

**STATE OF MAINE
SUPREME JUDICIAL COURT**

**IN RE: PROPOSED AMENDMENT)
 TO THE MAINE RULES OF)
 PROF. CONDUCT - RULE 8.4(g))**

**Joint Comment Opposing Adoption of
Proposed New Rule of Professional Conduct 8.4(g)**

This Joint Comment, submitted by 17 Maine licensed attorneys, opposes Maine’s adoption of the newly proposed Rule 8.4(g), for the reasons set forth herein. As more fully explained, this proposed rule is not supported by any showing of necessity, seeks in reality to regulate thought and speech, violates Constitutional protections, and is more problematic than the flawed but narrower proposal recently apparently rejected by the Court.

I. The Rule

A. Maine’s Current Rule

Maine’s current Rule of Professional Conduct 8.4 provides as follows:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Maine Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or unlawful act that reflects adversely on the lawyer’s honest, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Maine Rules of Professional Conduct or other law; or

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

B. Proposed Maine Rule 8.4(g)

Proposed new Rule 8.4(g) would amend Maine Rule 8.4 by adding a new subsection (g) to read as follows:

It is professional misconduct for a lawyer to: . . . (g) engage in conduct or communication related to the practice of law that the lawyer knows or reasonable [sic] should know is harassment, or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity.

This is merely a somewhat shortened version of the new ABA Model Rule of Professional Conduct 8.4(g), which reads 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 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.¹

However, for all intents and purposes, the Rule being proposed in Maine is the ABA Model Rule, as the Advisory Committee makes clear when it states:

“Subsection (g) is added and is based on ABA Model Rule of Professional Conduct 8.4(g), with some modifications.” Namely, “[t]he Committee has omitted the final two sentences of the ABA Model Rule, not out of disagreement with their substance, but because they are unnecessary to the Rule text. . . . The Committee endorses the substance of those omitted sentences.”

Further, although the Advisory Committee is not proposing that the ABA Model Comments [3], [4], and [5] be formally adopted, because, as it says, “[h]istorically, the Maine Supreme Judicial Court has not adopted Comments when adopting amendments to the Rules of Professional Conduct,” the Advisory Committee does state that “Comments [3] through [5] to the ABA Model Rule provide much useful guidance in the application of Model Rule 8.49 (g).” Therefore, in order to appreciate how the ABA and the Maine Advisory Committee understand the proposed Rule, it is necessary to set out the ABA Model Comments guiding Model Rule 8.4(g), which 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. 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).*

II. Objections to the Proposed Maine Rule 8.4 (g)

A. *The Proposed Rule Is Unconstitutional.*

1. Attorney Speech is Constitutionally Protected

There is no question that citizens do not surrender their First Amendment speech rights when they become attorneys. *NAACP v. Button*, 371 U.S. 415 (1963) (“a State may not, under the guise of prohibiting professional

misconduct, ignore constitutional rights”). *See also Ramsey v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 771 S. W. 2d 116, 121 (Tenn. 1989) (an attorney’s statements that were disrespectful and in bad taste were nevertheless protected speech and use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney’s First Amendment rights. “[W]e must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights”); *Standing Committee on Discipline of U.S. Dist. Court for Central District of California v. Yagman*, 55 F. 3d 1430, 1444 (9th Cir. 1995) (the substantive evil must be extremely serious and the degree of imminence must be extremely high before an attorney’s utterances can be punished under the First Amendment).

Indeed, the ABA itself has acknowledged this very principle in an *amicus* brief it filed in the case of *Wollschlaeger, et al. v. Governor of the State of Florida, et al.*, 797 F. 3d 859 (11th Cir. 2015). In its brief the ABA denied that a law regulating speech should receive less scrutiny merely because it regulates “professional speech.” “*On the contrary*,” the ABA stated, “*much speech by . . . a lawyer . . . falls at the core of the First Amendment. The government should not, under the guise of regulating the profession, be permitted to silence a perceived ‘political agenda’ of which it disapproves. That is the central evil against which*

the First Amendment is designed to protect.” “Simply put,” the ABA stated, “states should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession . . . Indeed,” continued the ABA, “the Supreme Court has never recognized ‘professional speech’ as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created.”

In short, attorneys do not surrender their constitutional rights when they enter the legal profession, and the state may not ignore attorneys’ constitutional rights under the guise of professional regulation.

2. Many Authorities Have Expressed Concerns About The Constitutionality Of The ABA Model Rule, Which Concerns Are Likewise Presented by the Proposed Maine Rule.

Many authorities have pointed out the constitutional infirmities of ABA Model Rule 8.4(g).

When the ABA opened up the new Model Rule for comment, it received 481 comments, and of those 481 comments, 470 of them opposed the new Rule, many on the grounds that the new Rule would be unconstitutional.

Indeed, the ABA’s own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law

Section, initially warned the ABA that the new Rule may violate attorneys' First Amendment speech rights.

And prominent legal scholars, such as UCLA constitutional law professor Eugene Volokh and former U.S. Attorney General Edwin Meese, III, have opined that the new Rule is constitutionally infirm. "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities,*" Eugene Volokh, *The Washington Post*, August 10, 2016 and¹ Attorney General Meese wrote that the new Rule constitutes "*a clear and extraordinary threat to free speech and religious liberty*" and "*an unprecedented violation of the First Amendment.*"²

In addition, the authors of several law review articles have concluded that Model Rule 8.4(g) – like other professional anti-discrimination Rules – may violate attorneys' First Amendment rights. *See, e.g.,* Andrew F. Halaby and Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call For Scholarship*, 41 *J. LEGAL PROF.* 201, 2016-2017 (the new Model Rule 8.4(g) has due process and First Amendment free expression infirmities); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law,"* 30 *GEO. J. LEGAL ETHICS* 241 (2017)(Model Rule

¹ http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf.

² http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf

8.4(g) constitutes an unjustified incursion into constitutionally protected speech); Caleb C. Wolanek, *Discriminatory Lawyers In A Discriminatory Bar: Rule 8.4(G) Of The Model Rules Of Professional Responsibility*, 40 HARV. J. L. & PUB. POLICY 773 (June 2017)(Model Rule 8.4(g) goes too far and implicates the First Amendment). *See also* Lindsey Keiser, *Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge On Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629 (Summer 2015)(rule violates attorneys' Free Speech rights) and Dorothy Williams, *Attorney Association: Balancing Autonomy and Anti-Discrimination*, 40 J. LEG. PROF. 271 (Spring 2016) (rule violates attorneys' Free Association rights).

In fact, in several states that have already considered adopting the new Model Rule, important professional stakeholders have rejected it. The most recent example is our neighbor state, New Hampshire, in which the Civil Liberties Union of New Hampshire has urged its Supreme Court to reject the Model Rule. Letter of Devon Chaffee, Executive Director, ACLU of NH, May 31, 2018. Chaffee writes

“[T]he proposed rule, as currently drafted, is overbroad and could capture within its scope speech that is protected under the First Amendment . . . For example, [the rule] could potentially sweep within its scope a panelist at a state bar function or CLE conference engaging in ‘verbal . . . conduct’ that ‘manifests bias or prejudice’ toward LGBTQ individuals, Christians, women, or men. . . this is a potentially sweeping prohibition. As written, the rule could

also implicate advocacy by lawyers who represent religious organizations and who are giving advice based on that organization's faith, as one person's religious tenet could be another person's manifestation of bias. The subjective nature of the terms 'harassment' and 'discrimination' also creates the possibility for arbitrary and discriminatory enforcement."

The Illinois State Bar Association has taken an official position opposing the Rule; the Pennsylvania Supreme Court Disciplinary Board is opposing the Rule; the South Carolina Bar's Committee on Professional Responsibility opposed the Rule; the Louisiana District Attorneys Association is opposing the new Rule; the North Dakota Supreme Court Joint Commission on Attorney Standards has rejected the Rule; the Tennessee District Attorneys General Conference opposes the Rule; and the Memphis Bar Association Professionalism Committee voted unanimously to oppose the Rule.

The National Lawyers Association's Commission for the Protection of Constitutional Rights has issued a Statement that ABA Model Rule 8.4(g) would violate an attorney's free speech, free association, and free exercise rights under the First Amendment to the U.S. Constitution.³

In addition, the Montana legislature adopted a Joint Resolution – Montana Senate Resolution 15 – determining that it would be an unconstitutional act of legislation and violate the First Amendment rights of

³ <https://www.nla.org/nla-task-force-publishes-statement-on-new-aba-model-rule-8.4g/>

Montana citizens for the Supreme Court of Montana to enact ABA Model Rule 8.4(g).

Significantly, the Attorneys General of four States – Texas, South Carolina, Louisiana, and Tennessee – have also all issued official opinions that ABA Model Rule 8.4(g) is unconstitutionally vague and overbroad, and violates the free speech, free exercise of religion, and free association rights of attorneys. Opinion No. KP-0123, Attorney General of Texas, December 20, 2016; 14 SC AG Opinion, May 1, 2017; Opinion 17-0114, Attorney General of Louisiana, September 8, 2017; State of Tennessee Office of Attorney General, Opinion No. 18-11 (March 16, 2018). The Arizona Attorney General has stated that the Model Rule “raises significant constitutional concerns, including potential infringement of speech and association rights” and implicates attorneys’ First Amendment right to participate in expressive association. Attorney General’s Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court, R-17-0032 (May 21, 2018).

3. The Proposed Rule is Unconstitutionally Vague.

Due process requires that restrictive laws give people of ordinary intelligence fair notice of what is prohibited. And the lack of such notice in a law that regulates expression raises special First Amendment concerns

because of its obvious chilling effect on free speech. For that reason, courts apply a more stringent vagueness test when a regulation interferes with the right of free speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

Vague laws present several due process problems. First, such laws may trap the innocent by not providing fair warning. Second, vague laws delegate policy matters to state agents for enforcement on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. And, third, such laws lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

(a) The Term “Harassment” is Unconstitutionally Vague. The proposed Rule prohibits attorneys from engaging in “harassment” but the Rule does not define the term “harassment.” Thus, the term “harassment” is subject to multiple interpretations. It provides no standard by which an attorney can reasonably determine whether or not any particular speech or conduct might violate the Rule.

For example, can simply being offended by an attorney’s expressions constitute harassment? Might an attorney violate the Rule merely by sharing her religious beliefs with another attorney who finds such religious beliefs –

or their expression – offensive? Could an attorney’s body language – such as a dismissive hand gesture, a turning of one’s back, the shaking of one’s head, or a rolling of one’s eyes – constitute harassment?

In answering these questions, one should note that Comment [3] of the Model Rule states only that “The substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g).” In other words, such substantive law may – but need not – guide disciplinary authorities in applying the Rule. As a consequence, attorneys will not be able to rely on such substantive anti-discrimination and anti-harassment law in gauging whether or not their speech and behavior may violate the Rule.

Indeed, some courts have explicitly found that the term “harass” – in and of itself – is unconstitutionally vague. *Kansas v. Bryan*, 910 P. 2d 212 (Kan. 1996) (holding that the term “harasses,” without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague).

Because the term “harassment” as used in the proposed Rule is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of

Professional Conduct to enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid violating the Rule.

But it gets worse. Comment [3] to the Model Rule provides that harassment includes “*derogatory or demeaning verbal or physical conduct.*” And the Maine Advisory Committee adopts that approach, stating that “*Harassment’ as used in this Rule means derogatory or demeaning conduct or communication. . .*”

The terms “verbal conduct” and “communication” are, of course, simply substitutes designed to disguise the intent to regulate “speech.” So the proposed Rule prohibits attorneys from engaging in “derogatory” or “demeaning” speech - which raises First Amendment free speech issues. In fact, courts have found terms such as “derogatory” and “demeaning” unconstitutionally vague. *Hinton v. Devine*, 633 F. Supp. 1023 (E.D. Pa. 1986) (the term “derogatory” without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal. App. 4th 669 (Cal. App. 2012) (statute prohibiting statements that are “derogatory to the financial condition of a bank” is facially unconstitutional due to vagueness).

(b) The Term “Discrimination” is Unconstitutionally Vague. The term

“discrimination” is also unconstitutionally vague. That the Advisory Committee is inviting subjective application of the Rule is clear from its comment

The Committee considered the Legislature’s statement of anti-discrimination policy in the Maine’s (*sic*) Human Rights Act, 5 M.R.S. § 4552, as well as application of that Act, in coming to the Committee’s own conclusions on what to include or not include in a rule of attorney discipline.

Many proponents of the ABA Rule contend that the word “discrimination” is widely used and easily understood. And it is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it is also true that such statutes and ordinances do not merely prohibit “discrimination” and leave it at that, as does the proposed Maine Rule. Rather, they spell out what specific behavior constitutes discrimination.

Title VII, for example, specifies what sorts of acts constitute discrimination under the statute. 42 U.S.C. § 2000e-2. Similarly, the federal Fair Housing Act provides a detailed description of what, specifically, is prohibited discrimination under the Act. 42 U.S.C. § 3604.

But the proposed Maine Rule does not do that. It simply provides that it is professional misconduct for a lawyer to engage in conduct or communication that the lawyer knows or reasonably should know is

“discrimination” – leaving to the attorney’s speculation or the subjective view of third parties and disciplinary authorities what sorts of behavior might be encompassed in that proscription.

Model Comment [3] to the proposed Rule does not cure this defect. In fact, it makes matters worse, providing that the term “discrimination” includes “*harmful* verbal or physical conduct that *manifests bias or prejudice towards others.*” The term “harmful” – standing alone – is unconstitutionally vague because attorneys cannot determine with any degree of reasonable certainty what speech and conduct may be included or excluded from that category of speech or conduct. The word “harmful” simply means “causing or capable of causing harm.”⁴ And “harm” encompasses a wide range of injury, from “physical injury or mental damage” to “hurt” to “moral injury.”⁵ In other words, “harmful” speech can encompass an almost limitless range of allegedly injurious effects on others. For that reason, mental injury or damage, for example, could easily be interpreted to include real, imagined, or even feigned, emotional distress at being exposed to expression someone finds offensive.

It is also important to emphasize that speech does not lose its

⁴ <http://www.dictionary.com/brows/harmful>.

⁵ <http://www.dictionary.com/browse/harm>.

constitutional protection just because it is “harmful.” *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995) (the point of all speech protection is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (an interest in protecting bystanders from feeling offended or angry is not sufficient to justify a ban on expression); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (striking down a ban on picketing near embassies where the purpose was to protect the emotions of those who reacted to the picket signs’ message). *See also Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 791 (2011) (“new categories of unprotected speech may not be added to the list [of unprotected speech – such as obscenity, incitement, and fighting words] by a legislature that concludes certain speech is *too harmful* to be tolerated”)(Emphasis added).

The Supreme Court has stated that the idea that free speech protection should be subject to a balancing test that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test, is a “startling and dangerous” proposition.

Entertainment Merchants Ass’n, *supra*, at 792. *See also United States v. Stevens*,

559 U.S. 460, 470 (2010) (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it”).

(c) The Phrase “conduct related to the practice of law” is Unconstitutionally Vague.

Whereas the current Maine Rule 8.4(d) and Comment [3] apply only to attorney conduct while the attorney is representing a client, the new Rule applies to any conduct of an attorney “*related to the practice of law.*” What conduct is related to the practice of law and what conduct is unrelated to the practice of law, is vague and subject to reasonable dispute.

The Advisory Committee Comment, which again is not part of the Rule or authoritative, says

“Related to the practice of law” as used in the Rule means occurring in the course of representing clients; interacting with witnesses, coworkers, court personnel, lawyers and other while engaged in the practice of law, or operating or managing a law firm or law practice.

A close reading of this language shows it is not particularly helpful, and is unclear whether this statement is illustrative or exclusive. Something pretty far removed from an activity can be “related to” it, depending on one’s

sensibilities and perceptions. Upon a bit of reflection it can be seen this statement is devoid of any real meaning.

Model Comment [4] attempts to provide some guidance as to what the phrase “related to the practice of law” means. But the Comment’s definition is nearly limitless, including within it *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*. Further, the Comment’s list of conduct “related to the practice of law” is an explicitly non-exclusive list.

How, then, is an attorney supposed to determine with certainty what might or might not be “related to the practice of law”? Does the Rule include comments made by an attorney while attending a retirement party for a law firm co-worker; or comments an attorney makes while teaching a constitutional law class; or statements an attorney makes at a neighborhood holiday party, if one of the reasons the attorney is attending the party is to generate legal work for the attorney’s law firm? Can an attorney be disciplined for refusing to participate in a firm activity or event honoring LGBTQ diversity because participating would violate the attorney’s conscientiously held beliefs, religiously grounded or not?

Because one cannot, with any degree of reasonable certainty, determine what behavior of an attorney is not “related to the practice of law,” the proposed Rule is unconstitutionally vague.

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

Because of the vagueness of several of its essential terms, the proposed Rule is unconstitutional.

4. The Proposed Rule is Unconstitutionally Overbroad.

Even if a law is clear and precise, thereby avoiding a vagueness challenge, it may nevertheless be unconstitutionally overbroad if it prohibits constitutionally protected speech.

Overbroad laws like vague laws deter protected activity. The crucial question in determining whether a law is unconstitutionally overbroad is whether the law sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972).

Although some of the speech the proposed Rule prohibits might arguably be unprotected, such as speech that actually and substantially

prejudices the administration of justice or speech that would actually and clearly render an attorney unfit to practice law (see a discussion of this issue under subsection C below), the proposed Rule prohibits lawyer speech that is clearly protected by the First Amendment, such as speech that might be regarded as offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit to practice law. *DeJohn v. Temple University*, 537 F. 3d 301 (2008) (a University Policy on Sexual Harassment that prohibited “all forms of sexual harassment . . . , including expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment” was unconstitutionally overbroad on its face).

Therefore, because the proposed Rule will prohibit a broad swath of protected speech, the Rule is unconstitutionally overbroad.

As discussed above, speech is not unprotected merely because it is harmful, derogatory, demeaning, or even discriminatory or harassing. *Saxe v. State College Area School Dist.*, 240 F. 3d 200 (3rd Cir. 2001) (there is no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another’s race or national origin or that denigrate religious beliefs; harassing

or discriminatory speech implicate First Amendment protections; there is no categorical rule divesting “harassing” speech of First Amendment protection).

The Supreme Court has said offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995) (the point of all speech protection is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful). *See also Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Matal v. Tam*, 137 Sup.Ct. 1744 (2017) (the government’s attempt to prevent speech expressing ideas that offend strikes at the heart of the First Amendment).

American courts have found that terms such as “derogatory” and “demeaning” are unconstitutionally overbroad. *Hinton v. Devine, supra* (the term “derogatory information” is unconstitutionally overbroad); *Summit Bank v. Rogers, supra* (statute defining the offense of making or transmitting an untrue “derogatory” statement about a bank is unconstitutionally overbroad

because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech). *See also Saxe, supra* (school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional because it is overbroad).

The broad reach of the proposed Rule is well illustrated by the example that Senior Ethics Counsel Lisa Panahi and Ethics Counsel Ann Ching of the Arizona State Bar give in their article “Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g),” *Arizona Attorney*, January 2017, page 34. They state that an attorney could be professionally disciplined under the Rule for telling an offensive joke at a law firm dinner party. But that speech would clearly be constitutionally protected. The fact that such constitutionally protected speech would violate the Rule demonstrates that the proposed Rule is unconstitutionally overbroad.

Whether any attorney is actually disciplined under the proposed Rule for engaging in protected speech, the mere possibility that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers’ speech, which is precisely what the overbreadth doctrine is designed to prevent. For all the above reasons, the proposed Rule would not pass

constitutional muster.

5. The Proposed Rule Will Constitute An Unconstitutional Content-Based Speech Restriction.

By only proscribing speech that is derogatory, demeaning, or harmful toward members of certain designated classes, the proposed Rule will constitute an unconstitutional content-based speech restriction. *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2227 (2015) (Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed). *See also American Freedom Defense Initiative v. Metropolitan Transp. Authority*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

Indeed, the Supreme Court recently reiterated this principle in a case that is directly relevant when considering the constitutional infirmities of the proposed Rule. In *Matal v. Tam, supra*, the Court found that a Lanham Act provision prohibiting the registration of trademarks that may “disparage” or bring a person “into contempt or disrepute” to be *facially* unconstitutional, because such a disparagement provision, even when applied to a racially

derogatory term, “. . . offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.” In a concurring opinion joined by four Justices, Justice Kennedy described the constitutional infirmity of the disparagement provision as “viewpoint discrimination” and “an ‘egregious form of content discrimination,’ which is ‘presumptively unconstitutional.’” The problem, he pointed out, was that, under the disparagement provision, “an applicant may register a positive or benign [trade]mark but not a derogatory one” and that “This is the essence of viewpoint discrimination.” Likewise, under the ABA Model Rule 8.4 (g) and proposed Maine Rule 8.4 (g), attorneys may engage in positive or benign speech, but not “derogatory,” “demeaning,” or “harmful” speech. Under the Supreme Court’s *Tam* decision, this is the essence of viewpoint discrimination, and presumptively unconstitutional.

Ronald Rotunda, late Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, provided a concrete example of how the new ABA Rule may constitute an unconstitutional content-based speech restriction. He explained:

At another bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, ‘Black lives matter.’ Another responds, ‘Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.’ A third says, ‘All lives matter.’ Finally, another lawyer says (perhaps for comic relief), ‘To

make a proper martini, olives matter.’ The first lawyer is in the clear; all of the others risk discipline.

Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting “Diversity” But Not Diversity of Thought*, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, p. 4.

So the content of a lawyer’s speech will determine whether or not the lawyer has or has not violated the proposed Rule. A lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that some consider to be discriminatory based on sexual orientation, while a lawyer who speaks in favor of same-sex marriage would not be. That is a classic example of an unconstitutional viewpoint-based speech restriction. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (the government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed). So, for example, in *R.A.V.*, *supra*, the Supreme Court struck down, as facially unconstitutional, St. Paul’s Bias-Motivated Crime Ordinance because it applied only to fighting words that insulted or provoked violence “on the basis of race, color, creed, religion or gender,” whereas expressed hostility on the basis of other bases were not covered. In striking down the Ordinance, the Court stated: “The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views

on disfavored subjects.” *R.A.V., supra*, at 390. That is precisely what the proposed Rule does. For that reason, commentators have described ABA Model Rule 8.4(g) as a speech code for lawyers, and the proposed Maine Rule is just as infirm.

For those who would deny that the proposed Rule creates an attorney speech code, we need only point them to Indiana, a state that has adopted a black letter non-discrimination Rule, albeit not as broad as the new Model Rule 8.4(g). In *In the Matter of Stacy L. Kelley*, 925 N. E. 2d 1279 (Indiana 2010) an Indiana attorney was professionally disciplined under Indiana’s Rule 8.4(g) for merely asking someone if the person were “gay.” And in *In the Matter of Daniel C. McCarthy*, 938 N. E. 2d 698 (Indiana 2010) an attorney had his license suspended for applying a racially derogatory term to himself. In both cases, the attorneys were professionally disciplined merely for using disfavored speech.

Because it constitutes an unconstitutional speech code for lawyers, the proposed Rule should be rejected.

6. The Proposed Rule Will Violate Attorneys’ Free Exercise of Religion and Free Association Rights.

The new Maine Rule will also violate an attorney’s free exercise of religion and freedom of association rights. As the New Hampshire ACLU

Executive Director said, “As written, the rule could also implicate advocacy by lawyers who represent religious organizations and who are giving advice based on that organization’s faith, as one person’s religious tenet could be another person’s manifestation of bias.” How true this is.

Consider this real and current example: The ABA is encouraging law firms to conduct various activities to celebrate and foster diversity. As part of that effort, it has provided recommended activities to highlight and celebrate those identifying as part of the LGBTQ community. One such activity being embraced by many law firms – including law firms in Maine – calls for celebratory events, scripted presentations and the wearing of pride pins, all in the law firm environment. Suppose that, for sincerely held religious reasons, a lawyer does not participate in such an event or wear such a pin in her law firm. That attorney’s nonparticipation could be considered a violation of Rule 8.4(g), because the conduct is related to the practice of law, and could be considered a manifestation of bias or prejudice based on sexual orientation or gender identity. As the ACLU of New Hampshire has noted, “one person’s religious tenet could be another person’s manifestation of bias.” The irony, of course, is that, if the law firm took adverse employment action against the lawyer for manifesting bias or prejudice in violation of Rule 8.4(g), the lawyer would probably have a valid civil rights claim against the firm for unlawful

discrimination based on religion.⁶

The national Catholic Lawyers Association has adopted a Resolution stating that ABA Model Rule 8.4(g) is “*unconstitutional and incompatible with Catholic teaching and the obligations of Catholic lawyers.*” As an illustration of this problem, the late Professor Rotunda posited the example of Catholic attorneys who are members of the St. Thomas More Society, an organization of Catholic lawyers and judges. If the St. Thomas More Society should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court’s same-sex marriage rulings, Professor Rotunda explained that those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. In fact, Professor Rotunda pointed out that an attorney might be in violation of the new Rule merely for being a member of such an organization. *The ABA Decision to Control What Lawyers Say: Supporting “Diversity” But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, pp. 4-5. The fact that the Rule may prohibit such speech or membership indicates that the Rule will be unconstitutional.

⁶ It likely also would be an unconstitutional restriction on speech based on content or viewpoint. Even a lawyer’s silence is speech. See *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1985) - “the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”

Because the proposed Rule will violate attorneys' Free Exercise and Free Association rights, the Honorable Court should reject it.

7. The Proposed Rule Will Result in the Suppression of Politically Incorrect Speech While Protecting Politically Correct Speech.

Model Comment [4] to the new Rule contains an exception absent from the proposed Maine Rule or comments for “*conduct undertaken to promote diversity and inclusion*” and Model Comment [5] allows lawyers to limit their practice to certain clientele, as long as that clientele are “*members of underserved populations.*” These exceptions to the Rule illustrate that the proposed ABA Rule is not going to be a Rule of general applicability and equal application. Rather, it will allow attorneys who are discriminating in politically *correct* ways to continue that discrimination, but will prohibit attorneys from discriminating in politically *incorrect* ways. The proposed Maine Rule, like the ABA Rule no which it is modeled, will do the same. The potential abuse is that if an attorney engages in discriminatory conduct that furthers a *politically correct* interest, the disciplinary authority will find that the discrimination is undertaken to promote diversity or inclusion, or to serve an underserved population, and for that reason does not violate the Rule. However, if an attorney engages in discriminatory conduct that furthers a *politically incorrect* interest, the state will discipline that attorney for violating

the Rule.

This phenomenon has already been seen in other similar contexts. For example, the Civil Rights Commission in Colorado prosecuted a Christian baker for declining to bake a wedding cake for a same-sex couple, but refused to prosecute three other bakers who refused to bake a cake for a Christian, finding that the first constituted illegal discrimination but that the second did not. The reason underlying this disparate treatment was in the first the complaining party was a member of a politically favored class, while in the second the complaining party was a member of a disfavored one.

By prohibiting only disfavored discriminatory messages, while allowing favored ones, the Rule likely creates a viewpoint-based speech restriction.

*R.A.V., supra.*⁷

8. The Proposed Rule Will Also Violate the Maine Constitution.

The proposed Rule would not only infringe upon attorneys' First Amendment rights under the U.S. Constitution, but also attorneys' constitutional rights under the Maine Constitution. Constitution of the State of Maine, Article I, Sec. 4 ("Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty").

⁷ See *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1985) - "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."

With respect to freedom of speech, the Maine Constitution is no less protective than the Federal Constitution. *City of Bangor v. Diva's, Inc.*, 830 A. 2d 898, 902 (Maine 2003). Therefore, the constitutional infirmities of the proposed Rule are as glaring under the Maine Constitution as under the U.S. Constitution.

8. The Proponents' Assurances That the Proposed Rule Will Not Be Applied in an Unconstitutional Manner Does Not Cure the Rule's Constitutional Infirmities.

Most proponents of the ABA Model Rule – including the Maine Advisory Committee here – do not even attempt to address the constitutional infirmities of the Rule. And those proponents who do, do not directly deny the charge that the Rule may very well be unconstitutional. Instead, they assure the Rule's critics that the professional disciplinary authorities will not *apply* the Rule in an unconstitutional manner. For example, Stanford University Law Professor Deborah L. Rhode, a proponent of the Rule, has stated:

*"I understand the First Amendment concerns, but I don't think they present a realistic threat in this context. I don't think these cases are going to end up in bar disciplinary proceedings. They are going to end up in informal mediation and occasionally in lawsuits if the conduct is egregious and the damages are substantial."*⁸

But such bland assurances do little to address attorneys' concerns and, more importantly, do not cure the Rule's constitutional infirmities.

⁸ http://www.abajournal.com/magazine/article/ethics_model-rule-harassing-conduct.

Proponents of the Rule do not have the authority to speak on behalf of a state's professional disciplinary authorities. They cannot say how the disciplinary authorities will or will not interpret or apply the proposed Rule.

And beyond that this very argument was made and rejected in *U.S. v. Stevens*, 559 U.S. 460 (2010). There, in a case challenging the constitutionality of a statute criminalizing certain depictions of animal cruelty, the Supreme Court addressed the government's claim that the statute was not unconstitutionally overbroad because the government would interpret the statute in a restricted manner so as to reach only "extreme" acts of animal cruelty, and that the government would not bring an action under the statute for anything less. In response, the high court pointed out that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." The court pointed out the danger in putting faith in government representations of prosecutorial restraint, and stated that "The Government's assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." *Stevens, supra*, at 480.

In other words, far from curing the law's constitutional defects,

representations that the proposed Rule will not be applied so as to violate the Constitution, constitute indirect admissions that the proposed Rule is, in fact, constitutionally infirm.

In arguing that the proposed Rule will not be applied unconstitutionally, the Maine Advisory Committee writes, “Declining representation, limiting one’s practice to particular clients or types of clients, and advocacy of policy position or changes in the law are not regulated by Rule 8.4 (g).” In writing this the Committee is not being accurate as to the text of the rule itself, which has no such exceptions (the ones in the ABA Model Rule, such as they are, having been omitted). One can have no confidence that the Committee’s *ipse dixit* will be authoritative on the courts in the future.

One wonders reading this Rule in light of the Committee’s Comment if it would be professional misconduct to represent the very baker whose case is now pending before the Supreme Court, since clearly in the eyes of some the baker and derivatively the lawyer are engaging in discrimination against the gay men who wanted their wedding cake. The non-binding comment only says you can advocate “policy positions or changes in the law” without violating it. This is merely a nod to the obvious risk that even engaging in politics or legislative lobbying could be considered a violation of the Rule. But it does not say you can represent or defend persons accused of discrimination

without violating the Rule. It does not say you can advocate for an interpretation or application of the law that permits what some see as discrimination or harassment. It does not say you can advocate for a ruling that an anti-discrimination law is itself unconstitutional. You might say this is obvious; but how indeed can one be so sure of that?

Proponents of the ABA Model Rule point to the Rule's provision, omitted in our Maine proposal, that "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules" (one of the sentences of the Model Rule that the Maine Advisory Committee has deleted but which the Committee endorses). But that provision does not cure the defect either.

It does not cure the defect, first, because the cited provision is circular. It requires that, in order to qualify as "legitimate" the advice or advocacy must be "consistent with these Rules." But, in order to be consistent with the Rules (in particular with Rule 8.4(g) itself), the advice or advocacy cannot be discriminatory or harassing. In other words, under the proposed Rule, advice or advocacy that constitutes "discrimination" or "harassment" can, by definition, never be legitimate advocacy because "discriminatory" or "harassing" advice or advocacy is inconsistent with Rule 8.4(g) itself.

Further, by stating that the Rule will not prohibit "legitimate advice or advocacy" the Model Rule – for the first time – creates the concept of

illegitimate advocacy. Giving advice and advocating for clients are the very essence of what a lawyer does. If the proposed Rule is adopted, however, an attorney will need to worry whether her advice or advocacy might be considered “illegitimate” and, therefore, a violation of professional ethics. And, having to worry about that, will chill the lawyer’s speech and interfere with an attorney’s ability to provide zealous representation.

Finally, who will determine whether an attorney’s advice or advocacy is legitimate or illegitimate? The disciplinary authorities, of course, will make that determination, in their unfettered discretion, after the fact and, potentially, on political or ideological grounds.

Given the proposed Rule’s many constitutional defects, the proposed Rule should be rejected.

B. Other States Are Rejecting The Rule.

Despite the fact that it has been nearly two years since the ABA adopted Model Rule 8.4(g), Vermont is the only state that has adopted it. The Supreme Courts of South Carolina and Tennessee have both considered and expressly rejected the Rule. *Order*, Supreme Court of South Carolina, Appellate Case No. 2017-000498 (6-20-2017); *Order: In Re Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, No. ADM2017-02244 (4-23-2018). And many

states that have considered the Rule – including Montana, Illinois, Nevada, Pennsylvania, and Utah – have not adopted it.

The majority of states, Maine among them, continue to have no blackletter nondiscrimination rule in their Rules of Professional Conduct. Not only do the majority of states have no black letter antidiscrimination rule in their Rules of Professional Conduct, in those states that *do* have black letter antidiscrimination provisions in their Rules, no state’s rule (other than, now, Vermont’s) is even comparable to the new Model Rule 8.4(g).

For example, aside from Vermont, none of the jurisdictions with black letter anti-discrimination rules extends its non-discrimination rule to “conduct related to the practice of law” as the proposed Rule does. Seven of those jurisdictions limit their coverage to conduct “in the representation of a client” or “in the course of employment” (Florida, Idaho, Nebraska, Missouri, North Dakota, Oregon and Washington State). Eight states limit the applicability of their non-discrimination rules to conduct toward other counsel, litigants, court personnel, witnesses, judges, and others involved in the legal process (Colorado, Florida, Idaho, Michigan, Nebraska, and Washington State). California limits its provision to attorney conduct “in representing a client” and “in relation to a law firm’s operations.” Massachusetts, New Jersey and Ohio limit their Rules to conduct “in a professional capacity.” Massachusetts further

limits its Rule to conduct “before a tribunal.”⁹ New York limits its Rule to “the practice of law.” And D.C. limits its Rule to employment discrimination only.

Likewise, other than Vermont, no state’s rule prohibits “harmful,” “derogatory,” or “demeaning” speech or conduct as the ABA Model Rule does and as the Maine Advisory Committee comment does.

Further, eight states (California, Iowa, Minnesota, New Jersey, New York, Illinois, Ohio, and Washington State) limit their anti-discrimination rules to “unlawful” discrimination or discrimination “prohibited by law.” Of those eight states, Illinois, New Jersey, and New York actually require that, before any disciplinary action can be filed, a tribunal of competent jurisdiction *other than a disciplinary tribunal* must have found that the attorney has actually violated a federal, state, or local anti-discrimination statute or ordinance.

And unlike the proposed Rule, eight of the states with black letter anti-discrimination rules require that the alleged discrimination actually either prejudice the administration of justice or render the attorney unfit to practice law (Florida, Illinois, Maryland, Minnesota, Nebraska, North Dakota, Rhode Island, and Washington State).

⁹ Massachusetts Rule of Professional Conduct 3.4(i) provides: “A lawyer shall not . . . (i) in appearing in a professional capacity before a tribunal, engage in conduct manifesting bias or prejudice based on . . .” In other words, it only applies (1) to a lawyer’s conduct “in a professional capacity” AND (2) while “appearing before a tribunal.”

Unlike the proposed Maine Rule with a “know or reasonably should know” standard four states with black letter rules require the discriminatory conduct to be “knowing,” “intentional” or “willful” (Maryland, New Jersey, New Mexico, and Texas). Unlike the proposed Rule, Texas expressly excludes from its antidiscrimination rule a lawyer’s decisions whether or not to represent a particular person. If Maine adopts the proposed Rule, it will have adopted a Rule that impinges on attorney speech and conduct in ways, and far more extensively, than almost any other state has seen fit to do.

There are good reasons why the majority of states have not adopted any black letter nondiscrimination Rules in their Rules of Professional Conduct. And there are also good reasons why no state other than Vermont has adopted the new ABA Model Rule 8.4(g), or anything comparable to it. And there are good reasons why the Supreme Courts of South Carolina and Tennessee have expressly rejected ABA Model Rule 8.4(g). For these same reasons, Maine would be wise to reject the proposed Rule as well.

C. The Proposed Rule Would, For The First Time, Sever The Rules From Any Legitimate Regulatory Interests Of The Legal Profession.

The Court and the legal profession have a legitimate interest in proscribing attorney conduct that if not proscribed would either adversely affect an attorney’s fitness to practice law or that would prejudice the

administration of justice. Maine's current Rule 8.4 recognizes this principle by prohibiting attorneys from engaging in six types of conduct, all of which might either reflect adversely on an attorney's fitness to practice law or would prejudice the administration of justice. Those types of conduct are:

- (a) Violating the Rules of Professional Conduct;
- (b) Committing a criminal or unlawful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) Engaging in conduct that is prejudicial to the administration of justice;
- (e) Stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; and
- (f) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

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

The second and third proscriptions are targeted at attorney conduct which directly affects the attorney's ability to be entrusted with the professional obligations with which all attorneys are entrusted, namely, to serve their clients and the legal system with honesty and trustworthiness. But those Rules do not proscribe conduct that, although perhaps not praiseworthy, does not warrant the conclusion that the attorney engaging in such conduct is unfit to practice law. Indeed, it is worth noting that Rule 8.4(b) does not even conclude that all *criminal* or *unlawful* conduct is a violation of the Rules of Professional Conduct. Instead, the Rule proscribes only criminal and unlawful conduct "*that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*" (Emphasis added). As Comment [2] to Maine's Rule 8.4 explains: "*Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. . . A lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category*" (Emphasis added).

The fourth type of proscribed conduct is conduct that would prove

prejudicial to the administration of justice. Historically, this proscription has been limited to misconduct that would seriously interfere with the proper and efficient functioning of the judicial system. For example, the Supreme Court of Oregon analyzed this provision and determined that prejudice to the administration of justice referred to actual harm or injury to judicial proceedings. *In re Complaint as to the Conduct of David R. Kluge*, 66 P. 3d 492 (Or. 2003), (to establish a violation of this Rule it must be shown that the accused lawyer's conduct occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding). And in *In re Complaint as to the Conduct of Eric Haws*, 801 P. 2d 818, 822-823 (Or. 1990), the court noted that the Rule encompasses attorney conduct such as failing to appear at trial; failing to appear at depositions; interfering with the orderly processing of court business, such as by bullying and threatening court personnel; filing appeals without client consent; repeated appearances in court while intoxicated; and permitting a non-lawyer to use a lawyer's name on pleadings. *See also Iowa Supreme Court Attorney Disciplinary Board v. Wright*, 758 N. W. 2d 227, 230 (Iowa 2008) (Generally, acts that have been deemed prejudicial to the administration of justice have hampered the efficient and proper operation of the courts or of ancillary systems upon which the courts rely); *Rogers v. The Mississippi Bar*, 731 So. 2d 1158, 1170

(Miss. 1999) (For the most part this rule has been applied to those situations where an attorney's conduct has a prejudicial effect on a judicial proceeding or a matter directly related to a judicial proceeding); *In re Hopkins*, 677 A. 2d 55, 60-61 (D.C. Ct. App. 1996) (In order to be prejudicial to the administration of justice, an attorney's conduct must (a) be improper, (b) bear directly upon the judicial process with respect to an identifiable case or tribunal, and (c) must taint the judicial process in more than a *de minimis* way, that is, at least potentially impact upon the process to a serious and adverse degree); and *In re Karavidas*, 999 N. E. 2d 296, 315 (Ill. 2013) (In order for an attorney to be found guilty of having prejudiced the administration of justice, clear and convincing proof of actual prejudice to the administration of justice must be presented). Therefore, this provision, too, is directed at attorney conduct that exposes the judicial process itself to serious harm.

The fifth and sixth proscriptions in Maine's current Rule also target conduct that, if engaged in by an attorney, would adversely affect the integral operation of the judicial system, namely, improperly influencing a government agency or official, knowingly assisting a judge or judicial officer in conduct that violates the rules of judicial conduct or other law, and seeking a change of judge for improper purposes.

In short, Maine's Rule 8.4 has always heretofore been solely concerned

with attorney conduct that might adversely affect an attorney's fitness to practice law or that seriously interferes with the proper and efficient operation of the judicial system.

The proposed Rule, however, takes Rule 8.4 in a completely new and different direction because, for the first time, the new Rule would subject attorneys to discipline for engaging in conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system. Because the new Rule would not require *any* showing that the proscribed conduct prejudices the administration of justice or that such conduct adversely affects the offending attorney's fitness to practice law, the new Rule will constitute a free-floating anti-harassment non-discrimination provision the only restriction on which will be that the conduct be "related to the practice of law."

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

used language deemed by the court to be offensive.

Ironically, an attorney could actually engage in *criminal* and *unlawful* conduct without violating current Rule 8.4. *See, e.g., Formal Opinion Number 124 (Revised) – A Lawyer’s Use of Marijuana* (October 19, 2015) (a lawyer’s use of marijuana, which would constitute a federal crime, does not necessarily violate Colo. R. P. C. 8.4(b)) because Rule 8.4(b) only applies to a lawyer’s “*criminal or unlawful act[s] that reflect adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.*” But under proposed Rule 8.4 (g) a lawyer could be disciplined merely for engaging in politically incorrect speech. In other words, the proposed Rule would create a species of super offenses, where “harassment” and “discrimination” would be punishable without regard to whether such speech or conduct reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, but criminal and unlawful behavior would not be.

Such a dramatic departure from the historic regulation of attorney conduct in Maine should not be taken lightly. Because the proposed Rule constitutes an extreme and dangerous departure from the principles and purposes historically underlying Maine’s Rule 8.4 and the legitimate interests of professional regulation, the Honorable Court should reject the proposed Rule.

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

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

If the proposed Rule 8.4(g) is adopted, however, attorneys will be subject to professional discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases because, under the proposed Rule, attorneys will be affirmatively precluded from declining certain clients or cases. They will be forced to take cases or clients they might have otherwise declined.

Although the Advisory Committee says that “declining representation . . . [is] not regulated by Rule 8.4(g),” that is not completely true. The rule itself says no such thing, and the comment also says under the proposed Rule, “Lawyers are free to accept and decline representations as they see fit, in accordance with Rule 1.16” (Emphasis added). This is simply a restatement of the Model Rule’s provision that “*This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with*

Rule 1.16 “ (Emphasis added) which the Committee explicitly endorses.

So the Rule does not, in fact, allow an attorney complete liberty in choosing clients. What the Rule really provides is that an attorney’s client selection decisions will not be subject to the Rule, *as long as such decisions are permitted by Rule 1.16*. The problem with this, however, is easily recognizable by anyone familiar with Rule 1.16, because Rule 1.16 does not even address the question of what clients or cases an attorney *may* decline. It only addresses the question of which clients and cases an attorney *must* decline.

What Rule 1.16 addresses are three circumstances in which an attorney “shall not” represent a client, namely: (a) if the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client, (b) the lawyer is discharged, or (c) the representation will result in violation of the Rules of Professional Conduct or other law. None of these has anything whatever to do with an attorney’s decision not to represent a client *because the attorney does not want to represent the client*. It only addresses the opposite situation, that is, in what circumstances an attorney who otherwise *wants* to represent a client *may not* do so. So what might appear, to someone unfamiliar with Rule 1.16, to be some sort of safe harbor that would preserve an attorney’s right to exercise his or her discretion to decline clients and cases, is no such thing. In short, if an attorney declines representation for a

discriminatory reason, the attorney will have violated the Rule. This amounts to imposing discipline based on subjective prejudice against certain points of view.

If there is any question about that, it is now clear from Vermont's adoption of the new Model Rule that the Rule will, in fact, apply to an attorney's client selection decisions. In its *Reporter's Notes* to its adoption of the new Rule 8.4(g), the Vermont Supreme Court explicitly states that Rule 1.16's provisions about declining or withdrawing from representation "*must [now] also be understood in light of Rule 8.4(g)*" so that refusing or withdrawing from representation "*cannot be based on discriminatory or harassing intent without violating that rule.*" In other words, if an attorney declines or withdraws from representation for an allegedly discriminatory reason, the attorney violates Rule 8.4(g).

In short, contrary to the assertions of the Rule's proponents, the proposed Rule *will* apply to an attorney's client selection decisions, and *will* prohibit attorneys from declining representation of particular clients if to do so could be considered harassment or discrimination.

This is another alarming departure from the principles historically embodied in Maine's Rules of Professional Conduct and its predecessors, which have, before now, always respected the attorney's freedom and

professional autonomy when it comes to choosing who to represent and what cases to accept.

Although the Rules *have* placed restrictions on which clients attorneys may *not* represent¹⁰ never before have the Rules required attorneys to *take* cases the attorney decides – for whatever reason – the attorney does not want to take, or to represent clients the attorney decides – for whatever reason – the attorney does not want to represent.¹¹ Until now, the principle that attorneys were free to accept or decline clients or cases at will, for any or no reason, prevailed universally. *See, e.g.,* Charles W. Wolfram, *Modern Legal Ethics* at 573 (1986)(“*a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer’s demanded fee; because the client is not of the lawyer’s race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.*”).

There is, of course, a good reason why the profession has left to the attorney the professional decision as to which cases the attorney will accept and which the attorney will decline and which clients the attorney will or will not represent. That reason is to protect clients from attorneys who – due to

¹⁰ See, for example, Rule 1.7 which precludes attorneys from representing clients or cases in which the attorney has a conflict of interest, and Rule 1.16(a) which requires attorneys to decline or withdraw from representation when representation would compromise the interests of the client.

¹¹ Although Rule 6.2 prohibits attorneys from seeking to avoid court appointed representation, the Rule allows attorneys to decline such appointments “for good cause” – including because the attorney finds the client or the client’s cause repugnant.

personal conflicts of interest – are unable to provide that client with unconflicted and zealous representation.

The Rules specifically impose upon attorneys a professional obligation to represent their clients without personal conflicts (Rule 1.7(a)(2)). A lawyer's ability to do that, would be compromised should the lawyer have personal or moral objections to a client or a client's case. Indeed, Rule 6.2(c) acknowledges that a lawyer's personal view of a client or a case can be expected to adversely affect the attorney's ability to provide zealous and effective representation.

To force an attorney to accept a client or case the attorney does not want, and then require the attorney to provide zealous representation to that client, is both unfair to the attorney (because doing so places conflicting obligations upon the lawyer) and to the client. Every client deserves an attorney who is not subject to or influenced by any interests which may, directly or indirectly, adversely affect the lawyer's ability to zealously, impartially, and devotedly represent the client's best interests. *See, e.g.*, Rule 1.7(a) (2), which prohibits an attorney from representing a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer.

It must be admitted that human nature is such that an attorney who –

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

This is not only a self-evident principle, in conformance with universal human experience, but is also well attested in the lives of some of our greatest lawyers. For example, it was well known that Abraham Lincoln was not an effective lawyer unless he had a personal belief in the justice of the case he was representing. “Fellow lawyers testified that Mr. Lincoln needed to believe in a case to be effective.”¹² This truth about human nature is embodied in Rules such as Rule 6.2(c), which recognizes that a client or cause that is repugnant to the attorney may impair the lawyer’s ability to represent the client.

For these reasons, too, the proposed Rule should be rejected.

E. The Proposed Rule Conflicts with Other Professional Obligations and Rules of Professional Conduct.

Another significant problem with the proposed Rule is that it conflicts with other professional obligations and Rules of Professional Conduct. For

¹² .M. Steiner, AN HONEST CALLING: THE LAW PRACTICE OF ABRAHAM LINCOLN, Northern Illinois University Press (2006).

example:

1. The Proposed Rule Conflicts with Rule 1.7 (Conflicts of Interest)

Rule 1.7 provides that:

*“(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict-of-interest. A concurrent conflict-of-interest exists if: . . . (2) there is a significant risk that the representation of one or more clients would be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or **by a personal interest of the lawyer**”* (Emphasis added).

And RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §125 (2000)

clarifies that:

*“A conflict under this Section need not be created by a financial interest. . . **Such a conflict may also result from a lawyer’s deeply held religious, philosophical, political, or public-policy belief**”* (Emphasis added).

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

How is that conflict to be resolved?

2. The Proposed Rule Conflicts with Rule 6.2 (Accepting

Appointments) – Rule 6.2 provides that

*“A lawyer shall not seek to avoid appointment by a tribunal to represent a person **except for good cause**: such as: . . . (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client” (Emphasis added).*

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

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

Note that Rule 6.2 does not concern itself with *why* the attorney finds the client or cause repugnant because that’s irrelevant. The only relevant issue is whether the attorney for *whatever* reason cannot provide the client with zealous representation because the lawyer finds the client or cause repugnant. If not, the attorney must not, for the client’s sake, take the case. Clients deserve that. And yet, the proposed Rule would require an attorney to represent clients and cases the lawyer finds repugnant.

4. **The Proposed Rule Conflicts with Rule 1.16 (Declining or Terminating Representation)**

Rule 1.16(a) (1) provides that:

(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the rules of professional conduct or other law.

However, we have already seen that Rule 1.7 would prohibit an attorney from representing a client who – due to the lawyer’s personal beliefs – the lawyer could not represent without a personal conflict of interest interfering with that representation. To do so would constitute a violation of the Rules of Professional Conduct. But Vermont’s adoption of the new Rule confirms that the new Rule will require attorneys to accept clients and cases that – due to the attorney’s personal beliefs about the client or the case – the attorney would otherwise have to decline.

So, this Rule too is in conflict with the new Rule. Which Rule is going to prevail when they conflict?

This reveals a basic problem with the Rule. The proposed Rule is an attempt to impose approved attitudes and states of mind upon the legal profession inconsistent with who attorneys are and what they do professionally.

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

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

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

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

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

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

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

And once an attorney is in an attorney-client relationship, the attorney – unlike a merchant who is always free to terminate his relationship with a

customer – oftentimes may not unilaterally sever that relationship.

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

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

Because the effect of adopting the proposed Rule would be to impose professional obligations upon Maine's lawyers that conflict with other professional rules, and that are incompatible with the very nature of the attorney-client relationship, the proposed Rule should be rejected.

F. The Proposed Rule Will Harm Clients

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

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

Indeed, the proposed Rule, if adopted, would introduce insidious deception into the attorney-client relationship because – in order to avoid violating the Rule – some attorneys will be led to conceal their personal beliefs about a client or a case, thereby saddling clients with attorneys who – if the client knew of the attorney's personal beliefs – the client would not retain.

Because the proposed Rule will harm clients, the Court should reject it.

G. The Proposed Rule is Unnecessary, Will Not Remedy Proponent's Concerns, and Will Unnecessarily Burden Maine's Professional Disciplinary Authorities.

Given the fact that the only legitimate interest the bar has in proscribing attorney conduct is in proscribing conduct that either renders an attorney unfit to practice law or that prejudices the administration of justice, Maine's current Rules of Professional Conduct are already sufficient to address cases of harassment or invidious discrimination, rendering the proposed Rule unnecessary.

First, Rule 8.4(d) already prohibits attorney conduct that prejudices the administration of justice. And, in fact, sexual harassment has been

professionally disciplined in other states under current Rule 8.4(d). See for example *Attorney Grievance Commission of Maryland v. Goldsborough*, 624 A.2d 503 (Ct. App. Maryland 1993) (nonconsensual kissing of clients and spanking clients and employees can violate Rule 8.4(d) prohibiting lawyer from engaging in conduct that is prejudicial to the administration of justice). Therefore, because the existing Rule 8.4(d) is already adequate to address cases of attorney harassment or discrimination that prejudice the administration of justice, the new Rule is redundant and unnecessary. And to the extent the proposed Rule purports to punish attorneys for conduct that does not prejudice the administration of justice or otherwise render them unfit to practice law, the proposed Rule would constitute an inappropriate exercise of professional regulatory authority.

Further, many of the circumstances the proposed Rule might address are already addressed by other laws. For example, to the extent the new Rule addresses harassment or discrimination in the legal workplace, such behavior is already addressed in Title VII at the federal level as well as in this state's employment non-discrimination laws, including the Maine Human Rights Act, 5 M.R.S. § 4571, *et seq.* And harassing and discriminatory judicial behavior is already addressed in the Code of Judicial Conduct. Maine Code of Judicial Conduct Rule 2.3.

As if it were not enough to point out that the proposed Rule is unnecessary, proponents of the Model Rule – as discussed below – concede that the Rule would not even effectively address the harassment and discrimination concerns the proponents proffer as the rationale for adopting the Rule. So the proposed Rule is not only unnecessary, it's also ineffective.

In addition, the proposed Rule would create an entirely new layer of non-discrimination and anti-harassment laws, in addition to those already existing outside the Rules of Professional Conduct. By doing so, the Rule will burden Maine's professional disciplinary authorities with having to process very fact-intensive and duplicative cases – cases that could and should be processed under some other statute or ordinance, by judicial authorities better equipped to handle them. Indeed, Professor Alex B. Long, Professor of Law at the University of Tennessee, points out that, for a variety of reasons, “there are inherent limitations on the ability of ethics rules to address employment discrimination,” including that “employment discrimination law is a confusing, complicated area of law” and that “asking disciplinary authorities to master not only the complexities of modern discrimination law, but to devise a new and effective enforcement method is asking quite a bit,” concluding that “if states expect their professional responsibility organizations to engage in significant enforcement, they would need to be

willing to develop special units with special expertise and responsibility for addressing employment discrimination.” Alex B. Long, *Employment Discrimination in the Legal Profession: A Question of Ethics?*, 2016 U. ILL. L. REV. 445, 468-469 (2016).

Making discrimination and harassment a professional – as well as a statutory – offense, could very well subject attorneys to inconsistent obligations and results. For example, a lawyer could be exonerated from allegations of having violated a nondiscrimination or harassment law, but still be found to have engaged in harassing or discriminatory conduct that violates the Rules of Professional Conduct, or vice versa. Indeed, multiple states have recognized the importance of this issue by (a) prohibiting only “unlawful” harassment or discrimination and (b) requiring that any claim against an attorney for unlawful discrimination be brought for adjudication before a tribunal other than a disciplinary tribunal before being brought before a disciplinary tribunal. *See, e.g.*, Illinois Rules of Professional Conduct Rule 8.4(j) and New York Rules of Professional Conduct Rule 8.4(g).

So for these reasons, too, the proposed Rule should be rejected.

H. The Proponents’ Stated Reason for the Proposed Rule is an Inappropriate and Dangerous Use of Professional Regulatory Authority.

The Advisory Committee does not state any specific need or underlying

rationale for the proposed Rule, nor does it cite any result of the multiple surveys that the Bar has recently conducted on these issues.¹³ Thus the proposed rule is unsupported by any facts or showing of need.

Looking outside Maine, some proponents of ABA Model Rule 8.4(g) argue that the proposed Rule is necessary in order to address sexual harassment and discrimination, sexual and racial disparities, and a lack of diversity, in the legal profession. See, for example, *In the Matter of: Petition To Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court*, Ariz. Sup.Ct. No. R-17-0032. But those who posit such rationales for the Rule actually admit that the Rule will not, in fact, effectively address these issues. For example, Professor Long has written that amending the rules of professional conduct to prohibit discrimination “*is unlikely to have much impact in terms of addressing employment discrimination and increasing diversity in the legal profession.*” Alex B. Long, *Employment Discrimination in the Legal Profession: A Question of Ethics?*, 2016 U. ILL. L. REV. 445, 471-472 (2016).

So why are proponents of the Rule advocating for a Rule they admit will not solve the problems with which they purport to be concerned? In Arizona, the Petitioner’s own answer was that “the lawyer disciplinary process” should be used for the “*dissemination of values inside and outside the*

¹³ The Maine State Bar Association has notified its members that it will have an event to present results of its survey on June 15, 2018, in Portland, Maine.

profession” – to “educate lawyers and make them stop and think.” Petition to Amend, *supra*, page 9. “Though [the proposed Rule] may be infrequently enforced” – she said– “it can show lawyers the nature of the problem and need for change . . .” Petition to Amend, *supra*, page 10. Stanford University law professor Deborah L. Rhode agrees, describing the Rule as a “largely . . . symbolic statement” – saying that “The rule provides a useful symbolic statement and educational function.”¹⁴ This should all sound very familiar to those who have followed the history of the ABA’s adoption of the Model Rule. The ABA Standing Committee on Ethics and Professional Responsibility, in its December 22, 2015 Memorandum on the Draft Proposal to Amend Model Rule 8.4, expressed the same idea, saying that the proposed Rule 8.4(g) was necessary – not to protect the public or to insure attorney competence – but in order to compel a “cultural shift” in the legal profession. In other words, control of though through professional discipline.

These statements of the Model Rule’s proponents, including the ABA itself, show the Rule’s proponents are advancing the Rule for an inappropriate purpose, namely to impose an ideological viewpoint on the legal profession.

¹⁴ http://www.abajournal.com/magazine/article/ethics_model_rule_harassing-conduct.

Indeed, this use of Model Rule 8.4(g) is already emerging. In Minnesota – which has not even adopted the new Model Rule – the Minnesota Lavender Bar Association (MLBA) cited the Model Rule to punish its ideological opponents. After a law professor at St. Thomas Law School – a Roman Catholic institution – applied for and was granted CLE credit for a presentation entitled “Understanding and Responding to the Transgender Moment/St. Paul,” which discussed transgender issues from a Roman Catholic perspective, the MLBA alleged that the presentation constituted “discriminatory and transphobic messaging” and that, in violation of ABA Model Rule 8.4(g) “the language of the presentation encourages bias by arguing against the identities [of transgender people].” The MLBA attacked the presentation as “a criticism of transgender identities cloaked in religious messaging – i.e., a direct bias against transgender people” and that “discrimination is not legal education.” As a result of the allegations, the Minnesota State Board of Continuing Legal Education revoked the CLE credits it had earlier granted the presentation, apparently the first time the Board has ever retroactively revoked a CLE credit grant. Barbara L. Jones, *CLE credit revoked*, 5/28/18 Minn. Law. According to the MLBA, merely questioning the tenets of the transgender movement constitutes bias, discrimination, harassment, and transphobia – in violation of Rule 8.4(g).

This is an early warning of how Rule 8.4(g) will be used to weaponize the Rules of Professional Conduct so as to punish and chill disfavored thought and speech.

But the purpose of the Rules of Professional Conduct has never been – and should never be – to force a “cultural shift” on anyone, lawyers or otherwise.

The purpose of professional disciplinary proceedings and sanctions is – and should be – to protect the public and the legal profession from unscrupulous lawyers, *People v. Morley*, 725 P. 2d 510, 514 (Colo. 1986), and from those who do not possess the qualities of character and the professional competence requisite to the practice of law. *In re Disciplinary Action Against Jensen*, 418 N. W. 2d 721, 722 (Minn. 1988). These are the legitimate purposes of the Rules of Professional Conduct. The threat of professional discipline should never be employed to drive social change, if for no other reason than that the direction social change should be driven is subjective and subject to rapid shifts. Once we accept the idea that the Rules of Professional Conduct may be used to drive society – in and through the legal profession – in a particular political or ideological direction, there will be no limit to where the Rules can be used.

What is clear is that the proponents of ABA Model Rule 8.4(g) and its

derivatives such as the proposed Maine rule are using the Rules of Professional Conduct to corrupt the professional disciplinary process so as to force attorneys at hazard to their reputations, their licenses and their livelihoods to conform their thought, speech, and behavior to the dictates of an ideologically driven segment of the legal profession. The Rule's proponents are willing to violate the constitutional rights of attorneys to do that.

That is an inappropriate and dangerous use of the Rules of Professional Conduct. And for that reason, as well, the proposed Rule should be rejected.

III. Conclusion

For all the foregoing reasons, this Honorable Court should reject entirely the proposed Rule 8.4(g) and its Comments.

Respectfully submitted,

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