#2016-009

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May 29, 2018

Carolyn A. Koegler, Advisory Committee on Rules
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301
Via email: CKoegler@courts.state.nh.us

Re: Proposed New Hampshire Rule of Professional Conduct 8.4, #2016-009

Dear Ms. Koegler:

I am writing to give you my personal comments in opposition to all three proposed amendments to the New Hampshire Rules of Professional Conduct to add a new Rule 8.4(g). Existing discrimination and harassment statutes should be enforced to combat unlawful discrimination and harassment. There is no need to adopt a speech code for lawyers that would likely be unconstitutional.

The Attorneys General of five States –Texas, South Carolina, Louisiana, Tennessee and Arizona – have all issued official opinions that ABA Model Rule 8.4(g) is unconstitutionally vague and overbroad, and violates the free speech, free exercise of religion, and free association rights of attorneys. Opinion No. KP-0123, Attorney General of Texas, December 20, 2016; 14 SC AG Opinion, May 1, 2017; Opinion 17-0114, Attorney General of Louisiana, September 8, 2017; State of Tennessee Office of Attorney General, Opinion No. 18-11 (March 16, 2018); Attorney General of Arizona (May 21, 2018). I attach these opinions to this letter for your reference.[1]

[1] In addition, based on the constitutional concerns, the Supreme Courts of South Carolina and Tennessee have expressly rejected proposed Rule 8.4(g). See *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct*, No. 2017-000498 (S.C. June 20, 2017); *In Re Petition for Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, No. ADM2017-02244 (Tenn. April 23, 2018).

II. All Three New Hampshire Proposals Are Similarly Unconstitutional

All three proposals being considered here in New Hampshire seek to regulate speech based on the content of the speech. The proposals vaguely proscribe speech that an attorney should know is "discriminatory" and have, as comment 4 to the proposed rule: "See ABA Comment 4 related to the intended scope of the phrase "related to the practice of law." ABA Comment 4 provides "Conduct related to the practice of law includes ... 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."[2] Therefore, regardless of the potential differences between the three proposals, all three proposals adopt ABA Comment 4 and broadly limit some but not all speech that could be seen as discriminatory. Discriminatory speech that is "undertaken to promote diversity and inclusion" is purportedly permitted. This content based speech restriction raises great constitutional concerns.

Where New Hampshire's proposed rule 8.4(g) seeks to proscribe attorney speech based on the content of the speech, it is likely facially unconstitutional. Just last year the U.S. Supreme Court struck down, on free speech grounds, a statute prohibiting trademarks that disparage people on the basis of race or ethnicity. *Matal v. Tam*, 137 S. Ct. 1744 (June 19, 2017) (holding statute that prohibited the registration of the trademark "The Slants" as disparagement of a racial or ethnic group to be unconstitutional). *Doyle v. Commissioner, NH Dept. of Resources & Economic Development*, 163 N.H. 215, 220 (2012). ("Only narrow categories of speech, such as defamation, incitement and pornography produced with real children, fall outside the ambit of the right to free speech" under Part I, Article 22 of the New Hampshire Constitution.) Proposed Rule 8.4(g) would be similarly unconstitutional.

III. Proposed Rule 8.4(g) is Unnecessary as Discrimination and Harassment Can Be Curtailed by Enforcing Existing Statutes

New Hampshire already has statutes that prohibit discrimination and harassment. RSA 354-A (prohibiting discrimination); RSA 644:4 (harassment). Unlawful discrimination or harassment can and should be remedied by enforcing existing laws. Adopting an attorney speech code is both unnecessary and unconstitutional. See *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016)(statute

[2] The full text of the comment provides: "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."

restricting speech is unconstitutional where state failed to show existing statutes could not be enforced to address the problem). Existing statutes should be enforced.

IV. The Proposed Rules Vaguely Chill Core Political Speech

Finally, the proposed rules are overbroad and vague, both in what constitutes harassment or discrimination as well as what is "conduct related to the practice of law." ABA Model Comment 4 states that the rule applies to "participation in bar association, business or social activities related to the practice of law." There are numerous legal organizations that touch on race, ethnicity, gender, or religion. It is unclear if participating in organizations at UNH School of Law such as Black Law Students Association, the Hispanic Law Students Association; the Chinese and Taiwanese Law Student Association, or Hillel would violate the rule. Would participating in the Women's Bar Association, the Christian Legal Society or the Catholic Lawyers Guild violate the rule? And, how would the rule effect an attorney's advocacy for clients whose legal needs touch on issues of race, ethnicity, gender, or religion? A rule of professional conduct that does not clearly define the proscribed conduct unconstitutionally chills protected speech. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)(holding Nevada's bar rule unconstitutional).

Conclusion

I ask that Committee reject the proposed Rule 8.4(g) for the reasons stated in this letter, for the reasons stated in the Opinions of the Attorneys General of Texas and South Carolina attached to this letter as well as in the detailed Memorandum of Law specifying the specific and various problems with the proposed Rule 8.4(g) that is also attached to this letter.

Very truly yours,

Michael J. Tierney

MJT/pd

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THE SUPREME COURT OF NEW HAMPSHIRE
ADVISORY COMMITTEE

IN RE:	**PROPOSED AMENDMENT OF**	**)**
	NEW HAMPSHIRE RULE OF	**) 2016-009**
	PROFESSIONAL CONDUCT 8.4	**)**

MEMORANDUM OF LAW IN OPPOSITION TO ADOPTION OF PROPOSED NEW HAMPSHIRE RULE OF PROFFESSIONAL CONDUCT 8.4(g)

For the reasons stated in this Memorandum, all three proposal to add a new Rule 8.4(g) to New Hampshire's Rules of Professional Conduct would be unconstitutional and harm clients who need legal advice, particularly in the sensitive areas effecting race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation or marital status. Rather than enacting a speech code for lawyers, New Hampshire's existing statutes prohibiting discrimination and harassment should be enforced

I. The Rule

A. New Hampshire's Current Rule

New Hampshire's current Rule of Professional Conduct 8.4 provides as follows:

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) state or imply an ability to influence improperly a government agency or official;
(e) state or imply an ability to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Ethics Committee Comment: *Section (d) of the ABA Model Rule is deleted.*[1] *A*

[1] Section (d) of the ABA Model Rule provides: *It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice.* Previous Comment [3] to ABA Model Rule 8.4(d) provides: *[3] A*

lawyer's individual right of free speech and assembly should not be infringed by the New Hampshire Rules of Professional Conduct when the lawyer is not representing a client. The deletion of section (d) was not intended to permit a lawyer, while representing a client, to disrupt a tribunal or prejudice the administration of justice, no matter how well intentioned nor how noble the purpose may be for the unruly behavior.

Model Rule section (e) is split into New Hampshire sections (d) and (e).

A. The Proposed Amendment(s) – Rule 8.4(g) and Comments

There are currently three proposed alternative amendments to New Hampshire Rule of Professional Conduct 8.4.[2] All three proposals are based upon ABA Model Rule 8.4(g) – an amendment to the ABA Model Rules of Professional Conduct the ABA adopted in August of 2016. All three proposals would amend New Hampshire Rule 8.4 by adding an entirely new subsection (g) and related comments, and all are basically similar, with some small differences. In order to highlight both the similarities and the differences between the three proposals, we have integrated all three proposed amendments, with internal indications of their differences. The various

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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.

[2] The proposals do not mention whether the ABA Model Comments [3], [4], and [5] to ABA Model Rule 8.4(g) are being proposed for adoption. However, we consider and address those Comments here because (a) the Comments shed light on the ABA's intent behind Model Rule 8.4(g); (b) all the proposed Rules make explicit reference to ABA Model Comment [4]; (c) the ABA Model Comments are actually set out below each corresponding New Hampshire Rule; and (d) the New Hampshire Supreme Court has relied upon the Model Comments in interpreting and applying New Hampshire's Rules. See, for example, *In re Richmond's Case*, 904 A.2d 684, 690 (N.H. 2006)(applying ABA Model Code Comments to N.H.R. Prof. Conduct Rule 1.5); *Carpenito's Case*, 651 A.2d 1, 4 (N.H. 1994)(applying ABA Model Code Comments to N.H.R. Prof. Conduct 4.1); *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, footnote 5 (1st Cir. 2005)("Although the New Hampshire Supreme Court has never formally adopted these [ABA Model Code] comments, it has stated that 'Although the text of each rule is authoritative, the comments are intended as guides to interpretation.' [citation omitted]. Therefore the Model Code commentary can inform judgments about the professional conduct of an attorney in New Hampshire. In fact, this is how it appears the New Hampshire Supreme Court uses the 'ABA Model Code Comments'").

proposals are identified by reference to the Appendix letters – K, L, and M – with which they are identified in the Advisory Committee's Public Hearing Notice.

The proposed amendments to the Rule itself reads as follows:

> **[K][L] and [M]** *It is professional misconduct for a lawyer to: . . . (g) engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination* **([L only]** *against a client***) ([M only]** *as defined by substantive state or federal law***)** *on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation or marital status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.*
>
> **[K][L] and [M]** ***Comment [3]*** *– The substantive state and federal law of anti-discrimination and anti-harassment statutes and related case law is intended to guide the application of subsection (g)* **[M** stops here, but **[K]** and **[L]** continue thus: *however, statutory or regulatory exemptions based upon the number of personnel in a law office, for example, shall not relieve a lawyer of the requirement to comply with this Rule***).**
>
> **[K], [L], and [M]** ***Comment [4]*** *– See ABA Comment 4 related to the intended scope of the phrase "related to the practice of law."* [3]
>
> **[K], [L], and [M]** ***Comment [5]*** *– As used in this Rule, discrimination and harassment based upon "sex" and "sexual orientation" are intended to encompass same-sex*

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[3] **ABA Model Comment [4] to Model Rule 8.4(g) provides:** *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.*

ABA Model Comment [3] to Model Rule 8.4(g) provides: *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 antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).*

ABA Model Comment [5] to ABA Model Rule 8.4(g) provides: *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).*

discrimination and harassment, as well as discrimination and harassment based upon gender identity.

[K], [L], and [M] ***Comment [6]*** *– This Rule is not intended to infringe on a lawyer's rights of free speech or a lawyer's right to advocate for a client in a manner that is consistent with these Rules.*

B. The Objections

A. The Proposed Rule Is Unconstitutional.

1. Attorney Speech is Constitutionally Protected

There is no question but that citizens do not surrender their First Amendment speech rights when they become attorneys. *NAACP v. Button*, 371 U.S. 415 (1963)("a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"). See also *Ramsey v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 771 S.W.2d 116, 121 (Tenn. 1989)(an attorney's statements that were disrespectful and in bad taste were nevertheless protected speech and use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney's First Amendment rights. "[W]e must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights"); *Standing Committee on Discipline of U.S. Dist. Court for Central District of California v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995)(the substantive evil must be extremely serious and the degree of imminence must be extremely high before an attorney's utterances can be punished under the First Amendment).

Indeed, the ABA itself has acknowledged this very principle in an amicus brief it filed in the case of *Wollschlaeger, et al. v. Governor of the State of Florida, et al.*, 797 F.3d 859 (11th Cir. 2015). In its brief the ABA denied that a law regulating speech should receive less scrutiny merely because it regulates "professional speech." "*On the contrary*" – the ABA stated – "*much speech by . . . a lawyer . . . falls at the core of the First Amendment. The government should not, under*

the guise of regulating the profession, be permitted to silence a perceived 'political agenda' of which it disapproves. That is the central evil against which the First Amendment is designed to protect." "*Simply put*" – the ABA stated – "*states should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession . . . Indeed,* – the ABA stated – *the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created.*"

In short, attorneys do not surrender their constitutional rights when they enter the legal profession, and the state may not ignore attorneys' constitutional rights under the guise of professional regulation.

2. Many Authorities Have Expressed Concerns About the Constitutionality of ABA Model Rule 8.4(g) Upon Which the New Hampshire Proposals Are Based

The proposals being considered by the Advisory Committee are all based on ABA Model Rule 8.4(g), and many authorities have pointed out the constitutional infirmities of that Rule.

When the ABA opened up the new Model Rule for comment, a total of 481 comments were filed – and of those 481 comments, 470 of them opposed the new Rule, many on the grounds that the new Rule would be unconstitutional.

Indeed, the ABA's own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law Section, initially warned the ABA that the new Rule may violate attorneys' First Amendment speech rights.

And prominent legal scholars, such as UCLA constitutional law professor Eugene Volokh and former U.S. Attorney General Edwin Meese, III, have opined that the new Rule is constitutionally infirm. "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities,*" Eugene Volokh, The Washington Post, August 10,

2016 and http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf. Attorney General Meese wrote that the new Rule constitutes "*a clear and extraordinary threat to free speech and religious liberty*" and "*an unprecedented violation of the First Amendment.*" http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf

In addition, the authors of several law review articles have concluded that Model Rule 8.4(g) – like other professional anti-discrimination Rules – may violate attorneys' First Amendment rights. See, for example, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call For Scholarship*, Andrew F. Halaby and Brianna L. Long, 41 J. Legal Prof. 201, 2016-2017 (the new Model Rule 8.4(g) has due process and First Amendment free expression infirmities); *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, 30 Geo. J. Legal Ethics 241 (2017)(Model Rule 8.4(g) constitutes an unjustified incursion into constitutionally protected speech); *Discriminatory Lawyers In A Discriminatory Bar: Rule 8.4(G) Of The Model Rules Of Professional Responsibility*, Caleb C. Wolanek, 40 Harv. J. L. & Pub. Policy 773 (June 2017)(Model Rule 8.4(g) goes too far and implicates the First Amendment). See, also, *Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge On Lawyers' First Amendment Rights,* Lindsey Keiser, 28 Geo. J. Legal Ethics 629 (Summer 2015)(rule violates attorneys' Free Speech rights) and *Attorney Association: Balancing Autonomy and Anti-Discrimination*, Dorothy Williams, 40 J. Leg. Prof. 271 (Spring 2016)(rule violates attorneys' Free Association rights).

In fact, in several states that have already considered adopting the new Model Rule, important professional stakeholders have rejected it. For example, the Illinois State Bar Association has taken an official position opposing the Rule; the Pennsylvania Supreme Court

Disciplinary Board is opposing the Rule; the South Carolina Bar's Committee on Professional Responsibility opposed the Rule; the Louisiana District Attorneys Association is opposing the new Rule; the North Dakota Supreme Court Joint Commission on Attorney Standards has rejected the Rule; the Tennessee District Attorneys General Conference opposes the Rule; and the Memphis Bar Association Professionalism Committee voted unanimously to oppose the Rule.

Further, the National Lawyers Association's Commission for the Protection of Constitutional Rights has issued a Statement that ABA Model Rule 8.4(g) would violate an attorney's free speech, free association, and free exercise rights under the First Amendment to the U.S. Constitution. https://www.nla.org/nla-task-force-publishes-statement-on-new-aba-model-rule-8.4g/.[4]

In addition, the Montana legislature has adopted a Joint Resolution – Montana Senate Resolution 15 – determining that it would be an unconstitutional act of legislation and violate the First Amendment rights of Montana citizens for the Supreme Court of Montana to enact ABA Model Rule 8.4(g).

And, significantly, the Attorneys General of five States – Texas, South Carolina, Louisiana, Arizona and Tennessee – have all issued official opinions that ABA Model Rule 8.4(g) is unconstitutionally vague and overbroad, and violates the free speech, free exercise of religion, and free association rights of attorneys. Opinion No. KP-0123, Attorney General of Texas, December 20, 2016; 14 SC AG Opinion, May 1, 2017; Opinion 17-0114, Attorney General of Louisiana, September 8, 2017; State of Tennessee Office of Attorney General, Opinion No. 18-11 (March 16, 2018). Further, the Arizona Attorney General has recently stated that the Model Rule "raises

[4] With respect to the constitutional issues raised by the new Model Rule, those filing this Joint Comment agree with the discussion, analysis and conclusions set forth in the National Lawyers Association's Statement, and have adopted, restated, and in some respects expanded upon much of that discussion and analysis in this Joint Comment.

significant constitutional concerns, including potential infringement of speech and association rights" and implicates attorneys' First Amendment right to participate in expressive association. Attorney General's Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court, R-17-0032 (May 21, 2018).

3. All Rule 8.4(g) Proposals Currently Being Considered in New Hampshire are Unconstitutionally Vague.

Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. And the lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. For that reason, government may regulate in the area of First Amendment freedoms only with narrow specificity. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 807 (2011). Vague laws present several due process problems. First, such laws may trap the innocent by not providing fair warning. Second, vague laws delegate policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. And, third, such laws lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

(a) The Term "Harassment" is Unconstitutionally Vague

Model Rule 8.4(g) prohibits attorneys from engaging in "harassment" on the basis of any of the protected classes. But the Rule does not define the term "harassment." Thus, the term "harassment" is subject to multiple interpretations – and no standard is provided by which an attorney can reasonably determine whether or not any particular speech or conduct might violate the Rule.

For example, can simply being offended by an attorney's expressions constitute harassment? Might an attorney violate the Rule merely by sharing her religious beliefs with

another attorney who finds such religious beliefs – or their expression – offensive? Could an attorney's body language – such as a dismissive hand gesture, a turning of one's back, the shaking of one's head, or a rolling of one's eyes – constitute harassment? In answering these questions, one should note that Comment [3] of the new Rule states only that "The substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g)." In other words, such substantive law may – but need not – guide disciplinary authorities in applying the Rule. As a consequence, attorneys will not be able to rely on such substantive anti-discrimination and anti-harassment law in gauging whether or not their speech and behavior may violate the Rule.

Indeed, some courts have explicitly found that the term "harass" – in and of itself – is unconstitutionally vague. *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).

Because the term "harassment" as used in the new Rule 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 violating the Rule.

But it gets worse. Model Comment [3] to the Model Rule 8.4(g) provides that harassment includes *derogatory or demeaning verbal or physical conduct.* What exactly is encompassed by the words "derogatory" and "demeaning"? Courts have found terms such as these 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).

The proposed Comment [3] to the New Hampshire proposals attempts to address the vagueness (and, perhaps, other) issues that the Rule's prohibition of "harassment" raise, by providing that "*The substantive state and federal law of anti-discrimination and anti-harassment statutes and related case law is intended to guide the application of subsection (g).*" However, this provision is inadequate to address the proposed Rule's constitutional infirmities.

First, the provision is not mandatory. To state that the drafters intend the Rule be applied in a certain way does not guarantee that the Rule will, in practice, be applied in that way.

Second, the Rule has a much broader application than do federal and state statutory anti-harassment laws. For example, Title VII prohibits sexual harassment in *employment*, as does RSA 354-A:1, et seq. New Hampshire also has several statutes that prohibit *criminal* harassment, such as RSA 644:4[5] (which prohibits making telephone calls or repeated communications at extremely inconvenient hours or in offensively coarse language with a purpose of annoying, abusing, threatening, or alarming another, or insults, taunts, or challenges directed at another in a manner likely to provoke a violent or disorderly response) and RSA 644:2 (which prohibits directing at another in public obscene, derisive, or offensive words which are likely to provoke a violent reaction on the part of an ordinary person). But the proposed Rules go far beyond what those statutes prohibit. One may be able to determine the scope and applicability of the proposed Rule's anti-harassment prohibition when the alleged conduct falls squarely within one or more of the

[5] It is worth noting that two different New Hampshire's anti-harassment statutes have already been declared unconstitutional. *State v. Brobst*, 151 N.H. 420 (2004) and *State v. Pierce*, 152 N.H. 790 (2005).

federal or state anti-harassment statutes. But when it does not, an attorney would be hard-pressed to determine with any degree of certainty what conduct the Rules prohibit.

For example, the proposed Rules would apply to an attorney's conduct while attending or participating in a bar-sponsored CLE (see Comment [4] of the Model Rule). But an attorney's conduct at a bar-sponsored CLE would not fall under the auspices of Title VII or New Hampshire state laws prohibiting sexual harassment in *employment*. And it is difficult to see how an attorney's conduct at a bar-sponsored CLE would fall within the purview of New Hampshire's *criminal* harassment laws either. So, in the context of a bar-sponsored CLE, how would the substantive state and federal law of anti-harassment statutes and related case law guide the application of the Rule? We submit that it wouldn't – and couldn't. Indeed, given the fact that the Rule is applicable to any and all "conduct related to the practice of law," including "bar association, business, or social activities" of attorneys (see Model Comment [4]), there is a wide field of attorney conduct subject to the proposed Rules that would not fall within state and federal anti-harassment laws and, therefore, will not – and cannot – be "guided" by substantive state and federal anti-harassment law.

It is in that vast field of attorney conduct "related to the practice of law" – but not falling within the employment or criminal harassment contexts – that attorneys will be left without any reasonable guidance as to whether particular conduct is or is not "harassment" prohibited by the Rule.

(b) The Term "Discrimination" is Unconstitutionally Vague.

The term "discrimination" is also unconstitutionally vague. Many proponents of the Rule contend that the word "discrimination" is widely used and easily understood. And it is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it is

also true that such statutes and ordinances do not – as does the proposed Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

Title VII, for example, specifies what sorts of acts constitute discrimination under the statute. 42 U.S.C. § 2000e-2. Similarly, the federal Fair Housing Act provides a detailed description of what, specifically, is prohibited under the Act. 42 U.S.C. § 3604.

But Model Rule 8.4(g) does not do that. It simply provides 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*" – thereby leaving to the attorney's imagination what sorts of behavior might be encompassed in that proscription.

Model Comment [3] to the Model Rule 8.4(g) does not cure this defect. In fact, it makes matters worse, providing that the term "discrimination" includes "*harmful* verbal or physical conduct that *manifests bias or prejudice towards others.*" The term "harmful" – standing alone – is unconstitutionally vague because attorneys cannot determine with any degree of reasonable certainty what speech and conduct may be included or excluded from that category of speech or conduct. The word "harmful" simply means "causing or capable of causing harm." http://www.dictionary.com/brows/harmful. And "harm" encompasses a wide range of injury, from "physical injury or mental damage" to "hurt" to "moral injury." http://www.dictionary.com/browse/harm. In other words, "harmful" speech can encompass an almost limitless range of allegedly injurious effects on others. For that reason, mental injury or damage, for example, could easily be interpreted to include real, imagined, or even feigned, emotional distress at being exposed to expression someone finds offensive.

Apart from the fact that the term "harmful" is vague, proponents of the Rule evidently need to be reminded that speech is not constitutionally unprotected merely because it is "harmful." See, for example, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011)(the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)(the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989)(an interest in protecting bystanders from feeling offended or angry is not sufficient to justify a ban on expression); *Boos v. Barry*, 485 U.S. 312, 321 (1988)(striking down a ban on picketing near embassies where the purpose was to protect the emotions of those who reacted to the picket signs' message). See, also, *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 791 (2011)("new categories of unprotected speech may not be added to the list [of unprotected speech – such as obscenity, incitement, and fighting words] by a legislature that concludes certain speech is *too harmful* to be tolerated")(our emphasis).

Indeed, the U.S. Supreme Court has stated that the idea that free speech protection should be subject to a balancing test that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test, is a "startling and dangerous" proposition. *Entertainment Merchants Ass'n*, supra, at 792. See also *United States v. Stevens*, 559 U.S. 460, 470 (2010)("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it").

And just as with the term "harassment," the New Hampshire proposed Comment [3] –

providing that "*the substantive state and federal law of anti-discrimination . . . statutes and related case law is intended to guide the application*" of the Rule – is inadequate to address the proposed Rule's constitutional infirmities.

First – as pointed out above – to state that it is the drafters' intent that the Rule be applied in a certain way does not guarantee the Rule will be applied in that way.

And second – just as with respect to harassment – the Rule has a much broader application than do federal and state statutory nondiscrimination laws. Title VII prohibits discrimination in *employment*, as does RSA 354-A:7. New Hampshire also prohibits discrimination in housing, RSA 354-A:8, and in public accommodations, RSA 354-A:16. But the proposed Rules go far beyond what those statutes prohibit.

One may be able to determine the scope and applicability of the proposed Rules' anti-discrimination prohibitions when the alleged conduct falls squarely within one or more of the federal or state anti-discrimination statutes – because those laws specifically define what sort of conduct constitutes discrimination in each statutory context. For example, RSA 354-A:7, it is unlawful to "*refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.*" Likewise, under RSA 354-A:17, it is unlawful public accommodations discrimination to "*refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof.*"

But outside the specific contexts of those statutes, an attorney would be hard-pressed to determine with any degree of certainty what conduct may be considered "discrimination" under the proposed Rules.

For example, what sort of speech or conduct would constitute "discrimination" in bar

association, business, or social activities" related to the practice of law? State and federal nondiscrimination statutes will not be of much help in determining the parameters of the proposed Rules in those contexts.

Would the proposed Rules prohibit an attorney from making a sexist joke – not directed at anyone in particular – at a law firm dinner party, as constituting discrimination based on sex? Or would the proposed Rules prohibit a young attorney, while attending a bar-sponsored CLE on social security law, from making a comment that social security payment amounts should be reduced because baby-boomer attorneys have already received more than their fair share and we need to preserve the social security fund for younger people, since such a comment could be considered discrimination based on age? Would the proposed Rule prohibit a comment at a Women's Bar social gathering that female judges understand certain cases better as such a comment would constitute gender discrimination?

Because a lawyer's speech and conduct that could possibly constitute "discrimination" in violation of the proposed Rules falls within an extensive field of attorney conduct "related to the practice of law" but that does not fall within conduct prohibited under a state or federal nondiscrimination statute, attorneys will be left without any reasonable guidance as to whether particular conduct is or is not "discrimination" prohibited by the Rule.

(c) The Phrase "conduct related to the practice of law" is Unconstitutionally Vague.

The proposed Rules apply to any conduct of an attorney "*related to the practice of law.*" It hardly need be said, however, that what conduct is related to the practice of law and what conduct is unrelated to the practice of law, is vague and subject to reasonable dispute.

Model Comment [4] – which the proposed Rules expressly adopt – attempts to provide some guidance as to what the phrase "related to the practice of law" means. But the Comment's

definition is 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.* Further, the Rule's list of conduct "related to the practice of law" is an explicitly non-exclusive list.

How, then, is an attorney supposed to determine what might or might not be "related to the practice of law"? Does the Rule include comments made by an attorney while attending a retirement party for a law firm co-worker; or comments an attorney makes while teaching a religious liberty class at the attorney's church; or statements an attorney makes at a neighborhood holiday party, if one of the reasons the attorney is attending the party is to, hopefully, generate legal work for his law firm?

Because one cannot, with any degree of reasonable certainty, determine what behavior of an attorney is not "related to the practice of law," the new Rule is unconstitutionally vague.

If attorneys face professional discipline for engaging in certain proscribed behavior, they are entitled to know, with reasonable precision, what behavior is being proscribed, and should not be left to guess what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the proposed Rules' essential terms, the proposed Rules are unconstitutional.

4. The Proposed Rules are Unconstitutionally Overbroad.

Even if a law is clear and precise – thereby avoiding a vagueness challenge – it may nevertheless be unconstitutionally overbroad if it prohibits constitutionally protected speech.

Overbroad laws – like vague laws – deter protected activity. The crucial question in

determining whether a law is unconstitutionally overbroad is whether the law sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972).

Although some of the speech the proposed Rules prohibit might arguably be unprotected – such as speech that actually and substantially prejudices the administration of justice or speech that would actually and clearly render an attorney unfit to practice law (see a discussion of this issue under subsection C below) – the proposed Rules would also sweep within their prohibitions lawyer speech that is clearly protected by the First Amendment, such as speech that might be offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit to practice law. *DeJohn v. Temple University*, 537 F.3d 301 (2008)(a University Policy on Sexual Harassment that prohibited "all forms of sexual harassment . . . , including expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment" was unconstitutionally overbroad on its face).

Therefore, because the proposed Rules would prohibit a broad swath of protected – as well as possibly unprotected speech – the proposed Rules are unconstitutionally overbroad.

Model Comment [3] of Model Rule 8.4(g) defines harassment and discrimination as including "derogatory," "demeaning" and "harmful" speech. It does not take a constitutional scholar to recognize that "harmful verbal conduct" and "derogatory or demeaning verbal conduct" – all of which the Rule prohibits – are simply pejorative euphemisms for protected speech. Speech does not become non-speech by referring to it as "verbal conduct." Nor is speech unprotected merely because it is harmful, derogatory, demeaning, or even discriminatory or harassing. *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3rd Cir. 2001)(there 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; harassing or discriminatory speech implicate First Amendment protections; there is no categorical rule divesting "harassing" speech of First Amendment protection).

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)(the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)(the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful). 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"). See also *Joseph Matal, Interim Director, United States Patent And Trademark Office v. Simon Shiao Tam*, 137 Sup.Ct. 1744(2017)(the government's attempt to prevent speech expressing ideas that offend strikes at the heart of the First Amendment).

Indeed, courts have found that terms such as "derogatory" and "demeaning" are 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*, supra (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 because it is overbroad).

The broad reach of the new Rule is well illustrated by the example that Senior Ethics Counsel Lisa Panahi and Ethics Counsel Ann Ching of the Arizona State Bar give in their article "Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g), " *Arizona Attorney*, January 2017, page 34. They state that an attorney could be professionally disciplined under the Rule for telling an offensive joke at a law firm dinner party.

But the speech in that example would clearly be constitutionally protected. The fact that such constitutionally protected speech would violate the new Rule demonstrates that the proposed Rules are unconstitutionally overbroad.

Indeed, regardless of whether any attorney is actually prosecuted under the proposed Rules for engaging in protected speech, the mere possibility that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – which is precisely what he overbreadth doctrine is designed to prevent.

For these reasons, the proposed Rules would not pass constitutional muster.

5. The Proposed Rules Will Constitute An Unconstitutional Content-Based Speech Restriction

By only proscribing speech that is derogatory, demeaning, or harmful toward members of certain designated classes, the proposed Rules will constitute unconstitutional content-based speech restrictions. *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2227 (2015)(Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed). See, also, *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).

Indeed, the U.S. Supreme Court recently reiterated this principle in a case that is directly relevant when considering the constitutional infirmities of the Model Rule 8.4(g) and the proposed Rules in New Hampshire. In *Matal v. Tam*, 137 S.Ct. 1744 (June 19, 2017), the Court found that a Lanham Act provision prohibiting the registration of trademarks that may "disparage" or bring a person "into contempt or disrepute" to be *facially* unconstitutional, because such a disparagement provision – even when applied to a racially derogatory term – ". . . *offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.*" In a concurring opinion joined by four Justices, Justice Kennedy described the constitutional infirmity of the disparagement provision as "viewpoint discrimination" – "an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" The problem, he pointed out, was that, under the disparagement provision, "an applicant may register a positive or benign [trade]mark but not a derogatory one" and that "This is the essence of viewpoint discrimination." Likewise, under the new ABA Model Rule 8.4(g), attorneys may engage in positive or benign speech, but not "derogatory," "demeaning," or "harmful" speech. Under the Supreme Court's *Tam* decision, this is the essence of viewpoint discrimination, and presumptively unconstitutional.

The late Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provided a concrete example of how the ABA Model Rule may constitute an unconstitutional content-based speech restriction. He explained: "*At another 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, p. 4.

So the content of a lawyer's speech will determine whether or not the lawyer has or has not violated the proposed Rules. A lawyer who speaks against same-sex marriage may be in violation of the Rules for engaging in speech that constitutes discrimination on the basis of sexual orientation, while a lawyer who speaks in favor of same-sex marriage would not be. That is a classic example of an unconstitutional viewpoint-based speech restriction. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992)(the government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed). So, for example, in *R.A.V.*, supra, the Supreme Court struck down, as facially unconstitutional, St. Paul's Bias-Motivated Crime Ordinance because it applied only to fighting words that insulted or provoked violence "on the basis of race, color, creed, religion or gender," whereas expressed hostility on the basis of other bases were not covered. In striking down the Ordinance, the Court stated: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *R.A.V.*, supra, at 390. That is precisely what the proposed Rules do. For that reason, commentators have described ABA Model Rule 8.4(g) as a speech code for lawyers.

For those who would deny that the proposed Rules create an attorney speech code, we need only point them to Indiana, a state that has adopted a black letter non-discrimination Rule – albeit not as broad as New Hampshire Rule 8.4(g). In *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Indiana 2010) an Indiana attorney was professionally disciplined under Indiana's Rule 8.4(g) for merely asking someone if they were "gay." And in *In the Matter of Daniel C. McCarthy*, 938

N.E.2d 698 (Indiana 2010) an attorney had his license suspended for applying a racially derogatory term to himself. In both cases, the attorneys were disciplined merely for using disfavored speech.

Because it constitutes an unconstitutional speech code for lawyers, the proposed Rules should be rejected.

6. The Proposed Rules Will Violate Attorneys' Free Exercise of Religion and Free Association Rights

The proposed Rules will also violate an attorney's free exercise of religion and freedom of association rights. Indeed, the national Catholic Lawyers Association has adopted a Resolution stating that ABA Model Rule 8.4(g) is "*unconstitutional and incompatible with Catholic teaching and the obligations of Catholic lawyers*." As an illustration of this problem, the late Professor Rotunda posited the example of Catholic attorneys who are members of the St. Thomas More Society, an organization of Catholic lawyers and judges. If the St. Thomas More Society 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, Professor Rotunda explained that 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. In fact, Professor Rotunda pointed out that an attorney might be in violation of the new Rule merely for being a member 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. The fact that the Rule may prohibit such speech or membership indicates that the Rule will be unconstitutional.

Because the proposed Rules will violate attorneys' Free Exercise and Free Association rights, they should be rejected.

7. The Proposed Rules Will Result in the Suppression of Politically Incorrect Speech While Protecting Politically Correct Speech.

Model Comment [4] to the proposed Rule 8.4(g) contains an explicit exception for "*conduct undertaken to promote diversity and inclusion*" and Model Comment [5] allows lawyers to limit their practice to certain clientele, as long as that clientele are "*members of underserved populations*" (whatever that means).

These exceptions to the Rule illustrate that the proposed Rules are not going to be Rules of general applicability and equal application.

Rather, they will allow attorneys who are discriminating in politically *correct* ways to continue that discrimination – but will prohibit attorneys from discriminating in politically *incorrect* ways.

Here's how it will work: If an attorney engages in discriminatory conduct that furthers a *politically correct* interest, the disciplinary authority will find that the discrimination is undertaken to promote diversity or inclusion, or to serve an underserved population – and for that reason does not violate the Rules. However, if an attorney engages in discriminatory conduct that furthers a *politically incorrect* interest, the state will prosecute that attorney for violating the Rules.

This phenomenon has already been seen in other similar contexts. For example, a Civil Rights Commission in Colorado prosecuted a Christian baker for declining to bake a wedding cake for a same-sex couple, but refused to prosecute three other bakers who refused to bake a cake for a Christian, finding that the first constituted illegal discrimination but that the second did not. The reason underlying this disparate treatment was obvious – in the first the complaining party was a member of a politically favored class, while in the second the complaining party was a member of a disfavored one.

These nefarious exceptions built into the Rule – decrying discrimination generally, while at the same time explicitly approving of it as long as the discrimination furthers an approved agenda

– reveals that the Rule's interest in prohibiting discrimination is not a compellingly general and neutral interest, but rather a narrow and ideologically motivated interest.

These exceptions also render the proposed Rules unconstitutional because – by prohibiting only disfavored discriminatory messages, while allowing favored ones – the Rules create a viewpoint-based speech restriction. *R.A.V.*, supra.

No state should adopt a Rule constructed so as to punish certain viewpoints while protecting and advancing others. In fact, to do so would be unconstitutional.

8. The Proposed Rules Will Also Violate the New Hampshire Constitution.

It must also be noted that the proposed Rule would not only infringe upon attorneys' First Amendment rights under the U.S. Constitution, but would also infringe upon attorneys' constitutional rights under the New Hampshire Constitution. See New Hampshire Constitution, Part I, Article 22 ("Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved"). The New Hampshire Constitution provides at least as much protection as does the U.S. Constitution. *State v. Allard*, 813 A.2d 506, 510 (N.H. 2002). Portions of New Hampshire's anti-harassment statutes have already been declared unconstitutional under the New Hampshire constitution. *State v. Brobst*, 151 N.H. 420 (2004) and *State v. Pierce*, 152 N.H. 790 (2005); see also *Doyle v. Comm'r, New Hampshire Dep't of Res. & Econ. Dev.*, 163 N.H. 215, 220 (2012) ("Only narrow categories of speech, such as defamation, incitement and pornography produced with real children, fall outside the ambit of the right to free speech" under Part I, Article 22 of the New Hampshire Constitution). Proposed Rule 8.4(g) likely violates the New Hampshire Constitution for similar reasons.

9. The Current New Hampshire Rules of Professional Conduct Expressly Protect the Free Speech and Assembly Rights of New Hampshire's Attorneys. The Proposed Rules Change That

It is important to note that New Hampshire has heretofore provided more protection for

attorneys' free speech rights under its Rules of Professional Conduct than have most other states.

Not only is New Hampshire one of only six states that have not adopted ABA Model Rule 8.4(d) – prohibiting attorney conduct "prejudicial to the administration of justice" and previous Comment [3] prohibiting "bias and prejudice" in attorney conduct attached to Model Rule 8.4(d) – but in its Ethics Committee Comment to Rule 8.4 New Hampshire expressly states that "*A lawyer's individual right of free speech and assembly should not be infringed by the New Hampshire Rules of Professional Conduct when the lawyer is not representing a client.*"

The proposed Rules constitute a clear renunciation of this historical protection of attorney free speech rights in New Hampshire. The proposed Rules accomplish this renunciation by specifically prohibiting speech that constitutes "harassment or discrimination" (including, under Model Comment [3], "derogatory," "demeaning" and "harmful" speech) and by extending that prohibition to any and all conduct "related to the practice of law" as opposed to only while an attorney is representing a client. As noted above, conduct related to the practice of law sweeps in not only conduct while representing a client, but also an attorney's conduct in bar association activities, business activities, and even a lawyer's social activities.

We should not take lightly the fact that the proposed Rules represent an historic departure from New Hampshire's explicit protection of attorneys' free speech and other constitutional rights. For that reason, too, the proposed Rules should be rejected.

10. The Proposed Rules' Assurances That the Proposed Rules Will Not Be Applied in an Unconstitutional Manner Do Not Cure the Rules' Constitutional Infirmities

Most proponents of black-letter nondiscrimination and anti-harassment Rules do not even attempt to address the constitutional infirmities of those Rules. And those proponents who do, do not directly deny the allegations that the Rules may very well be unconstitutional. Instead, they assure the Rules' critics that the professional disciplinary authorities will not *apply* the Rules in an

unconstitutional manner. For example, Stanford University Law Professor Deborah L. Rhode, a proponent of ABA Model Rule 8.4(g), has stated: "I understand the First Amendment concerns, but I don't think they present a realistic threat in this context. I don't think these cases are going to end up in bar disciplinary proceedings. They are going to end up in informal mediation and occasionally in lawsuits if the conduct is egregious and the damages are substantial." http://www.abajournal.com/magazine/article/ethics_model-rule-harassing-conduct. But such assurances do little to assuage attorneys' concerns and, more importantly, do not cure the Rules' constitutional infirmities.

The author(s) of the proposed New Hampshire Rules attempt the same sort of end-run around the First Amendment – proposing a Comment [6] that provides "T*his Rule is not intended to infringe on a lawyer's rights of free speech or a lawyer's right to advocate for a client in a manner that is consistent with these Rules*."

This very position was advanced and rejected in *U.S. v. Stevens*, 559 U.S. 460 (2010). There, in a case challenging the constitutionality of a statute criminalizing certain depictions of animal cruelty, the U.S. Supreme Court addressed the government's claim that the statute was not unconstitutionally overbroad because the government would interpret the statute in a restricted manner so as to reach only "extreme" acts of animal cruelty, and that the government would not bring an action under the statute for anything less – in other words, that the state would not apply the law in an unconstitutional manner. In response, the high court pointed out that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." The court pointed out the danger in putting faith in government representations of prosecutorial restraint, and stated that "The Government's assurance that it will apply § 48 far

more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." *Stevens*, supra, at 480.

In other words, far from curing the law's constitutional defects, representations – as here, in a non-binding Comment to the Rules – that the proposed Rules will not be applied so as to violate the Constitution, constitute indirect admissions that the proposed Rules are, in fact, constitutionally infirm.

Given the proposal's many constitutional defects, the proposed Rule should be rejected.

B. Other States Are Rejecting Proposals Similar to New Hampshire's Proposed 8.4(g)

Proponents of black-letter non-discrimination Rules often contend that such Rules are not only unremarkable, but that many states have already adopted ABA Model Rule 8.4(g) or something akin to it. That is not true.

First, only one state – Vermont – has adopted ABA Model Rule 8.4(g), whereas two states – South Carolina and Tennessee – have expressly rejected it. *Order*, Supreme Court of South Carolina, Appellate Case No. 2017-000498 (6-20-2017); *Order: In Re Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, No. ADM2017-02244 (4-23-2018). And of the numerous other states that have considered the Rule – including Montana, Colorado, Nevada, Utah, Arizona, Illinois, Pennsylvania, and Maine – none have adopted it.

Second, not only has no state – other than Vermont – rushed to adopt the ABA's new Model Rule or anything akin to it, but no state other than Vermont has even seen fit to adopt *any* black letter nondiscrimination Rule since the ABA adopted Model Rule 8.4(g) two years ago.

And third, not only do the majority of states have no black letter antidiscrimination rule in their Rules of Professional Conduct, in those states that *do* have black letter antidiscrimination

provisions in their Rules, no state's rule (other than Vermont's and New Hampshire's proposed rule) is even comparable to the new Model Rule 8.4(g).

For example, aside from Vermont, none of the jurisdictions with black letter anti-discrimination rules extends its non-discrimination rule to "conduct related to the practice of law" – as all three New Hampshire proposals do. Seven of those jurisdictions limit their coverage to conduct "in the representation of a client" or "in the course of employment" (Florida, Idaho, Nebraska, Missouri, North Dakota, Oregon and Washington State). Eight states limit the applicability of their non-discrimination rules to conduct toward other counsel, litigants, court personnel, witnesses, judges, and others involved in the legal process (Colorado, Florida, Idaho, Michigan, Nebraska, and Washington State). California limits its provision to "the management and operation of a law practice." Massachusetts, New Jersey and Ohio limit their Rules to conduct "in a professional capacity." Massachusetts limits its Rule to conduct "before a tribunal." New York limits its Rule to "the practice of law." And D.C. limits its Rule to employment discrimination only. Nevertheless, all three proposals being considered here in New Hampshire have the "conduct related to the practice of law" language.

Likewise, other than Vermont, no state's rule prohibits – as the new Model Rule does - "harmful," "derogatory," or "demeaning" speech or conduct.

Further, eight states (California, Iowa, Minnesota, New Jersey, New York, Illinois, Ohio, and Washington State) limit their anti-discrimination rules to "unlawful" discrimination or discrimination "prohibited by law." Indeed, of those eight states, half of them (California, Illinois, New Jersey, and New York) actually require that, before any disciplinary claim can even be filed, a tribunal of competent jurisdiction *other than a disciplinary tribunal* must have found that the attorney has actually violated a federal, state, or local anti-discrimination statute or ordinance.

And unlike any of the New Hampshire proposals, eight of the states with black letter anti-discrimination rules require that the alleged discrimination actually either prejudice the administration of justice or render the attorney unfit to practice law (Florida, Illinois, Maryland, Minnesota, Nebraska, North Dakota, Rhode Island, and Washington State).

Further, unlike the Model Rule and all three proposal being considered in New Hampshire – which all have a "know or reasonably should know" standard – four states with black letter rules require the discriminatory conduct to be "knowing," "intentional" or "willful" (Maryland, New Jersey, New Mexico, and Texas).

Michigan's "nondiscrimination" rule is more of a civility rule, prohibiting only "discourteous" or "disrespectful" conduct.

And, unlike the new Model Rule, Texas expressly excludes from its antidiscrimination rule a lawyer's decisions whether or not to represent a particular person.

So, should New Hampshire adopt any of the proposed Rules, it will have adopted a Rule that impinges on attorney conduct in ways, and far more extensively, than almost any other state has seen fit to do.

There are good reasons why the majority of states have not adopted any black letter nondiscrimination Rules in their Rules of Professional Conduct. And there are also good reasons why no state other than Vermont has adopted the new ABA Model Rule 8.4(g), or anything comparable to it. And there are good reasons why the Supreme Courts of South Carolina and Tennessee have expressly rejected ABA Model Rule 8.4(g). For these same reasons, New Hampshire would be wise to reject Model Rule 8.4(g) – or any of the proposed Rules – as well.

C. The Proposed Rule Would, For The First Time, Sever The Rules From Any Legitimate Regulatory Interests Of The Legal Profession

The legal profession has a legitimate interest in proscribing attorney conduct that – if not

proscribed – would either adversely affect an attorney's fitness to practice law or that would prejudice the administration of justice. New Hampshire's current Rule 8.4 recognizes this principle by prohibiting attorneys from engaging in six types of conduct, all of which might either adversely impact an attorney's fitness to practice law or would prejudice the administration of justice. Those types of conduct are:

> (a) Violating the Rules of Professional Conduct or assisting others to do so;
> (b) Committing criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> (c) Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (d) Stating or implying an ability to influence improperly a government agency or official;
> (e) Stating or implying an ability to achieve results by means that violate the Rules of Professional Conduct or other law; or
> (f) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The first proscribed conduct – violating the Professional Conduct Rules – is self-explanatory and obvious, since the Rules are enacted for the precise purpose of regulating the conduct of attorneys as attorneys. The Rules would hardly serve their purpose if an attorney's violation of them did not constitute professional misconduct.

The second and third proscriptions are targeted at attorney conduct which directly impacts the attorney's ability to be entrusted with the professional obligations with which all attorneys are entrusted , namely, to serve their clients and the legal system with honesty and trustworthiness – since Rule 8.4(b) and (c) prohibit certain criminal conduct and conduct involving dishonesty, fraud, deceit, or misrepresentation.

But – revealingly – those Rules do not proscribe conduct that, although perhaps not praiseworthy, does not warrant the conclusion that the attorney engaging in such conduct is unfit to practice law. Indeed, it is worth noting that Rule 8.4(b) does not even conclude that all *criminal* conduct is a violation of the Rules of Professional Conduct. Instead, the Rule proscribes only

criminal conduct "*that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*" (our emphasis). As Model Comment [2] to ABA Model Rule 8.4 explains: "*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. . . 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*" (our emphasis).

The fourth, fifth, and sixth proscriptions in New Hampshire's current Rule also target what is clearly attorney conduct that, if engaged in, would adversely affect the integral operation of the judicial system – namely, stating or implying an ability to improperly influence a government agency or official or an ability to achieve results by means that violate the Rules of Professional Conduct or other law, and knowingly assisting a judge or judicial officer in conduct that violates the rules of judicial conduct or other law.

In short, New Hampshire's Rule 8.4 has always – heretofore – been solely concerned with attorney conduct that might adversely affect an attorney's fitness to practice law or that would seriously interfere with the proper and efficient operation of the judicial system.

The proposed Rules, however, would take Rule 8.4 in a completely new and different direction because, for the first time, the proposed Rules would subject attorneys to discipline for 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. Indeed, because the proposed Rules would not require *any* showing that the proscribed conduct prejudices the

administration of justice or that such conduct adversely affects the offending attorney's fitness to practice law, the new Rule will constitute a free-floating non-discrimination provision – the only restriction on which will be that the conduct be "related to the practice of law."

To fully appreciate what this departure from the historic principles of attorney regulation will mean, we need only look to the two Indiana cases cited above - *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Indiana 2010) and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Indiana 2010). In neither case did the offending conduct have any demonstrable prejudicial effect on the administration of justice or render the attorneys unfit to practice law. In both cases, it was deemed sufficient that the attorneys had simply used certain offensive language.

Strikingly, if a proposed Rule is adopted, an attorney could actually engage in *criminal* conduct without violating the Rules (see, for example, *Formal Opinion Number 124 (Revised) – A Lawyer's Use of Marijuana* (October 19, 2015)(a lawyer's use of marijuana, which would constitute a federal crime, does not necessarily violate Colo. R. P. C. 8.4(b))) – because Rule 8.4(b) only applies to a lawyer's "*criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*" or that involve "*moral turpitude*" – but could be disciplined merely for engaging in politically incorrect speech.

Such a dramatic departure from the historic regulation of attorney conduct in New Hampshire should not be taken lightly. Because Model Rule 8.4(g) and the proposed Rules constitute an extreme and dangerous departure from the principles and purposes historically underlying New Hampshire's Rule 8.4 and the legitimate interests of professional regulation, the proposed Rule should be rejected.

D. The Proposed Rule Will Invade The Historically Recognized Right And Duty Of Attorneys To Exercise Professional Autonomy In Choosing Whether To Engage In Legal Representation

The most important decision for any attorney – perhaps the greatest expression of a lawyer's professional and moral autonomy – is the decision whether to take a case, whether to decline a case, or whether to withdraw from representation once undertaken.

If any of the proposed Rules are adopted, however, attorneys will be subject to professional discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases – because, under the new Rule, attorneys will be affirmatively precluded from declining certain clients or cases. They will be forced to take cases or clients they might have otherwise declined.

Proponents of Model Rule 8.4(g) contend that the proposed Rule will not require an attorney to accept any client or case the attorney does not want to accept, pointing to that provision of the Model Rule that reads "*This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16*" (our emphasis). The Rules being proposed in New Hampshire also contain this language. The Rules' reference to Rule 1.16 is critical because it limits the disclaimer. In other words, under the provision, an attorney's client and case selection decisions are only protected from the proposed Rule's non-discrimination prohibition if the lawyer's decisions are "in accordance with Rule 1.16."

But Rule 1.16 does not even address the question of what clients or cases an attorney *may* decline. It only addresses the question of which clients and cases an attorney *must* decline. What Rule 1.16 addresses are three circumstances in which an attorney is *prohibited* from representing a client, namely: (a) if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, (b) the lawyer is discharged, or (c) the representation will result in

violation of the Rules of Professional Conduct or other law. None of these has anything whatever to do with an attorney's decision not to represent a client *because the attorney does not want to represent the client*. It only addresses the opposite situation – namely, in what circumstances an attorney who otherwise *wants* to represent a client *may not* do so. So what might appear, to someone unfamiliar with Rule 1.16, to be some sort of safe harbor that would preserve an attorney's right to exercise his or her discretion to decline clients and cases, is no such thing. In short, if an attorney declines representation for a discriminatory reason, the attorney will have violated the Rule.

If there is any question about that, it is now clear from Vermont's adoption of Model Rule 8.4(g) that the Rule will, in fact, apply to an attorney's client selection decisions. In its *Reporter's Notes* to its adoption of the new Rule 8.4(g), the Vermont Supreme Court explicitly states that Rule 1.16's provisions about declining or withdrawing from representation "*must* [now] *also be understood in light of Rule 8.4(g)*" so that refusing or withdrawing from representation "*cannot be based on discriminatory or harassing intent without violating that rule*." In other words, if an attorney declines or withdraws from representation for an allegedly discriminatory reason, the attorney violates Rule 8.4(g).

In short, contrary to the assertions of the proposed Rules' proponents, the proposed Rules *will* apply to an attorney's client selection decisions, and *will* prohibit attorneys from declining representation of particular clients if to do so could be considered discriminatory.

This is another alarming departure from the professional principles historically enshrined in New Hampshire's Rules of Professional Conduct and its predecessors, which have, before now, always respected the attorney's freedom and professional autonomy when it comes to choosing who to represent and what cases to accept.

Although the Rules *have* placed restrictions on which clients attorneys may *not* represent (see, for example, Rule 1.7 which precludes attorneys from representing clients or cases in which the attorney has a conflict of interest, and Rule 1.16(a) which requires attorneys to decline or withdraw from representation when representation would compromise the interests of the client), never before have the Rules required attorneys to *take* cases the attorney decides – for whatever reason – he or she does not want to take, or to represent clients the attorney decides – for whatever reason – he or she does not want to represent. (Although Rule 6.2 prohibits attorneys from seeking to avoid court appointed representation, the Rule allows attorneys to decline such appointments "for good cause" – including because the attorney finds the client or the client's cause repugnant.)

Indeed, up until now, the principle that attorneys were free to accept or decline clients or cases at will, for any or no reason, prevailed universally. See, for example, *Modern Legal Ethics*, Charles W. Wolfram, p. 573 (1986)("*a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.*").

There are, of course, good reasons why the profession has left to the attorney the professional decision as to which cases the attorney will accept and which the attorney will decline and which clients the attorney will or will not represent.

First, the Rules impose upon attorneys a professional obligation to represent their clients without personal conflicts (Rule 1.7(a)(2)). A lawyer's ability to do that, however, would be compromised should the lawyer have personal or moral objections to a client or a client's case

In the same vein Rule 1.16(b)(4) recognizes that a lawyer may withdraw from representing a client if the client insists upon taking action that the lawyer considers repugnant or with which

the lawyer has a fundamental disagreement.

And as noted above, although Rule 6.2 prohibits attorneys from seeking to avoid accepting cases that are appointed to them by judicial tribunals, the Rule explicitly recognizes that good cause to refuse such appointments includes the situation where the client or cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client (Rule 6.2(c)) – an acknowledgement in the Rules themselves that a lawyer's personal view of a client or a case can be expected to adversely affect the attorney's ability to provide zealous and effective representation.

To force an attorney to accept a client or case the attorney does not want, and then require the attorney to provide zealous representation to that client, is both unfair to the attorney – because doing so places conflicting obligations upon the lawyer – and to the client, because every client deserves an attorney who is not subject to or influenced by any interests which may, directly or indirectly, adversely affect the lawyer's ability to zealously, impartially, and devotedly represent the client's best interests (see, for example, Rule 1.7(a)(2), which prohibits an attorney from representing a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer).

It must be admitted that human nature is such that an attorney who – for whatever reason – has an aversion to a client or a case will not be able to represent that client or case as well as could an attorney who has no such aversion. For that reason, recognizing an attorney's unfettered freedom to choose which clients and cases to accept and which to decline serves the best interests of the client.

This is not only a self-evident principle, in conformance with universal human experience, but is also well attested in the lives of some of our greatest lawyers. For example, it was well

known that Abraham Lincoln was not an effective lawyer unless he had a personal belief in the justice of the case he was representing. "Fellow lawyers testified that Mr. Lincoln needed to believe in a case to be effective." An Honest Calling: The Law Practice of Abraham Lincoln, Mark A. Steiner, Northern Illinois University Press (2006). Indeed, the recognition of this truth about human nature is embodied in Rules such as Rule 6.2(c), which recognizes that a client or cause that is repugnant to the attorney may impair the lawyer's ability to represent the client.

Should a gay attorney be forced to represent the Westboro Baptist Church? Should an African American attorney be forced to represent a member of the Aryan National Church? Should a Jewish lawyer be forced to represent a Muslim pro-Palestinian group? And, if so, would these attorneys be able to provide zealous representation to these clients? To pose these questions is sufficient to answer them, in the negative. And yet that is exactly what the proposed Rule would do. For these reasons, too, the proposed Rule should be rejected.

E. The Proposed Rules Conflict with Other Professional Obligations and Rules of Professional Conduct.

Another significant problem with the proposed Rules is that they conflicts with other professional obligations and Rules of Professional Conduct. For example:

1. The Proposed Rules Conflict with Rule 1.7 (Conflicts of Interest)

Rule 1.7 provides that: "*(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or* ***by a personal interest of the lawyer***" (our emphasis). Restatement (Third) of the Law Governing Lawyers §125 (2000) clarifies that: "*A conflict under this Section need not be created by a financial interest. . . **Such a conflict may also result from a lawyer's deeply held religious, philosophical, political,***

or public-policy belief" (our emphasis). So – on the one hand the proposed Rules appear to require an attorney to accept clients and cases, despite the fact that such clients or cases might run counter to the attorney's deeply held religious, philosophical, political, or public policy principles; while at the same time Rule 1.7 provides that accepting a client or a case – when the client or case runs counter to the attorney's beliefs – would violate Rule 1.7's Conflict of Interest prohibitions!

How is that conflict to be resolved?

2. The Proposed Rules Conflict with Rule 6.2 (Accepting Appointments)

Rule 6.2 provides that "*A lawyer shall not seek to avoid appointment by a tribunal to represent a person* ***except for good cause****: such as: . . . (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client*" (our emphasis).

Although this Rule is technically applicable only to court appointments, it's important to what we're discussing here because it contains a principle that should be equally – if not more – applicable to an attorney's voluntary client-selection decisions. Namely, the Rule recognizes that a client or cause may be so repugnant to a lawyer that the lawyer-client relationship would be impaired or the lawyer's ability to represent the client be adversely affected.

Indeed, Comment [1] to Rule 6.2 sets forth this general principle that "*A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.*"

Note that Rule 6.2 does not concern itself with *why* the attorney finds the client or cause repugnant – because that's irrelevant. The only relevant issue is whether the attorney – for *whatever* reason – cannot provide the client with zealous representation because the lawyer finds the client or cause repugnant. If not, the attorney must not – for the client's sake – take the case. Clients deserve that. And yet, the proposed Rules would require an attorney to represent clients and cases the

lawyer finds repugnant.

4. **The Proposed Rules Conflict with Rule 1.16 (Declining or Terminating Representation)**

Rule 1.16(a)(1) provides that: *(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the Rules of Professional Conduct or other law.*

However, we've already seen that Rule 1.7 would prohibit an attorney from representing a client who – due to the lawyer's personal beliefs – the lawyer could not represent without a personal conflict of interest interfering with that representation. To do so would constitute a violation of the Rules of Professional Conduct. But Vermont's adoption of Model Rule 8.4(g) confirms that the Rules proposed in New Hampshire will require attorneys to accept clients and cases that – due to the attorney's personal beliefs about the client or the case – the attorney would otherwise have to decline.

So, this Rule too is in conflict with the proposed Rules.

Which Rule is going to prevail when they conflict? Vermont has answered that question – Rule 8.4(g)'s nondiscrimination prohibition will prevail over the Rule that attorneys must not accept cases in which the attorney will have a personal conflict of interest.

Indeed, the fact that the Model Rule and the Rules proposed in New Hampshire conflict with other Professional Rules reveals a basic problem with the proposed Rules – and that is that the proposed Rules are an attempt to impose upon the legal profession a nondiscrimination construct that is, in its basic premises, inconsistent with who attorneys are and what they professionally do. It is an attempt to force a round peg into a square hole.

In considering the proposed Rules, we must remember that the nondiscrimination template on which the proposed Rules are based is taken from the context of public accommodation laws –

nondiscrimination laws that are imposed in the context of merchants and customers – where a merchant sells a product or service to a customer who the merchant does not know and will probably never see again; a transient and impersonal commercial transaction.

But attorneys are not mere merchants, and clients are not mere customers.

Unlike mere merchants – who usually have only distant impersonal commercial relationships with their customers – attorneys have *fiduciary relationships* with their clients.

Attorneys are made privy to the most confidential of their client's information, and are bound to protect those confidentialities. That's not true between a merchant and a customer.

Attorneys are bound to take no action that would harm their clients. That is not true between a merchant and a customer.

And an attorney's relationship with his or her clients is often a long-term relationship, oftentimes lasting months, or even years. That is rarely true between a merchant and a customer.

And once an attorney is in an attorney-client relationship, the attorney – unlike a merchant who is always free to terminate his relationship with a customer – oftentimes may not unilaterally sever that relationship.

So it's one thing to say a *merchant* may not pick and choose his *customers*. It's entirely another to say a *lawyer* may not pick and choose her *clients*.

No lawyer should be required to enter into what is, by definition, a fiduciary, and what could turn out to be a long-term, relationship with a client or case the attorney does not want – whatever the reason.

Because the effect of adopting the proposed Rules would be to impose professional obligations upon New Hampshire's lawyers that conflict with other professional rules, and that are incompatible with the very nature of the attorney-client relationship, the proposed Rules should be

rejected.

F. **The Proposed Rules Will Harm Clients**

A primary purpose of the Rules is to protect the public, by ensuring that attorneys represent their clients competently and without personal interests that will adversely affect the attorney's ability to provide clients with undivided and zealous representation. It recognizes the principle that the client's best interest is never to have an attorney who – for any reason – cannot zealously represent them or who has a personal conflict of interest with the client.

The ABA Model Rule and the Rules proposed in New Hampshire, however, will force an attorney to represent clients who the attorney cannot represent zealously or who, on account of the attorney's personal beliefs about the client or the case, will not be able to represent without a personal conflict of interest.

Indeed, the proposed Rules, if adopted, would introduce insidious deception into the attorney-client relationship because – in order to avoid violating the Rules – some attorneys will be led to conceal their personal beliefs about a client or a case, thereby saddling clients with attorneys who – if the client knew of the attorney's personal beliefs – the client would not retain.

Because the proposed Rules will harm clients, they should be rejected.

G. The Proposed Rules Will Not Remedy the Concerns Underlying the Rules' Rationale, Will Unnecessarily Burden New Hampshire's Professional Disciplinary Authorities, and Subject New Hampshire's Attorneys to Multiple Prosecutions and Inconsistent Results

Given the fact that the only legitimate interest the bar has in proscribing attorney conduct is in proscribing conduct that either renders an attorney unfit to practice law or that prejudices the administration of justice, New Hampshire's current Rules of Professional Conduct are already sufficient to address serious cases of harassment or invidious discrimination, rendering the proposed Rule unnecessary.

First, Rule 8.4 already prohibits attorney conduct that prejudices the administration of justice. See Ethics Committee Comment to New Hampshire Rule of Professional Conduct 8.4 ("*The deletion of section (d) was not intended to permit a lawyer, while representing a client, to disrupt a tribunal or* ***prejudice the administration of justice,*** *no matter how well intentioned nor how noble the purpose may be for the unruly behavior*")(our emphasis). And, in fact, sexual harassment has been professionally disciplined in other states under current Rule 8.4's prohibition on conduct that prejudices the administration of justice. See, for example, *Attorney Grievance Commission of Maryland v. Goldsborough*, 624 A.2d 503 (Ct. App. Maryland 1993)(nonconsensual kissing of clients and spanking clients and employees can violate Rule 8.4(d) prohibiting lawyer from engaging in conduct that is prejudicial to the administration of justice).

Therefore, because the existing Rule 8.4 is already adequate to address cases of attorney harassment or discrimination that prejudice the administration of justice, the new Rule is redundant and unnecessary. And to the extent the proposed Rule purports to punish attorneys for conduct that does not prejudice the administration of justice or otherwise render them unfit to practice law, the proposed Rule would constitute an inappropriate exercise of professional regulatory authority.

Further, many of the circumstances the proposed Rules might address are already addressed by other laws. For example, to the extent the new Rules address harassment or discrimination in the legal workplace, such behavior is already addressed in Title VII at the federal level as well as in this state's employment non-discrimination laws, such as RSA 354-A:1, et seq. And harassing and discriminatory judicial behavior – as well as attorney behavior in proceedings before a judicial tribunal – are already addressed in the Code of Judicial Conduct. N. H. Code of Judicial Conduct Canon 2, C. and Canon 3, B (5) and (6).

As if it were not enough to point out that the proposed Rules are unnecessary, the proposed

Rules are also ineffective. For example, Professor Alex Long, a professor of Professional Responsibility and Law of the Workplace at the University of Tennessee College of Law – despite being a proponent of ABA Model Rule 8.4(g) – has written that amending the rules of professional conduct to prohibit discrimination "*is unlikely to have much impact in terms of addressing employment discrimination and increasing diversity in the legal profession*." Employment Discrimination in the Legal Profession: A Question of Ethics?, Alex B. Long, 2016 U. Ill. L. Rev. 445, 471-472 (2016).

So the proposed Rules are not only unnecessary, they are also ineffective to address the concerns the Rules' proponents put forth as the rationale for adopting the Rules.

In addition, the proposed Rules would create an entirely new layer of nondiscrimination and anti-harassment laws, in addition to those already existing outside the Rules of Professional Conduct. By doing so, the new Rules will burden professional disciplinary authorities with having to process very fact-intensive and duplicative cases – cases that could and should be processed under some other statute or ordinance, by judicial authorities better equipped to handle them.

Indeed, Professor Long points out that, for a variety of reasons, "there are inherent limitations on the ability of ethics rules to address employment discrimination," including that "employment discrimination law is a confusing, complicated area of law" and that "asking disciplinary authorities to master not only the complexities of modern discrimination law, but to devise a new and effective enforcement method is asking quite a bit" and that "if states expect their professional responsibility organizations to engage in significant enforcement, they would need to be willing to develop special units with special expertise and responsibility for addressing employment discrimination." Alex B. Long, Employment Discrimination in the Legal Profession: A Question of Ethics?, 2016 U. Ill. L. Rev. 445, 468-469 (2016).

Further, making discrimination and harassment a professional – as well as a statutory – offense, could very well subject attorneys to inconsistent obligations and results. For example, a lawyer could be exonerated from allegations of having violated a nondiscrimination or harassment law, but still be found to have engaged in harassing or discriminatory conduct that violates the Rules of Professional Conduct, or vice versa. Indeed, some states have recognized the importance of this issue by (a) prohibiting only "unlawful" harassment or discrimination and (b) requiring that any claim against an attorney for unlawful discrimination be brought for adjudication before a tribunal other than a disciplinary tribunal before being brought before a disciplinary tribunal. See, for example, Illinois Rules of Professional Conduct Rule 8.4(j) and New York Rules of Professional Conduct Rule 8.4(g).

So for these reasons, too, Rule 8.4(g) proposed in New Hampshire should be rejected.

H. Version L of the Proposed Rules Does Not Cure the Rule's Defects.

The effect of version L of the proposed Rules would be to restrict the Rule's application to harassment or discrimination "against a client." Although version L is a more limited Rule, in that it applies only to harassment and discrimination against a **client** – thereby avoiding an expansion of the Rule into areas that are not legitimate areas of professional regulation, version L still harbors several of the deficiencies identified in this Joint Comment.

For example, version L does not cure the vagueness and overbreadth defects of the Rules. Nor does version L cure other infirmities of the Rules, such as that the Rules will force attorneys to accept clients and cases in which the attorney may have a personal conflict of interest, the Rules will be contrary to other Rules of Professional Conduct, and the Rules will harm clients.

If an attorney is representing a client who alleges to be the victim of discrimination, will an attorney be subject to discipline for explaining to his client that his client's alleged

discrimination is not actionable, not likely to be believed by a jury or if the attorney advises the client as to allowable conduct?

For these reasons, version L of the Rule should be rejected.

I. Version M of the Proposed Rules Does Not Cure the Rule's Defects.

Version M of the proposed Rules adds a defining element to the terms "harassment" and "discrimination" by providing that the harassment and discrimination the Rule prohibits is harassment and discrimination "*as defined by substantive state or federal law.*" Unfortunately, this language does not cure the Rule's constitutional and other defects.

Most importantly, it is not clear what the qualifying language means. Does it mean that only harassment and discrimination that is expressly *unlawful* under some state or federal law is prohibited? Or does it only mean that the terms "harassment" and "discrimination" will be *interpreted* in light of state or federal discrimination and harassment law?

If it's the latter, then version M of the proposed Rules still has the same constitutional vagueness and overbreadth defects as do versions K and L. Indeed, proposed Comment [3] already provides that "*The substantive state and federal law of anti-discrimination and anti-harassment statutes and related case law is intended to guide the application of subsection (g).*" So if the language of version M merely means that the terms "harassment" and "discrimination" will be *interpreted* in light of state or federal discrimination and harassment law, the added language of version M does not add anything substantive to the Rule that is not already present in the Rule by virtue of Comment [3], rendering the language both redundant and unnecessary.

In addition, if the version M language merely means that the terms "harassment" and "discrimination" will be *interpreted* in light of state or federal discrimination and harassment law, (rather than that only behavior that actually violates some existing state or federal

nondiscrimination/harassment law violates the Rule), then the Rule will still have the same problems pointed out in sub-sections 3(a) and (b) above – namely, the Rule will have a much broader application than do federal and state statutory discrimination and harassment laws. So, although one may be able to determine the scope and applicability of the proposed Rule's prohibitions when the alleged conduct falls squarely within one or more of the federal or state statutes, when it does not, an attorney would be hard-pressed to determine with any degree of certainty what conduct may be covered by the Rule.

However, if the meaning of the version M language is that only behavior that is actually *unlawful* under some state or federal law is prohibited under the Rule, then the Rule had better say that. And if that is the intent, then the Rule should also follow the lead of such states and Illinois and New York, which have similar Rules. In those states, only "unlawful" discrimination and harassment are prohibited, and to insure that attorneys are only disciplined for having actually engaged in *unlawful* behavior – and in order to protect attorneys and professional disciplinary authorities from duplicative prosecutions with possibly inconsistent results – both states require that any claim against an attorney for unlawful discrimination be brought for adjudication *first* before a tribunal other than a disciplinary tribunal before being brought before a disciplinary tribunal. See, for example, Illinois Rules of Professional Conduct Rule 8.4(j)[6] and New York Rules of Professional Conduct Rule 8.4(g).

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[6] "*It is professional misconduct for a lawyer to: . . . (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.*" Ill. R. P. C. 8.4(j).

Because the meaning of version M is unclear – rendering the proposed Rule either redundant or insufficient – version M of the proposed Rules warrants rejection.

J. The Proponents' Stated Reason for the Proposed Rule is an Inappropriate and Dangerous Use of Professional Regulatory Authority.

Proponents of ABA Model Rule 8.4(g) argue that the Rule is necessary in order to address sexual harassment, sexual and racial disparities, and a lack of diversity, in the legal profession. *Petition to Amend Rule 8.4, Rule 42, Arizona Rules of the Supreme Court*, Ariz. Sup. Ct. No. R-17-0032. But proponents of the Rule actually admit that the Rule will not, in fact, effectively address these issues. As noted above, Professor Alex Long has written that amending the rules of professional conduct to prohibit discrimination "*is unlikely to have much impact in terms of addressing employment discrimination and increasing diversity in the legal profession*" (our emphasis). Alex B. Long, Employment Discrimination in the Legal Profession: A Question of Ethics?, 2016 U. Ill. L. Rev. 445, 471-472 (2016).

So why are proponents proposing the adoption of a Rule they admit will not solve the problems with which they are concerned? Professor Long's answer is that "the lawyer disciplinary process" should be used for the "dissemination of values inside and outside the profession" – to influence lawyer behavior "by threatening discipline." Alex B. Long, Employment Discrimination in the Legal Profession: A Question of Ethics?, 2016 U. Ill. L. Rev. 445, 472-473 (2016). Stanford University law professor Deborah L. Rhode agrees, describing the Rule as a "largely . . . symbolic statement" – saying that "The rule provides a useful symbolic statement and educational function."
http://www.abajournal.com/magazine/article/ethics_model_rule_harassing-conduct.

This should all sound very familiar to those who have followed the history of the ABA's adoption of Model Rule 8.4(g). The ABA Standing Committee on Ethics and Professional Responsibility, in its December 22, 2015 Memorandum on the Draft Proposal to Amend Model Rule 8.4, expressed the same idea, saying that the proposed Rule 8.4(g) was necessary – not to protect the public or to insure attorney competence – but in order to compel a "cultural shift" in

the legal profession.

But the purpose of the Rules of Professional Conduct is – and should be – to protect the public and the legal profession from unscrupulous lawyers, *People v. Morley*, 725 P.2d 510, 514 (Colo. 1986), and from those who do not possess the qualities of character and the professional competence requisite to the practice of law. *In re Disciplinary Action Against Jensen*, 418 N.W.2d 721, 722 (Minn. 1988). These are the legitimate purposes of the Rules of Professional Conduct. The Rules should never be used for political or ideological purposes, or to drive social change, if for no other reason than that the direction social change should be driven is subjective. Once we accept the idea that the Rules of Professional Conduct may be used to drive society – in and through the legal profession – in a particular political or ideological direction, there will be no telling where the Rules will be used to drive us next – or who will use them to do so.

Using the Rules of Professional Conduct for political and ideological purposes is inappropriate – and dangerous.

Conclusion

The proposed amendments to add a new Rule 8.4(g) are unnecessary, unconstitutional, will harm clients and should be rejected.

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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.

Jeff Landry
Attorney General

State of Louisiana
DEPARTMENT OF JUSTICE
CIVIL DIVISION
P.O. BOX 94005
BATON ROUGE
70804-9005

September 8, 2017
OPINION 17-0114

15-A CONSTITUTIONAL LAW

U.S. CONST. amend. I La. Const. art. V § 5(B)
U.S. CONST. amend. XIV

ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(h) violate the First and Fourteenth Amendments of the United States Constitution.

Warren L. Montgomery
District Attorney, 22nd JDC
701 N. Columbia St.
Covington, LA 70433

Dear Mr. Montgomery:

Our office received your request for an opinion regarding the constitutionality of ABA Model Rule of Professional Conduct 8.4(g) which expands the definition of professional misconduct for lawyers. In August of 2016, the ABA House of Delegates added paragraph (g) to ABA Model Rule 8.4 to provide that 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.

As a result of the ABA's adoption, the Louisiana State Bar Association ("LSBA") formed the Rule 8.4 Subcommittee (the "Subcommittee") following the September 28, 2016 meeting of the LSBA's Rules of Professional Conduct Committee.[1] The Subcommittee has proposed the following subsection [proposed Rule 8.4(h)] be added to Louisiana's current Rule 8.4 to provide that it is professional misconduct for a lawyer to:

> engage in conduct in connection with the practice of law that the lawyer knows or reasonably should know involves discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability. This Rule does not prohibit legitimate advocacy when race, color, religion, age, gender, sexual

[1] LSBA RULES OF PROFESSIONAL CONDUCT COMMITTEE, *Rule 8.4 Subcommittee Report*, (Mar. 24, 2017), http://files.lsba.org/documents/News/LSBANews/RPCSubFinalReport.pdf (last visited Aug. 22, 2017).

> orientation, national origin, marital status, or disability are issues, nor does it limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.[2]

The LSBA Rules of Professional Conduct Committee has not yet taken any position on the Subcommittee's proposed Rule 8.4(h) and instead has chosen to seek written comments from the public regarding the full text of ABA Model Rule 8.4(g).[3] You are concerned that ABA Model Rule 8.4(g) violates the constitutional guarantees of the United States Constitution because the rule restrains the speech and actions of lawyers in a wide variety of areas outside of the courtroom. Due to these restrictions the rule may violate a lawyer's right to freedom of speech, freedom of association, and free exercise of religion. Additionally you are concerned that due to the vague terms included in the rules, they might violate a lawyer's due process rights under the Fourteenth Amendment.

We begin our analysis by noting that pursuant to La. Const. art. V §5(B), the Louisiana Supreme Court has exclusive original jurisdiction of disciplinary proceedings against a member of the bar. "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."[4] However, it is well established that a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.[5] "[B]road rules framed to protect the public and to preserve respect for the administration of justice must not work a significant impairment of 'the value of associational freedoms.'"[6]

First Amendment of the United States Constitution – Freedom of Speech

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

As noted by both the Louisiana Supreme Court and the United States Supreme Court the "liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due

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[2] LSBA RULES OF PROFESSIONAL CONDUCT COMMITTEE, *Rule 8.4 Subcommittee Report- EXECUTIVE SUMMARY* (Mar. 24, 2017), http://files.lsba.org/documents/News/LSBANews/RPCExecutiveSummary.pdf (last visited August 22, 2017).

[3] "LSBA Rules of Professional Conduct Committee Seeking Written Comments on ABA Model Rule 8.4(g)," https://www.lsba.org/NewsArticle.aspx?Article=71844d90-d6ee-4204-acdb-fbd1a8cca05e (last visited August 22, 2017).

[4] *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991).

[5] *NAACP v. Button*, 371 U.S. 415, 439 (1963).

[6] *In re Primus*, 436 U.S. 412, 426 (1978).

Process Clause of the Fourteenth Amendment from invasion by state action."[7] These rights are also guaranteed in our State Constitution.[8] "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."[9] Speech may not be prohibited because it concerns subjects offending our sensibilities.[10] The fact that some in society may find speech offensive is not a sufficient reason for suppressing it.[11] The First Amendment protects, "[a]ll ideas having even the slightest redeeming social importance."[12]

In order to decide whether a regulation restricting speech is constitutional, a court must first determine whether the regulation is content-based or content-neutral so that the appropriate analysis can be applied.[13] Content-neutral speech restrictions are those that are justified without reference to the content of the regulated speech. As a general rule, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."[14] Content-neutral regulations are subject to an intermediate level of scrutiny.[15]

"Content-Based laws include both regulations that target speech based on the viewpoints expressed and regulations that target speech on the basis of subject matter or topic."[16] "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or view expressed are content based."[17] The United States Constitution prohibits restrictions on free speech "because of disapproval of the ideas expressed."[18] "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[19] "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[20] Content-based regulations are presumptively invalid.[21]

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[7] *In re Warner*, 05-1303 (La. 4/17/09), 21 So.3d 218, 228; *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 779 (1978).
[8] La. Const. art. I, §§ 2, 7, 8, and 9.
[9] *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000).
[10] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002).
[11] *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978); *Reno v. ACLU*, 521 U.S. 844, 874 (1997).
[12] *In re Warner*, 21 So.3d at 241, (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).
[13] *Id.*
[14] *In re Warner*, 21 So.3d at 243,)citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994)).
[15] *Id.*
[16] *In re Warner*, 21 So.3d at 244-45.
[17] *Id.*
[18] *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).
[19] *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).
[20] *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991), (citing *Cohen v. California*, 403 U.S. 15, 24 (1971)).
[21] *R. A. V.*, 505 U.S. at 382, citing *Simon & Schuster, Inc.* 502 U.S. at 115; *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 536 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

The regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid. On judicial review, ABA Model Rule 8.4(g) would be subject to a strict scrutiny analysis. ABA Model Rule 8.4(g) would only be found valid if (1) the regulation serves a compelling governmental interest, and (2) the regulation is narrowly tailored to serve that compelling interest.[22]

The Louisiana Supreme Court examined and applied the strict scrutiny analysis to a content-based regulation in *In Re Warner*. In *Warner* the court considered the constitutionality of La. S. Ct. Rule XIX, §16 which imposed confidentiality requirements on all participants in an attorney disciplinary proceeding. In discussing the first part of the strict scrutiny test, the court stated:

> [T]he first component of the compelling interest analysis requires the government to assert an interest served by the regulation in question, such as the need to address a perceived problem, protect a group from harm, or cure some ill in society. *However, "[m]ere speculation of harm does not constitute a compelling state interest." The state must effectively demonstrate "that the harms it recites are real and that its restriction [of speech] will in fact alleviate them to a material degree*" "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny . . . will vary up or down with the novelty and plausibility of the justification raised."[23]

The Subcommittee report to the LSBA Rules of Professional Conduct Committee notes that the Subcommittee examined matters of lawyer behavior in other jurisdictions and in the State of Louisiana.[24] The group reviewed 57 pages of case summaries prepared and provided by the ABA Center for Professional Responsibility in response to the Subcommittee's request for "any information on disciplinary cases from around the U.S. involving harassment and/or discrimination—and involving some version of ABA model Rule 8.4."

Most of the cases identified by the ABA involved a particular state's version of ABA Model Rule 8.4(d) or (g) which was narrower in scope than ABA Model Rule 8.4(g). No disciplinary cases were found from Louisiana applying Rules 8.4(d) or 8.4(g) to situations involving harassment and/or discrimination. (The Louisiana Rules of Professional Conduct already incorporate Rule 8.4(d) which states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of

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[22] *In re Warner*, 21 So. 3d at 249-50, (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002); *Playboy Entertainment Group*, 529 U.S. at 813; *Burson v. Freeman*, 504 U.S. 191, 198 (1992); *Simon & Schuster*, 502 U.S. at 118; *Boos v. Barry*, 485 U.S. 312, 321-22 (1988); *Consolidated Edison*, 447 U.S. at 540 (government must show regulation is "precisely drawn means" of serving compelling state interest)).

[23] *In re Warner*, 21 So. 3d at 227 (citations omitted) (emphasis added).

[24] LSBA RULES OF PROFESSIONAL CONDUCT COMMITTEE, *Rule 8.4 Subcommittee Report* at p. 1.

justice." Rule 8.4(d) encompasses the majority, if not all, of the conduct proposed Rule 8.4(h) seeks to address).

The Subcommittee's report failed to identify any cases in Louisiana where a lawyer engaged in harassment or discrimination that was prejudicial to the administration of justice (which is currently prohibited by Rule 8.4(d) in the Louisiana Rules of Professional Conduct). Despite the lack of Louisiana cases, the Subcommittee felt that some sort of regulation that would "cover an attorney's actions that might occur outside of the attorney's law practice or involving non-attorneys" was necessary.[25] Since no Louisiana discrimination cases which fell outside the existing Louisiana Rules of Professional Conduct were identified by the Subcommittee, and lacking any further evidence that such a restriction on speech is necessary to cure a real harm, it is unlikely a court would find there is a compelling state interest. Accordingly, it is our opinion that a court would likely find ABA Model Rule 8.4(g) violates a lawyer's freedom of speech under the First Amendment.

First Amendment of the United States Constitution – Overbreadth

The free speech guarantee of the First Amendment "gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere."[26] "The Government may not suppress lawful speech as the means to suppress unlawful speech."[27] The overbreadth doctrine prohibits the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.[28] In the First Amendment context, a law that punishes activities which may be legitimately regulated is impermissibly overbroad if it includes within its prospective reach speech or conduct protected by the First Amendment.[29]

ABA Model Rule 8.4(g) is a content-based regulation which has the effect of suppressing a lawyer's conduct, actions, and speech in an array of areas and settings outside a lawyer's professional practice. Comment 4 to ABA Model Rule 8.4 illustrates the extensive areas to which the rule is intended to apply and 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. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting,

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[25] *Id* at pp. 1, 10.
[26] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).
[27] *Id.* at 255.
[28] *Id.*
[29] *State v. Schirmer*, 94-2631 (La. 11/30/94), 646 So.2d 890, 900-01, (citing *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)).

> hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

The expansive definition of "conduct related to the practice of law" has countless implications for a lawyer's personal life. For example, a private interaction or conversation between a lawyer and any other person at a social activity sponsored by a law firm or bar association meets this definition. Similarly, a lawyer who is asked his 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. We note other jurisdictions have observed that this definition constitutes overreach into every attorney's free speech, opinions, and social activities and could encompass a lawyer's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.[30]

The phrase "conduct related to the practice of law" in Comment 4 encompasses many areas and scenarios outside of the courtroom that are entitled to First Amendment protection. It is therefore our opinion that ABA Model Rule 8.4(g) is unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct.

First Amendment of the United States Constitution – Freedom of Association and Free Exercise of Religion

As discussed above, the phrase "conduct related to the practice of law" as defined in Comment 4 to ABA Model Rule 8.4 is overbroad. Comment 4 notes the Rule applies to a lawyer's participation in "business or social activities in connection with the practice of law."[31] Lawyers participate in a wide variety of associations that engage in expressive conduct which could run afoul of ABA Model Rule 8.4(g), including faith-based legal organizations and activist organizations that promote a specific political or social platform.[32]

The United States Supreme Court has held that "implicit 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."[33] A regulation touching the "freedom of association must be narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State."[34] "Protection of the right to expressive association is especially important in preserving political and cultural diversity and in shielding

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[30] Tx. Att'y. Gen. Op. No. KP-0123, Senate Joint Resolution No. 15 of the 2017 Montana Legislature, Op. S.C. Att'y Gen., 2017 WL 1955652.
[31] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS'N 2016).
[32] As noted by the Texas Attorney General, Proposed Rule 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.
[33] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000), (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984)).
[34] *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966).

dissident expression from suppression by the majority."[35] "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[36]

ABA Model Rule 8.4(g) could also result in lawyers being punished for practicing their religion. The United States Supreme Court specifically noted in *Obergefell v. Hodges* that "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."[37] However, this type of advocacy appears to be prohibited by ABA Model Rule 8.4(g). Although *Obergefell* specifically envisioned a person who was opposed to same-sex marriage due to their particular religious doctrine, the analysis may be applied to other areas. Under Rule 8.4(g) a lawyer who acts as a legal advisor on the board of their church would be engaging in professional misconduct if they participated in a march against same-sex marriage or taught a class at their religious institution against divorce (*i.e.*, marital status). The United States Supreme Court has explicitly recognized that "the First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations."[38] Accordingly, it is our opinion that a court would likely find ABA Model Rule 8.4(g) violates the First Amendment because it can be applied in a manner that unconstitutionally restricts a lawyer's participation and involvement with both faith-based and secular groups that advocate or promote a specific religious, political, or social platform.

Fourteenth Amendment of the United States Constitution – Vagueness

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.[39] The enactment must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited.[40] To avoid arbitrary and discriminatory enforcement the enactment must provide explicit standards for those who apply them.[41] Where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms."[42] This inevitably leads to persons steering "far wider of the 'unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[43]

The terms "harassment" and "discrimination" in ABA Model Rule 8.4(g) are defined by Comment 3 as follows:

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[35] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).
[36] *Id.*
[37] *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015).
[38] *Id.*
[39] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

> 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. 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).

Although sexual harassment clearly is prohibited by this definition and is well defined in jurisprudence, the terms "discrimination" and "harassment" are not. Discrimination is defined by Comment 3 as "harmful verbal or physical conduct that manifests bias or prejudice towards others" and harassment is defined as "derogatory or demeaning verbal or physical conduct." Far from providing explicit standards, the definitions in Comment 3 further complicate and muddle the meanings of the words used in ABA Model Rule 8.4(g) such that a person of common intelligence does not know what is prohibited.

As noted by the United States Supreme Court in examining the word "annoy,"

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning.[44]

For the same reasons we think a court could find the terms "harassment" and "discrimination" as defined by Comment 3 to be unconstitutionally vague and a violation of the Fourteenth Amendment. The Rule does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. As noted by the United State Supreme Court conduct that is harmful, derogatory, or demeaning to some may not be to others and invites arbitrary and discriminatory enforcement.

Subcommittee Proposed Rule 8.4(h)

Proposed Rule 8.4(h) defines professional misconduct as conduct that the "lawyer knows or reasonably should know *involves* discrimination prohibited by law."[45] The word "involve" is defined as, "a. To have as a necessary feature or consequence; entail, b. To relate to or affect or c. To cause to burn; spread to."[46] The use of the word "involve" seems to indicate that an actual violation of a law is not required for a finding of

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[44] *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971).
[45] (emphasis added).
[46] *Involve*, The American Heritage Dictionary of the English Language, 5th ed., https://ahdictionary.com/word/search.html?q=involve (last visited August 24, 2017).

professional misconduct. For instance, if the alleged discrimination is merely related to conduct that is prohibited by law then under Rule 8.4(h) a lawyer would be subject to discipline. It is impossible to ascertain what behavior would be *related to* discrimination prohibited by law. Considering the uncertainty of the standard set forth in 8.4(h) a court would likely find proposed Rule 8.4(h) violates the Fourteenth Amendment due to vagueness since its prohibitions are not clearly defined.

Proposed Rule 8.4(h) also uses the term "conduct in connection with the practice of law" which, as discussed above, includes many areas and scenarios outside of the courtroom that are entitled to First Amendment protection. For the reasons discussed previously, it is our opinion that a court would likely find proposed Rule 8.4(h) is overbroad and a violation of the First Amendment.

We also note the "legitimate advocacy" exception of proposed Rule 8.4(h) is narrower than the exception in ABA Model Rule 8.4(g). The proposed rule only excepts legitimate advocacy when "race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability are issues." No guidance is provided as to when something would be considered an "issue" and it is unclear whether something must be directly related to the cause of action of the case or merely a component of an argument presented for a court's consideration. Moreover, it is unclear whether the exception applies only once a case has been filed or whether it is equally applicable to such actives such as writing a demand letter, negotiating a contract, or participating in mediation. The inherent vagueness of the exception has the potential to discourage lawyers from making legitimate arguments on behalf of their clients for fear of violating the rule.

The existing Rules of Professional Conduct and Louisiana laws against discrimination address the perceived problems identified in the Subcommittee's report. There has been no demonstration that there is a need for proposed Rule 8.4(h) in Louisiana. Rule 8.4(d) addresses actions of lawyers which are prejudicial to the administration of justice and includes actions which are prejudicial to the administration of justice because they are discriminatory. This is clearly evident in the Louisiana Supreme Court's rulings on 8.4(d) misconduct. The Louisiana Supreme Court has stated that "[t]he proscription against conduct that is prejudicial to the administration of justice most often applies to litigation-related misconduct. *However, La. St. Bar art. XVI, R. 8.4(d) also reaches conduct that is uncivil, undignified, or unprofessional, regardless of whether it is directly connected to a legal proceeding.*"[47]

In conclusion, it is the opinion of this office that a court would likely find ABA Model Rule 8.4(g) unconstitutional under the First and Fourteenth Amendments. Although proposed Rule 8.4(h) seeks to avoid many of the constitutional infirmities of the Model Rule, the proposed rule does not clearly define what type of behavior is prohibited and suffers from the same vagueness and overbreadth issues as ABA Model Rule 8.4(g).

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[47] *In re Downing*, 05-1553 (La. 05/17/06), 930 So.2d 897, 898 (emphasis added).

We hope that this opinion has adequately addressed the questions you have submitted. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

JEFF LANDRY
ATTORNEY GENERAL

BY: _____
Emily Andrews
Assistant Attorney General

JL: EGA

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).

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 -

ALAN WILSON
ATTORNEY GENERAL

May 1, 2017

The Honorable John R. McCravy III, Member
South Carolina House of Representatives, District No. 13
420-A Blatt Building
Columbia, SC 29201

Dear Representative McCravy:

You seek an opinion regarding ABA Model Rule 8.4(g) and whether it should be adopted and enforced in South Carolina. By way of background, you state the following:

> [t]he South Carolina Supreme Court has decided to solicit public comment as to whether an amended version of ABA Model Rule 8.4 should be adopted and enforced in South Carolina. The proposed amended rule would govern the conduct of members of the South Carolina Bar, many of whom are my constituents. As the Court is open for public comment through March 29, time is of the essence.
>
> It is my belief that this rule infringes upon the constitutional rights of attorneys in South Carolina, is overly vague and ambiguous, and may not be necessary. In fact, the Attorney General of Texas has issued an opinion on the same rule stating the following:
>
> - the proposed Rule infringes upon the free speech rights of members of the State Bar,
> - it infringes upon an attorney's right to freedom of association,
> - the proposed Rule infringes upon an attorney's First Amendment right to free exercise of religion,
> - the proposed Rule attempts to prohibit constitutionally protected activities
> - the proposed Rule is void for vagueness;
> - the proposed Rule is not necessary insofar as the current rules of disciplinary conduct sufficiently address attorney misconduct to prohibit unlawful discrimination.
>
> The essential legal questions for your office to address are (a) whether the proposed rule infringes upon the free speech rights of members of the State Bar; (b) whether it infringes upon an attorney's right to freedom of association; (c) whether it infringes upon an attorney's First Amendment right to free exercise of religion; (d) whether it attempts to prohibit constitutionally protected activities; (e) whether it is void for

> vagueness; and (f) whether the current rules of professional conduct sufficiently address attorney misconduct.

Law/Analysis

Model Rule 8.4(g) was approved by the American Bar Association last year and 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 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.

The ABA added pertinent Comments to the Rule which state:

> (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. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).
>
> (4) Conduct related to the practice of law includes investigating 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.

Turning now to the analysis of Model Rule 8.4(g), we first note that our Supreme Court has decided a case involving application of the First Amendment to a lawyer disciplinary Rule. See In re Anonymous Member of South Carolina Bar, 392 S.C. 328, 709 S.E.2d 633 (2011). Anonymous resolved a First Amendment challenge to the lawyers' "civility oath" in favor of the constitutionality of that oath. There, the Court found that the requirement that all lawyers pledge to opposing parties and their counsel ". . . fairness, integrity and civility, not only in court, but also in all written and oral communications. . . ." was not unconstitutionally vague nor overbroad. 192 S.C. at 331, 729 S.E.2d at 637.

The Court in Anonymous first observed that

> [t]he United States Supreme Court has noted that lawyers are not entitled to the same First Amendment protections as laypeople. See In re Snyder, 472 U.S. 634, 644-45, 105 S.Ct. 2874, 2881, 86 L.Ed. 20504 (1985). Moreover, attorneys' "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." In re Sawyer, 360 U.S. 622, 646-47, 79 S.Ct. 1388, 3 L.Ed.2d 1473 (1959) (Stewart, J. concurring). "Even outside the courtroom ... lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen might not be." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071, 111 S.Ct. 2720, 2743, 115 L.Ed.2d 888 (1991).

With that background for analysis, as to the vagueness claim, the Court cited Grievance Administrator v. Fieger, 719 N.W.2d 123 (Mich. 2006), which had upheld Michigan's civility oath. Based upon the facts before the Anonymous Court -- the attorney in question had sent Attorney Doe a "Drug Dealer" e-mail accusing Doe's daughter of buying drugs from a "crack head" -- the Court thus stated:

> [I]n this case there is no question that even a casual reading of the attorney's oath would put a person on notice that the type of language used in Respondent's "Drug Dealer" e-mail violates the civility clause. Casting aspersions on an opposing counsel's offspring and questioning the manner in which an opposing attorney was rearing his or her own children does not even near the margins of the civility clause. While no one argued it in this case, it could be argued that the language used by the Respondent in the "Drug Dealer" e-mail constituted fighting words. Moreover, a person of common intelligence does not have to guess at the meaning of the civility oath. We hold, as the Court held in Fieger, that the civility oath is not unconstitutionally vague.

392 S.C. at 335-36, 709 S.E.2d at 637.

With respect the overbreadth doctrine and its relation to the First Amendment, the Anonymous Court noted that overbreadth is a departure from the usual rule that a party may facially challenge a law only as it relates to him, but instead "'is an exception to the standards for facial challenges.'" (quoting In re Amir, 371 S.C. 380, 384, 639 S.E.2d 144, 146 (2006)). The Court explained the rules governing overbreadth are as follow:

> [u]nder the overbreadth doctrine, "the party challenging a statute simply must demonstrate that the statute could cause someone else – anyone else – to refrain from constitutionally protected expression." Id. (citation omitted). The overbreadth doctrine has "been implemented out of concern that the threat of enforcement of an overly broad law may deter or "chill' constitutionally protected speech – especially when the overly broad law imposes criminal sanctions." Id. at 384-85, 639 S.E.2d at 146 (citation omitted). The overbreadth doctrine:

> . . . permits a court to wholly invalidate a statute only when the terms are so broad that they punish a substantial amount of protected free speech in relation to the statute's otherwise plainly legitimate sweep – until and unless a limiting construction or partial invalidation narrows it so as to remove the threat or deterrence to constitutionally protection.

Id. at 385, 639 S.E.2d at 146-47 (citation omitted).

392 S.C. at 336, 709 S.E.2d at 637-38.

Next, Anonymous set forth the First Amendment standard for the discipline of lawyers, stating that "[a] court analyzing whether a disciplinary rule violates the First Amendment must balance 'the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest' in the kind of speech that was at issue." Id., quoting Gentile v. State Bar of Nevada, 501 U.S. 1030, 1073, 111 S.Ct. 2720, 2744, 115 L.Ed.2d 888 (1991). According to the Court, while "[a] layman may, perhaps pursue his theories of free speech . . . until he runs afoul of the penalties of libel or slander, or into some infraction of statutory law . . . a member of the bar can, and will be stopped at the point where he infringes our Canon of Ethics." 392 S.C. at 336-37, 709 S.E.2d at 638, quoting In re Woodward, 300 S.W.2d 385, 393-94 (Mo. 1957). Thus, in the view of the Court, the civility oath met the governing standards under the First Amendment:

> [t]he interests protected by the civility oath are the administration of justice and integrity of the lawyer-client relationship. The State has an interest in ensuring a system of regulation that prohibits lawyers from attacking each other personally in the manner in which Respondent attacked Attorney Roe. Such conduct not only compromises the integrity of the judicial process, it also undermines a lawyer's ability to objectively represent his or her client. There is no substantial amount of protected free speech penalized by the civility oath in light of the oath's plainly legitimate sweep of supporting the administration of justice and the lawyer-client relationship. Thus, we find the civility oath is not unconstitutionally overbroad.

Id.

From this review of Anonymous, it can be seen that our Supreme Court, relying upon cases such as Gentile, requires a more painstaking standard for declaring a lawyer disciplinary rule unconstitutional on either vagueness or First Amendment grounds than would be the case with respect to a non-lawyer's First Amendment claim. In other words, the Court must balance the State's interest "'in the regulation of a specialized profession against a lawyer's First Amendment interest' in the kind of speech at issue." Anonymous, 392 S.C. at 336, 709 S.E.2d at 637-38.

Turning now to Model Rule 8.4(g), we are aware of no judicial decision which has addressed the constitutionality of such Model Rule. However, the proposed Rule has been surrounded by much controversy and has received considerable commentary. As you note, the Texas Attorney General recently concluded that the Rule is likely to be deemed by a court to be

unconstitutional on a number of grounds. See Tex. Att'y Gen. Op. KP-0123, 2016 WL 743186 (December 20, 2016). According to the Attorney General of Texas, the Model Rule prohibits the very core of a lawyer's Free Speech:

> [w]hile 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."
>
> . . .
>
> 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 relating 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. . . .
> >
> > 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.

In his Opinion, the Texas Attorney General quoted noted Constitutional Law Professor Ronald D. Rotunda, co-author of a leading Treatise on Constitutional Law,[1] noting that "[o]ne 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)." See 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). Thus, according to the Attorney General of Texas,

> [i]n 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 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

[1] See Rotunda and Nowak's Treatise on Constitutional Law: Substance and Procedure (5th ed.).

> 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.

The Texas Attorney General also concluded that the rule infringes upon the attorney's right to free exercise of religion, upon his or her right to freedom of association, is overbroad, and is void for vagueness. With respect to free exercise, the Attorney General quoted Obergefell v. Hodges, 135 S.Ct. 2584, 2607 (2015) that "'religious doctrines, may continue to advocate' their religious views on same-sex marriage and engage in an open and searching debate" on the issue. However, as the Texas Attorney General pointed out, Rule 8.4(g)'s operation

> . . . would stifle such a debate within the legal community for fear of disciplinary reprimand and would likely in some attorneys declining to represent clients involved in this issue for fear of disciplinary action. . . . "[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.

Moreover, with regard to the attorney's freedom of association, the Attorney General of Texas cited from Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) and Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48 (2000), stating that:

> [c]ontrary 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 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.

In addition, the Texas Attorney General found Rule 8.4(g) to be overbroad because it "'sweeps within its scope a wide range of both protected and nonprotected expressive activity.'" (quoting Hobbs v. Thompson, 448 F.2d 456, 460 (5th Cir. 1971)). According to the Attorney General,

> [i]n the First Amendment context, a court will invalidate a statute as overbroad as to chill individual thought and expression of particular 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). . . . 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 Assn. v. City of N.Y., 487 U.S. 1, 11 (1988). . . .
>
> 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[.]", ... 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 as 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.

In addition, the Attorney General of Texas concluded that Model Rule 8.4(g) is void for vagueness. In the view of the Attorney General, "'[W]hen 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.'" (quoting Benton, 980 S.W.2d at 437). The Attorney General further noted that "[w]hen 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. With that in mind, the Attorney General reasoned as follows:

> Model Rule 8.4(g) lacks clear meaning and is capable of infringing upon multiple constitutionally protected rights, and it 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 advance 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 analysis of the Texas Attorney General, set forth above, is persuasive and we agree with the many constitutional concerns expressed in the Attorney General's opinion. However, there is much more than this one Attorney General's Opinion which would lead to the conclusion that the Model Rule is constitutionally suspect. As noted above, eminent law professor Ronald Rotunda has dissected the Rule in a paper entitled "Legal Memorandum," published by the Heritage Foundation in October, 2016. See www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought. According to Professor Rotunda,

> [t]he First Amendment even limits the EEOC. What is "harassment"? In the context of Title IX sexual harassment, the Supreme Court held in Davis Next Friend LaShonda D. v. Monroe City Board of Education, [526 U.S. 629 (1999)] that "an action will lie only for harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." [Id. at 633 (emphasis added by Rotunda)]. LaShonda insisted on a narrow definition to avoid a free speech violation. The EEOC was not listening to LaShonda when it decided the "Don't tread on me" case. [deciding that there can be racism and a hostile work environment for a Postal Service worker to wear a "Don't tread on me" cap].
>
> LaShonda cited with approval other cases that invalidated actions that were not sensitive to free speech. For example, UWM Post, Inc. v. Board of Regents of University of Wisconsin System [774 F.Supp. 1163 (E.D. Wis. 1991)] . . . invalidated a university speech code that prohibited "discriminatory comments" directed at an individual that "intentionally . . . demean" the "sex . . . of the individual" and "[c]reate an intimidating, hostile or demeaning environment for education, university related work or other university-authorized activity."
>
> One would think that the ABA, which exists to promote the rule of law (including the case law that interprets and applies the Constitution), would follow the holding in LaShonda, but the ABA nowhere embraces the limiting definition of LaShonda. It proudly goes far beyond even the EEOC's "Don't tread on me" case because the ABA rule bans a broader category of speech that is divorced from any action. The new list includes gender identity, marital status, and socioeconomic status. It also includes social activities at which no coworkers are present. Even "a sole practitioner could face discipline because something that he said at a law-related function offended someone employed by another law firm." (quoting Eugene Volokh, A Speech Code for Lawyers; Banning Viewpoints That Express "Bias," Including in Law-Related Social Activities, Washington Post (Aug. 10, 2016) www.washingtonpost.com/news/volokhconspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm-term=.094f10eab400.

In LaShonda, Justices Kennedy, Chief Justice Rehnquist, Justice Scalia and Justice Thomas elaborated upon the First Amendment's limitations upon school administrators. Justice Kennedy put it this way:

>]a] university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment. . . . [citing numerous decisions]. The difficulties associated with speech codes simply underscore the limited nature of a university's control over student behavior that may be viewed as sexual harassment.

562 U.S. at 669. While the constraints of the First Amendment upon a "speech code" may not be the same upon lawyers as upon students, clearly there are limits to how far a Bar Rule can go.

We observe also that numerous other cases are in accord with LaShonda's analysis. Indeed, Justice Kennedy in LaShonda cited with approval Doe v. University of Michigan, 721 F.Supp. 852 (E.D. Mich. 1989). In Doe, the Court held that a University's policy on discrimination and harassment and the policy was so vague that its enforcement violated The Due Process Clause. The Policy prohibited individuals from "'stigmatizing or victimizing individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era status.'" According to the Doe Court, "[l]ooking at the plain language of the Policy, it was impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct." 721 F.Supp. at 867. Moreover, the Court emphasized that ". . . the State may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited. This was the fundamental infirmity of the Policy." Id. at 864. In addition, IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University, 993 F.2d 386 (4th Cir. 1993), which LaShonda also cited with approval, concluded that the University's sanctions of a fraternity for conducting an "ugly woman contest," being racist and sexist overtones, was protected by the First Amendment, despite its offensiveness.

Moreover, the Third Circuit in Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001) held that a school district's anti-harassment policy was unconstitutionally overbroad. The policy in question defined "harassment" as

> verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment.

In addition, harassment could include "'any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual because of the characteristics described above.'" Then Judge Alito noted that

> [t]he Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is

> not sufficient justification for prohibiting it. See Tinker [v. Des Moines Ind. Comm. School Dist., 393 U.S. 503] at 509, 89 S.Ct. 733 (school may not prohibit speech based on the "mere desire to avoid discomfort and unpleasantness that always accompany an unpopular viewpoint"); Texas v. Johnson, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Street v. New York, 394 U.S. 576, 592, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) ["It is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."] see also Doe v. University of Michigan, 721F.Supp. 852, 863 (E.D. Mich. 1989) (striking down university speech code: "Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.").

240 F.3d at 215. Judge Alito sought a "reasonable limiting construction" with respect to the policy in question. However,

> . . . the Policy, even narrowly read, prohibits substantial amounts of non-vulgar, non-sponsored student speech. . . . [Therefore,] SCASD must . . . satisfy the Tinker test by showing that the Policy's restrictions are necessary to prevent substantial disruption or interference with the work of the school or the rights of other students. Applying this test, we conclude that the policy is substantially overbroad.

Id. at 216. Because the Policy "appears to cover substantially more speech than could be prohibited under Tinker's substantial disruption test, accordingly we hold that the Policy is unconstitutionally overbroad.

Turning now to the First Amendment's application to the regulation of lawyers, we note that Gentile v. State Bar of Nevada, supra is the seminal decision applying the First Amendment to lawyers' disciplinary rules. There, an attorney was disciplined for holding a press conference after his client was indicted. The Nevada bar filed a complaint alleging that statements made in the press conference violated Supreme Court Rule 177 prohibiting a lawyer from making extrajudicial statements that he knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding. The lawyer was found to have violated the Rule and subjected to a private reprimand. Gentile's claim that the Rule violated his right to Free Speech was rejected by the Nevada Supreme Court. In a plurality opinion, Justice Kennedy wrote the opinion for the Court that the Rule was void for vagueness. Chief Justice Rehnquist wrote the opinion concluding that the "substantial likelihood of material prejudice" standard satisfied the First Amendment.

The Chief Justice analyzed the First Amendment issue as follows:

> [w]hen a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question.

> . . . . the "substantial likelihood" test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right. . . . The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants.
>
> The restraint on speech is narrowly tailored to achieve these objectives. The regulation of attorneys' speech is limited – it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

501 U.S. at 1077. On the other hand, Justice Kennedy concluded that "[t]here is not support for the conclusion that petitioner's statements created a likelihood of material prejudice, or indeed of any harm of sufficient magnitude or imminence to support a punishment for speech." Id. at 1048.

It is our understanding that the Professional Responsibility Committee of the South Carolina Bar has recently voted (in a non-unanimous vote) to send a legal Memorandum to the South Carolina Supreme Court opposing Proposed Rule 8.4(g). In that Memorandum, the Committee argued that the Rule is unconstitutionally vague, noting that the word "harassment" is a term "open to a multitude of interpretations." Further, the Committee stated:

> [t]he vagueness of this proposed amendment raises due process concerns. The United States Supreme Court [see In re Ruffalo, 390 U.S. 544 (1968)] has held that disciplinary measures are quasi-criminal and certain due process requirements apply including fair notice of the charges. . . . The Court [see Connally v. General Construction Co., 269 U.S. 385, 391 (1926) has also held that "[a] disciplinary rule that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. . . . [With respect to "harassment,"] . . . attorneys must guess the exact definition.

In addition, the Committee's Memorandum concluded that the Rule is unconstitutionally overbroad. The Memorandum further states:

> [t]he proposed model rule seeks to prohibit "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," . . . thereby making 8.4(g) overbroad and diluting the main justification of restricting attorney speech. Our current phrase in comment [3] to Rule 8.4 uses the language, "[i]n the course of representing a client . . .:" and requires that the manifestation of a bias or prejudice be ". . . prejudicial to the administration of justice."
>
> Ostensibly, every word uttered by a lawyer, whether work-related or personal, may be considered related to the practice of law. "If every action an attorney makes is related to the practice of law, how does an attorney attend a rally that opposes or questions same-sex marriage or participate in a protest with a poster stating "He's not my President"? Another attorney, a client, or a potential client, may cite a violation of the proposed amendment based on these actions. At the end of the day, lawyers are also humans and have their own personal beliefs and causes outside the profession. The proposed rule, unlike the Civility Oath and Rule 8.4 and its comments, does not clearly contain its application to instances involving "the administration of justice and the integrity of the lawyer-client relationship . . . as noted by the South Carolina Supreme Court in addressing the specific application of the Civility Oath. [see the discussion of In re anonymous Member of South Carolina Bar, supra, above].

See January, 2017 Letter from Kirsten Small to House of Delegates, found www.sccourts.org/HOD2017/hod-materials-january-2017- extract.pdf.

We agree. It can be seen that then-Judge Alito's analysis in Saxe, supra, while rendered in a different context [schools] is very instructive here. The school policy creating a "speech code" in the school environment is quite similar to the "speech code" created by the Model Rule. As Judge Alito concluded,

> The "undifferentiated fear or apprehension of disturbance" is not enough to justify a restriction on student speech. Although SCASD correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the Policy.

240 F.3d at 217. See also Justice Kennedy's statement in LaShonda, infra.

While there are differences, of course, Judge Alito's analysis is even more applicable with respect to lawyers' speech. As Professor Rotunda has noted, the ABA has explained the reason for the Rule as follows:

> [t]here is a need for a cultural shift in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity,

> gender expression, sexual orientation, marital status, or disability, to be captured in the rules of professional conduct.

Comment (3) to the Rule also explains that "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." In our view, such a justification, particularly in light of the "substantial likelihood" test used by Chief Justice Rehnquist in Gentile, particularly with respect to "verbal" conduct, is not nearly sufficient to suppress the "broad swath" of lawyers' speech which application of the Model Rule would involve. Much of this speech would present no harm to the integrity of the profession at all. What is legitimate non-harmful speech by members of the Bar cannot be chilled in order to achieve the lofty goal of a "cultural shift" through enforcement of the Rules of Professional Conduct.

Conclusion

As Justice O'Connor wrote in her concurring opinion in Gentile, while a State "may regulate speech by lawyers representing clients more readily than it may regulate the press," nevertheless, legitimate regulation of the profession "does not mean, of course, that lawyers forfeit their First Amendment rights. . . ." Although we readily acknowledge that the adoption of Model Rule 8.4(g)[2] is a matter within the province of the Supreme Court of South Carolina, we believe the Rule is constitutionally suspect for the reasons discussed above. As the Attorney General of Texas found, 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.

And, as our Supreme Court explained in Anonymous, supra, (quoting Gentile) "[a] court analyzing whether a disciplinary rule violates the First Amendment must balance 'the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue.'" In our view, the quantity of legitimate speech sacrificed at the expense of the Rule versus the State's interest in the enforcement of the Rule to ensure "confidence in the legal profession and the legal system," weighs heavily in favor of the First Amendment. As Justice Kennedy noted in Gentile, regardless of whether a disciplinary rule is subject to the standard of "serious and imminent threat" or "the more common formulation of substantial likelihood of material prejudice," the First Amendment requires an assessment of proximity and degree of harm." 501 U.S. at 1037 (Kennedy, J.). We discern little, if any harm to the legal profession by much of the speech which the Model Rule purports to regulate or prohibit. Thus, when the Model Rule's purpose of protecting the integrity of the legal profession is balanced against the lawyer's First Amendment interest in the kind of speech at issue, as Anonymous requires, it seems to us that the Rule severely infringes upon Free Speech. In the First Amendment context, "'a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional judged in relation to the statute's plainly legitimate sweep. '"

[2] See Art. V, § 4 and § 4A of the South Carolina Constitution (1895).

U.S. v. Stevens, 559 U.S. 460, 473 (2010), quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008).

In summary, we believe, if adopted, that the likelihood of a successful challenge to the Model Rule based upon the First Amendment and Due Process Clause is substantial and that a court could well conclude the Rule is unconstitutional.

Sincerely,

Robert D. Cook
Solicitor General

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
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Requested by:

The Honorable Mike Carter
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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.

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[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.

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[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).

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)

No. ADM2017-02244

ORDER

On November 15, 2017, the Tennessee Board of Professional Responsibility ("BPR") and the Tennessee Bar Association ("TBA") filed a petition asking the Court to amend Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by adopting a new RPC 8.4(g). This proposed rule of professional conduct provision pertains to the prohibition of discrimination and harassment by attorneys in relation to the practice of law. By Order filed November 21, 2017, the Court published the BPR and TBA's proposed amendment for public comment with a comment deadline of March 21, 2018.

The Court has received in excess of four hundred (400) pages of comments to the proposed amendment to Rule 8, RPC 8.4, from members of the bar, members of the public, and various organizations, including the Knoxville Bar Association and the Memphis Bar Association. The Court appreciates the interest of the bar and the public in this matter, as well as the comments received.

The Court has carefully considered the BPR and TBA's proposed amendment, the comments received, including the points and issues raised therein, and this entire matter. Upon due consideration, the BPR and TBA's petition to adopt a new Rule 8, RPC 8.4(g) is respectfully DENIED. It is so ORDERED.

PER CURIAM

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.

[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,

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