JAMES RIGBY*
James@RigbyLawFirm.com
(206) 755-7600

THE RIGBY LAW FIRM
600 Stewart Street, Suite 1908
Seattle, WA 98101

1302 - 24th Street West, #342
Billings, MT 59102

*Licensed in the States of Montana and Washington

December 7, 2016

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

Re: Professional Rules of Conduct- Proposed Amendment 8.4(g)

Honorable Members of the Court:

As a recent immigrant to this fine state and a member of the State Bar of Montana since only July 2016, I was surprised by the proposed amendment. I asked myself: "What is the purpose of this rule and why is it needed? Do Montana attorneys regularly demean witnesses and other participants in legal proceedings?" I answered my own question: "Within my limited experience, Montana lawyers conduct themselves in a professional and respectful manner, pursuant to this Supreme Court's Montana Values." Although my experience is limited, I am unaware of an outbreak of disrespectful or unprofessional conduct by Montana attorneys.

The Montana Rules of Professional Conduct presently proscribe unprofessional and disrespectful conduct. RPC 3.3 proscribes false statements. RPC 3.4 proscribes alluding in court to irrelevant and inadmissible evidence. RPC 3.5 proscribes conduct intended to disrupt a tribunal. RPC 4.4 proscribes the use of means that have no substantial purpose other than to embarrass. And last but not least, RPC 8.4(d) proscribes conduct that is prejudicial to the administration of justice.

So, if Montana attorneys generally conduct themselves in a professional and respectful manner and if unprofessional and disrespectful behavior is already covered by the Montana RPC, I return to my question: "What is the purpose for adopting Proposed Rule 8.4(g)?"

In a surprisingly candid statement, the ABA Standing Committee on Ethics and Professional Responsibility provides us with the answer to my question:

> "[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."1

Thus the ABA proposes a change to the RPC not to protect clients, not to protect the courts and the system of justice, not to protect the role of lawyers as officers of the court, but rather to propose a grandiose "cultural shift." The ABA has self evidently confused the role of the courts with the role of the legislature.

The ABA Standing Committee on Ethics and Professional Responsibility sights nary a single incident to demonstrate a need for the Proposed Rule. It does, however, signal its motive:

> "By choosing to move the prohibition against discrimination and harassment into a black letter rule, the ABA will join many other professions that prohibit this same behavior in their codes of conduct."2

The ABA, then, desires to "signal" its social progressiveness and oneness with certain other professional organizations. Interestingly, a Google search of "american professional organization" results in 303,000,000 hits. Undoubtedly, some organizations were "hit" more than once. In any event, the ABA lists only 11 associations in its appendix.3 That is not impressive.

While the ABA was unable to articulate a single reason why any court, which by definition does not have the power to legislate, could legitimately engage in "forcing a cultural shift" or "signal its social progressiveness," hundreds of opposing comments were submitted detailing the adverse consequences of the Proposed Rule.

One of which was The Heritage Foundation's comment to the Proposed Rule, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought* attached hereto as Exhibit A. It explains:

> "We live in an era when America's elites are anxious to control what we say, because language both reflects **and molds how we think."**

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1 ABA Standing Comm. on Ethics and Professional Responsibility, Memorandum: Draft Proposal to Amend Model Rule 8.4, 2 (Dec. 22, 2015) (emphasis added), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf.

2 Id.

3 The ABA list does not include associations for florists or wedding photographers.

Emphasis added. An easy read, the comment demonstrates that the Proposed Rule does not prohibit discrimination, but rather promotes discrimination of its favored kind.

The comment submitted by the Christian Legal Society to the ABA Ethics Committee is attached hereto as Exhibit B and details the First Amendment and other implications of the Proposed Rule. It explains how the Proposed Rule relates to every aspect of an attorney's life. The plain meaning of the Proposed Rule will be violated if an attorney provides legal advice to a religious organization concerning it's right to deny employment or membership to cohabitating couples. The plain meaning of the Proposed Rule will be violated if an attorney appears before the State Legislature and testifies in support of bills which segregate bathrooms by sex.

Articulating the manifold implications of the Proposed Rule are beyond the skills of this writer and the scope of this brief comment. They are much more eloquently and thoroughly treated in the two attached Exhibits. Please read those comments for a thorough understanding of the full implications of the Proposed Rule.

The question remains: Why should this Court risk diminishing its prestige and legitimacy by taking sides in the Culture War? What does this Court stand to gain?

History may record that the 2016 Presidential election was as much a blowback against corrupt American institutions and new trends—the press and homosexual marriage for instance—as it was about the economy. Progressive's salient shock and anxiety resulting from HRC's loss will fuel much Culture War litigation. Such litigation will come before this Court. For instance, may a religious organization segregate its bathrooms by sex under the Constitution of Montana?

Can this Court afford to diminish its prestige and legitimacy—in the eyes of many Montanans—by joining sides in the Culture War? This Court's Constitutional role is to function as the impartial decider of disputes. History has apparently not yet decided, given the recent election, which side of the Culture War will prevail. In the deep dark unimaginable future, if this Court ultimately loses its prestige and legitimacy, what purpose will it serve? Let the Governor and Legislature take sides in the Culture War. This Court should remain the Constitutionally legitimate and impartial referee.

Respectfully Submitted,

James Rigby
SBOM #39732622

EXHIBIT A

The Heritage Foundation

LEGAL MEMORANDUM

No. 191 | OCTOBER 6, 2016

The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought

Ronald D. Rotunda

Abstract

At its August 2016 annual convention, the American Bar Association approved a significant change in its Rule 8.4(g) that will affect all lawyers. Shortly before that, in June, the ABA Board of Governors had approved a major change regulating ABA-sponsored Continuing Legal Education (CLE) programs. The ABA has announced that lawyers may not engage in "verbal conduct" that "manifests bias" concerning a litany of protected categories, and in June, the Board of Governors announced that it would not sponsor any CLE program unless the panel has the proper proportion of women, gays, transgender individuals, and so forth. The ABA sponsors a number of CLE programs, and most states require lawyers to participate for a certain number of hours each year as a condition of keeping their licenses to practice law. These changes show that the ABA is very much concerned with what lawyers say and who teaches them. The only thing that does not concern the ABA is diversity of thought.

We live in an era when America's elites are anxious to control what we say, because language both reflects and molds how we think.[1] Hence, they are falling all over themselves to become politically correct.

In higher education, universities are banning "trigger warnings" that might offend someone. College administrators at Ivy League schools like Cornell and Yale agreed to rip up copies of the U.S. Constitution,[2] which were distributed off campus, after a person posing as a student described the document as "triggering" and "oppressive."[3]

Key Points

- The American Bar Association's changes in rules to increase "diversity" are concerned with anything but intellectual diversity.
- Under Rule 8.4(g), it is "professional misconduct" to engage in discrimination (including "verbal conduct") based on "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."
- The ABA's rules prohibiting political *speech* related to gender identification contrasts dramatically with its narrow rule regarding *conduct* involving racial discrimination and peremptory challenges.
- Rule 8.4(g) specifically approves of reverse discrimination: It is not about forbidding discrimination based on sex or marital status; it is about punishing those who say or do things that do not support the ABA's particular views.
- The new rule to implement "Goal III: Eliminate Bias and Enhance Diversity" in Continuing Legal Education programs fails to promote equal opportunity.

This paper, in its entirety, can be found at **http://report.heritage.org/lm191**

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Go to YouTube and you can see and hear Carol Lasser,[4] Professor of History and Director of Gender, Sexuality, and Feminist Studies at Oberlin College, tell us that "[t]he Constitution is an oppressive document." The Chair of Comparative Studies at Oberlin, Professor Wendy Kozol, agrees: "The Constitution in everyday life causes people pain."[5] It also protects Kozol's right to attack the Constitution—something she forgot to mention.

Students at Harvard's School of Public Health "demand" that the university "address race and inequity through education by instituting mandatory training on race and privilege for all students, postdocs, staff, and faculty, developing case studies that challenge social injustice, and increasing practicum opportunities on themes of racism and health." They further "demand" that "[t]his process should begin by the spring semester and incorporate student input."[6]

The State University of New York (SUNY) at Binghamton is now offering a course called "#StopWhitePeople2K16."[7] In August, a university administrator defended this course, designed to "cultivate an environment where our students listen to one another, learn from one another and do so in a manner that doesn't cause unnecessary harm."[8] Shortly after that, it became national news when the University of Chicago announced to its students that "we do not support so-called 'trigger warnings'" and "do not condone the creation of 'safe spaces' where individuals can retreat from ideas and perspectives at odds with [their] own."[9]

What a strange world it is when a university's announcement that it supports free speech is major news. And what a strange world it is when the American Bar Association (ABA) decides to discipline lawyers who say something that is politically incorrect. But with political correctness all the rage, it should not be a surprise that the ABA has joined the party, even if belatedly.

At its August 2016 annual convention, held in San Francisco, the ABA approved a significant change in its Rule 8.4(g) that will affect all lawyers. Shortly before that, in June, the ABA Board of Governors had approved a major change regulating Continuing Legal Education (CLE) programs that the ABA sponsors.

The ABA has announced that lawyers may not engage in "verbal conduct" that "manifests bias" concerning a litany of protected categories. (It is still all right to make short jokes or bald jokes, but be careful about anything related to, for example, gender identity, marital status, or socioeconomic status.)

The ABA also decided that men could use the ladies' room at a law firm (no bias based on gender identity) and that it would not sponsor any CLE programs unless the panel has the proper proportion of women, gays, transgender individuals, and so forth. The ABA sponsors many CLE programs, and most states require lawyers to participate in a certain number of hours each year as a condition of keeping their licenses to practice law.

These changes show that the ABA is very much concerned with what lawyers say and who teaches them. The only thing that does not concern the ABA is diversity of thought. The language that the ABA uses to promote its latest foray into political correctness makes this all too clear. Moreover, what the ABA does affects all of us, even if we are not lawyers, because of its governmental power.

The ABA's Governmental Power

The ABA is a private trade association with about 400,000 lawyers as members. However, it is much more than a trade association because it also has some governmental power, which it uses to impose political correctness. That is exactly what the ABA did at its 2016 annual convention.

States give the ABA power to accredit law schools: You cannot take the bar examination in many states unless you graduate from an ABA-accredited law school.[10] The accreditation rules require that an accredited law school must teach the ABA Model Rules of Professional Conduct and that its students must pass a special Multistate Professional Responsibility Exam (MPRE) on those ABA rules.[11]

The ABA lobbies state courts to adopt these rules, and many state courts almost routinely follow the ABA's lead and often approve what the ABA supports. The ABA Model Rules have a presumption of support that is lacking for any proposed change that someone might offer.

The ABA Model Rules then become real law governing how and whether lawyers can practice law. They are real law, just like the Rules of Evidence or Rules of Civil Procedure, but unlike the Rules of Evidence or Rules of Civil Procedure, the rules governing lawyers apply even when lawyers are not before a court. They govern, for example, how lawyers find

business; how they deal with clients, each other, and third parties; how they handle client funds; and how they advertise, make representations to others, organize their law firms, and set fees.

Whenever the ABA changes its Model Rules, the MPRE *automatically* follows suit and changes its examination to test the new rules. It does that about one year later.[12] In August, the ABA House of Delegates approved a significant and controversial change in Rule 8.4, and in about a year, law students throughout the country will have to know this new rule and respond correctly on the MPRE or risk not being admitted to the bar. Even California, which has not yet adopted the format of the Model Rules (although it has adopted some of their substance), requires that anyone seeking admission to the California bar must pass the MPRE.[13]

The New Rule 8.4(g)

The exact wording of new Rule 8.4(g) is available on the Web[14] along with the "Comments" to that rule.[15] The comments provide guidance to interpreting the rule.[16] The ABA's official legislative history and its justification for the change are also on the Web.[17]

Before this new rule, there was a rather vague comment in Rule 8.4 advising that "in the course of representing a client," a lawyer should not knowingly manifest bias based on various categories "when such actions are prejudicial to the administration of justice."[18] The comment was not a black-letter rule. The comments do not impose discipline; only the rules do that.[19] The ABA adopted this vague comment in 1998 after six years of debate and several failed attempts.[20]

Fast-forward nearly two decades, and we see that the new rule and comment go well beyond the 1998 change. The ABA has elevated the new prohibition into a black-letter rule, added to the listing of protected categories and significantly broadening its coverage. The ABA explained that the problem with this mere comment is that:

> [It] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. [The limitation] fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms).[21]

When the ABA proposed this new rule, it did not offer any examples in its report of the failure of the old comment.[22] That is not why it wanted to create this new rule. The reason for the change, the ABA says, is not so modest:

> There *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.[23]

We must change the Model Rules not to protect clients, not to protect the courts and the system of justice, and not to protect the role of lawyers as officers of the court. No, the purpose is much more grandiose: to create "a cultural shift."

The ABA report explaining the reasons for this controversial change starts by quoting then-ABA President Paulette Brown, who boastfully tells us that lawyers are "responsible for making our society better," and because of our "power," we "are the standard by [*sic*] which all should aspire."[24]

This new Rule 8.4(g) provides that it is "professional misconduct" to engage in discrimination based on "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." If lawyers do not follow this proposed rule, they risk discipline (e.g., disbarment or suspension from the practice of law). In addition, courts enforce the rules in the course of litigation (e.g., through sanctions or disqualification) and routinely imply private rights of action from violation of the rules (malpractice and tort suits by nonclient third parties). Violations of the rules matter: They are more than Law Day rhetoric.

Lawyers should be expert at drafting rules, especially rules about the practice of law. What exactly does Rule 8.4(g) proscribe?

Discrimination includes "verbal or physical conduct that manifests bias." The First Amendment applies to speech, but the ABA tries to get around that by labeling speech as "verbal conduct," but "verbal conduct" is an oxymoron. Rule 8.4(g) prohibits mere speech divorced from discriminatory action.

If one holds a gun and says, "Give me your money or your life," he is engaging in conduct (robbery) accompanied by words. If one says, "I wish I had Bill Gates's money," he is just engaging in speech.

Consider "socioeconomic status," one of the protected categories. Rule 8.4, Comment 4 makes clear that it covers any "bar association, business or social activities in connection with the practice of law." The rule covers any "law firm dinners and other nominally social events" at which lawyers are present because they are lawyers.[25] If one lawyer tells another, at the water cooler or a bar association meeting on tax reform, "I abhor the idle rich. We should raise capital gains taxes," he has just violated the ABA rule by manifesting bias based on socioeconomic status.

If the other lawyer responds, "You're just saying that because you're a short, fat, hillbilly, neo-Nazi," he's in the clear, because those epithets are not in the sacred litany. Of course, that cannot be what the ABA means, because it is always in good taste to attack the rich. Yet that is what the rule says.

The Equal Employment Opportunity Commission (EEOC) has already said that there can be racism and a "hostile work environment" if the U.S. Postal Service allows a coworker to wear a cap that says "Don't tread on me" along with a drawing of a coiled snake. The EEOC admitted that the "Don't tread on me" flag "originated in the Revolutionary War in a non-racial context."[26] But some people might think it racist, and that is enough to launch a full-scale investigation. The fellow just wore a cap; there was not even a finding that the person who wore the cap ever said anything offensive to the person complaining.[27]

The 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* 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."[28] *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.

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*[29] 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."[30]

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 solo practitioner could face discipline because something that he said at a law-related function offended someone employed by another law firm."[31]

At another bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, "Black lives matter." Another responds, "Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime." A third says, "All lives matter." Finally, another lawyer says (perhaps for comic relief), "To make a proper martini, olives matter." The first lawyer is in the clear; all of the others risk discipline.

Even when a court does not enforce this rule by disbarring or otherwise disciplining the lawyer, the effect will still be to chill lawyers' speech, because good lawyers do not want to face any nonfrivolous accusation that they are violating the rules. The ABA as well as state and local bar associations routinely issue ethics opinions advising lawyers what to do or avoid, and most lawyers follow this advice.

Consider this example. The St. Thomas More Society is an organization of "Catholic lawyers and judges" who strengthen their "faith through education, fellowship, and prayer."[32] Therefore, since Rule 8.4(g) covers any "law firm dinners and other nominally social events" at which lawyers are present because they are lawyers,[33] any St. Thomas More Society event, including a Red Mass, CLE program, or similar event, would be subject to the rule. Assume further that at a St. Thomas More–sponsored CLE program, some (and perhaps all) of the lawyers on a

panel discuss and object to the Supreme Court's gay marriage rulings. The state bar may draft an ethics opinion advising that lawyers risk violating Rule 8.4(g) if they belong to a law-related organization that is not "inclusive" and opposes gay marriage.

As a result, many lawyers may decide that it is better to be safe than sorry, better to leave the St. Thomas More Society than to ignore the ethics opinion and risk a battle. If they belong to an organization that opposes gay marriage, they can face problems. If they belong to one that favors gay marriage, then they are home free.

Judges, law professors, and lawyers (even if they are not Catholic) often attend the Red Mass. That simple action raises issues because the Catholic Church, like many other churches, does not recognize gay marriage. Like many other religious organizations, it does not embrace the right to abortion found in U.S. Supreme Court decisions. It limits its priesthood to males. All of those religious practices raise questions under the new, vaguely worded Rule 8.4(g).

Consider another example involving marriage. ABA Rule 2.1 provides that the lawyer must offer candid advice and may refer to "moral" considerations. What if the lawyer's conscientious view of what is "moral" conflicts with the "cultural shift" that Rule 8.4(g) seeks to impose?

For example, assume that the client (worried about a "palimony"[34] suit) tells the lawyer that he would like to create a prenuptial agreement with the woman he does not intend to marry. Absent the new Rule 8.4(g), the lawyer can advise the individual that he might be taking advantage of the woman, that it might not be right to live with the woman, use her, and then drop her without fear of financial consequences. Indeed, the lawyer can say that he or she refuses to draft palimony prenuptials.

But what is the law after Rule 8.4(g)? That rule says that a lawyer is subject to discipline if he or she discriminates in speech or conduct related to the practice of law (drafting the palimony papers) based on "marital status" (the lawyer does not normally like to draft palimony prenuptials). What if the person who refuses to draft the palimony papers objects on religious grounds? The prospective client can walk next door and hire another lawyer, but the ABA's proposed rule says that this may not be good enough. The bar may discipline the first lawyer, who exercised his or her religious objections to participating in palimony prenuptials. What if the lawyer objects to drafting palimony papers on nonreligious but moral grounds: It treats women like sex objects? The result is the same: The bar may discipline the lawyer because of the "need for a cultural shift" in the United States.

It is true that the new Rule 8.4(g) says that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16," but Comment 5 to Rule 8.4 appears to interpret this right to refuse representation narrowly. It says that the lawyer does not violate Rule 8.4(g) "by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law."

Moreover, case law tells lawyers that they cannot refuse to take a case because the prospective client is a member of the litany of protected classes. In *Stropnicky v. Nathanson*,[35] for example, the Massachusetts Commission Against Discrimination found that a law firm that specialized in representing women in divorce cases violated the state's antidiscrimination law by refusing to represent a man in such a case. The firm was known for securing large awards for women who had put their husbands through professional school, and the prospective male client had done the same thing for his wife. The existence of Rule 8.4(g) makes it easier for a state court to find that refusing to represent a client or refusing to draft certain papers for a client violates that state's general antidiscrimination laws.

Or consider "gender identity," another category that Rule 8.4(g) protects. Assume that a law firm does not hire a job applicant who seeks a position as a messenger. The firm's decision to hire or terminate messengers is conduct related to "operation and management of a law firm or law practice."[36] The disgruntled messenger may complain to the disciplinary authorities that he is transgender and the firm did not hire him because of that. If the disgruntled applicant identifies with the opposite sex (or claims to), he or she can argue that it is evidence of the law firm's bias that its restrooms discriminate based on "gender identity."

The law firm may claim that it did not know the disgruntled applicant is transgender. That is an issue on the merits, and its assertion does not preclude a full hearing. Rule 8.4(g) does say that the lawyer must know "or reasonably should know" that his "verbal conduct" is harassment or discrimination, but that requirement is easily met. Lawyers

"reasonably should know" that the federal government now contends that preventing someone from using the restroom they prefer to use is discrimination based on gender identity.

The lawyer hauled before the state's discipline board will find that it is not like a court: It does not typically open its proceedings to the public, it follows relaxed rules of evidence, and there is no jury. For the law firm, it is simpler and safer to avoid all of these problems by removing the restroom signs that protect the privacy of men and women.

Problems extend beyond the weak procedural protections of state disciplinary authorities. The risk to the law firm also includes civil liability, because the disgruntled employee may sue. That could be expected to happen here, because courts often imply causes of action from violation of the Rules of Professional Conduct. The law firm will face expensive discovery, a gauntlet of motions, and possibly years of litigation and a trial—particularly if the disgruntled applicant files a class action.

The ABA's proposed Rule 8.4(g) will apply even if no state statute bans the "verbal conduct" that the ABA's rule will prohibit. No matter what the EEOC or the state legislature does, the ABA rule still applies because it makes clear that the "substantive law of antidiscrimination and anti-harassment statutes" is not "dispositive."[37]

Many states have no law banning gender identification discrimination. Some states require that individuals use public restrooms that correspond to the sex on their birth certificates. Congress has not enacted a statute banning discrimination based on gender identification. The EEOC did not announce until recently that it regards workplace sexual orientation and transgender discrimination as illegal. The EEOC announcement[38] (it is not a rule) may not be valid under the federal statute, a matter now being litigated in the courts, and even if its new announcement is valid, the EEOC can always change its mind.

Nonetheless, the ABA rule explicitly applies even if no state or federal law bans "verbal conduct" dealing with gender identification. Even if the government does ban gender identification discrimination but no court has found any violation, the disciplinary authorities can still find a violation. If the complainant decides not to complain to the EEOC, the state can still discipline the lawyer. The ABA made that point repeatedly in explaining the significance of its new rule. To require an allegedly injured party to invoke the civil legal system first "would send the wrong message to the public."[39]

Peremptory Challenges and "Legitimate" versus Illegitimate Advice or Advocacy

Rule 8.4(g), Comment 5 appears to give lawyers freedom to engage in peremptory challenges on racial grounds. It says, "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g)." An earlier comment had a similar safe harbor. The ABA report on the new Rule 8.4(g) does not explain the reason.

We know now that it violates the Constitution for a lawyer (whether government or private) to exercise a peremptory challenge in either a civil case or a criminal one to exclude a juror on grounds of race.[40] One might think that this would be a case where the disciplinary authorities might want to take action. After all, a judge had made a specific finding that the lawyer has engaged in racial discrimination. Yet the comment is clear that the judge's ruling that the lawyer engaged in racist behavior does not alone prove anything.

If the judge sits the juror anyway, the lawyer who exercised the improper peremptory challenge is home free. The judge merely refuses to exclude the juror. If the lawyer exercises the racist peremptory challenge but gets away with it, he is equally home free. It is as if one says, with respect to income taxes, "catch me and I'll pay what I owe."

The ABA's broad rules prohibiting political *speech* that relates to gender identification contrasts dramatically with the ABA's narrow rule regarding *conduct* involving racial discrimination. The ABA's report does not explain its rationale. Rule 8.4(g) does say that it "does not preclude legitimate advice or advocacy consistent with these Rules." It does not tell us what is "legitimate" advice or advocacy. As noted, a racially motivated peremptory challenge apparently may be legitimate.

We should be very concerned about prohibiting legitimate advice or advocacy without defining those terms carefully. In Rule 8.4(g), the ABA blessed the concept that the disciplinary authority has the right to determine what is or is not legitimate advocacy. The idea that advocacy is "illegitimate" invites criticism of lawyers who represent unpopular clients. The neighbors of Atticus Finch in *To Kill a Mockingbird* no doubt believed that his advocacy was illegitimate

and that Finch should not have fought that zealously for his client, a poor black man.

If the ABA meant only to prohibit advocacy or advice that violates the ABA rules, it could have said that. Instead, it said that the advice or advocacy must be (1) "consistent with these Rules" and (2) legitimate. We have gone down this road before, and the results were not pretty. In the 1950s and 1960s, some states used the legal discipline process to punish lawyers who were too energetic (in the view of some lawyers) in defending Communist sympathizers or draft protestors. The recent movie *Bridge of Spies* recalls an earlier era when the public and many lawyers did not applaud James B. Donovan, the lawyer who defended Soviet spy Rudolf Abel.

Granted, we are not like the supposedly narrow-minded people of the 1950s and 1960s. We all say that. Remember, however, that every generation says that it is not like the narrow-minded earlier generation. We do not appreciate our own prejudices, but the next generation will. A few years ago, it was politically incorrect to support gay marriage; now it is politically incorrect to oppose gay marriage. Many of the people who support it today were opponents just a few short years ago, and many of them do not acknowledge their 180-degree shift.

Reverse Discrimination

The new ABA rule specifically approves of reverse discrimination. Assume, for example, that two young lawyers (or two photocopiers) apply for one job. The lawyer making the hiring decision says that Applicant No. 1 is better than Applicant No. 2. However, Applicant No. 2 says that he is gay or transgender. The lawyer tells the two applicants, "I'm going with Applicant No. 2 because you are gay. Sorry, Applicant No. 1; you are a bit better, but I already have enough heterosexual lawyers and photocopiers."

The rules are clear that the lawyer saying this, who is discriminating based on sexual orientation or gender identification, does not violate Rule 8.4(g). Comment 4 gives the lawyer a safe harbor: "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."

Lawyers can discriminate, by words or conduct, against people because they are in a traditional marriage or because they are white, because "new Comment [4] to Rule 8.4 makes clear that paragraph (g) does not prohibit conduct undertaken by lawyers to promote diversity."[41] The ABA rule is not about forbidding discrimination based on sex or marital status; it is about punishing those who say or do things that do not support the ABA's particular view of sex discrimination or marriage.

The Aftermath of the New Rule 8.4(g)

Bar discipline authorities will typically tell anyone inquiring that they have their hands full disciplining lawyers who lie and steal from their clients. The state and federal reports are replete with cases disqualifying law firms (even some very prestigious law firms) for conflicts of interest. The first Rule of Legal Ethics, Rule 1.1, is that the lawyer must be competent, and Rule 1.5 forbids lawyers from filing excessive fees. Yet many lawyers violate those rules. Cases show that clients routinely sue their lawyers because of excessive fees or incompetence.

Is it the best use of scarce bar resources to discipline lawyers who may violate a vague rule that prohibits speech because that speech violates the new Rule 8.4(g)? It is not as if the disciplinary authorities are looking for things to do. There are plenty of lawyers who are incompetent, who commingle trust funds, or who cheat third parties.

The purpose of the new Rule 8.4(g) is to promote a "cultural shift" in the United States. Until now, that was not within the job description of the ABA or of the Rules Governing Professional Conduct.

CLE Programs, the ABA, and the New Rules on "Diversity"

In 2008, the ABA House of Delegates adopted what it called "GOAL III: Eliminate Bias and Enhance Diversity"[42] in an effort to "Promote full and equal participation in the association, our profession, and the justice system by all persons" and "Eliminate bias in the legal profession and the Justice System." Obviously, these are worthy goals. The problem is how the ABA chooses to implement them. The ABA now has a new rule to implement Goal III in the case of CLE programs. This new rule does not promote equal opportunity. It does not remove barriers to equal opportunity. It does not promote intellectual diversity. Instead, this poorly drafted rule imposes a requirement that each CLE panel must have "diversity" based on sexual orientation, gender identification, and so forth—the same litany we find in Rule 8.4(g).

In June 2016, in response to the efforts of the ABA's Diversity & Inclusion 360 Committee, the ABA Board of Governors adopted a new ABA rule for all ABA-sponsored Continuing Legal Education programs.[43] This rule "will take effect on March 2, 2017,"[44] and builds on what the ABA later adopted in Rule 8.4(g):

> The ABA expects all CLE programs sponsored or co-sponsored by the ABA to meet the aspirations of Goal III by having the faculty include members of diverse groups as defined by Goal III (*race, ethnicity, gender, sexual orientation, gender identity, and disability*). This policy applies to individual CLE programs whose faculty consists of three or more panel participants, including the moderator. Individual programs w*ith faculty of three or four panel participants*, including the moderator, will require *at least 1 diverse member*; individual programs with faculty of five to eight panel participants, including the moderator, will require *at least 2 diverse members*; and individual programs with faculty of nine or more panel participants, including the moderator, will require *at least 3 diverse members*. The ABA will not sponsor, co-sponsor, or seek CLE accreditation for any program failing to comply with this policy unless an exception or appeal is granted. The ABA implementation date for the new Diversity & Inclusion CLE Policy shall be March 1, 2017.[45]

The ABA intends that this new policy be mandatory, not aspirational.[46] Favored groups include "race, ethnicity, gender, sexual orientation, gender identity, and disability." As individuals, we all are members of some race and some ethnic group. We all have some sexual orientation. Hence, one might think that every CLE panelist would count toward satisfying the mandated quotas for ABA CLE faculty participants. Of course, that is not what the ABA really means by its use of these code words.

While ABA groups must comply as of March 1, 2017, they may comply earlier, and some have, so we know what the ABA really means. One person said proudly that she sponsored a program in which every participant but one was from a diverse group. Who was the person that did not fit within all of the categories? It was a white male, she said.

Sexual orientation includes people who are lesbian, gay, bisexual, or transgender (LGBT). The ABA tells us that only 1.25 percent of its members fall in this category.[47] At least 30 percent of all CLE panelists in any ABA-sponsored event must include one of the favored classes as part of affirmative action.

It will be interesting to see how the ABA will implement this rule. Assume, for example, that an ABA official planning a CLE on patent law e-mails a prospective panelist. The conversation might well go as follows:

> ABA: We'd like to invite you to be on our October panel on estoppel rules in patent law. I understand your new article on this issue is brilliant.
>
> PANELIST: Thank you so much. I'd love to attend. I've completed more empirical research since then, and I'd be pleased to share that with your audience.
>
> ABA: Great. Tell me, what is your sexual orientation?
>
> PANELIST: Excuse me! It's no business of yours what I do in my bedroom.
>
> ABA: I'm sorry, but we need to know before we can extend the invitation. We're short one gay, and we need a woman. If you are a member of one of those groups, my next question would be which one, so we can, in fairness, exclude members of that group from inclusion on our next program in order to secure diversity from among the diverse groups when filling the few CLE faculty positions for each program. I notice your name is Chris. Is that Christine or Christopher?
>
> PANELIST: What difference does that make?
>
> ABA: I want to know if you are a woman.
>
> PANELIST: My work speaks for itself. What difference does it make if my DNA has two X chromosomes or an X and Y chromosome?
>
> ABA: We'll ask another person. I'm going to e-mail Ms. Smythe instead.
>
> PANELIST: It's a free country; you can invite whomever you want, but you told me that I'm the expert in this area.

ABA: Yes, you are, and I know that your work demolished Smythe's earlier article. You really destroyed her logically. But we need diversity, and you're not that.

PANELIST: I came to this country 30 years ago, an orphan from Ukraine. I could not speak English, and now I'm one of the top patent lawyers in the country. Besides, I disagree with Smythe. A debate between the two of us would offer intellectual diversity.

ABA: We're not interested in intellectual diversity. As for your immigrant status, that's not on the approved list.

Conclusion

As that old cliché reminds us, every cloud has a silver lining. Perhaps the ABA's new Rule 8.4(g) will ameliorate the problem of underemployed lawyers. We will need more lawyers to meet the demand that this new rule will create. Lawyers will get richer and richer as we sue and defend each other, obviating the need for clients. It will be like the village that raised its gross domestic product when everyone took in everyone else's laundry.

As for training lawyers through Continuing Legal Education programs, we will no longer worry about getting the best person, nor do we care about intellectual diversity. The new ABA requirement is not about equal opportunity; it is about equal results. As for the immigrant panelist who came to the United States alone, not knowing the language, that person should lobby the ABA to get on the approved list.

*—**Ronald D. Rotunda** is Doy and Dee Henley Chair and Distinguished Professor of Jurisprudence, Chapman University, Fowler School of Law.*

Endnotes

1. RONALD D. ROTUNDA, THE POLITICS OF LANGUAGE: LIBERALISM AS WORD AND SYMBOL (University of Iowa Press 1986).
2. Valerie Richardson, *University Officials Agree to Rip Up Constitution in Undercover Video*, WASH. TIMES (Nov. 8, 2015), http://www.washingtontimes.com/news/2015/nov/8/yale-cornell-syracuse-vassar-oberlin-administrator/.
3. *Id.*
4. Peter Fricke, *Administrators Literally Shred Constitution After Reporter Calls It "Oppressive" and "Triggering,"* CAMPUS REFORM (Nov. 3, 2015), http://www.campusreform.org/?ID=6946.
5. Oliver Bok, *Right-Wing Activist Poses as Student, Secretly Films Professors*, OBERLIN REV. (Nov. 6, 2016), http://oberlinreview.org/9030/news/right-wing-activist-poses-as-student-secretly-films-professors/.
6. A. G. Wallace, *16 Points, 1000 Demands* (Dec. 1, 2015), https://agwallace.wordpress.com/2015/12/01/16-points-1000-demands/.
7. Pardes Seleh, *State University Now Offers "Stop White People" Training*, DAILY WIRE (Aug. 23, 2016), http://www.dailywire.com/news/8590/state-university-now-offers-stop-white-people-pardes-seleh?utm_source=facebook&utm_medium=social&utm_content=062316-news&utm_campaign=benshapiro.
8. Suh Neubauer, *BU Reviewed #StopWhitePeople2K16 Training Session, Not "Anti-White,"* Fox 40 WICZ-TV NEWS (Aug. 26, 2016), http://www.wicz.com/story/32831634/bus-stopwhitepeople2k16-training-program-slammed-by-bloggers-social-media.
9. *E.g.*, Leonor Vivanco & Dawn Rhodes, *U. of C. Tells Incoming Freshman It Does not Support "Trigger Warnings" or "Safe Spaces,"* CHICAGO TRIBUNE (Aug. 25, 2016), http://www.chicagotribune.com/news/local/breaking/ct-university-of-chicago-safe-spaces-letter-met-20160825-story.html.
10. California is an exception. The ABA accredits law schools, but the state also accredits other law schools in the state, and their graduates can take the California Bar Examination.
11. MPRE MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION, *Jurisdictions Requiring the MPRE* (2016), http://www.ncbex.org/exams/mpre/.
12. MPRE MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION, *Preparing for the MPRE* (2016), http://www.ncbex.org/exams/mpre/preparing/ ("Amendments to the ABA Model Rules of Professional Conduct or the ABA Model Code of Judicial Conduct will be reflected in the examination no earlier than one year after the approval of the amendments by the American Bar Association.").
13. California also includes at least one essay question on its bar examination that tests both the Model Rules and the California Rules of Professional Conduct.
14. ABA, MODEL RULES OF PROFESSIONAL CONDUCT, RULE 8.4 (Aug. 2016), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html.
15. ABA, MODEL RULES OF PROFESSIONAL CONDUCT, RULE 8.4, COMMENTS 3, 4, 5 (Aug. 2016), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4.html.
16. ABA MODEL RULES OF PROFESSIONAL CONDUCT, PREAMBLE & SCOPE [21] (2016).
17. ABA STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE, COMM. ON DISABILITY RIGHTS, DIVERSITY & INCLUSION 360 COMM., COMM. ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, COMM. ON SEXUAL ORIENTATION AND GENDER IDENTITY, COMM. ON WOMEN IN THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES, REVISED RESOLUTION 109 (Aug. 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.
18. RULE 8.4, COMMENT 3 (replaced by the August 2016 ABA revisions).
19. "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." ABA MODEL RULES OF PROFESSIONAL CONDUCT, PREAMBLE & SCOPE [21] (2016).
20. STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, MEMORANDUM: DRAFT PROPOSAL TO AMEND MODEL RULE 8.4, at 1 (Dec. 22, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2015.authcheckdam.pdf; *Id.* at 6.
21. ABA REPORT TO THE HOUSE OF DELEGATES, REVISED RESOLUTION 109, *supra* note 17, at 2.
22. The ABA does list examples of lawyers disciplined engaging in improper sexual harassment, but most examples cover conduct. *E.g.*, "The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student's appearance; *engaged in unwelcome physical contact of a sexual nature with the student*; and attempted to convince the student to recant complaints she had made to authorities about him. *In re Griffith*, 838 N.W.2d 792 (2013)." (emphasis added). ABA REPORT TO THE HOUSE OF DELEGATES, REVISED RESOLUTION 109, *supra* note 17, at 6 n.15. In a few cases, state courts have imposed discipline for lawyers saying things that are politically incorrect. What some state courts have done should be jaw-dropping for anyone who supports the First Amendment. *Id.* "The Indiana Supreme Court in 2009 disciplined a lawyer who, while representing a father at a child support modification hearing, made *repeated* disparaging references to the facts that the mother was not a U.S. citizen and was receiving legal services at no charge. *In re Campiti*, 937 N.E.2d 340 ([Ind.] 2009)." Such advocacy is surely not persuasive to any court. That does not mean the lawyer should be punished for saying something "disparaging." If the trial court thought there was a problem, it could have instructed the lawyer that it was unnecessary to repeat legal irrelevancies.

23. ABA Standing Comm. on Ethics and Professional Responsibility, Memorandum: Draft Proposal to Amend Model Rule 8.4, 2 (Dec. 22, 2015) (emphasis added), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf.
24. ABA Report to the House of Delegates, Revised Resolution 109, *supra* note 17, at 3.
25. *Id.* at 11.
26. Shelton D., Complainant, EEOC DOC 0520140441, 2016 WL 3361228, at *2 (June 3, 2016).
27. Eugene Volokh, *Wearing "Don't Tread on Me" Insignia Could Be Punishable Racial Harassment*, Wash. Post (Aug. 3, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/03/wearing-dont-tread-on-me-insignia-could-be-punishable-racial-harassment/?tid=a_inl&utm_term=.cba04ea026d3.
28. Davis Next Friend LaShonda D. v. Monroe City Board of Education, 526 U.S. 629, 633 (1999) (emphasis added).
29. UWM Post, Inc. v. Board of Regents of University of Wisconsin System, 774 F. Supp. 1163 (E.D.Wis.1991).
30. The *LaShonda* Court also cited with approval *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D.Mich. 1989), a similar case. It also cited *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason University*, 993 F.2d 386 (C.A.4 1993), which overturned on First Amendment grounds the university's sanctions on a fraternity for conducting an "ugly woman contest" with "racist and sexist" overtones. Cases like *IOTA XI Chapter* do not approve of "ugly woman" contests; such cases approve of the First Amendment, which allows people to say and do puerile things.
31. Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express "Bias," Including in Law-Related Social Activities*, Wash. Post (Aug. 10, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.094f10eab400.
32. *E.g.*, St. Thomas More Society of Orange County, http://www.stthomasmore.net/.
33. *See supra* note 25.
34. "Palimony" is the term used for court-ordered payments following the dissolution of nonmarital cohabitation. *See* Major Keith K. Hodges, *Palimony: When Lovers Part*, 102 Mil. L. Rev. 85 (1983).
35. Stropnicky v. Nathanson, 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, Nathanson v. MCAD, No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003). The MCAD is the Massachusetts Commission Against Discrimination.
36. ABA Model Rule 8.4, Comment 4.
37. ABA Report to the House of Delegates, Revised Resolution 109, *supra* note 17, at 7. The ABA makes this point repeatedly: "The Association has never before required that a party first invoke the civil legal system before filing a grievance through the disciplinary system. [It is not necessary for the complainant] to have brought and won a civil action against the respondent lawyer." *Id.* at 11. Indeed, if the complainant does use the civil courts and loses, the disciplinary authorities can still take action, because "the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context." *Id.* at 11-12.
38. Press Release, EEOC, What You Should Know About EEOC and the Enforcement Protections for LGBT Workers (July 2016) ("EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on **gender identity or sexual orientation**. These protections apply regardless of any contrary state or local laws.") (bold in original), https://content.govdelivery.com/accounts/USEEOC/bulletins/1567cc2.
39. ABA Report to the House of Delegates, Revised Resolution 109, at 12.
40. Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). Batson v. Kentucky, 476 U.S. 79, 96, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1986). *See also* Taylor v. Louisiana, 419 U.S. 522, 526, 95 S.Ct. 692, 695, 42 L.Ed.2d 690 (1975), holding that a male has standing to object to the exclusion of females from his jury. The Court based its decision on the Sixth Amendment right to a jury drawn from a fair cross section of society.
41. ABA Report to the House of Delegates, Revised Resolution 109, *supra* note 17 at 1, 132.
42. ABA Mission and Goals, Goal III, http://www.americanbar.org/about_the_aba/aba-mission-goals.html.
43. ABA, 1 Voice of Experience (Issue 7, July 2016), http://www.americanbar.org/publications/voice_of_experience/20160/july-2016/bog-approves-new-rules-for-diversity-in-cle-programs.html.
44. *Id.*
45. *Id.* (emphasis added). *See also* Memorandum from ABA President Brown's Diversity & Inclusion 360 Commission to SOC Chairs and Chairs-Elect (Mar. 2016), http://www.americanbar.org/content/dam/aba/administrative/public_contract_law/2016_agenda/pubconfpi16/2016_diversity_and_inclusion_cle_policy.authcheckdam.pdf.
46. ABA, 1 Voice of Experience, *supra* note 43.
47. ABA Comm. on Sexual Orientation and Gender Identity, Goal III Report for 2015-2016, Eighth Annual Review of the Status of Lesbian, Gay, Bisexual, and Transgender Participation at the American Bar Association, at 6, 15 (2016), http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/sogi_2016_goaliii.authcheckdam.pdf.

EXHIBIT B

CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

March 10, 2016

ABA Ethics Committee
Center for Professional Responsibility
American Bar Association
17th Floor
321 North Clark Street
Chicago, Illinois 60654
Attn: Dennis A. Rendleman, Ethics Counsel

Re: Comments of the Christian Legal Society on Proposed Rule 8.4(g) and Comment (3)

Dear Committee Members:

The Christian Legal Society ("CLS") is a non-profit, interdenominational association of Christian attorneys, law students, and law professors, networking thousands of lawyers and law students in all 50 states since its founding in 1961. Among its many activities, CLS engages in two nationwide public ministries through its Christian Legal Aid ministry and its Center for Law & Religious Freedom.

Demonstrating its commitment to helping economically disadvantaged persons, the goal of CLS's Christian Legal Aid program is to meet urgent legal needs of the most vulnerable members of our society. CLS provides resources and training to help sustain approximately 60 local legal aid clinics nationwide. This network increases access to legal aid services for the poor, marginalized, and victims of injustice in America. Based on its belief that the Bible commands Christians to plead the cause of the poor and needy, CLS encourages and equips individual attorneys to volunteer their time and resources to help those in need in their communities. Legal issues addressed include: avoiding eviction or foreclosure; maintaining employment; negotiating debt-reduction plans; petitioning for asylum for those persecuted abroad; confronting employers or landlords who take advantage of immigrants; helping battered mothers obtain restraining orders; and advocating on behalf of victims of sex trafficking.

Demonstrating its commitment to pluralism and the First Amendment, for forty years, CLS has worked, through its Center for Law & Religious Freedom, to protect the right of all citizens to be free from discriminatory treatment based on their religious expression and religious exercise. CLS was instrumental in passage of the federal Equal Access Act of 1984 that protects the right of both religious and LGBT student groups to meet on public secondary school campuses. Equal Access Act ("EAA"), 20 U.S.C. §§ 4071-74. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting the EAA). *See, e.g., Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (EAA protects religious student groups' meetings); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (EAA protects LGBT student groups' meetings).

For forty years, CLS has protected free speech, religious exercise, assembly, and expressive association rights for all citizens, regardless of their race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status. The motivation for these comments regarding the proposed changes to Rule 8.4 is rooted in CLS's deep concern that the proposed rule will have a detrimental impact and a chilling effect on attorneys' ability to continue to engage in free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square. Moreover, the proposed rule contradicts longstanding ethical considerations woven throughout the Rules of Professional Conduct.

Because the Committee has not demonstrated an empirical need for the proposed changes to the rule and comment, CLS recommends that no changes be made.

But if the proposed rule and comment are to be adopted, CLS recommends numerous changes be made to the draft Rule 8.4(g) and the draft comment. The need for these important changes is explored throughout the discussion that follows, and the changes are summarized in the "Summary of Recommendations" at the conclusion of this letter.

The Proposed Rule's Negative Impact on Attorneys Generally

Before discussing the harm to attorneys' First Amendment rights that the proposed rule will certainly cause, we will briefly touch upon non-First Amendment harms that the proposed rule will likely cause.

1. The wisdom of imposing a "cultural shift" on all attorneys should give pause. From a broad perspective, the rule, if adopted, will break new and untested ground in terms of the purpose of the Rules of Professional Conduct. Typically, the Rules of Professional Conduct are grounded in one of three ethical philosophies: client-protective rules, officer-of-the-court rules, or profession-protective rules. But the proposed rule does not seem grounded in any of these existing models. Rather, it seems to inject a rule of conduct that is better understood as advancing a particular theory of social justice. Or, as the Memorandum of December 22, 2015, explains the proposed rule, there 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[.]" Memorandum, Standing Committee on Ethics and Professional Responsibility, Draft Proposal to Amend Model Rule 8.4, Dec. 22, 2015, at 2 (hereinafter "Mem.").[1]

[1] We confess that we do not know what the term "the inherent integrity of people" means. We assume that the term is actually supposed to be something else, such as "the inherent equality of people," or "the inherent worth of people," or "the inherent dignity of people." If so, CLS affirms its shared belief in the inherent equality, dignity, and worth of every human being, a concept deeply rooted in Christianity, and reflected in the Declaration of Independence's foundational statement that all persons "are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence of 1776, The Organic Laws of the United States of America.

The wisdom of imposing a "cultural shift" on 1.3 million opinionated, individualistic, free-thinking lawyers should give pause. If history teaches any lesson, it is the grave danger created when a government, or a people group, or a movement tries to impose uniform cultural values on other people. The Twentieth Century provided searing lessons of inhumane repression through forced "cultural shifts," regardless of whether those efforts came from the right or the left of the political spectrum. As Justice Jackson pithily observed, "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). Justice Jackson's famous words are as true today as they were seventy years ago: "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.

2. A cardinal principle is to avoid new disciplinary rules or rule amendments that will do decidedly more harm than good. The proposed rule change almost certainly will create a huge imbalance between comparatively few instances where the rule punishes misconduct as intended, as opposed to numerous instances where the rule is wielded as a weapon against lawyers by disgruntled job applicants, rejected clients, opposing parties, or opposing counsel. The Committee does not provide any documentation of the need for the proposed rule, which suggests that there currently are relatively few instances when it has been necessary to punish a lawyer who truly is abusing his or her license in a manner to cause harm to others through harassment or discrimination. Specifically, the Committee cites no examples of discrimination or harassment in the legal profession, examples of people in these categories who are being denied access to the courts, or instances of misconduct by lawyers in this regard. On the other hand, it is completely foreseeable that the proposed rule will trigger thousands of complaints against lawyers by job applicants, rejected clients, and opposing parties, all claiming that a lawyer's conduct constituted harassment or knowing discrimination in one or more of the prohibited categories. Even if frivolous, these cases will be difficult and expensive to defend. And, because complainants have immunity, there will be no recourse against frivolous complaints.

Furthermore, as will be explained below, the harm is not just that the proposed rule hands disgruntled persons a tool for harassing lawyers in their everyday practice of law. The proposed rule also poses a real threat that lawyers will be disciplined for public speech on current political, social, religious, and cultural issues, as well as for their free exercise of religion, expressive association, and assembly.

3. The proposed rule is inconsistent with the existing Rules of Professional Conduct. It is generally accepted that a lawyer has no duty to accept a representation. The comment to Model Rule 6.2 provides: "A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant." Similarly, ABA Model Rule of Professional Conduct

1.16(b)(4) allows a lawyer to withdraw from a representation when a client insists on pursuing action that, while lawful, the lawyer considers "repugnant," or with which the lawyer has a "fundamental disagreement." Under the proposed rule, will these standards now be limited to exclude any situation touching on one of the protected categories?

Subjecting an attorney to discipline for refusing to represent a client is a new idea, one that flies in the face of longstanding deference to professional autonomy and freedom of conscience. In fact, Model Rule 6.2(c) recognizes that when a lawyer is forced to take on a cause that is "repugnant" to the lawyer, it may impair the lawyer's ability to represent the client. The proposed rule and comment also conflict with Model Rules 1.7(a)(2), 1.10(a)(1), and 1.10 cmt. [3], which specifically reference how "personal" and "political" beliefs of a lawyer can result in that lawyer's having a personal conflict of interest that renders her unable to represent the client.

The Rules of Professional Conduct should encourage lawyers to practice law according to conscience, in order to increase the number of lawyers, encourage zealous representation, enhance client choice, and expand access to justice for all. The proposed rule moves the profession in the opposite direction while infringing on professional autonomy and freedom of conscience without good cause.

Relatedly, ABA Model Rule of Professional Conduct 2.1 authorizes lawyers to give advice by referring to "moral" considerations. Is that rule to be limited also, or will the lawyer who gives moral advice be subject to discipline if the advice ventures into advice that some might perceive to be "harassing" or "discriminatory" regarding a protected category?

Because these questions are too important to leave unaddressed, we urge the addition of the following language to the proposed comment: "Consistent with longstanding principles behind the Rules of Professional Conduct, declining representation based on religious, moral, or ethical considerations is not proscribed by this rule."

4. The current comment's language "when such actions are prejudicial to the administration of justice" should be incorporated into the proposed rule. The Committee proposes deleting from the current comment that a lawyer violates the rule only when conduct is "prejudicial to the administration of justice." It admits that the text of the proposed revision is broader, encompassing all activity "related to the practice of law." Mem. at 4. This longstanding limitation should not be eliminated but instead should be included in the proposed rule itself. The "prejudicial to the administration of justice" language recognizes that, in almost every conceivable case when an individual might be denied service by one attorney (*e.g.*, refusal to author an amicus brief advocating social policy with which the attorney disagrees for religious reasons), another attorney is ready, willing, and able to take on that representation. In such situations, the administration of justice is in no way prejudiced.

Moreover, the "prejudicial to the administration of justice" language has long been included in the text of Rule 8.4(d). Thus, the meaning of the limitation has been discussed for

years by courts and ethicists. The introduction of the more expansive term "in conduct related to the practice of law" creates problematic uncertainty in the proposed rule's application, as addressed below. Including "prejudicial to the administration of justice" in the proposed rule will help minimize needless friction about whether challenged conduct is protected by the First Amendment and, thus, excepted from the scope of the revised rule.

The Proposed Rule's Negative Impact on Attorneys' First Amendment Rights

Two prominent weaknesses of the proposed rule, if adopted, necessitate addressing the proposed rule's inevitable conflict with attorneys' First Amendment rights.

1. The proposed rule's operative phrase, "harass or knowingly discriminate," poses significant threats to attorneys' freedoms of speech, expressive association, assembly, and free exercise of religion. To begin, "knowingly" should modify both "harass" and "discriminate." Just as a lawyer should not be disciplined for unintentional discrimination, neither should she be disciplined for unintentional harassment. For that reason, in the proposed rule, "knowingly" should be added to modify "harass," as well as "discriminate."

Second, the elasticity of the term "harass" needs to be addressed in the comment if the proposed rule is to have any hope of surviving either a facial or an as applied challenge to the proposed rule's unconstitutional vagueness or its infringement on free speech. To ameliorate the constitutional problems created by the term "harass," the proposed comment should adopt the United States Supreme Court's definition of "harassment" in the Title IX context, which is "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

For purposes of the proposed rule, therefore, the proposed comment should state: "The term 'harass' includes only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice." This language makes clear that "harassment" has an objective, rather than a subjective, standard. The consequences of disciplinary action against an attorney are too great to leave the definition of "harass" open-ended or subjective. "Harassment" should not be "in the eye of the beholder," whether that be the attorney or the alleged victim of harassment, but instead should be determined by an objective standard, as provided by the Supreme Court's seventeen-year-old definition of "harassment."

The need for such an objective definition of "harass" is apparent when one considers the courts' uniform rejection of university speech codes over the past two decades. The courts have found that speech codes violate freedom of speech because of the overbreadth of "harassment"

proscriptions and the potential for selective viewpoint enforcement. [2] For example, after noting the Supreme Court's application of the overbreadth doctrine to prevent a "chilling effect on protected expression," *DeJohn v. Temple Univ.*, 537 F.3d 301, 313-314 (3d Cir. 2008) (citing *Broadrick v. Okla.*, 413 U.S. 601, 630 (1973)), the Third Circuit quoted then-Judge Alito's words in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001):

> "Harassing" or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."

DeJohn, 537 F.3d at 314 (quoting *Saxe*, 240 F.3d at 209, (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). The *DeJohn* court went on to explain, "[b]ecause overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases." *Id.* A lawyer's free speech should be no less protected than that of a student.

2. By expanding its coverage to include all "conduct related to the practice of law," the proposed rule encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment. As the Committee observes, "[t]he draft proposal would expand the coverage of the rule from conduct performed 'in the course of representing a client' to conduct that is 'related to' the practice of law." Mem. at 3. The Committee illustrates the broad scope of the rule by a variety of descriptions of lawyers' roles: "representatives of clients, officers of the legal system, and *public citizens* 'having special responsibility for the quality of justice'"; "advisors, advocates, negotiators, and evaluators for clients"; "third-party neutrals"; and "officers of the legal system, [who] participate in activities related to the practice of law through court appointments, bar association activities, *and other, similar conduct*." *Id.* (emphases supplied). It is unclear what conduct is not reached by "conduct related to the practice of law," particularly in light of the fact that the Committee has consciously rejected the more discrete description of scope "in the course of representing a client." *Id.* Because the phrase "conduct related to the practice of law" is so broad and undefined, the proposed

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[2] *See, e.g., McCauley v. Univ. of V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Blair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, 1998 WL 35867183 (E.D. Ky. 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989).

comment's reference to excepting conduct protected by the First Amendment is wholly inadequate. The phrase simply makes the proposed rule ripe to create confusion and uncertainty that is an unacceptable and unnecessary result.

a. Attorneys' service on boards of religious institutions may be subject to discipline if the proposed rule is adopted. Many lawyers sit on the boards of their churches, religious schools and colleges, and other religious non-profits. As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. But they also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.

For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities. A religious college may ask a lawyer on its board of trustees to review its housing policy or its student code of conduct. While drafting and reviewing legal policies may qualify as "conduct related to the practice of law," surely a lawyer should not be disciplined for volunteer legal work she performs for her church or her alma mater.

Equally importantly, a lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law." If the proposed rule is not clear that a lawyer's free exercise of religion, expressive association, assembly, and speech are protected when serving religious institutions, the chilling effect on her exercise of her First Amendment rights will be unacceptably high.

b. Attorneys' public speech on political, social, cultural, and religious topics may be subject to discipline if the proposed rule is adopted. Similarly, lawyers often are asked to speak to various community groups about current legal issues of the day, or to participate in panel discussions about the pros and cons of various legal positions on sensitive social issues of the day. Lawyers are asked to speak *because they are lawyers*, "public citizens 'having special responsibility for the quality of justice.'" Mem. at 3. Moreover, sometimes such speaking engagements are undertaken to increase the visibility of the lawyer's practice and create new business opportunities.

It seems highly likely that public speaking on legal issues falls within "conduct related to the practice of law." But even if some public speaking falls inside the line of "conduct related to the practice of law," while other public speaking falls outside the line, how is a lawyer to know? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of "sexual orientation" as a protected category in a nondiscrimination law being debated in one of the 28 states that lack such a provision? Is the lawyer subject to discipline if she speaks against amending a nondiscrimination law to include "sexual orientation," "gender

identity," or "marital status"? Would a lawyer's testimony before a state legislature or municipal commission be protected if it opposed amending these laws?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Thus, the proposed rule institutionalizes viewpoint discrimination for lawyers' public speech on some of the most important current political and social issues. "Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Again, the proposed rule's chilling effect on lawyers' free speech will be unacceptably high.

c. The proposed comment highlights a troubling gap between protected and unprotected speech under the proposed rule. This legitimate concern about whether a lawyer's public speech falls within "conduct related to the practice of law" highlights a substantial gap in the proposed rule's coverage that further threatens attorneys' First Amendment rights. The proposed comment states that the proposed rule "does not prohibit lawyers from referring to any particular status or group when such references are *material* and *relevant* to factual or legal issues or arguments *in a representation*." But lawyers often speak when they are not "in a representation" of a client but are merely offering their own views – *as a lawyer and a "public citizen"* — on sensitive legal issues. By including the qualifying phrase "in a representation," the comment may reasonably be inferred to mean that the proposed rule does "prohibit lawyers from referring to any particular status or group" when engaged in "conduct related to the practice of law" but not specifically "in a representation." This inference is supported by the Committee's particular emphasis on the distinction between the current comment's scope, that is, the narrower scope of "in the course of representing a client," and the proposed rule's broader scope as described by the phrase "in conduct related to the practice of law." This gap in protection for lawyers' speech seems to have been intentionally created by adding the phrase "in a representation" in the proposed comment. The sentence should be deleted from the comment.

d. Attorneys' membership in religious, social, or political organizations may be subject to discipline if the proposed rule is adopted: The proposed rule raises legitimate concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or some other religious belief implicated by the proposed rule's strictures. Religious organizations are sometimes denied access to the public square because they require their leaders to be religious. *Compare Alpha Delta Chi v. Reed,* 648 F.3d 790 (9th Cir. 2011) (religious student group could be denied recognition because of its religious membership and leadership requirements) *with CLS v.*

Walker, 453 F.3d 853 (7th Cir. 2006) (religious student group could not be denied recognition because of its religious leadership requirements).

According to some government officials, this basic exercise of religious liberty – the right of a religious group to choose its leaders according to its religious beliefs -- is "religious discrimination." But it is simple common sense and basic religious liberty that a religious organization's leaders should agree with its religious beliefs. As the Supreme Court has observed:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 710 (2012).

The proposed rule also raises severe doubts about the ability of lawyers to participate in political or social organizations that promote traditional values regarding sexual conduct and marriage. Last year, the California Supreme Court adopted a disciplinary rule that prohibits all California judges from participating in Boy Scouts because of the organization's values regarding sexual conduct. Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, *available at* http://www.courts.ca.gov/documents/sc15-Jan_23.pdf. Will the proposed rule subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Will the proposed rule subject lawyers to disciplinary action for belonging to a political organization that advocates for laws that promote traditional values regarding sexual conduct and marriage? The answers to these questions are not assuaged by the insuffient assurance in the proposed comment that conduct protected by the First Amendment will not be the subject of disciplinary action, particularly when the California Supreme Court is threatening disciplinary action against judges who participate in Boy Scouts.

e. The inadequacies of "material and relevant" as speech protections. The Committee explains that the proposed comment speaks in terms of not reaching "references [that] are material and relevant to factual or legal issues or arguments in a representation." Mem. at 5. In the Committee's opinion, this is a clearer standard than the current comment's statement that "[l]egitimate advocacy" is not covered. We would disagree that either a "material" or "relevant" standard is sufficiently clear when it comes to protecting free speech from suppression. Both are almost certainly unconstitutionally vague. But if forced to choose the

lesser of two evils, we would urge the retention of "legitimate advocacy" because it at least would seem to protect all advocacy, rather than causing the speaker to have to wonder what speech might be deemed "irrelevant" or "immaterial" and, thus, discipline-worthy. The Committee is correct that "material and relevant" are "concepts already known in the law." *Id.* But that does not mean they satisfy the First Amendment's requirements regarding free speech, particularly on political, social, cultural, and religious issues, or the Fourteenth Amendment's requirement that laws not be unconstitutionally vague.

f. The comment's assurance that the rule "does not apply to . . . conduct protected by the First Amendment" is completely inadequate to protect basic First Amendment rights. The Committee's assertion that the addition to the proposed comment of the language that "the Rule does not apply . . . to conduct protected by the First Amendment" is enough to "make[] clear that a lawyer does retain a 'private sphere' where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to the Rule" fails to give sufficient protection to our most basic civil liberties. For several reasons, the proposed rule and comment must be amended to give more than lip service to First Amendment rights for the reasons already discussed above and because:

1) *The First Amendment protects much more than a lawyer's "private sphere" of conduct.* The First Amendment actually places real limits on the government's ability to limit a lawyer's speech and conduct through bar rules. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 469 (1988) (First Amendment applied to state bar disciplinary actions through the Fourteenth Amendment). The Committee suggests that the scope of the comment's exception for "conduct protected by the First Amendment" is limited to a lawyer's "private sphere" of life. Mem. at 5. This suggests that "religious expression" and other related freedoms do not intersect with a lawyer's public, professional life. That is a common, but decidedly untrue, perception. Christians are enjoined by Scripture to bring their religious beliefs and practices to bear in their professions – indeed, to see their professions as their ministries of service to others – and to apply their Christian principles to the practice of their professions.

2) *The First Amendment protects much more than political speech.* A lawyer does not relinquish her right to speak freely when she receives her license to practice law. To the extent any restrictions are allowed, they are the same as applied to other individuals, except when they are appropriately tailored to the needs of the practice of the profession itself. Even when commercial speech such as attorney advertising is involved, restrictions "may be no broader than necessary to prevent . . . deception." *In re R.M.J.*, 455 U.S. 191, 203 (1982). Moreover, the "State must assert a substantial interest and the interference of speech must be in proportion to the interest served. Restrictions must be narrowly dawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest." *Id.*; *see also Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (lawyer's commercial speech "may not be subjected to blanket suppression"). Of course, here we are not concerned with commercial speech, and so the full protections of the First Amendment apply. But if lawyers' commercial

speech has been protected, how much more should their religious and political speech be protected as it relates to the practice of law?

The Comment says the rule "does not apply to . . . *conduct* protected by the First Amendment." (Emphasis added.) It is unclear whether "conduct" includes "speech," especially when the current comment's text that used the phrase "*words or* conduct" is to be eliminated, leaving the impression that "words or" was deliberately eliminated. (Emphasis added.) Clarification that "conduct" includes "speech" should be made in some form.

3) *The First Amendment protects much more than religious expression.* Reinforcing and undergirding the free speech and assembly protections is the additional First Amendment right (also applied to the States through the Fourteenth Amendment) to be free of regulation of the free exercise of religion. Associating with others who share one's religious faith or joining a group like CLS is typically a religious exercise for those individuals who do so. It cannot properly be targeted for discipline merely because CLS (or similar organizations) require their leaders and members to share the organizations' religious beliefs and standards of conduct.

It should be counterintuitive to accuse religious organizations of improper "religious discrimination." It is only *invidious* discrimination that is not constitutionally protected, and *religious* discrimination by *religious* organizations is, by definition, not invidious; rather, it is protected by both federal and state constitutions. Nondiscrimination policies proscribing discrimination on the basis of religion must be interpreted in light of the fact that such policies are intended to *protect* citizens when being religious, not to penalize them for being religious. A contrary "application of the nondiscrimination policy against faith-based groups undermines the very purpose of the nondiscrimination policy: protecting religious freedom." Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 914 (2009); *see also* Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, ch. 4 in Austin Surat, ed., *Legal Responses to Religious Practices in the United States* 194 (Cambridge Univ. Press 2012), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=2087599.

Moreover, it is basic religious liberty, not invidious discrimination, for religious organizations to require their leaders to agree with their religious beliefs. In its unanimous ruling in *Hosanna-Tabor*, the Supreme Court held that federal nondiscrimination laws did not outweigh the right of religious institutions to select their leaders. 132 S. Ct. at 710.

The free exercise of religion protects not only group exercises; it also reaches to individual actions and choices. This is at least implicitly acknowledged in the current Model Rules, which repeatedly recognize that a lawyer's decision whether to accept a representation is often a complex calculus involving moral and ethical judgments and enjoin attorneys to apply their moral judgments and consciences. For instance, the Model Rules' Preamble provides as follows:

> Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, *a lawyer is also guided by personal conscience* .... [¶ 7 (emphasis added).]
>
> ....
>
> Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to *the lawyer's own interest in remaining an ethical person* .... Such issues must be resolved through the exercise of sensitive professional and *moral* judgment . ... [¶ 9 (emphasis added).]
>
> ....
>
> The Rules [of Professional Conduct] do not, however, exhaust the *moral and ethical considerations that should inform a lawyer*, for no worthwhile human activity can be competently defined by legal rules. The Rules simply provide a framework for the *ethical* practice of law. [¶ 16 (emphasis added).]

The First Amendment protects both a lawyer's conscience and her putting it into operation in the practice of law. Legitimate differences of opinion exist in our country concerning issues of sexual conduct. Unsurprisingly, many attorneys' views regarding sexual conduct reflect their religious convictions. A lawyer should not be compelled to undertake a representation that would require her to advocate viewpoints or facilitate activities that violate her religious convictions. Neither should a lawyer be compelled to undertake a representation that she considers to be immoral, unethical, or contrary to the public interest. Any new rule and comment should make clear that a lawyer's individual choices based on her sincerely held religious beliefs are protected by the First Amendment and may not be punished by the government, acting through a state bar's disciplinary code. A lawyer's objections based on moral or ethical considerations should likewise be protected.

Any such constitutional limitation (or associated limitation based on other law) should be put in the text of the rule itself, rather than in the respective comment. As the Committee notes, a major impetus for the proposed rule's elevation of the anti-discriminatory text that appears in the present comment to a rule is that comments are not authoritative, but only provide guidance for interpretation. Mem. at 1. The protection of constitutional rights should be given the same dignity and, for the same reasons, should be included in the rule itself rather than relegated to the comment.

4) *The First Amendment protects rights of association and assembly.* The First Amendment's right of assembly has also been incorporated and applied to the States through the Fourteenth Amendment. *DeJonge v. Ore.*, 299 U.S. 353 (1937); *see also Thomas v. Collins*, 323 U.S. 516 (1945); *Hague v. CIO*, 307 U.S. 496 (1939); *Herndon v. Lowry*, 301 U.S. 242 (1937). This right includes both the right to assemble peaceably for political, religious, and other purposes (at least for non-commercial purposes, *see Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)), and the right not to define a group's leadership and membership. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *cf. NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958) (upholding right not to keep membership identities private). Indeed, the ABA's amicus brief in *Hague v. CIO* championing the right of assembly is widely regarded as one of the most influential briefs of the last century. *See* John D. Inazu, *Liberty's Refuge* 54-55 (Yale Univ. Press 2012).

5) *Additional federal and state protections for speech, free exercise, association, and assembly will be triggered by the proposed rule change.* Many state constitutions have broader protections than those in the federal constitution's First Amendment. Federal statutes such as the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* (2012), also provide broader protection of freedoms enumerated in the First Amendment than the amendment itself provides. *See generally Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). It obviously would not be appropriate for the rule to cover conduct protected by applicable laws or state constitutions, even if it were not protected by the federal constitution. Words or conduct so protected cannot be "professional misconduct" and cannot be made subject to a "balancing" against nondiscrimination purposes, but must be fully excepted from application of any rule adopted. Therefore, a reference only to "First Amendment" limitations is problematically narrow.

The Proposed Rule's Negative Impact on Attorneys' Fourteenth Amendment Rights

Disciplinary proceedings by State bars are state actions that affect the property and reputational/liberty interests of the attorney involved. *See In re R.M.J.*, 455 U.S. 191, 203-204 (1982); *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 238-39 (1957); *Doe v. DOJ*, 753 F.2d 1092, 1111-12 (D.C. Cir. 1985). Thus, the due process protections of the Fourteenth Amendment of the U.S. Constitution adhere to such proceedings, including the disciplinary rules themselves. *See* U.S. Const. amend. XIV § 1.

A disciplinary rule that "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Cramp v. Bd. of Pub. Instruction of Orange Cnty., Fla.*, 368 U.S. 278, 287 (1961). As the Supreme Court recently summarized:

> Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them

> so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317-18 (2012); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1082 (1991) (reasoning that a "vague" disciplinary rule "offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement") (O'Connor, J., concurring); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (when a "law interferes with the right of free speech or of association a more stringent vagueness test should apply"); *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (internal quotation marks omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Summary of Recommendations

Because the Committee has not demonstrated an empirical need for the proposed changes to the rule and comment, CLS recommends that no changes be made.

But if the proposed rule and comment are to be adopted, CLS recommends the following with regard to the draft Rule 8.4(g) and its associated draft comments:

- Add to the proposed rule explicit protection for lawyers' right to freedom of speech, assembly, expressive association, and exercise of religion, by adding the following: "except when such conduct is undertaken because of the lawyer's sincerely held religious beliefs, or is speech or conduct protected by the First Amendment or other applicable federal or state laws."

- Add to the proposed comment the following language: "Consistent with longstanding principles behind the Rules of Professional Conduct, declining representation based on religious, moral, or ethical considerations is not proscribed by this rule."

- Add to the proposed comment the following language to protect lawyers' freedom of speech, assembly, expressive association, and exercise of religion: "This rule does not apply to speech or conduct undertaken by a lawyer because of his or her sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment, including the rights of free speech, assembly, expressive association, press, and petition, or speech or conduct otherwise protected by applicable federal or state laws."

- Replace the proposed rule's language "in conduct related to the practice of law" with the current comment's language "in the course of representing a client."

- Add "knowingly" before "harass."

- Add to the proposed comment the following definition of the term "harass," as defined in the context of Title IX by the United States Supreme Court in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999): "The term 'harass' includes only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice."

- Add to the proposed rule that a lawyer violates the rule only "when such conduct is prejudicial to the administration of justice," as the current comment states.

- Retain the current comment's sentence, slightly modified to align with the proposed rule, "Legitimate advocacy respecting the listed factors in the rule does not violate paragraph (g)," while deleting from the proposed comment, for reasons explained in Part II.2.c. & e., *supra*, the sentence "Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation."

- Retain the current comment's use of the term "words and conduct," modifying it to "speech and conduct," as opposed to the proposed comment's use of the term "conduct."

With these changes, the proposed rule and comment would read as follows:

"(g) in the course of representing a client, knowingly harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, when such conduct is prejudicial to the administration of justice, except when such conduct is undertaken because of the lawyer's sincerely held religious beliefs, or is speech or conduct protected by the First Amendment or other applicable federal or state laws."

Comment

"[3] Paragraph (g) applies only to conduct in the course of representing a client. Consistent with longstanding principles behind the Rules of Professional Conduct, declining representation based on religious, moral, or ethical considerations is not proscribed by this rule. This rule does not apply to speech or conduct undertaken by a lawyer because of his or her sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment, including the rights of free speech, assembly, expressive association, press, and petition, or speech or conduct otherwise

protected by applicable federal or state laws. Legitimate advocacy respecting the listed factors in the rule does not violate paragraph (g). The term "harass" includes only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice."

Thank you for your consideration of our concerns and suggested modifications to proposed Rule 8.4(g) and its associated draft comment.

Respectfully submitted,

/s/ David Nammo

David Nammo
CEO & Executive Director
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, Virginia 22151
(703) 642-1070
dnammo@clsnet.org