

DATE: September 28, 2020

TO: North Carolina State Bar Councilors

RE: Comments on Proposed Amendment to Preamble of the North Carolina Rules of Professional Conduct and Study of Rule 8.4 of the Rules of Professional Conduct.

VIA: Email Delivery To: ethicscomments@ncbar.gov

The North Carolina Family Policy Council and the North Carolina Values Coalition respectfully submit these Comments on the proposed amendment to the Preamble and on the study of Rule 8.4 of the North Carolina Rules of Professional Conduct.

I. The Proposed Amendments

It is being proposed that subsection [6] of the Preamble to the North Carolina Rules of Professional Conduct be amended so as to read as follows:

[6] While acting in a professional capacity, a lawyer should not discriminate on the basis of a person's race, gender, national origin, religion, age, disability, sexual orientation, gender identity, marital status, or socioeconomic status. This responsibility of non-discrimination does not limit a lawyer's right to advocate on any issue, nor does this responsibility limit the prerogative of a lawyer to accept, decline or withdraw from a representation in accordance with these rules.

It is also being studied whether Rule 8.4 of the North Carolina Rules of Professional Conduct should be amended to include ABA Model Rule 8.4(g) or a provision similar to it. ABA Model Rule 8.4(g) reads as follows:

It is professional misconduct for a lawyer to:

(f) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule

1.16. *This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.*

Model Rule 8.4(g) also includes the following Comments to Model Rule 8.4(g), which read as follows:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine 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).

[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.

[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 32:1.5(A). Lawyers also should be mindful of their professional obligations under rule 32:6.1 to provide legal services to those who are unable to pay, and their obligation under rule 32:6.2 not to avoid appointments from a tribunal except for good cause. See Rule 32:6.2(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.

II. Comments

A. *The Proposed Amendment To The Preamble And The Proposed Amendment To Rule 8.4 That is Being Studied Are Substantially The Same.*

The proposed amendment to the Preamble and the proposed amendment to Rule 8.4 that is being studied are substantially the same.

Both the proposed Preamble amendment and ABA Model Rule 8.4(g) use similar language, and both serve the same purpose – prohibiting attorneys from “discriminating” based on certain protected class characteristics.

Likewise, the reach of both amendments is equally extensive. The proposed Preamble amendment prohibits discrimination and harassment by lawyers “[w]hile acting in a professional capacity.” Similarly, the amendment to Rule 8.4 prohibits attorneys from discrimination “in conduct related to the practice of law.”

And what Model Rule 8.4(g) does explicitly, through its Comments, the proposed Preamble amendment does implicitly.

Indeed, because of their similarities, both proposed amendments share many of the same infirmities.

Therefore, because the two amendments are similar in purpose, reach, and language – and because they share many of the same infirmities – we will be addressing them together and referring to them, collectively” as the “Rules” or the “Amendments.”

B. The Proposed Amendments Are Unconstitutional

1. Attorney Speech is Constitutionally Protected

Citizens do not surrender their First Amendment speech rights when they become attorneys, including when they are acting in their professional capacities as lawyers. *NAACP v. Button*, 371 U.S. 415 (1963) (holding that “a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.”); *see also Ramsey v. Bd. of Prof’l Responsibility of the Sup. Ct. of Tenn.*, 771 S.W.2d 116, 121 (Tenn. 1989) (holding that 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, and stating that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights."); *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995) (stating that 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 v. Governor of the State of Fla.*, 797 F.3d 859 (11th Cir. 2015). In its brief the ABA denied that a law regulating speech should receive less scrutiny merely because it regulates "professional speech." "On the contrary" – the ABA stated – "much speech by . . . a lawyer . . . falls at the core of the First Amendment. The government should not, under the guise of regulating the profession, be permitted to silence a perceived 'political agenda' of which it disapproves. That is the central evil against which the First Amendment is designed to protect." "Simply put" – the ABA stated – "states should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession . . . Indeed," – 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."

The ABA is, of course, correct in stating that "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression." Indeed, the U.S. Supreme Court recently reiterated this principle in *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018), in which it devoted a part of its opinion to the subject of

professional speech, stating: “[T]his Court’s precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, . . . The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals’ speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information” (internal citations omitted). The Court concluded that it was not presented with any persuasive reason for treating professional speech as a unique category of speech that is exempt from ordinary First Amendment principles.

In short, attorneys do not surrender their constitutional rights when they enter the legal profession – including with respect to their professional speech – and the state may not violate attorneys’ constitutional rights under the guise of professional regulation.

2. The Proposed Amendments Prohibit Constitutionally Protected Speech

Some proponents of the sorts of professional Rules being proposed here claim that such Rules prohibit only conduct, not speech, and that any speech that is prohibited is speech that is merely incidental to the prohibited conduct. For that reason – they claim – such Rules do not violate the First Amendment free speech rights of lawyers.

But that is incorrect. The proposed Rules prohibit “harassment” and “discrimination,” and pure speech can constitute both harassment and discrimination under both Rules. Indeed, Comment [1] of the proposed amendment to Rule 8.4 expressly prohibits what it calls “verbal conduct” – which is, of course, simply a euphemism for speech. The Comment elaborates that the Rule prohibits “derogatory,” “demeaning,” and “harmful” speech.

For that reason, the proposed Amendments do not prohibit conduct that incidentally involves speech. Instead, the Amendments prohibit speech that incidentally involves professional conduct. See Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 *Harvard J. Law & Pub. Policy* 173, 247 (2019).

An event in Minnesota illustrates the point. In May of 2018 the Minnesota Lavender Bar Association (“MLBA”) – “a voluntary professional association of lesbian, gay, bisexual, transgender, gender queer, and allies, promoting fairness and equality for the LGBT community within the legal industry and for the Minnesota community” – objected to an accredited Continuing Legal Education presentation entitled “Understanding and Responding to the Transgender Moment/St. Paul,” which was co-sponsored by a Roman Catholic law school and addressed transgender issues from a Roman Catholic perspective. The MLBA complained that the CLE – which was pure speech – was “discriminatory and transphobic,” “encourages bias by arguing against the identities [of transgender people],” was contrary to the bar’s diversity efforts, and constituted “harassing behavior” under Rule 8.4(g) of the Model Rules of Professional Conduct. The MLBA further characterized the presentation as “transphobic rhetoric” and stated that “Discrimination is not legal education.” *Minn. Lavender Bar Ass’n*, <https://gumroad.com/mlba> (last visited Apr. 2, 2019). As a result of the MLBA’s complaint, the CLE accrediting body of the Minnesota Bar revoked its CLE accreditation of the presentation – reportedly the first time such retroactive revocation of CLE credit had ever occurred in Minnesota. See Barbara L. Jones, *CLE credit revoked*, *Minnesota Lawyer* (May 28, 2018).

In this real life example, the complained of behavior consisted of pure speech, was alleged to constitute “harassment” under Model Rule 8.4(g) – as well as discrimination – and was punished by the state.

Thus, it is clear that the proposed Rules do, in fact, prohibit lawyer speech. And, as is discussed below, much of that speech is constitutionally protected. By prohibiting and threatening to punish attorneys for engaging in constitutionally protected speech, the proposed Rules violate attorneys' free speech rights.

3. Many Authorities Have Expressed Concerns About The Constitutionality Of The Model Rule

The rule amendment being studied is identical to ABA Model Rule 8.4(g) and its Model Comments. And, as demonstrated above, the proposed amendment to the Preamble is based closely upon the Model Rule. But many authorities have pointed out the constitutional infirmities of ABA Model Rule 8.4(g).

When the ABA opened up Model Rule 8.4(g) for comment, a total of 481 comments were filed – and of those 481 comments, 470 of them opposed the Rule, many on the grounds that the 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 Model Rule 8.4(g) 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 ABA Model Rule 8.4(g) is constitutionally infirm. *See* Eugene Volokh, "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities," Wash. Post, Aug. 10, 2016; *see also* Edwin Meese III, August Letter to ABA House of Delegates, http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf. Attorney General

Meese wrote that ABA Model Rule 8.4(g) constitutes “a clear and extraordinary threat to free speech and religious liberty” and “an unprecedented violation of the First Amendment.” *Id.*

Indeed, 52 law professors have signed a letter – titled *The Unconstitutionality of ABA Model Rule 8.4(g)* – in which they conclude that “the scholars who have signed this letter believe that ABA Model Rule 8.4(g) would, if adopted by any state, be clearly unconstitutional.”

In addition, the authors of many law review articles have concluded that Model Rule 8.4(g) threatens attorneys’ First Amendment rights. *See, e.g.*, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional & Blatantly Political*, 32 Notre Dame J.L. Ethics & Pub. Pol’y 135 (2018); Andrew F. Halaby and Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, & a Call For Scholarship*, 41 J. Legal Prof. 201 (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 & “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); Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol’y 173 (2018) (Model Rule 8.4(g) expands impulses within the legal profession to coerce viewpoint conformity and marginalize and deter dissenters); Bradley S. Abramson, *ABA Model Rule 8.4(g): Constitutional and Other Concerns for Matrimonial Lawyers*, 31 J. Am. Acad. Matrim. Law. 283 (2019) (Model Rule 8.4(g) would appear to prohibit constitutionally protected speech, chill constitutionally protected speech, and

interfere with attorneys' free exercise of religion rights). *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); Dorothy Williams, *Attorney Association: Balancing Autonomy & Anti-Discrimination*, 40 *J. Leg. Prof.* 271 (Spring 2016) (rule violates attorneys' Free Association rights).

In several states that have considered adopting the Model Rule, important professional stakeholders have rejected it. For example, the Illinois State Bar Association, the Pennsylvania Supreme Court Disciplinary Board, the South Carolina Bar's Committee on Professional Responsibility, the Louisiana District Attorneys Association, the North Dakota Supreme Court Joint Commission on Attorney Standards, the Tennessee District Attorneys General Conference, and the Memphis Bar Association Professionalism Committee have all opposed the Rule.

The National Lawyers Association's Commission for the Protection of Constitutional Rights has issued a Statement that ABA Model Rule 8.4(g) would violate an attorney's free speech, free association, and free exercise rights under the First Amendment to the U.S. Constitution. National Lawyers Association, <https://www.nla.org/nla-task-force-publishes-statement-on-new-aba-model-rule-8.4g/> (last visited on Apr. 2, 2019).¹

Likewise, the national Catholic Bar Association has taken a public position that the Rule is unconstitutional.

In Montana, the state legislature adopted a Joint Resolution – Montana Senate Resolution 15 – that, if the Supreme Court of Montana were to enact ABA Model Rule 8.4(g), such would constitute an unconstitutional act of legislation and violate the First Amendment rights of Montana lawyers. In response, the Montana Supreme Court declined to adopt the Rule.

¹ With respect to the constitutional issues raised by the new Model Rule, those filing this 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 Comment.

Significantly, the Attorneys General of four States – Texas, South Carolina, Louisiana, and Tennessee – have 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. *See* Tex. Att’y Gen. Op. KP-0123 (Dec. 20, 2016); S.C. Att’y Gen. Op. 14 (May 1, 2017); La. Att’y Gen. Op. 17-0114 (Sept. 8, 2017); Tenn. Att’y Gen. Op. No. 18-11 (Mar. 16, 2018). In addition, the Attorney General of Arizona has written that the Rule “raises significant constitutional concerns, including potential infringement of speech and association rights.” Ariz. Att’y Gen.’s Comment to Petition to Amend ER 8.4, Rule 42, Ariz. Rules of the Sup. Ct., R-17-0032 (May 21, 2018). And the Attorney General of Alaska has opined that the Rule would “violate First Amendment freedoms, including freedom of speech, free exercise of religion, and freedom of association . . . As a policy it is unwise, and as a law it is unconstitutional.” Letter of Alaska Attorney General to the Board of Governors of the Alaska Bar Association (August 9, 2019).

4. The Proposed Amendments Are 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 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, 108-09 (1972).

(a) The Term “Harassment” is Unconstitutionally Vague

The proposed Rule 8.4(g) 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.

For example, can simply being offended by an attorney’s expressions constitute harassment? Might an attorney violate the Rule merely by sharing her religious beliefs with another attorney who finds such religious beliefs – or their expression – offensive? Could an attorney’s body language – such as a dismissive hand gesture, a turning of one’s back, the shaking of one’s head, or the rolling of one’s eyes – constitute harassment? Could an attorney’s clothing or apparel – such as wearing a “Make America Great Again” cap – violate the Rule? Or what if a lawyer had a Gadsden flag (“Don’t Tread on Me”) sticker on her briefcase – might that violate the Rule? If not, why not – since some would consider this speech derogatory or demeaning and, therefore, harassing.

Indeed, some courts have explicitly found that the term “harass” – in and of itself – is unconstitutionally vague. *See, e.g., Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996) (holding that the term “harasses,” without any sort of definition or objective

standard by which to measure the prohibited conduct, was unconstitutionally vague).

Because the term “harassment” as used in the proposed Rule is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid violating the Rule.

Further, Comment [3] to Model Rule 8.4(g) provides that harassment includes *derogatory or demeaning verbal or physical conduct*. It should be noted, first, that “verbal conduct” is simply a euphemism for speech. So what the Rule prohibits is “derogatory or demeaning” speech. But what exactly is encompassed by the words “derogatory” and “demeaning” speech? Courts have found terms such as these unconstitutionally vague. *See, e.g., Hinton v. Devine*, 633 F.Supp. 1023 (E.D. Pa. 1986) (holding that the term “derogatory” without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal. App. 4th 669 (Cal. App. 2012) (holding that a statute prohibiting statements that are “derogatory to the financial condition of a bank” is facially unconstitutional due to vagueness).

Finally, the statement in Comment [3] that “[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)” does not cure this vagueness defect because, first, the Comment does not identify which statutes and case law it is referring to and, second, merely provides that such unidentified statutes and case law “*may guide*” application of the Rule –

leaving open the very real possibility that the Rule will *not* be applied in accord with substantive anti-harassment law. So the Comment provides attorneys with no real guidance as to what the Rule prohibits or how it will be applied.

(b) The Term “Discrimination” is Unconstitutionally Vague

The term “discrimination” or “discriminate,” used in both amendments, is also unconstitutionally vague. Many proponents of these Rules contend that the words “discrimination” or “discriminate” are widely used and easily understood. And it is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it is also true that such statutes and ordinances do not – 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. *See* 42 U.S.C. § 2000e-2. Similarly, the federal Fair Housing Act provides a detailed description of what, specifically, is prohibited under the Act. *See* 42 U.S.C. § 3604.

But the proposed Rules do not do that. Rule 8.4(g) simply provides that “It is professional misconduct for a lawyer to: . . . engage in conduct that the lawyer knows or reasonably should know is . . . discrimination”, and the proposed Preamble amendment simply provides that lawyers “should not discriminate” – leaving to the attorney’s imagination what sorts of speech and behavior might be encompassed in those proscription.

Again, if reference is made to proposed Comment [3] to the proposed Rule 8.4(g),

the vagueness problem gets worse, because under Comment [3] 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 constitute “harmful” speech or conduct. Indeed, the word “harmful” simply means “causing or capable of causing harm.” *Harmful*, Dictionary.com, <http://www.dictionary.com/browse/harmful> (last visited Apr. 4, 2019). And “harm” encompasses a wide range of injury, from “physical injury or mental damage” to “hurt” to “moral injury.” *Harm*, Dictionary.com, <http://www.dictionary.com/browse/harm> (last visited Apr. 2, 2019). So “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.

And for the same reasons set forth above, the fact that Comment [3] provides that “[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)” does not cure the vagueness defect of determining what constitutes discriminatory speech either.

It is also important to emphasize that speech does not lose its constitutional protection just because it is “harmful.” *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995) (stating that the point of all speech protection

is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (noting that an interest in protecting bystanders from feeling offended or angry is not sufficient to justify a ban on expression); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (striking down a ban on picketing near embassies where the purpose was to protect the emotions of those who reacted to the picket signs’ message). *See also Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 791 (2011) (stating that “new categories of unprotected speech may not be added to the list [of unprotected speech – such as obscenity, incitement, and fighting words] by a legislature that concludes certain speech is *too harmful* to be tolerated”) (emphasis added).

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. *Id.* at 792; *see also United States v. Stevens*, 559 U.S. 460, 470 (2010) (holding that “The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.”)

(c) The Phrases “in conduct related to the practice of law” and “while acting in a professional capacity” are Unconstitutionally Vague

The Amendments apply to any conduct of an attorney which is “related to the practice of law” or “while acting in a professional capacity,” including, according to Comment [4] of the Model Rule, participating in bar association, business or social activities in connection with the practice of law.” It hardly need be said, though, that what conduct is conduct “related to” or “in connection with” the practice of law, or “in a professional capacity,” and what conduct is not, is vague and subject to reasonable dispute.

The phrase is vague, first, because although what does and does not constitute the *actual* practice of law may, itself, not be so vague as to be unconstitutional, the proposed Rules create uncertainty by sweeping in not just attorney conduct while engaged in the “practice of law,” but attorney conduct – including bar association, business and even social activities – that are merely “*related to*” or “*in connection with* the practice of law” or that are performed in an attorney’s “*professional capacity*.”

Untethered, as it is, from any legal or historical understanding of what constitutes the “practice of law,” the proposed Rules’ use of the phrases “related to” and “in connection with” the practice of law, and “in a professional capacity,” become nearly meaningless.

Considering some hypothetical situations brings the problem into focus. Would the Rules apply to comments made by an attorney while attending a law firm retirement party for a law firm co-worker, for example? If so, would it also include comments made while the attorneys are walking to their vehicles after the party has ended? Would it apply to comments one attorney makes to another while car-pooling

to or from work? Would it include comments an attorney makes while teaching a religious liberty class at the attorney's church? Or sitting on his church's governing board, where he is sometimes asked for his professionally informed opinion on some matter before the board? Or when attending an alumni function at the law school the attorney attended? Or when publishing a letter to the editor of a newspaper when the author is identified therein as a lawyer? Or, for that matter, in any behavior in which the actor is identified as being a lawyer? The answers to these inquiries are far from self-evident.

And it is not just our opinion that the phrase "conduct related to the practice of law" or "in a professional capacity" are unconstitutionally vague. The Chair of the ABA Policy & Implementation Committee, which is charged with advocating for the Model Rules of Professional Conduct, while serving on an ABA CLE panel discussing Model Rule 8.4(g), was asked what the phrase "related to the practice of law" in the Model Rule meant? In response, he stated "I don't have an answer for you." "It is extraordinarily broad." "I don't know where it begins or where it ends." *Model Rule 8.4 – Update, Discussion, and Best Practices in a #MeToo World*, August 2, 2018.

Because a lawyer cannot, with any degree of reasonable certainty, determine what behavior of an attorney is conduct "related to" or "in connection with" the practice of law, or "while acting in a professional capacity" and what is not, the proposed Rules are unconstitutionally vague.

If attorneys face professional discipline for engaging in certain proscribed behavior, they

are entitled to know, with reasonable precision, what behavior is being proscribed, and should not be left to speculate what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the Rules' essential terms, the proposed Rules are unconstitutional.

5. The Proposed Amendments Are 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*, 408 U.S. at 114-15.

Although some of the speech the Amendments prohibit might arguably be unprotected – such as speech that actually and substantially prejudices the administration of justice or speech that would actually and clearly render an attorney unfit to practice law – the proposed Rules would also sweep within their prohibitions lawyer speech that is clearly protected by the First Amendment, such as speech that might be offensive, disparaging, or hurtful and, therefore, considered at least by some as constituting discrimination or harassment, but that would not prejudice the administration of justice nor render the attorney unfit to practice law. *DeJohn v. Temple Univ.*, 537 F.3d 301 (2008) (holding that 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).

Speech is not unprotected merely because it is harmful, derogatory, demeaning, or even discriminatory or harassing. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) (holding that 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).

Indeed, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder*, 562 U.S. at 458 (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley*, 515 U.S. at 574 (noting that 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 Johnson*, 491 U.S. at 414 (stating that “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) (stating that the government’s attempt to prevent speech expressing ideas that offend strikes at the heart of the First Amendment) and *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019)(observing that “regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be”).

In fact, courts have found that terms such as “derogatory” and “demeaning” – both of which are used in Comment [3] of the proposed Rule 8.4(g) to describe what the terms

“discrimination” or “harassment” mean – are unconstitutionally overbroad. *Hinton*, 633 F.Supp. 1023 (holding that the term “derogatory information” is unconstitutionally overbroad); *Summit Bank*, 206 Cal. App. 4th 669 (finding that a 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*, 240 F.3d 200 (holding that a 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 Rules are well illustrated by the example that Senior Ethics Counsel Lisa Panahi and Ethics Counsel Ann Ching of the Arizona State Bar gave in their January 2017 article “Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g),” in the *Arizona Attorney*. They state that an attorney could be professionally disciplined under Model Rule 8.4(g)’s prohibition on discriminatory or harassing conduct in business or social activities “related to the practice of law” 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 Model 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 at 4, The Heritage Foundation (Oct. 6, 2016)

But the speech in both these examples would clearly be constitutionally protected. The

fact that such constitutionally protected speech would violate the Amendments demonstrates that the Amendments are unconstitutionally overbroad.

Indeed, regardless of whether any attorney is ultimately prosecuted under the Rules for engaging in protected speech, the mere possibility that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – which is precisely what the overbreadth doctrine is designed to prevent. *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (noting that overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression.).

Therefore, because the proposed Rules will prohibit a broad swath of protected speech and would chill lawyers' speech, the Rules would not pass constitutional muster.

6. The Amendments Will Constitute Unconstitutional Content-Based Speech Restrictions

By only proscribing speech that is derogatory, demeaning, or harmful toward members of certain designated classes, the proposed Rules will constitute unconstitutional content-based speech restrictions. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (explaining that 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 Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (holding that an 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 proposed Rules. In *Tam*, the Court found that a Lanham Act provision – prohibiting the registration of trademarks that may “disparage” or bring a person “into contempt or disrepute” – 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.” 137 Sup. Ct. 1744. In a concurring opinion joined by four Justices, Justice Kennedy described the constitutional infirmity of the disparagement provision as “viewpoint discrimination” – “an ‘egregious form of content discrimination,’ which is ‘presumptively unconstitutional.’” *Id.* at 1766. 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.” *Id.* Likewise, under the proposed Rule here, attorneys may engage in positive or benign speech with regard to the protected classes, but not derogatory, demeaning, or harmful speech. Under the Supreme Court’s *Tam* decision, this is the essence of viewpoint discrimination, and presumptively unconstitutional.

The late Professor Rotunda provided a concrete example of how the proposed Rules may constitute unconstitutional content-based speech restrictions. Referring to Model Rule 8.4(g), 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.” Rotunda, *supra*.

Under the proposed Rules, the content of a lawyer’s speech will determine whether or not the lawyer has or has not violated the Rules. For example, a lawyer who speaks against same-sex

marriage may be in violation of the Rules for engaging in speech that some consider to be discriminatory based on sexual orientation or marital status, while a lawyer who speaks in favor of same-sex marriage would not be. Or as the Minnesota case discussed above illustrates, one may speak favorably about transgender issues, but not unfavorably. These are classic examples of unconstitutional viewpoint-based speech restrictions. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (holding that 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, the city of 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. *Id.* In striking down the Ordinance, the Court stated: “The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.” *Id.* at 390. That is precisely what the proposed Rule does. For that reason, commentators have described Model Rule 8.4(g) as a speech code for lawyers.

For those who would deny that the proposed Rules constitute attorney speech codes, we need only point them to Indiana, a state that has adopted a black letter non-discrimination Rule – albeit not as broad as the Rules being proposed here in North Carolina. In *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Ind. 2010), an Indiana attorney was professionally 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 (Ind. 2010), an attorney had his license suspended for applying a racially derogatory term to himself. In both cases, the attorneys were professionally disciplined merely for using certain disfavored speech.

Because they constitute unconstitutional speech codes for lawyers, the proposed Rules

should be rejected.

7. The Proposed Amendments Will Violate Attorneys' Free Exercise of Religion and Free Association Rights

The proposed Amendments will also violate attorneys' constitutional right of free religious exercise because the Rule prohibits religious expression if such expression could be considered discriminatory or harassing.

The ACLU of New Hampshire opposed a similar rule – considered but not adopted – in that state, noting correctly that such rules threaten religious liberty because “one person’s religious tenet could be another person’s manifestation of bias.” American Civil Liberties Union of New Hampshire, Letter to Advisory Committee on Rules, New Hampshire Supreme Court (May 31, 2018).

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 Rule merely for being a member of such an organization. Rotunda, *supra* at 4-5. The fact that the Rule may prohibit such speech or membership indicates that the Rule will be unconstitutional.

To those who might deny the proposed Rules could or would be applied in that way, one

need only note the above-referenced action of the CLE accrediting authorities in Minnesota upon the Minnesota Lavender Bar Association's complaint that a CLE co-sponsored by a Roman Catholic law school, discussing transgender issues from a Roman Catholic perspective, constituted "harassment" under ABA Model Rule 8.4(g), stating that the religiously based discussion constituted "transphobic rhetoric" and "discrimination." In essence, that case stands for the proposition that the prohibition of "harassment" and "discrimination" as embodied in professional conduct rules, such as the one proposed here in North Carolina, will apply to and prohibit religious speech – speech that expresses a religious tenet of some, but to others is viewed as discrimination or harassment.

Religiously based legal organizations have consistently opposed professional conduct rules like the ones being considered here in North Carolina on the ground that such rules threaten religious liberty. Those groups include the Catholic Bar Association – which has adopted a resolution stating that Model Rule 8.4(g) is not only unconstitutional, but that it is "incompatible with Catholic teaching and the obligations of Catholic lawyers" – as well as the Christian Legal Society. Both organizations have cause for concern because, as Professor Rotunda presciently warned, merely being members of those organizations would violate rules like the Rules proposed here. How so? Because both organizations limit their membership based on religion. The Christian Legal Society requires its members to subscribe to a Christian statement of faith. And the Catholic Bar Association requires its members to be practicing Roman Catholics. Therefore, both legal organizations "discriminate" on the basis of religion – something explicitly prohibited under the terms of the proposed Rules. The proposed Rules would, essentially, destroy both organizations.

Because the proposed Rules will violate attorneys' Free Exercise and Free Association

rights, they should be rejected.

8. The Proposed Amendments Will Result In The Suppression of Politically Incorrect Speech While Protecting Politically Correct Speech

Under a literal reading of the proposed Rules, a law firm's affirmative action hiring practices would constitute violations of the Rules, because the Rules make clear that it is professional misconduct for a lawyer operating or managing a law firm or law practice to discriminate on the basis of race, sex, national origin, ethnicity, sexual orientation, or gender identity. Therefore, any hiring or other employment practices that favor applicants or employees on the basis of any of those characteristics are forbidden.

But does anyone really believe that a lawyer will ever be prosecuted for favoring women or racial minorities in hiring or promotion decisions, undertaken in order to increase diversity in the legal profession? Of course not.

Indeed, the proposed Comment [4] to Model Rule 8.4(g) makes this practice, of protecting favored speech and suppressing disfavored speech, explicit because Comment [4] to the Rule contains an express exception for "conduct undertaken to promote diversity and inclusion." And Comment [5] to the Model Rule allows lawyers to limit their practices to certain clientele, as long as that clientele are "members of underserved populations" – whatever that might mean.

So, 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. But if an attorney engages in discriminatory conduct that furthers a *politically*

incorrect interest, the state will prosecute that attorney for violating the Rules. And because the terms “harassment” and “discrimination” are both vague and overbroad, professional disciplinary authorities will be able to interpret those terms in ways that result in selective prosecution of politically incorrect or disfavored speech, while protecting politically correct or favored speech.

This phenomenon has already been observed 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 cakes 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. The U.S. Supreme Court condemned that unequal treatment, stating that it constituted a “clear and impermissible hostility toward the religious beliefs” of the baker the Commission selectively chose to prosecute. *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018).

These exceptions also render the proposed Rules unconstitutional because – by prohibiting only disfavored discriminatory messages, while allowing favored ones – the Rules create a viewpoint-based speech restriction. *See R.A.V.*, 505 U.S. 377.

No rule of professional conduct should punish certain viewpoints while protecting and advancing others. In fact, to do so would be unconstitutional.

9. Assurances That the Proposed Amendments Will Not Be Applied in an Unconstitutional Manner Will Not Cure the Rules’ Constitutional Infirmities

Supporters of the proposed Rules may argue that, although the Rules could be applied in

an unconstitutional manner, they will not be – or may suggest that, in order to assuage attorneys’ concerns about the proposed Rules’ constitutional infirmities, the proposed Rules be modified so as to provide that the Rules will not be applied in an unconstitutional manner. Neither approach, however, would remedy the Rules’ constitutional infirmities.

First, proponents of the proposed Rules do not have the authority to speak on behalf of North Carolina’s professional disciplinary authorities. Proponents of the Rules cannot say how the disciplinary authorities will or will not interpret or apply the Rules.

And second, this very argument was made and rejected in *Stevens*, supra. 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.” *Id.* at 480.

In other words, far from curing its constitutional defects, representations that the proposed Rules will not be applied so as to violate the Constitution, constitute indirect admissions that the proposed Rules are, in fact, constitutionally infirm.

In arguing that the proposed Rules will not be applied unconstitutionally, proponents may also point to Model Rule 8.4(g)'s provision that "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules." But that provision does not cure the defects either.

It does not cure the defects, 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 proposed Rule 8.4(g) itself), the advice or advocacy cannot be discriminatory or harassing. In other words, under the proposed Rules, advice or advocacy that constitutes "discrimination" or "harassment" can, by definition, never constitute legitimate advocacy because "discriminatory" or "harassing" advice or advocacy is inconsistent with "these Rules" – which would include proposed Rule 8.4(g) itself.

Further, by stating that the Rules will not prohibit "legitimate advice or advocacy" the proposed Rules – for the first time – create the concept of *illegitimate* advice or advocacy. Giving advice and advocating for clients are the very essence of what lawyers do. If the proposed Rules are adopted, however, attorneys will need to worry whether their advice or advocacy might be considered "illegitimate" and, therefore, a violation of professional ethics. And having to worry about that will chill lawyers' speech and interfere with attorneys' ability to provide their clients with 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.

10. The Proposed Amendments Also Violate the North Carolina Constitution.

Like the United States Constitution, the North Carolina Constitution guarantees citizens the right to free speech and free religious exercise without governmental infringement. N.C. Const. art. 1 §14. And the North Carolina Supreme Court has stated that the protections under the state constitution are the same as under the federal constitution. *State of North Carolina v. Petersilie*, 432 S.E.2d 832, 841 (N.C. 1993)

Therefore, the proposed Rules are unconstitutional not only under the U.S. Constitution, but also under the North Carolina Constitution.

Given the proposed Rules' many constitutional defects, the proposed Rules should be rejected.

C. Only Two States Have Adopted Model Rule 8.4(g). All Other State Supreme Courts That Have Considered And Acted Upon the Rule Have Rejected It

In considering ABA Model Rule 8.4(g) – and the Preamble amendment based upon it – it should be noted that, in the four years since the ABA adopted the Model Rule, although many states have considered it, only two states, Vermont and New Mexico, have adopted it. On the other hand, the supreme courts of six states – Arizona, Idaho, Montana, South Carolina, South Dakota, and Tennessee – have expressly rejected the Model Rule.

Indeed, the majority of states continue to have no black letter nondiscrimination rule at all in their Rules of Professional Conduct.

In fact, not only do the majority of states have no black letter antidiscrimination rule in their rules of professional conduct, but in those states that *do* have black letter antidiscrimination provisions in their rules, no state's rule – other than Vermont's and New Mexico's – is comparable to Model Rule 8.4(g).

Aside from Vermont and New Mexico, none of the jurisdictions with black letter anti-discrimination rules extends its rule to conduct related to the practice of law or conduct in connection with the practice of law – including social activities of attorneys – as does the North Carolina proposed Rules. (Although Maine’s prohibition applies to “conduct related to the practice of law,” it specifically declined to extend its prohibition to lawyers’ bar association, business, or social activities). Indeed, seven of those jurisdictions specifically 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 nondiscrimination 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). And Massachusetts limits its Rule to conduct “before a tribunal.”

And unlike Model Rule 8.4(g) and the Preamble amendment proposed here, eight of the states with black letter antidiscrimination 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 Model Rule 8.4(g), being studied here – which has a “know or reasonably should know” standard, or the proposed Preamble amendment, which has no scienter standard whatsoever – four states with black letter rules require the discriminatory conduct to be “knowing,” “intentional” or “willful” (Maryland, New Jersey, New Mexico, and Texas). Indeed, New Hampshire’s rule only applies to attorney conduct when the attorney’s “primary purpose” is to embarrass, harass or burden another person. As an explanatory comment to New Hampshire’s rule explains: “The rule does not prohibit conduct that lacks this primary purpose, even if the

conduct incidentally produces, or has the effect or impact of producing” embarrassment, harassment, or a burden to another.”

Finally, nine states (California, Minnesota, New Jersey, New York, Illinois, Ohio, Pennsylvania, Washington State, and Iowa) limit their antidiscrimination rules to “unlawful” discrimination or discrimination “prohibited by law.” And of those nine states, nearly half of them (Illinois, New Jersey, New York, and Pennsylvania) 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 antidiscrimination statute or ordinance.

So, should North Carolina adopt either of these amendments now being considered, it will have adopted Rules that impinge on attorney conduct in ways, and far more extensively, than any other jurisdictions – other than Vermont and New Mexico – have seen fit to do.

There are good reasons why the majority of jurisdictions have not adopted any black letter nondiscrimination Rules in their Rules of Professional Conduct. And there are also good reasons why no states other than Vermont and New Mexico have adopted ABA Model Rule 8.4(g). And there are good reasons why the Supreme Courts of Arizona, Idaho, South Carolina, South Dakota, Tennessee, and Montana have all rejected ABA Model Rule 8.4(g). For these same reasons, North Carolina would be wise to reject these amendments as well.

D. The Proposed Amendments Would, For The First Time, Sever The Rules From The Legitimate Regulatory Interests Of The Legal Profession

The legal profession has a legitimate interest in proscribing attorney conduct that – if not proscribed – would either render an attorney unfit to practice law or that would prejudice the

administration of justice. North Carolina'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 or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another;
- (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 that reflects adversely on the lawyer's fitness as a lawyer;
- (d) Engaging in conduct that is prejudicial to the administration of justice;
- (e) Stating or implying an ability to improperly influence a government agency or official;
- (f) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) Intentionally prejudice or damage a client during the course of a professional relationship.

The first proscribed conduct – violating or assisting others in 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, competency, 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 Rules 8.4(b) and (c) do not even conclude that all *criminal* conduct, or all conduct that is *dishonest, fraudulent, deceitful* or that constitutes *misrepresentation* are violations 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” and “dishonest, fraudulent, deceitful, or misrepresentation[al]” conduct “that reflects adversely on the lawyer’s fitness as a lawyer.”

The fourth proscription is limited to conduct that actually prejudices the administration of justice.

The fifth and sixth proscriptions in North Carolina’s current Rule 8.4 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 or knowingly assisting a judge or judicial officer in conduct that violates the rules of judicial conduct or other law.

And the seventh proscription prohibits attorney conduct that would breach a lawyer’s fiduciary duty to the attorney’s clients.

In short, North Carolina’s current Rule 8.4 has always – heretofore – been solely concerned with attorney conduct that would either adversely affect an attorney’s fitness to practice law or that would seriously interfere with the proper and efficient operation of the judicial system.

The proposed Rules, however, would take North Carolina's Rules of Professional Conduct in a completely new and different direction because, for the first time, the proposed Rules 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 proposed Rules 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 Rules will constitute free-floating nondiscrimination/anti-harassment provisions.

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 (Ind. 2010) and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Ind. 2010). In neither case did the offending conduct have any demonstrable prejudicial effect on the administration of justice or render the attorneys unfit to practice law. In both cases, it was deemed sufficient that the attorneys had simply used certain offensive language.

Strikingly, if the proposed Rules are adopted, an attorney could actually engage in conduct that is *criminal, dishonest, fraudulent, deceitful, or that would constitute misrepresentation* without violating the Rules (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*" and Rule 8.4(c) only applies to a lawyer's conduct that would *reflect adversely on the lawyer's fitness as a lawyer*) but could be disciplined merely for engaging in politically incorrect speech. In that respect, the proposed Rules would create a sort of "super offense," because unlike Rules 8.4(b) and (c) – which only prohibit conduct that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer – the proposed Rules

would prohibit all discriminatory or harassing behavior, without regard to whether or not such conduct is unlawful or whether it reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer – thereby treating allegedly discriminatory or harassing conduct as being worse than *criminal, dishonest, fraudulent, or deceitful* conduct.

Because the proposed Rules constitute an extreme and dangerous departure from the principles and purposes historically underlying North Carolina's attorney misconduct rules and the legitimate interests of professional regulation, the amendments should be rejected.

E. The Amendments Are Unnecessary, Will Not Remedy the Proponent's Concerns, and Will Unnecessarily Burden North Carolina's Professional Disciplinary Authorities

Many of the circumstances the amendments would address are already addressed by the current Rules of Professional Conduct or other laws.

First, Rule 8.4(d) already prohibits attorney conduct that prejudices the administration of justice. And, in fact, sexual harassment has been professionally disciplined in other states under Rule 8.4(d). *See, e.g., Attorney Grievance Comm'n of Md. v. Goldsborough*, 624 A.2d 503 (Ct. App. Maryland 1993) (holding that nonconsensual kissing of clients and spanking clients and employees can violate Rule 8.4(d) prohibiting lawyer from engaging in conduct that is prejudicial to the administration of justice).

In addition, harassment and discrimination in the legal workplace are also already addressed in Title VII at the federal level, as well as in North Carolina's employment nondiscrimination laws, including N.C. Gen. Stat. Ann. §143-422.1, et seq. So the proposed Rules would create an entirely new layer of nondiscrimination and anti-harassment laws, in addition to those already existing outside the Rules of Professional Conduct. By doing so, the

Rules will burden professional disciplinary authorities with having to process very fact-intensive, jurisprudentially complicated, and duplicative cases – cases that could and should be processed under some other statute or ordinance, by judicial authorities better equipped to handle them.

Further, making discrimination and harassment a professional, as well as a statutory, offense, divorced from antidiscrimination and harassment laws, could very well subject attorneys to multiple prosecutions and inconsistent obligations and results. Lawyers could be forced to defend against parallel prosecutions, being pursued by different prosecutorial authorities, all at the same time. And, because different legal and evidentiary standards may apply in different proceedings, attorneys could – under the same set of facts – be exonerated from allegations of having violated a nondiscrimination or harassment law, but still be found to have engaged in harassing or discriminatory conduct that violates the Rules of Professional Conduct, or vice versa. Indeed, as noted above, 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).

So for all these reasons, too, the Amendments should be rejected.

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

If ABA Model Rule 8.4(g) 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 that Rule, attorneys will not only be forced to take cases or clients they might have otherwise declined, they will be forced to take cases or clients the Rules of Professional Conduct forbid them to take.

Proponents of Model Rule 8.4(g) often contend that the Rule will not require an attorney to accept any client or case the attorney does not want to accept. But that is not true.

Model Rule 8.4(g) facially prohibits an attorney from engaging in any discriminatory conduct in any conduct related to the practice of law. Client selection decisions are clearly conduct related to the practice of law. Therefore, the Model Rule will prohibit attorneys from engaging in discrimination when making their client and case selection decisions.

And the provision of the Model Rule, being proposed here in North Carolina, that “[t]his *paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16*” (our emphasis) will not change this result, because Rule 1.16 does not even address the question of what clients or cases an attorney *may* decline. It only addresses the question of which clients and cases an attorney *must* decline.

What Rule 1.16 addresses are three circumstances in which an attorney 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 was ever any question about that, it is now clear from Vermont's adoption of the 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 Model 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).

Likewise, although the proposed Preamble amendment provides that it "*does [not] limit the prerogative of a lawyer to accept, decline or withdraw from a representation in accordance with these rules*" (our emphasis), it is far from clear what "other rules" the proposed Preamble amendment is referring to. Does that language refer to other rules of the Rules of Professional Conduct – and, if so, which ones – or some other "rules" altogether?

In short, contrary to the assertions of the proposed Rules' proponents, the proposed Rule – in particular, the Model Rule, but perhaps the Preamble amendment as well – *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 North Carolina'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

whom 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.

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. For example, the Preamble to North Carolina’s Rules provides that “*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 “*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, would interfere with the lawyer's interest in remaining an ethical person, and would prohibit lawyers from exercising their own moral judgment.

And second, the Rules impose upon attorneys a professional obligation to represent their clients zealously (Rule 1.3) 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.

To force an attorney to accept a client or case the attorney does not want, and to then require the attorney to provide zealous representation to that client, is unfair to the attorney because doing so places conflicting and unresolvable obligations upon the lawyer.

But it will also harm clients 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.

We must always remember that 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.

Model Rule 8.4(g), however, will force an attorney to represent clients whom 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. In that

respect, the Amendments will harm clients.

Indeed, the Amendments, if adopted, would introduce insidious deception into the attorney-client relationship because – in order to avoid violating the Rules – 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, too, the Amendments should be rejected.

G. The Proposed Amendments Conflict with Other Professional Obligations and Rules of Professional Conduct.

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

1. Rule 1.3. Zealous Representation. Attorneys have a professional duty to represent their clients zealously. Indeed, the U.S. Supreme Court has stated that lawyers have a fundamental duty to zealously represent their clients. *Evans v. Jeff D.*, 475 U.S. 717, 758 (1986). See also *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994)(stating that “a lawyer’s first duty is zealously to represent his or her client”). So, this is a fundamental professional duty, independent of the Rules of Professional Conduct.

But Rule 1.3 of North Carolina’s Rules of Professional Conduct also establishes such a duty. The Comment to Rule 1.3 (Diligence) states that “A lawyer must . . . act . . .with zeal in advocacy upon the client’s behalf.”

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

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 ABA Model Rule 8.4(g), 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 must not take the case.

How is that conflict to be resolved?

2. 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 Rules require attorneys to accept clients and cases, despite the fact that such clients or cases might run counter to the attorneys' 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 such beliefs of the attorney – would violate Rule 1.7's Conflict of Interest prohibitions.

3. **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 law or the Rules of Professional Conduct.* However, we have already seen that Rule 1.7 would prohibit an attorney from representing a client who – due to the lawyer’s personal beliefs – the lawyer could not represent without a personal conflict of interest interfering with that representation; and Rule 1.3 would prohibit an attorney from representing a client if the attorney could not do so zealously. To represent clients in any of these situations would constitute a violation of the Rules of Professional Conduct. But Vermont’s adoption of the Model Rule being considered here in North Carolina 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, the proposed Rules are in conflict with this Rule too.

In the event of an inevitable conflict, which Rules are going to prevail?

Indeed, the fact that the proposed Rules conflict with other Professional Rules reveals a foundational problem with Model Rule 8.4(g) – and that is that the Model 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 Model Rule 8.4(g), 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 is one thing to say a *merchant* may not pick and choose his *customers*. It is 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 the attorney does not want – for whatever reason – to represent.

III. Conclusion

The proposed Amendments are unconstitutional. They are unconstitutionally vague. They are unconstitutionally overbroad. And they constitute unconstitutional content-based speech restrictions. They also violate attorneys' Free Speech, Free Exercise, and Free Association rights and would create a strict liability speech code for lawyers.

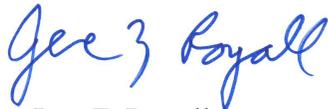
In addition to being constitutionally infirm, the proposed Rules would sever North Carolina's Rules of Professional Conduct from the legitimate interests of the bar in regulating the legal profession, conflict with other Rules of Professional Conduct and professional obligations attorneys have, and would authorize professional disciplinary authorities to discipline lawyers for non-commercial speech and conduct that neither prejudices the administration of justice nor renders attorneys unfit to practice law. The proposed Rules would also subject attorneys to duplicative prosecutions, as well as inconsistent obligations and results. And they would harm clients.

The many infirmities of the proposed Rules are evidenced by the fact that, in the more

than four years since the ABA adopted Model Rule 8.4(g), only two states have adopted it. All other state supreme courts that have considered and acted upon the rule have rejected it. So, should North Carolina adopt the Rule – or the Preamble amendment based on the Model Rule – it would be embarking on a path that all states, but two, have – for good reasons – rejected.

For all these reasons, the proposed amendments to the Preamble and to Rule 8.4 of North Carolina’s Rules of Professional Conduct should be rejected.

Respectfully submitted,



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