LAW OFFICES OF
Hartelius, Durocher & Winter, P.C.

ATTORNEYS AND COUNSELORS AT LAW
(406) 727-4020

Channing J. Hartelius
Roland B. Durocher
Jeffrey G. Winter

P.O. Box 1629
118 6th Street South
Great Falls, Montana 59403
Fax (406) 771-7319

Fed ID# 81-0421173
www.mtlawyers.net

ORIGINAL

November 2, 2016

Ed Smith
Clerk of the Supreme Court
P.O. Box 203003
Helena, Montana 59620-3003

Re: Professional Conduct Rule 8.4(g)

Dear Mr. Smith:

I am writing to voice my thoughts on the proposed addition to Rule 8.4 (*see* AF 09-068). The proposed addition to Rule 8.4 may be based on good intentions, but from my professional experience in decades of practicing law, it would be wholly unnecessary. Neither do I believe that there is any substantial harassment or discrimination in the practice of law, nor do I see policing of such specific matters to be a matter of professional conduct. Improper harassment need not be tied to certain classes of people. More importantly, I see the rule as being fraught with pitfalls that would prevent lawyers from abiding by their obligations to seek the truth and represent clients zealously.

For example, in a criminal case, a complaining witness may feel harassed if questioned about myriad issues, including deeply held religious beliefs, sexual orientation, or ethnicity, but those issues may reveal a motive to dislike or distrust the person charged. Taking the right from the defendant's lawyer to seek out bias would stifle the defense. In another context, a prosecutor might be guilty of misconduct by seeking to establish motive when delving into the socioeconomic status of a person charged with embezzlement, fraud or theft. In civil practice, a plaintiff in an injury lawsuit might feel harassed if the attorney deposing her were to inquire about sex, but that may be part of her change of course of life. Or perhaps

she would feel harassed when asked about disability, but that may be an important issue to clarify when determining what damages were caused by another person's negligence. No lawyer can effectively evaluate such issues without getting into personal matters that may make someone feel harassed.

In regard to discrimination, attorneys are hired to use discriminating analysis. Not in the sense of mistreating others, but rather in the sense of critical thinking. Both can legitimately be considered discrimination. With that in mind, the process of jury selection might well be nullified if we cannot take into account that a young male might be less empathetic than an older female, or that white supremacist might not be a good juror for a gay plaintiff, or a devout Jewish juror whose parents survived Auschwitz might be inappropriate for a neo-Nazi criminal defendant. If we cannot choose jurors based on the interests of our clients, voir dire is meaningless. We will be left to post trial relief whenever an improperly biased juror affects the outcome of a case.

While these problems would not be the goal of the rule, the complete lack of direction or definition as to what constitutes harassment or discrimination, or the perspective from which these terms are viewed, makes the rule impossible to harmonize with the work lawyers do. With these thoughts in mind, I recommend against rule change. The proposed rule will likely have negligible effect in protecting those who need protection, but could easily have a chilling effect on some of the most important investigation, evaluation and consideration lawyers do on a day to day basis.

Respectfully,

Roland B. Durocher
Hartelius, Durocher & Winter, P.C.

enclosures (7 copies of this letter for Justices)