ALASKA BAR ASSOCIATION
RULES OF PROFESSIONAL CONDUCT COMMITTEE

JOINT COMMENT IN OPPOSITION TO PROPOSED AMENDMENT TO ALASKA RULE OF PROFESSIONAL CONDUCT 8.4

The Alaska licensed attorneys listed below respectfully submit this Comment on the proposed revisions to Alaska Rule of Professional Conduct 8.4.

I. The Proposed Amendment

The Committee is proposing to amend Rule 8.4 of the Alaska Rules of Professional Conduct by adding an entirely new subsection (f) to the Rule, which would read 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 while:*
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> *(1) representing clients,*
> *(2) interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law,*
> *(3) operating or managing a law firm or law practice, or*
> *(4) participating in bar association, business or social activities in connection with 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.*

II. Comments

A. The Proposed Rule Is 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) ("[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) (An attorney's statements that were disrespectful and in bad taste were nevertheless protected speech and use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney's First Amendment rights. "[W]e must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights."); *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. 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. 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 just recently reiterated this principle in *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ____ (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, and the state may not violate attorneys' constitutional rights under the guise of professional regulation.

2. The Proposed Rule Prohibits Constitutionally Protected Speech

Some proponents of the Rule claim that the Rule prohibits 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 – the Rule does not violate the First Amendment free speech rights of lawyers.

But that is incorrect. The proposed Rule prohibits "harassment" and "discrimination,"

and pure speech can constitute both harassment and discrimination under the Rule. Comment [1] of ABA Model Rule 8.4(g) – upon which the Rule being proposed in Alaska is based – 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 Rule does not prohibit conduct that incidentally involves speech. Instead, the Rule prohibits 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).

A recent 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 Rule does, 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 Rule violates attorneys' free speech rights.

3. Many Authorities Have Expressed Concerns About The Constitutionality Of The Model Rule, Upon Which the Proposed Rule is Based

The Committee's proposed amendment is based on ABA Model Rule 8.4(g). In fact, the Rule being proposed in Alaska is identical to ABA Model Rule 8.4(g), except that where the Model Rule provides that its proscriptions apply to any "conduct related to the practice of law," the proposed Alaska Rule replaces that with Comment [4] of the Model Rule. Model Comment [4] defines the phrase "conduct related to the practice of law" by listing a variety of contexts that are – under the Rule – "related to the practice of law." In the proposed Alaska Rule, that list of the types of conduct that are "related to the practice of law" is simply imported directly into the Rule. For that reason, the Rule being proposed in Alaska is, for all intents and purposes, ABA Model Rule 8.4(g).

The problem is that 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 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 the ABA Model Rule 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 thatABA 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, 43 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] And 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.

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* Alaska Att'y Gen. comment letter re: Proposed Rule of Professional Conduct 8.4(f) (August 9, 2019); 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, importantly, the Attorney General of Alaska recently opined that "Applications of [proposed] Rule 8.4(f) will violate First Amendment freedoms, including freedom of speech, free exercise of religion, and freedom of association . . . As a

[1] 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.

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 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 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 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, if reference is made to Comment [1] of Model Rule 8.4(g) – which the Alaska proposed Rule parrots – that Comment 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) (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. Many proponents of the proposed Rule contend that the word "discrimination" is widely used and easily understood. And it is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it is also true that such statutes and ordinances do not – 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 Rule does not do that. It simply provides that "It is professional misconduct for a lawyer to: . . . engage in conduct that the lawyer knows or reasonably should know is . . . discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital

status, family responsibility, or socioeconomic status" – thereby leaving to the attorney's imagination what sorts of speech and behavior might be encompassed in that proscription.

Again, if reference is made to Comment [1] of the Model Rule – upon which the Alaska Rule is based – the vagueness problem gets worse, because under the Model Rule's Comment [1] 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*, Dicionary.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.

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) (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) (the point of all speech protection is to shield just those

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

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

(c) The Phrase "in connection with the practice of law" is Unconstitutionally Vague

The proposed Rule applies to any conduct of an attorney while "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 "in connection with the

practice of law" and what conduct is not, is vague and subject to reasonable dispute.

The phrase is vague, first, because what does and does not constitute the practice of law is, itself, vague. In fact, the Alaska Supreme Court has refused to give a specific definition of the term "because the practice of law may well be used in a different sense for various purposes." *Christiansen v. Melinda*, 857 P.2d 345 (Alaska 1993). Indeed, Rule 15(b)(1) of the Alaska Bar Rules provides that, for purposes of the practice of law prohibition for disbarred and suspended attorneys (except for attorneys suspended solely for nonpayment of bar fees), "'practice of law' is defined as: (A) holding oneself out as an attorney or lawyer authorized to practice law; (B) rendering legal consultation or advice to a client; (C) appearing on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate judge, commissioner, hearing officer, or governmental body which is operating in its adjudicative capacity, including the submission of pleadings; (D) appearing as a representative of the client at a deposition or other discovery matter; (E) negotiating or transacting any matter for or on behalf of a client with third parties; or (F) receiving, disbursing, or otherwise handling a client's funds." But Rule 63 – which defines practice of law for purposes of AS 08.08.230 (making the unauthorized practice of law a misdemeanor) – defines the term much more restrictively, as "(a) representing oneself by words or conduct to be an attorney . . . ; and (b) either (i) representing another before a court or governmental body which is operating in its adjudicative capacity, including the submission of pleadings, or (ii), for compensation, providing advice or preparing documents for another which affect legal rights or duties."

So, what is the definition of "practice of law" for purposes of the proposed Rule, since the proposed Rule does not define the term?

But if that were not sufficiently unclear, the proposed Rule sweeps within it 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 "*in connection with* the practice of law."

Untethered, as it is, from any legal or historical understanding of what constitutes the "practice of law," the proposed Rule's use of the phrase "in connection with the practice of law" becomes nearly meaningless.

Considering some hypothetical situations brings the problem into focus. Would the Rule 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 every behavior in which the actor is identified as being a lawyer? The answers to these inquiries are far from self-evident.

Because a lawyer cannot, with any degree of reasonable certainty, determine what

behavior of an attorney is conduct "in connection with the practice of law" and what is not, the proposed Rule is unconstitutionally vague.

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

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

5. 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*, 408 U.S. at 114-15.

Although some of the speech the proposed Rule prohibits might arguably be unprotected – such as speech that actually and substantially prejudices the administration of justice or speech that would actually and clearly render an attorney unfit to practice law (see a discussion of this issue under subsection C below) – the proposed Rule would also sweep within its 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) (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) (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 (the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley*, 515 U.S. at 574 (the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); s*ee also Johnson*, 491 U.S. at 414 ("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).

In fact, courts have found that terms such as "derogatory" and "demeaning" – both of which are used in Comment [3] of the Model Rule to describe what the terms "discrimination" or

"harassment" mean in Model Rule 8.4(g) – are unconstitutionally overbroad. *Hinton*, 633 F.Supp. 1023 (the term "derogatory information" is unconstitutionally overbroad); *Summit Bank*, 206 Cal. App. 4th 669 (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); s*ee also Saxe*, 240 F.3d 200 (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 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, and therefore the proposed Alaska 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 proposed Rule demonstrates that the Rule is unconstitutionally overbroad.

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

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

6. 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*, 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 Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

Indeed, the U.S. Supreme Court recently reiterated this principle in a case that is directly relevant when considering the constitutional infirmities of the proposed Rule. 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 Rule may constitute an unconstitutional content-based speech restriction. 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*.

So under both Model Rule 8.4(g) and the proposed Rule here, the content of a lawyer's

speech will determine whether or not the lawyer has or has not violated the Rule. For example, a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that some consider to be discriminatory based on sexual orientation 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) (the government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed). So, for example, 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 professional rules, such as the Rule proposed here in Alaska, as speech codes 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 Rule proposed here in Alaska. 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 it constitutes an unconstitutional speech code for lawyers, the proposed Rule should be rejected.

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

The proposed Rule will 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 the Granite 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 Rule could or would be applied in that way, one need only note the 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 Alaska, 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 one being proposed here in Alaska 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 Rule 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. 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 Rule. The proposed Rule would, essentially, destroy both organizations.

Because the proposed Rule will violate attorneys' Free Exercise and Free Association rights, it should be rejected.

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

Under a literal reading of the proposed Rule, a law firm's affirmative action hiring practices would constitute a violation of the Rule, because the Rule makes 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. In fact, discrimination for those purposes will actually be favored.

Indeed, Comment [2] to ABA Model Rule 8.4(g) – upon which the proposed Rule is based – makes this practice, of protecting favored speech and suppressing disfavored speech, explicit. Comment [2] to ABA Model Rule 8.4(g) contains an express exception for "conduct undertaken to promote diversity and inclusion" and Comment [3] allows lawyers to limit their practices to certain clientele, as long as that clientele are "members of underserved populations"

– whatever that may 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 Rule. 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 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. 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 Rule unconstitutional because – by prohibiting only disfavored discriminatory messages, while allowing favored ones – the Rule creates 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 Rule Will Not Be Applied in an Unconstitutional Manner Does Not Cure the Rule's Constitutional Infirmities

Some supporters of the proposed Rule may suggest that – in order to assuage attorneys' concerns about the proposed Rule's constitutional infirmities – the proposed Rule be modified so as to provide that the Rule will not be applied in an unconstitutional manner. Such an attempt, however, would not, in fact, remedy 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. The Committee 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 *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 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 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(f) 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 "these Rules" – which would include proposed Rule 8.4(f) itself.

Further, by stating that the Rule will not prohibit "legitimate advice or advocacy" the proposed Rule – for the first time – creates the concept of *illegitimate* advice or advocacy. Giving advice and advocating for clients are the very essence of what lawyers do. 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 the attorney's ability to provide her client 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 Rule Also Violates the Alaska Constitution.

Like the United States Constitution, the Alaska Constitution generally guarantees citizens the right to free speech without governmental infringement. In fact, the Alaska Supreme Court has long held that Alaska's constitutional heritage may require individual protections over and above federal guarantees. *Club Sinrock, LLC v. Municipality of Anchorage*, ____ P.3d ____ (Alaska 2019). As the Alaska Supreme Court has declared:

> "[W]e are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage." *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970).

Therefore, under the Alaska Constitution, laws and regulations such as the Rule proposed here – which are content-based speech restrictions – are analyzed under a strict scrutiny standard. Thus the proposed Rule would only pass muster under the Alaska Constitution if the Rule serves a compelling governmental interest and is narrowly tailored to serve that interest. As explained above, however, the proposed Rule fails that test.

Therefore, the Rule is as unconstitutional under the Alaska Constitution as it is under the U.S. Constitution.

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

B. Only One State Has Adopted Model Rule 8.4(g). All Other State Supreme Courts That Have Considered And Acted Upon the Rule Have Rejected It

The Committee should note that – in the nearly three years since the ABA adopted Model Rule 8.4(g) – although many states have considered it, only one state, Vermont, has adopted it. The supreme courts of four states – Arizona, Idaho, South Carolina, and Tennessee – have expressly rejected the Rule. And the supreme court of Montana – the first state supreme court to consider Model Rule 8.4(g) – recently ended its consideration of the rule and declined to adopt it.

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

In fact, not only do the majority of states have no blackletter 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) is comparable to Model Rule 8.4(g) or the Rule currently being considered here in Alaska. (Maine recently adopted a rule based on the Model Rule, but it contains significant modifications, such as a more restricted application and an express exemption for attorneys' client selection decisions. Likewise, New Hampshire recently adopted a new nondiscrimination rule, but the 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.

Aside from Vermont and Maine, none of the jurisdictions with blackletter anti-discrimination rules extends its rule to "conduct related to the practice of law" as the Model Rule

does, or conduct "in connection with the practice of law" as does the Alaska proposed Rule. 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 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). California limits its provision to attorney conduct "in representing a client, or in terminating or refusing to accept the representation of any client" or "in relation to a law firm's operations." Massachusetts, New Jersey and Ohio limit their Rules to conduct "in a professional capacity." New Hampshire limits its rule to attorney conduct "while acting as a lawyer." And Massachusetts limits its Rule to conduct "before a tribunal."

Likewise, other than Vermont, no state's rule prohibits – as Model Rule 8.4(g) 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 antidiscrimination 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 antidiscrimination statute or ordinance.

And unlike Model Rule 8.4(g) and the Rule proposed here in Alaska, 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) and the Rule proposed here in Alaska – which have 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).

So, should Alaska adopt the proposed Rule, it will have adopted a Rule that impinges on attorney conduct in ways, and far more extensively, than any other jurisdiction – other than Vermont – has seen fit to do.

There are good reasons why the majority of jurisdictions have not adopted any blackletter nondiscrimination Rules in their Rules of Professional Conduct. And there are also good reasons why no state other than Vermont has adopted ABA Model Rule 8.4(g). And there are good reasons why the Supreme Courts of Arizona, Idaho, South Carolina, Tennessee, and Montana have rejected ABA Model Rule 8.4(g). For these same reasons, Alaska would be wise to reject the Rule proposed here as well.

C. The Proposed Rule 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 adversely affect an attorney's fitness to practice law or that would prejudice the administration of justice. Alaska's current Rule 8.4 recognizes this principle by prohibiting attorneys from engaging in five 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;

(d) Stating or implying an ability either to influence a government agency or official or to achieve results that violate the Rules of Professional Conduct or other law; or

(e) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The first proscribed conduct – violating 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 Rule 8.4(b) does not even conclude that all *criminal* conduct is a violation of the Rules of Professional Conduct. Instead, the Rule proscribes only criminal conduct "that reflects adversely on the lawyer's honesty,

trustworthiness or fitness *as a lawyer* in other respects" (emphasis added).

And the fourth and fifth proscriptions in Alaska's 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.

In short, Alaska'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 would seriously interfere with the proper and efficient operation of the judicial system.

The proposed Rule, however, takes the Alaska Rules in a completely new and different direction because, for the first time, the proposed 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 proposed 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 Rule will constitute a free-floating nondiscrimination/anti-harassment provision.

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 Rule is adopted, an attorney could actually engage in *criminal*

conduct 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*") but could be disciplined merely for engaging in politically incorrect speech. In that respect, the proposed Rule would create a sort of "super offense," because unlike Rule 8.4(b) – which only prohibits criminal conduct that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer – the proposed Rule would prohibit all discriminatory or harassing behavior, without regard to whether or not such conduct 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* conduct.

Because the proposed Rule constitutes an extreme and dangerous departure from the principles and purposes historically underlying Alaska's attorney misconduct rules and the legitimate interests of professional regulation, the proposed Rule should be rejected.

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

Many of the circumstances the proposed Rule would address are already addressed by other laws. For example, to the extent the proposed Rule addresses harassment or discrimination in the legal workplace, such behavior is already addressed in Title VII at the federal level, as well as in Alaska's employment nondiscrimination laws, including A.S. Sec. 18.80.220, which covers all work places regardless of the number of employees employed. And harassing and discriminatory judicial behavior – as well as discriminatory and harassing conduct of attorneys in proceedings before judicial tribunals – are already addressed in the Code of Judicial Conduct. Alaska Court Rule, Code of Judicial Conduct, Canon 3 (5) and (6).

Furthermore, supporters of nondiscrimination rules in the Rules of Professional Conduct admit that such rules will not, in fact, effectively address the issues the rules are meant to address. For example, Professor Alex Long – a professor of law at the University of Tennessee – has written that, for a variety of reasons, 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 professio*n" (emphasis added). Alex B. Long, *Employment Discrimination in the Legal Profession: A Question of Ethics?*, 2016 U. Ill. L. Rev. 445, 471-472 (2016).

So the proposed Rule is not only unnecessary, it is also ineffective.

In addition, the proposed Rule 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 Rule 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. Professor Long recognizes this problem, writing that "employment discrimination law is a confusing, complicated area of law" and that "asking disciplinary authorities to master not only the complexities of modern discrimination law, but to devise a new and effective enforcement method is asking quite a bit." He concludes that "if states expect their professional responsibility organizations to engage in significant enforcement, they would need to be willing to develop special units with special expertise and responsibility for addressing employment discrimination." *Id*. at 468-69.

Further, making discrimination and harassment a professional, as well as a statutory, offense 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, 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 proposed Rule should be rejected.

E. 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) 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.

Like the Model Rule, the Rule being proposed here in Alaska provides only that "*This*

paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16" (our emphasis). 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 was ever any question about that, it is now clear from Vermont's adoption of the Model Rule – which has the same provision as the Rule being proposed in Alaska – 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) of the Model Rules and Rule 8.4(f) of the Rule proposed in Alaska.

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 Alaska'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. For example, the Preamble to Alaska'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 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.

F. 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. 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)("a lawyer's first duty is zealously to represent his or her client"); *Watts v. McKinney*, 394 P.3d 710, 711 (9th Cir. 2005)(a lawyer must be zealous on behalf of his client). So, this is a fundamental professional duty, independent of the Rules of Professional Conduct.

But Rule 1.3 of the Alaska 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 the proposed Rule, the attorney may not be allowed to reject a case or client she might otherwise reject – due to the attorney's personal beliefs – but then must also represent that client with passion and fervor, enthusiastically and in an eager and determined manner.

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

How is that conflict to be resolved?

2. 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 such beliefs of the attorney – would violate Rule 1.7's Conflict of Interest prohibitions.

3. 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, the Comment 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.

4. The Proposed Rule Conflicts with Rule 1.16 (Declining or Terminating Representation). Rule 1.16(a)(1) provides that: *(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the Rules of Professional Conduct or other law.* However, we'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; and Rule 1.3 would prohibit an attorney from representing a client if the attorney could not do so zealously; and Rule 6.2 provides that a lawyer may decline court appointed representation if the attorney finds the client or the client's cause so repugnant as to interfere with the ability of the lawyer to provide un-conflicted representation. To represent clients in any of these situations would constitute a violation of the Rules of Professional Conduct. But Vermont's adoption of the 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, the proposed Rule is in conflict with this Rule too.

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

Indeed, the fact that the proposed 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 the attorney does not want – whatever the reason – to represent.

III. Conclusion

The proposed Rule is unconstitutional. It is unconstitutionally vague. It is unconstitutionally overbroad. And it constitutes an unconstitutional content-based speech restriction. It violates attorneys' Free Speech, Free Exercise, and Free Association rights.

In addition to being constitutionally infirm, the proposed Rule would sever Alaska'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. It would create a strict liability speech code for lawyers. And the proposed Rule would subject attorneys to duplicative prosecutions, as well as inconsistent obligations and results.

The many infirmities of the proposed Rule are evidenced by the fact that, in the three years since the ABA adopted Model Rule 8.4(g) – the Rule upon which the Rule being proposed here in Alaska is based – only one state has adopted it. All other state supreme courts that have considered and acted upon the rule have rejected it. So, should Alaska adopt the proposed Rule, it would be embarking on a path that all states, but one, have – for good reasons – rejected.

For all these reasons, the proposed amendment to Rule 8.4 of the Alaska Rules of Professional Conduct should be rejected.

Respectfully submitted,

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