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CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

December 8, 2016

Clerk of the Montana Supreme Court
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Via email (clerkofsupremecourt@mt.gov) and UPS Overnight

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

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

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. CLS's membership includes attorneys who practice in Montana, as well as a law student chapter at the University of Montana Alexander Blewett III School of Law.

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, the marginalized, and the 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.

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.

I. Proposed Rule 8.4(g) should not be adopted by the Montana Supreme Court.

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.[1] Unfortunately, in adopting the new model rule, the ABA largely ignored over 450 comment letters,[2] most opposed to the rule change. The ABA's own Standing Committee on Professional Discipline filed a comment letter[3] questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).

The ABA's new Model Rule 8.4(g) poses a serious threat to attorneys' First Amendment rights and should be rejected. If adopted, the proposed rule would have a chilling effect on attorneys' ability to engage in free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square.

Because no state has adopted ABA Model Rule 8.4(g), the proposed rule has no track record whatsoever. There is no empirical evidence to demonstrate a need in Montana for the adoption of the proposed rule. Nor does it solve a problem that is not already adequately addressed by application of current state disciplinary rules, including the rule that makes it misconduct for a lawyer to engage in conduct that prejudices the administration of justice. Indeed, the fact that Montana has not previously adopted either a similar rule or comment suggests that this is not an issue that needs to be addressed by a black-letter rule on professional conduct.

The ABA argues that twenty-four states and the District of Columbia have adopted black-letter rules dealing with "bias" issues.[4] All state black-letter rules are narrower in significant

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[1] Model Rule and its accompanying comments are in the attached Appendix 1. The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

[2] American Bar Association website, Comments to Model Rule 8.4, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.

[3] Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

[4] Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative,

ways than Model Rule 8.4(g)'s expansive scope. Examples of the differences between state black-letter rules and Model Rule 8.4(g)'s expansive scope include the following:

- Many states' black-letter rules apply only to *unlawful discrimination* and require that another tribunal find that an attorney has engaged in unlawful discrimination before the disciplinary process can be instigated;

- Many states limit their rules to "conduct in the course of representing a client," in contrast to Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law;"

- Many states require that the misconduct be prejudicial to the administration of justice, unlike Model Rule 8.4(g);

- Almost no state black-letter rule enumerates all eleven of Model Rule 8.4(g)'s protected characteristics;

- No black-letter rule utilizes Model Rule 8.4(g)'s "circular non-protection" for "legitimate advocacy . . . consistent with these rules."

A. Model Rule 8.4(g) operates as a speech code for attorneys.

There are many areas of concern with the new rule. Perhaps the most troubling is the likelihood that the new rule will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on various political, social, and religious issues. Because of the importance of lawyers as spokespersons and leaders in any political, social, or religious movement, a rule that threatens to discipline a lawyer for his or her speech on such issues should be rejected as a serious detriment to freedom of speech, free exercise of religion, and freedom of political belief in a diverse society that continually births movements for justice in a variety of contexts.

Two renowned constitutional scholars have written about their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. Professor Ronald Rotunda, who authored a treatise on American constitutional law,[5] also wrote the ABA's treatise

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July 16, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf. Twelve states have adopted a comment, but not a black-letter rule, while fourteen states have neither adopted a rule nor a comment addressing "bias" issues. The fact that Montana has not adopted a rule or a comment suggests that this is not an issue that needs to be addressed by a black-letter rule on professional conduct.

[5] Professor Rotunda is the well-known author of textbooks and treatises on constitutional law. See, *e.g.*, AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME I –

on legal ethics.[6] He explained in a piece for *The Wall Street Journal* entitled "The ABA Overrules the First Amendment"[7] that:

> In the case of rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.

Professor Rotunda also recently published an extensive critique of Model Rule 8.4(g), entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought,"[8] which is attached as Appendix 3 to this letter. His analysis is essential to understanding the threat the new rule poses to attorneys' freedom of speech.

Influential First Amendment scholar and editor of *The Washington Post*'s daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has likewise described the new rule as a speech code for lawyers, explaining:[9]

> Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

INSTITUTIONAL POWERS (West Academic Publishing, St. Paul, MN. 2016); AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME II – LIBERTIES (West Academic Publishing, St. Paul, MN. 2016); Principles of Constitutional Law (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).

[6] *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016).

[7] Ron Rotunda, "*The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech*," *The Wall Street Journal,* Aug. 16, 2016, http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.

[8] Ronald D. Rotunda, "*The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*," The Heritage Foundation, Oct. 6, 2016, http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf.

[9] Eugene Volokh, "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities*," The Washington Post, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

> Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."

The concerns of these two leading First Amendment scholars should raise a significant red flag regarding adoption of proposed Rule 8.4(g). The proposed rule would create a multitude of potential problems for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, or otherwise engage in public discussions of current political, social, and religious issues.

1. 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.

Proposed Rule 8.4(g) raises troubling new concerns for every attorney because it explicitly applies to all of an attorney's "conduct related to the practice of law." Comment [4] to ABA Model Rule 8.4(g) explicitly delineates Model Rule 8.4(g)'s extensive reach: "Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law, operating or managing a law firm or law practice; and participating in bar association, business *or social activities in connection with* the practice of law." (Emphasis supplied.)[10]

Note that Model Rule 8.4(g) greatly expands upon the predecessor Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 through July 2016. First, Model Rule 8.4(g) has an accompanying comment that makes clear that "conduct" encompasses "speech," when it states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others." Second, Model Rule 8.4(g) is much broader in scope than predecessor Comment [3], which applied only to conduct "in the course of representing a client."[11] Instead, the ABA's Model Rule 8.4(g) applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." As will be discussed below, this is a breathtaking expansion of the previous comment's scope. Third, predecessor Comment [3] applied only to "actions when prejudicial to the administration of justice." By deleting that

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[10] The October 27,3016, Order "In Re the Rules of Professional Conduct," AF 09-0688, speaks only of adopting proposed Rule 8.4(g) and does not mention the new Comments [3], [4], & [5] that were adopted by the ABA when it adopted Model Rule 8.4(g). Nonetheless, it seems reasonable to examine these Comments because it seems completely predictable that they will be given weight in future interpretation of proposed Rule 8.4(g), if it were adopted. These new comments are found in Appendix 1.

[11] Comment [3] to Model Rule 8.4(d) was in place from 1998-2016 and is found in the attached Appendix 2.

qualifying phrase, the new Rule 8.4(g) also greatly expands the reach of the rule into attorneys' lives.

Indeed, the substantive question becomes, what conduct does Rule 8.4(g) *not* reach? Virtually everything a lawyer does is "conduct related to the practice of law." Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Most likely, the rule includes all "business or social activities in connection with the practice of law" because there is no real way to delineate between the two. So much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

For example, activities likely to fall within the proposed Rule 8.4(g)'s scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds
- giving guest lectures at law school classes
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to non-profits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one's religious congregation
- serving one's alma mater college, if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving on the boards of fraternities or sororities
- volunteering with or working for political parties
- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues

Lest these examples seem unlikely, recall that the nationally acclaimed Atlanta fire chief, Chief Kelvin Cochran, lost his job in 2014 because he published a book based on lessons he taught his Sunday School class at his church, which included his traditional religious beliefs regarding sexual conduct and marriage. In moving testimony before a congressional committee this summer, former Chief Cochran described the racial harassment he experienced in the 1980s when he joined the Shreveport Fire Department. But as he notes, he was never fired for his race.

Instead, he was fired in 2014 for his religious beliefs. His testimony is a sober reminder that in America today people are losing their jobs because their religious beliefs are disfavored by some government entities.[12]

2. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their religious congregations, religious schools and colleges, and other religious ministries. Many lawyers sit on the boards of their religious congregations, religious schools and colleges, and other religious non-profit ministries. 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.

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." 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 who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not be disciplined for volunteer legal work she performs for her church or her alma mater.

The rule will do immense harm to the good work that many lawyers do for religious institutions. 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." Because proposed Rule 8.4(g) seems to prohibit lawyers providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyer's free speech and free exercise of religion when serving religious congregations and institutions.

3. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline. Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues. Of course, lawyers are asked to speak *because they are lawyers*. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

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[12] Chief Cochran's written statement, which was submitted to the House Committee on Oversight and Government Reform for its July 12, 2016, *Hearing on Religious Liberty and HR 2802, the First Amendment Defense Act*, can be read at https://oversight.house.gov/wp-content/uploads/2016/07/2016-07-12-Kelvin-Cochran-Testimony.pdf. His oral testimony can be watched at https://oversight.house.gov/hearing/religious-liberty-and-h-r-2802-the-first-amendment-defense-act-fada/ (beginning at 41:47 minutes).

Writing -- "Verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics, uses controversial words to make a point, or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar because that person perceives the speech as "manifest[ing] bias or prejudice towards others"? If so, public discourse and civil society will suffer from the ideological paralysis that proposed Rule 8.4(g) will impose on lawyers, who are often at the forefront of new movements and unpopular causes.

Speaking -- It would seem that all public speaking by lawyers on legal issues falls within proposed Rule 8.4(g)'s prohibition. But even if some public speaking were to fall inside the line of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? 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" or "gender identity" as a protected category in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in Model Rule 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

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. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, proposed Rule 8.4(g) chills attorneys' speech.

4. Attorneys' membership in religious, social, or political organizations may be subject to discipline. Proposed Rule 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. Last year, the California Supreme Court adopted a disciplinary rule that prohibits all California state judges from participating in Boy Scouts because of the organization's teaching 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.

Would proposed Rule 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would it subject lawyers to disciplinary action for belonging to political organizations

that advocate for laws that promote traditional values regarding sexual conduct and marriage? These are serious concerns that mitigate against adoption of proposed Rule 8.4(g).

Proposed Rule 8.4(g) raises additional 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 numerous other religious beliefs implicated by the proposed rule's strictures. For example, according to some government officials, 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 explained in a recent unanimous opinion:

> 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., 565 U.S. 171, ___, 132 S. Ct. 694, 710 (2012).

B. Proposed Rule 8.4(g) would institutionalize viewpoint discrimination against many lawyers' public speech on current political, religious, and social issues.

As seen in the ABA's Comment [4], Proposed Rule 8.4(g) explicitly protects some viewpoints over others by allowing lawyers to "engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations." Because "conduct" includes "verbal conduct," the proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not.

But that is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he 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). Proposed Rule 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, what speech or action does or does not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of conformity, uniformity, or orthodoxy.

Because enforcement of Rule 8.4(g) gives governmental actors unbridled discretion to determine which speech is permissible and which is impermissible, which speech "promote[s] diversity and inclusion" and which does not, the rule clearly countenances viewpoint discrimination based on governmental actors' subjective biases. Courts have recognized that giving any government official such unbridled discretion to suppress citizens' free speech is unconstitutional. See, e.g., *Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006).

C. A troubling gap exists between protected and unprotected speech under proposed Rule 8.4(g).

Proposed Rule 8.4(g) cursorily states that it "does not preclude legitimate advice or advocacy *consistent with these rules*." But the qualifying phrase "consistent with these rules" makes Rule 8.4(g) utterly circular. Like the proverbial dog chasing its tail, Rule 8.4(g) protects "legitimate advice or advocacy" only if it is "consistent with" Rule 8.4(g). Speech is permitted by Rule 8.4(g) if it is permitted by Rule 8.4(g).

This circularity itself compounds the threat proposed Rule 8.4(g) poses to attorneys' freedom of speech. The epitome of an unconstitutionally vague rule, Rule 8.4 violates the Fourteenth Amendment as well as the First Amendment. Again, who decides what speech is permissible? By what standards? It is not good for the profession or for a free society for lawyers to be potentially subject to disciplinary action every time they speak or write on a topic that may cause someone to disagree and file a disciplinary complaint to silence the attorney.

II. Significant Modifications Would Be Needed to Proposed Rule 8.4(g) Before Adoption.

A. Proposed Rule 8.4(g)'s serious problems must be remedied before further consideration.

Because an empirical need for its adoption has not been demonstrated, the Montana Supreme Court should not adopt Model Rule 8.4(g). But if efforts to adopt proposed Rule 8.4(g) were continued, several modifications would be essential in order to protect attorneys' First Amendment rights, including:

1. In the first sentence, delete "in conduct related to the practice of law" and substitute language from predecessor Comment [3], which applied, first, to conduct "in the course of representing a client" and, second, "when such conduct is prejudicial to the administration of justice."

2. Anchor the definitions of "discrimination" and "harassment," by adding the sentence: "The substantive law of antidiscrimination and anti-harassment statutes and case law determines the conduct to which paragraph (g) applies."

3. Include the Supreme Court's definition of "harassment" in order to avoid violating the First Amendment, by adding the following sentence: "The term 'harassment' shall be defined, in accordance with the United States Supreme Court's decision in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), as conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice."

4. Provide explicit protection for lawyers' freedoms of speech, assembly, expressive association, religious exercise, and press, by adding the following sentence: "This paragraph does not apply to speech or conduct undertaken by a lawyer because of sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment or applicable federal or state laws."

5. Modify the last sentence to read: "Advocacy respecting the foregoing factors does not violate this paragraph." Note that this modification deletes the modifier "legitimate," because it gives a government actor unconstitutional unbridled discretion to determine whether advocacy is "legitimate" or not "legitimate." Such unbridled discretion violates the First Amendment's prohibition on viewpoint discrimination, as well as the Fourteenth Amendment's prohibition on laws that are unconstitutionally vague. Similarly, the deletion of the phrase "consistent with these rules" eliminates the sentence's circularity, which is unconstitutional because it gives a government actor unbridled discretion in determining which advocacy is "consistent with these rules," and which is not. Again, this unbridled discretion violates the First Amendment's prohibition on viewpoint discrimination and the Fourteenth Amendment's prohibition on laws that are unconstitutionally vague.

With those modifications, the rule would read (additions underlined and deletions in brackets):

"It is professional misconduct for a lawyer to: . . .

"(g) engage in conduct, in the course of representing a client, that the lawyer knows or reasonably 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 when such conduct is prejudicial to the administration of justice [in conduct related to the practice of law]. This paragraph does not apply to speech or conduct undertaken by a lawyer because of sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment or applicable federal or state laws. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule1.16. Advocacy respecting the foregoing factors does not violate this

paragraph. [This paragraph does not preclude legitimate advice or advocacy consistent with these rules.] The substantive law of antidiscrimination and anti-harassment statues and case law determines the conduct to which paragraph (g) applies. The term "harassment" shall be defined in accordance with the United States Supreme Court's decision in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999), as conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice."

B. The ABA's new Comments accompanying Model Rule 8.4(g) are seriously flawed.

CLS does not recommend that the proposed Rule 8.4(g) include the ABA's new Comment [3], Comment [4], and Comment [5]. But if those comments were added, several additional modifications would be necessary, including:

1. In Comment [3], delete the sentence stating that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others." Several of these terms are unconstitutionally vague and give government actors unbridled discretion in enforcement of the rule. Specifically, what is the standard for determining what "verbal or physical conduct" is "harmful" or "manifests bias or prejudice"?

2 Comment [3] threatens attorneys' First Amendment rights because "verbal conduct" is simply another term for "speech." Therefore, delete the phrases "verbal conduct" and "derogatory or demeaning verbal conduct." By deleting these phrases, the current second, third, and fourth sentences are tightened to reduce redundancy and to avoid infringing on speech by focusing on prohibiting actual physical conduct. The three sentences are reduced to one sentence which reads: "Harassment includes sexual harassment, such as unwelcome sexual advances, requests for sexual favors, and other unwelcome physical conduct of a sexual nature."

3. Because the rule no longer applies to all "conduct related to the practice of law," delete the first sentence of Comment [4]. The phrase "conduct related to the practice of law" particularly threatens the First Amendment because Comment [4] had interpreted "conduct related to the practice of law" to include "participating in bar association, business or social activities in connection with the practice of law," making the rule applicable to most, if not all, that a lawyer does.

4. Delete the second sentence of Comment [4] because it violates the First Amendment's basic prohibition on viewpoint discrimination by stating 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 or sponsoring diverse law student organizations."

5. Delete "alone" from the first sentence in Comment [5] (which is now Comment [4]), so that an attorney is not subject to discipline for exercising peremptory challenges.

With these modifications, the Comments would read as follows:

"Comment [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. The term "harassment" is defined, in accordance with the United States Supreme Court's decision in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), as conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice. Harassment includes sexual harassment, such as unwelcome sexual advances, requests for sexual favors, and other unwelcome physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law determines the conduct to which paragraph (g) applies.[13]

"Comment [4] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b)."

Conclusion

Because proposed Rule 8.4(g) would have a chilling effect on attorneys' First Amendment rights, it should not be adopted. Attorneys must remain free to engage in speech, religious exercise, assembly, and expressive association in their workplaces and the public square.

Because no state has adopted ABA Model Rule 8.4(g), the proposed rule has no track record. There is no empirical evidence documenting that the Montana legal profession needs the proposed rule. Nor does the proposed rule solve a problem that is not already adequately addressed by application of current state disciplinary rules, including the rule that makes it misconduct for a lawyer to engage in conduct that prejudices the administration of justice. Indeed, the fact that Montana has not previously adopted such a rule or comment suggests that

[13] Most of Comment [3] would not be necessary if the proposed Rule 8.4(g) were modified as proposed in Part II.A.

this is not an issue that needs to be addressed by a new black-letter rule. For all of these reasons, we urge that proposed Model Rule 8.4(g) not be adopted.

Respectfully submitted,

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Appendix 1: ABA Model Rule 8.4(g) and comments adopted August 2016

On August 8, 2016, the ABA House of Delegates adopted new Model Rule 8.4(g) and three accompanying comments, which provide as follows:

It is professional misconduct for a lawyer to: . . .

(g) engage in conduct that the lawyer knows or reasonably 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. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.
Comment [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).
Comment [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.
Comment [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).

Appendix 2: Predecessor Comment [3] to Model Rule 8.4(d), 1998-2016

In 1998, the ABA adopted Comment [3] to Rule 8.4(d), which stated:

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

The Heritage Foundation

LEGAL MEMORANDUM

No. 191 | OCTOBER 6, 2016

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

Ronald D. Rotunda

Abstract

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

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

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

KEY POINTS

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

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

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

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

The New Rule 8.4(g)

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

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

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

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

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

> There *is a need for a cultural shift in understanding* the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the rules of professional conduct.[23]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reverse Discrimination

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

The rules are clear that the lawyer saying this, who is discriminating based on sexual orientation or gender identification, does not violate Rule 8.4(g). Comment 4 gives the lawyer a safe harbor: "Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations."

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

The Aftermath of the New Rule 8.4(g)

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

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

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

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

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

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

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

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

Conclusion

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

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

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