IN THE SUPREME COURT OF THE STATE OF MONTANA

AF 09-0688

IN RE: PROPOSED CHANGES TO MONTANA RULE OF PROFESSIONAL CONDUCT 8.4

Joint Comment Regarding Proposed Changes To Montana Rule of Professional Conduct 8.4

The undersigned Montana licensed attorneys hereby respectfully submit this Joint Comment regarding proposed changes to Rule 8.4 of the Montana Rules of Professional Conduct as set forth in the October 26, 2016 Order of the Supreme Court of the State of Montana.

I. The Current Rule and Proposed Amendments

A. The Current Rule

The current Rule 8.4 of the Montana Rules of Professional Conduct ("Rules") provides that "*It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct*

or other law; or (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable code of judicial conduct or other law."

B. The Proposed Amendment *

The amendment under consideration would amend Montana Rule 8.4 by adding an entirely new subsection (g), which would read:

> *It is professional misconduct for a lawyer to: . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.*

*(Because the Court's Order does not state that the Court is considering adopting any of the Model Comments – Comments [3], [4], or [5] – to the new Model Rule 8.4(g), we are assuming that such Comments are not under consideration and will not be used or referred to in interpreting or applying Model Rule 8.4(g) in Montana.)

There are several reasons why the signers of this Comment object to the Committee's proposed amendments to Rule 8.4 of the Montana Rules of Professional Conduct. These reasons are discussed below.

II. <u>The Objections</u>

A. The Proposed Amendment Is Unconstitutional.

1. **The Proposed Amendment is Unconstitutionally Vague:** It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Grayned*, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned*, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned*, supra, at 109.

The language of the proposed Rule 8.4(g) violates all these principles.

(a) The Term "Harass" is Unconstitutionally Vague. The proposed amendment prohibits attorneys from *harassing* anyone on the basis of one of the protected classes. But the term "harass" is not defined in the proposed Rule, is subject to varied interpretations, and no standard is provided to determine whether conduct is or is not harassing.

Does expressing disagreement with someone's religious beliefs constitute

harassment based on the basis of religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment?

Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996)(holding that the term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague). See also *Are Stalking Laws Unconstitutionally Vague Or Overbroad*, 88 Nw. U. L. Rev. 769, 782 (1994)(the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass.").

In short, because the term "harass" is so vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid inadvertently violating the Rule.

(b) The Term "Discriminate" is Unconstitutionally Vague. It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it's also true that such statutes and ordinances do not – as does the proposed Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what

specific behavior constitutes discrimination.

For example, Title VII does not merely provide that it shall be an unlawful employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that "*It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin.*" 42 U.S.C. § 2000e-2.

Likewise, the federal Fair Housing Act does not simply provide that one may not discriminate in housing based on race, color, religion, familial status, or national origin. It provides a description of what, specifically, is being prohibited: "[I]*t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations*

regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604. And the Act provides precise definitions of important terms used in the Act, such as "*dwelling*," "*person*," "*to rent*," and "*familial status*." 42 U.S.C. § 3602.

Unlike other non-discrimination enactments, however, the amendment proposed here simply states that "*It is professional misconduct for a lawyer to: . . . (g) 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 in conduct related to the practice of law*" – leaving to the attorney's imagination what sorts of behavior might be encompassed in that proscription.

Indeed, a reference to the Model Comments [3], [4], and [5] to the Model Rule 8.4(g) – which Montana is not considering adopting – illustrates the overbreadth problem. Model Comment [3] states that the term "discrimination" in the new Rule includes "*harmful* verbal or physical conduct that *manifests bias or prejudice towards others*" and that the term "harassment" includes "*derogatory or demeaning* verbal or physical conduct." It does not take a constitutional scholar to recognize that "harmful verbal conduct" and "derogatory or demeaning verbal conduct" sweep into their maw speech that is clearly constitutionally protected.

(c) The Phrase "conduct related to the practice of law" is Unconstitutionally Vague. Whereas the current Rule applies only to attorney conduct while the attorney is representing a client – a relatively narrow and reasonably determinable aspect of a

lawyer's activities – the new Rule applies to any conduct of an attorney that is in any way "*related to the practice of law.*" What conduct is related to the practice of law and what conduct is unrelated to the practice of law, however, is vague and not easily or readily determinable.

For example, does the phrase include activities – including employment decisions – made in the management or operation of a law practice? Does it include an attorney's bar association activities? How about a lawyer's social activities – such as comments made by an attorney while attending a birthday celebration for a law firm co-worker; or a statement made by an attorney at a cocktail party the attorney is attending, at least in part, in order to make connections that will hopefully result in future legal work; or comments an attorney makes while teaching a religious liberty class at the attorney's church?

Because no attorney, with any degree of certainty, can determine what behavior is or is not "related to the practice of law", the new Rule is unconstitutionally vague.

If attorneys face professional discipline for engaging in certain proscribed behavior, they are entitled to know precisely what behavior is being proscribed, and should not be left to guess what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the terms used, the proposed amendments are subject to constitutional challenge.

2. The Proposed Amendment is Unconstitutionally Overbroad.

Even if an enactment is otherwise clear and precise in what conduct it proscribes, the law

may nevertheless still be unconstitutionally overbroad if its reach prohibits constitutionally protected conduct. *Grayned*, supra, at 114.

It is clear that the Model Rule is not only unconstitutionally vague, it is also unconstitutionally overbroad because, although it may apply to attorney conduct that might be unprotected – such as conduct that actually prejudices the administration of justice or that would clearly render an attorney unfit to practice law – Model Rule 8.4(g) would also sweep within its orbit lawyer conduct that is clearly protected by the First Amendment, such as speech that might be offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit.

For that reason, the proposed new Rule is unconstitutionally overbroad and would not pass constitutional muster.

The signers of this Comment are not the only ones who recognize the constitutional infirmities of the proposed Rule.

When the ABA opened up the new Model Rule for comment, a total of 487 comments were filed – and of those 487 comments, *470 of them opposed* the new Rule, many on the grounds that the new Rule would be unconstitutional.

Indeed, the ABA's own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law Section, warned the ABA that the new Rule may violate attorneys' First Amendment speech rights.

And prominent legal scholars, such as UCLA constitutional law professor Eugene Volokh and former U. S. Attorney General Edwin Meese, III, have both opined that the new Rule is constitutionally infirm. Attorney General Meese wrote that the new Rule constitutes "*a*

clear and extraordinary threat to free speech and religious liberty" and "*an unprecedented violation of the First Amendment.*"

Further, the authors of at least two law review articles have noted that these sorts of professional Rules violate attorneys' First Amendment rights. See *Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge On Lawyers' First Amendment Rights,* Lindsey Keiser, 28 Geo. J. Legal Ethics 629(Summer 2015)(Rule violates attorneys' Free Speech rights) and *Attorney Association: Balancing Autonomy and Anti-Discrimination*, Dorothy Williams, 40 J. Leg. Prof. 271 (Spring 2016)(Rule violates attorneys' Free Association rights).

Further, in the few states that have already modified their Rule 8.4s in similar ways, such Rules are being enforced as clearly unconstitutional free-standing speech codes. See, for example, *In the Matter of Stacy L. Kelley*,9 925 N.E.2d 1279 (Indiana Supreme Court 2010), in which an Indiana attorney was professionally disciplined merely for asking someone if they were "gay"; and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Indiana 2010) in which an attorney had his license suspended for applying a racially derogatory term to himself.

Because the proposed Rule is unconstitutional – and will, if adopted, subject the state to costly federal litigation – Model Rule 8.4(g) should be rejected.

B. The Proposed Amendment Would, For The First Time, Sever The Rules From Any Legitimate Interests Of The Legal Profession.

The legal profession has a legitimate interest in proscribing attorney conduct that – if not proscribed – would either adversely affect an attorney's fitness to practice law or that would prejudice the administration of justice. Montana's current Rule 8.4 recognizes this principle by prohibiting attorneys from engaging in six types of conduct, all of which might either adversely

impact an attorney's fitness to practice law or would prejudice the administration of justice. Those types of conduct are:

(1) Violating the Rules of Professional Conduct;

(2) Committing criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(3) Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

(4) Engaging in conduct that is prejudicial to the administration of justice;

(5) Stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; and

(6) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The first proscribed conduct – violating the Professional Conduct Rules – is self-explanatory and obvious, since the Rules are enacted for the precise purpose of regulating the conduct of attorneys as attorneys. The Rules would hardly serve their purpose if an attorney's violation of them did not constitute professional misconduct.

The second and third proscriptions are targeted at attorney conduct which directly impacts the attorney's ability to be entrusted with the professional obligations with which all attorneys are entrusted – namely, to serve their clients and the legal system with honesty and trustworthiness. But– revealingly – those Rules do not proscribe conduct that, although perhaps not praiseworthy, does not warrant the conclusion that the attorney engaging in such conduct is unfit to practice law. Indeed, it is worth noting that Rule 8.4(b) does not even conclude that all *criminal* conduct is a violation of the Rules of Professional Conduct. Instead, the Rule

proscribes only criminal conduct "*that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.*" As current Comment [2] to Model Rule 8.4 explains: "*Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. . . Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category*" (our emphasis).

The fourth type of proscribed conduct is conduct that would prove prejudicial to the administration of justice. Historically, conduct falling within the parameters of this proscription has been limited to misconduct that would seriously interfere with the proper and efficient functioning of the judicial system. For example, the Supreme Court of Oregon analyzed this provision and determined that prejudice to the administration of justice referred to actual harm or injury to judicial proceedings. See, for example, *In re Complaint as to the Conduct of David R. Kluge*, 66 P.3d 492 (Or. 2003), which held that to establish a violation of this Rule it must be shown that the accused lawyer's conduct occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding. And in *In re Complaint as to the Conduct of Eric Haws*, 801 P.2d 818, 822-823 (Or. 1990), the court noted that the Rule encompasses attorney conduct such as failing to appear at trial; failing to appear at depositions; interfering with the orderly processing of court business, such as by bullying and threatening court personnel; filing appeals without client consent; repeated appearances in court while intoxicated; and permitting a non-lawyer to use a lawyer's name on pleadings. See also, *Iowa*

Supreme Court Attorney Disciplinary Board v. Wright, 758 N.W.2d 227, 230 (Iowa 2008)(Generally, acts that have been deemed prejudicial to the administration of justice have hampered the efficient and proper operation of the courts or of ancillary systems upon which the courts rely); *Rogers v. The Mississippi Bar*, 731 So.2d 1158,1170 (Miss. 1999)(For the most part this rule has been applied to those situations where an attorney's conduct has a prejudicial effect on a judicial proceeding or a matter directly related to a judicial proceeding); *In re Hopkins*, 677 A.2d 55, 60-61 (D.C.Ct.App. 1996)(In order to be prejudicial to the administration of justice, an attorney's conduct must (a) be improper, (b) bear directly upon the judicial process with respect to an identifiable case or tribunal, and (c) must taint the judicial process in more than a *de minimus* way, that is, at least potentially impact upon the process to a serious and adverse degree); and *In re Karavidas*, 999 N.E.2d 296, 315 (Ill. 2013)(In order for an attorney to be found guilty of having prejudiced the administration of justice, clear and convincing proof of actual prejudice to the administration of justice must be presented). Therefore, this provision, too, is directed at attorney conduct that exposes the judicial process itself to serious harm.

And the last two proscriptions in the current Rule 8.4 also target what is clearly attorney conduct that, if engaged in, would adversely affect the integral operation of the judicial system – namely (a) improperly influencing a government agency or official or (b) knowingly assisting a judge or judicial officer in conduct that violates the rules of judicial conduct or other law.

In short, Rule 8.4 has always – heretofore – been solely concerned with attorney conduct that might adversely affect an attorney's fitness to practice law or that seriously interferes with the proper and efficient operation of the judicial system.

The amendment now under consideration, however, would take Rule 8.4 in a completely new and different direction because, for the first time, the new Rule would subject attorneys to

discipline for engaging in conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system. Indeed, because the proposed new Rule would not require *any* showing that the proscribed conduct prejudice the administration of justice or that such conduct adversely affects the offending attorney's fitness to practice law, the Rule will constitute a free-floating non-discrimination provision – the only restriction on which will be that the conduct be "related to the practice of law."

To fully appreciate what this departure from the historic principles of attorney regulation will mean, we need only look to the two Indiana cases cited above - *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Indiana 2010) and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Indiana 2010). In neither case did the offending conduct have any demonstrable prejudicial effect on the administration of justice or render the attorneys unfit to practice law. It was deemed sufficient that the attorneys had simply used certain offensive language.

Strikingly, if the proposed new Rule is adopted, an attorney could actually engage in *criminal* conduct without violating the Rules (see, for example, *Formal Opinion Number 124 (Revised) – A Lawyer's Use of Marijuana* (October 19, 2015)(a lawyer's use of marijuana, which would constitute a federal crime, does not necessarily violate Colo.R.P.C. 8.4(b))), because Rule 8.4(b) only applies to a lawyer's "*criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*," but could be disciplined for gratuitously asking someone if they were "gay" or for uttering a racially derogatory term in a private conversation.

Such a dramatic departure from the historic regulation of attorney conduct should not be taken lightly. It would represent an entirely new and precedent-setting intrusion on attorneys'

professional autonomy, freedom of speech, and freedom of association.

Because the proposed amendment to Rule 8.4 constitutes an extreme and dangerous departure from the principles and purposes historically underlying Model Rule 8.4 and the legitimate interests of professional regulation, it should be rejected.

C. *The Proposed Amendment Will Invade The Historically Recognized Right And Duty Of Attorneys To Exercise Professional Autonomy In Choosing Whether To Engage In Legal Representation.*

The most important decision for any attorney – perhaps the greatest expression of a lawyer's professional and moral autonomy – is the decision whether to take a case, whether to decline a case, or whether to withdraw from representation once undertaken.

If the proposed amendment is adopted, however, attorneys will be subject to professional discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases – because, under the proposed Rule, attorneys will be affirmatively precluded from declining certain clients or cases. They will, in other words, be forced to take cases or clients they might have otherwise declined.

This is another grave departure from the professional principles historically enshrined in the Rules of Professional Conduct and its predecessors, which have, before now, always respected the attorney's freedom and professional autonomy when it comes to choosing who to represent and what cases to accept.

Although the Rules *have* placed restrictions on which clients attorneys may *not* represent (see, for example, Rule 1.7 which precludes attorneys from representing clients or cases in which

the attorney has a conflict of interest, and Rule 1.16(a) which requires attorneys to decline or withdraw from representation when representation would compromise the interests of the client), never before have the Rules required attorneys to *take* cases the attorney decides – for whatever reason – he or she does not want to take, or to represent clients the attorney decides – for whatever reason – he or she does not want to represent. (Although Rule 6.2 prohibits attorneys from seeking to avoid court appointed representation, the Rule allows attorneys to decline such appointments "for good cause" – including because the attorney finds the client or the client's cause repugnant.)

Indeed, up until now, the principle that attorneys were free to accept or decline clients or cases at will, for any or no reason, prevailed. See, for example, *Modern Legal Ethics*, Charles W. Wolfram, p. 573 (1986)("*a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.*").

There are, of course, good reasons why the profession has left to the attorney the professional decision as to which cases the attorney will accept and which the attorney will decline and which clients the attorney will or will not represent. The reasons underlying this historically longstanding respect for attorneys' professional autonomy are twofold.

First, the Rules themselves respect an attorney's personal ethics and moral conscience. See, for example, Rules Preamble [8] ("*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*"), and [10] ("*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 . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment . . .""), and [17]("*The Rules do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.*"). If a lawyer is required to accept a client or a case to which the attorney has a moral objection, the Rules would have the effect of forcing the attorney to violate his or her personal conscience. The Rules have never – until perhaps now – done so.

And second, the Rules impose upon attorneys a professional obligation to represent their clients zealously. *Palmer by Diacon v. Farmers Ins. Exchange*, 861 P.2d 895 (Montana 1993); *Sanders v. Ratelle*, 21 F.3d 1446, 1446 (9th Cir. 1994)(A lawyer's first duty is zealously to represent his or her client). A lawyer's ability to do that, however, would be compromised should the lawyer have personal or moral objections to a client or a client's case

In the same vein Rule 1.16(b)(4) recognizes that a lawyer may withdraw from representing a client (which, of course, would also mean a lawyer may decline in the first instance to accept a client) if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

And as noted above, although Rule 6.2 prohibits attorneys from seeking to avoid accepting cases that are appointed to them by judicial tribunals, the Rule explicitly recognizes that good cause to refuse such appointments includes the situation where the client or cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client (Rule 6.2(c)) – an acknowledgement in the Rules themselves that a lawyer's personal view of a client or a case can be expected to adversely affect the attorney's ability to provide zealous and effective representation.

To force an attorney to accept a client or case the attorney does not want, and then require

the attorney to provide zealous representation to that client, is both unfair to the attorney – because doing so places conflicting obligations upon the lawyer – and to the client, because every client deserves an attorney who is not subject to or influenced by any interests which may, directly or indirectly, adversely affect the lawyer's ability to zealously, impartially, and devotedly represent the client's best interests (see, for example, 1.7(a)(2), which prohibits an attorney from representing a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer).

It must be admitted that human nature is such that an attorney who – for whatever reason – has an aversion to a client or a case will not be able to represent that client or case as well as could an attorney who has no such aversion. For that reason, recognizing an attorney's unfettered freedom to choose which clients and cases to accept and which to decline serves the best interests of the client.

This is not only a self-evident principle, in conformance with universal human experience, but is also well attested in the lives of some of our greatest lawyers. For example, it was well known that Abraham Lincoln was not an effective lawyer unless he had a personal belief in the justice of the case he was representing. "Fellow lawyers testified that Mr. Lincoln needed to believe in a case to be effective." An Honest Calling: The Law Practice of Abraham Lincoln, Mark A. Steiner, Northern Illinois University Press (2006).

Indeed, as noted above, the Rules themselves recognize this principle in that Rule 6.2(c) itself recognizes that a client or cause that is repugnant to the attorney may impair the lawyer's ability to represent the client.

Should a gay attorney be forced to represent the Westboro Baptist Church? Should an African American attorney be forced to represent a member of the KKK? Should a Jewish

lawyer be forced to represent a neo-Nazi? And, if so, would these attorneys be able to provide zealous representation to these clients? To pose these questions is sufficient to answer them, in the negative. And yet that is exactly what the proposed amendment would do.

(Some will contend that the new Rule will not require an attorney to accept any client or case the attorney does not want to accept – pointing to the language of the new Rule that provides: "*This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.*" But Rule 1.16 does not even address the question of what clients or cases an attorney *may* decline. It only addresses the question of which clients and cases an attorney *must* decline. What Rule 1.16 addresses are three circumstances in which an attorney is *prohibited* from representing a client, namely: (a) if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, (b) the lawyer is discharged, or (c) the representation will result in violation of the Rules of Professional Conduct or other law. None of these has anything whatever to do with an attorney's decision not to represent a client *because the attorney does not want to represent the client*. It only addresses the opposite situation – namely, in what circumstances an attorney who otherwise *wants* to represent a client *may not* do so. So what might appear, to someone unfamiliar with Rule 1.16, to be some sort of safe harbor that would preserve an attorney's right to exercise his or her discretion to decline clients and cases, is no such thing.)

For these reasons, too, the Court should reject the proposed amendment.

D. The Proposed Amendment Conflicts With Other Professional Obligations and Rules of Professional Conduct.

Another significant problem with the proposed Rule is that it conflicts with other

professional obligations and Rules of Professional Conduct. For example:

1. Rule 1.7 Conflicts of Interest – Rule 1.7 provides that: "*(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or* ***by a personal interest of the lawyer***" (our emphasis).

And Restatement (Third) of the Law Governing Lawyers §125 (2000) clarifies that: "*A conflict under this Section need not be created by a financial interest. . . Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy beliefs*" (our emphasis).

So – on the one hand the new Rule appears to require an attorney to accept clients and cases, despite the fact that such clients or cases might run counter to the attorney's deeply held religious, philosophical, political, or public policy principles; while at the same time Rule 1.7 provides that accepting a client or a case – when the client or case runs counter to the attorney's beliefs – would violate Rule 1.7's Conflict of Interest prohibitions!

How is that conflict to be resolved?

2. Zealous Representation. Attorneys have a professional duty to represent their clients zealously. *In the Matter of A.S., Youth in Need of Care*, 87 P.3d 408, 415 (Montana 2004); *Palmer v. Farmers Insurance Exchange*, 861 P.2d 895, 914 (Montana 1993)(an attorney in litigation is ethically bound to represent the client zealously); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994)(a lawyer's first duty is zealously to represent his or her client); *Watts v. McKinney*, 394 P.3d 710, 711 (9th Cir. 2005)(a lawyer must be zealous on behalf of his client).

"Zeal" means "*a strong feeling of interest and enthusiasm that makes someone very eager or determined to do something.*" Synonyms are "passion" and "fervor".

But how would an attorney be able to zealously represent a client whose case runs counter to the attorney's deeply held religious, political, philosophical, or public policy beliefs?

Under the proposed new Rule, the attorney may not be allowed to reject a case or client she might otherwise reject – due to the attorney's personal beliefs – but then must also represent that client with passion and fervor, enthusiastically and in an eager and determined manner.

Is that humanly possible? We would submit that it is not. And we believe that is exactly why the Rules provide that, if a lawyer cannot do that – for whatever reason – even a discriminatory one – they should not take the case.

How is that conflict to be resolved?

3. Rule 6.2 Accepting Appointments: Rule 6.2 provides that "*A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause: such as: . . . (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client*" (our emphasis).

Although this Rule is technically applicable only to court appointments, it's important to what we're discussing here because it contains a principle that should be equally – if not more – applicable to an attorney's voluntary client-selection decisions. Namely, the Rule recognizes that a client or cause may be so repugnant to a lawyer that the lawyer-client relationship would be impaired or the lawyer's ability to represent the client be adversely affected.

Indeed, Model Comment [1] to Rule 6.2 sets forth this general principle that "*A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.*"

Note that Rule 6.2 does not concern itself with WHY the attorney finds the client or cause repugnant – because that's irrelevant. The only relevant issue is whether the attorney – for *whatever* reason – cannot provide the client with zealous representation because the lawyer finds the client or cause repugnant. If not, the attorney must not – for the client's sake – take the case. Clients deserve that.

4. Rule 1.16: Declining or Terminating Representation.

Rule 1.16(a)(4) provides that: *(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the rules of professional conduct or other law* (our emphasis).

But we've already seen that Rule 1.7 would prohibit an attorney from representing a client who – due to the lawyer's personal beliefs – the lawyer could not represent without a personal conflict of interest interfering with that representation. To do so would constitute a violation of the Rules of Professional Conduct.

So, this Rule too is in conflict with the new Rule.

Which Rule is going to prevail when they conflict?

Indeed, the fact that the proposed Rule conflicts with other Professional Rules reveals and highlights a basic problem with the proposed Rule – and that is that the new proposed Rule is an attempt to impose upon the legal profession a non-discrimination construct that is, in its basic premises, inconsistent with who attorneys are and what they professionally do. It is an attempt to force a round peg into a square hole.

In considering the proposed non-discrimination Rule, we must remember that the non-

discrimination template is taken from the context of public accommodation laws – non-discrimination laws that are imposed in the context of merchants and customers – where a merchant sells a product or service to a customer who the merchant does not know and will probably never see again. A transient and impersonal commercial transaction.

But attorneys are not mere merchants, and clients are not mere customers.

Unlike mere merchants – who usually have only distant impersonal commercial relationships with their customers – attorneys have *fiduciary relationships* with their clients.

Attorneys are made privy to the most confidential of their client's information, and are bound to protect those confidentialities. That's not true between a merchant and a customer.

Attorneys are bound to take no action that would harm their clients. That is not true between a merchant and a customer.

And an attorney's relationship with his or her clients is often a long-term relationship, oftentimes lasting months, or even years. That is rarely true between a merchant and a customer.

And once an attorney is in an attorney-client relationship, unlike a merchant the attorney oftentimes may not unilaterally sever that relationship.

So it's one thing to say a *merchant* may not pick and choose his *customers*. It's entirely another to say a *lawyer* may not pick and choose her *clients*.

No lawyer should be required – for any reason – to enter into what is, by definition, a fiduciary, and what could turn out to be a long-term, relationship with a client the attorney does not want – whatever the reason.

Because the effect of adopting the new Model Rule 8.4(g) would be to impose professional obligations upon lawyers that conflict with other professional rules, and that are incompatible with the very nature of the attorney-client relationship, the Court should reject the

new Model Rule.

E. The Proposed Amendment Will Harm Clients

A primary purpose of the Rules is to protect the public, by ensuring that attorneys represent their clients competently and without personal interests that will adversely affect the attorney's ability to provide undivided and zealous representation. It recognizes the principle that the client's best interest is never to have an attorney who – for any reason – cannot zealously represent them or who has a personal conflict of interest with the client.

The proposed new Rule, however, will force attorneys to represent clients who the attorneys cannot represent zealously or who, on account of the attorney's personal beliefs about the client or the case, will not be able to represent without a personal conflict of interest.

Indeed, the new Rule, if adopted, would introduce insidious deception into the attorney-client relationship because the new Rule will force attorneys to conceal their personal animosities from clients, thereby saddling clients with attorneys who – if the client knew of the attorney's animosities – the client would not retain.

For these reasons the new Rule will harm clients and should be rejected.

F. There Is No Need For the Proposed Amendment Because Rule 8.4 Already Contains Provisions Sufficient To Address Discrimination.

Given the fact, as addressed above, that the only legitimate interest the bar has in proscribing attorney conduct is in proscribing conduct that either renders an attorney unfit to practice law or that prejudices the administration of justice, the current Rules of Professional Conduct are already sufficient to address serious cases of harassment or discrimination.

First, Rule 8.4(d) already prohibits any and all attorney conduct that prejudices the administration of justice. As noted above, alleged harassment or discrimination that does not prejudice the administration of justice may be regrettable, but it is not a fit subject for professional discipline. So because the existing Rule 8.4(d) is already adequate to address all cases of attorney harassment or discrimination that prejudices the administration of justice, the proposed amended Rule is unnecessary.

Further, many of the circumstances the new proposed Rule 8.4(g) might address are already addressed by other laws. For example, to the extent the new proposed Rule addresses harassment or discrimination in the legal workplace, such behavior is already addressed in Title VII at the federal level as well as in the Montana Human Rights Act. And to the extent a law practice would be considered a public accommodation, discrimination in that context is covered by Section 49-2-304 of the Montana Human Rights Act as well as a myriad of local non-discrimination laws. And harassing and discriminatory judicial behavior is already addressed in Rule 2.3 of the Montana Code of Judicial Ethics. Therefore, the new Rule is unnecessary. Indeed, by creating another entirely new layer of non-discrimination rules on top of those that already exist outside the Code of Professional Conduct, the new Rule, if adopted, could actually subject attorneys to inconsistent obligations and results. (Indeed, some states have recognized the importance of this issue by (a) prohibiting only "unlawful" harassment or discrimination and (b) requiring that any claim against an attorney for unlawful discrimination be brought for adjudication before a tribunal other than a disciplinary tribunal before being brought before a disciplinary tribunal. See, for example, Illinois Rules of Professional Conduct Rule 8.4(j) and New York Rules of Professional Conduct Rule 8.4(g).)

For these reasons, too, the Court should reject Model Rule 8.4(g).

G. There Is No Demonstrated Need For The Proposed Amendment.

It is striking to note that there is little or no evidence that harassment or invidious discrimination actually exists to any significant degree in the legal profession in Montana – or that, if it does exist, it is such a serious and widespread problem that the Rules must be amended, and attorneys' professional and constitutional rights infringed, to address it.

Where *is* the evidence that the legal profession in Montana is so rife with harassment and invidious discrimination that the Rules of Professional Conduct simply *must* be amended to address the problem?

Those who would support this effort to amend Rule 8.4 would have to believe that – despite the lack of any actual evidence that attorneys are, in fact, pervasively engaged in invidious harassment and discrimination, many of their fellow lawyers are so vile and depraved that, unless the professional disciplinary authorities are armed with a new precedent-setting tool enabling them to encroach upon the sanctity of all lawyers' professional autonomy, not to mention their personal consciences and constitutional rights, dictating to attorneys who they must represent and which cases they must accept and disciplining them for using politically incorrect speech – lawyers, on the whole, cannot be trusted to behave honorably. We, who join this Comment, have greater respect for and confidence in our fellow members of the Montana legal profession. And we take it upon ourselves – perhaps a bit presumptuously – to speak on their behalf.

There is no demonstrated need for the proposed amendment to Rule 8.4 – and the effort to enshrine this amendment in the Rules is a personal insult to members of the Montana legal

profession. It is the equivalent of using a sledge hammer to swat a gnat. And – perhaps most disturbing of all – by enacting this amendment, the Montana legal profession would be forging its own chains.

H. The Proposed Amendment Will Have Adverse Unintended Consequences

1. The Rule Will Create The Concept of Illegitimate Advice And Advocacy

The new Rule provides that "*This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.*" Of course, if there is "legitimate advice and advocacy" there must also be "illegitimate advice and advocacy." Which advice and advocacy is legitimate and which is illegitimate is not defined, leaving it up to the attorney to guess – at her peril – whether her advice or advocacy will be considered legitimate or illegitimate. All the attorney will know is that there is some sorts of advice and advocacy which the disciplinary authorities may deem "illegitimate" and which will subject the attorney to professional discipline.

2. The Rule Will Prohibit Attorneys From Making Client Selection Decisions Based Upon Whether The Prospective Client Can Pay For The Attorney's Services.

The new Rule prohibits attorneys from discriminating against anyone – in conduct related to the practice of law – on the basis of the person's socioeconomic status. Since a person's ability to pay for legal services is dependent upon their socioeconomic status, a literal reading of the Rule would lead to the conclusion that an attorney would be in violation of the Rule should the attorney refuse to provide services to a prospective client solely on the basis that the client – due to the client's socioeconomic status – could not pay the lawyer's fee.

3. A Trial Judge's Finding That Peremptory Challenges Were Exercised On A Discriminatory Basis Would Establish A Violation Of The New Rule.

The new Rule prohibits attorneys from discriminating against anyone – in conduct related to the practice of law – on the basis of one of the protected classes. Therefore, should an attorney make jury selection decisions that may be found by the trial judge to be discriminatory on the basis of one of the protected characteristics, the attorney could be found to have violated the Rule and be subject to professional discipline.

III. Conclusion

For all the foregoing reasons, the signers of this Joint Comment respectfully request this Honorable Court to reject the proposed amendment to Rule 8.4 of the Montana Rules of Professional Conduct.

Respectfully submitted,

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