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CLERK OF THE MONTANA SUPREME COURT
215 N. SANDERS, RM 323
P.O. BOX 203003
HELENA, MT 59620-3003

RE: Comment on Proposed Change to MRPC adding Rule 8.4(g)

Clerk and Honorable Members of the Montana Supreme Court:

I urge this Court to reject the proposed modification to the Montana Rules of Professional Conduct which would add paragraph 8.4(g) to current rules. When I first started practicing law in another state more than 32 years ago, I was a member of the ABA. At that time the ABA was undergoing a transition from being an organization which promoted the administration of justice to one which became focused on the promotion of liberal principles. I found many of the political positions advocated by the ABA to be inconsistent with my personal religious and political beliefs. I soon chose to leave the ABA. Many other attorneys who held conservative beliefs did so as well, leaving behind an organization dominated by advocates of liberal political viewpoints. This latest revision to the ABA Model Rules of Professional Responsibility is yet another effort by a small group of liberal elitists to impose acceptance of a "cultural shift" on members of the legal profession.

Prior to adoption of Rule 8.4(g), the ABA sought comment from its membership regarding the proposed change. Many principled voices were raised in opposition to the proposal. I agree with those opposing voices which I submit are more in accord with the majority of Montana residents than are the proponents of this proposal. For the sake of brevity, I will limit my comments to only a few of the many excellent points which were raised by those in opposition to the ABA proposal.

(1) Has the State Bar of Montana engaged in any statistically valid studies in this state which would indicate that harassment or discrimination are so prevalent among Montana attorneys that ethical regulation of the bar membership as a whole is necessary?

(2) The proposed language represents an overreach into attorney behavior or beliefs by regulating conduct which does not adversely affect an attorney's fitness to practice law or which seriously interferes with the proper and efficient administration of justice. To illustrate the absurdity of the proposal, a lawyer could arguably be subject to discipline for gratuitously asking someone if they are "gay." (*In the Matter of Stacy L. Kelley*, 925 N.E. 2d 1279 (Indiana 2010). Yet, would the attorney be subject to discipline if he or she used medical marijuana in this state which would violate federal drug laws?

(3) If adopted, the rule will have a chilling effect on the exercise of free speech by attorneys of faith who have viewpoints at odds with the ongoing "cultural shift" in our country. Will this rule open the door to ethical inquiries or disciplinary investigations of attorneys of faith whose personal moral and religious convictions will not allow them to accept views they find repugnant? Would an attorney representing Carroll College on school policies be subject to discipline if he or she provides advice which would be consistent with religious doctrine yet may arguably discriminate against a select group? Would an attorney who is asked to appear on a panel discussion, for example legal issues relating to "diversity," be subject to discipline if he or she expressed an opposite viewpoint outside a court advocacy context? Might an attorney who speaks in favor of traditional marriage be "targeted" for an ethics complaint by an individual or group which holds other views?

(4) There are too many vague and undefined terms included in the proposed language. Will the terms "harass" or "discriminate" be sufficiently defined to provide some measure of certainty regarding what behavior may subject the attorney to disciplinary action? What constitutes "legitimate advice" on a legal matter? What activities would the phrase "conduct related to the practice of law" encompass?

(5) Rule 1.16 provides guidelines which allow an attorney to decline or withdraw from representation of prospective or current clients in certain instances. Will an attorney be allowed to decline representation of a prospective client who engages in behavior that the attorney finds morally repugnant? If not, how can we be expected to "zealously" represent that individual?

There were many, many more questions and points raised by the opponents to this ABA proposal who stated their positions and objections far more articulately than I am able. I would like to highlight one point in particular. In its letter of opposition to proposed Rule 8.4(g) which the Christian Legal Society submitted to the ABA during the period allowed for comment, its director, David Nammo, quoted Justice Jackson from his opinion in the 1943 U.S. Supreme Court case of *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642, "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."

When the ABA shifted to the left many years ago, I chose to dissociate myself from that organization. If adopted, I would be prohibited from dissociating myself from this rule which would mandate the acceptance of conduct that I find immoral and reprehensible. It is unnecessarily divisive and counterproductive to follow the ABA's lead down this path of regulation.

Sincerely,

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