ORIGINAL

Henning, Keedy & Lee, P.L.L.C.
Attorneys at Law

Eastside Brick
723 5th Ave. East, Ste. 100, Kalispell, MT 59901

December 8, 2016

*Lee C. Henning, P.C.**
*Kay Lynn Lee, P.C.***
Rebecca Henning-Rutz, P.C.
James T. McCormack

**Also Admitted in Utah*
***Also Admitted in California*

Sandra M. Ko, Paralegal
Melinda R. Cole, Paralegal
Keirsten L. Giles, Paralegal

Telephone (406) 752-7122
Fax (406) 752-3367
e-mail: becky@GrizzlyLaw.com

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

Via Fax 406-444-5705

Re: Professional Rules of Conduct, Rule 8.4(g)

Dear Honorable Members of the Court,

You have called for public comment of the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As a member of the State Bar of Montana, I hereby submit my request that you reject this rule for the following reasons.[1]

I believe that the proposed rule negatively impacts attorneys generally. Apparently, the proposed rule seeks to inject and advance a specific philosophy of social justice where the typical Rules of Professional Conduct are grounded in more objective ethical philosophies i.e.

[1]Much of the discussion in this letter was taken from David Nammo's (CEO & Executive Director Christian Legal Society) letter to the ABA dated March 10, 2016, attached. Mr. Nammo's letter was written addressing the prior drafts of the proposed ABA model rule, and thus it is not, in its entirety applicable to Montana's proposed 8.4(g). Additionally, I am not a member of the Christian Legal Society for various reasons – including philosophical differences with them. That being said, I found Mr. Nammo's letter well-reasoned and I agree to a large extent with much of what he argued there.

discrimination of a protected class is too vague. Rather than make any "harassment" or "discrimination" based on an objective standard, this modifier seems to signal a subjective standard for harassment or discrimination.

Furthermore, the proposed rule's phrase "conduct related to the practice of law," is too vague. Many lawyers serve on boards of religious institutions and many lawyers who attend churches are asked to advise their church regarding various issues. For example, I know of one Montana lawyer who was asked to advise his former church regarding bilaws and policies regarding same-sex marriages. These types of things seem to be "conduct related to the practice of law" and "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." (Exhibit A).

Montana's Rules of Professional Conduct's Preamble specify that, "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).] The Rules acknowledge that, "[v]irtually 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 . . . . [¶ 9 (emphasis added).] Furthermore, "The Rules 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. [¶ 17 (emphasis added).]. In light of these stated purposes of the Rules and the obvious practical conflicts the proposed rule raises, I request that the proposed rule be rejected outright. If not, I strongly suggest that the proposed rule (and comment) be 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

"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 this letter and the suggested modifications to proposed Rule 8.4(g) and its associated comment.

Yours truly,

HENNING, KEEDY & LEE, P.L.L.C.

By Rebecca Henning-Rutz

RJH/

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

---

[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

ORIGINAL

Henning, Keedy & Lee, P.L.L.C.

Attorneys at Law

Eastside Brick
723 5th Ave. East, Ste. 100, Kalispell, MT 59901

*Lee C. Henning, P.C.**
*Kay Lynn Lee, P.C.***
Rebecca Henning-Rutz, P.C.
James T. McCormack

**Also Admitted in Utah*
***Also Admitted in California*

Sandra M. Ko, Paralegal
Melinda R. Cole, Paralegal
Keirsten L. Giles, Paralegal

Telephone (406) 752-7122
Fax (406) 752-3367
e-mail: lee@GrizzlyLaw.com

December 8, 2016

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

FILED

DEC 08 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Via Fax 406-444-5705

Re: Professional Rules of Conduct, Rule 8.4(g)

Dear Honorable Members of the Court,

You have called for public comment of the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As a member of the State Bar of Montana, I hereby submit my request that you reject this rule for the following reasons.[1]

I believe that the proposed rule negatively impacts attorneys generally and so I request that this Court reject the proposed rule. I likewise adopt the views expressed by Rebecca Henning-Rutz in her letter of today's date – what follows, is her letter, in its' entirety below:

---

[1]Much of the discussion in this letter was taken from David Nammo's (CEO & Executive Director Christian Legal Society) letter to the ABA dated March 10, 2016, attached. Mr. Nammo's letter was written addressing the prior drafts of the proposed ABA model rule, and thus it is not, in its entirety applicable to Montana's proposed 8.4(g). Additionally, I am not a member of the Christian Legal Society for various reasons – including philosophical differences with them. That being said, I found Mr. Nammo's letter well-reasoned and I agree to a large extent with much of what he argued there.

Apparently, the proposed rule seeks to inject and advance a specific philosophy of social justice where the typical Rules of Professional Conduct are grounded in more objective ethical philosophies i.e. client-protective rules, officer-of-the-court rules or profession-protective rules. As the ABA Memorandum of December 22, 2015, explained the ABA 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.").[2]

I wholeheartedly agree with Mr. Nammo's contention that, "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." (Exhibit A).

Likewise, the proposed rule seems to propose changes that will do more harm than good. Apparently, the ABA Committee did not provide documentation of the need for the proposed rule; however, the proposed rule seems to leave the door wide open to complaints against lawyers by job applicants, rejected clients, opposing parties etc.. Any disgruntled client could file a complaint with the bar just by claiming that a lawyer's conduct constituted what the lawyer "should know or reasonably know" is "harassment" or "discrimination" in one or more of the prohibited categories. Every baseless complaint is entertained, with immunity, by the state bar. These kinds of complaints portend to be a difficult "he-said/she-said," time-

---

[2]"The inherent integrity of people" is probably a typo, supposed to mean, perhaps, "the inherent equality of people," or "the inherent worth of people," or "the inherent dignity of people." If so, I agree with the principle that the inherent equality, dignity, and worth of every human being is worth upholding, and I note that it is a concept deeply rooted in Christianity; however, as set forth in this letter, I do not agree that the proposed change is the way to go about upholding inherent equality/dignity. Letter to ABA Ethics Committee March 10, 2016 Page 3 of 16.

consuming and possibly expensive morass to defend against (and, for the State Bar, to navigate to satisfactory conclusion).

Again, I believe Mr. Nammo was spot on when he stated to the ABA that, "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."

Another difficult and disconcerting thing about this proposed rule is it's inconsistencies with the existing Rules of Professional Conduct. Rule 6.2 of the current M.R.Pro.Res. provides that a lawyer may refuse representation for good cause i.e. representing a client would work unreasonable financial burden on the lawyer, or the client/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. How can I read both these rules in concert with each other? Am I now bound to accept representation of a client's difficult and complex hourly case regardless of whether the client is able to pay – because this would be discrimination based on socioeconomic status? Or, am I bound to represent a client or cause that directly flies in the face of my deeply held moral, religious, ethical, political beliefs? Are the standards of Rule 6.2 now limited to exclude any situation touching on one of the protected categories?

Again, I agree with Mr. Nammo's statement that, "[t]he 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."

The current M.R.Civ.Pro. 2.1 likewise gives lawyers the freedom to exercise "independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral ... social and political factors that may be relevant to the client's situation." How do I reconcile this to the proposed rule? I easily see a situation where my moral or political opinion and advice could be perceived as harassing or discriminating several of the protected categories – can I not rely on Rule 2.1, but instead be subject to discipline?

Again, I find advisable Mr. Nammo's suggestion that, if the proposed rule is adopted "the following language [be added] 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.'"

As I have intimated, the proposed rule negatively impacts attorney's First Amendment Rights. 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.

The term "harass" is vague. It is difficult in this day and age to describe to others my spiritual/religious beliefs because Christianity has become so politicized in the last few decades. I would call myself a "conservative" Christian – but to some that seems to denote a tendency to vote Republican, which is not accurate – I would call myself an "evangelical" Christian – but again, that seems to have political meanings in today's day and age. My deeply held beliefs about Jesus Christ, God and the Bible transcend these terms and are difficult to explain in this space, over this medium. Suffice it to say, I believe – as the Bible teaches – that all men are sinners.[3] Romans chapter 1 (among other places) provides quite an exhaustive list of sins and define any who commit them as "sinners." Many people – I believe – bristle and find "harassing" any person professing these definitions as authoritative or applying these definitions to them. Is it their perception that is "harassing"? If the conversation turns to these philosophical, religious matters in a client meeting – as they sometimes do – and I speak openly of my deeply held religious beliefs, am I subject to discipline for harassment?

Indeed, the spongy "harassment" should be defined – if the proposed rule is adopted. Again, I support Mr. Nemmo's suggestion, "[t]o 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

---

[3]More importantly, I believe that Jesus Christ's sacrifice on the cross to save sinners is universally available to every person who repents and turns to follow Jesus – as set forth in the rest of the book of Romans (among other biblical books). Again, when conversations turn to these matters in professional settings, I voice my beliefs – and again, might this be considered harassment by some under the proposed rule?

"harassment.'" (Exhibit A).

Furthermore, the term "reasonably should know," relating to harassment or discrimination of a protected class is too vague. Rather than make any "harassment" or "discrimination" based on an objective standard, this modifier seems to signal a subjective standard for harassment or discrimination.

Furthermore, the proposed rule's phrase "conduct related to the practice of law," is too vague. Many lawyers serve on boards of religious institutions and many lawyers who attend churches are asked to advise their church regarding various issues. For example, I know of one Montana lawyer who was asked to advise his former church regarding bilaws and policies regarding same-sex marriages. These types of things seem to be "conduct related to the practice of law" and "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." (Exhibit A).

Montana's Rules of Professional Conduct's Preamble specify that, "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).] The Rules acknowledge that, "[v]irtually 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 . . . . [¶ 9 (emphasis added).] Furthermore, "The Rules 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. [¶ 17 (emphasis added).]. In light of these stated purposes of the Rules and the obvious practical conflicts the proposed rule raises, I request that the proposed rule be rejected outright. If not, I strongly suggest that the proposed rule (and comment) be 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

"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 this letter and the suggested modifications to proposed Rule 8.4(g) and its associated comment.

Yours truly,
HENNING, KEEDY & LEE, P.L.L.C.

/s/ Lee Henning

By Lee Henning

ORIGINAL

December 5, 2016

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

Fax: 406-444-5705

Re: Professional Rules of Conduct – Rule 8.4(g)

Honorable Members of the Supreme Court of Montana.

Per your request for comment on the above referenced rule, I request that you reject this rule. While I am not a lawyer, it appears to me that there is attempt here to ignore the first amendment of the US Constitution concerning religious belief, freedom of expression and the State of Montana Constitution regarding religion. Government and small anti religion groups desire to tell citizens that their religious beliefs are wrong. This rule could force citizens whose religious rights are violated have no lawyers to represent them.

Thank you for your consideration.

John C. Cromwell
5517 Bonanza Pl
Missoula, MT 59808

ORIGINAL

Honorable Ed Smith:

I am writing to express my opposition to proposed rule change 8.4. This is a clear violation of freedom of speech!!

Please vote against this rule change!

Sincerely,
Terry Palagi
P.O. Box 1862
Malta, MT 59538

ORIGINAL

December 7, 2016

Judy Tankink
3620 9th Ave N
Great Falls, MT 59401

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

Re: Professional Rules of Conduct, Rule 8.4(g)

Honorable Members of the Court,

You have called for public comment of the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As a Christian citizen of the State of Montana, I hereby submit my request that you reject this rule for the following reasons.

This proposed rule infringes on the religious liberties of attorneys and judges who want to honor their faith. This is a great overreach of government intrusion and not only affects religious freedom, but freedom of speech as well.

I urge you to reject this proposed rule.

Signed,

Judy Tankink

FILED

DEC 08 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORIGINAL

December 7, 2016

Rudolf Tankink
3620 9th Ave N
Great Falls, MT 59401

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

Re: Professional Rules of Conduct, Rule 8.4(g)

Honorable Members of the Court,

You have called for public comment of the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As a Christian citizen of the State of Montana, I hereby submit my request that you reject this rule for the following reasons.

Rule 8.4(g) is in direct violation with the First Amendment to the Constitution of the United States which prohibits the making of any law respecting an establishment of religion, ensuring that there is no prohibition on the free exercise of religion and abridging the freedom of speech.

Please reject this proposed Rule 8.4(g) as it is unconstitutional.

Signed,

Rudolf Tankink

FILED

DEC 08 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORIGINAL

State of Montana

Blair Jones
District Judge

Hannah J. Scott, Law Clerk
Stacy Fortune, Court Reporter
Kathryn Stanley, Court Administrator

Big Horn County
Carbon County
Stillwater County

406-322-5406
Fax: 406-322-8429

DISTRICT COURT
22nd Judicial District
P.O. Box 1268
Columbus, MT 59019

December 8, 2016

FILED

DEC 08 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Montana Supreme Court
Room 323, Justice Building
215 North Sanders
P.O. Box 203003
Helena, MT 59620-3003

Re: Proposed Rule 8.4(g) of the Rules of Professional Conduct

Dear Chief Justice McGrath and Associate Justices of the Montana Supreme Court:

By this letter I wish to express my strong opposition to the adoption of proposed Rule 8.4(g) as part of the Montana Rules of Professional Conduct. In August 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, Model Rule 8.4(g), making it professional misconduct for a lawyer to knowingly engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics. Unfortunately, in adopting the rule, the ABA largely ignored over 450 comment letters, most opposed to the rule change. I am advised that the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee apparently dropped its opposition immediately prior to the August 8th vote.) Why the need for the rule change? The ABA did not justify the change to protect clients, the courts, the system of justice, or to protect the role of lawyers as officers of the court. Instead, the ABA stated:

> **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.** (See, ABA Standing Comm. on Ethics and Professional Responsibility, Memorandum: Draft Proposal to Amend Model Rule 8.4, (Dec. 22, 2015.)

The ABA wants to change the culture and it proposes to do so by chilling lawyers' expression of disfavored political, social, and religious viewpoints on various political, religious, and social issues. Lawyers have historically been advocates and leaders of political, social, and religious movements through the years, enduring much unpopularity for their courage. The civil rights movement is a classic example. This rule threatens to discipline a lawyer for his or her speech on the contentious issues of our time and should be rejected as a violation of freedom of speech, free exercise of religion, and freedom of political belief.

By expanding its coverage to include all "conduct related to the practice of law," the proposed rule 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment. We live in a time when the Bill of Rights is under assault from both the left and the right. In my view, our number one priority as judges is to protect individual rights from authoritarian abridgement at all levels. The proposed rule change is one such abridgment that I urge the Court to reject.

I was privileged to serve on the Commission on the Code of Judicial Conduct that drafted the 2009 Montana Code of Judicial Conduct for this Court's review and ultimate adoption. During deliberations on Rule 3.6 of the Code relative to affiliation with discriminatory organizations, the Commission recognized that a judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation. In our discussions, we noted that the Catholic Church, many evangelical protestant churches, the Mormon Church, and Muslim teachings have tenets of faith that some might allege to be discriminatory. Nevertheless, we came to a consensus that membership in such religious organizations as a lawful exercise of the freedom of religion is **not** a violation of Rule 3.6 because freedom of religion is a constitutionally protected activity. This consensus was codified as subsection (C) of Rule 3.6 and expressly approved by the Court.

I urge that this Court recognize that lawyers are not subject to a watered down version of constitutional rights. Please afford to lawyers the same religious freedom right afforded to judges under Rule 3.6(C).

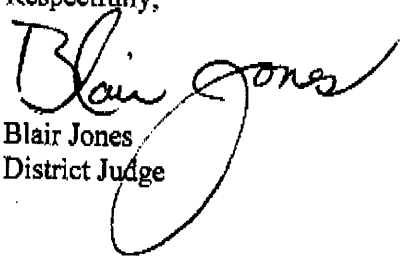
U.S. Supreme Court Justice William O. Douglas aptly stated:

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purposes when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

Have we now, in the name of altering the culture and avoiding dispute, abandoned the caution of a great jurist who valued freedom so greatly? The Court must reject Rule 8.4(g) and preserve to lawyers the right to advocate for and zealously support those persons or groups who

may currently be disfavored culturally, politically, religiously, or socially without fear of reprisal from a disciplinary body.

Respectfully,



Blair Jones
District Judge

Thomas J. Stusek
STUSEK LAW FIRM, P.C.
ATTORNEY AT LAW (LL.M.-TAX)
LICENSED REALTOR

2115 Durston Rd., Ste. 10
Bozeman, MT 59718
Tele: (406) 284-2152

2020 Grand Ave., Ste. 1
Billings, MT 59102
Cell: (406) 670-9770

ORIGINAL

December 7, 2016

Mr. Ed Smith, Clerk of the Montana Supreme Court
215 N. Sanders, Room 323
P. O. Box 203003
Helena, MT 59620-3003

FILED
DEC 08 2016
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

RE: Proposed Rule 8.4(g)

Dear Mr. Smith and Honorable Members of the Montana Supreme Court:

This letter is written to voice my opposition to the addition of Proposed Rule 8.4(g) to the Montana Rules of Professional Conduct. To my knowledge, the Montana Supreme Court has not identified any issues associated therewith that are not addressed by the existing Rules of Professional Conduct, as well as current state and federal laws prohibiting unlawful discrimination and harassment.

I have never been a member of the America Bar Association, as I perceive is to be an uber-liberal organization that is more interested in its idea of social justice and political correctness than in the welfare of the legal community. To my understanding proposed Rule 8.4(g) will include as actionable "professional misconduct" any

> "conduct that the lawyer knows or reasonable should know is harassment or discrimination 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."

From my perspective, this provision bears no relation to an attorney's professional and ethical competence, those area with which the rules of Professional Conduct assumedly should be concerned. Rather, in our hyper-sensitive, politically correct world, this rule would open the door to a whole new class of

grievances and adversarial complaints. Anyone who feels slighted in any way by an attorney, in any capacity "related to the practice of law" (over-broad), is going to want to harass that attorney with the filing of a ethics complaint. I recall not too long ago when we used to laugh at ourselves (ethnic jokes, etc.). Now, with ABA-initiated proposals such as this, we are creating a culture of hyper-sensitive victimization.

Bottom line, the proposed rule change is redundant and unnecessary; it may well lead to slew of ethics-related complaints which the Supreme Court will have to address. I'm sure the Court has better things to do.

Very truly yours,

Thomas J. Stusek

TJS/pas

ORIGINAL

Rolland W Karlin
P.O. Box 1113
.Big Timber, MT

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

Re: Professional Rules of Conduct, Rule 8.4(g)
Honorable Members of the Court,
You have called for public comment of the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As a concerned citizen, I hereby submit my request that you reject this rule for the following reasons. The reason for the rule change is the claim that it is discriminatory on the basis of sexual orientation or gender identity. The rule change in itself is discriminatory towards me a person of faith that believes in the traditional definition of marriage. Please consider the US Constitution's guarantee of religious freedom and freedom of speech. It is time to put the brakes on the political correct movement and its push to limit our freedoms
Signed,

Rolland W. Karlin

12/5/2016

Clerk of Montana Supreme Court
PO Box 203003
Helena, MT 59620-3003

ORIGINAL

FILED

DEC 08 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Re: Professional Rules of Conduct- Rule 8.4

Honorable Members of the Court, 12/1/16

In your order of October 26, 2016 regarding case number AF 09-0688 you have called for public comment on the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys.

As a concerned citizen of Montana, I would urge the Court to decline the adoption of this rule for the following reasons:

- **This rule is a threat to freedom of speech**

By the adoption of this rule Montana Lawyers will find their "verbal conduct" severely limited, even in social activities "in connection with the practice of law."[i] This limitation on free speech is a dangerous precedent. No one expects free speech to be abolished in one fell swoop. It may happen as small groups of citizens, particularly those with less access to public appeal, have their rights limited. This incremental erosion is of great concern. Who will be next? A threat to the freedom of speech for one class is a threat to the freedom of speech for all.

Most importantly, from my perspective, this rule does not allow for sincerely held religious beliefs. Such beliefs may lead a lawyer to speak against certain behaviors associated with a sexual orientation, gender identity or marital status, without acting in a discriminatory manner. Lawyers with such religious beliefs may, by those beliefs, voluntarily limit their clientele. The adoption of this rule, threatens their very livelihood on the basis of their speech. If they speak their beliefs they may be disciplined.

- **This rule is a threat to religious freedom.**

Montana lawyers may find themselves under the threat of discipline by associating themselves with religious organizations that hold certain behaviors, connected to a sexual orientation, gender identity or marital status, to be contrary to their belief system. This appears to be an overt threat to the religious freedom of Montana attorneys. In addition, this may bring about a chilling effect on access to legal advice if lawyers are reluctant to grant pro-bono work, or to sit on the governing boards of congregations or not-for-profit companies. The lack of access to such legal advice may create a serious threat to religious freedom in Montana.

- **This rule is a threat to the purpose of the court**

The ABA Committee on Ethics' Memorandum of December 22, 2015, explaining the purpose of the proposed rule change favorably quotes the sentiment that there is "a need for a cultural shift in understanding the inherent integrity of people..." In other words, the rule change was not proposed for the sake of protecting clients, for protecting attorneys, or for protecting the court. It was proposed because the American Bar Association felt the need to promote a cultural shift. This type of social engineering is clearly outside the auspices of the court. Such an expansion of the purpose of the court threatens the very fiber of the judicial estate. Once the court determines that

it is to be the arbiter of cultural values, instead of interpreting the law, it crosses a bridge that ends in the crumbling of the rule of law.

- **This rule is encourages of class warfare.**

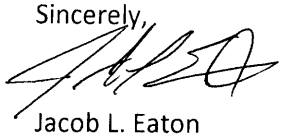
Comment 4 to Rule 8.4(g) says that "Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees..." If so interpreted, this rule will provide the foundation for exacerbating class warfare. The favored classes will enjoy the support of Montana attorneys. The disfavored classes will suffer.

- **This rule is defies common sense**

The final sentence of the proposed rule states, "This paragraph does not preclude legitimate advice or advocacy consistent with these rules." Since Rule 8.4(g) is included in "these rules," the effect of this sentence is, "Rule 8.4 does not preclude legitimate advice consistent with rule 8.4." Rules for the professional conduct of attorneys ought not to contain circular reasoning. What protection could that sentence possibly give to a Montana lawyer?

On the basis of the above reasoning I urge the court not to adopt the proposed change to Rule 8.4 of the Professional Rules of Conduct.

Sincerely,



Jacob L. Eaton
P.O. Box 81274
Billings, MT 59108

ORIGINAL

Re: Professional Rules of Conduct, Rule 8.4(g)

Honorable Members of the Court,
You have called for public comment of the proposed new Rule 8.4(g) of the professional Rules of Conduct for Montana Attorneys. As a concerned citizen, I hereby submit my request that you reject this rule for the following reasons, It infringes upon Freedom of Speech, Religious Freedom, and is an overreach of the government.

Signed,

Kyle D. Owens

FILED

DEC 08 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORIGINAL

200 Sunnyside
Plentywood, Mt. 59254
December 5, 2016

Re: Professional Rules of Conduct, Rule 8.4(g)

Honorable Members of the Court,

You have called for public comment of the proposed Rule 8.4(g) of the Professional Conduct for Montana Attorneys. As a concerned citizen, I hereby submit my request that you reject this rule for the following reason. This government overreach dimished our freedom of speech and religious freedoms, when it takes away our lawyer's freedom of speech.

Sincerely,
D L Pederson

CHAPEL OF HOPE
Assembly of God
2425 Hwy 87 E • Billings Mt 59101

ORIGINAL

Clerk of Montana Supreme Court
PO Box 203003
Helena, MT 59620-3003

December 6, 2016

FILED
DEC 08 2016
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Re: Professional Rules of Conduct- Rule 8.4

Honorable Members of the Court,

In your order of October 26, 2016 regarding case number AF 09-0688 you have called for public comment on the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. After reading the proposed new rule I am concerned at the possible ramifications.

I believe this rule is meant to protect and for that reason, and with those intentions, could have the appearance of good and right. However we must use caution in establishing any ruling that would protect, and at the same time, take away the protections afforded another. The right to free speech and religious liberties is foundational in our nation and government. That means people of all races, religions, persuasions and orientations are protected to say what they believe or think whether we agree or not.

With this in mind, it is my request that you decline the adoption of this rule. Thank you for seeking to protect the people you serve and I encourage you to continue to do so. I know your position certainly is a difficult one and the pressure you face extreme. I offer my prayers and appreciation as you work with diligence to do your part to keep America, "the land of the free and the home of the brave."

Sincerely,

Reverend Richard Grieve
Lead Pastor
Chapel of Hope
Billings, Montana

ORIGINAL

12/6/16

Re: Professional Rules of Conduct, Rule 8.4(g)

Honorable Members of the Court,

You have called for public comment of the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As a concerned citizen, I hereby submit my request that you reject this rule for the following reasons.
This is in opposition of my religious freedom. It is definitely government overreach. Finally, it cancels out my freedom of speech.

Signed,

WES KRIDONEN

ORIGINAL

Re: Professional Rules of Conduct, Rule 8.4(g)

Honorable Members of the Court,

You have called for public comment of the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As a concerned citizen, I hereby submit my request that you reject this rule for the following reasons.
This is in opposition of my religious freedom. It is definitely government overreach. Finally, it cancels out my freedom of speech.

Signed,

Mary Ellen Kivonen

ORIGINAL

Clerk of Montana Supreme Court
PO Box 203003 Helena, MT 59620-3003

FILED

DEC 08 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

12/6/2016
Re: Professional Rules of Conduct- Rule 8.4

Honorable Members of the Court,

In your order of October 26, 2016 regarding case number AF 09-0688 you have called for public comment on the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As a concerned citizen of the state of Montana, I hereby submit my request that you decline the adoption of this rule for the following four reasons.

This rule threatens the practice of Religious Freedom. Montana lawyers could come under the threat of discipline by associating themselves with religious organizations that consider certain behaviors; (connected to a sexual orientation, gender identity or marital status) to be considered sin according to what is clearly written in the scriptures, the Holy Bible. This would threaten to the religious freedom of Montana attorneys and could also affect access to legal advice, especially to Christians who believe the Bible. Adopting this rule may make lawyers reluctant to grant pro-bono work, or to sit on the governing boards of congregations or religious not-for-profit companies. The lack of access to such legal advice may create a serious threat to religious freedom in Montana, especially for Christians. People who hold sincere belief in God and the Bible do not merely exercise the practice of religious freedom by going to church on Sunday morning, but in everything they say and think and do each and every day. This is not an expression of hate toward fellow man as some would claim, but rather a love for God and his Truth in the Bible that has not changed, despite the changes in our culture and society about attitudes toward certain behaviors that remain classified as sin by God. God's laws are immutable; unlike man's laws, which necessitates the writing of this letter.

This rule will threaten Freedom of Speech. This rule does not allow for sincerely held religious beliefs. Such beliefs may lead a lawyer to speak against certain behaviors associated with a sexual orientation, gender identity or marital status, without acting in a discriminatory manner. This limitation on free speech is a dangerous precedent. This reminds me of writings by Martin Niemoller, a German pastor who was an outspoken public foe of Adolf Hitler. He is remembered for his poem, that starts "First they came for the Socialists and I did not speak out - because I was not a socialist…" and ends with "…Then they came for the Jews and I did not speak out -because I was not a Jew. Then they came for me – and there was no one left to speak for me." A threat to the freedom of speech for one group of people in our society is a threat to the freedom of speech for all. The adoption of this rule threatens the very livelihood of attorneys with religious beliefs on the basis of their speech. If they speak their beliefs according to what the Bible, the Word of God clearly states about certain behaviors, they may be disciplined. By the adoption of this rule lawyers practicing in Montana will find their "verbal conduct" severely limited, even in social activities "in connection with the practice of law."

This rule change threatens the Purpose of the Court. The ABA Committee on Ethics' Memorandum of December 22, 2015, explaining the purpose of the proposed rule change favorably quotes the sentiment that there is "a need for a cultural shift in understanding the inherent integrity of people…" In other words, the rule change was not proposed for the sake of protecting clients, for protecting attorneys, or for protecting the court. It was proposed because the American Bar Association felt the need to promote a cultural shift currently underway in our society. This type of social engineering is clearly outside the auspices of the court. Such an expansion of the purpose of the court threatens the very fiber of the judicial estate. Once the court determines that it is to be the arbiter of cultural values, instead of interpreting the law, it crosses a bridge that ends in the crumbling of the rule of law, and ultimately in the crumbling of the very foundation of our society as a whole.

This proposed rule change has a logic error. The final sentence of the proposed rule states, "This paragraph does not preclude legitimate advice or advocacy consistent with these rules." Since Rule 8.4(g) is included in "these rules," the effect of this sentence is, "Rule 8.4 does not preclude legitimate advice consistent with rule 8.4." Rules for the professional conduct of attorneys ought not to contain circular reasoning. What protection could that sentence possibly give to a Montana lawyer? This rule was obviously written by, who else? A lawyer! A lawyer who needs free speech protection and the freedom to practice religion as much as any of the rest of us. Secular humanism is equally regarded as a "religion" and belief system, and I would equally profess the need for the right for a humanist to act on his or her religious beliefs as well. Religious freedom is good for all of us, not just those who hold beliefs in accordance with the preferred religion of our current culture: humanism.

On the basis of the above reasoning I urge the court not to adopt the proposed change to Rule 8.4 of the Professional Rules of Conduct.

Sincerely,

Maureen Wallace
Laurel, MT

Dec. 6, 2016

ORIGINAL

FILED

DEC 08 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

MONTANA SUPREME COURT

I AM GREATLY CONCERNED ABOUT THE PROPOSED RULE TO DISBAR ANY LAWYER WHO WOULD EXPRESS HIS VIEWS CONTRARY TO THE POLITICALLY CORRECT VIEW SUPPORTING HOMOSEXUALITY. SUCH A RULE WOULD BE AN ABSOLUTE VIOLATION OF A LAWYER'S (OR ANYONE ELSES) FIRST AMENDMENT RIGHT OF FREEDOM OF SPEECH. WE CLAIM MANY OTHER PRACTICES OR VERBAL EXPRESSIONS ARE PROTECTED BY THE FIRST AMENDMENT, SUCH AS DESECRATING OUR FLAG AND YET HOMOSEXUALITY IS SINGLED OUT AS TOO SACROSANCT TO SPEAK AGAINST. IN MY VIEW THIS ANTI-DISCRIMINATION THING HAS GOTTEN TOTALLY OUT OF HAND. IN FACT THERE IS NO THING SUCH AS ANTI-DISCRIMINATION. BY SIDING WITH ONE GROUP ANOTHER GROUP IS DISCRIMINATED AGAINST. WHAT IT BOILS DOWN TO IS VARIOUS VIEWS OF MORALITY OR IMMORALITY AND THE GOVERNMENT DECIDING WHICH ONE IS ACCEPTED AND WHICH ONE IS NOT. THE FIRST AMENDMENT PROTECTS THE RIGHT TO EXPRESS

ANY VIEW, EVEN THOSE THAT ARE WRONG. WHEN GOVERNMENT PROTECTS ONE VIEW TO THE EXCLUSION OF OTHERS IT BECOMES TYRANNICAL. HOMOSEXUALITY IS FAR FROM A SETTLED ISSUE, NOR SHOULD IT BE. THE DEBATE SHOULD REMAIN OPEN.

FINALLY, YES I DO VIEW HOMOSEXUALITY FROM A BIBLICAL PERSPECTIVE AS IMMORAL. I AM NOT A MORAL RELATIVIST. I BELIEVE IN MORAL ABSOLUTES. THERE IS STILL A SUPREME JUDGE WHO CREATED US. WE ARE HIS. HE DELIGHTS IN US AND HE PROVIDED A MANUAL FOR US TO LIVE BY TO KEEP US FROM SELF-DESTRUCTING. IT IS SUMMARIZED IN THE TEN COMMANDMENTS. THEY ARE SO SIMPLE AND YET PROFOUNDLY RIGHT THAT NO HONEST PERSON OR GOOD WILL COULD DISAGREE WITH THEM. INDEED THE IMPLEMENTATION OF THEM ENSURES OUR RIGHTS TO LIFE, LIBERTY, PROPERTY, AND THE PURSUTE OF HAPPINESS.

HOMOSEXUALITY IS DESTRUCTIVE, EMOTIONALLY, PHYSICALLY, AND SPIRITUALLY FOR THE INDIVIDUAL INVOLVED IN IT. AND IT IS DESTRUCTIVE TO SOCIETY IN GENERAL. THOSE INVOLVED IN IT ARE NOT TO BE HATED BUT RATHER HELPED OUT OF IT.

I REALLY BELIEVE THE ISSUE IS OUTSIDE THE COURT'S PREROGATIVE.

SINCERELY,
BRUCE HILL - WHITEWATER, MT.

ORIGINAL

Click here to read the full rule.

The Montana Supreme Court will decide on whether or not this rule is adopted. They are accepting public comments on this proposed rule change through December 9. That means there's no time to waste!

Sadly, the Clerk of the Supreme Court will not accept comments via e-mail. Your comments must be sent via regular mail and must be signed.

With a deadline of December 9 and snail mail the only option, if you choose to act, it must be quickly. The address for comments is:

Clerk of the Montana Supreme Court, P.O. Box 203003, Helena, MT 59620-3003. NOTE: IF you have access to a fax machine, fax is also acceptable. Fax: 406-444-5705

If enough Montanans speak out, we have hope of defending the religious freedom of everyone in the legal profession. Your comments could stop this rule. We urge you to act at once.

FILED
DEC 08 2016
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Here's a suggestion to get you started on your letter:

Re: Professional Rules of Conduct, Rule 8.4(g)
Honorable Members of the Court,
You have called for public comment of the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As a [concerned citizen] [pastor] [business owner] [Attorney], I hereby submit my request that you reject this rule for the following reasons.
[insert your statement here. Consider religious freedom, government overreach, freedom of speech or other points for your comments.]

Signed,

[Your Name]

America was founded on the principles and commandments of God's Holy Word, the Bible.
God created a man (Adam), and then a woman (Eve) to be his helpmeet.
Without the union of a male and female — where would we be?
Arlene Harvey

12/2/2016