of justice" to subject a lawyer to discipline. In contrast, proposed ABA Model Rule 8.4(g) applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." And it deletes the traditional limitation of "prejudicial to the administration of justice."

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[61] Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities*, The Washington Post, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086 (last visited May 2, 2018).

In reality, the substantive question becomes: What conduct does proposed ABA Model Rule 8.4(g) *not* reach? Virtually everything a lawyer does is "conduct related to the practice of law."[62] Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Arguably, the rule includes all of a lawyer's "business or social activities" because there is no real way to delineate between those "business or social activities" that are related to the practice of law and those that are not. Quite simply, much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

Activities likely to fall within the proposed ABA Model Rule 8.4(g)'s scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds
- giving guest lectures at law school classes
- granting media interviews
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to nonprofits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- testifying before a legislative body
- writing a letter to one's government representatives
- serving one's congregation
- serving one's alma mater if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, and other vulnerable populations
- serving on the board of a fraternity or sorority
- volunteering with or working for political parties
- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues[63]

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[62] *See* Halaby & Long, *supra* note 5, at 226 ("The proposed comment of Version 3 expanded the ambit of 'conduct related to the practice of law' to include virtually anything a working lawyer might do.")

[63] Tex. Att'y Gen. Op., *supra*, note 37, at 3 ("Given the broad nature of this rule, a court could apply it to an attorney's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event."); La. Att'y Gen. Op., *supra*, note 39, at 6 ("[A] lawyer who is asked his

ABA Model Rule 8.4(g) would make a lawyer subject to disciplinary liability for a host of expressive activities. At bottom, ABA Model Rule 8.4(g) has a "fundamental defect," which is that "it wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech."[64]

2. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their congregations, religious schools and colleges, or other religious ministries.

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious ministries. These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. These ministries also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform marriages or whether it will host receptions for weddings that are contrary to its religious beliefs. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not fear being disciplined for volunteer legal work she performs for her church or her alma mater.[65]

By chilling attorneys' speech, the Rule is likely to do real harm to religious institutions and their good works in their communities. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law," yet ABA Model Rule 8.4(g) creates such a concern.[66] Because ABA Model Rule 8.4(g) seems to prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyers' free speech and free exercise of religion when serving their congregations and religious institutions.

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opinions, thoughts, or impressions on legal matters taking place in the news at a social function could also be found to be engaged in conduct related to the practice of law.").

[64] Tenn. Att'y Gen. Letter, *supra*, note 15, at 2. *See id.* at 10 ("[T]he goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.")(Emphasis in original.)

[65] Tenn. Att'y Gen. Letter, *supra*, note 15, at 8 n.8 ("statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization" "could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)").

[66] Tex. Att'y Gen. Op., *supra*, note 37, at 4 ("Model Rule 8.4(g) could also be applied to restrict an attorney's religious liberty and prohibit an attorney from zealously representing faith-based groups.")

3. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline.

Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues. Their commentary is sought by the media regarding controversial issues in their community, state, and nation.

Of course, lawyers are asked to speak *because they are lawyers*. And a lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Writing -- "Verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar? Must lawyers forgo media interviews on topics about which they have some particularly insightful comments because anyone hearing the interview could file a complaint if offended? If so, public discourse and civil society will suffer from the ideological paralysis that ABA Model Rule 8.4(g) will impose on lawyers.

Speaking -- It would seem that all public speaking by lawyers on legal issues falls within ABA Model Rule 8.4(g)'s prohibition. But even if some public speaking were to fall outside the parameters of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various protected characteristics in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in proposed ABA Model Rule 8.4(g)? What if she testifies for adding all protected categories but urges that a religious exemption be included in the legislation? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

The Rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. As a state attorney general recently advised:

> Even if the [Board of Professional Responsibility] may ultimately decide not to impose disciplinary sanctions on the basis of such

> speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place.[67]

Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, ABA Model Rule 8.4(g) threatens to suffocate attorneys' speech.

4. Attorneys' membership in religious, social, or political organizations would be subject to discipline.

ABA Model Rule 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, cultural, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibits all California state judges from participating in Boy Scouts because of the organization's teaching regarding sexual conduct.[68]

Would proposed ABA Model Rule 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

Proposed ABA Model Rule 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or numerous other religious beliefs implicated by proposed ABA Model Rule 8.4(g).

Professor Rotunda and Professor Dzienkowski have expressed concern that ABA Model Rule 8.4(g) would subject lawyers to discipline for attending events sponsored by the St. Thomas More Society, an organization of Catholic lawyers and judges who meet together to share their faith. Attending the Red Mass, an annual mass held by the Catholic Church for lawyers, judges, law professors, and law students, could be deemed conduct related to the practice of law that runs afoul of the Rule because of the Catholic Church's limitation of the priesthood to males, its opposition to abortion, or its teachings regarding marriage, sexual conduct, or sexual identity.[69]

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[67] Tenn. Att'y Gen. Letter, *supra*, note 15, at 8.
[68] Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, http://www.courts.ca.gov/documents/sc15-Jan_23.pdf (last visited May 2, 2018).
[69] Rotunda & Dzienkowski, *supra*, note 4, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

The Tennessee, Texas, and Louisiana Attorneys General expressed similar concerns.[70] The Tennessee Attorney General warned that "serving as a member of the board of a religious organization, participating in groups such as the Christian Legal Society, or even speaking about how one's religious beliefs influence one's work as an attorney" could "be deemed conduct 'related to the practice of law.'"[71] Furthermore, ABA Model Rule 8.4(g) "is far broader than Rule 3.6 of the Code of Judicial Conduct" because Rule 3.6's Comment [4] clarifies that a judge's membership in a religious organization does not violate the rule.[72] Arizona similarly has an exception for judges' membership in a religious organization.[73] By contrast, ABA Model Rule 8.4(g) "contains no exception for membership in a religious organization."[74]

B. ABA Model Rule 8.4(g) Would Institutionalize Viewpoint Discrimination Against Many Lawyers' Public Speech on Current Political, Social, Religious, and Cultural Issues.

1. ABA Model Rule 8.4(g) on its face discriminates on the basis of viewpoint.

As seen in its Comment [4], ABA Model Rule 8.4(g) would explicitly protect some viewpoints over others by allowing lawyers to "engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations."[75] Because "conduct" includes "verbal conduct," the proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not.

That is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he government must abstain from regulating speech when the specific motivating

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[70] Tex. Att'y Gen. Op., *supra*, note 37, at 5 ("Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline."); La. Att'y Gen. Op., *supra*, note 39, at 6 ("Proposed 8.4(h) could apply to many of the faith-based legal societies such as the Christian Legal Society, Jewish Legal Society, and Muslim Legal Society.")

[71] Tenn. Att'y Gen. Letter, *supra*, note 15, at 10.

[72] *Id.* at 9.

[73] "A judge's membership or participation in a religious organization as a lawful exercise of the freedom of religion, or a judge's membership or participation in an organization that engages in expressive activity from which the judge cannot be excluded consistent with the judge's lawful exercise of his or her freedom of expression or association, is not a violation of this rule." Ariz. Sup. Ct. Rule 81, Code of Judicial Conduct Rule 3.6(C).

[74] Tenn. Att'y Gen. Letter, *supra*, note 15, at 9.

[75] Halaby and Long make the important point that "the terms 'diversity' and 'inclusion' themselves were left undefined" which creates a "quandary that the proponents of the model rule change left for those who might be asked to implement and enforce it in a real world lawyer discipline setting." Halaby & Long, *supra*, note 5, at 240.

ideology or the opinion or perspective of the speaker is the rationale for the restriction."[76] Yet proposed ABA Model Rule 8.4(g) explicitly promotes one viewpoint over others.[77]

Even more importantly, whether speech or action does or does not "promote diversity and inclusion" depends on the beholder's subjective beliefs. Where one person sees inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of uniformity.

Because enforcement of ABA Model Rule 8.4(g) gives government officials unbridled discretion to determine which speech is permissible and which is impermissible, which speech "promote[s] diversity and inclusion" and which does not, the rule clearly countenances viewpoint discrimination based on government officials' subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens' free speech is unconstitutional viewpoint discrimination.[78]

For that reason, the "most exacting level of scrutiny would apply to Proposed Rule 8.4(g) because it regulates speech and expressive conduct that is entitled to full First Amendment protection based on viewpoint."[79]

2. The ABA Model Rule 8.4(g)'s definition of "harassment" is viewpoint discriminatory, as illustrated most recently by the United States Supreme Court's decision in *Matal v. Tam* in 2017.

In its Comment [3], ABA Model Rule 8.4(g) defines "harassment" to include "derogatory or demeaning verbal . . . conduct." This definition of "harassment" departs from the United States Supreme Court's much narrower definition of "harassment" as "harassment that is so *severe, pervasive, and objectively offensive* that it effectively bars the victim's access to an educational opportunity or benefit."[80] For that reason alone, its definition of "harassment" diminishes the likelihood that ABA Model Rule 8.4(g) can survive either a facial or an as-applied challenge to its unconstitutional vagueness under the Fourteenth Amendment or its restriction on free speech under the First Amendment.

Note that Arizona's current Comment [3] with its requirement that the professional misconduct be "prejudicial to the administration of justice" aligns with the Supreme Court's

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[76] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).
[77] Rotunda & Dzienkowski, *supra* note 4, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (noting that lawyers who belong to a religious "organization that opposes gay marriage . . . can face problems. If they belong to one that favors gay marriage, then they are home free.").
[78] *See, e.g., Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).
[79] Tenn. Att'y Gen. Letter, *supra*, note 15, at 5, citing *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011).
[80] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (emphasis added).

requirement that, to be harassment, conduct must "effectively bar[] the victim's access to an educational opportunity or benefit." Unfortunately, ABA Model Rule 8.4(g) eliminates the previous requirement that conduct be "prejudicial to the administration of justice" if it is to be subject to discipline.

Of course, the consequences of disciplinary action against an attorney are too great to leave the definition of "harass" so open-ended and subjective. "Harassment" should not reside "in the eye of the beholder," whether the beholder be the attorney or the alleged victim of harassment, but instead should be determined by an objective standard, as provided by the United States Supreme Court.

The need for an objective definition of "harassment" is apparent in the courts' uniform rejection of university speech codes over the past two decades. The courts have found that speech codes violate freedom of speech because their "harassment" proscriptions are overbroad and unacceptably increase the risk of viewpoint discrimination. [81] For example, the Third Circuit struck down a campus speech policy "[b]ecause overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination." Quoting then-Judge Alito, the court wrote:

> "Harassing" or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "[i]f 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 offensive or disagreeable."[82]

Finally, ABA Model Rule 8.4(g) was drafted without the benefit of the United States Supreme Court's recent decision in *Matal v. Tam.*[83] There the *unanimous* Court held that the long-established use of a prominent federal law to deny trademarks for terms that were "derogatory or offensive," even on racial or ethnic grounds, was unconstitutional viewpoint discrimination.[84]

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[81] *See, e.g., McCauley v. Univ. of V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Blair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, 1998 WL 35867183 (E.D. Ky. 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989).
[82] *DeJohn v. Temple Univ.*, 537 F.3d 301, 313-314 (3d Cir. 2008), *quoting Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001), *quoting Texas v. Johnson*, 491 U.S. 397, 414 (1989)).
[83] 137 U.S. 1744 (2017).
[84] *Id.* at 1754, 1765.

In his concurrence, which was joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, Justice Kennedy explained that it was unconstitutional viewpoint discrimination for a government agency to penalize speech that it deemed to be "derogatory":

> At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as "persons, living or dead, institutions, beliefs, or national symbols." Within that category, an applicant may register a positive or benign mark but not a *derogatory* one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.[85]

C. Who determines whether advocacy is "legitimate" or "illegitimate" under proposed ABA Model Rule 8.4(g)?

ABA Model Rule 8.4(g) cursorily states that it "does not preclude *legitimate* advice or advocacy *consistent with these rules*." But the qualifying phrase "consistent with these rules" makes ABA Model Rule 8.4(g) utterly circular. Like the proverbial dog chasing its tail, ABA Model Rule 8.4(g) protects "legitimate advice or advocacy" only if it is "consistent with" ABA Model Rule 8.4(g). That is, speech is permitted by ABA Model Rule 8.4(g) if it is permitted by ABA Model Rule 8.4(g).

The epitome of an unconstitutionally vague rule, ABA Model Rule 8.4(g) violates the Fourteenth Amendment as well as the First Amendment. Again, who decides which speech is "legitimate" and which speech is "illegitimate"? By what standards? By whose standards?

"In fact, the proposed rule would effectively require enforcement authorities to be guided by their 'personal predilections' because whether a statement is 'harmful' or 'derogatory or demeaning' depends on the subjective reaction of the listener. Especially in today's climate, those subjective reactions can vary widely."[86]

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[85] *Id.* at 1766 (citations omitted) (emphasis added). The Tennessee Attorney General similarly relied on *Matal* for the proposition that "'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" Tenn. Att'y Gen. Letter, *supra*, note 15, at 6, *quoting Matal*, 137 S. Ct. at 1763; and *citing, Brown*, 564 U.S. at 791, 790 (noting that "disgust is not a valid basis for restricting expression"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting . . . ."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991)("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (internal quotation marks omitted))."

[86] Tenn. Att'y Gen. Letter, *supra*, at note 15, at 9 (citation and explanatory parenthetical omitted). *See id.* ("The lack of clarity in Proposed Rule 8.4(g)'s terms creates a substantial risk that determinations about whether expression is

As Halaby and Long note in their survey of the Rule's many problems, "the word 'legitimate' cries for definition."[87] Indeed, "one difficulty with the 'legitimate' qualifier" is that "lawyers need to make the arguments in order to change the law, yet the new model rule obstructs novel legal arguments." [88] This is particularly true when "the subject matter is socially, culturally, and politically sensitive."[89]

It is not good for the profession, or for a robust civil society, for lawyers to be potentially subject to disciplinary action every time they speak or write on a topic that may cause someone who disagrees to file a disciplinary complaint to silence them.

V. ABA Model Rule 8.4(g)'s Threat to Free Speech is Compounded by the Fact that It Adopts a Negligence Standard rather than a Knowledge Requirement.

The lack of a knowledge requirement is one of the Rule's most serious flaws: "[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way."[90]

Professor Dane Ciolino, an ethics law professor at Loyola University New Orleans College of Law, has explained:

> [ABA Model Rule 8.4(g)] subjects to discipline not only a lawyer who *knowingly* engages in harassment or discrimination, but also a lawyer who *negligently* utters a derogatory or demeaning comment. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the objectively reasonable lawyer' will be constructed for purposes of making this determination.[91]

3. "[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to

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prohibited will be guided by the 'personal predilections' of enforcement authorities rather than the text of the rule. *Kolender v. Lawson*, 461 U.S. 352, 356 (1983) (internal quotation marks omitted).") *See also, id.* at 10 ("[T]he [Board of Professional Responsibility] would presumably get to draw the line between legitimate and illegitimate advocacy, creating a further risk that advocacy of controversial or politically incorrect positions would be deemed harassment or discrimination that constitutes professional misconduct.")

[87] Halaby & Long, *supra*, note 5, at 237.

[88] *Id.* at 238.

[89] *Id.*

[90] Tenn. Att'y Gen. Letter, *supra*, at note 15, at 5. *See* Halaby & Long, *supra*, note 5, at 243-245.

[91] Prof. Dane S. Ciolino, "LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct," *Louisiana Legal Ethics*, Aug. 6, 2017 (emphasis in original), https://lalegalethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/ (last visited May 2, 2018).

> be or intended as harassing or discriminatory, simply because someone might construe it that way."[92]

Similarly, the Disciplinary Board of the Supreme Court of Pennsylvania criticized ABA Model Rule 8.4(g) because:

> The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.[93]

VI. The Vermont Supreme Court has Interpreted ABA Model Rule 8.4(g) as Limiting a Lawyer's Ability to Accept, Decline, or Withdraw from a Representation in Accordance with Rule 1.16.

The proponents of ABA Rule 8.4(g) generally claim that it will not affect a lawyer's ability to refuse to represent a client. They point to the language in the Rule that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16." But as Professor Rotunda and Professor Dzienkowski explain, Rule 1.16 actually "deals with when a lawyer must or may *reject* a client or *withdraw* from representation."[94] Rule 1.16 does not address *accepting* clients. The Tennessee Attorney General similarly suggests that "[a]n attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g)."[95]

In the one state to have adopted ABA Model Rule 8.4(g), the Vermont Supreme Court explained in its accompanying Comment [4] that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." It further explained that, under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)."[96]

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that "[a] lawyer is under no obligation to accept every person who may wish to become a client *unless the refusal to accept a person amounts to*

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[92] *Id.* at 5.
[93] The Pennsylvania Bulletin, *supra*, note 46.
[94] Rotunda & Dzienkowski, *supra*, note 4, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis supplied by the authors).
[95] Tenn. Att'y Gen. Letter, *supra*, note 15, at 11.
[96] Vermont Supreme Court, *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, July 14, 2017, at 3, https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf.

unlawful discrimination."[97] The facts before the Committee were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of "unlawful discrimination" for purposes of New York's Rule 8.4(g) a question of law beyond its jurisdiction, the Committee declined to "opine on whether a lawyer's refusal to represent a prospective client in a suit against the lawyer's own religious institution constitutes 'unlawful discrimination'" for purposes of New York's Rule 8.4(g).[98]

In *Stropnicky v. Nathanson*,[99] the Massachusetts Commission Against Discrimination found a law firm that specialized in representing women in divorce cases had violated state nondiscrimination law when it refused to represent a man.[100] As these examples demonstrate, reasonable doubt exists that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation.

VII. Grave Reservations Exist Regarding Whether State Bars Should Be Tribunals of First Resort for Employment and Other Discrimination and Harassment Claims Against Attorneys and Law Firms.

The Disciplinary Board of the Supreme Court of Pennsylvania identified two defects of ABA Model Rule 8.4(g). The first was the rule's "potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers."[101] The second defect was that "after careful review and consideration … the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities."[102]

Model Rule 8.4(g) generates many new concerns. Increased demand may drain the limited resources of the state bar if it becomes the tribunal of first resort for discrimination and harassment claims against lawyers. Serious questions arise about the evidentiary or preclusive effects that a state bar proceeding might have on other tribunals' proceedings. State bar tribunals have their own rules of procedure and evidence that may be significantly different from state and federal court rules. Often, discovery is more limited in bar proceedings than in civil court. And, of course, there is no right to a jury trial in state bar proceedings.

An attorney may be disciplined regardless of whether her conduct is a violation of any other law. Professor Rotunda and Professor Dzienkowski warn that Rule 8.4(g) "may discipline

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[97] NY Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).
[98] *Id.* New York's Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is narrower.
[99] 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003).
[100] Rotunda & Dzienkowski, *supra*, note 4, *in* "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."
[101] The Pennsylvania Bulletin, *supra*, note 46.
[102] *Id.*

the lawyer who does not violate any statute or regulation [except Rule 8.4(g)] dealing with discrimination."[103] Nor is "an allegedly injured party [required] to first invoke the civil legal system" before a lawyer can be charged with discrimination or harassment.[104]

The threat of a complaint under Model Rule 8.4(g) could also be used as leverage in other civil disputes between a lawyer and a former client. Model Rule 8.4(g) even may be the basis of a private right of action against an attorney. Professor Rotunda and Professor Dzienkowski note this risk:

> If lawyers do not follow this proposed Rule, they risk discipline (e.g., disbarment, or suspension from the practice of law). In addition, Courts enforce the Rules in the course of litigation (e.g., sanctions, disqualification). Courts also routinely imply private rights of action from violation of the Rules – malpractice and tort suits by third parties (non-clients).[105]

Unsurprisingly, Professor Rotunda and Professor Dzienkowski disagree with the Rule's proponents that lawyers "should rely on prosecutorial discretion because disciplinary boards do not have the resources to prosecute every violation." As discussed *supra* at pp. 23-27, "[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas."[106]

A lawyer's loss of his or her license to practice law is a staggering penalty and demands a stringent process, one in which the standards for enforcement are clear and respectful of the attorneys' rights, as well as the rights of others. Arizona's current Comment [3] that accompanies Rule 8.4(d) already provides a carefully crafted balance that works.

Conclusion

Lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts in their social activities, their workplaces, and the public square without fear of losing their license to practice law. Because ABA Model Rule 8.4(g) would drastically curtail lawyers' freedom to express their viewpoints on political, social, religious, and cultural issues, this Court should reject the National Lawyers Guild's Petition.

For all the reasons discussed above, this Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out if it is adopted and implemented in other states. There is no reason to make Arizona attorneys

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[103] Rotunda & Dzienkowski, *supra*, note 4 (parenthetical in original).
[104] *Id.*
[105] *Id.*
[106] *Id.*

laboratory subjects in the ill-conceived experiment that ABA Model Rule 8.4(g) represents. This is particularly true when sensible alternatives are readily available, such as waiting to see whether any other states (other than Vermont) adopt ABA Model Rule 8.4(g), and observing its impact on attorneys in those states. A decision to reject ABA Model Rule 8.4(g) can always be revisited after other states have served as its testing ground.

Christian Legal Society thanks the Court for holding this public comment period and considering these comments.

Respectfully submitted,

/s/ David Nammo

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The Honorable Scott Bales, Chief Justice
The Honorable Robert M. Brutinel, Vice Chief Justice
The Honorable John Pelander, Justice
The Honorable Ann A. Scott Timmer, Justice
The Honorable Clint Bolick, Justice
The Honorable John R. Lopez, Justice
The Honorable Andrew Gould, Justice
The Arizona Supreme Court
1501 W. Washington St., Room 402 Phoenix, Arizona 85007

Attn: Clerk of the Supreme Court

May 17, 2018

Dear Chief Justice Bales, Vice Chief Justice Brutinel, Justice Pelander, Justice Timmer, Justice Bolick, Justice Lopez, and Justice Gould:

This comment letter is filed pursuant to this Court's Order of January 18, 2018, soliciting public comment on Petition R-17-0032. In its petition, the National Lawyers Guild, Central Arizona Chapter, urges this Court to amend Rule 42, ER 8.4, by adopting ABA Model Rule 8.4(g).

This proposed rule raises significant First Amendment issues. Rule 8.4(g) has an unprecedented scope. It disfavors the expression of certain viewpoints in forums completely disconnected with the servicing of clients or provision of legal services. I explain these arguments at length in my recently-published article in Volume 30 of the GEORGETOWN JOURNAL OF LEGAL ETHICS, titled *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law*." For your convenience, I have enclosed a copy of the article, which can also be downloaded at https://ssrn.com/abstract=2888204.

This article has been useful to deliberations in other states. For example, the Tennessee Bar Association adopted several of my proposals to address the First Amendment problems raised by a modified version of Rule 8.4(g).[1] Ultimately, the Tennessee Supreme Court rejected the rule altogether.[2] I recommend the same course of conduct for Arizona.

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[1] Mindy Rattan, Tennessee Again Rejects Anti-Discrimination Ethics Rule, Bloomberg BNA (May 1, 2018), https://www.bna.com/tennessee-again-rejects-n57982091727/ ("In response to the comments, particularly those from Blackman, the board and Tennessee bar proposed modifications to the revised Rule 8.4(g) on the day the public comment period closed. Those revisions focused on trying to avoid confusion and clarify the legitimate advocacy exception and that the rule does not apply to conduct protected by the First Amendment.").
[2] *Id.*

Over the past two decades, nearly three dozen jurisdictions have amended their local version of Rule 8.4 to prohibit discrimination, harassment, or other forms of bias against specifically defined groups. With few exceptions, these rules *only* govern conduct within the three heads of conduct reached by Rule 8.4(a)–(f). First, the narrowest category regulated bias *during the representation of a client* or *in the practice of law*. This standard is set by fifteen states in their rules, and ten states in their comments. Second, a far broader standard regulates bias that implicates a *lawyer's fitness to practice law*, whether or not it occurs in the practice of law. Only two states impose this standard in their rules. Third, the broadest, most nebulous standard at issue prohibits bias that would *prejudice the administration of justice*. This standard, which can reach conduct entirely outside the client-lawyer relationship or the practice of law, is imposed by seven states. None of these jurisdictions provide a precedent for the Rule 8.4(g).

Three jurisdictions have adopted far broader scopes to their anti-bias provisions. First, Indiana regulates such misconduct when "engage[d] . . . in a professional capacity." Second and third, Washington state and Wisconsin both regulate such misconduct that is committed "in connection with the lawyer's professional activities." None of these rules define "professional capacity" or "professional activities." Yet, these three provisions still have a concrete nexus to delivering legal services, and do not purport to reach "social activities," such as bar-sponsored dinners that are merely "connected with the practice of law." Rule 8.4(g) is unprecedented in its scope. Efforts to cite precedents from these states as evidence that Rule 8.4(g) would not censor protected speech are unavailing. Because they are far more circumscribed, it is unsurprising that they have not given rise to litigation.

To avoid the chilling, and potential infringement, of protected free speech, the Arizona Supreme Court should deny the petition. It would be my pleasure to provide any further insights to inform your deliberations.

Sincerely,

Josh Blackman
Associate Professor
South Texas College of Law Houston

Reply: A Pause for State Courts Considering Model Rule 8.4(g)

The First Amendment and "Conduct Related to the Practice of Law"

JOSH BLACKMAN*

ABSTRACT

In August 2016, the American Bar Association approved Model Rule of Professional Conduct 8.4(g). Under the amendment, it is misconduct for an attorney 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." Comment [4] explains that "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." The Model Rule is just that—a model, which does not apply in any jurisdiction. Now the project goes to the states, as state courts consider whether to adopt Rule 8.4(g).

Professor Stephen Gillers analyzes the new provision in this Issue with A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g). *This reply urges state courts to pause before adopting Rule 8.4(g) in light of its First Amendment implications.*

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* Associate Professor, South Texas College of Law, Houston. I am grateful to Scott H. Greenfield, Michael K. Krauss, and Ronald D. Rotunda, for their assistance with this Article.

INTRODUCTION

In August 2016, the American Bar Association (ABA) approved Model Rule of Professional Conduct 8.4(g). Under the amendment, it is misconduct for an attorney 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."[1] Comment [4] explains that:

> 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.[2]

The model rule is just that—a model that does not apply in any jurisdiction. Now the project goes to the states, as state courts consider whether to adopt Rule 8.4(g).

Professor Stephen Gillers analyzes the new provision in this Issue with *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts*

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1. STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY ET AL., REPORT TO THE HOUSE OF DELEGATES 1 (Aug. 8, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [https://perma.cc/K2XB-T76E] [hereinafter 2016 ABA REPORT].

2. *Id.* at 2.

Considering Model Rule 8.4(g).[3] This reply urges state courts to pause before adopting Rule 8.4(g) in light of its First Amendment implications. (Professor Gillers was given an opportunity to reply to my Article, but declined to do so.)[4]

Part I focuses on how Rule 8.4(g) extends a disciplinary committee's jurisdiction to "conduct related to the practice of law" for speech that can be deemed "harassment." Lectures given at CLE events, or dinner-time conversation at a bar association function, would now be subject to discipline if the speaker reasonably should know someone would find it "derogatory." The threat of sanction will inevitably chill speech on matters of public concern. Neither the rule nor its comments express any awareness of this novel intrusion into the private spheres of an attorney's professional life.

Part II compares the operation of Rule 8.4(g) with previous ABA model rules, as well as state-adopted anti-bias regimes. Rule 8.4(g) is unprecedented, as it extends a disciplinary committee's jurisdiction to conduct merely "related to the practice of law," with only the most tenuous connection to representation of clients, a lawyer's fitness, or the administration of justice.

Part III discusses Rule 8.4(g)'s chilling effects. Though courts have generally upheld the regulation of attorney speech in the context of the practice of law, as the expression becomes more attenuated from the bar association's traditional purposes, the state interest becomes far less compelling. In this sense, past precedents upholding disciplinary actions for attorney speech are largely unhelpful. Rule 8.4(g) sweeps in a vast amount of speech on matters of public concern, and imposes an unlawful form of viewpoint discrimination. At bottom, the defenders of the model rule can only urge us to trust the disciplinary committees. The First Amendment demands more. This Article concludes by offering three simple tweaks to the comments accompanying Rule 8.4(g) that would still serve the drafters' purposes, but provide stronger protection for free speech.

I. MODEL RULE 8.4(G)

Rule 8.4(g)'s overarching purpose was to eliminate discrimination and harassment in "conduct related to the practice of law." Part I analyzes how the rule's design to eradicate "verbal" harassment sweeps in vast amounts of speech protected by the First Amendment.

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3. Professor Gillers notes his personal connection with the promulgation of the rule. Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 197 n.2 (2017) ("My wife, Barbara S. Gillers, was a member of the Standing Committee on Ethics and Professional Responsibility, the sponsor of the amendment. I say this in the spirit of full disclosure.").

4. *See id.* at 195 n.*.

A. "CONDUCT RELATED TO THE PRACTICE OF LAW"

Rule 8.4(g)'s drafters were well intentioned. During a two-hour hearing held in February 2016, several witnesses expressed their concerns about sexual harassment that occurs during the practice of law, and in particular at after-hours social functions.[5] Attorney Wendi Lazar of New York, for example, acknowledged that "no one wants to engage in the . . . private aspects of a lawyer['s]," life, but stressed that she was "concerned that so much sexual harassment and bullying against women actually takes place on the way home from an event or in a limo traveling on the way back from a long day of litigation."[6] Ms. Lazar explained "that to say that these events are *social events* as opposed to professional events is" not accurate, as a more narrow definition would allow misconduct to go unpunished.[7]

Laurel Bellows, a past president of the ABA, offered anecdotes of sexual harassment occurring at a "Christmas party," or when a male partner asks a female associate to "dinner after the deposition is over," followed by a "social invitation" to "come to my room."[8] Ms. Bellows asked, rhetorically, "[i]s that in relation to the practice of law?" She suggested that the rule should govern conduct that is more than "simply related to the *technical* practice of law." The ABA's report, justifying the final version of Rule 8.4(g), cited the "substantial anecdotal information" provided to the Standing Committee of "sexual harassment" at "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law."[9] Read against this history, Rule 8.4(g) and comment [4] were crafted to allow disciplinary boards to punish lawyers who engage in sexual harassment at social activities that are not strictly connected with the attorney-client relationship or the operation of a law practice.

B. "HARASSMENT"

Rule 8.4(g) and comment [4], however, accomplish far, far more than punishing sexual harassment.[10] As a threshold matter, the rule does not proscribe only sexual harassment, but it also extends to the far broader category of

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5. *See* ABA House of Delegates, Tr. of Proceedings, Feb. 7, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.pdf [https://perma.cc/WNZ3-BA4Y] [hereinafter 2016 ABA HOD Proceedings].

6. *Id.* at 39.

7. *Id.* at 42.

8. *Id.* at 62.

9. 2016 ABA REPORT, *supra* note 1, at 11.

10. Joseph J. Martins, a law professor at Liberty University, submitted a comment addressing the likely unintended consequences of this rule. "The overbreadth and vagueness of the draft language imperils First Amendment liberties and the right to practice law itself. I cannot imagine this was the intent of the Committee, but the language of the proposed amendments leads me to this conclusion nonetheless." Joseph J. Martins, *Re: Proposed ABA Model Rule of Professional Conduct 8.4(g) and Comment [3]* (Mar. 11, 2016), http://www.

"harassment," which comment [3] defines to include "derogatory or demeaning verbal . . . conduct." Black's Law Dictionary defines "demeaning" as "[e]xhibiting less respect for a person or a group of people than they deserve, or causing them to feel embarrassed, ashamed, or scorned."[11] "Derogatory," not included in Black's, is defined by the Oxford Living Dictionary as "[s]howing a critical or disrespectful attitude."[12] Random House defines "derogatory" as "tending to lessen the merit or reputation of a person or thing; disparaging; depreciatory."[13] In the abstract, speech that satisfies *any* of these definitions is entirely protected by the First Amendment, and does not fall into any of the special exceptions to free speech, such a "fighting words" or "incitement."[14] As then-Judge Alito observed, there is no "categorical harassment exception" to the First Amendment.[15]

The courts have generally permitted the imposition of damages for verbal—that is, non-physical—sexual harassment in the employment context so long as the speech was so "severe or pervasive" that it created an "offensive work environment."[16] While comment [3] to Model Rule 8.4(g) explains that the "substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g),"[17] it does not impose a requirement of severity or pervasiveness. A single "harassing" comment could result in

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americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/martins_3_11_16.authcheckdam.pdf [https://perma.cc/SW9N-YPLW].

11. *Demeaning*, BLACK'S LAW DICTIONARY (10th ed. 2014).

12. *Derogatory*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/derogatory [https://perma.cc/U28W-PXB8] (last visited Apr. 20, 2017).

13. *Derogatory*, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1998).

14. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 791 (2011) ("These limited areas—such as obscenity, incitement, and fighting words—represent 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'") (citations omitted).

15. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001). It is worth noting that there is much uncertainty in the law concerning how the First Amendment limits hostile environment law; these laws may not be constitutional in the first instance. *See* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596–97 (5th Cir. 1995) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment . . . . Whether such applications of Title VII are necessarily unconstitutional has not yet been fully explored. The Supreme Court's offhand pronouncements are unilluminating.") (citations omitted). For purposes of this analysis of Rule 8.4(g), I will assume such a regime that polices verbal harassment, as distinguished from sexual harassment or discrimination, is constitutional. If it is not, then no tweaks will save the model rule from facial invalidation.

16. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 787–88 (1998) ("[I]n order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' Most recently, we explained that Title VII does not prohibit 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.' A recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (citations omitted).

17. 2016 ABA REPORT, *supra* note 1, at 2.

discipline. Further, the rule expressly extends beyond the work environment. Rule 8.4(g) and comment [4] provide a near-infinite number of fora where speech can be give rise to discipline.

Lectures and debates hosted by bar associations that offer Continuing Legal Education (CLE) credits are necessarily held "in connection with the practice of law." Lawyers are required to attend such classes to maintain their law licenses. It is not difficult to imagine how certain topics could reasonably be found by attendees to be "derogatory or demeaning" on the basis of one of the eleven protected classes in Rule 8.4(g). Consider several examples:

- *Race*—A speaker discusses "mismatch theory," and contends that race-based affirmative action should be banned because it hurts minority students by placing them in education settings where they have a lower chance of success.
- *Gender*—A speaker argues that women should not be eligible for combat duty in the military, and should continue to be excluded from the selective service requirements.
- *Religion*—A speaker states that the owners of a for-profit corporation who request a religious exemption from the contraceptive mandate are bigoted and misogynistic.
- *National Origin*—A speaker contends that the plenary power doctrine permits the government to exclude aliens from certain countries that are deemed dangerous.
- *Ethnicity*—A speaker states that *Korematsu v. United States* was correctly decided, and that during times of war, the President should be able to exclude individuals based on their ethnicity.
- *Disability*—A speaker explains that people with mental handicaps should be eligible for the death penalty.
- *Age*—A speaker argues that minors convicted of murder can constitutionally be sentenced to life without parole.
- *Sexual Orientation*—A speaker contends that *Obergefell v. Hodges* was incorrectly decided, and that the Fourteenth Amendment does not prohibit classifications on the basis of sexual orientation.
- *Gender Identity*—A speaker states that Title IX cannot be read to prohibit discrimination on the basis of gender identity, and that students should be assigned to bathrooms based on their biological sex.
- *Marital Status*—A speaker remarks over dinner that unmarried attorneys are better candidates for law firms because they will be able to dedicate more time to the practice.
- *Socioeconomic Status*—A speaker posits that low-income individuals who receive public assistance should be subject to mandatory drug testing.

For each topic—chosen for its deliberate provocativeness—a speaker "reasonably should know" that someone at the event could find the remarks disparaging

towards one of the eleven protected groups. A person whose marriage was legalized by *Obergefell*, or who gained access to a bathroom of choice under an interpretation of Title IX, or who immigrated from a country subject to an immigration ban, or who was admitted to college under an affirmative action plan, could plausibly feel demeaned by such arguments. Lest you think these charges are implausible, consider the tempestuous reaction to Justice Scalia's discussion of mismatch theory during oral arguments in *Fisher v. University of Texas at Austin*.[18] CLE lectures on any of these eleven topics would each be entirely protected by the First Amendment, yet could still give rise to liability under Rule 8.4(g). These eleven examples should reveal another fairly obvious result: speech on the right side of the political spectrum would disproportionately give rise to liability.[19] We will return to this unconstitutional form of viewpoint discrimination in Part III.

Further, comment [4] provides an even greater number of fora that could be deemed "connected to the practice of law." For example, dinners hosted by bar associations or similar legal groups, such as the Federalist Society or the NAACP, are "social activities" with a connection to the practice of law. If any of these eleven topics were discussed at the dinner table of such events, an attendee who felt demeaned could file a bar complaint.[20]

Additionally, teaching a law school class could be deemed "conduct related to the practice of law," as in virtually all states, attending an accredited law school is a prerequisite to becoming an attorney. The report accompanying the final

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18. *See, e.g.*, Stephen Dinan, *Scalia Accused of Embracing 'Racist' Ideas for Suggesting 'Lesser' Schools for Blacks*, WASH. TIMES (Dec. 10, 2015), http://www.washingtontimes.com/news/2015/dec/10/antonin-scalia-accused-of-embracing-racist-ideas-f/ [https://perma.cc/V6CX-DWHY]; Lauren French, *Pelosi: Scalia Should Recuse Himself from Discrimination Cases*, POLITICO (Dec. 11, 2015, 12:56 PM), http://www.politico.com/story/2015/12/nancy-pelosi-antonin-scalia-216680 [https://perma.cc/BCL5-VGWY]; Joe Patrice, *Scientists Agree: Justice Scalia Is a Racist Idiot*, ABOVE THE LAW (Dec. 14, 2015, 9:58 AM), http://abovethelaw.com/2015/12/scientists-agree-justice-scalia-is-a-racist-idiot/ [https://perma.cc/9GA8-2NGT]; David Savage, *Justice Scalia Under Fire for Race Comments During Affirmative Action Argument*, L.A. TIMES (Dec. 10, 2015, 2:40 PM), http://www.latimes.com/nation/la-na-scalia-race-20151210-story.html [https://perma.cc/U3T2-CBAE]; Debra Cassens Weiss, *Was Scalia's Comment Racist?*, A.B.A. J. (Dec. 10, 2015, 7:32 AM), http://www.abajournal.com/news/article/was_scalias_comment_racist_some_contend_blacks_may_do_better_at_slower_trac/ [https://perma.cc/G7DH-U5H3].

19. *See* Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities*, WASH. POST (Aug. 10, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2 [https://perma.cc/HEJ7-CLBH] ("And, of course, the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you're fine; if you express the contrary viewpoints, you're risking disciplinary action.").

20. *See id.* ("Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters—Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.").

resolution also discusses how "lawyers engage in mentoring."[21] In many cases, teaching embraces forms of "mentoring" that are connected to bar exam preparation. Admittedly, this reading of the rule is somewhat tenuous. However, speaking from personal experience, students in my classes from various walks of life have found offensive lectures on a host of these topics.[22] The prospect of a bar complaint, where the Associate Dean's response does not provide enough solace, could be appealing to aggrieved students. The important question is not whether a student's reaction is "reasonable," but whether a professor should "reasonably" know a student will be triggered by disrespectful speech.

The rule could even apply to an attorney speaking at career day at his child's Catholic school about the role of faith in the practice of law.[23] Whether or not such complaints lead to any disciplinary action, the threat of liability would chill speech during a CLE debate, over dinner, and in the classroom.

C. "PROTECTED BY THE FIRST AMENDMENT"

The most striking aspect of the adoption of Model Rule 8.4(g) is how little awareness the ABA expressed about the boundless scope of prohibited speech.[24] Neither the rule nor the comments even reference the First Amendment. Charitably, such concerns simply may not have been on the drafters' minds, as they focused primarily on "substantial anecdotal information" provided to the Standing Committee about sexual harassment at after-hours events. Addressing such misconduct, which would also violate well-established employment law, was their primary target. But there is reason to suspect that there was a deliberate effort to include otherwise-protected speech as well.

An earlier draft of comment [3] from December 2015 stressed that the rule "does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment."[25] The accompanying report "ma[d]e clear that a lawyer does retain a 'private sphere' where personal opinion, freedom of association, religious expression, and political speech is protected by the First

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21. 2016 ABA REPORT, *supra* note 1, at 10.

22. Josh Blackman, *My (Rejected) Proposal for the AALS President's Program on Diversity*, JOSH BLACKMAN'S BLOG (Nov. 15, 2016), http://joshblackman.com/blog/2016/11/15/my-rejected-proposal-for-the-aals-presidents-program-on-diversity-the-effect-of-model-rule-of-professional-conduct-8-4g-and-law-school-pedagogy-and-academic-freedom/ [https://perma.cc/ZSL3-8TQ3].

23. Lindsey Keiser, Note, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629, 637–38 (2015).

24. Gillers devotes two sentences, all descriptive, to the scope of the new 8.4(g). Gillers, *supra* note 3, at 219 ("Not only would this language apply to client matters that are not before a tribunal, such as negotiation or counseling, it would also apply to a lawyer's words or conduct toward others in his or her law office and at professional meetings or on bar committees. It would cover a lawyer who made unwelcome sexual overtures to a subordinate lawyer or a legal assistant.").

25. STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, AM. BAR ASS'N, NOTICE OF PUBLIC HEARING 14 (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.pdf [https://perma.cc/US3Z-F9BJ].

Amendment and not subject to the Rule."[26] The Standing Committee stressed that this provision "is a useful clarification," and "would appropriately address" some of the "possible First Amendment challenges" that may arise when "state court[s] adopted similar black letter provisions."[27] I wholeheartedly endorsed this analysis as I read through the rule's record chronologically.

Several comments that were supportive of Model Rule 8.4(g) praised the inclusion of this First Amendment proviso, as it assuaged concerns about possible constitutional infirmities. Myles Lynk, a member of the Standing Committee on Ethics and Professional Responsibility, endorsed comment [3]'s explicit reference to the First Amendment as "a useful clarification" that "avoid[s] other possible ambiguities."[28] The ABA's Standing Committee on Professional Discipline worried that even with this provision, the language was "overbroad," and questioned whether it "would withstand constitutional scrutiny" as it may "result in infringement upon lawyers' exercise of their First Amendment rights."[29] Other groups that opposed Rule 8.4(g), such as the Christian Legal Society, took little solace in this proviso, but appreciated its inclusion.

During the February 2016 hearing, however, Laurel Bellows, a past president of the ABA, took the opposite position. Including that provision, Bellows contended, would make it unduly difficult to mete out punishment because it "take[s] away" from the purpose of the rule.[30] She explained, "We know that the constitution governs," and the New York rule[31] "does not have any exception for conduct that might be protected by the First Amendment."[32] As a result, Bellows urged the Standing Committee to excise that provision.

Her argument is something of a non sequitur. New York Rule of Professional Conduct 8.4(g) applies only to the "practice of law," not "conduct related to the practice of law," and is limited to "discrimination," and not the more nebulous speech acts embraced by "harassment."[33] Attorneys, when engaged in the

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26. *Id.* at 5.

27. *Id.*

28. STANDING COMM. ON SEXUAL ORIENTATION & GENDER IDENTITY, AM. BAR ASS'N, PROPOSED AMENDMENT TO ABA MODEL RULE OF PROFESSIONAL CONDUCT 8.4, app. c (Feb. 7, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/sogi_comments_2_7_16.authcheckdam.pdf [https://perma.cc/Z76E-TNRC].

29. Letter from Arnold R. Rosenfeld, Chair, Am. Bar Ass'n Standing Comm. on Prof'l Discipline, to Myles V. Lynk, Chair, Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, at 4 (Oct. 8, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf [https://perma.cc/4UW4-RKB2].

30. *See* 2016 ABA HOD Proceedings, *supra* note 5, at 63.

31. N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) (2017) ("A lawyer or law firm shall not . . . unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation.").

32. 2016 ABA HOD Proceedings, *supra* note 5, at 63–64.

33. *Id.* at 39–40.

"practice of law," admittedly have severely constrained First Amendment rights. Ultimately, Bellows' position prevailed, and the proviso was *removed* in the second draft. Neither the final rule, nor the comments, nor the ratified report, makes any reference to the First Amendment.[34] This regrettable omission was deliberate.

II. ANTI-BIAS PROVISIONS BEFORE MODEL RULE 8.4(G)

The scope of Rule 8.4(g) is unprecedented in how far it goes beyond regulating conduct related to the practice of law, conduct related to a lawyer's fitness to practice, or conduct prejudicial to the administration of justice. Part II will analyze how Model Rules 8.4(a)–(f) operated before the amendment, and document how the states have narrowly tailored their anti-bias disciplinary provisions.

A. MISCONDUCT PROHIBITED BY THE MODEL RULES

The first seven sections of the *Model Rules of Professional Conduct* govern the responsibilities, duties, and restrictions on attorneys when they are practicing law or representing clients. Rules 1.0–1.18 define the various attributes of the client-lawyer relationship, including conflicts of interest and duties owed to clients. Rules 2.1–2.4 discuss the attorney's role as a counselor. Rules 3.1–3.9 prescribe an attorney's responsibilities as an advocate before tribunals and other fora. Rules 4.1–4.4 establish how an attorney must transact with people other than clients. Rules 5.1–5.7 govern an attorney's responsibilities as part of a law firm or association. Rules 6.1–6.5 center around an attorney's commitment to public service, including pro bono work. Rules 7.1–7.6 focus on how an attorney can convey information about legal services, such as through advertising to, and solicitation of, clients. If an attorney violates any of these rules, he or she is in violation of Rule 8.4(a).[35]

The remainder of Rule 8.4, however, governs conduct that is increasingly more attenuated from the actual practice of law. Rule 8.4(b) states that it is misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Not *all* criminal acts are misconduct—only those that "reflect[] adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." In a sense, white-collar crimes, more so than violent crimes, warrant this disapprobation. Rule 8.4(c)

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34. Gillers writes that an attorney "remains free to argue that as applied to his or her conduct the rule is unconstitutional . . . whether or not the rule says, for example, 'subject to the First Amendment.'" Gillers, *supra* note 3, at 231.

35. MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2016) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.").

provides that it is misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Thus, even if an action is not criminal, so long as it "involv[es] dishonesty, fraud, deceit, or misrepresentation," it warrants disciplinary action. Indeed, Rule 8.4(c) swallows up virtually all of the conduct that satisfies 8.4(b), and then some. These two provisions articulate a standard that a lawyer's actions, even when unconnected with the practice of law, must at all times promote honesty and trustworthiness, so there is no doubt about his or her fitness to practice law.

Rule 8.4(d) states that lawyers cannot "engage in conduct that is prejudicial to the administration of justice." For example, the ABA's May 2016 report on the proposed Model Rule 8.4(g) cited *Neal v. Clinton*.[36] In this Arkansas case, former-President Clinton was suspended from the practice of law for five years because "he gave knowingly evasive and misleading discovery responses concerning his relationship with Ms. Lewinsky." This conduct, the court found, was "prejudicial to the administration of justice," even though Mr. Clinton was not even engaged in the practice of law.[37] More pressingly, Clinton lied under oath, which would arguably also run afoul of Model Rule 8.4(c).

Rule 8.4(e) prohibits lawyers from "stat[ing] or imply[ing] an ability to influence improperly a government agency or official." Finally, Rule 8.4(f) prohibits "knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct." Rules 8.4(e) and 8.4(f) are in large respects duplicative of 8.4(d). Each concern conduct—including speech—that undermines the neutrality and fairness of our legal system, even if not engaged in during the course of a representation.

Prior to amending Rule 8.4 in August 2016, the *Model Rules* generally prohibited three heads of conduct: (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 prejudicing the administration of justice.[38] Model Rule 8.4(g), which covers "conduct related to the practice of law," including speech at "bar association[s]" and "social activities," represents an unprecedented expansion of the disciplinary committee's jurisdiction over the private lives and speech of attorneys.

During the February 2016 hearing over Model Rule 8.4(g), Ben Strauss, a past-president of the Delaware State Bar Association, warned that "[w]e need to be a little bit careful in terms of how we get involved in the life of people that are *not related to the delivery of legal services* which is ultimately what we're all

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36. 2016 ABA REPORT, *supra* note 1, at 9 n.19 (citing Neal v. Clinton, No. CIV 2000-5677, 2001 WL 34355768 (Ark. Cir. Ct. Jan. 19, 2001)).

37. *Clinton*, 2001 WL 3435576, at *2.

38. *See generally* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4-2 (2016–17 ed.).

about."[39] Myles Lynk, the Chairman of the Standing Committee, promptly replied, "I know you're familiar with [Model Rule] 8.4(c)," which provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Lynk continued, "so the rules do contemplate that some conduct which is unrelated to the practice of law can constitute professional misconduct." The ABA included a virtually identical argument in its written report, stating "[s]uch conduct need not be related to the lawyer's practice of law, but may reflect adversely on the lawyer's fitness to practice law or involve moral turpitude."[40]

This position, however, disregards the three categories that were traditionally limited by the *Model Rules*. Rule 8.4(g) opens up for liability an entirely new realm of conduct unrelated to the actual practice of law or a lawyer's fitness to practice, and not connected with the administration of justice. Along these lines, Mr. Strauss concisely responded that "the behavior which constitutes misconduct is one that goes to the character that impacts on the person's ability to deliver legal services," while this rule regulated mere "social behavior."[41] He added that "the purposes of the new rule might be different."[42] Indeed it was different. The Delawarean cautioned that "there is a certain risk" when we "go[] overboard to the point where the vast majority of our membership may think we've gone too far."[43]

The ABA acknowledged that the new Rule 8.4(g) is indeed "broader than the current provision,"[44] but insisted that the "change is necessary."[45] The final resolution concluded, "ethics rules should make clear that the profession will not tolerate harassment and discrimination in any conduct related to the practice of law." Beyond serving as "officers of the court" and "managers of their law practices," the ABA resolved, lawyers are "public citizens" with a "special responsibility for the administration of justice." This notion of an attorney as a *public citizen* is derived from Preamble [6] to the *Model Rules*. Critically, by its own terms, the Preamble still treats as private almost the entirety of an attorney's interactions. Preamble [6] speaks of the attorney's duty as a public citizen to include seeking "improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession." It does not, and cannot, reach constitutionally protected speech that demeans others at bar-related functions.

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39. 2016 ABA HOD Proceedings, *supra* note 5, at 72–73 (emphasis added).

40. 2016 ABA REPORT, *supra* note 1, at 9–10.

41. *See* 2016 ABA HOD Proceedings, *supra* note 5, at 73.

42. *Id.*

43. *Id.* at 34.

44. 2016 ABA REPORT, *supra* note 1, at 10. Professor Gillers agrees that no state has a rule "as broad as the new ABA rule." Gillers, *supra* note 3, at 198.

45. 2016 ABA REPORT, *supra* note 1, at 10.

The strongest textual hook for the ABA in Preamble [6] is an attorney's duty to "further the public's . . . confidence in the rule of law." The report, and several instances of the model rule's legislative history, suggest that the drafters were concerned about what message the bar sends to the public when attorneys misbehave. For example, the conclusion of the resolution states, "As the premier association of attorneys in the world, the ABA should lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but *wherever it occurs* in conduct by lawyers related to the practice of law. *The public expects no less of us*."[46] This may be a laudable goal, but it is important to recognize how far afield such concerns are from Rule 8.4(a)–(f), and what the states have traditionally adopted. State courts that consider this rule should be very careful about relying on public perception of attorney behavior as an impetus for the overregulation of what has *long* been considered private speech.

B. STATE ANTI-BIAS PROVISIONS

Over the past two decades, nearly three dozen jurisdictions have amended their local version of Rule 8.4 to prohibit discrimination, harassment, or other forms of bias against specifically defined groups.[47] With few exceptions, these rules *only* govern conduct within the three heads of conduct reached by Model Rule 8.4(a)–(f). First, the narrowest category regulated bias *during the representation of a client* or *in the practice of law*. This standard is set by fifteen states in their rules,[48] and ten states in their comments.[49] Second, a far broader standard

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46. *Id.* at 15 (emphasis added). Gillers makes a similar point. Gillers, *supra* note 3, at 200. ("Second, adoption of Rule 8.4(g) tells the public that the legal profession will not tolerate this conduct, not solely when aimed at other lawyers, but at anyone. The rule tells the public who we are.").

47. *See* 2016 ABA REPORT, *supra* note 1, at 5.

48. CAL. RULES OF PROF'L CONDUCT R. 2-400(B) (2015) ("In the management or operation of a law practice"); COLO. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("engage in conduct, in the representation of a client"); D.C. RULES OF PROF'L CONDUCT R. 9.1 (2007) ("in conditions of employment"); FLA. RULES OF PROF'L CONDUCT R. 4-8.4(d) (2017) ("engage in conduct in connection with the practice of law"); IDAHO RULES OF PROF'L CONDUCT R. 4.4(a) (2014) ("[i]n representing a client"); IOWA RULES OF PROF'L CONDUCT R. 32:8.4(g) (2015) ("in the practice of law"); MASS. RULES OF PROF'L CONDUCT R. 3.4(i) (2013) ("in appearing in a professional capacity before a tribunal"); MICH. RULES OF PROF'L CONDUCT R. 6.5(a) (2015) ("involved in the legal process"); N.J. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("engage, in a professional capacity"); N.M. RULES OF PROF'L CONDUCT R. 16-300 (2009) ("In the course of any judicial or quasi-judicial proceeding before a tribunal"); N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) (2017) ("in the practice of law"); OHIO RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("in a professional capacity"); OR. RULES OF PROF'L CONDUCT R. 8.4(a)(7) (2015) ("in the course of representing a client"); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 5.08 (2016) ("in connection with an adjudicatory proceeding"); VT. RULES OF PROF'L CONDUCT R. 8.4(g) (2009) ("in hiring, promoting or otherwise determining the conditions of employment of that individual").

49. DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013) ("in the course of representing a client"); IDAHO RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) ("in the course of representing a client"); ME. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) ("a lawyer who, in the course of representing a client"); N.C. RULES OF PROF'L CONDUCT R. 8.4 cmt. 5 (2015) ("anyone associated with the judicial process"); S.C. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2015) ("in the course of representing a client"); S.D. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2004) ("in the course of representing a client"); TENN. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2016)

regulates bias that implicates a *lawyer's fitness to practice law*, whether or not it occurs in the practice of law. Only two states impose this standard in their rules.[50] (Such a provision would be largely duplicative of Model Rules 8.4(b) and 8.4(c).) Third, the broadest, most nebulous standard at issue prohibits bias that would *prejudice the administration of justice*. This standard, which can reach conduct entirely outside the client-lawyer relationship or the practice of law, is imposed by seven states.[51] None of these jurisdictions provide a precedent for the new Model Rule 8.4(g).

Three jurisdictions have adopted far broader scopes to their anti-bias provisions. First, Indiana regulates such misconduct when "engage[d] . . . in a *professional capacity*."[52] Second and third, Washington state and Wisconsin both regulate such misconduct that is committed "in connection with the *lawyer's professional activities*."[53] None of these rules define "professional capacity" or "professional activities." A note in the *Georgetown Journal of Legal Ethics* explained that the rule from Wisconsin—and by extension, the other two—is "extraordinarily broad and loses its main justification of why attorney speech needs to be restricted at all," which is "[p]reserving the administration of justice."[54] Yet, these three provisions still have a concrete nexus to delivering legal services,[55] and do not purport to reach "social activities," such as bar-sponsored dinners that are merely "connected with the practice of law." Model Rule 8.4(g) is unprecedented in its scope. Efforts to cite precedents from these states as evidence that Model Rule 8.4(g) would not censor protected speech are unavailing.

("in the course of representing a client"); UTAH RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013) ("in the course of representing a client"); W. VA. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2015) ("in the course of representing a client"); WYO. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) ("in the course of representing a client").

50. ILL. RULES OF PROF'L CONDUCT R. 8.4(j) (2016) ("conduct that reflects adversely on the lawyer's fitness as a lawyer"); MINN. RULES OF PROF'L CONDUCT R. 8.4(h) (2015) ("reflects adversely on the lawyer's fitness as a lawyer").

51. ARIZ. RULES OF PROF'L CONDUCT R. 8.4(d) (2004) ("prejudicial to the administration of justice"); ARK. RULES OF PROF'L CONDUCT R. 8.4(d) (2016) ("conduct that is prejudicial to the administration of justice"); CONN. RULES OF PROF'L CONDUCT R. 8.4(4) (2006) ("conduct that is prejudicial to the administration of justice"); MD. ATTORNEY'S RULES OF PROF'L CONDUCT R. 19-308.4(e) (2016) ("when acting in a professional capacity . . . when such action is prejudicial to the administration of justice"); NEB. RULES OF PROF'L CONDUCT R. 8.4(d) (2016) ("engage in conduct that is prejudicial to the administration of justice . . . [when] employed in a professional capacity"); N.D. RULES OF PROF'L CONDUCT R. 8.4(f) (2006) ("engage in conduct that is prejudicial to the administration of justice"); R.I. RULES OF PROF'L CONDUCT R. 8.4(d) (2007) ("engage in conduct that is prejudicial to the administration of justice").

52. IND. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) (emphasis added).

53. WASH. RULES OF PROF'L CONDUCT R. 8.4(g) (2015) (emphasis added); WISC. RULES OF PROF'L CONDUCT 8.4(I) (2017) (emphasis added).

54. Keiser, Note, *supra* note 23, at 636.

55. *See* Gillers, *supra* note 3, at 199–200 n.18 (citing cases from Indiana, Washington, and Wisconsin).

III. RULE 8.4(G) AND THE FIRST AMENDMENT

The ABA's report accompanying Rule 8.4(g) provides only the most cursory First Amendment analysis. As discussed in Part II, without any explanation, the final report deleted both comments and analysis from an earlier draft that explicitly protected the freedom of speech. In his article, Professor Gillers provides what he admits is a "brief" analysis of the First Amendment issues implicated by the new Model Rule 8.4(g). Due to the new rule's intrusion into the private spheres of attorneys' speech and conduct, a "brief" discourse does not suffice.

Gillers' First Amendment analysis centers around whether Rule 8.4(g) would survive a facial challenge. "An overbreadth claim is likely to fail," we are told, in light of the Supreme Court's difficult-to-satisfy test for invalidating overbroad statutes.[56] A void-for-vagueness challenge will fail, Gillers writes, "[s]o long as the rule is drafted in a way that seeks to define only the conduct or speech that will and constitutionally can be the basis of discipline."[57] These analyses are premature in an article titled *A Guide for State Courts Considering Model Rule 8.4(g)*. The far more important question presented to state courts is whether they are willing to adopt a new model rule designed to root out harassment and discrimination, which also prohibits speech outside the delivery of legal services. This is a profound policy question that the ABA elided and that Professor Gillers considers a mere afterthought.[58]

Part III will analyze this vague standard's chilling effects on speech, how the rule sweeps in a range of constitutionally protected speech, and how the comments establish an invalid form of viewpoint discrimination. Next, three tweaks to Rule 8.4(g) are offered that would still maintain the drafters' intent, while providing protection for free expression. This Article will close with an admonition that state courts should not be content to simply trust disciplinary committees to exercise discretion.

A. THE CHILLING EFFECT OF RULE 8.4(G)

Professor Gillers accurately notes that courts have upheld numerous efforts by state bar associations to discipline various forms of attorney speech. He writes that provisions of the *Model Rules* "subordinate[] the right to speak in order to protect the fairness of and public confidence in the legal system . . . ."[59] When confronted with language "even more general" than *harassment* "that offers even less notice of the forbidden conduct," Gillers observes, void-for-vagueness

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56. *Id.* at 235 (quoting Virginia v. Hicks, 539 U.S. 113, 119–20 (2003) (emphasis in original)).

57. *Id.* at 236 (citing United States v. Wunsch, 84 F.3d 1110, 1116 (9th Cir. 1996)).

58. *Id.* at 230–31 ("Any lawyer charged with violating Rule 8.4(g) remains free to argue that as applied to his or her conduct the rule is unconstitutional.").

59. *Id.* at 235.

challenges have failed.[60] For example, a New York court censured a lawyer who, during a deposition, "called the opposing female lawyer a 'bitch,' described her with anatomical references ('c___' and 'a_____'), and told her to 'go home and have babies.'"[61] On appeal, the court concluded that such speech uttered in a legal proceeding was "conduct that adversely reflects on the lawyer's fitness as a lawyer."[62] Indeed, as Gillers points out, the concept of conduct that "adversely reflects" a lawyer's fitness is quite capacious, though it too has been upheld in the face of constitutional challenges.[63] The court stressed that "'[b]road standards governing professional conduct are permissible and indeed often necessary' where it is almost impossible to enumerate every offense for which an attorney ought to be removed or disciplined."[64]

These precedents, however, do not resolve the question at hand, as they considered challenges in the context of disciplinary actions that related to the representation of a client, a lawyer's fitness for practice, or the administration of justice—all conduct within the state bar's competencies.

Constitutional scrutiny amounts to a balance of the means and the ends.[65] As the government's interest becomes more compelling, the rule's tailoring need not be as narrow. Conversely, when the government's interest becomes less compelling, narrow tailoring becomes essential. "Governing professional conduct" is a compelling interest within a bar association's core jurisdiction.[66] Here, the government's authority is at its apex, and narrow tailoring is not as critical. "Broad standards," to use the phrasing of the New York court, suffice.

However, when conduct is merely "related to the practice of law," which includes speech at social events, the government's interest becomes far less compelling, as it is outside the traditional regulatory functions of bar associations. In other words, when the nexus between the legal practice and the speech at issue becomes more attenuated, the disciplinary committee's authority to regulate an attorney's expressions becomes weaker.[67] As a result, narrow tailoring becomes critical to salvage the sanction's constitutionality. Stated differently, the same capacious standard of "harassment" could constitutionally support a

60. *Id.* at 236.

61. *Id.* at 237–38 (citing *In re* Schiff, No. HP 22/92 (Departmental Disc. Comm. N.Y. Sup. Ct. Feb. 2, 1993)).

62. *Id.* at 216 n.80 (citing *In re* Schiff, 599 N.Y.S.2d 242 (1993)).

63. *See id.* (citing *In re* Holley, 729 N.Y.S.2d 128, 132 (N.Y. App. Div. 2001)).

64. *Id.*

65. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 (1984) ("In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.").

66. *In re Holley*, 729 N.Y.S.2d at 220.

67. In its report, the ABA cited only "substantial *anecdotal* information" about "sexual harassment" at "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law" (emphasis added). That conjectural standard does not satisfy the lofty standard needed to establish a *compelling* state interest. 2016 ABA REPORT, *supra* note 1, at 11.

punishment for an incident during a deposition, but *not* during a bar association dinner or CLE lecture. Context matters for the First Amendment.

Because no jurisdiction has ever attempted to enforce a speech code over social activities merely "connected with the practice of law," there are no precedents to turn to in order to assess such a regime's constitutionality. (Professor Gillers fails to acknowledge this gap in his otherwise thorough analysis.) While discrimination and sexual harassment do have established bodies of case law that can be referred to,[68] longstanding ethics rules do not penalize harassment by itself in the context of private speech at various social functions. In such fora, the government's interest is at its nadir, and tailoring must be extremely narrow to survive judicial scrutiny. Even before Rule 8.4(g) was adopted, attorneys often found themselves "in the midst of that recurring inquiry into when lawyer conduct has a sufficient nexus with fitness to practice law that it ought to be a basis for lawyer discipline, even when it is marginal to the direct representation of clients."[69] Now discipline can be imposed for conduct merely related to the practice of law, and totally unrelated to the direct representation of any clients.

It is against this backdrop that the chilling effects of Rule 8.4(g) must be assessed. As drafted, the rule could discipline a wide range of speech on matters of public concern at events with only the most dubious connection with the practice of law. Though these laws may survive a facial challenge, they are quite vulnerable to individual challenges. Gillers takes solace that an attorney "remains free to argue that as applied to his or her conduct the rule is unconstitutional."[70] I am not so sanguine. If a jurisdiction adopts Rule 8.4(g), some lucky attorney can become a test case with his or her livelihood on the line. This is not a mere academic exercise.

States must be very careful about adopting this novel new approach to discipline that may end up censoring speech on matters of public concern, only to have those actions reversed by the courts.

B. THE BROAD SWEEP OF RULE 8.4(G)

The comments to Rule 8.4(g) provide several examples of the various fora where the regime would apply, such as "social activities" or "bar association" functions. However, the long-deliberated rule does not offer examples of the types of speech that could be deemed "harassment." Professor Gillers does. He writes, "[n]o lawyer has a First Amendment right to demean another *lawyer* (or

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68. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment,* 39 UCLA L. REV. 1791 (1992).

69. Donald R. Lundberg, *Of Telephonic Homophobia and Pigeon-Hunting Misogyny: Some Thoughts on Lawyer Speech*, RES GESTAE, June 2010, at 22, 23, http://lawyerfinder.indybar.org/_files/11th%20Hour/D.LundbergReRule8.4.pdf [https://perma.cc/VT9M-NQVN].

70. Gillers, *supra* note 3, at 230–31.

anyone else involved in the *legal process*)."[71] Gillers adds, "[t]here is no First Amendment right, for example, to call a *female opponent* 'a c__,' or to mock *another lawyer's* accent, or to use a racial epithet in addressing an *opposing party*." Finally, he observes that "[t]here is no constitutional right to sexually harass an *employee or a client*." Gillers asks, rhetorically, "[w]hy should identical biased words or conduct be forbidden in litigation but allowed in all other *work* lawyers do?"[72]

As my added emphases reveal, Gillers only discusses disciplinable speech uttered *during* the practice of law, such as statements to opposing counsel, clients, or employees. These are activities squarely within the state bar's longstanding and traditional interest in regulating the legal profession. In this entreaty, he does not reference the far more novel concept that speech at "social activities," which is merely "related" to the practice of law, could be subject to discipline. As speech bears a weaker and weaker connection to the delivery of legal services, the bar's justification in regulating it becomes less and less compelling. The bar lacks a sufficiently compelling interest to censor an attorney who makes a remark deemed "demeaning" at a CLE lecture, or makes a comment viewed as "derogatory" at the dinner table during a bar association gala. These are the sorts of problems that can be resolved by refusing to re-invite offending speakers—not by threatening to suspend or revoke a lawyer's license. Here, the nexus between the bar's mission to regulate the practice of law is far too attenuated to justify this incursion into constitutionally protected speech.

To return to Gillers' rhetorical question, the Constitution expressly protects "biased words" that can usually be prohibited in the course of litigation.[73] Demeaning speech, as opposed to *defamatory* conduct, is constitutionally protected. In *FCC v. Pacifica*, the Supreme Court recognized "cunt," one of George Carlin's seven dirty words, as protected by the First Amendment.[74] (Some may find a reading of the appendix in *Pacifica* to be "demeaning" toward women.) In *Snyder v. Phelps*, the Supreme Court upheld the right of funeral protestors to hold signs that said "God Hates Fags."[75] *R.A.V. v. City of St. Paul* invalidated a city's law that prohibited "arous[ing] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[76] Comments that would constitute sexual harassment in the workplace are perfectly lawful if uttered in public. A private sphere must remain in a lawyer's life, when it is

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71. *Id.* at 237 (emphasis added).

72. *Id.* at 220 (emphasis added).

73. In certain cases, cursing is especially appropriate during the course of litigation. *See* Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 642 n.127 (2016) (recounting how counsel in *Cohen v. California*, against the wishes of Chief Justice Burger, used the word "fuck" during oral arguments at the Supreme Court).

74. 438 U.S. 726, 751 (1978) ("The original seven words were shit, piss, fuck, *cunt*, cocksucker, motherfucker, and tits.") (emphasis added).

75. *See* 562 U.S. 443, 460–61 (2011).

76. *See* 505 U.S. 377, 391 (1992).

separate from the practice of law or representing a client, and does not reflect on a lawyer's fitness or prejudice the administration of justice.

Finally, there is a separation of powers element of this analysis. It is not surprising that disciplinary actions for speech fall within three heads: (1) conduct during the practice of law or representing a client; (2) conduct that reflects on a lawyer's fitness to practice; and (3) conduct prejudicing the administration of justice. State bar associations are chartered to supervise these regulatory purposes.[77] Disciplinary committees do not have boundless discretion over all aspects of an attorney's life. Like all administrative agencies, bar associations only have the authority that the relevant state legislature or court-of-last resort has delegated. When a bar association attempts to regulate conduct that is beyond its jurisdiction, the action is *ultra vires*. Beyond the First Amendment implications of Rule 8.4(g), state courts should consider whether bar associations even have the statutory authority to assert jurisdiction over speech that is increasingly attenuated from the practice of law. It is not enough to proclaim that "*[t]he public expects no less of us*."[78] The law demands more. As a matter of the separation of powers under state constitutional law, Rule 8.4(g) may also be impermissible.

C. COMMENT FOUR'S IMPOSITION OF VIEWPOINT DISCRIMINATION

Comment [4] to Rule 8.4(g) provides, in part, that "Lawyers may engage in conduct undertaken to *promote diversity* and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations" (emphasis added). Though well-intentioned, this provision explicitly sanctions one perspective on a divisive issue—affirmative action—while punishing those who take the opposite perspective. This comment amounts to an unconstitutional form of viewpoint discrimination. Consider a debate hosted by a bar association about affirmative action. One speaker *promotes* racial preferences

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77. *See, e.g.*, *About the Bar*, VA. STATE BAR, http://www.vsb.org/site/about [https://perma.cc/5UES-RKNP] (last visited Jan. 26, 2017) ("The mission of the Virginia State Bar, as an administrative agency of the Supreme Court of Virginia, is to regulate the legal profession of Virginia; to advance the availability and quality of legal services provided to the people of Virginia; and to assist in improving the legal profession and the judicial system."); *Our Mission*, STATE BAR OF TEX., https://www.texasbar.com/Content/NavigationMenu/AboutUs/OurMission/default.htm [https://perma.cc/6GQM-V7MJ] (last visited Jan. 26, 2017) ("The mission of the State Bar of Texas is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the administration of justice and the practice of law."); *About the Bar*, FLA. BAR, http://www.floridabar.org/TFB/TFBOrgan.nsf/043adb7797c8b9928525700a006b647f/90c2ad07d0bd71fc85257677006a8401?OpenDocument [https://perma.cc/NN3T-TC3J] (last visited Jan. 26, 2017) ("To inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.").

78. Gillers makes a similar point at Gillers, *supra* note 3, at 200 ("Second, adoption of Rule 8.4(g) tells the public that the legal profession will not tolerate this conduct, not solely when aimed at other lawyers, but at anyone. The rule tells the public who we are.").

as a means to advance diversity. His speech would be entirely protected under Rule 8.4(g). Another speaker *critiques* racial preferences in light of mismatch theory. His speech would *not* be protected under Rule 8.4(g). This is a blatant instance of preferring one perspective over another. That the ABA sought to include this provision suggests that there was a concern that bar complaints could be filed over speech about affirmative action, or other diversity measures, that some could find "demeaning." But not for other types of speech about affirmative action.

Beyond speech about diversity, Rule 8.4(g) will disproportionately affect speech on the right side of the ideological spectrum. Speech supporting a right to same-sex marriage will not be considered "derogatory"; speech critiquing it will. Speech supporting an interpretation of Title IX that permits bathroom assignments based on gender identity will not be considered "demeaning"; speech critiquing it will. Speech opposing immigration policy that excludes people based on their nationality will not be considered discriminatory; speech endorsing it will. A range of theories would be silenced under the threat of an unconstitutionally vague standard of "harassment." Experiences with political correctness and speech codes on college campuses provide a roadmap of the sorts of speech that complaints filed under Rule 8.4(g) would likely target.[79]

D. "WE WOULD HAVE TO JUST TRUST THEM"

I will begin this concluding section by chronicling a debate that should have occurred before the adoption of Rule 8.4(g), but alas, was only held months after

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79. *See generally* Scott Jaschik, *If You Say You're Sorry*, INSIDE HIGHER ED (Mar. 25, 2016), https://www.insidehighered.com/news/2016/03/25/marquette-suspends-controversial-faculty-blogger-requires-him-apologize [https://perma.cc/F8BE-M54U] ("McAdams, however, has maintained that he was being punished for his opinions that are free speech. He also maintained that Marquette shouldn't be attacking him, given that he is defending an undergraduate's views against gay marriage that are consistent with Roman Catholic teachings."); Adam Liptak, *Students' Protests May Play Role in Supreme Court Case on Race in Admissions*, N.Y. TIMES (Dec. 1, 2015), http://www.nytimes.com/2015/12/02/us/politics/justices-to-rule-once-again-on-race-in-college-admissions.html?_r=0 [https://perma.cc/NY6T-Z8WW] ("The justices are almost certainly paying close attention to the protests, including those at Princeton, where three of them went to college, and at Yale, where three of them went to law school. At both schools, there have been accusations that protesters, many of them black, have tried to suppress the speech of those who disagree with them. Others welcomed the protests as part of what they called a healthy debate."); Jessica Murphy, *Toronto Professor Jordan Peterson Takes on Gender-Neutral Pronouns*, BBC NEWS (Nov. 4, 2016), http://www.bbc.com/news/world-us-canada-37875695 [https://perma.cc/4C5T-4MEV] ("Dr. Peterson was especially frustrated with being asked to use alternative pronouns as requested by trans students or staff, like the singular 'they' or 'ze' and 'zir,' used by some as alternatives to 'she' or 'he.' In his opposition, he set off a political and cultural firestorm that shows no signs of abating. At a free speech rally mid-October, he was drowned out by a white noise machine. Pushing and shoving broke out in the crowd. He says the lock on his office door was glued shut. At the same time, the University of Toronto said it had received complaints of threats against trans people on campus. His employers have warned that, while they support his right to academic freedom and free speech, he could run afoul of the Ontario Human Rights code and his faculty responsibilities should he refuse to use alternative pronouns when requested. They also said they have received complaints from students and faculty that his comments are 'unacceptable, emotionally disturbing and painful' and have urged him to stop repeating them.").

its approval. During the 2016 Federalist Society National Lawyers Convention, Professors Eugene Volokh and Deborah Rhode debated how the new rule interacted with the First Amendment.[80] The event was moderated by Judge Jennifer Walker Elrod of the U.S. Court of Appeals for the Fifth Circuit. Along similar lines to the analysis in this Article, Professor Volokh worried that complaints could be filed against a speaker at a CLE event who critiques the Supreme Court's decision in *Obergefell v. Hodges*.[81] He charged that Rule 8.4(g) amounts to a "deliberate[] . . . attempt to suppress particular derogatory views in a wide-range of conduct, expressly including social and . . . bar association activities." Volokh stressed that what the drafters of the rule "are getting is exactly what they are intending. They are intending to suppress particular views in these kinds of debates."

Professor Rhode was not particularly concerned with the potential for abuse. From her experiences, disciplinary committees "don't have enough resources to go after people who steal from their clients' trust fund accounts."[82] She found "wildly out of touch with reality" the "notion that they are going to start policing social conferences and go after people who make claims about their own views about" religion or sexual orientation. Rhode added that "many people who are in bar disciplinary agencies care a lot about First Amendment values," and "[b]ar associations don't want to set off their members and go down those routes." An aggrieved party could "file a complaint," she acknowledged, but "we can say that about pretty much anything in this country, right?" But such complaints would go nowhere, Rhode maintained, because "we as a profession have the capacity to deal with occasional abuses." She concluded her remarks, "We're a profession that knows better than that." Rhode paused. "I would hope."

Moments later, Judge Elrod asked whether Professor Rhode's position "would depend on a trust . . . that the organizations would not be going after people that they don't like, such as . . . conservatives." She asked, "We would have to just trust them?" The Federalist Society luncheon, packed with right-of-center lawyers, laughed aloud. Professor Rhode interjected that Rule 8.4(g) did not depend on trusting the disciplinary crowds alone. "And the Courts!" she added. "My god, I never thought I'd be saying this at a Federalist Society conference, the Rule of Law people, it's still out there!" Professor Rhode concluded, "I don't think we'd see a lot of toleration for those aberrant complaints." In other words, trust the bar such that the rules would not be abused.

Professor Gillers takes a similar "trust-us" approach to Rule 8.4(g). "We can be confident that the kind of biased or harassing speech that will attract the attention

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80. The Federalist Soc'y, *Ninth Annual Rosenkranz Debate: Hostile Environment Law and the First Amendment*, YOUTUBE (Nov. 20, 2016), https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s [https://perma.cc/7Y32-HPG7].

81. *Id.* (https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s#t=49m58s).

82. *Id.* (https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s#t=52m10s).

of disciplinary counsel," he writes, "will not enjoy First Amendment protection."[83] Or stated in the converse, he is confident that disciplinary committees will not target speech that is protected by the First Amendment. This argument, on its own terms, is a non sequitur, because speech often loses its First Amendment protections if it is uttered during the delivery of legal services. In other words, if the disciplinary committee successfully targets such speech, it will be *because* in this context it lacks First Amendment protections. This argument elides the threshold question of what speech is within a bar association's jurisdiction.

Further, Professor Gillers cites a series of cases to illustrate the types of speech that have resulted in punishment. None of these cases, however, support Professor Gillers' conclusion as they *all* concern speech uttered during the delivery of legal services—often at depositions—and each involved anti-bias provisions that are far more narrow than Rule 8.4(g). First, in *Florida Bar v. Martocci*, a lawyer was disciplined where "[t]he entire record" in a marriage dissolution case was "replete with evidence of Martocci's verbal assaults and sexist, racial, and ethnic insults."[84] The Florida rule at issue applied with respect to "conduct in connection with the practice of law." Second, in *In re Kratz*, a lawyer, acting in his capacity as the district attorney, was disciplined for "sending deliberate, unwelcome, and unsolicited sexually suggestive text messages to S.V.G., a domestic abuse crime victim and witness, while prosecuting the perpetrator of the domestic abuse crime."[85] Third, in *In re Griffith*, an adjunct law professor, who was supervising law students in a clinic, engaged in physical conduct of a sexual nature with a student.[86] This harassment, the court found was "in connection with professional activities." Fourth, in *In re McGrath*, an attorney "sent two ex parte communications to the judge disparaging the opposing party based upon her national origin."[87] Professor Gillers also cites several more cases involving harassing comments made during depositions.[88]

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83. Gillers, *supra* note 3, at 235.

84. *See, e.g.*, 791 So. 2d 1074, 1077 (2001).

85. 851 N.W.2d 219, 223 (Wis. 2014) (disciplining district attorney for sending a victim text messages suggesting that the two have sexual contact).

86. 838 N.W.2d 792, 792 (2013). A different analysis would likely apply under Minnesota law with respect to a doctrinal class that was not connected with the delivery of legal services. However, under the capacious standard set by Rule 8.4(g), all professors that engage in "mentoring" while teaching a class required to sit for the bar exam could be subject to discipline. *See supra* text accompanying note 21.

87. 280 P.3d 1091, 1093 (Wash. 2012).

88. Claypole v. Cty. of Monterey, No. 14-cv-02730-BLF, 2016 WL 145557, at *5 n.37 (N.D. Cal. Jan. 12, 2016) ("At a contentious deposition, when Plaintiffs' counsel asked Bertling not to interrupt her, Bertling told her, '[D]on't raise your voice at me. It's not becoming of a woman or an attorney who is acting professionally under the rules of professional responsibility'"); Cruz-Aponte v. Caribbean Petroleum Corp., 123 F. Supp. 3d 276, 279 (D.P.R. 2015); Laddcap Value Partners, LP v. Lowenstein Sandler P.C., No. 600973–2007, 2007 WL 4901555, at *2–7 (N.Y. Sup. Ct. 2007); Principe v. Assay Partners, 586 N.Y.S.2d 182, 184 (Sup. Ct. 1992); *In re* Monaghan, 743 N.Y.S.2d 519, 520 (App. Div. 2002); Mullaney v. Aude, 730 A.2d 759, 761–62 (Md. Ct. Spec. App. 1999); *In re* Schiff, 599 N.Y.S.2d 242 (App. Div. 1993).

It is unremarkable that *all* of these cases involve speech uttered during the delivery of legal services, and not during social activities merely connected to the practice of law. Rule 8.4(g) broke new ground by explicitly expanding a disciplinary committee's jurisdiction from the "practice of law," to "social activities," while simultaneously deleting a comment that expressly protected the First Amendment. I was unable to find a single case, in any jurisdiction, where a lawyer was sanctioned for a derogatory comment made at a social function. I doubt such a case exists, as no other state has previously permitted such discipline. The unprecedented nature of Rule 8.4(g) does not leave me confident that it will be enforced in a constitutional manner.

In any event, if such concerns are indeed "wildly out of touch with reality," then state courts should pause before adopting Model Rule 8.4(g) and its comments in their entirety. Professor Gillers writes that "[d]rafting demands precision and the elimination of ambiguity so far as words allow. Mathematical precision is not possible. We must strive to draft a rule that identifies the behavior we mean to forbid and not the behavior we do not."[89] He's right. With three slight tweaks to comments [3] and [4], the rule would have a far more narrowly tailored application to avoid censoring constitutionally protected speech, while still serving its intended purpose of rooting out sexual harassment.

- First, the amendments should clarify that for discrimination or harassment to fall within Rule 8.4(g), it must be "severe or pervasive." Along these same lines, stress that the law of antidiscrimination and anti-harassment statutes "will," and not "may" guide application of the paragraph. There is a well-established body of federal caselaw that disciplinary committees *should* rely on when determining if there has been discrimination or harassment.[90] This tweak would also put all parties on notice of the relative burdens of proof.
- Second, the exclusion for speech about promoting diversity was no doubt well-intentioned, but it creates an explicit form of viewpoint discrimination that cannot withstand a constitutional challenge. It should be eliminated.
- Third, I restored the exact language from the December 2015 comment and its accompanying report concerning the First Amendment and an attorney's "private sphere" of conduct. To make the point strikingly clear, I specified that speech on "matters of public concern" cannot give rise to liability.

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89. Gillers, *supra* note 3, at 201.
90. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64–67 (1986).

Here, an edited version of the comments, with insertions bolded:

> [Comment 3] ***"Severe or pervasive"*** discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of ***federal*** antidiscrimination and anti-harassment statutes and case law ~~**may**~~ ***will*** guide application of paragraph (g).
>
> [Comment 4] 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. ~~**Paragraph (g) does not prohibit conduct undertaken to promote diversity. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.**~~ ***Paragraph (g) does not apply to conduct protected by the First Amendment, as a lawyer does retain a "private sphere" where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to this rule. For example, paragraph (g) does not apply to speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.***

This revised rule would permit disciplinary actions for lawyers that engage in forms of severe or pervasive verbal harassment at social activities and bar functions, but it would also amply protect speech on matters of public concern that listeners may find "demeaning" or "derogatory."

CONCLUSION

During her remarks at the Federalist Society conference, Professor Rhode admitted that she viewed Rule 8.4(g) as "a largely symbolic gesture," and that "the reason why proponents wanted it in the Code was as a matter of educating the next generation of lawyers as well as a few practitioners in this one about *other* values besides First Amendment expression." Her answer is quite revealing. Even before Rule 8.4(g) was adopted, attorneys who engaged in sexual harassment and other forms of discrimination were already subject to liability under federal, state, and local employment law, which extend beyond the actual workplace. As a practical matter, Rule 8.4(g) amounts to little more than a pile-on. In addition to facing injunctive relief or monetary fines from civil suits,

lawyers can now potentially lose their law licenses for misconduct. In this sense, the new model rule—a product of zealous advocacy by disparate interest groups over the course of two decades—is indeed little more than a "largely symbolic gesture."

What Rule 8.4(g) does accomplish is "educating the next generation of lawyers" about what sorts of speech are permitted, and what sorts of speech are not. Professor Rhode's candor, acknowledging that there are "*other* values besides First Amendment expression," is refreshing after slogging through the entire administrative record of Rule 8.4(g). But if this was only a project of education, state bars could have accomplished it by launching a public relations campaign and distributing brochures. Of course, the rule is about much more than education. Failure to comply results in disciplinary action that can destroy an attorney's livelihood. This sanction is not a trivial matter. At bottom, this rule, and its expansion of censorship to social activities with only the most tenuous connection with the delivery of legal services, is not about education. It is about reeducation.

State courts should pause before adopting this rule, and think carefully about the primacy of our first freedom.

EXHIBIT 8

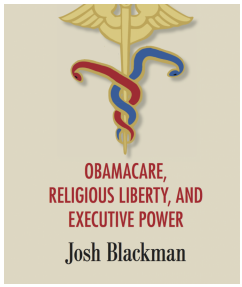
Josh Blackman, "My Rejected Proposal for the AALS President's Program on Diversity: The Effect of Model Rule of Professional Conduct 8.4(g) and Law School Pedagogy and Academic Freedom" (Nov. 15, 2016)

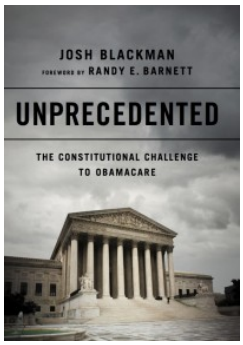
the AALS President's Program on Diversity: The Effect of Model Rule of Professional Conduct 8.4(g) and Law School Pedagogy and Academic Freedom

Nov 15, 2016 |

This year, the AALS issued a call for papers for the President's Program on Diversity:

> **Much fine scholarship has, in recent years, addressed important diversity issues surrounding gender, religion, race, viewpoint, disability, and sexual**





> **orientation. Tying in to recent events on and off campus, our colleagues in the legal academy have addressed questions of racial equity and inclusion in their teaching and scholarship. Many law schools are now engaged in heightened and new forms of institutional attention on racial and other forms of equity. Some of this heightened inquiry has been prompted by our own reflection on major social issues, including highly visible racial disparity issues in our criminal justice system; however, social and campus protests, including those of the Black Lives Matter movement, have also spurred greater focus.**
>
> **This President's Program and associated papers will seek to answer questions, including:**
>
> **– What are the challenges and opportunities for the legal academy in this social and campus climate?**
> **– Does our community have a special role to play as our schools, universities, and civil society confront critical issues surrounding the various diversity issues of concern?**
> **– Are there tensions or synergies between traditional academic values of academic freedom and viewpoint diversity with heightened commitments to racial and other forms of equity and inclusion?**

Prop 1 - Class 26 Final Exam Review Session

ConLaw Class 26 - The First Amendment

Vermont Law School Federalist Society Chapter - Predicting the Supreme Court

I submitted a proposal on intellectual diversity: The Effect of Model Rule of Professional Conduct 8.4(g) and Law School Pedagogy and Academic Freedom.

It was not selected.

In any event, here is my proposal, which I will write about at some point:

> **In August of 2016, the American Bar Association added to Model Rule of Professional Conduct 8.4 a new section (g), that provides, in part: "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 well-intentioned rule, which leaves key terms ill-defined, could have unintended consequences for law school pedagogy and academic freedom.**
>
> **Before this amendment, Comment 3 to Rule 8.4 prohibited an attorney from "knowingly manifest[ing] by words or conduct bias or prejudice" "in the course of representing a client" when such conduct was "prejudicial to the administration of justice." The former sphere of misconduct was fairly narrow. The new Rule 8.4(g) applies far more broadly to any "conduct related to**

Boston College Federalist Society Chapter - Debate on the Affordable Care Act

UPCOMING EVENTS

@JOSHMBLACKMAN

Tweets by @JoshMBlackman

Josh Blackman @JoshMBlackm

Judge Bates's ruling is a blessing in disguise. See lawfareblog.com/daca-rescissio… I have a piece forthcoming on @lawfareblog that explains how a potential injunction from Brownsville may facilitate DACA memo 2.0 in DDC

DACA… The at… lawfar…

Embed View on Twit

> **the practice of law," which is defined in a comment to include "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." At a minimum, this provision applies to law professors who speak at bar functions or offer continuing legal education classes. This would also include presentations at other "social activities in connection with the practice of law," such as the Federalist Society, the American Constitution Society, and even the AALS.**
>
> **Further, the new rule could reasonably be read to sweep in a host of law school activities. The comments specifically countenances such jurisdiction: "Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations." This explanation is far more specific than the proposed version, which merely stated that "Paragraph (g) does not prohibit conduct undertaken to promote diversity." That the ABA went out of its way to explain that**

> **activities to "promote diversity" in law schools were permissible, suggests that Rule 8.4(g) can in fact reach activities within law school. In addition to law student organizations, law school clinics also clearly fall within the umbrella of Rule 8.4(g). Clinical professors will have to govern their lectures to comply with this rule.**
>
> **Whether doctrinal classes are covered by this admonition is a far closer call. If in the course of a contracts class, a professor offers several litigation tips, is that "related to the practice of law"? If during a torts class, a professor recalls a case she worked on in practice, and uses that as a teaching moment, is that "related to the practice of law"? Read more broadly, graduation from an accredited law school is a prerequisite to practice law. Required courses would all seem to be "in connection with the practice of law." Even then, it would be difficult to argue that students should avoid electives. The term is ill-defined in the Model Rule, and could be read capaciously to cover a host of activities within law school.**
>
> **As a result, once law professors with active law licenses are bound by this rule, the burden shifts to them to ensure their pedagogy does not constitute "harassment." This measure, no doubt well-intentioned, can have a chilling effect on**

> **classroom discussions. Pure verbal "harassment," and nothing more, is unconstitutionally vague, and is not one of the categories of unprotected speech identified by the Supreme Court. The comments, which define the term as "derogatory or demeaning verbal or physical conduct," does little to cure the vagueness. Indeed, the ABA departed sharply from the Supreme Court's definition of "sexual harassment" in the Title IX context, which must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." Title VII employs a similar definition for a hostile work environment. The ABA's nebulous definition does not require the conduct to be "severe" or "pervasive," nor does it have to "deprive" a student of "educational opportunities." Rather, a student could file a bar complaint against a professor based on a single fleeting comment in class that he or she deems "derogatory" or "demeaning."**
>
> **Consider a few examples. First, a professor explains that the Supreme Court's decision in Obergefell v. Hodges, recognizing a right to same-sex marriage, has no grounding in the text or history of the Constitution. A student feels that such a lecture is "demeaning" to the LGBT community.**

> **Indeed, the majority decision in that case stated that the Constitution affords "dignity" in the form of marriage equality. Thus, criticizing the decision is denying dignity on the basis of sexual orientation. Second, a professor explains that the President's executive action on immigration is unconstitutional, and that aliens without lawful presence should be removable under statutory law. A student feels that such a lecture is "demeaning" to her noncitizen parents on the basis of their national origin. Third, a professor explains that even under the principles of Chevron deference, the term "sex" in Title IX (enacted in 1972) cannot be construed to prohibit discrimination on the basis of gender identity. A student feels that such a lecture is "derogatory" to transgender students. Fourth, a professor contends that affirmative consent laws violate due process. A student, a victim of abuse, finds the lecture "demeaning" on the basis of sex. I could go on, but you get the point. A range of academic theories would be silenced in the classroom under the threat of an unconstitutionally vague standard of "harassment." These examples should also illustrate another implication of this rule: right-of-center viewpoints in the classroom are at risk of being censored by Rule 8.4(g). Lectures extolling Obergefell, executive action on immigration, anti-discrimination laws, and affirmative consent regimes**

> **would not be deemed "derogatory" or "demeaning."**
>
> **The AALS President's Program on Diversity requested submissions that explore the "tensions or synergies between traditional academic values of academic freedom and viewpoint diversity with heightened commitments to racial and other forms of equity and inclusion." The well-intentioned Rule 8.4(g) will no doubt punish certain behaviors that are unacceptable within the legal community, but at the same time it will chill certain viewpoints and stifle academic freedom. I look forward to discussing this timely and important topic at the 2017 Annual Meeting.**

‹ PREVIOUS

Predict Justice Scalia's Replacement with #FantasyJustice from #Fantasy SCOTUS

NEXT ›

Flashback to 2009 Federalist Society Lawyer's Convention Live Blog Day #2

1 Comment

jimb82 on November 15, 2016 at 9:55 am

When I was in law school, I noted that discrimination on the basis of veteran status or religious belief was prohibited by state or federal law, and I hoped that those students who demanded a particular "diversity" outcome would win their somewhat specious case (they did not) so that I could then bring my own case as a religious veteran who was being discriminated against in my very liberal law school. Perhaps there is an opportunity lurking in Rule 8.4 to hoist discriminators on their own petards.

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to academic freedom…

2. New Article: "A Pause for State Courts Considering Model Rule 8.4(g)" | Josh Blackman's Blog - […] State Courts Considering Model Rule 8.4(g). I had written before about Rule 8.4(g), including my rejected proposal for the…

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EXHIBIT 9

Eugene Volokh, "Banning lawyers from discriminating based on 'socioeconomic status' in choosing partners, employees or experts,"
WASHINGTON POST (Aug. 10, 2016)

The Washington Post

The Volokh Conspiracy • Opinion

Banning lawyers from discriminating based on 'socioeconomic status' in choosing partners, employees or experts

By Eugene Volokh August 10, 2016

As I mentioned in my lawyer speech code post, the American Bar Association has just adopted a new provision in its Model Rules of Professional Conduct — an influential document that many states have adopted as binding on lawyers in their state. This proposal would allow lawyers to be punished for a wide range of "discrimination and harassment"; I've criticized the "harassment" ban, but here I want to focus on a different aspect of the rule, which I also discussed when the rule was first proposed (emphasis added):

> 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 Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. . . .
>
> 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*. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing [diverse] employees or sponsoring diverse law student organizations.
>
> A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Lawyers also should be mindful of their professional obligations . . . to provide legal services to those who are unable to

> pay, and their obligation . . . not to avoid appointments from a tribunal except for good cause. A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities.

So let's see how this works as to "socioeconomic status." That term isn't defined in the proposed rule, but the one definition I've seen — interpreting a similar ban on socioeconomic-status discrimination in the Sentencing Guidelines — is "an individual's status in society as determined by objective criteria such as education, income, and employment." *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991); see also *United States v. Peltier*, 505 F.3d 389, 393 & n.14 (5th Cir. 2007) (likewise treating wealth as an element of socioeconomic status); *United States v. Graham*, 946 F.2d 19, 21 (4th Cir. 1991) (same).

All of the following, then, might well lead to discipline if the ABA adopts this rule as part of its influential Model Rules of Professional Conduct, and then states adopt it in turn:

1. A law firm preferring more-educated employees — both as lawyers and as staffers — over less-educated ones.
2. A law firm preferring employees who went to high-"status" institutions, such as Ivy League schools.
3. A law firm contracting with expert witnesses and expert consultants who are especially well-educated or have had especially prestigious employment.
4. A solo lawyer who, when considering whether to team up with another solo lawyer, preferring a wealthier would-be partner over a poorer one. (The solo might, for instance, want a partner who would have the resources to weather economic hard times and to help the firm do the same.)

Back when the rule was limited to actions that were "prejudicial to the administration of justice" and didn't cover ordinary employment decisions, including socioeconomic status as one of the forbidden bases for discrimination may have made sense. For instance, insulting a witness because of his poverty, where the poverty is not relevant to the case, might reasonably be condemned. But now the rule is being broadened far beyond this. And though people pointed out the breadth of the rule when the ABA was first considering it, the ABA did nothing to materially limit the scope of the rule — apparently, it does indeed want to bar lawyers from discriminating based on socioeconomic status in choosing partners, employees and experts.

I think that, more broadly, there's no reason for state bars or state courts to go beyond the existing state and federal anti-discrimination categories when it comes to employment and similar matters. If state law bans, say, sexual orientation discrimination in employment generally, that would normally apply to law firms as well as to other firms. But if a state legislature chose not to ban sexual orientation, gender identity or marital status discrimination, I think that, too, should apply equally to lawyers. State bars and state courts may reasonably impose special rules on behavior in court, behavior with respect to witnesses, and the like; but I don't think they should become employment regulators.

Yet even if state bars and courts do want to regulate employment discrimination, they should certainly not include "socioeconomic status." To my knowledge, no state anti-discrimination law prohibits such discrimination, and there is very good reason not to prohibit it.

24 Comments

Eugene Volokh teaches free speech law, religious freedom law, church-state relations law, a First Amendment Amicus Brief Clinic, and an intensive editing workshop at UCLA School of Law, where he has also often taught copyright law, criminal law, tort law, and a seminar on firearms regulation policy. Follow @volokhc

EXHIBIT 6

Eugene Volokh, "Texas AG: Lawyer speech code proposed by American Bar Association would violate the First Amendment," WASHINGTON POST (Dec. 20, 2016)

The Washington Post

The Volokh Conspiracy • Opinion

Texas AG: Lawyer speech code proposed by American Bar Association would violate the First Amendment

By Eugene Volokh December 20, 2016

From today's Texas Attorney General Opinion No. KP-0123 (case citations omitted):

> In August of 2016, the ABA House of Delegates amended Model Rule 8.4 to add subsection (g), which provides that it is professional misconduct for a lawyer to:
>
> > (g) 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 paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Two comments relevant to subsection (g) were also added to the Rule:

> [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. ...

[4] 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. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[T]he Texas Supreme Court has not adopted Model Rule 8.4(g), and it is not currently part of the Texas Rules. However, if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent.

A court would likely conclude that Model Rule 8.4(g) infringes upon the free speech rights of members of the State Bar.

... Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues.

While decisions of the United States Supreme Court have concluded that

an attorney's free speech rights are circumscribed to some degree in the courtroom during a judicial proceeding and outside the courtroom when speaking about a pending case, Model Rule 8.4(g) extends far beyond the context of a judicial proceeding to restrict speech or conduct in any instance when it is "related to the practice of law" [including, among other things,] … ["]participating in bar association, business or social activities in connection with the practice of law.["] Given the broad nature of this rule, a court could apply it to an attorney's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.

One commentator [Prof. Ron Rotunda] has suggested, for example, that at a bar meeting dealing with proposals to curb police excessiveness, a lawyer's statement, "Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime," could be subject to discipline under Model Rule 8.4(g). In the same way, candid dialogues about illegal immigration, same-sex marriage, or restrictions on bathroom usage will likely involve discussions about national origin, sexual orientation, and gender identity. Model Rule 8.4(g) would subject many participants in such dialogue to discipline, and it will therefore suppress thoughtful and complete exchanges about these complex issues….

A court would likely conclude that Model Rule 8.4(g) infringes upon an attorney's First Amendment right to free exercise of religion.

Model Rule 8.4(g) could also be applied to restrict an attorney's religious liberty and prohibit an attorney from zealously representing faith-based groups. For example, in the same sex marriage context, the U.S. Supreme Court has emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." The Court has further encouraged "an open and searching debate" on the

issue.

However, operation of Model Rule 8.4(g) would stifle such a debate within the legal community for fear of disciplinary reprimand and would likely result in some attorneys declining to represent clients involved in this issue for fear of disciplinary action. If an individual takes an action based on a sincerely-held religious belief and is sued for doing so, an attorney may be unwilling to represent that client in court for fear of being accused of discrimination under the rule. "[D]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment." Given that Model Rule 8.4(g) attempts to do so, a court would likely conclude that it is unconstitutional.

A court would likely conclude that Model Rule 8.4(g) infringes upon an attorney's right to freedom of association.

"[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." Contrary to this constitutionally protected right, however, Model Rule 8.4(g) could be applied to restrict an attorney's freedom to associate with a number of political, social, or religious legal organizations.

The Rule applies to an attorney's participation in "business or social activities in connection with the practice of law." Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline. In addition, a number of other legal organizations advocate for specific political or social positions on issues related to race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital

status, or socioeconomic status. Were Texas to adopt Model Rule 8.4(g), it would likely inhibit attorneys' participation in these organizations and could be applied to unduly restrict their freedom of association. ·

Because Model Rule 8.4(g) attempts to prohibit constitutionally protected activities, a court would likely conclude it is overbroad.

An overbroad statute "sweeps within its scope a wide range of both protected and non protected expressive activity." … In the First Amendment context, a court will invalidate a statute as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." …

Like those examples discussed above, numerous scenarios exist of how the rule could be applied to significantly infringe on the First Amendment rights of all members of the State Bar. A statute "found to be overbroad may not be enforced at all, even against speech that could constitutionally be prohibited by a more narrowly drawn statute." Because Model Rule 8.4(g) substantially restricts constitutionally permissible speech and the free exercise of religion, a court would likely conclude it is overbroad and therefore unenforceable.

As applied to specific circumstances, a court would likely also conclude that Model Rule 8.4(g) is void for vagueness.

… Model Rule 8.4(g) lacks clear meaning and is capable of infringing upon multiple constitutionally protected rights, and it is therefore likely to be found vague. In particular, the phrase "conduct related to the practice of law," while defined to some extent by the comment, still lacks sufficient specificity to understand what conduct is included and therefore "has the potential to chill some protected expression" by not defining the prohibited conduct with clarity.

Also, the rule prohibits "discrimination" without clarifying whether it is

limited to unlawful discrimination or extends to otherwise lawful conduct. It prohibits "harassment" without a clear definition to determine what conduct is or is not harassing. And it specifically protects "legitimate advice or advocacy consistent with these Rules" but does not provide any standard by which to determine what advice is or is not legitimate. Each of these unclear terms leave Model Rule 8.4(g) open to invalidation on vagueness grounds as applied to specific circumstances.

The Texas Rules of Disciplinary Conduct sufficiently address attorney misconduct to prohibit unlawful discrimination.

Multiple aspects of Model Rule 8.4(g) present serious constitutional concerns that would likely result in its invalidation by a court. The Texas Disciplinary Rules of Professional Conduct, on the other hand, already address issues of attorney discrimination through narrower language that provides better clarification about the conduct prescribed. Texas Disciplinary Rule of Professional Conduct 5.08 provides:

(a) A lawyer shall not willfully, *in connection with an adjudicatory proceeding*, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation *towards any person involved in that proceeding in any capacity* [emphasis added –EV].

(b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as "confidential information" under these Rules. It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy:

is necessary in order to address any substantive or procedural issues raised in the proceeding; and

is conducted in conformity with applicable rulings and orders of a

> tribunal and applicable rules of practice and procedure.
>
> Model Rule 8.4(g) is therefore unnecessary to protect against prohibited discrimination in this State, and were it to be adopted, a court would likely invalidate it as unconstitutional.
>
> **Summary**
>
> A court would likely conclude that the American Bar Association's Model Rule of Professional Conduct 8.4(g), if adopted in Texas, would unconstitutionally restrict freedom of speech, free exercise of religion, and freedom of association for members of the State Bar. In addition, a court would likely conclude that it was overbroad and void for vagueness.

I'm very glad to see this, and I particularly agree with the free speech conclusion. Here's an excerpt from a comment that I submitted to the Texas AG's office during the public comments period, which discusses the free speech issue in more detail:

> [Say] that some lawyers put on a Continuing Legal Education event that included a debate on same-sex marriage, or on whether there should be limits on immigration from Muslim countries, or on whether people should be allowed to use the bathrooms that correspond to their gender identity rather than their biological sex. In the process, unsurprisingly, the debater on one side says something critical of gays, Muslims or transgender people. Under the Rule, the debater could well be disciplined by the state bar:
>
> 1. He has engaged in "verbal … conduct" that "manifests bias or prejudice" toward gays, Muslims, or transgender people.
>
> 2. Some people view such statements as "harmful"; those people may well include bar authorities.
>
> 3. This was done in an activity "in connection with the practice of law," a Continuing Legal Education event. (The event could also be a bar activity,

if it's organized through a local bar association, or a business activity.)

4. The statement isn't about one person in particular (though it could be — say the debater says something critical about a specific political activist or religious figure based on that person's sexual orientation, religion or gender identity). But "anti-harassment … case law" has read "harassment" as potentially covering statements that are offensive to a group generally, even when they aren't said to or about a particular offended person. *See, e.g., Sherman K. v. Brennan*, EEOC DOC 0120142089, 2016 WL 3662608 (EEOC) (coworkers' wearing Confederate flag T-shirts on occasion constituted racial harassment); *Shelton D. v. Brennan*, EEOC DOC 0520140441, 2016 WL 3361228 (EEOC) (remanding for factfinding on whether coworker's repeatedly wearing cap with "Don't Tread On Me" flag constituted racial harassment); *Doe v. City of New York*, 583 F. Supp. 2d 444 (S.D.N.Y. 2008) (concluding that e-mails condemning Muslims and Arabs as supporters of terrorism constituted religious and racial harassment); *Pakizegi v. First Nat'l Bank*, 831 F. Supp. 901, 908 (D. Mass. 1993) (describing an employee's posting a photograph of the Ayatollah Khomeni and another "of an American flag burning in Iran" in his own cubicle as potentially "national-origin harassment" of coworkers who see the photographs). And the rule is broad enough to cover statements about "others" as groups and not just as individuals.

Indeed, one of the comments to the rule originally read "Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups." But the italicized text was deleted, further reaffirming that the statement doesn't have to be focused on any particular person.

Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage,

restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

Again, you've engaged in "verbal … conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The State Bar, if it adopts the Rule, might thus discipline you for your "harassment." And, of course, the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you're fine; if you express the contrary viewpoints, you're risking disciplinary action.

This goes well beyond Texas Disciplinary Rule of Professional Conduct 5.08, which bans manifesting bias or prejudice only "in connection with an adjudicatory proceeding," and the rules in other states, which bar discrimination and harassment when they are "prejudicial to the administration of justice." See, e.g., Ariz. Rules of Prof. Conduct 8.4 Comment. Courts and the bar can legitimately protect the administration of justice from interference, even by, for instance, restricting the speech of lawyers in the courtroom or in depositions. But the ABA proposal deliberately goes vastly beyond such narrow restrictions, to apply even to "social activities."

The ABA proposal also goes beyond existing hostile-work-environment harassment law under Title VII and similar state statutes. That law itself poses potential First Amendment problems if applied too broadly. *See, e.g., DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment.") (dictum); *Rodriguez v. Maricopa County Comm. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause.") (quoting *Saxe v. State Coll. Area School Dist.*, 240 F.3d 200, 204 (3d Cir 2001) (Alito, J.)). But in most states, harassment law doesn't include sexual orientation, gender identity, marital status, or

socioeconomic status. It also generally doesn't cover social activities at which coworkers aren't present — but under the proposed rule, even a solo practitioner could face discipline because something that he said at a law-related function offended someone employed by some other law firm.

Hostile-work-environment harassment law is also often defended (though in my view that defense is inadequate) on the grounds that it's limited to speech that is so "severe or pervasive" that it creates an "offensive work environment." This proposed rule conspicuously omits any such limitation. Though the provision that "anti-harassment … case law may guide application of paragraph (g)" might be seen as implicitly incorporating a "severe or pervasive" requirement, that's not at all clear: That provision says only that the anti-harassment case law "may guide" the interpretation of the rule, and in any event the language of paragraph (g) seems to cover any "harmful verbal … conduct," including isolated statements.

Many people pointed out possible problems with this proposed rule — yet the ABA adopted it with only minor changes that do nothing to limit the rule's effect on speech. My inference is that the ABA wants to do exactly what the text calls for: limit lawyers' expression of viewpoints that it disapproves of. I hope that Texas, consistently with the First Amendment, rejects such a restriction on constitutionally protected speech.

90 Comments

Eugene Volokh teaches free speech law, religious freedom law, church-state relations law, a First Amendment Amicus Brief Clinic, and an intensive editing workshop at UCLA School of Law, where he has also often taught copyright law, criminal law, tort law, and a seminar on firearms regulation policy.
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EXHIBIT 5

Tennessee AG Opinion No. 18-11

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 16, 2018

Opinion No. 18-11

American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

Question 1

If Tennessee were to adopt the American Bar Association's new Model Rule 8.4(g), or the version of it currently being considered in Tennessee, could Tennessee's adoption of that new Rule constitute a violation of a Tennessee attorney's statutory or constitutional rights under any applicable statute or constitutional provision?

Opinion 1

Yes. Proposed Rule of Professional Conduct 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct.

ANALYSIS

For the analysis that forms the basis of this opinion, please see the Comment Letter of the Tennessee Attorney General filed with the Tennessee Supreme Court on March 16, 2018, in response to the Court's order of November 21, 2017, soliciting written comments on whether to adopt the amendments to Tennessee Supreme Court Rule 8, Rule of Professional Conduct 8.4, that are being proposed by Joint Petition of the Tennessee Board of Professional Responsibility and the Tennessee Bar Association. A copy of the Comment Letter is attached hereto and incorporated herein.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
Special Assistant to the Solicitor General and the Attorney General

Requested by:

The Honorable Mike Carter
State Representative
632 Cordell Hull Building
Nashville, Tennessee 37243

STATE OF TENNESSEE

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March 16, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Supreme Court
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219

Re: No. ADM2017-02244 — Comment Letter of the Tennessee Attorney General Opposing Proposed Amended Rule of Professional Conduct 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This letter is being filed in response to the Court's order of November 21, 2017, soliciting written comments on whether to adopt amendments to Tennessee Supreme Court Rule 8, Rule of Professional Conduct 8.4, that were proposed by Joint Petition of the Tennessee Board of Professional Responsibility ("BPR") and the Tennessee Bar Association ("TBA"). Because proposed Rule of Professional Conduct 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct, the Tennessee Office of the Attorney General and Reporter strongly opposes its adoption.

The proposed amendments to Rule 8.4 and its accompanying comment are "patterned after" ABA Model Rule 8.4(g).[1] That model rule has been widely and justifiably criticized as

[1] Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g) at 1, *In re Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, No. ADM2017-02244 (Tenn. Nov. 15, 2017) (hereinafter "Joint Petition").

creating a "speech code for lawyers" that would constitute an "unprecedented violation of the First Amendment" and encourage, rather than prevent, discrimination by suppressing particular viewpoints on controversial issues.[2] To date, ABA Model Rule 8.4(g) has been adopted by only one State—Vermont.[3] A number of other States have already rejected its adoption.[4] Although the BPR and TBA assert in their Joint Petition that their Proposed Rule 8.4(g) "improve[s] upon" ABA Model Rule 8.4(g) by "more clearly protecting the First Amendment rights of lawyers," Joint Petition 1, the proposed rule suffers from the same fundamental defect as the model rule: it wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech, even when the speech is related to the practice of law and even when it could be considered discriminatory or harassing. Far from "protecting" the First Amendment rights of lawyers, Proposed Rule 8.4(g) would seriously compromise them.

If adopted, Proposed Rule 8.4(g) would profoundly transform the professional regulation of Tennessee attorneys. It would regulate aspects of an attorney's life that are far removed from protecting clients, preventing interference with the administration of justice, ensuring attorneys' fitness to practice law, or other traditional goals of professional regulation. Especially since there is no evidence that the current Rule 8.4 is in need of revision, there is no reason for Tennessee to adopt such a drastic change. If the TBA and BPR are right that harassing and discriminatory speech is a problem in the legal profession, then the answer is more speech, not enforced silence in the guise of professional regulation.

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[2] Letter from Edwin Meese III and Kelly Shackelford to ABA House of Delegates (Aug. 5, 2016), https://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf. *See also, e.g.*, Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, The Volokh Conspiracy (Aug. 10, 2016, 8:53 AM), http://reason.com/volokh/2016/08/10/a-speech-code-for-lawyers-bann; John Blackman, *A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and Conduct Related to the Practice of Law*, 30 Geo. J. Legal Ethics 241 (2017); Ronald Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), https://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought.

[3] *ABA Model Rule 8.4(g) and the States*, Christian Legal Society, https://www.christianlegalsociety.org/resources/aba-model-rule-84g-and-states (last visited Mar. 6, 2018).

[4] Order, *In re Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct*, No. 2017-000498 (S.C. June 20, 2017), https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01; Order, *In re Amendments to Rule of Professional Conduct 8.4*, No. ADKT526 (Nev. Sep. 25, 2017).

I. Problematic Features of Proposed Rule 8.4(g)

In their current form, the Rules of Professional Conduct do not expressly prohibit discrimination or harassment by attorneys. Rather, Rule 8.4(d) provides that it is "professional misconduct" to "engage in conduct that is prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4(d). And comment 3 provides that "[a] lawyer, who in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice." *Id.* at RPC 8.4(d), cmt. 3. Comment 3 also makes clear that "[l]egitimate advocacy representing the foregoing factors does not violate paragraph (d)." *Id.*

Proposed Rule 8.4(g) would establish a new black-letter rule that subjects Tennessee attorneys to professional discipline for "engag[ing] 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." Comment 3 to the proposed rule would define "harassment" and "discrimination" to include not only "physical conduct," but also "verbal . . . conduct"—better known as speech.

Several problematic features of the proposed rule warrant highlighting. First, the proposed rule would apply not only to speech and conduct that occurs in the course of representing a client or appearing before a judicial tribunal, but also to speech and conduct that is merely "*related to the practice of law*." (emphasis added). Comment 4 to the proposed rule explains that "[c]onduct 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." Far from cabining the scope of the proposed rule, comment 4 leaves no doubt that the proposed rule would apply to virtually any speech or conduct that is even tangentially related to an individual's status as a lawyer, including, for example, a presentation at a CLE event, participation in a debate at an event sponsored by a law-related organization, the publication of a law review article, and even a casual remark at dinner with law firm colleagues.[5] Such speech or conduct would be "professional misconduct" even if it in no way prejudices the administration of justice.

[5] Indeed, the report that recommended adoption of Model Rule 8.4(g) to the ABA House of Delegates explained that the rule would regulate any "conduct lawyers are permitted or required to engage in because of their work as a lawyer," including "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law." Report to the House of Delegates 9, 11 (May 31, 2016), https://www.americanbar.org/content/dam/aba/administrative/ professional_ responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_ posting.authcheckdam.pdf.

Second, the proposed rule would prohibit a broad range of "harassment or discrimination," including a significant amount of speech and conduct that is not currently prohibited under federal or Tennessee antidiscrimination statutes. To the extent that federal antidiscrimination laws apply to attorneys engaged in speech or conduct related to the practice of law, they generally apply only in the employment and education contexts and prohibit discrimination only on the basis of race, color, national origin, religion, sex, age, or disability. *See* 20 U.S.C. § 1681 (Title IX); 29 U.S.C. § 623 (ADEA); 29 U.S.C. § 794 (Rehabilitation Act); 42 U.S.C. § 2000d (Title VI); 42 U.S.C. § 2000e-2 (Title VII); 42 U.S.C. § 12112 (ADA). The Tennessee Human Rights Act similarly applies only in certain limited areas, including employment, and prohibits discrimination only on the basis of "race, creed, color, religion, sex, age or national origin." Tenn. Code Ann. § 4-21-401. Under both federal and state antidiscrimination laws, moreover, the only discrimination or harassment that is actionable in the employment context is that which results in a materially adverse employment action or is sufficiently severe and pervasive to create a hostile work environment. *See, e.g., White & Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 & n.1 (6th Cir. 2004) (en banc) (explaining that "not just any discriminatory act by an employer constitutes discrimination under Title VII"); *Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 602, 610 (Tenn. Ct. App. 2007). And the only harassment that is actionable in the education context is that which is sufficiently severe and pervasive to effectively bar a student from receiving educational benefits. *See, e.g., Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018). Federal and state antidiscrimination laws also explicitly protect religious freedom by exempting religious organizations from their ambit. *See, e.g.*, 42 U.S.C. § 2000e-1(a); Tenn. Code Ann. § 4-21-405.

Proposed Rule 8.4(g) would reach well beyond federal and state antidiscrimination laws. For one thing, the proposed rule would prohibit any and all "harassment or discrimination"—even that which does not result in any tangible adverse consequence and is not sufficiently severe or pervasive to create a hostile environment. The proposed amendments to comment 3, which attempt to clarify what constitutes "harassment or discrimination," do nothing to alleviate this concern. The proposed comment simply states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others," and "[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct." In other words, any speech or conduct that could be considered "harmful" or "derogatory or demeaning" would constitute professional misconduct within the meaning of the proposed rule. And while proposed comment 3 states that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g)" (emphasis added), there is no requirement that the scope of Proposed Rule 8.4(g) be limited in that manner.

Even more troubling, Proposed Rule 8.4(g) would prohibit "harassment or discrimination" on the basis of characteristics that are not expressly covered by federal and state antidiscrimination laws—namely, "sexual orientation, gender identity, marital status, [and] socioeconomic status." It is no secret that individuals continue to hold diverse views on issues related to sexual orientation and gender identity, and those who hold traditional views on sexuality and gender frequently do so because of sincerely held religious beliefs. As the U.S. Supreme Court recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), for example, many who consider "same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." By deeming as "professional misconduct" any speech that someone may view as "harmful" or "derogatory or demeaning" toward homosexuals or transgender individuals,

Proposed Rule 8.4(g) would prevent attorneys who hold traditional views on these issues from "engag[ing] those who disagree with their view in an open and searching debate," *Obergefell*, 135 S. Ct. at 2607.

Unlike Title VII and the Tennessee Human Rights Act, Proposed Rule 8.4(g) includes no exception to protect religious freedom. Comment 4a to the proposed rule gives a nod to the First Amendment by stating that paragraph (g) "does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment." As explained below, however, nearly all speech and conduct that is "related to the practice of law" is also protected by the First Amendment, so that explanatory comment in fact does nothing to protect attorneys' First Amendment rights.

Third, Proposed Rule 8.4(g) would prohibit not only speech and conduct "that the lawyer knows . . . is harassment or discrimination," but also that which the lawyer "reasonably should know is harassment or discrimination." In other words, the proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way.

II. Proposed Rule 8.4(g) Would Violate the U.S. and Tennessee Constitutions and Conflict with the Rules of Professional Conduct.

As a result of these and other problematic features, Proposed Rule 8.4(g) would violate the U.S. and Tennessee Constitutions and conflict with the spirit and letter of the existing Rules of Professional Conduct.

A. Proposed Rule 8.4(g) Would Infringe on Tennessee Attorneys' Rights to Free Speech, Freedom of Association, Free Exercise of Religion, and Due Process.

Proposed Rule 8.4(g) would clearly violate the First Amendment rights of Tennessee attorneys, including their rights to free speech, freedom of expressive association, and the free exercise of religion, and equivalent protections under the Tennessee Constitution.[6]

The First Amendment prohibits the government from regulating protected speech or expressive conduct based on its content unless the regulation is the least restrictive means of achieving a compelling government interest. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011). That most exacting level of scrutiny would apply to Proposed Rule 8.4(g) because it regulates speech and expressive conduct that is entitled to full First Amendment protection based on viewpoint.

[6] The Tennessee Constitution also protects the rights to free speech, freedom of expressive association, and free exercise of religion. *See* Tenn. Const. art. I, § 19 (right to free speech); Tenn. Const. art. I. § 3 (right to free exercise of religion). This Court has held that these rights are at least as broad as those guaranteed by the First Amendment to the U.S. Constitution. *See, e.g., S. Living, Inc. v. Celauro*, 789 S.W.2d 251, 253 (Tenn. 1990); *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956).

Expression that would be deemed discrimination or harassment on the basis of one of the categories included in Proposed Rule 8.4(g) is entitled to robust First Amendment protection, even though listeners may find such expression harmful or offensive. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) ("[T]here is . . . no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs."). The U.S. Supreme Court has made clear that, save for a few narrowly defined and historically recognized exceptions such as obscenity and fighting words, the "'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (plurality opinion) (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)); *see also, e.g., Brown*, 564 U.S. at 791, 798 (noting that "disgust is not a valid basis for restricting expression"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting . . . ."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("[T]he Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (internal quotation marks omitted)). Indeed, the very "point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995); *see also Texas v. Johnson*, 491 U.S. 397, 408 (1989) ("[A] principal function of free speech under our system of government is to invite dispute." (internal quotation marks omitted)).

The fact that the speech at issue is that of attorneys does not deprive it of protection under the First Amendment. As a general matter, the expression of attorneys is entitled to full First Amendment protection, even when the attorney is acting in his or her professional capacity. *See, e.g., In re Primus*, 436 U.S. 412, 432-38 (1978) (applying strict scrutiny to invalidate on First Amendment grounds discipline imposed on attorney for informing welfare recipient threatened with forced sterilization that ACLU would provide free legal representation). Courts have permitted the government to limit the speech of attorneys in only narrow circumstances, such as when the speech pertains to a pending judicial proceeding or otherwise prejudices the administration of justice. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1072 (1991); *Mezibov v. Allen*, 411 F.3d 712, 717 (6th Cir. 2005); *Bd. of Prof'l Responsibility v. Slavin*, 145 S.W.3d 538, 549 (Tenn. 2004).[7]

[7] Courts have also applied a lower level of scrutiny to regulations that implicate only the commercial speech of attorneys. *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622-24 (1995); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). Proposed Rule 8.4(g) cannot be defended on that ground, because it reaches non-commercial speech. Some courts have also suggested that regulations of "professional speech" should be subject to a lower level of scrutiny. *See, e.g., Pickup v. Brown*, 740 F.3d 1208, 1225-29 (9th Cir. 2013). But neither the U.S. Supreme Court, the Sixth Circuit, nor the Tennessee Supreme Court has so held. In any event, Proposed Rule 8.4(g) is not limited to "professional speech"—that is, personalized advice to a paying client, *see, e.g., Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt.*, 879 F.3d 101, 109 (4th Cir. 2018)—but instead reaches speech or conduct that is merely "related to the practice of law."

This Court's decision in *Ramsey v. Board of Professional Responsibility*, 771 S.W.2d 116 (Tenn. 1989), is particularly instructive. There, a District Attorney General's law license was suspended because he made remarks to the media that were critical of the judicial system. This Court held that the disciplinary sanctions violated the First Amendment because the attorney's remarks, though "disrespectful and in bad taste," were protected expression. *Id.* at 122. This Court made clear that "[a] lawyer has every right to criticize court proceedings and the judges and courts of this State after a case is concluded," as long as those statements are not false. *Id.* at 122. Were the rule otherwise, this Court explained, it would "close the mouths of those best able to give advice, who might deem it their duty to speak disparagingly." *Id.* at 121. Proposed Rule 8.4(g) is not limited to speech and conduct that pertains to a pending judicial proceeding or that actually prejudices the administration of justice; rather, it reaches all speech and conduct in any way "related to the practice of law"—speech that is entitled to full First Amendment protection.

Proposed Rule 8.4(g) would not only regulate speech that is protected by the First Amendment, but it would also do so on the basis of viewpoint. But "it is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829 (referring to "[v]iewpoint discrimination" as "an egregious form of content discrimination"). Proposed Rule 8.4(g) discriminates based on viewpoint because it would permit certain expression that is laudatory of a person's race, sex, religion, or other protected characteristic, while prohibiting expression that is "derogatory or demeaning" of that characteristic. Indeed, proposed comment 4 makes clear that "[l]awyers may engage in conduct undertaken to *promote* diversity and inclusion without violating this Rule." (emphasis added). Like the trademark disparagement clause that the U.S. Supreme Court invalidated on First Amendment grounds in *Matal*, Proposed Rule 8.4(g) "mandat[es] positivity." 137 S. Ct. at 1766 (Kennedy, J., concurring in part and concurring in the judgment).

Because Proposed Rule 8.4(g) would regulate protected speech based on its viewpoint, it would be "presumptively unconstitutional" and could be upheld only if it were narrowly tailored to further a compelling government interest. *Rosenberger*, 515 U.S. at 830. But the proposed rule could not satisfy that exacting scrutiny. Even assuming that the government has a compelling interest in preventing discrimination in particular contexts such as employment or education, *see Saxe*, 240 F.3d at 209, or in protecting the administration of justice, Proposed Rule 8.4(g) is not narrowly tailored to further those interests because it would reach all speech and conduct in any way "related to the practice of law," regardless of the particular context in which the expression occurs or whether it actually interferes with the administration of justice.

Indeed, the Joint Petition does not establish empirically or otherwise any actual need for the proposed rule. The section of the Joint Petition titled "the need for proposed rule 8.4(g)" does not document any instances of harassment or discrimination brought to the attention of the BPR or TBR. Nor does it explain in what way discriminatory or harassing speech by attorneys harms the legal profession or the administration of justice. It simply agrees with the ABA House of Delegates' ipse dixit that the proposed rule is "in the public's interest" and "in the profession's interest." Joint Petition 2 (internal quotation marks omitted).

Even if discrete applications of Proposed Rule 8.4(g) could be upheld—for example, a discriminatory comment made during judicial proceedings that actually prejudices the administration of justice—the rule would still be subject to facial invalidation because it is unconstitutionally overbroad. A law may be invalidated under the First Amendment overbreadth doctrine "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (internal quotation marks omitted). The "reason for th[at] special rule in First Amendment cases is apparent: An overbroad statute might serve to chill protected speech." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977). A person "might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged." *Id.* The overbreadth doctrine "reflects the conclusion that the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." *Id.*

Because Proposed Rule 8.4(g) would apply to any "harassment or discrimination" on the basis of a protected characteristic, including a single comment that someone may find "harmful" or "derogatory or demeaning," that is in any way "related to the practice of law," including remarks made at CLE events, debates, and in other contexts that do not involve the representation of a client or interaction with a judicial tribunal,[8] it would sweep in a substantial amount of attorney speech that poses no threat to any government interest that might conceivably justify the statute. Even if the BPR may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place. But this Court has cautioned that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of [Professional Conduct], does not create a chilling effect on First Amendment Rights." *Ramsey*, 771 S.W.2d at 121.

Proposed Rule 8.4(g) also suffers from a related problem: the terms "harassment," "discrimination," "reasonably should know," "related to the practice of law," and "legitimate advice or advocacy" are impermissibly vague under the Due Process Clause. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). To comport with the requirements of due process, a regulation must "provide a person of ordinary intelligence fair notice of what is prohibited.'" *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). But how is an attorney to know whether certain speech or conduct will be deemed harassing or discriminatory under the rule? Or whether certain speech or conduct will be deemed sufficiently "related to the practice of law" to fall within the ambit of the proposed rule? Determining whether an attorney "knows" or "reasonably should know" that the speech is harassing or discriminatory would require speculating about whether someone might view the speech as "harmful" or "derogatory or demeaning." Is an attorney who participates in a debate on income inequality engaging in discrimination based on socioeconomic status when he makes a negative remark about the "one percent"? How about an attorney who comments at a CLE on

[8] Even statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently "related to the practice of law" to fall within the scope of Proposed Rule 8.4(g). So too could statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization.

immigration law that illegal immigration is draining public resources? Is that attorney discriminating on the basis of national origin? The vagueness of the proposed rule only exacerbates its chilling effect on attorney speech. *See id.* at 254.

Clarity of regulation is important not only for regulated parties, but also "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* at 253; *see also Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 532 (Tenn. 1993) ("[T]he more important aspect of the vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimum guidelines to govern law enforcement"). The lack of clarity in Proposed Rule 8.4(g)'s terms creates a substantial risk that determinations about whether expression is prohibited will be guided by the "personal predilections" of enforcement authorities rather than the text of the rule. *Kolender v. Lawson*, 461 U.S. 352, 356 (1983) (internal quotation marks omitted). In fact, the proposed rule would effectively require enforcement authorities to be guided by their "personal predilections" because whether a statement is "harmful" or "derogatory or demeaning" depends on the subjective reaction of the listener. *See, e.g., Dambrot v. Cen. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (invalidating university "discriminatory harassment" policy on vagueness grounds because "in order to determine what conduct will be considered 'negative' or 'offensive' by the university, one must make a subjective reference"). Especially in today's climate, those subjective reactions can vary widely. *See id.* (observing that "different people find different things offensive").

Proposed Rule 8.4(g) would also infringe on the First Amendment right of Tennessee attorneys to engage in expressive association. The First Amendment protects an individual's "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000). That right is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Id.* at 647-48. Proposed Rule 8.4(g) is sufficiently broad that even membership in an organization that espouses views that some may consider "harmful" or "derogatory or demeaning" could be deemed "conduct related to the practice of law" that is "harassing or discriminatory." In this respect, the proposed rule is far broader than Rule 3.6 of the Code of Judicial Conduct. The latter rule prohibits a judge from "hold[ing] membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation," but comment 4 to the rule makes clear that "[a] judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation" of the rule. Tenn. Sup. Ct. R. 10, CJC 3.6(A) & cmt. 4. Proposed Rule 8.4(g), by contrast, is not limited to "invidious" discrimination and contains no exception for membership in a religious organization.

Because Proposed Rule 8.4(g) includes no exception for speech or conduct that is motivated by one's religious beliefs, it would also interfere with attorneys' First Amendment right to the free exercise of religion. Indeed, by expressly prohibiting harassment or discrimination based on "sexual orientation" and "gender identity," the proposed rule appears designed to target those holding traditional views on controversial matters such as sexuality and gender—views that are often "based on decent and honorable religious or philosophical premises," *Obergefell*, 135 S. Ct. at 2602. It is well settled that the Free Exercise Clause protects not only the right to believe, but also the right to act according to those beliefs. *See, e.g., Emp't Div., Dep't of Human Res. of*

Or. v. Smith, 494 U.S. 872, 877 (1990) (explaining that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts"). While gathering for worship with a particular religious group is unlikely to be deemed conduct "related to the practice of law," serving as a member of the board of a religious organization, participating in groups such as the Christian Legal Society, or even speaking about how one's religious beliefs influence one's work as an attorney may well be. The proposed rule may also violate Tennessee's Religious Freedom Restoration Act, which prohibits the government from "substantially burden[ing] a person's free exercise of religion even if the burden results from a rule of general applicability," unless the burden is the least restrictive means of furthering a compelling government interest. Tenn. Code Ann. § 4-1-407(c).

The Joint Petition asserts that Proposed Rule 8.4(g) addresses the First Amendment concerns that have plagued ABA Model Rule 8.4(g) by adding an additional sentence to comment 4 and a new comment 4a. Joint Petition 6-7. But these supposed improvements in fact do nothing to increase protection for attorneys' First Amendment rights. The new sentence in comment 4 provides that "[l]egitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation." But proposed section (g) itself states only that "[t]his paragraph does not preclude legitimate advice or advocacy *consistent with these Rules*." (emphasis added). So even if "legitimate advocacy" includes advocacy both in the course of representing a client and in other contexts, such advocacy is allowed only if it is otherwise consistent with Proposed Rule 8.4(g)—i.e., only if it does not constitute harassment or discrimination based on a protected characteristic. That circular exception is no exception at all. Moreover, the proposed rule nowhere defines what constitutes "legitimate" advocacy; the BPR would presumably get to draw the line between legitimate and illegitimate advocacy, creating a further risk that advocacy of controversial or politically incorrect positions would be deemed harassment or discrimination that constitutes professional misconduct.

Proposed comment 4a is likewise of no help. It provides that "Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section." All that comment 4a does, in other words, is reiterate that the proposed rule reaches all speech and conduct that *is* related to the practice of law. But that is the very feature of the proposed rule that gives rise to many of its First Amendment problems. The comment rests on the same erroneous premise as the proposed rule itself: that attorney speech and conduct that *is* related to the practice of law is *not* protected by the First Amendment. As explained above, that is simply not the case. Attorney speech, even speech that is connected with the practice of law, ordinarily is entitled to full First Amendment protection.

The Joint Petition asserts that Proposed Rule 8.4(g) is consistent with the First Amendment because it "leaves a sphere of *private thought and private activity* for which lawyers will remain free from regulatory scrutiny." Joint Petition 6 (emphasis added). That statement is alarming. It makes clear that the goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.

B. Proposed Rule 8.4(g) Would Conflict with the Rules of Professional Conduct.

In addition to violating the constitutional rights of Tennessee attorneys, Proposed Rule 8.4(g) would also conflict in numerous respects with the spirit and letter of the existing Rules of Professional Conduct. Most fundamentally, the proposed rule would disregard the traditional goals of professional regulation by "open[ing] up for liability an entirely new realm of conduct unrelated to the actual practice of law or a lawyer's fitness to practice, and not connected with the administration of justice." Blackman, *supra*, at 252. Even violations of criminal law are left unregulated by the Rules of Professional Conduct when they do not "reflect[] adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." Tenn. Sup. Ct. R. 8, RPC 8.4(b). But Proposed Rule 8.4(g) would subject attorneys to professional discipline for speech or conduct that violates neither federal nor state antidiscrimination laws and has no bearing on fitness to practice law or the administration of justice.

The proposed rule also threatens to interfere with an attorney's broad discretion to decide which clients to represent. While the proposed rule states that it "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with RPC 1.16," the latter rule only addresses the circumstances in which an attorney is *required* to decline or withdraw from representation. An attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g) Take, for example, an attorney who declines to represent a corporate executive because the attorney believes corporate executives are responsible for the rising income inequality in our country. Would that attorney have discriminated based on socioeconomic status? While the attorney may be able to contend that his or her personal views concerning the client's wealth created a "conflict of interest" that prevented representation under the Rule of Professional Conduct 1.7, it is far from clear how the seeming tension between that rule and Proposed Rule 8.4(g) would be resolved.

The proposed rule may also chill attorneys from representing clients who wish to advocate positions that could be considered harassment or discrimination based on a protected characteristic, or at least from doing so zealously as required by the Rules of Professional Conduct. The proposed rule states that it "does not preclude legitimate advice or advocacy consistent with these Rules," but, as noted above, the "consistent with these Rules" qualifier renders that circular exception meaningless. Comment 5d to the proposed rule states that "[a] lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities." While that clarification may provide some comfort that an attorney's representation of a client will not be deemed harassment or discrimination, it is largely duplicative of existing Rule of Professional Conduct 1.2 and, if anything, adds to the uncertainty regarding whether an attorney's decision *not* to represent a client could subject the attorney to discipline.

More generally, the proposed rule infringes on the ability of attorneys to practice law in accordance with their religious, moral, and political beliefs. Yet the Rules of Professional Conduct make clear that lawyers should be "guided by personal conscience" and informed by "moral and ethical considerations." Tenn. Sup. Ct. R. 8, RPC Preamble and Scope; *see also id.* at RPC 2.1

("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.").

* * *

Because Proposed Rule 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct, it is incumbent on the Office of the Attorney General to urge this Court to reject its adoption.[9] The existing Rules of Professional Conduct are sufficient to provide for the discipline of attorneys whose expressions of "bias or prejudice" are in fact "prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4, cmt. 3. And existing federal and state antidiscrimination laws may provide recourse for individuals who are subjected to discrimination or harassment by attorneys in the workplace or in educational institutions. To the extent that the Joint Petition seeks to suppress speech on controversial issues such as same-sex marriage or gender identity, it is directly contrary to the First Amendment principle that the remedy for speech with which one disagrees is "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). "Society has the right and civic duty to engage in open, dynamic, rational discourse." *United States v. Alvarez*, 567 U.S. 709, 728 (2012). As members of a highly educated profession, attorneys are uniquely equipped to engage in informed debate on these and other important issues. Such debate should be encouraged, not silenced.

Sincerely,

Herbert H. Slatery III
Attorney General and Reporter

[9] The Attorneys General of Louisiana, South Carolina, and Texas have likewise concluded that ABA Model Rule 8.4(g) would violate the First Amendment and Due Process Clause. *See* La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017); S.C. Att'y Gen. Op. on Constitutionality of ABA Model Rule 8.4(g) (May 1, 2017); Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016).

EXHIBIT 3

Montana Joint Senate Resolution No. 15

2017 Montana Legislature

Additional Bill Links PDF version

SENATE JOINT RESOLUTION NO. 15

INTRODUCED BY D. HOWARD, D. ANKNEY, S. BERGLEE, M. BLASDEL, B. BROWN, D. BROWN, E. BUTTREY, P. CONNELL, A. DOANE, R. EHLI, J. ESSMANN, J. FIELDER, S. FITZPATRICK, W. GALT, F. GARNER, T. GAUTHIER, C. GLIMM, E. GREEF, S. GUNDERSON, G. HERTZ, S. HINEBAUCH, J. HINKLE, M. HOPKINS, B. HOVEN, L. JONES, D. KARY, A. KNUDSEN, C. KNUDSEN, M. LANG, S. LAVIN, D. LENZ, F. MANDEVILLE, W. MCKAMEY, F. MOORE, D. MORTENSEN, A. OLSZEWSKI, R. OSMUNDSON, A. REDFIELD, K. REGIER, T. RICHMOND, A. ROSENDALE, S. SALES, D. SALOMON, D. SKEES, J. SMALL, C. SMITH, N. SWANDAL, R. TEMPEL, F. THOMAS, B. TSCHIDA, G. VANCE, C. VINCENT, S. VINTON, P. WEBB, R. WEBB, J. WELBORN, D. ZOLNIKOV

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA MAKING THE DETERMINATION THAT IT WOULD BE AN UNCONSTITUTIONAL ACT OF LEGISLATION, IN VIOLATION OF THE CONSTITUTION OF THE STATE OF MONTANA, AND WOULD VIOLATE THE FIRST AMENDMENT RIGHTS OF THE CITIZENS OF MONTANA, SHOULD THE SUPREME COURT OF THE STATE OF MONTANA ENACT PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT 8.4(G).

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA MAKING THE DETERMINATION THAT IT WOULD BE AN UNCONSTITUTIONAL ACT OF LEGISLATION, IN VIOLATION OF THE CONSTITUTION OF THE STATE OF MONTANA, AND WOULD VIOLATE THE FIRST AMENDMENT RIGHTS OF THE CITIZENS OF MONTANA, SHOULD THE SUPREME COURT OF THE STATE OF MONTANA ENACT PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT 8.4(G).

WHEREAS, the Supreme Court of the State of Montana, at the urging of an Illinois not-for-profit corporation -- the American Bar Association (ABA)-- entered its Order of October 26, 2016, In Re The Rules of Professional Conduct No. AF 09-0688, proposing to adopt ABA Proposed Rule of Professional Conduct 8.4(g); and

WHEREAS, by the close of the Supreme Court's 45 day public comment period the People of Montana overwhelming expressed their virtually unanimous opposition to Proposed Rule 8.4(g) through hundreds of comments pointedly

observing that the proposed rule seeks to destroy the bedrock foundations and traditions of American independent thought, speech, and action, and in response, rather than reject the proposed rule at the close of the comment period, the Supreme Court of the State of Montana relentlessly pursues adoption of Proposed Rule 8.4(g) by extending the time to consider it; and

WHEREAS, Proposed Rule of Professional Conduct 8.4(g) provides 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; and

WHEREAS, Comment [4] to ABA Model Rule 8.4(g) clearly details Model Rule 8.4(g)'s expansive over-reach into every attorney's free speech, opinions, and social activities, when it states: "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"; and

WHEREAS, the ABA is incorporated as a nonprofit corporation under the laws of the State of Illinois, with the stated purpose of promoting the uniformity of legislation throughout the United States without regard to the 50 sovereign state constitutions, thus it was created as a national political advocacy group with a social and political agenda; and

WHEREAS, the ABA, in its legal capacity as a nonprofit corporation is not legally authorized to give legal advice, but rather is engaged in political advocacy and pursues its agenda by proposing rules that may serve as models for the ethics rules of individual states, even though it has no legal capacity to speak on behalf of any attorney nor as the mouthpiece of attorneys throughout the United States, but may only speak as a political advocacy group on behalf of its own corporate social and political agenda; and

WHEREAS, the Illinois corporation in question, the ABA, states that it seeks to force a cultural shift in the legal profession through Proposed Rule 8.4(g), even though the ABA has determined that the conduct sought to be prohibited is so uncommon as to be nearly non-existent (ABA Standing Committee on Ethics, December 22, 2015) and even though ABA's own Committee on Professional Discipline finds the rule to be unconstitutional, for a variety of constitutional reasons (ABA Standing Committee on Professional Discipline, March 10, 2016); and

WHEREAS, pursuant to Article III, section 1, of the Montana Constitution, the power of the government of this state is divided into three distinct branches -- legislative, executive, and judicial -- and that no person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others; and

WHEREAS, pursuant to Article V, section 1, of the Montana Constitution, the legislative power is vested in a

Legislature consisting of a Senate and a House of Representatives; and

WHEREAS, the Montana Supreme Court may make rules governing admission to the bar and the conduct of its members; and

WHEREAS, the Constitution for the State of Montana vests the power to enact legislation solely with the Legislature for the State of Montana, including legislation regarding the conduct Proposed Rule 8.4(g) seeks to regulate; and

WHEREAS, the Constitution of the State of Montana vests the Supreme Court with the authority to regulate the conduct of members of the bar, such power is not without limits and such power is limited to regulating conduct which adversely affects the attorney's fitness to practice law, or seriously interferes with the proper and efficient operation of the judicial system; and

WHEREAS, Proposed Rule 8.4(g) would unlawfully attempt to prohibit attorneys from engaging in conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system, therefore the scope of Proposed Rule 8.4(g) exceeds the Supreme Court's constitutional authority to regulate the conduct of attorneys; and

WHEREAS, Proposed Rule 8.4(g)'s expansive scope endeavors to control the speech of state legislators, who are licensed by the Supreme Court of the State of Montana to practice law, whether they are speaking on the Senate floor on legislative matters, speaking to constituents about their positions on legislation, or campaigning for office; and

WHEREAS, Proposed Rule 8.4(g)'s expansive scope endeavors to control the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees; and

WHEREAS, Proposed Rule 8.4(g)'s expansive scope endeavors to control the speech of Montanans, who are licensed by the Supreme Court of the State of Montana to practice law, when they speak or write publicly about legislation being considered by the Legislature; and

WHEREAS, Proposed Rule 8.4(g) infringes upon and violates the First Amendment Rights, including Freedom of Speech, Free Exercise of Religion and Freedom of Association, of Montanans who are licensed by the Supreme Court of the State of Montana to practice law, by prohibiting social conduct and speech which is protected by the First Amendment; and

WHEREAS, in order to fulfill their oath to protect and defend the Constitution of the State of Montana, the Legislators of the State of Montana must ascribe the genuine meaning to the words in the Constitution of the State of Montana, for otherwise it is a meaningless collage of alphabetic symbols and the word "conduct" clearly does not include the concept of "speech"; and

WHEREAS, for the reasons set forth in this resolution, adoption of Proposed Rule 8.4(g), by the Supreme Court of the

State of Montana, exceeds the authority vested in it by the Constitution for the State of Montana, to regulate the conduct of the members of the bar; and

WHEREAS, for the reasons set forth in this resolution, adoption of Proposed Rule 8.4(g), by the Supreme Court for the State of Montana, violates the Constitution for the State of Montana Article III, section 1, by usurping the legislative power of the Legislature for the State of Montana; and

WHEREAS, Proposed Rule 8.4(g) will deprive the Legislature of Montana specifically and the State of Montana generally, with candid, thorough, and zealous legal representation and will do so, pursuant to Proposed Rule 8.4(g)'s plain meaning, by imposing a speech code on attorneys and chilling their speech by making it professional misconduct for an attorney to socially or professionally say or do anything, including providing legal advice, which could be construed by any person or activist group as discriminatory; and

WHEREAS, Rule 8.4(g) would directly threaten every attorney in the State of Montana, twenty-four hours per day, with the potential loss of their ability to pursue their chosen career, to provide for the needs of their family, and to pursue life, liberty, and the pursuit of happiness, because at any point in time an attorney could be forced to answer for vague complaints, even if the attorney has not participated in historically unprofessional practices, thereby threatening such attorney's reputation, time, resources, and license to practice law; and

WHEREAS, Proposed Rule 8.4(g) will deprive Montanans and associations of Montanans, with candid, thorough, and zealous legal representation, and Proposed Rule 8.4(g) will do so pursuant to its plain meaning by imposing a speech code on attorneys and chilling their speech by making it professional misconduct for an attorney to say or do anything, including providing legal advice, which could be construed by any person as discriminatory; and

WHEREAS, contrary to the ABA's world view, there is no need in a free civil society, such as exists in Montana, for the cultural shift forced by the proposed rule, and even if such a need did exist, the Supreme Court has no constitutional power to enact legislation of any sort, particularly legislation forcing cultural shift.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

(1) That should the Supreme Court of the State of Montana adopt Proposed Rule 8.4(g), it would be an unconstitutional exercise power by that Court.

(2) That if Proposed Rule 8.4(g) is adopted by the Supreme Court of the State of Montana, such rule is unconstitutional and thereby null and void because:

(a) the Constitution of the State of Montana reserves the power of legislation to the Legislature of Montana;

(b) the scope of Proposed Rule 8.4(g) exceeds the Supreme Court's constitutional power to regulate the speech and

conduct of attorneys; and

(c) Proposed Rule 8.4(g) infringes upon the First Amendment rights of the Citizens of Montana.

(3) That the Secretary of State send a copy of this resolution to the President of the United States, the United States Supreme Court, the Speaker of the United State House of Representatives, the Majority Leader of the United States Senate, to each member of the Montana Congressional Delegation, the Montana Supreme Court, the Governor of every State in the Union, the American Bar Association, and the Montana Bar Association.

- END -

Latest Version of SJ 15 *(SJ0015.ENR)*

Processed for the Web on April 12, 2017 (6:46pm)

New language in a bill appears underlined, deleted material appears stricken.

Sponsor names are handwritten on introduced bills, hence do not appear on the bill until it is reprinted.

See the status of this bill for the bill's primary sponsor.

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