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DISTRICT COURT

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

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 Conduct

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

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

> **There is a need for a cultural shift in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the rules of professional conduct.** (See, ABA Standing Comm. on Ethics and Professional Responsibility, Memorandum: Draft Proposal to Amend Model Rule 8.4, (Dec. 22, 2015.)

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

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

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

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

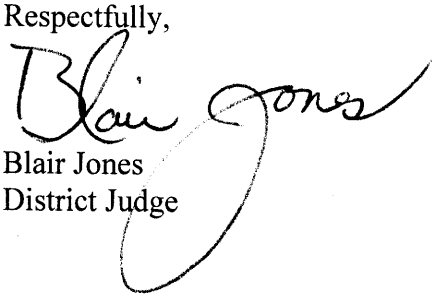
U.S. Supreme Court Justice William O. Douglas aptly stated:

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

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

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

Respectfully,



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