#2016-009

June 1, 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: Comments/ Proposed NH Rule of Professional Conduct 8.4(g)
(#2016-009)

Dear Ms. Koegler:

We the following undersigned members of the New Hampshire Catholic Lawyers Guild respectfully submit these comments concerning proposed New Hampshire Rule of Professional Conduct 8.4 (g) (#2016-009). We recommend that the Proposed Rules **not be adopted**. We believe that, were they to be adopted, these rules – which some legal commentators not inaptly have called a speech code for lawyers - would be contrary to the state and federal constitutions, and that, even apart from those constitutional considerations, the adoption of these proposed rules would not be a prudent exercise of the Supreme Court's regulatory power over the legal profession.

The Interests Of Catholic Lawyers

The New Hampshire Catholic Lawyers Guild is a group of New Hampshire attorneys who, consistent with the Catholic faith of its members, seek to advance high standards of religious, social, and ethical ideals and practices. As Pope Francis has said, Catholics have a "mandate of charity" that "encompasses all dimensions of existence, all individuals, all areas of community life, and all peoples. Nothing human can be alien to it." Apostolic Letter *Evangelii Gaudium* (2013), §183. Thus, our calling as lawyers and our calling as Catholics are knit together in the cause of the two foundational principles of Catholic social teaching and the secular body politic as well: the protection of human dignity, and the advancement of the common good. *Cf. Forming Consciences for Faithful Citizenship* (US Conference of Catholic Bishops, 2015), §§40 et seq.

Like our colleagues at the bar who have their own unique perspectives from across the political spectrum, we take seriously our duty to seek the truth and to engage in dialogue with our fellow citizens. It is a fundamental tenet of the teaching of the Catholic Church that "every person has the duty, and therefore the right, to seek the truth in matters religious in order that the person may with prudence form right and true judgments of conscience, under use of all suitable means." Second Vatican Council, *Declaration on Religious Freedom* (1965), §3. This inquiry is to be "free [and] carried on with…communication and dialogue, in the course of which people explain to one another the truth they have discovered, or think they have discovered, in order thus to assist one another in the quest for the truth." *Id.*

Catholic beliefs in this regard obviously are squarely consistent with the rights of conscience (Part 1, Art. 4) and religious freedom (Part 1, Art.5) that are recognized in the New Hampshire Constitution, and with the rights of free speech, free association, and free exercise of religion which are guaranteed by the First Amendment to the U.S. Constitution. The New Hampshire Rules of Professional Conduct themselves recognize the important role that conscience plays in the legal profession. *See* NHRPC Statement of Purpose ("professionalism encompasses …conscience").

The way that the practice of the Catholic faith actually plays out on the ground in the public square is well exemplified by the wide variety of bills that the Roman Catholic Bishop of Manchester (for one) has weighed in on over the course of the current legislative biennium. Among other things, the RCBM has opposed the death penalty; supported the reauthorization of expanded Medicaid; opposed bills that would impact non-citizens lawfully present in the United States; urged that the state budget adequately protect the poor; opposed a study of assisted suicide; advocated for the creation of education savings accounts; and joined with anti-human trafficking advocates to oppose a bill to legalize sex work. Of course, none of these issues were uniquely "Catholic" or even "religious" in nature, but Catholics participated in those debates - debates in which people of good will on both sides respectfully disagreed – in order to fulfill their obligations, as Catholics and as citizens, to serve human dignity and the common good.

It is because the proposed rules might be employed in a way that could hinder the full participation of lawyers in the public square or in the practice of law in general that we believe it inadvisable to adopt any of the proposed rules.

The Rule As Proposed In Appendix K

Appendix K lays out a Rule that is quite similar to the ABA Model Rule. Like the ABA Model, Appendix K does not define what is "harassment or discrimination", and thus the rule is particularly likely to chill speech and to present a risk of arbitrary and capricious enforcement. With their livelihoods on the line, lawyers will not know what conduct or speech decision-makers will consider to be actionable. [1]

Because of the fact that the proscribed conduct is undefined and that the arenas in which proscribed conduct might take place are so broad, Appendix K on its face also appears to expose a lawyer to a complaint by any person who might claim harassment or discrimination when all that the lawyer has done is to have spoken out in a legislative forum on a controversial subject covered by the rules. Indeed, because of the fact that "conduct relating to the practice of law" as defined in the comments could even include a discussion between two lawyers at a

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1 Although paragraph 3 of the Proposed Comments states that substantive state and federal laws are "intended to guide" the application of the subsection, this is certainly no guarantee that the "guide" must be heeded. And in any event it is difficult to envision how the state and federal laws (which typically apply in the employment or commercial contexts) would serve as any control over the application of this Rule when (as this draft would apparently allow) a complaint is brought against a lawyer by someone who has neither an employment nor a commercial relationship with the lawyer.

private dinner party, the chill on speech could extend to a discussion of public policy issues that takes place outside a public forum altogether.[2]

Moreover, to the degree that proposed Rule 8.4(g) seeks to proscribe attorney speech based on the content of the speech, we believe that the rule would be facially unconstitutional. Indeed, it was on similar grounds that just last year the U.S. Supreme Court struck down, on free speech grounds, a statute prohibiting trademarks that disparage on the basis of race or ethnicity. *Matal v. Tam*, 137 S. Ct. 1744 (2017) (holding statute that prohibited the registration of the trademark "The Slants" as disparagement of a racial or ethnic group to be unconstitutional). *See also Doyle v. Commissioner, NH Dept. of Resources & Economic Development*, 163 N.H. 215, 220 (2012) (only narrow categories of speech fall outside the ambit of the right to free speech).

The existence of laws to combat harassment and discrimination, such as RSA 354-A (prohibiting discrimination on the basis of age, sex, race, color, marital status, physical or mental disability, religious creed, national origin, or sexual orientation), RSA 644:4 (harassment), and related federal laws[3] provide a mechanism for addressing these important issues, and they also would seem to serve as one additional reason why the adoption of this attorney speech code would be unconstitutional. *See Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016) (statute restricting speech is unconstitutional where state failed to show that existing statutes could not be enforced to address the problem).

The Attorneys General of Texas, South Carolina, Louisiana, Tennessee, and Arizona have 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). We have attached these AG opinions for your reference. In addition, we would note that the Supreme Courts of South Carolina and Tennessee have rejected proposed versions of Rule 8.4. See *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct*, No. 2017-000498 (S.C.

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2 Note that the ABA Model Rule currently includes a statement that the rule "does not preclude legitimate advice or advocacy consistent with these rules." However, the proposal embodied in Appendix K entirely removes this language from the body of the rule, and instead states simply in a comment (Comment 6) that the 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" (emphasis added). This proposed new comment text is also a departure from the current New Hampshire Ethics Committee Comment to Rule 8.4, which says 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**" (emphasis added). The current New Hampshire comment would be replaced by a new comment (designated as Comment 1 in Appendix K, L and M) which states that the lawyer's right of free speech and assembly should not be infringed **"when the lawyer is representing a client"** (emphasis added). Unless this narrow limitation is simply a typographical error (this particular change in the text was not identified in the Committee's draft as a change from the current text), this language would appear to be directed at limiting the ability of lawyers to advocate in the public square with respect to certain positions on issues that are enumerated in the draft rule.

3 *See, e.g.*, Title VII, 42 U.S.C. § 2000e *et seq.* (prohibiting discrimination on the basis of race, color, religion, sex, or national origin); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*; Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

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).

The following examples may be helpful as you consider how the proposed new rule might apply in concrete situations:

- A lawyer at a Catholic Red Mass or Catholic Lawyers Guild event speaks about Catholic teaching with respect to marriage as between one man and one woman.

- An attorney represents a person who is claimed to have committed harassment or discrimination.

- An attorney speaks out in a public forum to question whether the state should make Medicaid funds available to pay for gender reassignment surgery.

- An attorney who represents Planned Parenthood, while on an office outing to Fenway Park, meets another NH attorney and, knowing that attorney to be a Catholic, speaks critically of the position of the Catholic Church on abortion.

- Lawyers join an association of fellow lawyers in which membership is targeted to lawyers of a particular religious faith.

The Rule As Proposed In Appendix L and Appendix M:

The rulemaking proposal, of course, also presents two possible alternatives to Appendix K. Appendix L forbids harassment or discrimination only against a *client*. Appendix M is the one iteration among the three that connects the definition of harassment or discrimination to substantive state and federal laws. Still, both of these alternative proposals share many of the same potential problems that Appendix K entails.

Like Appendix K, the body of the rule in Appendix L does not define what is meant by "harassment or discrimination". Moreover, all three proposed rules include Comment 4, which cross-references ABA Comment 4 regarding the intended scope of the phrase "related to the practice of law." ABA Comment 4 provides that this 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." Therefore, all three proposals broadly apply to undefined "business or social activities in connection with the practice of law" and make the same content-based distinction between discrimination that is barred by the rule and discrimination that is blessed by the rule.

Finally, it needs to be kept in mind that legislative–type processes (such as this) are inherently incremental in nature. Even if Appendix L or Appendix M are seen as being less objectionable than Appendix K in certain respects, it still would be unwise to adopt those alternate rules because such a move could well open the door to a future attempt to adopt Appendix K, with all of its many attendant problems. Thus, if the Committee were to decide that Appendix K is unacceptable, caution would counsel that all three proposals be rejected.

Considerations of Prudence

Aside from the many constitutional issues presented, we also believe that prudence alone makes it inadvisable to adopt these rules.

It is impossible to ignore the polarized nature of public discourse in our country in the present day. At a time when it is not infrequent that one side or another in a public controversy seeks to solve the problem by silencing its opponents, it is especially critical that we in the bar foster a robust marketplace of ideas, and that lawyers - who by their calling will frequently be in the forefront of these discussions - be allowed to advance the arguments they are making to their fellow citizens without having to fear that the Professional Conduct Rules might be used to force them to keep their beliefs (and especially their religious beliefs) out of the public square altogether.

It is also important to remember that some of the topic areas raised in the rules are even now the subject of ongoing legislative debate. Just this year, for instance, the New Hampshire legislature considered four bills concerning gender identity issues. If these proposed rules had been in place already, they might have foreclosed lawyers from freely participating in the debates on different aspects of those bills. Thus, these rules could shut some lawyers out of legislative discussions in areas where the legislature itself has not decided what lines to draw.

All lawyers, regardless of their backgrounds, should be able to participate in public policy debates to advance their views of what is in the best interests of the body politic. As the Supreme Court said in one relevant context, "many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." *Obergefell vs Hodges*, 135 S. Ct. 2584, 2602 (2015). Respectful and robust discussions are exactly what our democratic process calls for, and these discussions should not be diminished by means of the adoption of draft rules that could chill the speech of one side in those debates.

Justice Jackson's opinion in *West Virginia State Board of Education v. Barnette*, 309 U.S.624 (1943) contains an oft-cited and pertinent statement on freedom of conscience: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *Id.* at 642. The text that precedes that more famous quote, though, may be even more on point here:

> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

Thus, we respectfully urge the Committee to use its considered judgment and not recommend the proposed rules.

Thank you.

Very truly yours,

/s/ Andrew Cernota
Andrew Cernota, Nashua (Bar # 15575)

/s/ Courtney Eschbach
Courtney Eschbach, Concord

/s/ Jason Cole
Jason Cole, Manchester (Bar # 17366)

/s/ Ovide Lamontagne
Ovide Lamontagne, Manchester (Bar # 1419)

/s/ Meredith Cook
Meredith Cook, Manchester (Bar # 12838)

/s/ Diane Quinlan
Diane Quinlan, Manchester (Bar # 8213)

/s/ Robert Dastin
Robert Dastin, Manchester

/s/ Brian Quirk
Brian Quirk, Concord, (Bar #12526)

/s/ Paul Dowd
Paul Dowd, Manchester, (Bar # 11825)

/s/ Michael Tierney
Michael Tierney, Manchester (Bar # 17173)

/s/ Robert E. Dunn, Jr.
Robert E. Dunn, Jr., Concord (Bar # 2829)

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. . . .
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> [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Id. r. 8.4(g) cmts. 3–4.

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

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

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

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

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

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

> representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY

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

Very truly yours,

Ken Paxton

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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.

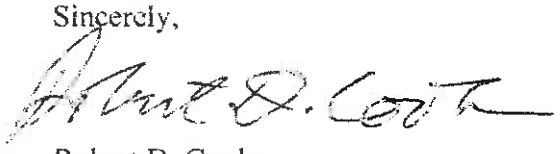
And, as our Supreme Court explained in Anonymous, supra, (quoting Gentile) "[a] court analyzing whether a disciplinary rule violates the First Amendment must balance 'the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that 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,



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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-d5ee-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 113; *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 (1953)).

> 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

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 16, 2018

Opinion No. 18-11

American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)

Question 1

If Tennessee were to adopt the American Bar Association's new Model Rule 8.4(g), or the version of it currently being considered in Tennessee, could Tennessee's adoption of that new Rule constitute a violation of a Tennessee attorney's statutory or constitutional rights under any applicable statute or constitutional provision?

Opinion 1

Yes. Proposed Rule of Professional Conduct 8.4(g) would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct.

ANALYSIS

For the analysis that forms the basis of this opinion, please see the Comment Letter of the Tennessee Attorney General filed with the Tennessee Supreme Court on March 16, 2018, in response to the Court's order of November 21, 2017, soliciting written comments on whether to adopt the amendments to Tennessee Supreme Court Rule 8, Rule of Professional Conduct 8.4, that are being proposed by Joint Petition of the Tennessee Board of Professional Responsibility and the Tennessee Bar Association. A copy of the Comment Letter is attached hereto and incorporated herein.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
Special Assistant to the Solicitor General and the Attorney General

Requested by:

The Honorable Mike Carter
State Representative
632 Cordell Hull Building
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STATE OF TENNESSEE

Office of the Attorney General

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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. 2017-000493 (S.C. June 20, 2017), https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01; Order, *In re Amendments to Rule of Professional Conduct 8.4*, No. ADKT526 (Nev. Sep. 25, 2017).

I. Problematic Features of Proposed Rule 8.4(g)

In their current form, the Rules of Professional Conduct do not expressly prohibit discrimination or harassment by attorneys. Rather, Rule 8.4(d) provides that it is "professional misconduct" to "engage in conduct that is prejudicial to the administration of justice." Tenn. Sup. Ct. R. 8, RPC 8.4(d). And comment 3 provides that "[a] lawyer, who in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice." *Id.* at RPC 8.4(d), cmt. 3. Comment 3 also makes clear that "[l]egitimate advocacy representing the foregoing factors does not violate paragraph (d)." *Id.*

Proposed Rule 8.4(g) would establish a new black-letter rule that subjects Tennessee attorneys to professional discipline for "engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law." Comment 3 to the proposed rule would define "harassment" and "discrimination" to include not only "physical conduct," but also "verbal . . . conduct"—better known as speech.

Several problematic features of the proposed rule warrant highlighting. First, the proposed rule would apply not only to speech and conduct that occurs in the course of representing a client or appearing before a judicial tribunal, but also to speech and conduct that is merely "*related to the practice of law*." (emphasis added). Comment 4 to the proposed rule explains that "[c]onduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law." Far from cabining the scope of the proposed rule, comment 4 leaves no doubt that the proposed rule would apply to virtually any speech or conduct that is even tangentially related to an individual's status as a lawyer, including, for example, a presentation at a CLE event, participation in a debate at an event sponsored by a law-related organization, the publication of a law review article, and even a casual remark at dinner with law firm colleagues.[5] Such speech or conduct would be "professional misconduct" even if it in no way prejudices the administration of justice.

[5] Indeed, the report that recommended adoption of Model Rule 8.4(g) to the ABA House of Delegates explained that the rule would regulate any "conduct lawyers are permitted or required to engage in because of their work as a lawyer," including "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law." Report to the House of Delegates 9, 11 (May 31, 2016), https://www.americanbar.org/content/dam/aba/administrative/ professional_ responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_ posting.authcheckdam.pdf.

Second, the proposed rule would prohibit a broad range of "harassment or discrimination," including a significant amount of speech and conduct that is not currently prohibited under federal or Tennessee antidiscrimination statutes. To the extent that federal antidiscrimination laws apply to attorneys engaged in speech or conduct related to the practice of law, they generally apply only in the employment and education contexts and prohibit discrimination only on the basis of race, color, national origin, religion, sex, age, or disability. *See* 20 U.S.C. § 1681 (Title IX); 29 U.S.C. § 623 (ADEA); 29 U.S.C. § 794 (Rehabilitation Act); 42 U.S.C. § 2000d (Title VI); 42 U.S.C. § 2000e-2 (Title VII); 42 U.S.C. § 12112 (ADA). The Tennessee Human Rights Act similarly applies only in certain limited areas, including employment, and prohibits discrimination only on the basis of "race, creed, color, religion, sex, age or national origin." Tenn. Code Ann. § 4-21-401. Under both federal and state antidiscrimination laws, moreover, the only discrimination or harassment that is actionable in the employment context is that which results in a materially adverse employment action or is sufficiently severe and pervasive to create a hostile work environment. *See, e.g., White & Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 & n.1 (6th Cir. 2004) (en banc) (explaining that "not just any discriminatory act by an employer constitutes discrimination under Title VII"); *Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 602, 610 (Tenn. Ct. App. 2007). And the only harassment that is actionable in the education context is that which is sufficiently severe and pervasive to effectively bar a student from receiving educational benefits. *See, e.g., Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018). Federal and state antidiscrimination laws also explicitly protect religious freedom by exempting religious organizations from their ambit. *See, e.g.*, 42 U.S.C. § 2000e-1(a); Tenn. Code Ann. § 4-21-405.

Proposed Rule 8.4(g) would reach well beyond federal and state antidiscrimination laws. For one thing, the proposed rule would prohibit any and all "harassment or discrimination"—even that which does not result in any tangible adverse consequence and is not sufficiently severe or pervasive to create a hostile environment. The proposed amendments to comment 3, which attempt to clarify what constitutes "harassment or discrimination," do nothing to alleviate this concern. The proposed comment simply states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others," and "[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct." In other words, any speech or conduct that could be considered "harmful" or "derogatory or demeaning" would constitute professional misconduct within the meaning of the proposed rule. And while proposed comment 3 states that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g)" (emphasis added), there is no requirement that the scope of Proposed Rule 8.4(g) be limited in that manner.

Even more troubling, Proposed Rule 8.4(g) would prohibit "harassment or discrimination" on the basis of characteristics that are not expressly covered by federal and state antidiscrimination laws—namely, "sexual orientation, gender identity, marital status, [and] socioeconomic status." It is no secret that individuals continue to hold diverse views on issues related to sexual orientation and gender identity, and those who hold traditional views on sexuality and gender frequently do so because of sincerely held religious beliefs. As the U.S. Supreme Court recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), for example, many who consider "same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises." By deeming as "professional misconduct" any speech that someone may view as "harmful" or "derogatory or demeaning" toward homosexuals or transgender individuals,

Proposed Rule 8.4(g) would prevent attorneys who hold traditional views on these issues from "engag[ing] those who disagree with their view in an open and searching debate," *Obergefell*, 135 S. Ct. at 2607.

Unlike Title VII and the Tennessee Human Rights Act, Proposed Rule 8.4(g) includes no exception to protect religious freedom. Comment 4a to the proposed rule gives a nod to the First Amendment by stating that paragraph (g) "does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment." As explained below, however, nearly all speech and conduct that is "related to the practice of law" is also protected by the First Amendment, so that explanatory comment in fact does nothing to protect attorneys' First Amendment rights.

Third, Proposed Rule 8.4(g) would prohibit not only speech and conduct "that the lawyer knows . . . is harassment or discrimination," but also that which the lawyer "reasonably should know is harassment or discrimination." In other words, the proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way.

II. Proposed Rule 8.4(g) Would Violate the U.S. and Tennessee Constitutions and Conflict with the Rules of Professional Conduct.

As a result of these and other problematic features, Proposed Rule 8.4(g) would violate the U.S. and Tennessee Constitutions and conflict with the spirit and letter of the existing Rules of Professional Conduct.

A. Proposed Rule 8.4(g) Would Infringe on Tennessee Attorneys' Rights to Free Speech, Freedom of Association, Free Exercise of Religion, and Due Process.

Proposed Rule 8.4(g) would clearly violate the First Amendment rights of Tennessee attorneys, including their rights to free speech, freedom of expressive association, and the free exercise of religion, and equivalent protections under the Tennessee Constitution.[6]

The First Amendment prohibits the government from regulating protected speech or expressive conduct based on its content unless the regulation is the least restrictive means of achieving a compelling government interest. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011). That most exacting level of scrutiny would apply to Proposed Rule 8.4(g) because it regulates speech and expressive conduct that is entitled to full First Amendment protection based on viewpoint.

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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 3.4(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 3.4(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).

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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
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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.

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[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.