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

RE: Amendment of Rule 8.4, M.R.P.C.

Dear Mr. Smith:

This letter is in response to the Court's request for comments on its consideration of amendment of Rule 8. 4 of the Montana Rules of Professional Conduct, by adoption of paragraph (g). I believe the proposed rule change to be unnecessary and ill-advised.

Please understand that I have not been a member of the Montana Bar for long, but I've practiced in Wyoming for over 35 years and, so far, I have been unable to perceive any real difference between Montana lawyers' professionalism and that of Wyoming attorneys.

Indeed, "professional" is perhaps the best word to describe my impressions of, and experience with, hundreds of Wyoming and Montana attorneys over the years. With that in mind, the first question I have regarding this proposed new rule is what ills it is intended to address. In all of my dealings, I have never encountered any evidence that harassment or invidious discrimination actually exists to any significant degree in the legal profession in Montana or Wyoming– or that, if it does exist, it is such a serious and widespread problem that the Professional Conduct Rules must be amended. (By the way, I think I would recognize evidence of harassment and discrimination if I encountered it–I have handled Title VII cases both as plaintiff's and defendant's counsel.)

I am not saying lawyers are as pure as driven snow. Lawyers are mere humans and are capable of perpetrating abuse (though possibly not, as a group, as prone to wrongdoing as other groups due to the "weeding out" process and rather thorough "vetting" a lawyer must go through in order to gain admittance to practice). There are, no doubt, lawyers who engage in prohibited harassment or discrimination. Regarding them, however, there are already procedures and remedies in place which are fully adequate. Lawyers are already subject to liability under federal, state, and local anti-discrimination laws. Not all of society's ills that touch the legal profession are appropriate subjects of rules geared toward professional discipline.

Besides being unnecessary, the proposal is incredibly overbroad. It would add a new, vague, and ever-expanding list of prohibitions to Rule 8.4. Its implementation would unquestionably result in what I must assume are unintended consequences. A few examples should suffice.

The proposed Rule 8.4(g) would bar, among other things, "knowingly discriminat[ing]

against persons on the basis of . . . socioeconomic status," in "conduct related to the practice of law." "Conduct related to the practice of law" would encompass pretty much everything a lawyer does, including the operation and management of a law firm. "Socioeconomic status" isn't defined in the proposed rule, but it could conceivably encompass, again, pretty much everything. One definition I've seen for the term is "an individual's status in society as determined by objective criteria such as education, income, and employment." *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991). Yet surely a law firm should be free to prefer higher educated employees – both as lawyers and as staffers – over less-educated ones. It should be free to prefer associates who went to law school at the University of Montana if it so chooses. It should be free to contract with expert witnesses and consultants who are especially well-educated or have had especially prestigious employment. Likewise, when choosing a prospective partner, a lawyer should be able to prefer someone who is wealthier. Wealth might be a plausible (though imperfect) indicator of past professional success, and a predictor of whether the partner would have the resources to weather economic hard times (and to help the firm do the same). Firms might reasonably spend more effort courting wealthy prospective clients and less effort pursuing middle-class ones. A firm should likewise be free to prefer lower socioeconomic status employees, if it wants to give someone who is poor or unemployed a hand-up, even though that would, under the rule, constitute discrimination against the middle-classed and employed. Likewise, a firm should be free to give better deals to clients who cannot afford the top rates. Yet the proposed rule would apparently forbid that.

It is unclear to me how this proposed amendment would affect an attorney's, or a firm's ability to limit or focus its practice. The proposed rule's only effort to answer that question is to state that the new rule would not affect a lawyer's ability to "accept, decline, or withdraw from . . . representation" in accordance with Rule 1.16–which, of course, deals with mandatory declination or withdrawal, and permissible withdrawal from representation.

In defining "discrimination" to include preferences, actions, inactions, and decisions based upon, *inter alia*, "sexual orientation," "gender identity," and "marital status," this proposal is just one more attempt to forcibly elevate sexual behavior, appetites, and self-styled identity to the level of unchanging characteristics such as race, sex, ethnicity, and national origin. But it has long been recognized that the equality principle that applies to race does not apply to other types of classifications, even including sex. If there can be men's and women's basketball, volleyball, and track teams, why can there not be law firms which limit their practice to representing only wives or only husbands in family law matters? Why should a lawyer in such a firm be subject to discipline because his firm makes a distinction between prospective clients on the basis of their "marital status"?

What about a person's "sexual orientation"? Or their "gender identity"? Neither of these latter two terms is objectively determinable or even objectively observable. Rather, they are completely subjective, dependent solely on a person's self-perception. Surely lawyers — of all people — ought to know better than to concoct such a vague and standardless rule.

Religion, likewise, is wholly unlike race. Statutes accommodating religious conscience abound at both the state and federal level. Law schools with an overtly religious mission, including preferences in hiring staff, employing faculty, and admission of students, enjoy ABA accreditation. Nationwide, lawyers and law firms hold themselves out to the public as Christians, letting the community know that they are dedicated to practicing law in accordance with ethical rules of their personal faith. Why should such law firms be barred from hiring lawyers who share the same religious convictions? Indeed, the Holy Scriptures counsel believers not to become

"unequally yoked" with nonbelievers. 2 Corinthians 6:14. Are Christian lawyers to be barred by ethics rules from obeying God's word? Why should lawyers not be free to hire and fire staff on the basis of fidelity to their shared moral code? In truth, doesn't everyone make distinctions based upon their personal moral code? Why should a lawyer be penalized if he candidly advises potential clients what that code is? Would not prospective clients be better served by such candor and transparency?

The proposed rule, of course, was drafted by some ABA committee with its own hidden agenda. The ABA long ago abandoned its role as a professional organization and has become just another special interest group. Many principled attorneys will have nothing to do with the organization. The ABA has no interest in promoting professional ethics based on sound moral choices. It has shifted its agenda to imposing a progressive political orthodoxy upon the legal profession, through the politicization of legal ethics. The expressed purpose of Rule 8.4 is to address "Misconduct," toward the end of "Maintaining the Integrity of the Profession," but this new proposal is all about social engineering. It has nothing to do with ethics.

Montana has no need for this rule.

Sincerely,

Thomas C. Bancroft

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