Public comments to selected

Supreme Court Rules

as of September 13, 2017

Notes: Comments to approved rules are not available on the 'utcourts.gov' website. Comments to rules out for public comment are grouped by the comment deadline.

Rules of Civil Procedure

Approved – Effective May 1, 2017

URCP007
URCP035
URCP045
URCP065C
URCP084
URCP034

Comment Period Closes September 24, 2017

URCP006
URCP026.03
URCP045

The comment deadline is in the future. Below are the comments as of September 13.
4 thoughts on "Utah Rules of Civil Procedure – Comment Period Closes September 24, 2017"

Carol Hopper
August 10, 2017 at 3:08 pm

Paragraph (b)(2)(A)(ii) also needs the word "occupancy" changed to "evidentiary."

Richard Terry
August 10, 2017 at 4:25 pm

Why was the word "occupancy" removed from some parts of Rule 26.3 but then left intact in other parts of the rule? See (b)(2)(A)(ii) and (c)(1)(B) – just saying

Kyle Kaiser
August 10, 2017 at 4:56 pm

Dear Members of the Rules Committee and the Honorable Justices of the Supreme Court:
I write to comment on the addition of the Prison Mailbox Rule into Rule 6(e) of the Utah Rules of Civil Procedure.

Please note that these comments are my own and not those of my employer.

In February, I made comments to a previous draft of the rule, which was proposed to be inserted into Rule 5.
http://www.utcourts.gov/utc/rules-comment/2017/01/03/rules-of-civil-procedure-comment-period-closes-february-17-2017/#comment-1182

I appreciate the incorporation of my suggestions into proposed rule Rule 6(e). The rule, as presently drafted, will insure that institutionalized persons have access to the courts and will provide clarity in calculating response times to legal papers filed or served by inmates. I urge the Committee and the Court to adopt the proposed rule.

Nathan Whittaker
August 10, 2017 at 8:38 pm
Rule 6(d) (lines 54-58):

Consider rewording as follows:

(d) Unrepresented parties. When a party may or must act within a specified time after filing, and that party is not represented by an attorney and does not have an electronic filing account, the time period is triggered by service and not by filing.

1) Consider deleting "service of that document is made by mail under Rule 5(b)(3)(C)" in line 56, as it should not be a requirement for application of the rule–if the document is filed and served on two different days, the date of service should govern for unrepresented parties regardless of whether it was served by mail.

2) Consider deleting "and the extra 3 days under paragraph (c) would apply" as it is redundant. If the committee thinks that it is necessary to clarify that paragraph (c) applies, it could be clarified in the advisory committee notes.

3) Consider deleting "Additional time after filing" from the title–as explained above, this change will not necessarily result in additional time if service is not made by mail.

4) The phrases "is unrepresented" and "does not have an electronic filing account" are the two requirements that must be met for the rule to apply, where the phrase "may or must act within a specified time after the filing of a document" is merely the circumstance that the rule applies to. As such, the circumstance the rule applies to should come first, and it should not be in the same series as the requirements that must be met for the rule to apply.

5) Consider replacing "unrepresented" in line 54 with "not represented by an attorney"–that makes it consistent with the language of Rule 5(b)(1).

6) Consider replacing "the filing of a document" with "filing". First, the shorter form is consistent with Rule 6(c)'s usage of "service" rather than "service of the document." Second, under Rule 5(e), "documents" are not filed, "papers" are.

7) Consider replacing "the period of time within which the unrepresented party may or must act" with "the time period" or perhaps just "the period". The shorter phrases are used in Rule 6(a) and 6(c) and are sufficient to convey the intended meaning.

8) Consider replacing "is calculated from" with "is triggered by" so that it matches the language of Rule 6(a)(1)(A).

9) Consider replacing "the service date and not the filing date of the document" with "service and not by filing". The word "date" should probably be avoided since Rule 6(a)(2) allows time to be counted in hours as well as days, and it is not used elsewhere in the rule.

Rule 6(e) (lines 59-71):

First, consider placing this at the end of Rule 5. This deals with filing and service as both are defined by Rule 5–in fact, it is an exception to Rule 5(b)(4) and 5(e). Additionally, it would cause less confusion over whether "service" only means Rule 5 service or both Rule 4 and 5 service if this rule were placed in Rule 5. (That said, the following suggested changes are formatted as though this were to be placed in Rule 6.)

Consider rewording as follows:

(e) Filing or service by inmate.

(e)(1)As used in these rules, an inmate is a person confined to an institution or committed to a place of legal confinement.

(e)(2) A paper filed or served under Rule 5 by an inmate is timely filed or served if it is deposited in the institution's internal mail system on or before the last day for filing or service.

(e)(3) For purposes of computing time under Rule 6, a paper filed or served under this paragraph

(e) is filed when it is accepted by the court and is served when it is placed in the mail as indicated by the date of the postmark.

(e)(4) A paper filed or served under this paragraph (e) must include a notarized statement or written declaration stating:

(e)(4)(A) the date of deposit and that first-class postage is being prepaid; or

(e)(4)(B) that the inmate has complied with any applicable requirements for legal mail set by the institution.

1) Consider replacing "For purposes of Rule 45(i) and this paragraph (e)" with "As used in these rules"–this language is consistent with indicating definitions in the rules (see Rule 17(f), Rule 54(a)). As I don't believe that this definition must apply only to Rule 45(i) and 6(e), the more general language is probably preferable.

2) Consider replacing "Papers", "are timely", and "they are" in line 62 with "A paper", "is timely", and "it is", respectively. See Garner, Guidelines for Drafting and Editing Court Rules, Para. 2.1 ("Draft in the singular number unless the sense is undeniably plural.").

3) Consider inserting "under Rule 5" or "under Rule 5(b)" after "service" on line 62. This clarifies what type of service this applies to and obviates (or at least lessens) the need for Paragraph (e)(3).

4) Consider replacing "Timely filing or service may be shown by a contemporaneously filed" with "A paper filed or served under this paragraph (e) must include a". First, the word "may" is misleading–this provision must be complied with in order for this exception to the time of filing. Second, this statement or declaration is basically a specialized certificate of service and should be "included" in the paper as stated in Rule 5(d) rather than contemporaneously filed" as a separate document (I'm sure the judges would rather not have the separate documents cluttering up their dockets).

5) Consider replacing "setting forth" in Line 64 with "stating" and deleting "stating" in line 65, or just replace "setting forth" with "setting out" as in Fed. R. App. P. 25(a)(2)(C)–I personally think the former option is more compact and preferable, as I can discern no difference between setting out and stating, but that's just my opinion.

6) Consider deleting "has been, or" in Line 65–it seems unnecessary and is omitted from Fed. R. App. P. 25(a)(2)(C)(i).

7) Consider replacing "Response time will be calculated from the date the papers are received by the court, or for papers served on parties that do not need to be filed with the court, the postmark date the papers were deposited in U.S. mail" with "For purposes of computing time under Rule 6, a paper filed or served under this paragraph (e) is filed when it is received by the court and is served when it is placed in the mail as indicated by the date of the postmark". First, "response time" is not used elsewhere in the rules, and Rule 6(a) "computes" rather than "calculates" time periods. Second, as explained above, "date" should be avoided if possible (although I don't think I can avoid it when talking about the postmark). Third, under Rule 5(e), the court "accepts" rather than "receives" papers. Fourth, making the date of filing the date of service seems unadvisable, especially if the opposing party is pro se and does not have easy access to the date that the paper was filed. Finally, "mail" rather than "U.S. mail" is the language used in Rules 5(b)(3)(C) and 6(c).

8) Consider deleting "The provisions of paragraph (e)(2) do not apply to service of process, which is governed by Rule 4" from the text of the rule, and place in the advisory committee notes.

Comment Period Closed June 4, 2017

URCP005

7 thoughts on "Rules of Civil Procedure – Comment Period Closed June 4, 2017"

Dallas Young
April 20, 2017 at 2:04 pm

As long as the court submitting the paper to an electronic filing provider generates the automatic notice of the filing to all counsel of record, this is a fantastic idea and I wish it would have been implemented years ago.

I have had a couple of cases in the last year where something was filed by handing a physical copy to a court clerk, who then scanned and e-filed the document. I've seen judges and pro se litigants do it. Currently, that will not generate electronic notice to counsel of record. And since that's where we all look to keep tabs on what is happening on our files, it's very easy to miss such an event.

So I whole-heartedly support allowing the courts to use an e-filing provider. That should, if I understand correctly, remedy part of that problem.

On a similar note, this same solution should be applied to allow clerks to use an e-filing provider for pro se pleadings. Pro se litigants frequently neglect to serve opposing counsel with filed documents. In that scenario, the opposing counsel won't know about the filing unless s/he fortuitously checks the docket and stumbles onto it. Allowing the clerks to use an e-filing service provider would similarly remedy that problem.

Alex Leeman
April 20, 2017 at 2:16 pm

The problem with this rule is that some court orders and decisions do not automatically generate an e-filing notice, depending on how the document is uploaded by the clerk. If court electronically approves an order that is submitted by counsel, the e-filing system sends notice to everyone. However, I find that when the judge writes a memorandum decision or its own order and the clerk then scans and uploads the document to the docket, the e-filing system generally does not send notice to anyone. Sometimes I check in on the dockets for my cases when I am anticipating a decision, and I often find rulings on the docket that have been sitting there for several days unknown to anyone. This amendment to Rule 5 is only a good idea if the e-filing system can be changed (or clerks can be trained) to ensure that every court decision automatically generates an e-filing notice to all parties.

Kevin Worthy
April 20, 2017 at 2:17 pm

If certificates of service are not required for papers that are prepared and served by the court, why should they be required for papers that are prepared and served by counsel of record? What is the basis for requiring attorneys to do it while allowing the courts to leave it undone?

Daniel Young
April 20, 2017 at 6:58 pm

I think Courts should be required to follow the same electronic filing rules as the parties. I have had many cases where there has been confusion caused because the Court does not file an order or notice electronically.

Also, I don't understand the reasoning for not requiring the court sign a certificate of service. Once I appeared for a hearing and the opposing party was not there. It turned out that the notice of the hearing was not sent to the opposing attorney and the only way to show that was referencing the certificate of service. If there had been no certificate of service there would not have been a way to show the court's error. A certificate of service may also be critical in determining whether appeal deadlines have been met, etc. Certificates of service are just as necessary for Courts as for the parties. Certificates of service provide a valuable record and courts should be required to certify that documents have been sent to the appropriate parties.

Tom Seiler

April 28, 2017 at 1:04 pm

Removing the Court from the certificate of service provision of URCP is a particularly bad idea. Of everyone except unsophisticated Pro Se litigants,the Courts are the most likely to overlook serving one or more of the parties.

Further, the Courts should be required to serve counsel through the efiling system. Whether the Courts are understaffed or the Courts staff are under trained, the times when parties are not served with court filings are nearly always because the Courts fail to serve or the party required to serve is a Pro Se litigant.

Further, the Courts' coris system is often filtered out by spam filters. Because the Courts do not use the efiling system, I check my spam (junk) file a couple of times a day when I am in the office. Also, by the Courts not using efiling, Court notices usually go to one attorney per firm who has made an appearance in a case, excluding the other attorneys who have made an appearance and excluding staff. This is contrary to the malpractice insurers requirement for a two layer calendaring system. It results in some calendaring being missed.

John Bogart
May 4, 2017 at 10:23 am

Currently int he Fourth District there is a practice by some judges of instructing clerks not to include third-parties on service lists. One represents a subpoena recipient, e.g., but the judge directs that no documents be served by filing on you. This practice should be barred. And with this Rule change, the third-party will be deemed to have been served (with orders, motions, etc,) when in fact they have not been served. So the third-pray may be under order to act when it has not been served with the order and may have no notice of the order.

I doubt that is consistent with due process.

Tom Seiler
May 5, 2017 at 2:24 pm

Earlier I posted that this was a bad idea. This week this was confirmed. In a Sixth District Court case filed in Manti, opposing counsel instgructed me to release a Lis Pendens in the case because the case had been dismissed. I carefully reviewed all my emails, even my spam folder, and found no notice from the Court.

I went to the Utah Court Xchange and there was a line item entry of a Notice of Intent to Dismiss, but the Notice itself could not be printed. I found the Notice of Dismissal and was able to print that. There was a certificate of service. I was not listed, nor was the pro se defendant – although the other Defendants' four counsel were listed.

After multiple telephone calls to the Court Clerk's Office, I was able to speak with an assistant Cour Clerk. After research, the Assistant Court Clerk confirmed that I had not been sent notice of the intent to dismiss nor of the notice of dismiss. The only solution, according to the Assistant Court Clerk, was to file a Motion to set Aside the Dismissal, with full briefing and my affidavit that I had not received notice , which I did.

All in all, it took up around six hours. If there is a hearing, that will be another three to five hours.

Rules of Criminal Procedure

Approved – Effective May 1, 2017

URCrP004
URCrP004A

URCrP004B
URCrP029
URCrP011
URCrP018
URCrP022
URCrP038

Comment Period Closed August 11, 2017

URCrP 007
URCrP 007A
URCrP 007B
URCrP 007C
URCrP 009
URCrP 009A

4 thoughts on "Rules of Criminal Procedure – Comment Period Closed August 11, 2017"

Martin V. Gravis
June 28, 2017 at 2:02 am

Proposed Rule 007B does not reflect current law regarding preliminary hearings. Under current law the State cannot refile a case that was dismissed after the magistrate determined that the state had failed to show probable cause unless the state get permission from the court after showing that they have new evidence that was not available at the time of the first hearing.

James Brady
June 30, 2017 at 6:16 am

Proposed Rule 9(2), presents practical problems.

Rule 9(g)(2) requires an information be filed within four days of arrest. When does the four day count begin? If a person is arrested at 1:00 am Monday, do we not count Monday and make Tuesday the first day of the four? If he is arrested at 11:30 pm Monday night, is Tuesday the first day of the four? Suggestion: Clarification of whether the four day count begins at 12:01 am or at 8:00 am the morning following an arrest would help uniform application in the state.

Rule (9)(2) requires a person to be released if no information is filed by 5:00 pm on the fourth day. Who will be required to remain at work after 5 pm each day to confirm that the deadline was breached and issue an order to release a defendant after 5:00 pm? Or, will the defendant wait until the next business day to be released? If the defendant waits past 5:00 pm on a Friday, the business next day could be Monday or Tuesday. Suggestion: Would the committee consider making the filing deadline 3:00 pm on the fourth day? This would allow clerks time to open a file, assign the case, file the information and confirm if any defendant is in custody without a timely information being filed the report that information to a judge and allow time for the judge to issue a release before the end of the work day?

Thanks.

Rule (9)(2)(a)

James Brady
June 30, 2017 at 6:26 am

Rule 7 does not identify a deadline for holding a first appearance on felonies or class A misdemeanors. Rule 9 sets a deadline of 24 hours following arrest for PC and pre-trial release review and sets a four day deadline to file the information. Is the Committee satisfied setting deadlines for PC and pre-trial release review, and for filing an information, but not setting a deadline for conducting a First

Appearance hearing? Is this scheduling item intentionally left to be determined by each district, or each judge depending on the resources of their court location?

Thanks.

Will Carlson
July 28, 2017 at 3:50 pm

While proposed rule 007C generally follows existing language, prosecutors have discovered that existing language poses serious impracticalities in obtaining a material witness warrant against uncooperative witnesses. Under the rule, after a magistrate is given good cause to believe a material witness will not appear and testify, the magistrate must issue a bond rather than a warrant. A warrant is only an option if the witness (who the magistrate already has good cause to believe will not appear and testify) fails or refuses to post the bond. This process wrongly assumes that uncooperative witnesses will nevertheless keep the parties and court apprised of their location so that they can be served with notice of the bond and determine whether or not they will post the bond after already demonstrating evidence they will not cooperate with the proceeding. For transient and hiding witnesses, this procedural requirement effectively prevents a material witness warrant from ever being issued.

As an alternative, the rule should be amended to focus on 1- how a magistrate obtains good cause to believe a material witness is uncooperative, and 2- empower the magistrate to issue a material witness warrant when that good cause exists. The following is one possible draft:

MATERIAL WITNESS WARRANTS

(1) WARRANT. On motion of the prosecuting authority or the defendant, after an Information or an Indictment has been filed with a court, the court may issue a warrant, subject to reasonable bail, for the arrest of a material witness. The warrant shall issue only on a showing, by affidavit or on the record in open court, that the testimony of the witness is material and that

(a) The witness is refusing or has refused to obey a lawfully issued subpoena; or

(b) It is or is likely to be impractical to secure the presence of the witness by subpoena.

(2) HEARING. After the arrest of the witness, the custodial authority shall notify the issuing court before the end of the next business day. The court shall provide a hearing for the witness within 48 hours of arrest or, upon a showing of good cause, within a reasonable period of time after being notified of the arrest. The witness is entitled to be represented by a lawyer. Upon a request by an indigent witness in custody, the court shall appoint a lawyer to represent the witness.

(3) RELEASE/DETENTION. The witness may be released upon the posting of bail or upon compliance with other conditions set by the court. Prior to release, the court may order the witness to be examined and cross-examined before the court in the presence of the defendant and the testimony shall be recorded. If the witness is unavailable or fails to appear at any subsequent hearing or trial when ordered to do so, the recorded testimony may be used at the hearing or trial in lieu of the personal testimony of the witness.

Rules of Juvenile Procedure

Approved – Effective November 1, 2017

URJP 018

Comment Period Closed July 23, 2017

URJP 019
URJP 019A
URJP 019B

URJP 019C

4 thoughts on “Rules of Juvenile Procedure – Comment Period Closed July 23, 2017”

Joshua K. Faulkner
June 8, 2017 at 6:01 pm

The time frames for filing and briefing motions outlined in proposed Utah R. Juv. P. 19(A) do not mesh. Paragraph (a) requires service of the written motion at least 7 days in advance of the hearing. Paragraph (c)(1) requires that the written opposition be filed 14 days before the hearing (7 days before the motion, itself). The reply is then due 7 days after the opposition – on the day the original motion would be due under the rule. Obviously the rule, itself, allows the court to specify a different time frame for briefing, but we will have to do so in EVERY instance under the proposal. I also recognize that the rule allows for briefing to occur before a hearing is calendared – in which case the briefing schedule makes sense. But it makes sense only then.

In my mind, the original motion should be 21 or 28 days prior to the hearing date to make this procedure sensible and practicable, even though I admit that 28 days is a long time in the juvenile court. If we are not intent on keeping the long lead times for opposition and reply, we could cut those down to 5 days after the original motion and 2 days after opposition, but that will be extremely scant time for counsel and parties to gather evidence necessary to support the briefs. Either way, the proposed rule, as it reads to me, tries to walk a fine line between briefing for a calendared and not-yet-calendared hearing, and will lead to confusion.

Joshua K. Faulkner
June 8, 2017 at 9:24 pm

In my haste, I mis-stated the deadline for filing of the opposition under the proposed rule – it is 14 days after the motion, which could have it filed 7 days after the hearing. Sorry for the mistake. The remainder of my analysis still pertains, I think.

Paul Wake
June 8, 2017 at 6:28 pm

Regarding proposed Juvenile Rule 19C, line 2, I suggest placement of an Oxford comma after “objection,” as the lack of an Oxford comma is an abomination whose stench filleth the heavens.

Michael Leavitt
June 8, 2017 at 7:39 pm

Regarding proposed Rule 19A(m)(7) stating that orders to pay money shall be enforced in the same manner as a judgment, it appears to contemplate that the juvenile court would be the forum in which such a judgment is enforced. If that is the intent, then it may not be within the limited jurisdiction of the juvenile court to enforce judgments. Utah Code 78A-6-103 or 104 do not talk about actions to enforce a judgment. Those actions would include things like writs of execution, garnishment or attachment. It is also unclear how the juvenile courts would practically handle writs of execution, garnishment or attachment.

In order for this portion of the rule to be meaningful, there needs to be clarification as to whether it is in the Court’s jurisdiction and then, if it is determined that is, further direction on utilization of those rules of civil procedure in juvenile court.

Comment Period Closed April 8, 2017

URJP037

No comments listed on the court website.

Rules of Appellate Procedure

Approved – Effective November 1, 2017

URAP024
URAP024A

Comment Period Closes September 24, 2017

URAP021
URAP025
URAP025A
URAP030
URAP037
URAP055

The comment close date is in the future. As of September 13, no comments are shown on the court website.

Rules of Evidence

Approved – Effective May 1, 2017

URE0412

Comment Period Closed August 12, 2017

URE 0511
URE 1102

3 thoughts on "Utah Rules of Evidence – Comment Period Closed August 12, 2017"

Nathan Evershed
June 29, 2017 at 7:32 pm

The "promptly reported" language in Rule 1102(7) does not make sense. Rule 1102 relaxes the hearsay rules by allowing "reliable hearsay" for "criminal preliminary examinations." In every other application, Rule 1102 allows in evidence that would not be so easily admitted, and likely excluded, in a trial. For example, forensic reports and records, a statement of a non-testifying peace officer to a testifying peace officer, and an affidavit of a non-testifying witness are examples of evidence where the hearsay rules are relaxed for a preliminary hearing compared to a trial.

The "promptly reported" language turns Rule 1102 on its head. Instead of a more relaxed standard to introduce evidence, in keeping with the essence of Rule 1102, it adds a requirement that a jury trial would not include. If a prosecutor wanted to introduce a video interview of a child victim of sexual or physical abuse at a trial, then he or she would need to follow Rule 15.5 of the Utah Rules of Criminal Procedure, which outlines the requirements to introduce such a video at a trial, and even at a preliminary hearing under Rule 1102. None of the requirements in Rule 15.5 require that the child must have promptly reported his or her victimization in order to allow such evidence, which Rule 1102 currently requires in a preliminary hearing. Thus, the "promptly reported" language of Rule 1102 makes evidence, involving child victims no less, more difficult to introduce at a preliminary hearing than at a jury trial, which is not in keeping with the essence of Rule 1102. Therefore, the "promptly reported" language should be removed and it is very encouraging that this amendment is being suggested.

Thank you for your time.

Paul Lyman
June 30, 2017 at 3:02 pm

Proposed Rules 7 and 7A of Criminal Procedure allow only seven day continuances. In rural areas some courts are only held monthly and others are only held every two weeks. There may not be a judge available within seven days. Longer periods should be allowed "for good cause shown."

Sandi Johnson
July 3, 2017 at 6:03 pm

I support the proposed change to remove the "promptly reported by the child victim" language. Research has shown that with child victims, the promise to tell the truth and using proper interviewing techniques are the important factors to consider. Removing this language protects victims from the trauma of reliving the experience more than is necessary.

Rules of Professional Conduct

Approved – Effective November 1, 2017

RPC 01.00
RPC 03.03
RPC 01.04
RPC 01.06
RPC 01.07
RPC 01.08
RPC 01.09
RPC 01.10
RPC 01.11
RPC 01.12
RPC 01.17
RPC 01.18
RPC 02.03
RPC 02.04
RPC 03.05

Comment Period Closed July 28, 2017

RPC 08.04

60 thoughts on "Rules of Professional Conduct – Comment Period Closed July 28, 2017"

J. RobRoy Platt
June 13, 2017 at 4:20 pm

I strongly object to the addition of this rule to the Utah Rules of Professional Conduct for the following reasons as laid out by attorney and long-time ABA member Bradley S. Abramson:

1. The rule is unconstitutional. The ABA's own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law Section, warned the ABA that the new rule may violate attorneys' First Amendment speech rights and be subject to constitutional challenge. Prominent legal scholars, such as Professor Eugene Volokh, who teaches free speech and religious freedom law at UCLA Law School, as well as former U.S. Attorney General Edwin Meese III, have also opined that the new rule is constitutionally infirm.

The same point has been made in more than one law review article on the subject. It is axiomatic that states should never enact unconstitutional laws and, for that reason alone, no state should enact this

one. Because of the new rule's constitutional defects, its adoption will embroil states in costly constitutional litigation and subject the states and the legal profession to contempt should federal courts strike down the rule on constitutional grounds.

2. The rule serves no legitimate professional purpose. The legal profession has a legitimate interest in proscribing attorney conduct that would either render an attorney unfit to practice law or that would prejudice the administration of justice. If attorney conduct does not significantly impinge on one or the other of these two legitimate professional concerns, the profession has no business prohibiting it. The previous misconduct rule recognized this principle by prohibiting attorneys from engaging in six types of conduct, all of which clearly served one or the other of these two purposes. The new rule, however, for the first time proscribes attorney conduct that neither renders an attorney unfit to practice law nor prejudices the administration of justice.

Instead, the new rule creates a free-floating speech code — unrelated to either the administration of justice or attorney fitness — that subjects attorneys to professional discipline simply for using language or engaging in conduct, even in contexts only remotely related to an attorneys' professional activities, that disciplinary authorities deem politically incorrect.

This has already occurred in Indiana, where a similar rule has been adopted, resulting in one attorney being professionally disciplined simply for asking someone if they were gay, and another attorney being suspended for applying a racially derogatory term to himself. No state has any business adopting a rule that interferes with attorney conduct that neither prejudices the administration of justice nor renders the attorney unfit to practice law. Any such rule is simply oppressive meddling.

3. The rule conflicts with other rules of professional conduct. Rule 1.7 of the ABA's Model Rules of Professional Conduct prohibits attorneys from representing clients in circumstances where the lawyer has a financial or personal interest (including religious, political or philosophical beliefs) that conflict with the client or the case — the concern being that in such a circumstance the attorney's interests will be divided, to the detriment of the client. Another rule — Rule 1.3 of the ABA's Model Rules — requires attorneys to zealously represent their clients. The ABA's new rule would conflict with these other ABA model rules in that the new rule would prohibit an attorney from declining representation — if the prospective client's personal characteristics fall within one or more of the protected classes — even when the attorney's religious, political or philosophical beliefs about the client or the case would be adverse to, or would interfere with, the attorney's ability to zealously represent the client.

This would place the attorney in a perilous position. If the attorney declines the representation, she may be disciplined under the new rule for discriminating against the prospective client. On the other hand, if she accepts the representation because she fears that declining the representation may subject her to discipline under the new nondiscrimination rule, she may be disciplined under Rule 1.3 or 1.7 should the attorney's personal interests adversely affect her representation of the client. No state should adopt a rule that conflicts with other already existing rules and that places inconsistent obligations upon attorneys.

4. The rule will harm clients. Because the new rule will require attorneys to accept cases and clients that the attorney, due to personal conflicts of interest, would otherwise decline, clients will be the ones who suffer. Clients are entitled to lawyers who can and will zealously represent them. Should an attorney be unable to represent a client zealously, for any reason — even a discriminatory one — the client is best served by a different attorney. The new rule, however, requires attorneys to accept clients they cannot zealously represent. In doing so, the new rule runs counter to the paramount purpose of the Rules of Professional Conduct, which is to make sure, to the extent possible, that lawyers provide clients with competent and zealous legal representation. No state should adopt a rule that will harm clients.

5. The rule will result in the suppression of politically incorrect speech while protecting politically correct speech. Comment [4] of the new rule contains an explicit exception for "conduct undertaken to promote diversity and inclusion." This exception to the new rule insures that the ABA and its liberal allies will be able to allow discrimination in contexts that advance the ABA's liberal agenda, while prohibiting

discrimination in contexts that don't. Here's how it will work: 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 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 prosecute that attorney for violating the rule.

This phenomenon has already been seen in other contexts. For example, a Civil Rights Commission in Colorado prosecuted a Christian cake artist for declining to use his artistic talents to create a same-sex wedding cake but refused to prosecute a baker who declined to create a cake with symbolism opposed to same-sex marriage, finding that the first constituted illegal discrimination but that the second did not. The reason underlying this disparate treatment was obvious: The first involved a politically favored class, the second a disfavored one. This nefarious exception — decrying discrimination generally, while at the same time explicitly approving of it as long as the discrimination furthers a liberally approved interest — reveals that the ABA's interest in prohibiting discrimination is not a compellingly general and neutral interest, but rather a narrow and politically motivated interest. No state should adopt a rule constructed so as to punish certain viewpoints while protecting and advancing others.

6. The rule will trespass on attorney conscience rights. Comment [5] of the new rule provides that "A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities." At first glance, this provision might appear to assist attorneys, by getting them "off the hook" — so to speak — from having to worry about becoming morally complicit in a client's behavior. But, in fact, that's precisely the problem with the rule. By adopting this rule the state is presuming to take on the role of the attorney's spiritual adviser — purportedly absolving attorneys from any moral culpability they may incur in representing a client. (To understand how this can be a problem, consider the Catechism of the Catholic Church, which explicitly teaches that it is a sin for one to become complicit in the sins of others — by participating in them, by advising them, by not hindering them, or by protecting them.)

The U.S. Constitution forbids government from doing this. The state cannot dictate to a citizen what does or does not — or should or should not — violate the citizen's religious beliefs. And the state certainly may not place itself between its citizens and their God by purporting to absolve citizens of their sins. If an attorney sincerely believes that being involved in a case makes him morally complicit in the client's cause or behavior — and for that reason the lawyer cannot represent the client without violating his conscience — the state may not determine otherwise or purport to "absolve" the attorney of the moral complicity.

Indeed, one would have to be obtuse not to grasp the fact that — by preemptively depriving attorneys of the claim that representing a client will make them complicit in a client's behavior — the ABA's very purpose in adopting this rule is to foreclose attorneys from being able to assert religious or moral considerations in making client selection decisions, thereby forcing attorneys to either act against their conscience or face professional discipline. No state should adopt a rule that would do that.

For any or all of these reasons, states should not only refuse to adopt the ABA's new misconduct rule, they should condemn it.

Martin V. Gravis
June 23, 2017 at 4:06 pm

While I agree that the rule has issues with properly defining harassment and discrimination and therefore may be unconstitutionally vague, I do agree that we have an ethical obligation not to discriminate or harass any group. p.s. I don't buy into the "religious liberties" argument.

Kurt Laird
June 27, 2017 at 7:26 pm

I agree with Mr. Platt's analysis. Thank you.

Russ Weekes
July 13, 2017 at 8:51 pm

Completely Agree with J. RobRoy Platt. This Rule should be rejected.

J. RobRoy Platt
July 17, 2017 at 5:51 pm

A point of clarification regarding my comment above — I am not the author of the excellent analysis within my comment. I just strongly agree with it. The author is Bradley S. Abramson. While I did credit the author in my original post, I realize that I should have made it more explicit that I was just copying and pasting his analysis into my comment. My apologies for any confusion I may have caused.

Here is a link to Mr. Abramson's article on the website on which I found it:

https://www.law360.com/texas/articles/836505/6-reasons-states-should-shun-aba-attorney-misconduct-rule

Ronald D. Rotunda
July 25, 2017 at 10:51 pm

I agree that proposed Rule RPC 08.04 is unconstitutional in violation of the First Amendment. I discuss some of the issues here, Ronald D. Rotunda,
The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought, http://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought

Ricky Nelson
July 28, 2017 at 3:18 am

I agree with the analysis stated. It saddens me that this rule is even being considered. Of course an attorney should never discriminate but this is taking it too far.

Eric K. Johnson
June 13, 2017 at 4:38 pm

This proposed amendment is unnecessary. It is already covered by existing rules of professional conduct.

This proposed amendment is a vague, subjective "rule" that in many circumstances would consist of offenses one cannot possibly know he/she can commit or has committed until after the fact, when he/she is subjectiely accused, and quite often without any consistently fair way to verify or refute the charges.

It is even questionable as to whether this proposed amendment is even well-meaning. It's a "guilty until proven innocent" trap.

None of the offenses in the proposed rule are defined. What is "harassment"? Sexual harassment? If so, what elements would this rule adopt? Criminal harrassment? If so, what elements would this rule adopt? Both kinds of harrassment? Other kinds? By the same token what is "discrimination"? What is (and is not) "conduct related to the practice of law"?

Consider the following hypotheticals:

1) the problem with "to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination . . . in conduct related to the practice of law" (aside from its awkward syntax) is that it is so vague and broad as to be meaningless. The list of possible victims is so inclusive as to be meaningless. "Socioeconmic status?" What does that even mean? "Gender identity?" Are you

kidding? It is hardly a settled matter that one's biological sex is now a matter of "choice." No lawyer should be branded as unprofessional if he/she thinks called "trans-gender" potential clients may be problematic. If they're not even sure of their own sex, what else are they unsure of? How credible a witness might they be?

2) a single, black, old woman is rejected as a paralegal job candidate. She is rejected because the employer finds other applicants to be a better fit for the job and the other employees in the office. The rejected applicant complains that the lawyer employer violated the newly revised RPC 8.04, saying she was rejected for being black, female, and old. But the lawyer actually hired a black woman who is older than the applicant. Still, the lawyer has to undergo the needless scrutiny of a bar complaint. Imagine how much worse it gets if the lawyer has the audacity to hire a young white man.

The fear of being branded discriminatory now perversely gives minorities an unfair advantage in the legal system. What self-preserving lawyer would dare question or oppose a job candidate, plaintiff, or defendant who is non-white, poor, unmarried, non-Christian, an immigrant, non-European, who is blind, over 65 years of age, and of ambiguous gender and sexual orientation? Who would want to go through the ordeal of having to defend his/her actions if accused?

Now every lawyer would have to ensure that his/her dealings with any minority could not possibly be construed as harassing or discriminatory. But lawyers and judges discriminate as a matter of their professional obligation. Who's guilty? Who's not? Who's lying? Who's not? Now a prosecutor has to practice "defensive prosecution" by assuring everyone that the black defendant isn't being harassed and discriminated against. Now–for fear the defense lawyer will be accused of the same–a defense lawyer cannot suggest that it was, instead of his/her straight male client, an old lesbian who embezzled.

What if a lawyer doesn't hold an elevator at the courthouse for a guy/gal in a wheel chair? Is that lawyer violating Rule 8.04? Is it "discriminatory" for that same TO HOLD the elevator at the courthouse for the guy/gal in a wheel chair? Is that part of the practice of law? Is it a violation of Rule 8.04?

It's trendy now for businesses and institutions to show the world how enlightened and progressive they are by proclaiming they don't discriminate and will punish those that do, but making such poorly drafted policy on such bases benefits no one and ultimately does more harm than good. It's not more rules we need, it's good-faith adherence to the rules we have by lawyers of good character.

Bryan Booth
June 13, 2017 at 4:57 pm

I agree with efforts to eliminate harassment and harmful discrimination based on these classifications. However, some discrimination may not be harmful and may be required for adherence to deeply held moral or religious beliefs. "Discrimination" is extremely broad and simply means treating someone differently. For example, if a married law partner has a policy of not going to lunch alone with young, single female associates (with the idea that he values his marriage and wants to avoid impropriety or the appearance of impropriety), that could be considered discrimination based on sex and the attorney could be subject to discipline. Or if an attorney with religious convictions that homosexuality is immoral refuses to represent a gay client seeking to expand LGBT rights, that could be considered discrimination on the basis of sexual orientation and subject the attorney to discipline. (I realize that the rule has language about not limiting the ability of an attorney to accept or decline representation, but I feel there could be tension between the two provisions.) Perhaps the "prejudicial to the administration of justice" language needs to be added back in so that non-prejudicial discrimination is not something that subjects an attorney to discipline.

Erin Byington
June 13, 2017 at 5:07 pm

The inclusion of discrimination based on socioeconomic status is extremely troublesome and

could be interpreted to mean that it is misconduct for a lawyer to decline to represent a person if they cannot afford the retainer. Operating a law practice is a business, and we need to be able to decline representation if an individual cannot afford our fees.

Dale W Sessions
June 13, 2017 at 5:54 pm

I am opposed to the language of this amendment. While I agree that harassment and discrimination are inappropriate, I remain concerned with the proposed language that it interferes with my ability to choose my clients, the types of matters I want to represent and the amount I may charge for my services. I should not be required to accept clients that are financially unable to pay my fees, unless I choose to participate in a reduced fee or pro bono effort. The language of the proposed amendment is far too broad.

David Jardine
June 13, 2017 at 6:37 pm

I object to the proposed wording change for RPC 08.04. While it is not professional behavior for a lawyer to harass or improperly discriminate against members of the public, given the radicalization in our media and politics of some of the issues being mentioned I believe this rule amendment will simply provide a basis for a multitude of unwarranted complaints against attorneys who have not done anything wrong. Socioeconomic status, gender identity and sexual orientation do not all enjoy the same level of protected status under the either federal or the various state laws. They should not be lumped in with those areas that legislatures and the courts have given those protections to, despite the fact that some wish they were fully protected statuses. This addition is a hornets nest waiting to be unleashed. The consequences will not be pleasant and will involve the Bar trying to force a social and political agenda.

Axel Trumbo
June 13, 2017 at 6:42 pm

Definitions and qualifications important to the interpretation of the proposed addition to rule 8.04 are located in the comments. The courts are not guaranteed to consider language other than the text of the rules themselves: “The comments are intended as guides to interpretation, but the text of each rule is authoritative.” See Preamble: Scope, para. 21, Utah Rules of Professional Conduct.

David Knowles
June 13, 2017 at 9:03 pm

I am troubled at the prospect that this could be interpreted to deny a lawyer the choice to decline representation, regardless of the reason or whether there even is a reason, of any person, including persons within one of these many “protected” classifications. Is there any real concern that a person needing legal services will not be able to find competent any legal counsel in Utah without this rule? Is this being considered in order to make the Utah bar appear politically correct by forcing its members to represent clients even if doing so would be objectionable to the attorney? Is coerced association likely to foster better legal representation or counseling?

Ralph R. Tate
June 13, 2017 at 9:33 pm

Does not this rule open up a whole new area of frivolous litigation by those who try to interpret the reasons an attorney chose not to accept the representation of a client. There are many valid reasons why an attorney chooses not to accept a case. He should not be subject of spurious lawsuits seeking to defend his personal reasons.

Vance
June 13, 2017 at 10:36 pm

This rule seems to trample on the rights of the non-politically correct to get legal representation. If, say, the LDS church is sued by an LGBT person, can anyone represent the LDS church without falling victim to this rule? Or what about a baker, accused of homophobia and sued by a LGBT person–can you accept the baker as a client without "harassing" the LGBT person in the form of impeaching him or her as a witness; calling into question the LGBT accuser's honesty or maybe showing the economic interests to sue? Can, in fact, you do anything to defend a client against any of these privileged classes? Wouldn't the consequence be that you are forced to withdraw as counsel, and the accused person is no longer able to retain counsel? This rule seems to eliminate the ability of any "non privileged" person or organization to get counsel.

Glen Thomas
June 14, 2017 at 12:18 am

Dumbest rule I have ever read. I should bill whoever proposed this change for the time I spent reading it and writing this response. But that would probably be considered discrimination. If this passes, heaven help us all.

Anonymous
June 14, 2017 at 1:02 am

I am opposed to this amendment. First, it is unnecessary. This is already covered by Rule 8.04(d); harassment and discrimination are certainly "conduct that is prejudicial to the administration of justice." In addition, to the extent that harassment and discrimination are already criminal offenses, a violation of the law is a violation of these rules. There is no need for an additional rule here.

Second, I am deeply concerned that the terms "harassment" and "discrimination" are not sufficiently defined.

I have twice in the past month learned of trans individuals that accused legal professionals of discrimination. One trans defendant accused a justice court judge of discrimination for ruling against her, when he found her guilty of a misdemeanor. The second trans individual accused the city attorneys of discrimination because they prosecuted her charge as a misdemeanor assault, rather than as a felony hate crime. These are clearly not examples of discrimination, but, without defining that term, this rule could open a can of worms for legal professionals. For example, an attorney may be accused of discrimination for declining a protected individual's case, even if the attorney had valid legal reasons for declining representation. As someone said above, this may become a "guilty until proven innocent" trap. What proof can an attorney show to prove his subjective thoughts about the merits of a case? At the very least, we need to define "discrimination" and identify the standards of evidence to be applied to this rule in largely subjective situations.

Third, I believe this addition will increase the burden on the disciplinary committee but will not result in any comparative protection for the listed classes of individuals. Considering the LGBTQIAPK issues currently surfacing, this issue will come up frequently. But the lack of definition, and precarious application of this rule to subjective situations, will likely result in many my-word-against-your-word situations with no evidence available to determine if discrimination occurred or not. This will not aid protected individuals and it will bog down the policing of these issues where they do occur. As the rules are currently written, if any individual has evidence of harassment or discrimination, the attorney can be disciplined under the existing rules.

Joseph Chambers
June 14, 2017 at 1:22 am

The proposed language change is problematic to me for several reasons:

First, I have no problem with the inclusion of harassment as prohibited conduct. In many instances, such would rise to the level of criminal conduct in any event. It is the expansion of the classes that I am concerned with. And the replacement of the qualifier "when such action is prejudicial to the administration of justice" for the vague phrase of "in conduct related to the practice of law. I feel the former is sufficiently defined, while the latter is vague and overbroad.

Second, removal of the following language from the comment to me is concerning: ". . . when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate [former] paragraph (d)." Comment 3 to the current Rule 8.04. If the newly expanded conduct is not prejudicial to the administration of justice then it would seem that this proposed change is motivated by social or political forces within the ABA that really has no legitimate basis to mandate such conduct to all lawyers. (Not all wisdom flows from the ABA. I discontinued my association with the ABA when they adopted a pro-abortion position that I felt intruded on my own personal and religious beliefs. However, it is obligatory to be a member of the Utah Bar to practice law so whatever social positions are interjected into the RPC are not an election, but mandated conduct.)

Third, I agree with Mr. Jardine's comments (June 13, 2017 6:37 PM) in their entirety. I am concerned that the proposed language will prove to be a tool to litigious consumers who simply want to get even with an attorney by filing a Bar complaint about conduct that was socially inappropriate but had no negative impact on the administration of justice. Legal consumers are increasingly becoming aware of tactics (via the internet) to employ to harass an attorney they have had a bad experience with. This broad language gives them fodder to do so.

I qualify the third point with the following: I personally agree that harassment and discrimination are inappropriate.

Third, however, in expanding the traditional classes of prohibited discrimination is the Court inadvertently signaling where it intends to go with legal issues that it may be facing in the near future and creating some precedent that is unintended. Traditionally, the Courts have deferred these type of social decisions to the legislature or elected officials. Particularly where the conduct has not adversely affected the administration of justice. I would hope that I would never discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age or sexual orientation. But as to gender identity and socioeconomic status, I have no guidance as to how I might inadvertently discriminate against someone in this class and then be subject to a Bar complaint. It concerns me and obviously other members of the Bar who have commented.

Charles Schultz
June 21, 2017 at 1:53 am

Who decides what "engage in conduct" means?

Who decides what "harassment" means?

Who decides what "discrimination" means?

Who decides what a "lawyer knows" mean?

Who decides what a lawyer "reasonably should know" means?

Who decides what "socioeconomic status" means?

Who decides what "conduct related to the practice of law" means?

Is it violation of this proposed rule for an attorney to simply make a statement? If so, who will make the determination of what an attorney is allowed to say and what he or she is not allowed to say?

If a lawyer violates this proposed rule, who will decide what sanctions or discipline can be imposed on the attorney?

If an attorney can be disciplined, or sanctioned, for simply speaking his or her mind, given the fact that the state bar is, a least, a quasi governmental organization, existing under the authority of the Utah

Supreme Court, that is a governmental organization existing under the laws of the State of Utah, and given the fact that a district court, that is also a governmental organization, will have to impose any sanctions or discipline against an attorney, that is proposed by the OPC, how is this proposed rule not a violation of the Free Speech Provision of the First Amendment to the Constitution of the United States?

While prevention of harassment on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status may be a laudable goal, this proposed rule is not the way to accomplish it.

Socioeconomic status????? Really????? Do I not have the right to discriminate against the wealthiest one tenth of the wealthiest one percent of the people that own the world, and are destroying it? Do I not have the right to discriminate against kings, queens, princes, princesses, dukes, duchesses, earls, and other so called "nobility?" Did not a lot of brave and heroic men die to give me that right?

This proposed rule is ludicrous and an assault on our fundamental rights!

Evan James
June 21, 2017 at 9:55 pm

One attorney general already concluded that the rule is unconstitutional. See, https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf

South Carolina's Professional Responsibility Committee disfavored the rule, concluded it is unconstitutional and believed it to be in opposition to "fundamental principles" associated with lawyers. See, http://www.sccourts.org/HOD2017/hod_materials_january_2017_extract.pdf

The EEOC acknowledges that harassment is often a "he said she said" dispute. It therefore advises, "The Commission's investigation also should search thoroughly for corroborative evidence of any nature." See, https://www.eeoc.gov/policy/docs/currentissues.html (citing, Henson v. City of Dundee, 682 F.2d at 912 n.25, "In a case of alleged sexual harassment which involves close questions of credibility and subjective interpretation, the existence of corroborative evidence or the lack thereof is likely to be crucial.") This means anything a lawyer says can and will be used against him, even when done while representing clients. Indeed, Comment 4 states, "Conduct related to the practice of law includes representing clients; interacting with witnesses…." So while the proposed rule does not "preclude legitimate (whatever that means) advice or advocacy," the fact remains that under existing law any advice given or advocacy performed is up for grabs as corroborating evidence when charges of harassment or discrimination are made. See Comment 3, "The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." This means that the proposed rule could have a chilling effect on advocacy and the administration of justice.

James M. Retallick
June 23, 2017 at 5:43 pm

This is the ultimate in the wave of PC assaults that have been flooding our society over the last decade. In an address from 2012, former Utah Supreme Court Justice, Dallin H. Oaks stated, "I speak first of free speech. I believe we live in a time of diminishing freedom of speech—not the formal free-speech doctrine declared by the United States Supreme Court, but the extent of free speech enjoyed by citizens in their daily lives. Ironically, this occurs at a time when technology has extended the impact of speech far beyond what could have been imagined even a few decades ago. But what kind of speech? I fear that free speech is diminishing as a result of the chilling effect of mostly invisible restraints, even censorship.

We are feeling increasing restrictions on unpopular views and unwelcome facts. Some of these restrictions are imposed by politically correct editorial censorship in the media and professional journals. In academic employment, free speech is diminished by hiring decisions that discriminate against persons who hold or are presumed to hold unpopular views. In a variety of other settings, free speech is diminished by the forces of political correctness. Free speech is also chilled by organized boycotts to use

the marketplace to punish unpopular persons or messages.

In case these generalities are unclear, I offer these selected examples of the way free speech is being punished or chilled by organizational restraints or punitive action.

1. New laws that criminalize so-called hate speech and administrative actions that enlarge the categories of targeted communications.

2. Scholars' inability to publish unpopular facts and opinions in professional journals and academic sanctions or pressures imposed on various professors who have succeeded in publishing unfavored material.

3. Pressures imposed on colleges and universities and their professors by professional associations and accrediting bodies bent on furthering various dogmas of political correctness.

4. Campus speech codes."

From a more practical every day perspective, I am a public defender and also practice in domestic law. I have been accused by minorities of being a racist because I could not get them the deal they wanted. (I am half hispanic myself) The same holds true with lower economic class people. Some call us public pretenders and said they wish they could afford a real lawyer. Although I have yet to see a "real lawyer" come in and get a better deal than the one I had already negotiated. I have been accused of being a sexist because I was able to prove that the woman in the case lied and perjured herself. I can see this proposed addition to the rules resulting in an explosion of frivolous claims based on speculation rather than substance. I am embarrassed that this is even being proposed by our bar.

Richard King
June 23, 2017 at 10:19 pm

This proposed rule should not be added to the Utah Rules of Professional Conduct for the following reasons. First, the rule is an unconstitutional violation of the right to free speech as guaranteed by the First Amendment, and is void for vagueness. Enforcement of this rule in Court proceedings would deny Utah citizens of their constitutional right to equal access to the courts. Second, the proposed rule does not have a valid purpose that is not already addressed by other rules. Third, the proposed rule conflicts with other rules of professional conduct. Utah should not adopt a rule that conflicts with other already existing rules and that places inconsistent obligations upon attorneys. Fourth, the proposed rule will harm clients because the new rule will require attorneys to accept cases and clients that the attorney would otherwise decline, clients will be the ones who suffer. The proposed rule requires attorneys to accept clients that they cannot zealously represent. In doing so, the new rule runs counter to the purpose of the Rules of Professional Conduct, which is to help insure that lawyers provide clients with competent and zealous legal representation. Fifth, the proposed rule will result in the suppression of unpopular speech while protecting "politically correct" speech. Utah should not adopt a rule that will punish unpopular speech and protect and advance the politically correct speech du jour. Therefore, this proposed rule should not be adopted.

Trevor Casperson
June 24, 2017 at 11:45 am

I agree with the comments herein made opposing the rule. My only addition is to further emphasize that by requiring attorneys to worry about whether they are discriminating, you limit their ability to zealously protect the worst of our society. Though we may abhor the actions of these individuals, in order to preserve our freedoms they must be given a worthy and competent voice.

Even worse however, this rule works against zealous protection of individuals with opinions that are not favored by those in power.

Attorneys should be thought leaders, but they cannot do that if their thoughts and actions are restricted by ever changing political views.

Samantha Smith
June 24, 2017 at 5:43 pm

I strongly object to this proposed amendment for the same reasons Robroy Platt, Eric Johnson, David Jardine have eloquently articulated above. This isn't just an unnecessary amendment– it is a ham-handed, blatant attempt to force a liberal social agenda and punish those who dare to commit thoughtcrime.

Andrew McCullough
June 25, 2017 at 3:39 am

I think we already have rules on civility. This sounds like imposing "political correctness" at the expense of free speech. Lawyers must be free to offend others; and we should not be forced to measure our statements on the basis of what others may feel is inappropriate.

Grant W.P.Morrison
June 25, 2017 at 8:48 pm

Absolutley, for the reasons set forth above, DO NOT agree with this proposed rule.

T.J. Tsakalos
June 25, 2017 at 11:05 pm

I am sure that discrimination/harassment occur, but I am just as sure a lot of the claims are bogus. Many of these claims arise when employees/partners are terminated or disciplined, and they make such claims from spite. Now the Bar wants to jump into these sticky situations via rule discipline? What's next? A review of petitions and orders in lawyer's personal divorce proceedings to determine whether discipline should be imposed?

The Bar should focus on lawyer competency and integrity. Political correctness will not serve the interests of the Bar, lawyers, or the public.

The Bar would do well to take the opposite approach of anything proposed by the ABA. I terminated my membership in that organization 30+ years ago. This proposed rule again vindicates my decision.

Paul Wake
June 30, 2017 at 7:27 pm

The PC BS doesn't even merit analysis. If it passes, I hope to be the first lawyer in Utah to publicly violate it.

Jenifer Hawks
July 4, 2017 at 1:26 pm

The Bar discriminated against me for whatever reason. I hired an attorney for my divorce. To make a long story short, this attorney "helped" my now ex get away with stealing hundreds of thousands of dollars. I filed a complaint with the Bar, they told me i had to send proof, well since my ex had stolen every dime, i could not make copies and mail them so i packed up the hundreds of papers with the proof and took them there in person with a friend helping me, FOUR TIMES. Each time i was told by a different person that i needed help, i.e. call legal aid and don't take no for an answer, well they said no. I kept trying to get help, and they,(the bar), told me they did not want to hear from me again. Then my ex's attorney lowered my alimony and the Court refused to let me object, even my Judges Clerk knew that my ex was getting away with stealing this money. The Bar discriminated against me??????? NO HELP

Mark Woodbury

July 6, 2017 at 5:25 pm

I oppose the adoption of this rule. I think the rule is poorly drafted, is potentially unconstitutional, and imposes an undue and unnecessary burden on practitioners.

As written, the rule gives no notice as to what conduct qualifies as "harassment or discrimination," or when that conduct is "related to the practice of law." In the comments, "conduct related to the practice of law" is literally defined as "conduct related to the practice of law." See Comment 4.

The only real guidance given is a series of possible examples, all of which are so broad as to regulate practically every aspect of an attorney's life, including "business or social activities" that are "related to the practice of law," which, as we just saw, is pretty much undefined. It's not impossible to imagine pretty much any business or social activity being related to the practice of law in some way, especially if everyone there knows that I am an attorney. For example, if I go to a friend's house for dinner and he asks me about current immigration policies (this actually happened to me recently), is this a "social activity" that is "related to the practice of law?" Are my thoughts and opinions about immigration now subject to bar oversight for "discrimination" or "bias?"

"Discrimination" is also defined so broadly that it is practically impossible for me to be sure about what behavior is or is not permissible. It includes "verbal conduct" that is "demeaning" or "manifests bias." I'm honestly not sure what "verbal conduct" is (it seems kind of like a paradox), but my best guess is that it's a stand in for "speech." And "demeaning" can be stretched to include just about anything that someone else doesn't like.

Keeping with the example up above, what if my opinion is that the current high level of low-wage and low-skill immigration from Latin America is a destabilizing influence on the domestic labor market, and also represents a potentially disruptive cultural phenomena, since the economic immigrants tend to be disproportionately young, unmarried males who fail to assimilate by adopting the local language and customs? Such a sentiment would seem to implicate several of the protected categories, including socio-economic status, marital status, sex, age, and race/ethnicity/national origin. At what point does it become demeaning verbal conduct? If I call immigrants names? If I advocate for increased border enforcement and a stricter deportation regime? Have I already demeaned them, just by saying we shouldn't want them here? Don't I "manifest bias" by making a sweeping generalization?

Is this close enough to be "related to the practice of law?" Maybe not, but what if I add that this is why the framers gave plenary power over immigration to congress? What if I opine that, as non-citizens, immigrants are afforded fewer constitutional protections? What if, instead of happening at a friend's home, this happens at lunch with my partners or associates? What if it occurs in the context of discussing enforcement priorities with the federal government, or with the DHS attorneys in immigration court?

I can always fall back on "legitimate advocacy," but I think the protections offered by that clause are illusory. The people who are deciding what "legitimate" means are the same ones deciding what constitutes "demeaning verbal conduct" in the first place. We just had the specter of a sitting United States senator suggest in confirmation hearings that it was "hateful" (his word, but I'm pretty sure it's a decent synonym for demeaning and derogatory) for a Christian to say that you have to be Christian to get into heaven, and that believing or defending this position disqualified someone from a position in government. Given that sort of political climate, I don't think it's unreasonable to be worried about how far "demeaning" can get stretched, and how far "legitimate advocacy" can be shrunk.

Obviously, we hope that the powers that be wouldn't choose to enforce and interpret the rule this way, but I don't see any reason to implement a poorly drafted rule and hope that the enforcers save it. Let's just write a better rule (or, better yet, just keep the rule we have).

I don't want to dwell too much on the First Amendment implications (it's not my area of expertise), but the Texas AG certainly seems to have some well founded concerns about this model rule. And it's not too hard to imagine some very concerning hypotheticals. For example, if an attorney defends the Westboro Baptist church in court, is he engaged in demeaning conduct? Probably not, seems like that

should be "legitimate advocacy." What if he is a member of the church? What if he participates in their crazy protests? (Side note: what if an attorney calls them crazy? Is that religious bias?) What if, in participating in their crazy protests, he holds up a sign that says that he's an attorney and that what they are doing is constitutionally protected speech? That looks a lot like "conduct related to the practice of law," and it sure seems like we're getting awfully close to restricting core First Amendment freedom of religion principles.

Finally, I'm not exactly sure why we need a new rule. If memory serves, we've already got a rule that restricts this sort of behavior. In fact, it's this same rule that they want to modify. Rule 8.4(d)—supplemented by comment 3—seems like it covers a lot of this same ground, just without all the overbreadth and constitutional pitfalls. For me, at least, the key provision in the present rule is that, before it can be sanctionable, the conduct must be "prejudicial to the administration of justice." If I understand correctly, to whole justification for all of these rules and restrictions on lawyers is that the State has a very strong interest in the administration of justice, and therefore a concomitant interest in regulating conduct of attorneys that is prejudicial to that administration. I think that this requirement is a very important protection. It separates a legitimate government (or quasi government, in the case of the bar association) interest from a speech code.

Now, I'm open to the argument that the current rule isn't working. But I haven't seen any evidence of it yet. So if we do have a widespread and systemic problem with bias and bigotry and hatefulness that is preventing people from accessing the justice system, then let's take a close look at it and talk about the best way to address that problem. But I'm betting the current proposal isn't it.

John Nielsen
July 10, 2017 at 9:56 pm

Speaking for myself, I oppose this rule, which appears to me to be unconstitutional. The Texas Attorney General recently issued an opinion on proposed model rule 8.4, stating that it was unconstitutional for various reasons, https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf. And First Amendment scholar Eugene Volokh agrees, https://tinyurl.com/yb6t3w2c.

National Lawyers Association
July 11, 2017 at 3:43 pm

After carefully reviewing the new ABA Model Rule 8.4(g) and its Comments, the National Lawyers Association finds that the new ABA Model Rule 8.4(g), if adopted by any state and enforced against any attorney, would violate an attorneys' free speech, free association, and free exercise rights under the First Amendment to the Constitution of the United States. Therefore, the National Lawyers Association recommends that Utah not adopt Model Rule 8.4(g).

A. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of speech

Lawyers do not surrender their constitutional rights when they enter the legal profession. In re Primus, 436 U.S. 412, 432-33 (1978). See also Gentile v. State Bar of Nevada, 501 U.S. 1030, 1054 (1991)(disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 469 (1988) (the First Amendment applies to state bar disciplinary actions through the Fourteenth Amendment). Although decisions of the United States Supreme Court have held that an attorney's free speech rights may be circumscribed to some extent in the courtroom during a judicial proceeding, as well as outside the courtroom when speaking about a pending case, Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991), Model Rule 8.4(g) extends far beyond the context of a judicial proceeding. It purports to restrict all speech that constitutes "discrimination" or "harassment" whenever such speech is – however attenuated – "related to the practice of law." Model Comment [3] makes clear that this includes any so-called "harmful," "derogatory," or "demeaning"

speech.

But speech is not unprotected merely because it is unpopular, harmful, derogatory or demeaning. In fact, 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). 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"). Therefore, if an attorney engages in speech – although unpopular, derogatory, demeaning, or offensive – but the speech does not prejudice the administration of justice or render the attorney unfit, such speech is constitutionally protected.

"All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – fall within the full protection of the First Amendment." Roth v. United States, 354 U.S. 476, 484 (1957). Contrary to these basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues. Furthermore, by only proscribing speech that is unpopular, derogatory, demeaning, or harmful toward members of certain designated classes, the new Model Rule constitutes an unconstitutional content-based speech restriction. 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).

For example, under the new Rule a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that manifests discrimination on the basis of sexual orientation, while a lawyer who speaks in favor of same-sex marriage would certainly not be in violation of the Rule. That is a classic example of an unconstitutional content-based speech restriction.

"Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995).

Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provides a concrete example of how the new Model Rule may constitute an unconstitutional content-based speech restriction. He explains: "At a . . .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." 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.

In other words, whether a lawyer has or has not violated the new Model Rule will be determined solely by reference to the content of the speaker's speech. Although attorneys may be speaking on the same subject matter, whether their speech violates the Rule will depend entirely upon the content of their speech. Some of the attorneys will be immune, based solely upon the content of their speech. Others could be prosecuted, based solely upon the content of their speech.

Indeed, in the few states that have already modified their respective Rule 8.4 in similar ways, such Rules are being enforced as clearly unconstitutional free-standing speech codes. See, for example, In the Matter of Stacy L. Kelley, 925 N.E.2d 1279 (Indiana Supreme Court 2010), in which an Indiana attorney was professionally disciplined for asking someone if they were "gay," and In the Matter of Daniel C. McCarthy, 938 N.E.2d 698 (Indiana 2010) in which an attorney had his license suspended for applying a racially derogatory term to himself.

B. Model Rule 8.4(g) violates attorneys' First Amendment right to free exercise of religion

Model Rule 8.4(g) would also infringe upon an attorney's First Amendment right to free exercise of religion. For example, in the same-sex marriage context, the U.S. Supreme Court has emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." Obergefell v. Hodges, 135 S. Ct. 25 84, 2607 (2015).

The new Model Rule, however, would discipline attorneys for expressing their religiously based opinions concerning same-sex marriage.

Professor Rotunda posits the example of Catholic attorneys who are members of an organization of Catholic lawyers and judges, like the Catholic Bar Association. If the Catholic Bar Association 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, 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. Indeed – he points out – attorneys might be in violation of the new Rule merely for being members 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. And yet, such speech and the right to belong to the Catholic Bar Association would both be constitutionally protected.

By prohibiting both, the new Rule would constitute an unconstitutional infringement on not only the free speech and free association rights of attorneys, but their free exercise rights as well.

C. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of association

"[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Roberts v. U.S.. Jaycees, 468 U.S. 609, 622 (1984). "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." Boy Scouts of America v. Dale, 530 U.S. 640, 647-48 (2000). The First Amendment protects rights of association and assembly. The new Model Rule 8.4(g), however, would violate attorneys' constitutionally protected rights to associate freely.

Under the new Rule an attorney could not belong to a legal organization, such as the Christian Legal Society, that requires its attorney members to acknowledge and agree with a Christian Statement of Faith, because belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion. https://clsnet.org/page.aspx?pid=367. The Christian Legal Society also has a Community Life Statement in which members "renounce unbiblical behaviors, including . . . immoral conduct such as . . . engaging in sexual relations other than within a marriage between one man and one woman." https://clsnet.org/page.aspx?pid=494. An attorney belonging to such an organization would violate the new Model Rule because, again, such would constitute conduct related to the practice of law, and would "discriminate" on the basis of marital status and, some may argue, sexual orientation.

Nor would the new Model Rule allow attorneys to be members of the Catholic Bar Association, which requires its attorney members to be practicing Catholics because, again, belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion.

Clearly, however, attorneys have a constitutional right to freely associate with other attorneys in pursuit of a wide variety of ends – including religious ends. The new Model Rule would clearly violate that right.

D. Model Rule 8.4(g) is unconstitutionally vague

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. Grayned, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Grayned, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. Grayned, supra, at 109.

The language of Rule 8.4(g) violates all these principles.

(a) The term "harassment" is unconstitutionally vague. The new Model Rule prohibits attorneys from engaging in harassment of anyone on the basis of one of the protected classes. But the term "harassment" is not defined in the Rule, is subject to varied interpretations, and no standard is provided to determine whether conduct is or is not harassing. Does expressing disagreement with someone's religious beliefs constitute harassment based on religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment?

Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, 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). See also Are Stalking Laws Unconstitutionally Vague Or Overbroad, 88 Nw. U. L. Rev. 769, 782 (1994) (the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass."). Because the term "harass" 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 inadvertently violating the Rule.

The new Comments to the Rule attempt to define the term "harassment," but in doing so actually raise additional concerns. For example, Comment [3] to the new Rule provides that harassment includes derogatory or demeaning verbal or physical conduct. Unfortunately, rather than clarifying (let alone limiting) the meaning of the term "harassment," the terms "derogatory" and "demeaning" present the same vagueness issues as the term they are intended to define. Indeed, because it is not clear what speech is encompassed by the words "derogatory" and "demeaning," courts have found those terms to be unconstitutionally vague. Hinton v. Devine, 633 F.Supp. 1023 (E.D. Pennsylvania 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. It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it's also true

that such statutes and ordinances do not – as does the new Model Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

For example, Title VII does not merely provide that it shall be an unlawful employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that "It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2.

Likewise, the federal Fair Housing Act does not simply provide that one may not discriminate in housing based on race, color, religion, familial status, or national origin. It provides a description of what, specifically, is being prohibited: "[I]t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604. And the Act provides precise definitions of important terms used in the Act, such as "dwelling," "person," "to rent," and "familial status." 42 U.S.C. § 3602.

Unlike other non-discrimination enactments, however, the new Model Rule simply states that "It is professional misconduct for a lawyer to: . . . (g) knowingly . . . discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law" – leaving to the attorney's imagination what sorts of speech and behavior might be encompassed in that proscription.

Making matters worse, Model Comments [3] to Model Rule 8.4(g) states that the term "discrimination" includes "harmful verbal or physical conduct that manifests bias or prejudice towards others." The term "harmful" – in the context of attorney speech and conduct – is unconstitutionally vague because attorneys cannot with any degree of reasonable certainty determine what speech and conduct may be prohibited and what may be allowed. (c) The phrase "conduct related to the practice of law" is unconstitutionally vague. Whereas the previous Model Rule applied only to attorney conduct while the attorney is acting in the course of representing a client – a relatively narrow and reasonably determinable aspect of a lawyer's activities – the new Rule applies to any conduct of an attorney that is in any way "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, however, is vague and not readily determinable. The new Comment [4] attempts to provide guidance as to what the phrase "related to the practice of law" means. But not only is the Comment's definition 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 – but its list of activities related to the practice of law is an expressly nonexclusive list. Activities other than those expressly included in the Comment could also qualify as being in connection with the practice of law. But what those activities may be is difficult to determine. For

example, does the phrase include comments made by an attorney while attending a birthday celebration for a law firm co-worker; or a statement made by an attorney at a cocktail party that the attorney is attending – at least in part – in order to make connections that will hopefully result in future legal work; or comments an attorney makes while serving on the governing board of the attorney's church and to whom the board periodically looks for churchrelated legal advice?

Because no attorney, with any reasonable degree of certainty, can determine what speech or conduct is or is not "related to the practice of law," the new Rule is unconstitutionally vague.

E. Model Rule 8.4(g) is unconstitutionally overbroad

Even if an enactment is otherwise clear and precise in what conduct it proscribes, the law may nevertheless still be unconstitutionally overbroad if its reach prohibits constitutionally protected conduct. Grayned, supra, at 114.

It is clear that the new Model Rule is not only unconstitutionally vague, it is also unconstitutionally overbroad because, although it may apply to attorney conduct that might be unprotected – such as conduct that actually and significantly prejudices the administration of justice or that would clearly render an attorney unfit to practice law – Model Rule 8.4(g) would also sweep within its orbit lawyer speech that is clearly protected by the First Amendment, such as speech that might be unpopular, offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit.

The terms "harmful verbal conduct" and "derogatory or demeaning verbal conduct" sweep into their ambit much speech that is clearly constitutionally protected. As noted above, speech is not unprotected merely because it is harmful, derogatory or demeaning. Snyder v. Phelps, supra at 458. In fact, that is precisely the sort of speech that is constitutionally protected. Speech that no one finds offensive needs no protection.

Courts have found terms such as "derogatory" and "demeaning" 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 v. State College Area School Dist., 240 F.3d 200, 215 (3rd Cir. 2001) (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). And it is irrelevant whether such speech would ever actually be prosecuted by disciplinary authorities under the new Rule. The fact that a lawyer could be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – the very danger the overbreadth doctrine is designed to prevent.

CJ Kyler
July 12, 2017 at 9:31 pm

The generality and breadth of this rule will create more problems than it solves. If this rule is adopted, I fear lawyers practicing in the political realm on public policy issues will feel compelled and, in fact, will be constrained in their ability to speak. In sum, I object to this rule as it will do harm to our constitutional liberties.

Vance
July 13, 2017 at 9:15 pm

I come back again to comment after having read the Utah Bar President's letter supporting this amendment to the Rules of Professional Conduct. He in essence state that "Chill out, your speech is only suppressed in the practice of law."

But how can any lawyer defend or work with the "non politically correct" client? Consider a government immigration attorney: under this rule it is a violation of the Rules of Professional Conduct to "discriminate on the basis of national origin." Yet that is the job of the governmental immigration attorney: to prosecute people based on their national origin!

Religious bias: can I represent a client who claims misconduct by a church? By definition I would be discriminating against the church by taking the side against them. By the same token, if a person claims sexual harassment against my client, can I defend them without violating this rule?

The Bar President states that attorneys are still free to decline representations of, presumably, clients that we do not wish to represent. Well and good, but if our only remedy is to quit rather than "engage in prohibited conduct" then some clients will never be able to be represented.
Of course, that is likely the intent of the rule, in part: to make sure that "unpopular" or "politically incorrect" clients cannot have legal counsel. How can any attorney work for the LDS church under this rule? Or the Catholic Church?

Further, what is the impact of this rule on other parts of the Rules of Professional Conduct, such as attorney client privilege?

The Supreme Court should not adopt this rule, despite the Bar Association's support. The impact on the practice of law would be horrific.

David R. Todd
July 14, 2017 at 12:09 am

This proposed rule should not be added to the Utah Rules of Professional Conduct for many of the reasons already expressed above. Although the intent behind the proposed rule may be laudable, its language is overbroad and flawed for many of the reasons already expressed above. Another example of the potential overbreadth of the language in addition to those already provided: Would it be "professional misconduct" under the proposed rule to assert the spousal privilege on behalf of a married client in a case? The proposed language states that "it is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is…discrimination on the basis of…marital status…in conduct related to the practice of law."

J. Michael Coombs
July 17, 2017 at 2:04 am

Honestly. Is it really necessary to go down this road? I mean, aren't there enough rules and regulations? Can't we just let a lawyer be a lawyer without now hanging political correctness over his and her heads as well? Let us practice law. If there are laws against these things embraced by the proposed rule, let the civil and criminal law take care of it. Look at how Title IX has screwed up universities and ruined the lives of young men when we already have criminal laws addressing sexual assault. Should it really be permissible for those running the Bar and the Utah Judiciary to impose their political agenda on other lawyers? To what end? So our right to make a living can be taken away if we don't behave properly in the eyes of those in charge? Why? This is wrong and wrong-headed and is an infringement on all lawyers' Constitutional rights, not to mention the right to make a living.

I can't believe that there are people arrogant enough and so full of themselves and their own moral superiority to propose such a rule in the first place. It is as self-serving as the rule proposed a few years ago to make it unethical to criticize a judge. Enough rules and regulations already. Petition the legislature if you want to regulate people's thoughts and feelings. See where that gets you. Is the next step to tell us lawyers what websites we are permitted to visit? What news channels we can watch? What newspapers we are allowed to read? Will we have to report to the Bar on a regular basis to show that we are sufficient politically correct to keep our law licenses? Where does this end? If the individuals running the Bar and our Utah judiciary want to embrace Social Justice Warrior madness, which only promotes divisiveness

and resentment in society, fine. Go ahead. But let them do it on their own. Don't force it on the rest of us simply because the Utah State Bar requires licensing.

Like it or not, a lawyer, like anyone, has a right to hurt another person's feelings, intentional or not. At the same time, members of the public, including other lawyers, don't have a right, let alone a Constitutional right, NOT to have their feelings hurt by a lawyer. Does the Utah State Bar really want to get in the business of regulating people's feelings and their consequences? Is that really the proper job of a Bar Association?

Cultural Marxism is extremely destructive as we can see from the polarization of our current political environment. I am saddened to see an organization that should believe in and promote free thought, free speech, freedom of expression, freedom of association, and treating individuals equally under the law regardless of race, creed or color, namely, the principles embodied in our state and federal Constitutions, going down this purely political road in derogation of those very concepts.

Forcing licensed attorneys to become Cultural Marxists or Social Justice Warriors through the imposition of political correctness, which is nothing but a political agenda, shouldn't be a condition to being a member in good standing of any bar association, including the Utah State Bar. That is not its job. The Bar's job is solely to regulate the integrity and competency of attorneys.

J. Michael Coombs
July 25, 2017 at 1:13 am

Two points to add to my comment above:

First, the proposed rule comes directly from the ABA, a national political organization. At the same time, no one proposing this rule has demonstrated any need or urgency to impose it on Utah lawyers. No one sponsoring the rule is claiming that a significant number of Utah lawyers behave so outrageously "politically incorrectly" with their minority clients and abuse them so because of their minority status that the Utah State Bar needs to rein in these lawyers in some fashion. Until those attempting to impose this rule on all licensed attorneys can demonstrate a legitimate need for the rule as opposed to imposing it for a national political purpose or agenda, the rule should be vigorously opposed.

In a free society, who has the right to impose a political agenda on a person as a condition of his or her employment? Might doing so violate Utah's Right to Work Law? Have the Committee Members and Bar President Robert O. Rice considered that obvious legal impediment to the implementation of the rule?

Secondly, contrary to Bar President Robert O. Rice's July 10, 2017, letter to the Utah Supreme Court in which he essentially certifies that the proposed rule will not burden Utah lawyers, it does not appear that the sponsoring Committee and Mr. Rice have done any investigation or research whatsoever into the practicalities and cost—to individual lawyers and the Bar itself—of implementing this proposed rule.

Because the proposed rule equates the subjective idea of "harassment" with the more objective concept of "discrimination," imagine the myriad of classes of people identified in the proposed new rule who will now be "empowered" to lodge spurious bar complaints against individual lawyers, perhaps in retaliation for a legal bill or for losing or allegedly "screwing up" the case or the contract, claiming they were the brunt of a racist, sexist or misogynist "micro aggression" or perhaps that the lawyer made them "feel harassed" under the rule on account of the fact that the lawyer is Caucasian or heterosexual and they are a black, Hispanic, LGBT, old, or couldn't speak English well and felt small or ridiculed in the lawyer's presence. I often ask immigrants what country they are from and what language they speak. This is now considered a racial "micro aggression" in certain political circles. Will I lose my license to practice law someday over such an innocuous question? Is this really the road we wish to march all Utah lawyers down? How is a lawyer supposed to defend himself or herself against another person's thin skin or subjective feelings of having been "harassed"? Will the lawyer have to bring a forensic psychologist at his sole cost and expense to his bar complaint hearing to opine that the minority individual shouldn't have felt

"harassed" or "discriminated" against? And if the outcome is a public reprimand, will the lawyer be impugned and disgraced on social media websites as a bigot, racist, sexist, homophobe or Islamaphobe for having unsuccessfully defended such a bar complaint? Will minority lawyers control these types of bar complaint adjudication panels just like feminists control virtually all the Title IX Offices of Equality and Diversity (OED) in American colleges and universities adjudicating "sexual assault" claims against young men?
https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html
http://www.charlotteobserver.com/news/local/crime/article155254404.html

Does the Utah State Bar really want to substantially increase its Bar Complaint caseload and now take on the obligation of adjudicating people's feelings toward their lawyer as well? Where is the Bar going to get the money to do so? Will it substantially increase our bar dues to pay for this? By how much? Will lawyers found guilty of violating this proposed rule be required to spend money taking myriad diversity and equality classes taught by the same kinds of grievance and victim industry advocates who may well have brought spurious "harassment" complaints against them in the first place? How upside down and malignantly preposterous should it all get before we realize how silly institutionalizing "political correctness" really is?

Mr. Rice and his colleagues pushing this proposed rule need to seriously think through the real and tangible ramifications to individual attorneys of what they are proposing. Imposing this rule will be a disaster of major proportions and may well lead some of us to start our own Utah Bar Association, which is perhaps long overdue under Utah's Right to Work Law and given that the Utah State Bar is clearly a compulsory labor union.

ofcourse
July 17, 2017 at 6:22 pm

This rule is full libsick. read this part: 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.

Translation: racial discrimination is totally permitted so long as it is exercised against white people. Espl. if it is exercised against a white male.

Diversity and Inclusion: sick lib sick lib sick lib.

Christian Legal Society
July 18, 2017 at 7:27 pm

Christian Legal Society ("CLS") is an interdenominational association of Christian attorneys, law students, and law professors, founded in 1961, to network lawyers and law students nationwide, including members in Utah. CLS opposes adoption of ABA Model Rule 8.4(g) because, if adopted, Model Rule 8.4(g) will have a chilling effect on lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues. If adopted, Model Rule 8.4(g) will create ethical concerns for attorneys who serve on nonprofit boards, speak publicly on legal topics, teach at law schools, advocate for legislation, or otherwise discuss current political, social, or religious issues. Because lawyers often serve as spokespersons for political, social, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief in a diverse society.

I. This Court Should Not Subject Utah Attorneys to a Rule that Has Not Been Adopted by Any Other State Supreme Court.

A. Utah already has Rule of Professional Conduct 8.4(d) and its Comment 3.

Utah Rule of Professional Conduct 8.4(d) currently provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Utah has adopted Comment 3 to that rule, which provides:

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

Utah R. Prof'l Conduct 8.4 cmt.3. Comment 3 is a verbatim adoption of Comment 3 that accompanied ABA Model Rule 8.4 from 1998 to 2016.

In August 2016, the ABA's House of Delegates deleted its Comment 3 and adopted a new disciplinary rule, Model Rule 8.4(g), accompanied by three new comments, that makes it professional misconduct for a lawyer to engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf. Model Rule 8.4(g) greatly expands upon its predecessor Comment 3, which is Utah's current Comment 3. First, Model Rule 8.4(g) has an accompanying comment that makes clear that "conduct" encompasses "speech," when it states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others." (Emphasis supplied.) Second, Model Rule 8.4(g) is much broader in scope than Comment 3, which applies only to conduct "in the course of representing a client." Instead, in a breathtaking expansion in regulatory scope, Model Rule 8.4(g) applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." Third, Comment 3 speaks in terms of "actions when prejudicial to the administration of justice." By deleting that qualifying phrase, Model Rule 8.4(g) greatly expands the reach of the rule into attorneys' lives.

Unfortunately, in adopting its new model rule, the ABA largely ignored over 450 comment letters, most of them opposed to the rule change. https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html. 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 dropped its opposition immediately before the August 8th vote. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf

B. No jurisdiction has adopted Model Rule 8.4(g).

The ABA claims that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers." https://clsnet.org/document.doc?id=993. But this claim is factually incorrect: ABA Model Rule 8.4(g) has not been adopted in any jurisdiction. Therefore, no empirical evidence supports the ABA's claim that Model Rule 8.4(g) "will not impose an undue burden on lawyers."

The ABA points to the fact that twenty-four states and the District of Columbia have black-letter rules dealing with "bias" issues. But each of these black-letter rules differs from ABA Model Rule 8.4(g) in significant ways. These differences between state black-letter rules and Model Rule 8.4(g)'s expansive scope include:

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

process can be initiated.

- Many states, including Utah's Comment 3, limit their rules to "conduct in the course of representing a client," in contrast to Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law."
- Many states, including Utah's Comment 3, require that the misconduct be prejudicial to the administration of justice, a requirement that Model Rule 8.4(g) abandons.
- Almost no state black-letter rule enumerates all eleven of the Model Rule 8.4(g)'s protected characteristics.
- No state black-letter rule contains Model Rule 8.4(g)'s circular non-protection for "legitimate advocacy . . . consistent with these rules."

Because no state has adopted Model Rule 8.4(g), the proposed rule has no track record. Nor is there any empirical evidence that demonstrates a need in Utah for its adoption.

II. Official Bodies in Illinois, Montana, Pennsylvania, Texas, and South Carolina Have Urged Rejection of Model Rule 8.4(g).

Last month, the Supreme Court of South Carolina became the first state supreme court to take official action regarding Model Rule 8.4(g) when it rejected adoption of the rule. Order, Supreme Court of South Carolina, App. Case No. 2017-000498 (June 20, 2017). http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01. The Court explained that the House of Delegates of the South Carolina Bar had "recommend[ed] the Court decline to incorporate the ABA Model Rule amendments within Rule 8.4, RPC." Id. The HOD also recommended a public comment period. After the comment period, "the Commissions on Lawyer and Judicial Conduct, whose members would initially be tasked with investigating alleged violations of any amended rule, informed the Court the Commissions share the same reservations expressed by the South Carolina Bar and others" and recommended that the rule not be adopted. Id.

In December 2016, the Texas Attorney General issued an opinion regarding ABA Model Rule 8.4(g). The Texas Attorney General opined that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent." https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf. The Texas Attorney General explained that "[a] court would likely conclude that Model Rule 8.4(g) infringes upon" several fundamental rights enjoyed by attorneys, including:

- Attorneys' free speech: The attorney general concluded that "Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues." Id. at 3. The attorney general found that "a court could apply it to an attorney's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event." Id.
- Attorneys' free exercise of religion: The attorney general explained that "Model Rule 8.4(g) could also be applied to restrict an attorney's religious liberty and prohibit an attorney from zealously representing faith-based groups." Id. at 4.
- Attorneys' freedom of association: The attorney general concluded that "[c]ontrary to this constitutionally protected right, however, Model Rule 8.4(g) could be applied to restrict an attorney's freedom to associate with a number of political, social, or religious legal organizations" because the "Rule applies to an attorney's participation in 'business or social activities in connection with the practice of law.'" Id. at 5 (citing Model Rule 8.4(g) cmt. 4). It "could curtail" attorneys' participation in "faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society . . . for fear of discipline." Id. Furthermore, the rule "would likely inhibit attorneys' participation" in "a number of other legal organizations [that] advocate for specific political or social positions on issues related to race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity,

marital status, or socioeconomic status." Id.

- Attorneys' due process rights: The attorney general concluded that a court would likely conclude the rule violated the Fourteenth Amendment because of its unconstitutional vagueness resulting from its failure to give fair notice of punishable conduct. It also invites arbitrary and discriminatory enforcement by failing to establish guidelines for those charged with enforcing the law. Id. at 5-6. The attorney general particularly noted the lack of specificity in the terms: 1) "conduct related to the practice of law;" 2) "discrimination;" 3) "harassment;" and 4) "legitimate advice or advocacy consistent with these Rules." Id. at 6.

The South Carolina Attorney General issued an opinion on May 1, 2017, expanding upon the Texas Attorney General's analysis and conclusions.
http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf

On December 10, 2017, the Illinois State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois.
https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals. "Opponents observed that the rule does not define 'discrimination' and 'harassment' and raised concerns about subjecting lawyers to unfounded disciplinary complaints."

On December 2, 2017, the Disciplinary Board of the Supreme Court of Pennsylvania explained that Model Rule 8.4(g) was too broad:

It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule broadly defines "harassment" to include any "derogatory or demeaning verbal conduct" by a lawyer, and the rule subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.

http://www.pabulletin.com/secure/data/vol46/46-49/2062.html.

On April 12, 2017, the Montana Legislature adopted a joint resolution expressing its view that Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens and urging the Montana Supreme Court not to adopt Model Rule 8.4(g).
http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf. The impact of Model Rule 8.4(g) on "the speech of legislative staff and legislative witnesses . . . when they are working on legislative matters or testifying about legislation before Legislative Committees" greatly concerned the Montana Legislature. It also found that the rule's "expansive scope endeavors to control the speech of Montanans, who are licensed by the Supreme Court of the State of Montana to practice law, when they speak or write publicly about legislation being considered by the Legislature." The Legislature concluded that Model Rule 8.4(g) "would directly threaten every attorney . . . with the potential loss of their ability to pursue their chosen career [and] to provide for the needs of their family . . . because at any point in time an attorney could be forced to answer for vague complaints, even if the attorney has not participated in historically unprofessional practices, thereby threatening such attorney's reputation, time, resources, and license to practice law."

III. Model Rule 8.4(g) Operates as a Speech Code for Lawyers.

First Amendment scholar and editor of The Washington Post's daily legal blog, The Volokh Conspiracy, UCLA Professor Eugene Volokh has warned against adoption of Model Rule 8.4(g) because it will function as a speech code for lawyers. In a two-minute video released by the Federalist Society, Professor Volokh succinctly summarized why the model rule should be rejected.
https://www.youtube.com/watch?v=AfpdWmlOXbA. In a debate at the Federalist Society's National Student Symposium in March 2017, Professor Volokh demonstrated the flaws of Model Rule 8.4(g) despite his debate opponent's efforts to gloss over them.

http://www.fed-soc.org/multimedia/detail/aba-model-rule-84-event-audiovideo

Professor Volokh explains its broad applicability to "conduct related to the practice of law," as defined in proposed Comments 3 and 4 to include speech (that is, "verbal conduct") in social activities, as well as bar and business activities, in connection with the practice of law:

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

Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment." https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.d144d1fbe798.

Renowned constitutional scholar, Professor Ronald Rotunda of Chapman University Dale E. Fowler School of Law, also has warned against the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. Known for his treatise on American constitutional law, as well as the ABA's treatise on legal ethics, Professor Rotunda wrote an extensive critique of Model Rule 8.4(g), entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf, as well as a Wall Street Journal article entitled "The ABA Overrules the First Amendment." https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418

These significant red flags raised by leading First Amendment scholars should not be ignored. If adopted, Model Rule 8.4(g) will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues.

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

Model Rule 8.4(g) explicitly applies to all "conduct related to the practice of law." Comment 4 to ABA Model Rule 8.4(g) delineates Model Rule 8.4(g)'s extensive scope: "Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law, operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law." (Emphasis supplied.)

Indeed, the question becomes, what conduct does Rule 8.4(g) not reach? Virtually everything a lawyer does is "conduct related to the practice of law." Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

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

presenting CLE courses at conferences or through webinars;
teaching law school classes as a faculty or adjunct faculty member;
publishing law review articles, blogposts, and op-eds;
giving guest lectures at law school classes;
speaking at public events;
participating in panel discussions that touch on controversial political, religious, and social viewpoints;
serving on the boards of various religious or other charitable institutions;

lending informal legal advice to nonprofits;
serving at legal aid clinics;
serving political or social action organizations;
lobbying for or against various legal issues;
serving one's religious congregation;
serving one's alma mater, if it is a religious institution of higher education;
serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations;
serving on the boards of fraternities or sororities;
volunteering with or working for political parties;
working with social justice organizations; and
any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues.

B. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their religious congregations, religious schools and colleges, and other religious ministries.

Many lawyers sit on the boards of their religious congregations, religious schools and colleges, and other religious nonprofit ministries, which face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance. As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not be disciplined for volunteer legal work she performs for her church or her alma mater.

By chilling attorneys' speech, the rule is likely to do real harm to religious institutions and their good work in their communities. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law," yet Model Rule 8.4(g) causes such concerns. Because Model Rule 8.4(g) seems to prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyer's free speech and free exercise of religion when serving religious congregations and institutions.

C. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline.

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

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

Speaking — It would seem that most public speaking by lawyers on legal issues falls within Model Rule 8.4(g)'s prohibition. But even if some public speaking falls outside the parameters of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him

to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of "sexual orientation" or "gender identity" as a protected category in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in Model Rule 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including other lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, ABA Model Rule 8.4(g) suffocates attorneys' speech.

D. Attorneys' membership in religious, social, or political organizations may be subject to discipline.

ABA Model Rule 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibits all California state judges from participating in nonprofit youth organizations such as Boy Scouts because of the organization's views on sexual conduct. http://www.courts.ca.gov/documents/sc15-Jan_23.pdf

ABA Model Rule 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs. See Texas A.G. Op., supra, at 5. Some government officials have claimed that the right of a religious group to choose its leaders according to its religious beliefs is "religious discrimination." But it is simple common sense and basic religious freedom that a religious organization's leaders should agree with its religious beliefs.

E. ABA Model Rule 8.4(g) Would Institutionalize Viewpoint Discrimination Against Many Lawyers' Public Speech on Current Political, Religious, and Social Issues.

As seen in its new Comment 4, Model Rule 8.4(g) explicitly protects some viewpoints over others by allowing lawyers to "engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations." Because "conduct" includes "verbal conduct," the proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not. But that is the very definition of viewpoint discrimination. The government is not allowed to enact laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995).

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

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

Park, 267 F.3d 558, 572-574 (7th Cir. 2001).

IV. Bar Officials in California and Pennsylvania Have Expressed Serious Concerns as to whether State Bars Have the Resources to Become the Tribunal of First Resort for Employment Claims Against Attorneys and Law Firms.

California State Bar authorities voiced serious concerns last year when considering whether to modify their disciplinary rule to something more akin to the ABA Model Rule 8.4(g). California's current Rule 2-400 requires that a separate judicial or administrative tribunal have found that a lawyer committed unlawful discrimination before disciplinary charges can be brought. According to Justice Lee Smalley Edmon, the presiding justice of the Second District, Division Three of the California Courts of Appeals and the Chair of the State Bar's Second Commission for the revision of the Rules of Professional Conduct, "[t]he proposed elimination of current Rule 2-400(C)'s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings." http://www.calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx. For that reason, she explained, an alternative was being offered to leave in place Rule 2-400(C)'s requirement that an attorney cannot be disciplined for unlawful discrimination unless a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law, and any appeal is final and leaves the finding of unlawful discrimination standing.

Similarly, an official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court's adjudicatory process and the adjudicatory processes of the state civil courts. http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000016945.pdf. In the words of the State Bar Court official, "the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings." Id. First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different. "State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases." Id. Any relevant evidence must be admitted, and hearsay evidence may be used. Third, "[i]n disciplinary proceedings, attorneys are not entitled to a jury trial." Id.

The California Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement. It described the problems with the requirement's deletion as follows:

Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, . . . lack of [the State Bar's Office of Chief Trial Counsel] resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients. Id. at 16.

Similarly, a memorandum outlining Pennsylvania's Proposed Rule 8.4(g) correctly identified two defects of Model Rule 8.4(g) that Pennsylvania's Proposed Rule 8.4(g) would avoid. http://www.pabulletin.com/secure/data/vol46/46-49/2062.html. Pennsylvania's proposed rule is a rule like several states (including Illinois, Iowa, California, Minnesota, Ohio, and Washington) have that requires a judicial or administrative tribunal, other than a state bar tribunal, find that an attorney committed unlawful discrimination before the state bar may entertain a disciplinary complaint against the attorney. The memorandum identified the first defect of ABA Model Rule 8.4(g) to be its "potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers." Mem. at 2. Second, as the Memorandum concluded, "after careful review and consideration … the breadth of ABA Model Rule 8.4(g) will pose difficulties for already

resource-strapped disciplinary authorities." Id.

V. Conclusion

For all the above reasons, we urge that Model Rule 8.4(g) not be adopted. Because no state has adopted Model Rule 8.4(g), it has no track record. Nor is there any empirical evidence showing a need to replace Utah's current Comment 3 with such an excessively broad rule as Model Rule 8.4(g). Its adoption would have a chilling effect on attorneys' First Amendment rights. Attorneys must remain free to engage in speech, religious exercise, assembly, and expressive association in their workplaces and the public square.

William C Duncan
July 19, 2017 at 12:05 am

On behalf of the Sutherland Institute, a nonpartisan public policy organization, and as a member of the Utah State Bar, I write to urge the Court to reject proposed Rule of Professional Conduct 8.4(g).

Other comments have outlined many of the reasons this Court should not adopt the proposed rule. We write to respond specifically to the letter of support from the Board of Bar Commissioners.

Although it does not explain how, the Commissioners' letter suggests adoption of this rule would advance its purpose of achieving a more diverse legal profession. It also suggests that adopting the rule would make a statement to the profession and the public about the profession's intolerance of prejudice, bias, discrimination and harassment. We respectfully suggest that the proposed Rule would have precisely the opposite effect, threatening diversity in the profession and endorsing viewpoint discrimination.

The Commissioners' letter seeks to obscure the novelty of this Rule by claiming 22 states have "similar" provisions. This is imprecise at best. The provision the letter alludes to were adopted before the Board of Delegates of the American Bar Association passed this amendment to the Model Rules in 2016. In fact, since the ABA vote, no state has adopted the proposed Rule.

Indeed, the South Carolina Supreme Court rejected the proposed Rule in June 2017; the Illinois State Bar Association's Assembly voted to oppose the proposal in December 2016; Pennsylvania's Disciplinary Board of the Supreme Court has proposed adoption of a limited alternative proposal; the Montana Legislature adopted a joint resolution urging the state's Supreme Court to reject the Rule; and the Attorney General of Texas issued an opinion that the Rule violates constitutional guarantees.

Most of the pre-existing state discrimination rules avoid the pitfalls of proposed Rule 8.4(g) by including limitations such as an independent finding of unlawful discrimination, application only to conduct related to representation of a client, limiting discipline to instances of misconduct "prejudicial to the administration of justice" (as the comments to the current Utah rule does), etc.

The opinions in other states noted above have explained that the proposed Rule could limit rights of free speech, free exercise of religion, freedom of association, and due process (because of its vague provisions). Other commentators across a broad spectrum of opinions have come to similar conclusions.

Despite this broad, public opposition, the Commissioners' letter argues that the proposed Rule would not affect rights of speech, thought, association or religious exercise. Unaccountably, the letter fails to address any of the well-documented criticisms of the opinion. The letter dismisses these concerns by pointing to the Rule's application to "conduct related to the practice of law." This response is inadequate for two reasons.

First, while there may be some legitimate and narrow limitations on First Amendment rights of attorneys, such as in the courtroom setting, the fact that the regulated individuals affected are attorneys cannot make an unconstitutional viewpoint discrimination provision constitutional. Professor Eugene Volokh of the UCLA School of Law argues that the proposed Rule is a speech code for lawyers, noting that "the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you're fine; if you express the contrary viewpoints, you're risking disciplinary action."

That the proposal is not viewpoint-neutral is further illustrated by an exception noted in the

comment which would allow "sponsoring diverse law student organizations." This seems to imply that sponsoring student organizations determined to be non-diverse or prejudiced, in the estimation of disciplinary officials, would be a violation of the Rule. Thus, officials would be empowered to rule on the acceptability of the makeup and perspectives of a student group sponsored by the firm.

Relatedly, the comments to the proposed Rule suggest attorneys would still be free to limit the scope and subject matter of their practice but leaves out otherwise legitimate bases for declining representation, such as a concern that the attorney would not be able to vigorously prosecute the client's cause. Under the Rule, it seems that failure to represent certain clients could be a violation of the proposed Rule, while the precisely same conduct (and motivation) would be fine if the attorney's disagreement of the client was based on her opinion that the prospective client had "discriminatory" views. In the alternative, would attorneys in some cases have to disavow their clients' position to avoid liability?

This would be an indefensible imposition on an independent profession required to make vigorous defenses of clients' interests and could harm access to legal assistance for those with disfavored views, in violation of our strong tradition of legal representation regardless of popularity or influence.

Licensing requirements should not be turned into de facto religious or ideological tests.

Second, the "limiting" phrase the letter points to is extremely expansive, including all attorney interactions "while engaged in the practice of law" and to "participating in bar association, business or social activities in connection with the practice of law." This would presumably include participation in continuing legal education programs, teaching courses, publishing law review articles or commentary on legal issues, public speaking, serving on boards of nonprofits, legislative testimony or even commentary, and much more.

When the Utah Legislature adopted anti-discrimination protections in 2015, it included protections of speech, association and religious liberty. Thus, no one on either side of a difficult issue would be at risk of losing their livelihood for expressing an opinion. We respectfully submit that this balanced approach is precisely what is missing in the proposed Rule, and thus, the proposed Rule should be rejected.

Jean Hill
July 19, 2017 at 7:48 pm

On behalf of the Catholic Diocese of Salt Lake City, we object to the proposed rule for many of the constitutional reasons ably stated by others. We are also object for the following reasons:

1. Lawyers employed by or representing a religious organization should not be covered by a rule that, in its application, would impede the organization's right to adopt and enforce religiously-based employee
conduct standards.

A religious organization may insist that persons it selects to further its mission and work—including its lawyers—share and live out the religious views of that organization. That is, religious organizations may lawfully insist not only that their employees profess a set of beliefs, but that they actually practice them, for otherwise, the religious organization would be compelled to retain employees who undermine its religious mission by their conduct.

A lawyer for a religious organization should not be subject to a charge of professional misconduct for implementing these conduct standards directly as a supervisor, or for facilitating their implementation as a legal advisor.

2. Representing unpopular persons and causes is part of the historic heritage of the law and legal system in this country. No lawyer should be subject to a claim of professional misconduct because he or she represents an unpopular person or advances an unpopular cause.

3. Similarly, no lawyer should be subject to a claim of professional misconduct because he or she declines to represent someone on a particular matter. This would include situations in which the lawyer has a conflict of interest, including a religious or moral objection to the client's objective. For example,

individual prosecutors do not run afoul of the rules of professional responsibility if, for religious or moral reasons, they decline to represent the government in death penalty sentencing proceedings.

For all of these reasons, we object to this poorly crafted rule change.

Larry Jenkins
July 19, 2017 at 10:21 pm

Proposed Rule 8.4(g) of the Utah Rules of Professional Conduct would make certain forms of discrimination professional misconduct. Unfortunately, it does so in a way that is overbroad, vague and—according to prominent scholars and two state attorneys general—a threat to free speech and other First Amendment freedoms. To date, no state has adopted it and neither should Utah.

Rule 8.4(g) has attracted criticism from politically diverse experts. UCLA law professor Eugene Volokh warned that the Rule is "a speech code for lawyers." (Eugene Volokh, A Speech Code for Lawyers, Banning Viewpoints that Express Bias, Including in Law-Related Social Activities, WASH. POST, Aug. 10, 2016.) Professor Ronald Rotunda, author of an influential treatise on constitutional law, stated in regard to the Rule that "[w]e should be very concerned about prohibiting legitimate advice or advocacy without defining those terms carefully. The idea that advocacy is 'illegitimate' invites criticism of lawyers who represent unpopular clients." (Ronald Rotunda, The ABA's Control Over What Lawyers Say Around the Water Cooler, HARV. L. REC., Oct. 4, 2016.) And Stephen Gillers, a proponent of the Rule and an expert in legal ethics at New York University Law School, frankly admitted that Rule 8.4(g) "subordinates the right to speak in order to protect the fairness of and public confidence in the legal system." (Stephen Gillers, A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g), 30 GEO. J. L. ETHICS 195, 235 (2017) (emphasis added)).

Rule 8.4(g) has met with serious opposition in Illinois, Montana, Nevada, Pennsylvania, South Carolina, and Texas. The attorneys general of South Carolina and Texas published opinion letters opposing it on First Amendment grounds. (See Letter from Alan Wilson, South Carolina Attorney General, to Hon. John R. McCravy III, Member of the South Carolina House of Representatives, May 1, 2017, at 1, available at http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf; Letter from Ken Paxton, Texas Attorney General, to Hon. Charles Perry, Member of the Texas Senate, Dec. 20, 2016, at 7 ("a court would likely invalidate it as unconstitutional."), available at https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/ op/2016/kp0123.pdf.) The Montana Legislature issued a joint resolution condemning it. (Joint Resolution Opposing a Proposed Montana Supreme Court Rule, S.J. 15 (Apr. 25, 2017).) South Carolina recently rejected the Rule. (See Order, Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct, No. 2017-000498 (S.C. June 21, 2017), available at http://www.sccourts.org/courtOrders/displayOrder.cfm? orderNo=2017-06-20-01.) Finally, the Illinois Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois" based on "concerns about subjecting lawyers to unfounded disciplinary complaints." See https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborativelaw-proposals

Key objections I have to Proposed Rule 8.4(g) include:

Overbreadth and vagueness. The Rule regulates not only the practice of law itself but any "conduct related to the practice of law." The vague term "related" entails a sweeping grant of authority to the Bar to regulate conduct in what most consider non-professional settings. Comment 4 states that the Rule would reach "social activities in connection with the practice of law," and it could go much further. And because Comment 3 includes "verbal conduct" within the Rule, that authority will reach the personal, political, moral, and religious speech of Bar members in non-professional situations. Professor Rotunda illustrates how the Rule affects lawyers with a hypothetical: "One lawyer tells another, at the water cooler or a bar

association meeting on tax reform, 'I abhor the idle rich. We should raise capital gains taxes.' …. The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status." (Rotunda, The ABA's Control Over What Lawyers Say Around the Water Cooler.") In practice, mainstream viewpoints will be tolerated while unpopular ones will trigger Bar complaints, investigations, and possible discipline—all potentially ruinous to one's career.

Viewpoint discrimination. Professor Volokh calls the Rule "overtly viewpoint-based: If you express pro-equality viewpoints, you're fine; if you express contrary viewpoints, you're risking disciplinary action." (Volokh, A Speech Code for Lawyers.) Attorneys with certain views on political or social issues risk having their speech chilled or outright suppressed. This is quite concerning.

Threatens freedom of religion. The Texas Attorney General reads Rule 8.4(g) to mean that it "could also be applied to restrict an attorney's religious liberty and prohibit an attorney from zealously representing faith-based groups." (Letter from Paxton, at 4.) I agree.

Please reject proposed Rule 8.4(g).

Alan J. Reinach, Esq.
July 20, 2017 at 7:30 pm

Re: Proposed Amendment to Utah Rules of Professional Responsibility, 8.4(g) – Oppose

The Church State Council is the oldest public policy and legal services organization in the southwestern United States devoted to issues of religious freedom and the separation of church and state. The Council is a Seventh-day Adventist organization working to combat religious discrimination on behalf of peaceful people of all faiths, not just our own. Utah is one of the states we serve. We routinely provide legal services to those suffering religious discrimination in Utah, and have testified on Utah legislation implicating religious freedom.

We submit this letter in adamant opposition to the proposed amendment to Rule 8.4(g) of the Model Rules of Professional Responsibility. A clearer violation of the First Amendment's rights to free speech and religion is difficult to imagine.

If I were to draft a discovery request in the same vein as this Proposed Model Rule, it would rightly be dismissed as overbroad, unduly burdensome, vague, and even unintelligible. Since the Rule touches on both speech and religion, matters protected by the Constitution, the Rule becomes unconstitutionally vague. But that is only the beginning of the mischief this Rule can cause.

Recently, Senator Bernie Sanders subjected a Budget Office nominee to intrusive questioning, not just about how his religious views might guide his public duty – a legitimate inquiry – but about whether his religious views were themselves, sufficient to disqualify him from public service. There has been vigorous discussion in the religious liberty community as to whether this questioning violated the constitutional ban on religious tests for public office. Submitted herewith, and incorporated herein, is the op-ed piece written by Jim Wallis, published recently in the Washington Post. Wallis admirably parses the distinction between challenging a public servant's religious beliefs, and asking how they may influence his or her duties.

Model Rule 8.4(g) poses a similar problem: it could become a religious test for the practice of law. As Wallis observes, many religions teach a doctrine that is mutually exclusive – that they have the truth, and the only way to salvation. Under Model Rule 8.4(g), a lawyer would be precluded from affirming the belief that Jesus or Allah is the right way in many circumstances, or risk losing his license to practice law on account of his faith. This is an absurd descent into the "thought police" George Orwell warned us about in his prescient book that has enjoyed a resurgence of popularity, and rightly so, 1984.

The Church State Council represents persons of many faiths precisely because of our commitment to a religiously pluralistic society, where people of differing beliefs live together in peace. In 1943, the Supreme Court repudiated a decision only three years earlier, when it ruled in favor of the rights of Jehovah Witness children to abstain from saluting the American flag. That it did so in the middle of a

popular war makes this decision all the more remarkable. Justice Jackson's opinion represents the Court at its finest, with observations we do well to recall now:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted **1186 to vote; they depend on the outcome of no elections.

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 63 S. Ct. 1178, 1185–86, 87 L. Ed. 1628 (1943)

And again:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us

W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L. Ed. 1628 (1943)

Make no mistake: Rule 8.4(g) constitutes just such an attempt to prescribe what shall be orthodox in speech, thought and religion for lawyers. It places the free speech and religion of lawyers at the mercy of State Bar Tribunals – tribunals having no legitimate right to judge the beliefs and speech of members of the Bar.

The Church State Council does not condone any form of discrimination or bigotry. We do not register our vigorous opposition to the proposed Model Rule out of any sympathy for those who would violate the norms of decency and civility that must govern in a pluralistic community. Instead, we oppose the proposal out of our conviction that we have nothing to fear from respecting and protecting robust rights of free speech and religion.

Respectfully submitted.

Alexander Dushku
July 21, 2017 at 8:35 pm

I oppose the proposed rule as drafted. Guarding against invidious discrimination within the Utah Bar is important. Fortunately, existing rules and norms already work well to achieve that end. After associating with numerous lawyers across the country, including many in major firms on both coasts, I can confidently say that Utah's lawyers are among the most civil and professional in the country. While there are diverse beliefs and robust debates among us regarding social, moral, political and religious issues, I have never encountered a Utah attorney that engages in invidious discrimination. The proposed rule is a solution in search of a problem.

Please consider two related concerns. First, there is no question the proposed rule regulates speech. As the official Comments that guide enforcement of the proposed rule confirm, prohibited "discrimination includes harmful verbal . . . conduct that manifests bias or prejudice." "Verbal conduct" is a euphemism for speech and expression. If the regulation were narrowly confined to harassing speech within the professional workplace or in the administration of justice, where standards and expectations are well defined and understood, there would be less cause for concern. But the notion of speech "that manifests bias or prejudice" is dangerously ambiguous in this context. It seems to include speech that evinces allegedly bad personal beliefs, thoughts, or feelings, as opposed to speech that is objectively bigoted. Among other defects, this ambiguity creates a troubling selective-enforcement problem. Suppose an attorney is said to hold allegedly biased or prejudiced beliefs but his speech in a particular instance could be interpreted as either innocent or biased. Will his known beliefs result in the bar's concluding that his speech was biased, whereas another attorney with allegedly unbiased beliefs might speak the identical

words and escape any censure or damage to her reputation? Lack of objectivity opens the door for censoring speech merely because it expresses or is motivated by unpopular beliefs.

Second, the regulation of speech extends beyond the actual practice of law and administration of justice. This dramatically compounds the problem with lack of objectivity and clarity. Members of the bar are well versed in what constitutes harassing speech in the workplace or inappropriately biased speech in a court or other legal setting. Existing laws, ethical standards and judges already ensure these boundaries are well policed. But as the Comments confirm, "[c]onduct [including 'verbal conduct,' i.e., speech] related to the practice of law includes" not only "representing clients" and other formal aspects of law practice but also "participating in bar association, business or social activities in connection with the practice of law." Terms like "related to" or "in connection with" are extremely broad and do not provide meaningful limits, much less fair notice. The combination of the standard's ambiguity, the broad scope of its application, the inherently subjective nature of determining what speech "manifests bias or prejudice," and the risk of severe damage to one's reputation and law practice from even a bar complaint guarantees that the proposed rule will chill the fundamental free-speech rights of Utah's lawyers.

As others have noted, proposed Rule 8.4(g) has attracted criticism from politically diverse experts, including Professors Eugene Volokh and Ronald Rotunda. Everywhere it has been considered, proposed Rule 8.4(g) has been the subject of deep concern among many upstanding members of the bar. Rules of professional conduct should be matters of consensus among bar members, not the cause of fear and disunity. When Stephen Gillers, a proponent of the proposed rule and expert in legal ethics at NYU Law School, flatly states that proposed Rule 8.4(g) "subordinates the right to speak in order to protect the fairness of and public confidence in the legal system," such fears cannot be dismissed as irrational. (See Stephen Gillers, A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g), 30 GEO. J. L. ETHICS 195, 235 (2017).)

I respectfully urge the Supreme Court of Utah to reject the proposed rule and instead use the ample professional and ethical tools that already exist to deal with any instances of invidious bias or prejudice within the profession. At a minimum, the Court should make perfectly clear that the proposed rule will not be interpreted to abridge established rights. Language such as the following would help achieve that end and address other troubling problems raised by the proposed rule:

"This paragraph shall not be interpreted to infringe upon, limit, or chill rights protected by the First Amendment to the United States Constitution or the Utah Constitution, or to require an attorney or law firm to undertake representation on behalf of an issue or cause to which the attorney or law firm is opposed on ideological, political, social, moral or religious grounds or which would conflict with or impair the interests of the attorney's or law firm's existing clients."

Respectfully submitted.

Eugene Volokh
July 25, 2017 at 3:57 pm

I oppose the rule, largely because it would unconstitutionally restrict speech. The State Bar says that, "by limiting its application to 'conduct related to the practice of law,' the proposed amendment does not infringe on the right of free speech" — but surely that's mistaken, given that the commentary to the rule expressly makes clear that "bar association" or "social activities in connection with the practice of law" are covered.

Say, then, that some lawyers put on a Continuing Legal Education event that includes a debate on same-sex marriage, or on whether there should be limits on immigration from Muslim countries, or on whether people should be allowed to use the bathrooms that cor-respond to their gender identity rather than their biological sex. In the process, unsurpris-ingly, the debater on one side says something critical of gays, Muslims or transgender people. Under the Rule, the debater could well be disciplined by the state

bar:

1. He has engaged in "verbal . . . conduct" that "manifests bias or prejudice" toward gays, Muslims, or transgender people.

2. Some people view such statements as "harmful"; those people may well include bar authorities.

3. This was done in an activity "in connection with the practice of law," a Continuing Legal Education event. (The event could also be a bar activity, if it's organized through a local bar association, or a business activity.)

4. The statement is not about one person in particular (though it could be—say the de-bater says something critical about a specific political activist or religious figure based on that person's sexual orientation, religion or gender identity). But "anti-harassment . . . case law" has read "harassment" as potentially covering statements that are offensive to a group generally, even when they are not said to or about a particular offended person. See, e.g., Sherman K. v. Brennan, EEOC DOC 0120142089, 2016 WL 3662608 (EEOC) (coworkers' wearing Confederate flag T-shirts on occasion constituted racial harassment); Shelton D. v. Brennan, EEOC DOC 0520140441, 2016 WL 3361228 (EEOC) (remanding for factfinding on whether coworker's repeatedly wearing cap with "Do not Tread On Me" flag constituted racial harassment); Doe v. City of New York, 583 F. Supp. 2d 444 (S.D.N.Y. 2008) (concluding that e-mails condemning Muslims and Arabs as supporters of terrorism constituted religious and racial harassment); Pakizegi v. First Nat'l Bank, 831 F. Supp. 901, 908 (D. Mass. 1993) (describing an employee's posting a photograph of the Ayatollah Khomeni and another "of an American flag burning in Iran" in his own cubicle as poten-tially "national-origin harassment" of coworkers who see the photographs). And the rule is broad enough to cover statements about "others" as groups and not just as individuals.

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

Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The State Bar, if it adopts the Rule, might thus discipline you for your "harassment." And, of course, the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you are fine; if you express the contrary viewpoints, you are risking disciplinary action.

Eugene Volokh
July 25, 2017 at 4:01 pm

I should also note that the rule would be vastly broad than most of the rules adopted in other states. The proposed rule goes well beyond the current Utah Rule of Professional Conduct 8.4, which generally bars "conduct" (which may well include discrimination and harassment) "that is prejudicial to the administration of justice." Likewise, rules in many other states bar discrimination and harassment when they are "prejudicial to the administration of justice." See, e.g., Ariz. Rules of Prof. Conduct 8.4 Comment.

Courts can legitimately protect the administration of justice from interference, even by, for instance, restricting the speech of lawyers in the courtroom or in depositions. But the proposal deliberately goes vastly beyond such narrow restrictions, to apply even to "social activities."

Indeed, I have found only two states, Indiana and New Jersey, that forbid lawyer speech that "manifests bias or prejudice" or speech that is "derogatory or demeaning" outside the special context of speech in courtrooms, depositions, negotiations, and the like — interactions that are indeed likely to directly interfere with the administration of justice. See Ind. Rule Prof. Conduct 8.4(g); N.J. Rule Prof.

Conduct 8.4 official comment. (Compare, e.g., Mass. R. Sup. Jud. Ct. 3.4(i) and Wash. R. Prof. Conduct 8.4(h), which forbid such speech only within such litigation or negotiation processes.) And even the Indiana and New Jersey rules do not go so far as to cover "social activities related to the practice of law."

The proposal also goes beyond existing hostile-work-environment harassment law under Title VII and similar state statutes. That law itself poses potential First Amendment problems if applied too broadly. See, e.g., DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591 (5th Cir. 1995) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment.") (dictum); Rodriguez v. Maricopa County Comm. Coll. Dist., 605 F.3d 703 (9th Cir. 2010) ("There is no categorical 'harassment exception' to the First Amendment's free speech clause."). And in any event, it is substantially narrower than the proposed rule: For instance, harassment law generally does not cover social activities at which coworkers are not present — yet under the proposed rule, even a solo practitioner could face discipline because something that he said at a law-related function offended someone employed by some other law firm.

Hostile-work-environment harassment law is also often defended (though in my view that defense is inadequate) on the grounds that it's limited to speech that is so "severe or pervasive" that it creates an "offensive work environment." This proposed rule conspicuously omits any such limitation. Though the statement in the ABA comments that "anti-harassment … case law may guide application of paragraph (g)" might be seen as implicitly incorporating a "severe or pervasive" requirement, that's not at all clear: That provision says only that the anti-harassment case law "may guide" the interpretation of the rule, and in any event the language of the comments (which, again the Utah State Bar petition expressly adopts and endorses) seems to cover any "harmful verbal … conduct," including isolated statements.

Many people pointed out possible problems with this proposed rule, which is based on the ABA's new Model Rule, when the ABA was considering it — yet the ABA adopted it with only minor changes that do nothing to limit the rule's effect on speech. It seems that the ABA and the Utah State Bar wants to do exactly what the text calls for: limit lawyers' expression of viewpoints that the ABA and the Bar dislikes.

Mary Corporon
July 26, 2017 at 1:43 am

Many of the comments here focus on First Amendment issues. Whereas I share concerns expressed about the First Amendment, as a criminal defense attorney, I have grave concerns about the impact of this proposed rule on the 6th Amendment. It is the duty of a defense attorney in a trial to discredit a witness against a criminal defendant and to use any reasonable means and all available evidence to discredit the witness. The job of a defense attorney confronting the prosecution's witnesses in a criminal trial is not to look out for the feelings and sensibilities of the witness. Quite the contrary. The defense attorney's duty in our adversarial system is to make the witness appear to be a liar, incompetent, demented, biased and self-interested in the extreme. There are theories of questioning of witnesses in various kinds of criminal trials, in front of juries in this state, which might serve very well to discredit a complaining witness. Areas of cross examination might include the sexual preference or practices of the witness, the financial status of the witness, or the races of the witness and the accused, the physical handicap of the witness (such as blindness or poor eyesight) and so forth. How can a defense attorney operating consistent with a constitutional obligation to attack the testimony of a accusing witness zealously and aggressively continue to do so, if the attorney also has to pull her punches to take this rule into account?

Also, law firms and lawyers routinely "discriminate" against prospective clients who cannot pay the necessary retainer to engage the lawyer, and routinely "discriminate" against existing clients by refusing to continue representing the client if a bill for legal services is not paid. Law firms and lawyers will routinely go bankrupt if they do not do so, yet it would appear that, by failing to represent every poor

person who comes through the door, a lawyer would be in violation of this rule.

Rob Latham
July 26, 2017 at 2:23 am

Rather than repeat much of what has already been written, I write merely to say that join with my fellow members of the Utah State Bar in opposition to this proposed rule.

Michael Esplin
July 26, 2017 at 5:09 pm

I oppose the proposed rule and agree with those who foresee First Amendment challenges and also with those who foresee Sixth Amendment issues. As as been stated in many previous posts, this rule is over reaching.

Anonymous
July 26, 2017 at 8:33 pm

This proposed rule change violates both the free exercise and the establishment clauses of the First Amendment to the United States Constitution.

I. The free exercise clause

The Bible teaches that we should love our neighbor as ourselves. (Matthew 22: 39)
The Bible also says that God desires all men to be saved and come to a full knowledge of the truth. (I Timothy 2:3-4).
However, certain acts by human beings are condemned. Homosexual acts are expressly condemned in the Bible. (I Cor 6:9-10; Lev 20:13 Amplified Version)
Although we don't hate the person, the Bible teaches that we can never condone homosexual acts. (Lev 18:22; I Cor 15:33).

II. The establishment clause

By forcing me to accept the homosexual acts of some, in violation of my religion, the state has established a religion for me … Thou shalt condone homosexual acts as not sin, regardless of what the Bible teaches.

Michael Erickson
July 27, 2017 at 4:52 pm

As a member of the Utah State Bar deeply concerned with the effect of Proposed Rule of Professional Conduct 8.4(g), I respectfully request that this Court order further study and amendment of the proposed rule in order to address serious concerns for freedom of speech, association, and religion. In 2015, Utah passed historic legislation, amending antidiscrimination laws to include sexual orientation and gender identity, but only after carefully balancing the need for LGBT protections with religious liberties. The American Bar Association's Rule 8.4(g) threatens to undo this delicate balance for Utah's legal community, potentially subjecting lawyers to charges of professional misconduct for speaking and acting in accordance with religious beliefs that are often accused of being inherently discriminatory. With the goal of furthering the spirit of the "Utah Compromise," I respectfully submit the following concerns for your consideration.

On a personal level, if Proposed Rule 8.4(g) is adopted, I am concerned that responding to bar complaints may become the price I must pay for continued public advocacy on subjects related to sexual orientation and gender identity. Over the last several years, I have authored opinion editorials for newspapers, testified at legislative hearings, participated in television and radio interviews, and spoken in educational forums on legal topics related to LGBT rights. While not representing clients, I was identified in each case as a practicing attorney. If the foregoing activities are "related to the practice of law," then under Proposed Rule 8.4(g), my continued speech and advocacy in these settings will come under scrutiny

for allegations of professional misconduct. Because Comment 3 to the proposed rule defines "discrimination" to include "verbal . . . conduct that manifests bias or prejudice to others," I would be naïve to believe that continued advocacy on such controversial subject matter would not, at some point or another, be accused of manifesting bias or prejudice to others. While it has always been my sincere desire to speak on such a sensitive topic with a moderate tone, appropriate decorum, and courteous respect for diverse viewpoints, I cannot escape the reality that faith-based viewpoints are often accused of being inherently discriminatory regardless of the manner in which they are expressed. It is of grave concern to me that Proposed Rule 8.4(g) could be used as an ideological weapon to silence unpopular viewpoints.

Significantly, these controversial aspects of Proposed Rule 8.4(g) were not sufficiently addressed by the Board of Bar Commissioners in their July 10, 2017 letter in support of the proposed rule. It is with utmost respect for the Board that I raise this concern, having personal and professional relationships with several bar commissioners, and confidence in the professionalism, diligence, and integrity of the entire Board. Nevertheless, I respectfully submit that the July 10, 2017 letter of support gives insufficient consideration to significant concerns being raised on a national level over Proposed Rule 8.4(g)'s potential deleterious effect on freedoms of speech, association, and religion. On the vital subject of free speech protections, the letter of the Board states only, "Additionally, by limiting its application to 'conduct related to the practice of law,' the proposed amendment does not infringe on the right of free speech, thought, association, or religious practice." (July 10, 2017 Letter from Board of Bar Commissioners.) The Board's letter appears to suggest that a lawyer's "right of free speech, thought, association, or religious practice" is not implicated by a lawyer's "conduct related to the practice of law." But Comment 4 to Proposed Rule 8.4(g) expressly defines "conduct related to the practice of law" to include "interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law" and "participating in bar association, business, or social activities in connection with the practice of law." If a lawyer's writing and speaking on legal issues in public settings—whether in educational forums, opinion editorials, legislative hearings, media interviews, and even watercooler conversations—is "conduct related to the practice of law," then Proposed Rule 8.4(g) should be cautiously evaluated for its potential limitations on the rights of free speech, association, and religion.

Further study of Proposed Rule 8.4(g) could only lead to increased understanding and clarity, balancing the concerns for lack of diversity in the legal community and the harmful effects of bias and discrimination on minority participation with the countervailing concerns that faith-based viewpoints are often accused of being inherently discriminatory. While the Board of Bar Commissioners argues the adoption of Proposed Rule 8.4(g) "will not impose an undue burden on lawyers" because there have been no adverse effects in the "[t]wenty-two states [that] already incorporate similar anti-discrimination and anti-harassment provisions into their rules," (July 10, 2017 Letter from Board of Bar Commissioners), the Board's letter fails to address the differences between the ABA's model rule adopted in 2016 and the antidiscrimination rules previously adopted by these states. (To date, no jurisdiction has adopted ABA's Model Rule 8.4(g), and South Carolina recently rejected it.) For example, the Board's letter does not identify the number of states that limit their antidiscrimination rule to "conduct in the course of representing a client," as opposed to the ABA's much broader "conduct related to the practice of law." Nor does the Board's letter disclose that many states limit their rules only to unlawful discrimination or harassment.

Indeed, as a matter of policy, it is perplexing that Proposed Rule 8.4(g) seeks to make certain lawful conduct the subject of professional misconduct when much criminal conduct is not. Under the proposed rule, lawyers could be disciplined for lawful conduct not punished by workplace discrimination and harassment laws. Yet, paradoxically, Rule 8.4(b) subjects lawyers to discipline for only a subset of criminal conduct—i.e., those criminal acts that reflect "adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Thus, Proposed Rule 8.4(g) would discipline lawyers for certain lawful conduct (e.g., speech alleged to be biased but not unlawfully so) when Rule 8.4(b) does not even

discipline lawyers for all unlawful criminal conduct. While the Board of Bar Commissioners understandably desires that lawyers be held accountable for "more than mere compliance with the law," (July 10, 2017 Letter from Board of Bar Commissioners), the Utah Rules of Professional Conduct do not even presently require full compliance with the law, disciplining lawyers for only certain criminal acts. Rather than subject lawful conduct to potential discipline under Proposed Rule 8.4(g), it might be advisable to instead expand Rule 8.4 to include certain unlawful conduct, including unlawful discrimination and harassment. Focusing on unlawful conduct is especially advisable in Utah, where civil rights and faith-based groups have already reached a historic compromise in enacting employment and housing antidiscrimination laws that balance protections for diverse groups, including LGBT, with religious liberties. (See Utah Code Ann. § 34a-5-101 et seq.)

Proposed Rule 8.4(g) addresses the laudable goal of curtailing workplace discrimination and harassment, but its vague language makes it susceptible to becoming a dangerous weapon for curtailing unpopular speech. While Comment 3 to Proposed Rule 8.4(g) specifically defines sexual harassment to include "unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature," the proposed rule fails to define other types of discrimination or harassment. And, regrettably, the terms "discrimination," "harassment," "bias," and "prejudice" can be interpreted so differently that failing to provide further guidance in the text or comments of the proposed rule could lead to unpredictable results. For example, the California Code of Judicial Ethics prohibits judges from belonging to organizations that practice "invidious discrimination." (See Code of Judicial Ethics, Canon 2, § B, "Membership in Organizations.") At the time of adoption in 1996, this rule may have appeared uncontroversial, yet for a period of time in 2015, the rule was applied to prohibit California judges from associating with the Boy Scouts of America. (NPR, "California Judge Must Cut Ties with the Boy Scouts," March 16, 2015, http://www.npr.org/2015/03/16/39236030.) As another example, the Southern Poverty Law Center labels as a "hate group" the Alliance Defending Freedom, a Christian legal advocacy organization, which currently represents Colorado-based Masterpiece Cakeshop in its appeal to the United States Supreme Court. Under Proposed Rule 8.4(g), would Utah lawyers be subject to discipline for associating with this faith-based organization labeled a "hate group" by a prominent civil rights organization?

The "Utah Compromise" brought together diverse groups with the goal of achieving fairness for all in employment and housing. Antidiscrimination measures need not curtail important religious liberties. When responsible citizens work together in good faith to understand one another's diverse viewpoints, remarkable results emerge. With this spirit of compromise in mind, I respectfully request that this Court order further study and amendment of Proposed Rule 8.4(g) in order to achieve the commendable goals of increasing diversity and eliminating discrimination without threatening the rights of free speech, association, and religion.

Respectfully submitted

Kenneth Prigmore
July 27, 2017 at 6:32 pm

The existing rules of Professional Responsibility are quite sufficient in describing and limiting the actions of an attorney to protect the administrating of justice. This new language adds nothing to the administration of justice, but does promote new bias not previously found in our state rules. I want to see significant evidence of how justice has not been served without this newly biased language before I am willing to make this change. For lack of evidence, this new language should be rejected.

National Legal Foundation (NLF) & Congressional Prayer Caucus Foundation (CPCF)
July 28, 2017 at 1:44 pm

NLF is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration

of the moral and religious foundation on which America was built. We comment on behalf of ourselves and donors and supporters, including those in Utah. NLF has had a significant federal and state court practice since 1985, including representing numerous parties and amici before the Supreme Court of the United States and the supreme courts of several states.

CPCF is an organization established to protect religious freedom and preserve America's Judeo-Christian heritage, while reaching across all denominational, socioeconomic, political, racial, and cultural dividing lines. CPCF has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-one states, including Utah.

The Constitutional deficiencies of the ABA's proposed Rule 8.4(g) (the proposed rule) have been widely discussed and documented in a growing body of scholarly and professional criticism. (See, for example: Professor Josh Blackman's article, "Reply: A Pause for State Courts Considering Model Rule 8.4(g)" in the Georgetown Journal of Legal Ethics, Vol. 30, 2017 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888204); Professor Ronald Rotunda's article, "The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech." (https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418); and Professor Eugene Volokh's article, "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities." (https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.601be9a57646).)

The proposed rule would undermine basic Constitutional protections for members of the Utah bar and is inimical to our Country's fundamental principles of freedom. When read in light of the ABA comments explaining the rule change, this proposed rule appears to be an effort to shout down those who do not agree with the world view of the ABA's leadership. This attitude contrasts starkly with freedoms that are the bedrock of our country. These concerns are magnified by the proposed rule's breathtaking overreach, as evidenced in Comment 4's statement that "the practice of law includes … participating in bar association, business or social activities in connection with the practice of law."

The proposed rule, in its avowed purpose to put lawyers at the forefront of a cultural movement, instead attempts to coopt State bars and judiciaries to undermine basic fairness with respect to Constitutionally protected, sincerely held religious beliefs and ethical standards.

No state that has considered the ABA's proposed 8.4(g) has adopted it. Several have expressed concerns about the proposed rule. For example:

- The Texas Attorney General (letter dated December 20, 2016) wrote, "A court would likely conclude that the [proposed rule] . . ., if adopted in Texas, would unconstitutionally restrict freedom of speech, free exercise of religion, and freedom of association for members of the State Bar. In addition, a court would likely conclude that it was overbroad and void for vagueness."
- The South Carolina Solicitor General (letter dated May 1, 2017) expressed the belief of the state's Attorney General's office that, "if adopted, . . . the likelihood of a successful challenge to the Model Rule based upon the First Amendment and Due Process Clause is substantial and that a court could well conclude the Rule is unconstitutional." The South Carolina Supreme Court issued an Order (Appellate Case No. 2017-00049, found at http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01), declining "to incorporate the ABA Model Rule within Rule 8.4, RPC, as requested by the ABA."
- In December 2016, the Illinois State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois." (https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals)

- In December 2016, the Disciplinary Board of the Supreme Court of Pennsylvania stated: "It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule broadly defines "harassment" to include any "derogatory or demeaning verbal conduct" by a lawyer, and the rule subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was." (http://www.pabulletin.com/secure/data/vol46/46-49/2062.html)

Much of the thinking and advocacy that undergirds the push for the proposed rule's adoption ignores credible and significant health and social science data that should signal skepticism in approaching the expansive scope of the proposed rule's language. There is well founded concern that the proposed rule would align the State of Utah behind those who are most actively pushing an expansive definition of "gender identity" and "marital status," to the degree that any such "discrimination," broadly defined, will override religious and other freedoms.

With respect to the categories of "gender identity" and "marital status," there are a number of relevant considerations that urge caution in their use in a rule of this sort. We outline several of them below, in part to explain more fully the key difference between homosexual and transgender inclinations and conduct and in part to reinforce that the public policy debate on such conduct is not closed but is still being informed by substantial health and social science evidence. (See, e.g., Mayer & McHugh, "Sexuality and Gender," 50 The New Atlantis 8 (Fall 2016), noting (1) that there is limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for non-heterosexual and transgender populations and (2) that more high-quality longitudinal studies are necessary for the "social stress model" to be a useful tool for understanding public health concerns.)

Religiously Informed Views on Sexual Orientation and Gender Identity:

Christians are called to love and serve all persons, including those with a homosexual orientation or those who feel a closer association to the gender other than their biological sex. However, most orthodox Christians (and those of other religions) sincerely believe that their Holy Scriptures (not to mention biology) identify same-sex intercourse and rejection of one's birth gender as both unnatural and immoral. Thus, while Christian lawyers would not (and overwhelmingly do not) refuse to take work from persons who identify themselves as gay or transgender when the work does not involve supporting that lifestyle (e.g., representation as a victim of a car accident), many would have ethical qualms in working for such a person or organization if the representation directly or indirectly advanced the cause of such lifestyles or helped entrench their participants in it. It is not discrimination on the basis of sexual orientation or gender identity to refuse to approve or support same-sex intercourse or gender "transformations." It is the difference between personhood and activity. Persons are just as much persons if they never engage in sexual intercourse, of whatever kind.

The orthodox Christian view that separates the person from the offensive activity is not generally accepted by either the LGBT community or, increasingly, administrative and judicial officials. Christian attorneys are often representing citizens whose refusals, made for religious reasons, to support the LGBT lifestyle or participate in LGBT events are attacked as "sexual orientation" or "marital status" discrimination. E.g., Masterpiece Cakeshop, et al. v. Colo. Civil Rights Comm'n, et al., 370 P.3d 272 (Colo. App. 2015), cert. granted, 2017 WL 2722428, (June 26, 2017) (No. 16-111). The proposed rule, if adopted without change, could be used in similar ways against attorneys acting in accord with their basic Constitutional freedoms. And, of course, this could affect not just Christian attorneys, but also those of other faiths, such as Judaism and Islam, that teach that homosexual conduct is immoral.

The view that distinguishes the person from the activity may not be held by a majority of the ABA, but it is held by many lawyers in Utah and nationwide and is religiously, scientifically, and logically informed. Those who sponsor adoption of the proposed rule are not satisfied with the pace of change

across the country. The ABA Ethics Committee in its December 22, 2015, memorandum uncritically accepted that there is a "need" for a "cultural shift." In seeking to advance it, the proponents of the proposed rule have taken an unwise step that should not be endorsed and followed by Utah. At a minimum, and consistent with other steps taken by Utah (e.g., the 2015 "Protections for Religious Expression and Beliefs About Marriage, Family, or Sexuality" Act), the State's approach to this subject should be more nuanced to recognize and exempt speech and conduct motivated by sincerely held religious beliefs and to clarify exactly what is being proscribed.

Suggested Revisions to the Proposed Rule:

We support a black-letter ethics rule addressing inappropriate, invidious discrimination, which would properly address discrimination based on uncontroversial and constitutionally protected categories, such as race, religion, and sex. In fact, this is already provided under Utah's Rules of Professional Conduct; Rule 8.4(d) provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice." Comment 3 to this rule provides that "[a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule."

However, the addition of "gender identity" and "marital status" as nondiscrimination categories is ill-advised unless those terms are more carefully defined and limitations more clearly specified to prevent unconstitutional application of the proposed rule.

1. Proposed use of "gender identity"

"Gender identity" should not be included in the rule as a nondiscrimination category for several reasons.

- The movement for official acknowledgement that taking transgender actions is "normal," and that such inclinations should even be encouraged, contrasts with social science studies documenting the dramatic, long-term deleterious effects on those who have elected to have transgender medical procedures performed. (See, e.g., "Transgender Surgery Isn't the Solution," by Dr. Paul McHugh, former Chief of Psychiatry at Johns Hopkins Hospital, in 6/12/14 Wall St. J., available at http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120 and "How to Close the LGBT Health Disparities Gap," http://www.americanprogress.org/issues/lgbt/report/2009/12/21/7048 ("[t]ransgender adults are much more likely to have suicide ideation" (2% heterosexual; 5% gay; 50% transgender.)) By including this term, the proposed rule ignores physical reality and social science results, unfairly and improperly accusing those who do not support transvestitism and gender transfers of "harassment" and "discrimination."
- The term "gender identity" is unconstitutionally vague. This term has no fixed meaning and, by definition, is the product of an individual, subjective determination that may conflict with how the individual objectively appears to others. Moreover, because of its subjectivity, the term is malleable and can even be used by an individual in a temporally inconsistent manner. ("The term [transgender] includes androgynous and gender queer people, drag queens and drag kings, transsexual people, and those who identify as bi-gendered, third gender or two spirit. 'Gender identity' refers to one's inner sense of being female, male, or some other gender…. Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient…, individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities." Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities, 12 Tex. J. on C.L. & C.R. 101, 103-04 (2006). See also DeJohn v. Temple Univ., 537 F.3d 301, 381 & n.20 (3d Cir. 2008) (noting fluidity of the term gender).) Such ambiguity in the term raises serious

vagueness concerns. The ABA Ethics Committee, which drafted the proposed rule, demonstrated the ambiguity of the term when it stated (December 22, 2015, memorandum, at 5) that the term gender identity recognizes that "a new social awareness of the individuality of gender has changed the traditional binary concept of sexuality." Any "identity" subject to changeable, subjective "individuality" untethered to time or objective biology is, by definition, vague and subject to abuse.

To reiterate, Christians (and others) do not believe those with transgender inclinations are any less persons for having such inclinations, but that is not the same as approving or supporting or advocating for actions taken in furtherance of that inclination or to advance its spread. Christians recognize that they themselves and all other persons take immoral actions. Christians are enjoined by their Scriptures to love and serve all persons, even though they do not approve of the immoral actions persons perform. At a minimum, if the proposed rule is adopted and this phrase is retained, the rule should include the following clarifying language: "Paragraph (g) does not include a lawyer's refusal to approve or support same-sex or gender transfer conduct or to represent an individual in a matter related to such conduct."

3. Proposed use of "marital status"

The term marital status is hopelessly ambiguous. It is not an inherent condition like race, ethnicity, or sex, but what exactly it covers is unclear, and its meaning is not well settled or accepted.

The ABA Ethics Committee indicated (ABA Memorandum, at 5) that it included this term based on the U.S. Supreme Court's Obergefell decision and on "the rise in single parenthood." This explanation yields more questions than answers. If the reference to Obergefell is meant to suggest that a lawyer could not discriminate against those in a same-sex marriage, "marital status," in this context, adds nothing to "sexual orientation." Moreover, Obergefell did not overturn the public policy of many States that still disfavors same-sex marriage, even though those States may no longer prohibit a civil ceremony. (In this respect, the right of a same-sex couple to a civil marriage parallels the right of a woman to a pre-viability abortion. Although such abortions may not be prohibited by governments, see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), the Supreme Court has repeatedly upheld the right of federal, state, and municipal governments to disfavor abortion and not to fund the practice. E.g., Webster v. Reproductive Health Serv., 492 U.S. 490 (1989).) To the extent "marital status" is intended to cover the same-sex marriage status, it runs directly contrary to the statements of public policy still common and effective throughout this country that disfavor same-sex marriage, including Utah. Utah's Constitution in Article 1, Section 29, paragraph (1) ("Marriage") provides: "Marriage consists only of the legal union between a man and a woman."

To the extent that "marital status" was included based on the implication that there is some kind of invidious discrimination against single parents, the ABA provided no evidence to support such an implication. The reason why representation (or employment at a law firm) would be refused because a person is single but has a child goes unarticulated and its occurrence unproven. Nondiscrimination categories should not be proliferated without cause.

On its face, it is also conceivable that "marital status" discrimination would include, for example, when an attorney, for religious reasons, refused to craft a prenuptial agreement for previously divorced individuals because the lawyer held the belief that the Bible disallows most remarriage after divorce if the divorced spouse is still alive. Similarly, would a family law attorney who refuses for religious reasons to assist a same-sex couple adopt a child have engaged in improper "marital status" discrimination?

The "marital status" category is simply too vague, pliable, and potentially subject to abuse to be used in the proposed rule. It fails due process analysis and could intrude on many decisions and actions that are constitutionally protected.

Conclusion:

For these reasons, we encourage the Supreme Court of Utah to reject adoption of this proposed rule. If some version of the rule is adopted, we recommend the following revisions to the current text:

- Remove "gender identity" as a nondiscrimination category. At a minimum:

o add additional language to the rule that "this rule does not include a lawyer's refusal to approve or support same-sex or gender transfer conduct or to represent an individual in a matter related to such conduct;" and

o add language to the rule that "the terms 'sex' and 'sexual orientation' do not overlap and do not overlap with the term 'gender identity.'"

- Remove "marital status" as a nondiscrimination category.

Christians do, indeed, believe that all people are created equal by God, and they also believe that God has set moral absolutes for behavior for those he has created, including that life is sacred from conception to natural death, that sexual intercourse is only ethical when between a man and woman married to each other, and that violating God's moral norms does not bring true liberty either to an individual or to a culture. Social science amply supports the wisdom of these religious principles.

Article 1, Section 4 ("Religious Liberty") of the Utah State Constitution begins with the proclamation that "[t]he rights of conscience shall never be infringed." The text of the proposed rule is susceptible of being used to attack those who sincerely hold religiously based views on and object to what they understand to be sexual libertinism. This is no idle threat, as the desire of some in the LGBT movement is quite evident to punish and drum out of the public conversation any who disagree with them and who express their religious beliefs that homosexual and transgender conduct are immoral and deleterious to our civil society, as well as to the individuals involved. The Utah Supreme Court should not provide a platform for such actions by adopting this proposed rule.

Thank you for the opportunity to provide these comments and for your consideration of them.

Charisma V. Buck
July 28, 2017 at 2:24 pm

Several other comments have addressed the concerns and problems of proposed rule 8.4(g) and why the Supreme Court should not adopt the proposed rule. I also strongly urge this Court to reject proposed Rule of Professional Conduct 8.4(g).

Numerous comments outline the violations to a lawyer's constitutionally protected rights the proposed Rule would cause; especially where the rule is too broad, is not limited to a lawyer's actions in connection with representing his or her client, and it does not limit discipline to instances where a lawyer's misconduct is "prejudicial to the administration of justice."

I will not restate those arguments, but I support those comments that ask this Court to reject the proposed Rule on grounds of it violating freedom of religion, freedom of speech, freedom of association and due process rights. There is ample evidence cited in the comments that demonstrates the unconstitutionality of the proposed Rule, the effects on the constitutional rights of attorneys, and the overall harmful effects of passing proposed Rule 8.4(g). I especially support the comments and citations by J RobRoy Platt, National Lawyer's Association, William C. Duncan and several other attorneys.

Taking those arguments and the discussions of the effects Proposed Rule 8.4(g) will have upon lawyers' liberties, I would like to emphasize the effect that proposed Rule 8.4(g) will have on the free exercise of religion, and freedom of speech. I respectfully remind this Court that even our own Utah Constitution offers protections against limiting religious freedoms and freedom of speech, which is what the proposed Rule seeks to limit with lawyers. Our Utah Constitution states, "The rights of conscience shall never be infringed. The State shall make no law….prohibiting the free exercise thereof…" (Article I §4) and "[n]o law shall be passed to abridge or restrain the freedom of speech…" (Article I §15). It states: "All men have the inherent and inalienable right to enjoy and defend their…liberties…to worship according to the dictates of the conscience, to assemble peaceably, protest against wrongs, and…to communicate freely their thoughts and opinions… (Article I §1). Passing proposed rule 8.4(g) would severely limit an attorney's liberty to worship according to his or her dictates of conscience and would limit a lawyer's ability to freely communicate their thoughts and opinions.

It is important to remember our country's origin and that our country would not exist if brave men and women were not willing to live by their conscience and seek out a safe haven where they could practice their religion. These men and women were seeking a place to freely practice their religious beliefs free from persecution. The US Constitution is the embodiment of these protections the Framers deemed unalienable rights that every individual possesses and that the judiciary should safe-guard encroachment upon.

I would ask this Court to prevent an opinion that is currently the popular political agenda to be allowed to trample the rights of individual lawyers. Founder, James Madison, stated in the Federalist Papers, "It is of great importance…to guard one part of the society against the injustice of the other part…In a free government the security for civil rights must be the same as that for religious rights." (Federalist Papers #51)

Proposed Rule 8.4(g) is undefined and overreaching as discussed in previous comments. Proposed Rule 8.4(g) needs to be limited to the scope to representation of a client and to instances of misconduct "prejudicial to the administration of justice," which is wording from the current comments to the Rule. Proposed Rule 8.4(g) needs to include protections of religious liberty and freedom of speech so that an attorney is not at risk of discipline or loss of his or her license for expressing their opinion or not representing a particular client. The proposed Rule is missing these protections and the balance between achieving anti-discrimination or anti-harassment and protections of every individual's, even a lawyer's, unalienable rights.

I respectfully ask this Court to reject proposed Rule 8.4(g).

Liisa Hancock
July 28, 2017 at 7:45 pm

I have been following the ABA's proposed changes to Rule 8.4(g), and have been concerned with the proposed changes for some time and second many of the comments set forth above and oppose the changes as drafted. While well-intentioned, the rule as drafted contains a vagueness that has a real potential to limit not only free speech, but also potentially limiting clients may be able to represent. I second the comments opposing this rule as set forth above.

Liisa Hancock
July 28, 2017 at 7:48 pm

Susan Griffith has authorized me to voice her opposition to the Rule change as drafted, but is not where she can make a timely comment.

Robert Breeze
July 28, 2017 at 10:51 pm

Let's be honest here. This rule attempts to impose a politically correct terror campaign on every member of the Bar.

No definition of harassment or discrimination? Leave that to the hands on persecutors right? How beautiful–ever shifting definitions. Stalin would be so proud. And read the comments for all the PC exceptions.

If I get a Mexican national on cross examination to admit that native Mexicans tend to consider lying in court acceptable due to the fact that in Mexico the defendant has no right to refuse to incriminate himself am I now a harassing and discriminating monster to be sanctioned and run out of the Bar?

If I refuse to accept a client because he is so abusive that I cannot work with him am I guilty of discrimination and/or because a mentally ill psychologist (sorry folks but we all know that many of them are suffering from mental illness) claims that the cad has a mental disability should I be run out of the Bar?

If I prove in court that a Muslim called a Mexican a “beaner” in order to show the Muslim intended to provoke an altercation I am sure the PC crowd would like to see me kicked out of the Bar for doing my job.

Wake up people. This rule is being promoted nationwide (and thankfully rejected as ridiculous in nearly every state Bar and court) by people who have a totalitarian bureaucratic PC mindset. These people are the ones who are dangerous and need to be outed and publicly shamed.

It is time to take a stand. I can only hope that the good people of Utah will target any Judge who supports this rule in any fashion for removal from office via impeachment or retention election defeat. And I hear that money is already being raised for that very purpose.

Bradley K. DeSandro
July 28, 2017 at 11:03 pm

THE SUPREME COURT OF UTAH
IN RE: PROPOSED ADOPTION OF)
ABA MODEL RULE OF)
PROFESSIONAL CONDUCT 8.4(g))

Joint Comment Opposing Adoption of ABA Model Rule of Professional Conduct 8.4(g)

This Joint Comment, submitted by Utah licensed attorneys, opposes Utah’s adoption of new ABA Model Rule 8.4(g) and Comments thereto, for the reasons set forth herein.

I. The Rule

A. Utah’s Current Rule

Utah’s current Rule of Professional Conduct 8.4 provides, in pertinent part, as follows:

It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice.

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

B. The New Model Rule 8.4(g) and Comments

Adopting the new ABA Model Rule 8.4(g) would amend Utah Rule 8.4 by adding an entirely new subsection (g) and comments, which read:

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.

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. The Objections

A. The New Rule Is Unconstitutional.

1. Attorney Speech is Constitutionally Protected

There is no question but that citizens do not surrender their First Amendment speech rights when they become attorneys. Indeed, the ABA itself recently acknowledged this in an amicus brief it filed in the case of Wollschlaeger, et al. v. Governor of the State of Florida, et al. (11th Circuit). 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, – the ABA stated – 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 support of its position, the ABA cited NAACP v. Button, 371 U.S. 415 (1963) for the proposition that "notwithstanding the State's 'interest in the regulation of the legal profession,' a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."

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 New Model Rule

Many authorities have pointed out constitutional infirmities of the new Model Rule.

When the ABA opened up the new Model Rule for comment, a total of 481 comments were filed – 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, 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 and http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf.

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

In addition, the authors of several law review articles have concluded that Model Rule 8.4(g) – and other Rules like it – may violate attorneys' First Amendment rights. See, for example, New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call For Scholarship, Andrew F. Halaby and Brianna L. Long, 41 J. Legal Prof. 201, 2016-2017 (the new Model Rule 8.4(g) has due process and First Amendment free expression infirmities); Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law," Josh Blackman, 30 Geo. J. Legal Ethics 241 (2017)(Model Rule 8.4(g) constitutes an unjustified incursion into constitutionally protected speech); Discriminatory Lawyers In A Discriminatory Bar: Rule 8.4(G) Of The Model Rules Of Professional Responsibility, Caleb C. Wolanek, 40 Harv. J. L. & Pub. Policy 773 (June 2017)(Model Rule 8.4(g) goes too far and implicates the First Amendment). See, also, Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge On Lawyers' First Amendment Rights, Lindsey Keiser, 28 Geo. J. Legal Ethics 629 (Summer 2015)(rule violates attorneys' Free Speech rights) and Attorney Association: Balancing Autonomy and Anti-Discrimination, Dorothy Williams, 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. For example, the Illinois State Bar Association has taken an official position opposing the Rule; the Pennsylvania Supreme Court Disciplinary Board is opposing the Rule; and the South Carolina Bar's Committee on Professional Responsibility is opposing the new Rule stating that the Rule is unconstitutionally vague, unconstitutionally overbroad, and constitutes unconstitutional content discrimination.

Further, 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. (With respect to the constitutional issues raised by the new Model Rule, the attorneys filing this Joint Comment agree with the discussion, analysis and conclusions set forth in the National Lawyers Association's Statement, and have adopted, restated, and in some respects expanded upon much of that discussion and analysis in this Joint Comment.)

In addition, the Montana legislature has adopted a Joint Resolution determining that it would be an unconstitutional act of legislation and violate the First Amendment rights of Montana citizens for the Supreme Court of Montana to enact the ABA Model Rule 8.4(g) in Montana. Senate Joint Resolution 15.

Finally, the Attorneys General of the States of Texas and South Carolina have both issued official Opinions that a court would likely conclude that the ABA Model Rule 8.4(g) constitutes an unconstitutional restriction on the free speech, free exercise of religion, and freedom of association of attorneys, is unconstitutionally overbroad, and void for vagueness. Opinion No. KP-0123, Attorney General of Texas, December 20, 2016; 14 SC AG Opinion, May 1, 2017.

3. The New Model Rule is Unconstitutionally Vague: It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following: First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. Grayned, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and

discriminatory application. Grayned, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. Grayned, supra, at 109.

The language of the new Model Rule 8.4(g) violates all these principles.

(a) The Term "Harassment" is Unconstitutionally Vague. The new Model Rule prohibits attorneys from engaging in harassment on the basis of any of the protected classes. But the term "harassment" is not defined in the Rule, is subject to varied interpretations, and no standard is provided to determine whether conduct is or is not harassing.

Does expressing disagreement with someone's religious beliefs constitute harassment based on religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment?

Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, 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). See also Are Stalking Laws Unconstitutionally Vague or Overbroad, 88 Nw. U. L. Rev. 769, 782 (1994)(the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass.").

Because the term "harassment" as used in the new 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 inadvertently violating the Rule.

But it gets worse. Comment [3] to the new Rule provides that harassment includes derogatory or demeaning verbal or physical conduct. What exactly is encompassed by the words "derogatory" and "demeaning"? Courts have found these terms to be unconstitutionally vague. Hinton v. Devine, 633 F.Supp. 1023 (E.D. Pennsylvania 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. 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 – as does the proposed Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

For example, Title VII does not merely provide that it shall be an unlawful employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that "It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2.

Likewise, the federal Fair Housing Act does not simply provide that one may not discriminate in housing

based on race, color, religion, familial status, or national origin. It provides a description of what, specifically, is being prohibited: "[I]t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604. And the Act provides precise definitions of important terms used in the Act, such as "dwelling," "person," "to rent," and "familial status." 42 U.S.C. § 3602.

Unlike other non-discrimination enactments, however, the new Model Rule simply states that "It is professional misconduct for a lawyer to: . . . (g) knowingly . . . discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law" – leaving to the attorney's imagination what sorts of behavior might be encompassed in that proscription.

Indeed, Model Comments [3] to the Model Rule 8.4(g) states that the term "discrimination" includes "harmful verbal or physical conduct that manifests bias or prejudice towards others." The term "harmful" – in the context of attorney speech and conduct – 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.

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

Whereas the current Rule applies only to attorney conduct while the attorney is representing a client – a relatively narrow and reasonably determinable aspect of a lawyer's activities – the new Rule applies to any conduct of an attorney that is in any way "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, however, is vague and not easily or readily determinable.

Comment [4] attempts to provide guidance as to what the phrase "related to the practice of law" means. But not only is the Comment's definition 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, but it also an explicitly non-exclusive list. So who can say with any degree of certainty where conduct related to the practice of law ends? For example, does the phrase include comments made by an attorney while attending a birthday celebration for a law firm co-worker; or a statement made by an attorney at a cocktail party the attorney is attending, at least in part, in order to make connections that will hopefully result in future legal work; or comments an attorney makes while teaching a religious liberty class at the attorney's church?

Because no attorney, with any degree of certainty, can determine what behavior is or is not "related to the practice of law," the new Rule is unconstitutionally vague.

If attorneys face professional discipline for engaging in certain proscribed behavior, they are entitled to know precisely 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 the Rule's important terms, the new Model Rule is unconstitutional.

4. The New Model Rule is Unconstitutionally Overbroad.

Even if an enactment is otherwise clear and precise in what conduct it proscribes, the law may nevertheless still be unconstitutionally overbroad if its reach prohibits constitutionally protected conduct. Grayned, supra, at 114.

It is clear that the new Model Rule is not only unconstitutionally vague, it is also unconstitutionally overbroad because, although it may apply to attorney conduct that might be unprotected – such as conduct that actually prejudices the administration of justice or that would clearly render an attorney unfit to practice law – Model Rule 8.4(g) would also sweep within its orbit lawyer speech that is clearly protected by the First Amendment, such as speech that might be offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit.

It does not take a constitutional scholar to recognize that "harmful verbal conduct" and "derogatory or demeaning verbal conduct" sweep into their ambit speech that is clearly constitutionally protected. Speech is not unprotected merely because it is harmful, derogatory or demeaning. In fact, 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). 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"). See also Joseph Matal, Interim Director, United States Patent And Trademark Office v. Simon Shiao Tam, 582 U.S. ____ (2017)(the government's attempt to prevent speech expressing ideas that offend strikes at the heart of the First Amendment).

And courts have found terms such as "derogatory" and "demeaning" 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 v. State College Area School Dist., 240 F.3d 200, 215 (3rd Cir. 2001)(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).

The broad reach of the new 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 new Rule for telling an offensive joke at a law firm dinner party. Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provides another example of the broad reach of the new Rule. He writes: "If one lawyer tells another, at the water cooler or a bar association meeting on tax reform, 'I abhor the idle rich. We should raise capital gains taxes,' he has just violated the ABA rule by manifesting bias based on socioeconomic status." 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, p. 4

But the speech in both these examples would clearly be constitutionally protected. The fact that such constitutionally protected speech would violate the new Rule demonstrates that the new Rule is unconstitutionally overbroad.

And it is irrelevant whether such speech would ever actually be prosecuted by disciplinary authorities under the new Rule. The fact that a lawyer could be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – the very danger the overbreadth doctrine is designed to prevent.

For these reasons, the new Model Rule would not pass constitutional muster.

5. The New Model 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 Rule will constitute an unconstitutional content-based speech restriction. 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 U.S. Supreme Court recently reiterated this principle in a case that is directly relevant when considering the constitutional infirmities of the new Model 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, Justice Kennedy described the constitutional infirmity of the disparagement provision as "viewpoint discrimination" – "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 new ABA Model 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.

Professor Rotunda provides a concrete example of how the new ABA Rule may constitute an unconstitutional content-based speech restriction. He explains: "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." 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, p. 4.

In other words, whether a lawyer has or has not violated the Rule will be determined solely by reference to the content of the attorney's speech. Under the Rule, a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that constitutes discrimination on the basis of sexual orientation, while a lawyer who speaks in favor of same-sex marriage would not be. That is a classic example of an unconstitutional content-based speech restriction.

Indeed, in some states that have modified their Rules in ways similar to the new Model Rule, such Rules are already being enforced as free-standing speech codes. See, for example, In the Matter of Stacy L. Kelley, 925 N.E.2d 1279 (Indiana Supreme Court 2010), in which an Indiana attorney was professionally disciplined merely for asking someone if they were "gay"; and In the Matter of Daniel C. McCarthy, 938 N.E.2d 698 (Indiana 2010) in which an attorney had his license suspended for applying a racially derogatory term to himself.

6. The New Model Rule Will Violate Attorneys' Free Exercise of Religion and Free Association Rights.

The new Rule will also violate an attorney's free exercise of religion and freedom of association rights. As an illustration of this problem, Professor Rotunda posits 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 explains 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. Indeed – he points out – attorneys might be in violation of the new Rule merely for being members 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.

But, clearly, that speech and an attorney's membership in such an organization are both constitutionally protected. The fact that the Rule may prohibit either indicates that the Rule will be unconstitutional. Because the new Model Rule is clearly unconstitutional, it should be rejected.

B. Only One State Has Adopted A Version Of The New Model Rule. The Supreme Court of South Carolina Has Expressly Rejected It.

Vermont is the only state to have adopted a version of the new Model Rule, while the South Carolina Supreme Court has expressly rejected it. Order, Supreme Court of South Carolina, Appellate Case No. 2017-000498 (6-20-2017).

In fact, the majority of states have no black letter anti-discrimination rule in their Rules of Professional Conduct at all. And in those states that do have black letter anti-discrimination provisions in their Rules, no state's rule (other than Vermont's) is even comparable to the new Model Rule.

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 new Model Rule does. Seven of those jurisdictions limit their coverage to conduct "in the representation of a client" or "in the course of employment" after having been retained (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 "the management and operation of a law practice." Massachusetts, New Jersey and Ohio limit their Rules to conduct "in a professional capacity." Massachusetts limits its Rule to conduct "before a tribunal." 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 – as the new Model Rule does – "harmful," "derogatory," or "demeaning" speech or conduct.

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." Indeed, of those eight states, half of them (California, Illinois, New Jersey, and New York) actually require that, before any disciplinary claim can even 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 new Model 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).

Further, unlike the Model Rule – which has 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).

Michigan's "non-discrimination" rule is more of a civility rule, prohibiting only "discourteous" or "disrespectful" conduct.

And, unlike the new Model Rule, Texas expressly excludes from its anti-discrimination rule a lawyer's decisions whether or not to represent a particular person.

So, should Utah adopt the new Model Rule, it will have adopted a Rule that impinges on attorney conduct in ways, and far more extensively, than almost any other state has seen fit to do.

There are good reasons no state other than Vermont has adopted a Rule like the new ABA Model Rule – and good reasons why the South Carolina Supreme Court has expressly rejected it. Utah would be wise to reject the new Model Rule as well.

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

The legal profession has 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. Utah's current Rule 8.4 recognizes this principle by prohibiting attorneys from engaging in six types of conduct, all of which might either adversely impact 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 criminal acts that reflect 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 impacts 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 – revealingly – 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 conduct is a violation of the Rules of Professional Conduct. Instead, the Rule proscribes only criminal conduct "that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." As Comment [2] to Utah'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. . . Although a lawyer is personally answerable to the entire criminal law, 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." (our emphasis).

The fourth type of proscribed conduct is conduct that would prove prejudicial to the administration of justice. Historically, conduct falling within the parameters of 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. See, for example, In re Complaint as to the Conduct of David R. Kluge, 66 P.3d 492 (Or. 2003), which held that 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 minimus 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.

And the last two proscription in Utah's current Rule also targets what is clearly attorney conduct that, if engaged in, would adversely affect the integral operation of the judicial system – namely, improperly influencing a government agency or official or knowingly assisting a judge or judicial officer in conduct that violates the rules of judicial conduct or other law.

In short, Utah'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 new Model Rule 8.4(g), 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. Indeed, because the new Rule would not require any showing that the proscribed conduct prejudice 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 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. It was deemed sufficient that the attorneys had simply used certain offensive language.

Strikingly, if the new Model Rule is adopted, an attorney could actually engage in criminal conduct without violating the Rules (see, for example, 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 acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" or that involve "moral turpitude," but could be disciplined merely for engaging in politically incorrect speech.

Such a dramatic departure from the historic regulation of attorney conduct in Utah should not be taken lightly. It would represent an entirely new and precedent-setting intrusion on the professional autonomy, freedom of speech, and freedom of association of Utah's attorneys…

Because the new Model Rule constitutes an extreme and dangerous departure from the principles and purposes historically underlying Utah's Rule 8.4 and the legitimate interests of professional regulation, it should be rejected.

D. The New Model 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 new Model 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 new Rule, attorneys will be affirmatively precluded from declining certain clients or cases. They will, in other words, be forced to take cases or clients they might have otherwise declined.

Proponents of the new Rule contend that the new Rule will not require an attorney to accept any client or case the attorney does not want to accept – pointing to the language of the new Rule that provides: "This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16."

But 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 is prohibited from representing 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 – namely, 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 addition, 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 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).

This is another alarming departure from the professional principles historically enshrined in Utah'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 represent (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), never before have the Rules required attorneys to take cases the attorney decides – for whatever reason – he or she does not want to take, or to represent clients the attorney decides – for whatever reason – he or she does not want to represent. (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.)

Indeed, up 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, for example, Modern Legal Ethics, Charles W. Wolfram, p. 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 are, of course, good reasons 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. The reasons underlying this historically longstanding respect for attorneys' professional autonomy are twofold.

First, the Rules themselves respect an attorney's personal ethics and moral conscience. See, for example,

Rule Preamble [7] (“Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience”), and [9] (“Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system, and to the lawyer’s own interest in remaining an ethical person . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment . . .”).

If a lawyer is required to accept a client or a case to which the attorney has a moral objection, however, the Rules would have the effect of forcing the attorney to violate his or her personal conscience. The Rules have never – until perhaps now – done so.

And second, the Rules impose upon attorneys a professional obligation to represent their clients zealously (Rule 1.3, Comment [1]), and without personal conflicts (Rule 1.7(a)(2)). A lawyer’s ability to do that, however, would be compromised should the lawyer have personal or moral objections to a client or a client’s case

In the same vein Rule 1.16(b)(4) recognizes that a lawyer may withdraw from representing a client if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

And as noted above, although Rule 6.2 prohibits attorneys from seeking to avoid accepting cases that are appointed to them by judicial tribunals, the Rule explicitly recognizes that good cause to refuse such appointments includes the situation where the client or 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 (Rule 6.2(c)) – an acknowledgement in the Rules themselves 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, because 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, for example, 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.” An Honest Calling: The Law Practice of Abraham Lincoln, Mark A. Steiner, Northern Illinois University Press (2006).

Indeed, as noted above, the Rules themselves recognize this principle in that Rule 6.2(c) itself recognizes that a client or cause that is repugnant to the attorney may impair the lawyer’s ability to represent the client.

Should a gay attorney be forced to represent the Westboro Baptist Church? Should an African American attorney be forced to represent a member of the KKK? Should a Jewish lawyer be forced to represent a neo-Nazi? And, if so, would these attorneys be able to provide zealous representation to these clients? To pose these questions is sufficient to answer them, in the negative. And yet that is exactly what the new Model Rule would do. (If you doubt this, ask yourself whether, under the new Model Rule, an adoption attorney who has sincerely held religious beliefs against same-sex couples adopting children, would be

allowed – for that reason – to decline representation of same-sex couples seeking to adopt, or whether the attorney, by declining that representation, would be held to have discriminated against the same-sex couple on the basis of sexual orientation? We think the answer is obvious, and that proponents of the Rule would admit that such an attorney would be in danger of professional prosecution under the new Rule.)
For these reasons, too, Model Rule 8.4(g) should be rejected.

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

Another significant problem with the new Model Rule 8.4(g) is that it conflicts with other professional obligations and Rules of Professional Conduct. For example:

1. 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 will 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" (our emphasis).

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" (our emphasis).

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. Rule 1.3. Rule 1.3 requires that a lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. Rule 1.3, Model Comment [1].

"Zeal" means "a strong feeling of interest and enthusiasm that makes someone very eager or determined to do something." Synonyms are "passion" and "fervor". Merriam-Webster.com.

But how would an attorney be able to zealously represent a client whose case runs counter to the attorney's deeply held religious, political, philosophical, or public policy beliefs?

Under the new Model Rule, the attorney may not be allowed to reject a case or client she might otherwise reject – due to the attorney's personal beliefs – but then must also represent that client with passion and fervor, enthusiastically and in an eager and determined manner.

Is that humanly possible? We would submit that it is not. And we believe that is exactly why the Rules provide that, if a lawyer cannot do that – for whatever reason – even a discriminatory one – they should not take the case.

How is that conflict to be resolved?

3. 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" (our emphasis).

Although this Rule is technically applicable only to court appointments, it's important to what we're 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, Model 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.

4. 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've 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?

Indeed, the fact that the new Model Rule conflicts with other Professional Rules reveals and highlights a basic problem with the proposed Rule – and that is that the proposed Rule is an attempt to impose upon the legal profession a non-discrimination construct that is, in its basic premises, inconsistent with who attorneys are and what they professionally do. It is an attempt to force a round peg into a square hole.

In considering the new Rule, we must remember that the non-discrimination template on which the new 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, unlike a merchant the attorney 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 the attorney does not want – whatever the reason.

Because the effect of adopting the new Model Rule 8.4(g) would be to impose professional obligations upon Utah's lawyers that conflict with other professional rules, and that are incompatible with the very nature of the attorney-client relationship, the new Model Rule 8.4(g) should be rejected.

Bradley K. DeSandro
July 28, 2017 at 11:05 pm

Continuation of Joint Comment from prior post also on 7/28/2017:

F. The New Model 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 new Model 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 new 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 animosities from clients, thereby saddling clients with attorneys who – if the client knew of the attorney's animosities – the client would not retain.

For these reasons the new Rule will harm clients and should be rejected.

G. There Is No Need For the New Model Rule Because Rule 8.4 Already Contains Provisions Sufficient To Address Discrimination.

Given the fact, as addressed above, 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, Utah's current Rules of Professional Conduct are already sufficient to address serious cases of harassment or discrimination.

First, Rule 8.4(e) already prohibits any and all attorney conduct that prejudices the administration of justice. As noted above, alleged harassment or discrimination that does not prejudice the administration of justice may be regrettable, but it is not a fit subject for professional discipline. So because the existing Rule 8.4(e) is already adequate to address all cases of attorney harassment or discrimination that prejudices the administration of justice, the new Rule is unnecessary.

Further, many of the circumstances the new Model Rule 8.4(g) 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 non-discrimination laws. And to the extent a law practice would constitute a public accommodation, discrimination in that context is covered by this state's public accommodation laws well as a myriad of local public accommodation non-discrimination laws. And harassing and discriminatory judicial behavior is already addressed in the Code of Judicial Ethics. Therefore, the new Rule is unnecessary.

Indeed, by creating another entirely new layer of non-discrimination and non-harassment rules on top of those that already exist outside the Code of Professional Conduct, the new Rule, if adopted, would burden professional disciplinary authorities with having to process duplicative cases – that is, cases that are, at the same time, also being processed under some other non-discrimination statute or ordinance, such as Title VII – and could actually subject attorneys to inconsistent obligations and results. Indeed, some 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, for example, Illinois Rules of Professional Conduct Rule 8.4(j) and New York Rules of Professional Conduct Rule 8.4(g).

For these reasons, too, the Model Rule 8.4(g) should be rejected.

H. There Is No Demonstrated Need For The New Model Rule.

It is striking to note that the proponents of the new Rule provide no evidence that harassment or invidious discrimination actually exists to any significant degree in Utah's legal profession or that – if it does exist – it is such a serious and widespread problem that the already existing plethora of other discrimination statutes and ordinances are insufficient, and that the Rules must be amended, and attorneys' professional and constitutional rights infringed, to address it.

Where is the evidence that the legal profession in this state is so rife with harassment and invidious discrimination that the Rules of Professional Conduct simply must be amended to address the problem? Those who would support this effort to amend Rule 8.4 would have us believe that – despite the lack of any actual evidence that attorneys are, in fact, pervasively engaged in invidious harassment and discrimination, many of their fellow lawyers are so vile and depraved that, unless the professional disciplinary authorities are armed with a new precedent-setting tool enabling them to encroach upon the sanctity of all lawyers' professional autonomy, not to mention their personal consciences and constitutional rights, dictating to attorneys who they must represent and which cases they must accept and disciplining them for using politically incorrect speech – lawyers, on the whole, cannot be trusted to behave honorably. We, who join this Comment, have greater respect for and confidence in our fellow members of Utah's legal profession. And we take it upon ourselves – perhaps a bit presumptuously – to speak on their behalf.

I. The New Model Rule Will Result in the Suppression of Politically Incorrect Speech While Protecting Politically Correct Speech.

Model Comment [4] to the new Rule contains an explicit exception 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" (whatever that means).

These exceptions to the new Rule illustrate that the proposed 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.

Here's how it will work: 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 prosecute that attorney for violating the Rule.

This phenomenon has already been seen in other similar contexts. For example, a 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 another baker 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 obvious – in the first the complaining party was a member of a politically favored class, while in the second the complaining part was a member of a disfavored one.

These nefarious exceptions built into the Rule – decrying discrimination generally, while at the same time explicitly approving of it as long as the discrimination furthers an approved interest – reveals that the Rule's interest in prohibiting discrimination is not a compellingly general and neutral interest, but rather a narrow and politically motivated interest.

No state should adopt a Rule constructed so as to punish certain viewpoints while protecting and advancing others – in fact, to do so would itself be unconstitutional.

J. The New Rule Will Trespass On Attorney Conscience Rights.

Comment [5] of the new Rule provides that "A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities."

At first glance, this provision might appear to assist attorneys, by getting them "off the hook" – so to speak – from having to worry about becoming morally complicit in a client's behavior. But, in fact, that's precisely the problem with the Rule. By adopting this Rule the state is presuming to take on the role of the attorney's spiritual advisor because it preemptively deprives attorneys of the claim that representing a client will make them complicit in a client's behavior – a judgment appropriately made by the attorney, not the state – and which will limit attorneys' ability to assert religious or moral considerations in making client selection and strategy decisions.

The new Rule purportedly attempts to absolve attorneys from any moral culpability they may incur in representing a client.

The U.S. Constitution forbids government from doing this. The state cannot dictate to a citizen what does or does not – or should or should not – violate the citizen's conscience. And the state certainly may not place itself between its citizens and their God by purporting to absolve citizens of their sins.

If an attorney sincerely believes that representing a client or being involved in a case makes the attorney morally complicit in the client's cause or behavior – and for that reason the lawyer cannot represent the client without violating the attorney's conscience – the state may not determine otherwise or purport to "absolve" the attorney of the moral complicity.

Indeed, by preemptively depriving attorneys of the claim that representing a client will make them complicit in a client's behavior – the very purpose of this provision of the new Rule appears to be to foreclose attorneys from being able to assert religious or moral considerations in making client selection decisions – thereby forcing attorneys to either act against their conscience or face professional discipline. No state should adopt a Rule that would do that.

K. The Utah State Bar's Support of the Proposed Rule is Based on Mischaracterizations and Misunderstandings of the Rule.

In its July 10, 2017 letter to the Utah Supreme Court, the Utah State Bar expresses its support for the proposed Rule. However, the State Bar's support for the Rule is based on mischaracterizations and misunderstandings of the Rule.

For example, in an attempt to convince the Court that, in adopting the proposed Rule, it would not be doing anything unusual, the Utah State Bar states that "twenty-two states already incorporate similar anti-discrimination and anti-harassment provisions into their rules." As demonstrated in section B above, however, that is simply not accurate. Only one state has adopted the new ABA Model Rule 8.4(g). No other state has adopted any Rule that is even comparable to the Rule now under consideration in Utah.

The Utah State Bar then takes its inaccurate representation about what other states have done even further, by stating that "As has already been shown in the jurisdictions that have adopted such a rule, it will not impose an undue burden on lawyers." But the State Bar has not provided any evidence that the non-discrimination Rules that have been adopted in other states have not imposed "undue burdens on lawyers." Further, the constitutional issues raised by the proposed Rule are not resolved by asking whether violating attorneys' constitutional rights would impose an "undue burden" on lawyers. In determining whether an enactment violates a citizen's First Amendment rights the test is not whether such enactment "unduly burdens' those rights. Indeed, the State Bar's assertion that "by limiting its application to 'conduct related to the practice of law,' the proposed amendment does not infringe on the right of free speech, thought, association or religious practice" of attorneys, the State Bar reveals its fundamental misunderstanding of First Amendment jurisprudence. Even the ABA – in its brief cited in the first section of this Comment – recognizes that a lawyer cannot be deprived of his or her First Amendment rights under the guise of regulating the lawyer's professional conduct. "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."

Also, the Utah Bar repeats the, now clearly disproven, representation that "The proposed amendment permits lawyers to decline representation without violating the Rule." As pointed out above – and as proven by Vermont's adoption of the new Rule – that is simply not true. Under the new Rule, if an attorney declines representation on an allegedly discriminatory basis, the attorney will have violated the Rule.

Finally, in an attempt to convince the Court that adopting the ABA Model Rule 8.4(g) would not represent any departure from the current Rule, the Utah State Bar states that "Comment 3 to the current version of Rule 8.4 [already] states that a lawyer engages in conduct prejudicial to the administration of justice when he or she engages in discriminatory conduct." But the current Comment 3 provides no such thing. In fact,

it provides just the opposite. Not only does the current Comment 3 not provide that discriminatory conduct constitutes prejudice to the administration of justice, the current Comment makes clear that a lawyer who manifests bias or prejudice only violates paragraph (d) of the Rule "when such actions are prejudicial to the administration of justice" (our emphasis). In other words, the current Comment 3 does not provide that discriminatory conduct constitutes prejudice to the administration of justice, but rather that discriminatory conduct in and of itself does not violate the Rule at all. Discriminatory conduct violates the Rule only if the discriminatory conduct, in fact, prejudices the administration of justice. Discriminatory conduct that does not prejudice the administration of justice does not violate the Rule, just as criminal conduct that does not reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer does not violate the Rule. As pointed out above, the proposed Rule – in divorcing the prohibited conduct from prejudice to the administration of justice – represents an historic departure from past purposes of the Rule regulating attorney conduct and trespasses into attorney conduct that is beyond the legitimate interest of professional regulation..

III. Conclusion

For all the foregoing reasons, Utah should reject Model Rule 8.4(g) and its Comments.

Respectfully submitted,

Kevin N. Anderson #A00100
Bradley DeSandro #6208
Matthew Hilton #3655
Andrew R. Hopkins #13748
Danny C. Leavitt #15185 (Inactive)
Paul J. Morken #10483
Frank D. Mylar #5116
Thaddeus W. Wendt #11977