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December 8, 2016

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



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. I hereby submit my request that you decline the adoption of this rule for the following five reasons.

**1. 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." This limitation on free speech is a dangerous precedent. We have seen the consequences of political correctness on college campuses, where speakers are denied the ability to present unpopular opinions, and adult students require "safe spaces" to protect them from ideas with which they do not agree. Freedom of speech is necessary to a free society. Limiting the free speech of attorneys on the basis that the ABA has decided there needs to be a "cultural shift" is unreasonable. There is no compelling governmental interest that would require that attorneys, as a profession, not express their opinions regarding sexual orientation, gender identity, etc. Attorneys are not longer a highly respected group. Does this make limiting their speech valid? This incremental erosion is of great concern. What group 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, 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 state their beliefs they may be disciplined.

**2. 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 religious beliefs. 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 perform pro-bono work, or to sit on the governing boards of congregations or not-for-profit organizations. The lack of access to such legal advice may create a serious threat to religious freedom in Montana.

**3. 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.

**4. A Threat 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. A lawyer would face discipline if he were to say, "I will hire you because you are a white male." A lawyer would be free to say, "I will hire you because you are a lesbian."

**5. A Threat to 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,

Kathryn M. Kay

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December 8, 2016

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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Re: *Amendment to Rule 8.4*

Dear Mr. Smith:

I am writing concerning the Supreme Court's recent Order dated October 26, 2016, by which the Court asks for comments with respect to the adoption of a new paragraph (g) of Rule 8.4 of the Montana Rules of Professional Conduct. This proposed new rule relates to conduct of lawyers in connection with purported harassment or discrimination on the basis of race, sex, religion, and related topics.

This letter is to indicate my opposition to, and concern about, the adoption of this proposed amendment to Rule 8.4. The ABA has, in August of 2016, apparently adopted this new disciplinary rule, 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 protective characteristics which are defined in the rule. The adoption of this rule has already encountered substantial opposition from numerous sources. In a recent article entitled "*The Pitfalls in the New ABA Model Rule 8.4(g)*", the Rule was extensively discussed and critiqued. The article is dated October 6, 2016. While it is a little bit long, I am enclosing a copy of the article for the Court's review. The Court may already be aware of this article, but the article details with some specificity the issues, concerns and problems with respect to the proposed amendment to the Rule.

It is my concern that the adoption of this Rule would have an unnecessary, chilling effect on the speech and conduct of lawyers in their practice, and in their representation of churches, religious institutions and other organizations. This proposed Rule may well call into question representation

institutions and other organizations. This proposed Rule may well call into question representation by lawyers of these organizations and religious institutions.

The proposed Rule is, in my opinion, unnecessary and may subject lawyers to sanctions for unwitting ethical violations. Its adoption may seriously hamper lawyers in effective, constitutional advocacy for the rights of clients to protect their rights and interests. I urge the Court not to adopt Model Rule 8.4 (g).

Very truly yours,

LUINSTRA & YOUNG, PLLC

Greg A. Luinstra

GAL:mpl

Enclosure: As stated above

**The Pitfalls in the New ABA Model Rule 8.4(g)**
**October 6, 2016**

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 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).

Nonetheless, the new ABA Model Rule 8.4(g) poses serious concerns for attorneys' First Amendment rights and should be rejected for that reason, among its other serious problems. The fact that no state has adopted a rule as broad as ABA Model Rule 8.4(g) also counsels against its adoption. The rule creates new problems for lawyers without any track record in any state to show that the new rule solves any problem that is not already adequately addressed by application of current state disciplinary rules that universally make it misconduct for a lawyer to engage in conduct that prejudices the administration of justice.

**I. 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, religious, and social 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 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.

Concerns about the chilling effect of ABA Model Rule 8.4(g) have been expressed by two renowned constitutional scholars. Professor Ronald Rotunda, who has authored a treatise on

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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.

American constitutional law,[4] also wrote the ABA's treatise on legal ethics.[5] He explained in a piece for *The Wall Street Journal* entitled "The ABA Overrules the First Amendment"[6] 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 has just published a more extensive critique of Model Rule 8.4(g) entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought,"[7] which is essential to understanding the threat the new rule poses to attorneys' freedom of speech.

Influential First Amendment scholar and editor of a daily legal blog for *The Washington Post*, Professor Eugene Volokh of the UCLA School of Law, has similarly described the new rule as a speech code for lawyers, explaining:[8]

> 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.
>
> 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

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[4] 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 – 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).

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

[6] 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.

[7] 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.

[8] 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.

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, as well as other legal commentators, should raise a large red flag for those states considering whether to adopt ABA Model Rule 8.4(g). Without attempting to be comprehensive, the following points discuss some of the problems that the new rule creates 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.

### A. By expanding its coverage to include all "conduct related to the practice of law," Model Rule 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.

ABA Model 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 explicitly delineates the broad scope of MR 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.)

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, in at least three ways. 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 the predecessor Comment 3, which applied only to conduct "in the course of representing a client."[9] Instead, the new 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, former Comment 3 applied only to "actions when prejudicial to the administration of justice." By deleting that 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 both "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.

Activities that likely fall within Model Rule 8.4(g)'s scope include:

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

- teaching 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
- 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
- serving one's religious congregation
- serving one's alma mater college, if it is a religious institution of higher education
- serving religious ministries that serve prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving fraternities or sororities
- serving political parties
- serving social justice organizations
- other pro bono work that involves advocating controversial socioeconomic, religious, or other 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. His moving testimony before a congressional committee describes the racial harassment he experienced in the 1980s when he joined the Shreveport Fire Department and rose to become its first African American fire chief. But as he notes, he was never fired for his race. Instead, he was fired in 2014 for his religious beliefs. His testimony before a congressional committee is a somber reminder that in America today people are losing their jobs because their religious beliefs are in disfavor among some government officials.[10]

**1. 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 if Model Rule 8.4(g) were adopted.** Many lawyers sit on the boards of their churches, religious schools and colleges, and other religious non-profit ministries. 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.

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[10] 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).

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. 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 Model 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.

**2. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline if Model Rule 8.4(g) were adopted.** Of course, 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 the day. Lawyers are asked to speak *because they are lawyers*. Often lawyers' speaking engagements have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

**Writing** -- Furthermore, verbal conduct includes written communication as well. 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 our free civil society will suffer from the ideological paralysis that Rule 8.4(g) imposes 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 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 a state that lacks such a provision? Is the lawyer subject to discipline if she testifies before a state legislature or 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, Model Rule 8.4(g) chills attorneys' speech.

**3. Attorneys' membership in religious, social, or political organizations may be subject to discipline if Model Rule 8.4(g) were adopted:** Model 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. For example, last year, the California Supreme Court adopted a disciplinary rule that prohibited 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.

Does Model 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? Does it subject lawyers to disciplinary action for belonging to a political organization that advocates for laws that promote traditional values regarding sexual conduct and marriage? These are serious concerns that mitigate against adoption of Model Rule 8.4(g).

Model 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 found in a unanimous decision in 2012:

> 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. The proposed rule institutionalizes viewpoint discrimination against some lawyers' public speech on important current political, religious, and social issues.**

Model 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 rule impermissibly favors 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). Model Rule 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, what speech or actions do or do 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 (here state bar officials) 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. The proposed comment highlights a troubling gap between protected and unprotected speech under the proposed rule.

The legitimate concern about whether a lawyer's public speech falls inside or outside the parameters of "conduct related to the practice of law" highlights the circularity of Model Rule 8.4(g). This circularity itself compounds the threat Model Rule 8.4(g) poses to attorneys' freedom of speech.

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).

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 our 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.

## II. All State Black-Letter Rules Are Narrower in Significant Ways than Model Rule 8.4(g)'s Expansive Scope.

Twenty-three states and the District of Columbia have adopted black-letter rules dealing with "bias" issues.[11] Thirteen 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.

Each of these black-letter rules differs from ABA Model Rule 8.4(g) and is in some significant way narrower than that rule. Examples of the differences between state black-letter rules and Model Rule 8.4(g)'s expansive scope include –

- 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.

- Almost no state black-letter rule enumerates all eleven of the 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."

## III. Modifications are Essential If Model Rule 8.4(g) Is to Protect, rather than Violate, Attorneys' First Amendment Rights.

Because no demonstration of an empirical need for its adoption has been made, individual states should not adopt Model Rule 8.4(g). In the alternative, because Model Rule 8.4(g) fails to protect attorneys' First Amendment rights, several modifications would be crucial before its adoption.

### A. Twelve modifications are needed.

The necessary modifications include the following:

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[11] 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, July 16, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf

1. Modify the first sentence of the black-letter rule by deleting "in conduct related to the practice of law" and substituting a phrase and a clause from predecessor Comment 3, which applied to conduct "in the course of representing a client" and "when such conduct is prejudicial to the administration of justice." These changes would avoid the major problem of Model Rule 8.4(g) that creates substantial threats to First Amendment rights because of its overly broad application to all "conduct related to the practice of law."

2. Modify the first sentence by deleting "or reasonably should know" in order to discipline an attorney only when he or she has engaged in intentional misconduct, given the severe consequences that potentially attend a disciplinary charge.

3. Modify the black-letter rule to provide explicit protection for lawyers' freedoms of speech, assembly, expressive association, religious exercise, and press, by adding the following sentence as the second sentence of the black-letter rule: "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."

4. Modify the current second sentence of the black-letter rule by deleting "in accordance with Rule 1.16" so that the sentence, which would now be the third sentence, reads: "This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation."

5. Modify the black-letter rule's last sentence to read: "Advocacy respecting the foregoing factors does not violate this paragraph." Note that this modification deletes the adjective "legitimate," because it unconstitutionally gives a government actor unbridled discretion in determining which advocacy is "legitimate" and which is 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 that further threatens free speech. Such circularity is unconstitutional because it likewise 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.

6. Modify Comment 3 by providing that: "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."

7. Modify Comment 3 by deleting the sentence that states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others." Several of its terms are individually unconstitutionally vague and give a government actor unbridled discretion in enforcing the rule. What is the standard for determining what "verbal or physical conduct" is "harmful" or "manifests bias or prejudice"? Of course, the sentence also directly threatens attorneys' First Amendment rights because "verbal conduct" is simply another term for "speech."

8. Modify Comment 3 to delete the phrases "verbal conduct" and "derogatory or demeaning verbal conduct," which again are terms for speech and, therefore, a direct threat to attorneys' First Amendment rights. 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."

9. Modify Comment 3 by revising the last sentence to anchor discrimination and harassment in the current "substantive law of antidiscrimination and anti-harassment statutes and case law," so that it reads: "The substantive law of antidiscrimination and anti-harassment statutes and case law determines the conduct to which paragraph (g) applies."

10. The first sentence of Comment 4 should be deleted because the black-letter rule no longer applies to all "conduct related to the practice of law." As already noted, the overly broad scope of "conduct related to the practice of law" creates insurmountable First Amendment problems that are best resolved by its deletion and substituting "in the course of representing a client" and "when prejudicial to the administration of justice." The phrase "conduct related to the practice of law" was particularly a threat to 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," which would seem to cover all that a lawyer does.

11. The second sentence of Comment 4 should be deleted because it violates the First Amendment's basic prohibition on viewpoint discrimination by providing 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." Therefore, that sentence should be deleted.

12. Modify current Comment 5, which would become Comment 4, by deleting "alone" from the first sentence so that an attorney is not subject to discipline for exercising peremptory challenges.

**B. As modified, the black-letter rule and its comments would better protect attorneys' First Amendment rights.**

With the above modifications, the improved rule and its comments would provide:

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. Advocacy respecting the foregoing factors does not violate this paragraph. ~~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. 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. ~~Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others.~~ Harassment includes sexual harassment, such as ~~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 determines the conduct to which~~may guide application of~~ paragraph (g) applies.

~~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~~4] 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 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.

ORIGINAL

FILED

DEC 12 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

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

Honorable Members of the Court, 12/6/16

You have asked for public comment on the proposed new Rule 8.4(g) of the Professional Rules of Conduct for Montana Attorneys. As a Montana citizen and after having read the history of Rule 8.4(g), I am against it.

What I see is the American Bar Association (ABA) wanting to appear relevant, or accommodating, to some activists' sensibilities, but, in the process, it fails to acknowledge the existing professionalism of its members. There are common sense guidelines and then there are tortured applications to prevent something that itself becomes a burden through unintended consequences.

The ABA says the purpose of the proposed rule change is "a need for a cultural shift in understanding the inherent integrity of people..." What does the "inherent integrity of people" mean? I don't believe people have innate moral uprightness or strong moral principles. Doesn't the ABA mean dignity?

The rule change comes along because the ABA is a private, political entity of lawyers who often feel the need to accommodate a so called cultural shift. Of America's 1.3 million lawyers, only 400,000 — less than one-third — are ABA members. So, Model Rule 8.4(g) does not automatically carry any force of law, nor does it come close to representing the ethical or moral values of the country's attorneys.

Instead, Montana law licenses are issued by the Montana Supreme Court, which has its own ethics rules. However, most state ethics rules are either taken directly from ABA's Model Rules or, at the minimum, ABA rules are the starting point from which the states fashion their ethical requirements. This may be reasonable for states with older constitutions, but Montana's constitution was updated in the Constitutional Convention of 1971 and approved by citizens in 1972 and has language to cover the issues raised by 8.4(g).

Besides, this rush of social engineering is clearly outside the auspices of the court. Once the court determines that it is to be the arbiter of cultural values, instead of interpreting the law, the public is in the cross-hairs of subjective interpretation rather than the sanctity of the rule of law. Montana is a responsible state without the new rule. I haven't seen many people unable to respond to actions that are out of line and which protections are enumerated in our constitution. Certainly, this can be said of Montana lawyers and the legal profession.

As members of the Montana Supreme Court, you must have faith in your profession and those who practice law here. You don't need a new rule to test attorneys' moral conduct; Montana is

a place that self-governs well. Our professionals know how to argue sexual orientation, gender identity or marital status, without acting in a discriminatory manner even if it deals with personal beliefs. If a lawyer is out of line, he or she will hear about it. If your start picking away at the free speech cornerstone, you soon have all sorts of speech codes for all of us. No thanks.

If the new rule is adopted, should Montana lawyers be concerned about associating themselves with a religious organization? I am thinking of the Catholic Diocese of Helena's settlement with abuse victims dating back 60 years. Bishop George Thomas said it couldn't have been accomplished without good lawyers. But this new rule could put these attorneys at risk for representing a religious organization that has views contrary to their belief system.

The new rule, if adopted, would allow for any person who hears an attorney speak, sees what the attorney has written, or is even aware of where the attorney goes to church, can file a bar complaint with the you, putting the lawyers license in jeopardy. For what? An allegation!

Ultimately, even if a bar complaint fails to get a lawyer disbarred, lawyers accused of unethical conduct need to hire (and pay) an attorney who specializes in legal ethics and usually attend hearings before a disciplinary committee. All create public records, giving rise to an appearance of possible unethical conduct that can destroy a lawyer's reputation and career.

However, 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..." Here comes the class warfare – some benefitting at the expense of others. From this I assume a Montana lawyer would face discipline if he were to say, "I will hire you because you are a white male." But a lawyer would be free to say, "I will hire you because you are a lesbian."

Model Rule 8.4 violates every lawyer's First Amendment rights to free speech and freedom of religion. I urge the Montana Supreme Court not to adopt the proposed change to Rule 8.4(g) of the Professional Rules of Conduct.

Sincerely,

Cort Freeman

Cort Freeman
2950 Bayard Street
Butte, MT 59701

ORIGINAL

Clerk of Montana Supreme Court

PO Box 203003

Helena, MT 59620-3300

FILED

DEC 12 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

RE: Professional Rules of Conduct-Rule 8.4

Honorable members of the Court, 12/6/16

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. I hereby my request that you decline the adoption of this rule for the following reasons:

1. Verbal conduct will be severely limited. The limitation of 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. A threat to the freedom of speech for one class is a threat to the freedom of speech for all.
2. This is a threat to Religious freedom. The lack of access to such legal advice may create a serious threat to religious freedom in Montana.
3. This 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 favorable 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.
4. Comment 4 to Rule .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 employee..." 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. A lawyer would face discipline if he were to say, " I will hire you because you are a white male." A lawyer would be free to say, "I will hire you because you are a lesbian."
5. 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 possible 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,

Sharon O'Donnell

Sharon O'Donnell

Montana Citizen

202 15th Street West

Billings, MT 59102

ORIGINAL

December 8, 2016

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.

Current national surveys show that 80+% of those surveyed believe that marriage is between one man and one woman. Your proposed change to the Professional Rules of Conduct for Montana Attorneys denies this massive majority opinion and places Montana Attorneys who support the majority opinion in jeopardy.

Thank you for your consideration,

Larry S. Banister
102 Ironwood Place
Missoula, MT 59803

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

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:

There is no legal or logical reasoning to justify restricting the Constitutional Rights (First Amendment Right of Free Speech and Religion) of any group of Montanans to further the rights of another group of Montanans (Gender Identity or Sexual Orientation). You should be trying to ensure the rights of all groups are protected equally without infringing on another groups rights!

Signed,

Stoney Fugate
P.O. Box 457
Fortine, MT 59918

ORIGINAL

P.O. Box 122
Frenchtown, MT
59834

Clerk of Montana Supreme Ct. Dec. 7, 2016
P.O. Box 203003
Helena, MT 59620-3003

(to Justices)

Dear Sir.

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

As a concerned citizen, I am requesting that you repeal this rule.

Among other things, but specifically I believe it would be an infringement on mine and all citizen's freedom of religion

Please repeal.

Thank you.

Sincerely,

D. J. Wallison

12-7-16

ORIGINAL

To: Clerk of the Montana Supreme Court

Re: Public comment on Professional Rules of Conduct Rule 8.4(g) for Montana Attorneys

Please reject this unfair, discriminatory rule!

As a concerned citizen I implore you to see the foolishness of this proposed rule change. In a wonderful country that believes in freedom of religion (not freedom FROM religion!), the idea of this new rule being to quell discrimination of one group by discriminating against another, (decidedly larger but not as vocal or demanding) groups seems counter-productive nonsense.

The Bible tells us that in the end times right will become wrong and wrong become right. I pray that this "rule change" will not become a part of that!

Respectfully,

Julie Greig

471 Stageline Dr.

Superior MT 59872

P.S. Have a wonderful Christmas!

FILED

DEC 12 2016

Ed Smith

CLERK OF THE SUPREME COURT

STATE OF MONTANA

ORIGINAL

Katrina Rausch
210 Demers Lane
Polson, MT 59806
December 6th, 2016

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

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 private citizen I am requesting that you decline the adoption of this rule for the following reasons.

First of all it seems very similar to laws, guidelines, and policies that want to force pharmacists to dispense abortifacient drugs, doctors and nurse to participate in abortions, and bakers, florists and photographers to provide their services for homosexual weddings although all such actions are in opposition to their deeply held religious beliefs. Lawyers are at the forefront of helping to protect our freedom of speech and freedom of religion and yet this rules change will have a stifling effect of limiting what lawyers can say about their personal beliefs out of fear of reprisal or disciplinary actions. This could also result in limited 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 because of their religious stance on certain issues. The lack of access to such legal advice may create a serious threat to religious freedom in Montana.

Secondly this appears to be a speech code that is very similar to college campus speech codes that have been struck down as unconstitutional. The fact that this rule is designed to apply not only in bar association or business activities in connection with the practice of law, but also in "social activities" seems to strike right at the heart of freedom of speech. This limitation on free speech is a dangerous precedent. A threat to the freedom of speech for one class is a threat to the freedom of speech for all.

Thank you for the consideration of my concerns, and I again urge you to decline the adoption of this rule change.

Sincerely,

Katrina Rausch

Katrina Rausch

FILED

DEC 12 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

ORIGINAL



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

Re: Professional Rules of Conduct- Rule 8.4

12/8/2016

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 President of the Montana District of The Lutheran Church—Missouri Synod, representing 68 congregations within the state, I hereby submit my request that you decline the adoption of this rule for the following five reasons.

**1. A Threat to Freedom of Speech.**

By the adoption of this rule Montana Lawyers will find their "verbal conduct"[1] severely limited, even in social activities "in connection with the practice of law."[2] 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.

**2. 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.

**3. 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.

**4. A Threat 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. A lawyer would face discipline if he were to say, "I will hire you because you are a white male." A lawyer would be free to say, "I will hire you because you are a lesbian."

**5. A Threat to 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,

Whit Olds
Montana resident for 50 years
Hardworking Montanan like you
Father of 2 boys
Supporter of our independence as a state

Whit Olds
101 Passage Court
Missoula, MT 59803-3300

[1] From Comment [3] Whether the Montana Court adopts the comments attendant to Rule 8.4(g) is inconsequential. Montana Lawyers, seeking to interpret the rule will, as a matter of course, reference the comments of the ABA model rules.

[2] From Comment [4]

ORIGINAL

12-7-2016

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. Even to a lay person like myself, this seems like an obvious infringement on the 1st Amendment right to freedom of speech. Not very many years ago, there were a number of state constitutional amendments, voted by a majority of the citizens of these states, that actually supported the belief that marriage is defined as being between 1 man and 1 woman. The livelihoods, ability to make a living and freedom to have relationships counter to these rules were never affected. Those people were still free to do so, even if they could not enjoy the full benefits that marriage offers.

What is now being proposed with this new rule will in fact attempt to punish, damage and even remove the people that do not conform to this dangerous political agenda now set before you to consider. Lives and livelihoods will be greatly and unfairly affected, should this rule be adopted. We are a nation defined by our freedoms as well as our laws. Unjust rules/laws are the very tyranny our country formed to stand against. How obviously this stands out as a prejudice against people that have these convictions and beliefs as an attempt to silence and reduce them in the face of a relentless agenda that goes against one of our very basic freedoms.

I call on you to reject this prejudiced rule. It is a very clear issue of right and wrong in my eyes. We do not force liberal people to adopt our set of values or be punished and we would ask the same respect from their side of the isle. All people should be treated in fairness and without prejudice. We all need to step back and really allow people to work and live freely. People that aren't supported to continue work will not be hired to work anyway and the free markets should more dictate this than procedural rule.

Sincerely,

Justin Burt

Justin Burt
576 Wagner Lane
Kalispell, MT 59901
406-885-7453 cell
justinburt@yahoo.com

ORIGINAL

Clerk of the Montana Supreme Court

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

Honorable Members of the Court,

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

This rule would establish bias against religious freedom, freedom of speech and an aggressive overreach by the government of Montana.

Thank you for your consideration.

Joanne White
Kalispell, Montana

Joanne White

FILED

DEC 12 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

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

Re: Professional Rules of Conduct- Rule 8.4 December 7, 2016

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 committee on ethics proposes a rule change that will significantly restrict the freedom of speech for attorneys and their clients. Your opinion that there is "need for a cultural shift" is not something you can decide on without allowing citizens to vote. Attorneys and their clients who have religious convictions should not be subject to discrimination. This is a violation of their constitutional rights as Citizens.

Sincerely,

Debbie Chai

D. Chai
8204 Angus Cir.
Billings, MT.
59106

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

ORIGINAL

Re: Professional Rules of Conduct- Rule 8.4 December 7, 2016

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.

The committee on ethics proposes a rule change that will significantly restrict the freedom of speech for attorneys and their clients.

I am deeply concerned about how this rule will affect the freedom of speech and religion in our state. These freedoms are the bedrock of American Society.

Attorneys and their clients who have religious convictions should not be subject to discrimination.

I believe this is a violation of their constitutional rights as citizens!

Sincerely,

Carol Bergoust

Carol Bergoust

Carol Bergoust
8204 Angus Cir.
Billings, Mt.
59106

FILED

DEC 12 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

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 reason. I think this rule contradicts our religious freedom.

Thank you for considering this.

Signed,

Mary Kimm

Mary Kimm
84 Oscars Run
Manhattan, MT 59741-9413

ORIGINAL

Montana Supreme Court

December 5, 2016

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

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

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:

1- Our creator designed marriage to consist of one man and one woman
2- Our attorneys should be protected to uphold that which is right
3- We ahould be guaranteed the freedom of speech for what is right.

Respectfully,

Mary Marchesseault

Mary Marchesseault

... Marchesseault
P.O. Box 460510
Polaris,MT 59746

MKM MATOVICH KELLER MURPHY PC
ATTORNEYS AT LAW

ORIGINAL

Carey E. Matovich
Geoffrey R. Keller
Brooke B. Murphy
Katherine S. Huso
Emily Jones
Adrianna Potts
Ryan J. Gustafson
Talia G. Loucks

December 8, 2016

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 Responsibility**

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

As an attorney practicing in Billings and member in good standing of the Montana Bar Association, please accept my strong opposition to the adoption of proposed Rule 8.4(g) into the Montana Rules of Professional Conduct. The proposed Rule infringes on attorneys' First Amendment rights and should be rejected by the Court. I agree wholeheartedly with the comments of Judge Blair Jones in his opposition letter, a copy of which is attached as Exhibit A. Thank you for your consideration.

FILED

DEC 12 2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Very Truly Yours,

Emily Jones

EMILY JONES

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ORIGINAL

December 8, 2016

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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 Responsibility

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

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both the left and the right. 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). Justice William O. Douglas once famously 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? I urge the Court to reject Rule 8.4(g) and preserve to lawyers the right to advocate for and support zealously those persons or groups who may currently be disfavored culturally, religiously, politically, or socially without fear of reprisal from a disciplinary body.

Respectfully,

Blair Jones
District Judge

ORIGINAL

December 8, 2016



Supreme Court
Helena, MT 59601

Honorable Members of the Court:

I am writing to object to the amendment of the Montana's Rules of Professional Conduct by adding Rule 8.4(g). The proposed amendment states: "It is professional misconduct for a lawyer to 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."

The proposed amendment is broad, vague and arbitrary. For instance, what constitutes "harassment"? How, specifically, is "discrimination" defined? What does it mean to "know or reasonably should know" one is discriminating? In this turbulent time when many traditional values are in flux, there is no definitive standard for what is (and what isn't) discrimination. Though the proposed amendment has a ring of feel-good nobility, in practice it will do little to better the legal profession. Rather, it will serve only to divide and foment fear.

Each of us should know to temper our free speech with kindness, yet many of us fail and fail daily. That failure does not cost us our jobs. However, under the proposed amendment, if an attorney makes a statement or takes a stand that is perceived to be discriminatory (or harassment or a slur), it could cost that attorney her livelihood. By the same token, should we then require such standards of our doctors? Our teachers? Other paraprofessionals? We have laws in place in this country which protect citizens from discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status. And should an attorney's behavior rise to a criminal level of discrimination, Rule 8.4 (b) of the Rules of Professional Conduct already provides, to-wit: "It is professional misconduct for a lawyer to . . .(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Thus, proposed Rule 8.4 (g) is not only vague and ill-advised, it is duplicitous.

Rule 8.4(g) likewise has conceptual flaws: In this case, creating special protection for one class of individual necessarily impinges on the the liberties of another. The tired and obvious example would be a lawyer whose religious convictions (Muslim, Jewish or Christian) do not embrace same-sex marriage. Is that freedom of speech and religious expression trumped by a gay couple's right to not only be accepted but endorsed? In a similar vein, how can an attorney competently and diligently represent a client (Rules 1.1 and 1.3) in matters involving such hot-button topics as these? It would seem that zealous representation in such instances might imperil an attorney's license. The legal profession, among all others, should see the flawed logic of the proposed amendment.

Finally, the Montana Bar Association has a Commission on Practice. Should someone's conduct be so egregious as to "reflect adversely on a lawyer's honesty, trustworthiness or fitness to practice," it seems that capable body could be trusted with the determination. Did criminal discrimination in fact occur, or was it a matter of a conflicting viewpoints?

I urge the Court to use the Rules and resources already available to the legal profession in dealing with ethical breaches, including those pertaining to discrimination. Please do not amend the Rules of Professional Conduct to add Rule 8(g).

Respectfully submitted,

Kay Burt
30 Strawberry View Lane
Kalispell, MT 59901

ORIGINAL

STEVEN G. TULL

December 7, 2016

MT Supreme Court
Ed Smith, Clerk of the Supreme Court
Helena, MT 59620-2003

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

Dear Sir:

In our church, a congregant mentioned a concern over the possibility that Christian lawyers could lose their jobs for their stance on the Biblical idea of marriage being an institution between a man and a woman. Being someone who does not react to the every publicly stated and anger-laced opinion, I decided to do some research.

When I searched your website and saw the ruling and the request for public comment, I read through the proposed addition of paragraph 8.4(g) forbidding attorneys from acts of discrimination and harassment related to "race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status." Where does this place the attorney, who might hold to a Biblical concept of marriage?

Not being an attorney, I am not sure how this might surface in the daily legal activities for a Christian professional, or any other lawyer who might be an adherent to another faith. People of faith serve others no matter the person's station in life. Their moral mandate is to look out for the needs of others. The attorney does need to serve the legal needs of whomever might call upon him for a whole range of official needs.

If they hold to the spiritual and moral statute of marriage being the sole venue of a man and a woman, will they be placed in the position where they must violate their own moral conscience? Can they offer their counsel on personal matters without the fear of being accused of harassment?

An attorney can and should be able to offer her professional expertise and hold to her personal moral conscience, making her more empathetic. This suggested rule change creates an untried area of false challenges for lawyers. Is this rule change even needed? Has practice shown a need for an additional rule?

A concerned citizen,

Steve Tull

Mr. Steve Tull
PO Box 778
Superior, MT 59872

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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA