Bradley S. Abramson
AZ Bar No. 029470
15100 N. 90th Street
Scottsdale, AZ 85260
480-444-0020
babramson@adflegal.org
For the Undersigned

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	**)**
	)
PETITION TO AMEND ER 8.4, RULE 42	**) Supreme Court No. R-17-0032**
	)
ARIZONA RULES OF THE SUPREME COURT	**) Joint Comment in Opposition to**
	) Petition to Amend Rule ER 8.4,
	) Rule 42
	)

The 102 Arizona licensed attorneys, as well as the legal organization(s) and law firm(s), listed below, respectfully submit this Comment for the Court's consideration.

I. The Rule

The Petitioner has requested the Court to amend Rule 8.4 of the Arizona Rules of Professional Conduct by adopting ABA Model Rule 8.4(g)[1], which reads:

> *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*

[1] The Petitioner does not specifically request the Court to adopt ABA Model Comments [3], [4], and [5] to ABA Model Rule 8.4(g). However, we consider and address those Comments because (a) the Court has adopted other Model Comments to the Rules, (b) the Comments shed light on the ABA's intent behind Rule 8.4(g); and (c) even states that have not specifically adopted the Model Comments still look to the Comments in applying the Rules. See, for example, *In the Matter of the Disciplinary Proceeding Against Carmick*, 48 P.3d 311, 318 (Wash. 2003)(although the comments to the Model Rules of Professional Conduct have not been adopted in Washington, the commentary may be instructive in exploring the underlying policy of the rules); *In re Environmental Insurance Declaratory Judgment Actions*, 600 A.2d 165 (Sup. Ct .N.J. 1991)(while the comments have not been adopted by the New Jersey Supreme Court, the Court has recognized that for assistance in interpreting the rules, reference should be made to the ABA comments).

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. Reasons the Proposed Rule Amendment Should Not Be Adopted

A. The Proposed Rule Is Unconstitutional.

1. Attorney Speech is Constitutionally Protected

There is no question that citizens do not surrender their First Amendment speech rights when they become attorneys. *NAACP v. Button*, 371 U.S. 415 (1963)("a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"). See also *Ramsey v. Board of Professional Responsibility of the Supreme Court of Tennessee*, 771 S.W.2d 116, 121 (Tenn. 1989)(an attorney's statements that were disrespectful and in bad taste were nevertheless protected speech and use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney's First Amendment rights); *Standing Committee on Discipline of U.S. Dist. Court for Central District of California v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995)(the substantive evil must be extremely serious and the degree of imminence must be extremely high before an attorney's utterances can be punished under the First Amendment).

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

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

When the ABA opened up the new Model Rule for comment, 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, initially warned the ABA that the new Rule may violate attorneys' First Amendment speech rights.

And prominent legal scholars, such as UCLA constitutional law professor Eugene Volokh and former U.S. Attorney General Edwin Meese, III, have opined that the new Rule is constitutionally infirm. Eugene Volokh, "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities,*" 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) – like other professional anti-discrimination Rules – may violate attorneys' First Amendment rights. See, for example, Andrew F. Halaby and Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call For Scholarship*, 41 J. Legal Prof. 201, 2016-2017 (the new Model Rule 8.4(g) has due process and First Amendment free expression infirmities); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law*," 30 Geo. J. Legal Ethics 241 (2017)(Model Rule 8.4(g) constitutes an unjustified incursion

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

In fact, in several states that have already considered adopting the new Model Rule, important professional stakeholders have rejected it. 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; the South Carolina Bar's Committee on Professional Responsibility opposed the Rule; the Louisiana District Attorneys Association is opposing the new Rule; the North Dakota Supreme Court Joint Commission on Attorney Standards has rejected the Rule; the Tennessee District Attorneys General Conference opposes the Rule; and the Memphis Bar Association Professionalism Committee voted unanimously to oppose the Rule.

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. https://www.nla.org/nla-task-force-publishes-statement-on-new-aba-model-rule-8.4g/.[2]

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

And, significantly, the Attorneys General of four States – Texas, South Carolina, Louisiana, and Tennessee – have all issued official opinions that ABA Model Rule 8.4(g) is unconstitutionally vague and overbroad, and violates the free speech, free exercise of religion, and free association rights of attorneys. Opinion No. KP-0123, Attorney General of Texas, December 20, 2016; 14 SC AG Opinion, May 1, 2017; Opinion 17-0114, Attorney General of Louisiana, September 8, 2017; State of Tennessee Office of Attorney General, Opinion No. 18-11 (March 16, 2018).

3. The New Model Rule is Unconstitutionally Vague:

Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. And the lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. For that reason, courts

[2]With respect to the constitutional issues raised by the new Model Rule, those 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.

apply a more stringent vagueness test when a regulation interferes with the right of free speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010). Vague laws present several due process problems. First, such laws may trap the innocent by not providing fair warning. Second, vague laws delegate policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. And, third, such laws lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

(a) The Term "Harassment" is Unconstitutionally Vague. The new Model Rule prohibits attorneys from engaging in "harassment" on the basis of any of the protected classes. But the Rule does not define the term "harassment." Thus, the term "harassment" is subject to multiple interpretations – and no standard is provided by which an attorney can reasonably determine whether or not any particular speech or conduct might violate the Rule. (Although Comment [3] of the new Rule states that "The substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g)," it is clear that such substantive law guidance is permitted, not directed. As a consequence, attorneys will not be able to rely on such substantive law in gauging whether speech and behavior violates the Rule.)

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

But it gets worse. Comment [3] to the new Rule provides that harassment includes *derogatory or demeaning verbal or physical conduct*. Courts have found terms such as "derogatory" and "demeaning" unconstitutionally vague. *Hinton v. Devine*, 633 F.Supp. 1023 (E.D. Pa. 1986)(the term "derogatory" without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal.App.4th 669 (Cal.App. 2012)(statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

(b) The Term "Discrimination" is Unconstitutionally Vague. The term "discrimination" is also unconstitutionally vague. While it is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts, 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.

Title VII, for example, specifies what sorts of acts constitute discrimination under the statute. 42 U.S.C. § 2000e-2. Similarly, the federal Fair Housing Act provides a detailed description of what, specifically, is prohibited under the Act. 42 U.S.C. § 3604. But the proposed Rule does not do that – leaving to the attorney's imagination what sorts of behavior might be encompassed in the proscription.

Model Comment [3] makes matters worse, providing that the term "discrimination"

includes "*harmful* verbal or physical conduct that *manifests bias or prejudice towards others.*" The term "harmful" – standing alone – is unconstitutionally vague because attorneys cannot determine with any degree of reasonable certainty what speech and conduct may be included or excluded from that category of speech or conduct. The word "harmful" simply means "causing or capable of causing harm." http://www.dictionary.com/brows/harmful. And "harm" encompasses a wide range of injury, from "physical injury or mental damage" to "hurt" to "moral injury." http://www.dictionary.com/browse/harm. In other words, "harmful" speech can encompass an almost limitless range of allegedly injurious effects on others. For that reason, mental injury or damage, for example, could easily be interpreted to include real, imagined, or even feigned, emotional distress at being exposed to expression someone finds offensive.

It is also important to emphasize that speech does not lose its constitutional protection just because it is "harmful." See, for example, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011)(the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)(the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful). See also *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 791 (2011)("new categories of unprotected speech may not be added to the list [of unprotected speech – such as obscenity, incitement, and fighting words] by a legislature that concludes certain speech is *too harmful* to be tolerated")(our emphasis).

Indeed, the U.S. Supreme Court has stated that the idea that free speech protection should be subject to a balancing test that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test, is a "startling and dangerous" proposition. *Entertainment Merchants Ass'n*, supra, at 792. See also *United States v. Stevens*, 559 U.S. 460, 470 (2010)("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits").

(c) The Phrase "conduct related to the practice of law" is Unconstitutionally Vague. Whereas the current Rule 8.4(d) and Comment [3] apply only to attorney conduct while the attorney is representing a client, the proposed Rule applies to any conduct of an attorney "*related to the practice of law*." What conduct is or is not related to the practice of law, however, is vague and subject to reasonable dispute.

Comment [4] attempts to provide some guidance as to what the phrase "related to the practice of law" means. But the Comment's definition is nearly limitless, including within it *representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities*

in connection with the practice of law. Further, the Rule's list of conduct "related to the practice of law" is an explicitly non-exclusive list.

How, then, is an attorney supposed to determine what might or might not be "related to the practice of law"? Does the Rule include comments made by an attorney while attending a retirement party for a law firm co-worker; or comments an attorney makes while teaching a religious liberty class at the attorney's church; or statements an attorney makes at a neighborhood holiday party, if one of the reasons the attorney is attending the party is to, hopefully, generate legal work for his law firm?

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

4. The Proposed Rule is Unconstitutionally Overbroad.

Even if a law is clear and precise – thereby avoiding a vagueness challenge – it may nevertheless be unconstitutionally overbroad if it prohibits constitutionally protected speech. Overbroad laws – like vague laws – deter protected activity. The crucial question in determining whether a law is unconstitutionally overbroad is whether the law sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. *Grayned,* supra, at 114-15.

The proposed Rule would clearly sweep within its prohibitions 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 or render the attorney unfit to practice law. *DeJohn v. Temple University*, 537 F.3d 301 (2008)(a University Policy on Sexual Harassment that prohibited "all forms of sexual harassment . . . , including expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment" was unconstitutionally overbroad on its face).

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

"Harmful verbal conduct" and "derogatory or demeaning verbal conduct" – all of which the Rule prohibits – are simply pejorative euphemisms for protected speech. Speech does not become non-speech by referring to it as "verbal conduct." Nor is speech unprotected merely because it is harmful, derogatory, demeaning, or even discriminatory or harassing. *Saxe v. State College Area School Dist.*, 240 F.3d 200 (3rd Cir. 2001)(there is no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs; harassing or discriminatory speech implicate First Amendment protections; there is no categorical rule divesting "harassing" speech of First Amendment protection).

In fact, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder v. Phelps*, surpa, at 458 (2011)(the government cannot restrict

speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., surpa, at 574 (1995)(the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful). See also *Texas v. Johnson*, 491 U.S. 397, 414 (1989)("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). See also *Matal v. Tam*, 137 Sup.Ct. 1744 (2017)(the government's attempt to prevent speech expressing ideas that offend strikes at the heart of the First Amendment).

Indeed, courts have found that terms such as "derogatory" and "demeaning" are unconstitutionally overbroad. *Hinton v. Devine*, supra (the term "derogatory information" is unconstitutionally overbroad); *Summit Bank v. Rogers*, supra (statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech). See also *Saxe*, supra (school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional because it is overbroad).

The broad reach of the proposed Rule is well illustrated by the example that Senior Ethics Counsel Lisa Panahi and Ethics Counsel Ann Ching of the Arizona State Bar give in their article "Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g), " *Arizona Attorney*, January 2017, page 34. They state that an attorney could be professionally disciplined under the Rule for telling an offensive joke at a law firm dinner party. The late Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provided another example of the broad reach of the proposed Rule. He wrote: "*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.*" Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, p. 4

But the speech in both these examples would clearly be constitutionally protected. The fact that such constitutionally protected speech would violate the proposed Rule demonstrates that the Rule is unconstitutionally overbroad. Indeed, the mere possibility that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – which is precisely what the overbreadth doctrine is designed to prevent.

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

By only proscribing speech that is derogatory, demeaning, or harmful toward members of certain designated classes, the proposed Rule will constitute an unconstitutional content-based speech restriction. *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2227 (2015)(Government regulation of speech is content based if a law applies to particular speech because of the topic

discussed or the idea or message expressed). See also *American Freedom Defense Initiative v. Metropolitan Transp. Authority*, 880 F.Supp.2d 456 (S.D.N.Y. 2012)(ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

Indeed, the U.S. Supreme Court recently reiterated this principle in *Matal v. Tam*, supra, in which the Court found that a Lanham Act provision prohibiting the registration of trademarks that may "disparage" or bring a person "into contempt or disrepute" was *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*." Under the proposed Rule, attorneys may engage in positive or benign speech, but not "derogatory," "demeaning," or "harmful" speech. Under the Supreme Court's *Tam* decision, that is the essence of viewpoint discrimination, and presumptively unconstitutional.

The late Professor Rotunda provided a concrete example of how the new ABA Rule may constitute an unconstitutional content-based speech restriction. He explained: "*At another bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.' Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally, another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline.*" Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, p. 4.

So the content of a lawyer's speech will determine whether or not the lawyer has or has not violated the Rule, which constitutes a classic unconstitutional viewpoint-based speech restriction. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992)(the government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed). In *R.A.V.*, the Supreme Court struck down, as facially unconstitutional, St. Paul's Bias-Motivated Crime Ordinance because it applied only to fighting words that insulted or provoked violence "on the basis of race, color, creed, religion or gender," whereas expressed hostility on the basis of other bases were not covered. That is precisely what the proposed Rule does. For that reason, commentators have described ABA Model Rule 8.4(g) as a speech code for lawyers.

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

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

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

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

Model Comment [4] to the 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 they are "*members of underserved populations.*"

These exceptions to the 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 three other bakers who refused to bake a cake for a Christian, finding that the first constituted illegal discrimination but that the second did not. The reason underlying this disparate treatment was obvious – in the first the complaining party was a member of a politically favored class, while in the second the complaining party was a member of a disfavored one.

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 agenda

– reveals that the Rule's interest in prohibiting discrimination is not a compellingly general and neutral interest, but rather a narrow and ideologically motivated interest.

These exceptions also render the proposed Rule unconstitutional because – by prohibiting only disfavored discriminatory messages, while allowing favored ones – the Rule creates a viewpoint-based speech restriction. *R.A.V.*, supra.

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

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

It must also be noted that the proposed Rule would not only infringe upon attorneys' First Amendment rights under the U.S. Constitution, but also attorneys' constitutional rights under the Arizona Constitution. See Arizona Constitution, Article II, Sec. 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right").

Indeed, the Arizona Constitution provides Arizona citizens *greater* free speech protections than does the U.S. Constitution. Whereas the First Amendment to the U.S. Constitution provides only a protection against government action, the Arizona Constitution directly grants every Arizonan a broad free speech right. *Mountain States Tel. & Tel. Co. v. Arizona Corp. Com'n*, 773 P.2d 455, 459 (Ariz. 1989). That being the case, whenever a right that the Arizona Constitution guarantees is in question, the Arizona Constitution is consulted first, because the Arizona Constitution provides a broader freedom. *Mountain States Tel. & Tel. Co.*, supra, at 461.

Therefore, the constitutional infirmities of the proposed Rule become more glaring under the brighter light of the Arizona Constitution.

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

Most proponents of the Rule – like the Petitioner here – do not even attempt to address the constitutional infirmities of the ABA Model Rule. And those proponents who do, do not directly deny the allegations that the Rule may very well be unconstitutional. Instead, they assure the Rule's critics that the professional disciplinary authorities will not *apply* the Rule in an unconstitutional manner. For example, Stanford University Law Professor Deborah L. Rhode, a proponent of the Rule, has stated: "I understand the First Amendment concerns, but I don't think they present a realistic threat in this context. I don't think these cases are going to end up in bar disciplinary proceedings. They are going to end up in informal mediation and occasionally in lawsuits if the conduct is egregious and the damages are substantial." http://www.abajournal.com/magazine/article/ethics_model-rule-harassing-conduct. But such assurances do little to assuage attorneys' concerns and, more importantly, do not cure the Rule's constitutional infirmities.

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

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

In other words, far from curing the law's constitutional defects, representations that the proposed Rule will not be applied so as to violate the Constitution, constitute indirect admissions that the proposed Rule is, in fact, constitutionally infirm.

In arguing that the proposed Rule will not be applied unconstitutionally, proponents also point to the Rule's provision that "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules." But that provision does not cure the defect either.

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

Further, by stating that the Rule will not prohibit "legitimate advice or advocacy" the Rule – for the first time – creates the concept of *illegitimate* advocacy. Giving advice and advocating for clients are the very essence of what a lawyer does. If the proposed Rule is adopted, however, an attorney will need to worry whether her advice or advocacy might be considered "illegitimate" and, therefore, a violation of professional ethics. And, having to worry about that, will chill the lawyer's speech and interfere with an attorney's ability to provide zealous representation.

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

B. Other States Are Rejecting The Rule.

In an apparent attempt to make the proposed Rule appear unremarkable, the Petitioner states that a Rule similar to new ABA Model Rule 8.4(g) has been adopted by the vast majority of

states. That is not true. In fact, the majority of states – Arizona among them – have no blackletter nondiscrimination rule in their Rules of Professional Conduct.

And not only has no state – other than Vermont – adopted the ABA's new Model Rule, two states have expressly rejected the Rule. *Order*, Supreme Court of South Carolina, Appellate Case No. 2017-000498 (6-20-2017); *Order: In Re Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, No. ADM2017-02244 (4-23-2018).

In fact, not only do the majority of states have no black letter antidiscrimination rule in their Rules of Professional Conduct, in those states that *do* have black letter antidiscrimination provisions in their Rules, no state's rule (other than Vermont's) is even comparable to the new Model Rule 8.4(g).

For example, aside from Vermont, none of the jurisdictions with black letter anti-discrimination rules extends its non-discrimination rule to "conduct related to the practice of law" – as the 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" (Florida, Idaho, Nebraska, Missouri, North Dakota, Oregon and Washington State). Eight states limit the applicability of their non-discrimination rules to conduct toward other counsel, litigants, court personnel, witnesses, judges, and others involved in the legal process (Colorado, Florida, Idaho, Michigan, Nebraska, and Washington State). California limits its provision to attorney conduct "in representing a client" and "in relation to a law firm's operations." Massachusetts, New Jersey and Ohio limit their Rules to conduct "in a professional capacity." Massachusetts 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, nearly half of them (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).

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

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

C. The Proposed Rule Would, For The First Time, Sever The Rules From Any Legitimate Regulatory 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. Arizona's current Rule 8.4 recognizes this principle by prohibiting attorneys from engaging in seven 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; (f) knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; and (g) filing a notice of change of judge under Rule 10.2 of the Arizona Rules of Criminal Procedure for an improper purpose, such as obtaining a trial delay or other circumstances enumerated in Rule 10.2(b).

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* <u>*as a lawyer*</u> *in other respects*" (our emphasis). As Comment [2] to Arizona'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. See, for example, *In re Complaint as to the Conduct of David R. Kluge*, 66 P.3d 492 (Or. 2003)(to establish a violation of this Rule it must be shown that the accused lawyer's conduct occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding). See also *In re Complaint as to the Conduct of Eric Haws,* 801 P.2d 818, 822-823 (Or. 1990); *Iowa Supreme Court Attorney Disciplinary Board v. Wright*, 758 N.W.2d 227, 230 (Iowa 2008); *Rogers v. The Mississippi Bar*, 731 So.2d 1158,1170 (Miss. 1999); *In re Hopkins*, 677 A.2d 55, 60-61 (D.C. Ct. App. 1996); and *In re Karavidas*, 999 N.E.2d 296, 315 (Ill. 2013). Therefore, this provision, too, is directed at attorney conduct that exposes the judicial process itself to serious harm.

The fifth, sixth and seventh proscriptions in Arizona's current Rule also target 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, knowingly assisting a judge or judicial officer in conduct that violates the rules of judicial conduct or other law, and seeking a change of judge for improper purposes.

In short, Arizona's Rule 8.4 has always – heretofore – been solely concerned with attorney conduct that might adversely affect an attorney's fitness to practice law or that seriously interferes with the proper and efficient operation of the judicial system.

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

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 Arizona should not be taken lightly. Because the proposed Rule constitutes an extreme and dangerous departure from the principles and purposes historically underlying Arizona's Rule 8.4 and the legitimate interests of professional regulation, the proposed Rule should be rejected.

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

If the proposed Rule is adopted, attorneys will be subject to 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 Rule, attorneys will be forced to take cases or clients they might have otherwise declined.

Proponents of Model Rule 8.4(g) contend that the proposed Rule will not require an attorney to accept any client or case the attorney does not want to accept. Indeed, the Petitioner states that "The ABA model rule still allows an attorney to decline or withdraw from a case based on that individual's personal belief." Petition to Amend, page 11. But that is not true.

The proposed Rule provides only that "*This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation* <u>*in accordance with Rule 1.16*</u>" (our emphasis). State Bar of Arizona Senior Ethics and Ethics Counsel confirm this, stating that, under Rule 8.4(g), "lawyers are still permitted to decline or withdraw from representation <u>for reasons articulated in Rule 1.16</u>" (our emphasis). "Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g)," *Arizona Attorney*, January 2017, page 37. So an attorney's client and case selection decisions are subject to the nondiscrimination prohibitions under the Rule – and are only protected if the lawyer's decisions are "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 short, if an attorney declines representation for a discriminatory reason, the attorney will have violated the Rule.

If there is any question about that, it is now clear from Vermont's adoption of the new Model Rule that the Rule will, in fact, apply to an attorney's client selection decisions. In its

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

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

This is another alarming departure from the professional principles historically enshrined in Arizona'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.*"). The reasons underlying this historically longstanding respect for attorneys' professional autonomy in making client and case selection decisions are clear.

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.

And second, the Rules impose upon attorneys a professional obligation to represent their

clients without personal conflicts (Rule 1.7(a)(2)). A lawyer's ability to do that, however, would be compromised should the lawyer have personal or moral objections to a client or a client's case.

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.

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

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

1. The Proposed Rule Conflicts with Rule 1.7 (Conflicts of Interest) – Rule 1.7 provides that: "*(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients 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 proposed Rule requires 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.

2. The Proposed Rule Conflicts with Rule 6.2 (Accepting Appointments) – Rule 6.2 provides that "*A lawyer shall not seek to avoid appointment by a tribunal to represent a person* ***except for good cause****: such as: . . . (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client*" (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, Comment [1] to Rule 6.2 sets forth the general principle that "*A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant*."

And yet, the proposed Rule would require an attorney to represent clients and cases the lawyer may find repugnant.

3. The Proposed Rule Conflicts with Rule 1.16 (Declining or Terminating Representation) – Rule 1.16(a)(1) provides that: *(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the Rules of Professional Conduct or other law.* However, we'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 proposed 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.

In the event of an inevitable conflict, which Rule is going to prevail?

Indeed, the fact that the new Model Rule conflicts with other Professional Rules reveals a foundational 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 proposed Rule, we must remember that the non-discrimination template on which the Rule is based is taken from the context of public accommodation laws – non-discrimination laws that are imposed in the context of merchants and customers. But lawyers are not mere merchants, and a lawyer's clients are not mere customers. Unlike merchants and 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; they are bound to take no action that would harm their clients; and attorneys' relationships with their clients oftentimes last months or even years. And once an attorney is in an attorney-client relationship, the attorney oftentimes may not unilaterally sever that relationship. None of those things are true with respect to a merchant's relationship with a customer. 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 relationship with a client or a case the attorney does not want – whatever the reason.

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

The Petitioner argues that the proposed Rule is necessary in order to address sexual harassment, sexual and racial disparities, and a lack of diversity, in the legal profession. Petition to Amend, pages 2-8. But the Petitioner actually admits that the proposed Rule will not, in fact,

effectively address these issues, referring to Professor Alex Long who has written that amending the rules of professional conduct to prohibit discrimination "*is unlikely to have much impact in terms of addressing employment discrimination and increasing diversity in the legal profession*" (our emphasis). Alex B. Long, Employment Discrimination in the Legal Profession: A Question of Ethics?, 2016 U. Ill. L. Rev. 445, 471-472 (2016).

So why is the Petitioner proposing the adoption of a Rule she admits will not solve the problems with which she is concerned? The Petitioner's own answer is that "the lawyer disciplinary process" should be used for the "*dissemination of values inside and outside* the profession" – to "educate lawyers and make them stop and think." Petition to Amend, page 9. Stanford University law professor Deborah L. Rhode agrees, describing the Rule as a "largely . . . symbolic statement" – saying that "The rule provides a useful symbolic statement and educational function." http://www.abajournal.com/magazine/article/ethics_model_rule_harassing-conduct.

This should all sound very familiar to those who have followed the history of the ABA's adoption of Model Rule 8.4(g). The ABA Standing Committee on Ethics and Professional Responsibility, in its December 22, 2015 Memorandum on the Draft Proposal to Amend Model Rule 8.4, expressed the same idea, saying that the proposed Rule 8.4(g) was necessary – not to protect the public or to insure attorney competence – but in order to compel a "cultural shift" in the legal profession. But the purposes of the Rules of Professional Conduct have never been – and should never be – to force a "cultural shift" on anyone, lawyers or otherwise.

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

III. Conclusion

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

Respectfully submitted,

/s/Bradley S. Abramson #029470
/s/Ramai L. Alvarez #022517
/s/Dale A. Anderson #003647 (inactive)
/s/Katherine L. Anderson #033104
/s/Travis C. Barham #024867
/s/Thomas Basile #031150

/s/Kevin L. Beckwith #010766
/s/Brian M. Bergin #016375
/s/Scott D. Bergthold #018238
/s/Alan Bowman #006134
/s/David P. Brooks #012645
/s/Linda Henneman Bowers #026176
/s/Robert E. Brown #003765
/s/Trevor A. Brown #014136
/s/Benjamin W. Bull #009940
/s/Joshua W. Carden #021698
/s/Timothy J. Casey #013492
/s/Dennis M. Caufield #026980
/s/Christopher J. Charles #023148
/s/Carol L. Childress #015402
/s/William M. Clark #033557
/s/David Cole #004643
/s/Kenneth J. Connelly Jr. #025420
/s/David Cortman #029490
/s/Jonathan Caleb Dalton #030539
/s/Timothy Danninger #023168
/s/Bradley DeSandro #023626
/s/Michael F. Edgell #021064
/s/Benjamin R. Eid #028148
/s/Dillon Fishman #024259
/s/Tami Fitzgerald #011852
/s/Douglas C. Fitzpatrick #005152
/s/Anne H. Flynn #029942 (inactive)
/s/Jeremiah J. Galus #030469
/s/John C. Gemmill #004554
/s/Peter Gentala #021789
/s/James Gottry #028818
/s/Elissa Graves #030670
/s/Kathryn A. Gray #016520
/s/Rory T. Gray #025505
/s/Bradley L. Hahn #018381
/s/Jeana Hallock #032678
/s/Michael Harrel #028272
/s/Brett B. Harvey #025120
/s/Keegan M. Healey #032622
/s/Cathi Herrod #009115
/s/Joseph P. Infranco #033736
/s/Douglas L. Irish #002288
/s/John J. Jakubczyk #005894
/s/Steven R. Janssen #021147
/s/Jeffrey W. Johnson #024435
/s/Raymond W. Kaselonis Jr. #034376
/s/Nathan Kassebaum #030646
/s/Steve Keist #011251
/s/Michael L. Kitchen Jr. #019848
/s/Benjamin Stephanus Kuipers #027746
/s/Joseph E. La Rue #031348
/s/Matthew J. LaFon #028202
/s/Tyson C. Langhofer #032589
/s/Wallace L. Larson #002295
/s/Mark E. Lassiter #016241
/s/Glen Lavy #022922
/s/Jason S. Lifschultz #026042
/s/Roberta S. Livesay #010982
/s/Marshall C. Lovrien #027135
/s/Andrew S. Mathers #033628
/s/Gary S. McCaleb #018848
/s/Ketti McCormick #018500
/s/Kyle McCutcheon #032310
/s/John M. McGowan #025890 (inactive)
/s/Abigail Mills #027219
/s/Bert E. Moll #015200
/s/James P. Mueller #013066
/s/Doug H. Napier #027706
/s/Douglas J. Newborn #029688
/s/Steven P. Oman #003072
/s/John Politan #007117
/s/James W. Richardson #006715
/s/Candace D. Ruetsch #032612
/s/Stephen C. Rogers #022667
/s/Kenneth W. Schutt Jr. #007497
/s/Jonathan A. Scruggs #030505
/s/Alan E. Sears #011702
/s/Jordan A. Smith #028366
/s/Michael F. Smith #029015
/s/Erik W. Stanley #030961

/s/Jerry Steele #006456
/s/Jeremy Tedesco #023497
/s/Kevin Theriot #030446
/s/Steve C. Thornton #012386
/s/Richard W. Tobin #022725
/s/Ryan J. Tucker #034382
/s/Steve Twist #004081
/s/Kristen K. Waggoner #032382
/s/Charles R. Walker #021376
/s/David C. Walker #030830
/s/Jackson Walsh #028483
/s/Douglas G. Wardlow #032028
/s/Jacob P. Warner #033894
/s/Robert Michael Way #023040
/s/James L. Williams #026402
/s/Randolph D. Wolfson #011774
ALLIANCE DEFENDING FREEDOM
PROVIDENT LAW