To: Jodi Nafzger

From: Steve Smith

Re: Idaho State Bar Professionalism and Ethics Section Subcommittee on the Proposed Idaho Rules of Professional Conduct, Rule 8.4(g)

Date: May 26, 2017

Thank you, and thanks to Brad Andrews, for the invitation to provide a dissenting opinion about the proposed Rule 8.4(g) (the "subsection") that was approved on May 8, 2017 for discussion at the CLE on June 6, 2017. Also, I wanted to express my appreciation to all the subcommittee members for all of the time, energy and good discussion invested by them.

The reasons that the rule should not be amended include the following:

1. **The proposed subsection is a "solution" in search of a problem.** Albert Einstein, who was a pretty good problem solver, was quoted as saying, "The framing of a problem is often more essential than its solution." I don't recall any evidence being presented in the Subcommittee's deliberations that demonstrated an actual need in Idaho for the subsection, especially in light of the fact that provisions already exist in the rules to address the concerns that were raised.

2. **The amendment would undermine the U. S. Constitution and threaten our liberties**. Thomas Jefferson wrote the following to James Madison in 1787: "A bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse...." Abraham Lincoln echoed that belief when he said, "Don't interfere with anything in the Constitution. That must be maintained for it is the only safeguard of our liberties." Attached is an analysis of the Rule provided by a constitutional lawyer who has reviewed the ABA Model Rule and various state rules. The analysis clearly shows the dangers posed if the subsection were adopted.

3. **There are better uses of state bar resources.** By creating a parallel system of discrimination and harassment rules, the bar would (A) duplicate judicial processes and remedies already provided by other tribunals (such as Title VII, etc.), (B) allow a situation that could result in inconsistent findings from other judicial tribunals (such as a court in a Title VII complaint) and disciplinary authorities, and (C) subject attorneys to having to defend

themselves in multiple venues for the same conduct. Also, because the subsection is so vague, it could lead to many meritless claims being filed, but which the bar disciplinary authorities are going to have to process nonetheless.

4. **The subsection would create a list of protected classes that is either underinclusive or overinclusive.** It creates special rights for some, and leaves others unprotected. The increasing number of protected classes has no limits and subjects the bar to politically-motivated demands that one's particular characteristic be included in the never-ending list of protected classes. Some interests are pushing for "height and weight" to be included. At least one government has included "reproductive (ie, contraceptive and abortion) decisions." How about red-heads? Or left-handers?

After listening to the subcommittee's discussions, the conclusions that I have reached are two-fold: First, if it isn't broken in Idaho — and I don't recall any evidence being presented that it is—then there is nothing that needs to be fixed. Secondly, even if there were a problem, the fix would not be the subsection because of (1) free speech constitutional infirmities (vagueness, overbreadth, and viewpoint discrimination) (2) going beyond legitimate interests of the bar in regulating attorney conduct that neither prejudices the administration of justice nor renders an attorney unfit, (3) interference with the professional autonomy of attorneys – particularly with respect to choosing which clients and cases to accept or decline, and (4) the subsection will disserve clients by saddling them with attorneys who will not provide them with unconflicted representation because the attorney harbors some animosity toward the client or the client's case.

Thank you again for the opportunity to submit this opinion.

Sincerely,

Steve Smith

IN RE: PROPOSED ADOPTION OF)
RULE OF)
PROFESSIONAL CONDUCT 8.4(g))

Memorandum in Support of Dissenting Opinion from Proposal to Amend Rule 8.4 of the Idaho Rules of Professional Conduct

On May 8, 2017 the Idaho State Bar Professionalism & Ethics Subcommittee approved for submission to the Idaho State Bar Professionalism & Ethics Section an amendment to Idaho Rules of Professional Conduct 8.4. For the reasons set forth below, the rule should not be amended.

I. The Rule

A. Idaho's Current Rule

Idaho' s current Rule of Professional Conduct 8.4(d) provides as follows:

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

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

The Subcommittee's proposal would amend Idaho Rule 8.4 by adding an entirely new subsection (g), which reads:

> *It is professional misconduct for a lawyer to: . . . (g) engage in discrimination or harassment, defined as follows:*
>
> *(1) in representing a client or operating or managing a law practice, engage in conduct that the lawyer knows or reasonably should know is unlawful discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. This subsection does not limit the ability of a lawyer to accept, decline or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules; and*
>
> *(2) in conduct related to the practice of law, engage in conduct that the lawyer knows or reasonably should know is harassment. Harassment is derogatory or demeaning verbal, written, or physical conduct toward a person based upon race, sex religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. To constitute a violation of this subsection, the harassment must be severe or pervasive enough to create an environment that is intimidating or hostile to a reasonable person. This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in theses Rules or preclude advice or advocacy consistent with these Rules.*
>
> .

In addition, the Subcommittee's proposal amends Comment [3] of Idaho's Rule 8.4 and adds two new Comments – Comments [4] and [5] – to Rule 8.4. Those Comments would read:

> ***Comment [3]*** *– Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes sexual harassment such as unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal, written, or physical conduct of a sexual nature. Factors to be considered to determine whether conduct rises to the level of harassment under paragraph (g)92) of this Rule include: the frequency of the harassing conduct; its severity; whether it is threatening or humiliating, or a mere offensive utterance; whether it is harmful to another person; or whether it unreasonably interferes with conduct related to the practice of law. Petty slights, annoyances, and isolated incidents, unless extremely serious, will not rise to the level of harassment under paragraph (g)(2). The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).*
>
> ***Comment [4]*** *– Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.*
>
> ***Comment [5]*** *– A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in*

accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

II. The Objections

A. The Proposed Rule Is Unconstitutional.

1. Many Authorities Have Expressed Concerns About The Constitutionality Of The New ABA Model Rule Upon Which The Subcommittee's Proposal Is Based.

The Subcommittee's proposal is based upon the ABA's new Model Rule 8.4(g). Many authorities have pointed out constitutional infirmities of the ABA's new Model Rule.

When the ABA opened up the new Model Rule for comment, a total of 481 comments were filed – and of those 481 comments, 470 of them opposed the new Rule, many on the grounds that the new Rule would be unconstitutional.

Indeed, the ABA's own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law Section, warned the ABA that the new Rule may violate attorneys' First Amendment speech rights.

And prominent legal scholars, such as UCLA constitutional law professor Eugene Volokh and former U.S. Attorney General Edwin Meese, III, have opined that the new Rule is

constitutionally infirm. "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities,*" Eugene Volokh, The Washington Post, August 10, 2016 and http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf.

Attorney General Meese wrote that the new Rule constitutes "*a clear and extraordinary threat to free speech and religious liberty*" and "*an unprecedented violation of the First Amendment.*" http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf

In addition, the authors of at least two law review articles have noted that these sorts of professional Rules violate attorneys' First Amendment rights. See, for example, *Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge On Lawyers' First Amendment Rights,* Lindsey Keiser, 28 Geo. J. Legal Ethics 629(Summer 2015)(Rule violates attorneys' Free Speech rights) and *Attorney Association: Balancing Autonomy and Anti-Discrimination,* Dorothy Williams, 40 J. Leg. Prof. 271 (Spring 2016)(Rule violates attorneys' Free Association rights).

In fact, in several states that have already considered adopting the new Model Rule, important professional stakeholders have rejected it. For example, the Illinois State Bar Association has taken an official position opposing the Rule; the Pennsylvania Supreme Court Disciplinary Board is opposing the Rule; and the South Carolina Bar's Committee on Professional Responsibility is opposing the new Rule stating that the Rule is unconstitutionally vague, unconstitutionally overbroad, and constitutes unconstitutional content discrimination.

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

The legislature of the State of Montana has adopted a Joint Resolution declaring the new

Rule unconstitutional. Montana Senate Joint Resolution No. 15.

Finally, the Attorney General of the State of Texas has issued an official Opinion that a court would likely conclude that the ABA Model Rule 8.4(g) is an unconstitutional restriction on the free speech, free exercise of religion, and freedom of association of members of the Texas State Bar, and that the new Rule is overbroad and void for vagueness. Opinion No. KP-0123, Attorney General of Texas, December 20, 2016. And the Attorney General of the State of South Carolina has opined that the Rule "severely infringes upon Free Speech." 14 SC AG Opinion.

Although the Subcommittee has made several changes to the new ABA Model Rule in creating its proposed Rule, the changes do not resolve the Rule's constitutional infirmities.

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

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

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

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

The language of the Subcommittee's proposed Rule 8.4(g) violates all these principles.

(a) The Term "Harassment" is Unconstitutionally Vague. The proposed Rule prohibits attorneys from engaging in *harassment* on the basis of one of the protected classes. But the Rule does not define what constitutes "harassment" other than by reference to vague descriptions – such as that harassment is "derogatory or demeaning" speech or conduct toward a person based upon one or more of the protected classes.

Does expressing disagreement with someone's religious beliefs constitute harassment based on religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment? Comment [3] states that "[p]etty slights, annoyances, and isolated incidents will not rise to the level of harassment "unless extremely serious." But how, exactly, is an attorney supposed to know what conduct the disciplinary authorities will consider "extremely serious"?

Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996)(holding that the term "harasses," without any sort of definition or objective

standard by which to measure the prohibited conduct, was unconstitutionally vague). See also *Are Stalking Laws Unconstitutionally Vague Or Overbroad*, 88 Nw. U. L. Rev. 769, 782 (1994)(the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass.").

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

Further, courts have found terms such as "derogatory" and "demeaning" to be unconstitutionally vague. *Hinton v. Devin*e, 633 F.Supp. 1023 (E.D. Pennsylvania 1986)(the term "derogatory" without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal.App.4th 669 (Cal.App. 2012)(statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

(b) The Term "Discrimination" is Unconstitutionally Vague. It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it is also true that such statutes and ordinances do not – as does the proposed Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

For example, Title VII does not merely provide that it shall be an unlawful

employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that "*It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin*." 42 U.S.C. § 2000e-2.

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

origin." 42 U.S.C. § 3604. And the Act provides precise definitions of important terms used in the Act, such as "*dwelling*," "*person*," "*to rent*," and "*familial status*." 42 U.S.C. § 3602.

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

The Subcommittee's attempt to define the term "discrimination" by limiting its application to "unlawful" discrimination, does not cure the defect because (1) an attorney will not be able to determine beforehand what constitutes "unlawful" as opposed to "lawful" discrimination" and (2) the Rule contains no requirement that an attorney actually be found by some independent judicial tribunal to have violated any specific federal, state, or local nondiscrimination statute or ordinance in order to be found to have engaged in "unlawful" discrimination.

As a consequence, the disciplinary tribunal will be able to find that an attorney engaged in "unlawful discrimination" under the Rule without the attorney actually having been legally found to have engaged in "unlawful discrimination" and even though the attorney may not have, in fact, engaged in unlawful discrimination uder any specific statute or ordinance.

Other states – such as Illinois and New York – avoid this defect by requiring that, before a professional complaint can be filed against an attorney for discrimination,

the attorney has to have been found by a tribunal, other than a disciplinary tribunal, to have actually violated a specific federal, state, or local nondiscrimination law. See, for example, Illinois rule 8.4(j) and New York Rule 8.4(g). The Subcommittee's proposed Rule contains no such provision.

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

The Subcommittee's proposed anti-harassment Rule applies to any conduct of an attorney that is in any way "*related to the practice of law*." What conduct is related to the practice of law and what conduct is unrelated to the practice of law, however, is vague and not easily or readily determinable.

Comment [4] attempts to provide guidance as to what the phrase "related to the practice of law" means. But not only is the Comment's definition nearly limitless, including within it *representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law,* but it is also an explicitly non-exclusive list. So who can say with any degree of certainty where conduct related to the practice of law ends? For example, does the phrase include comments made by an attorney while attending a birthday celebration for a law firm co-worker; or a statement made by an attorney at a cocktail party the attorney is attending, at least in part, in order to make connections that will hopefully result in future legal work; or comments an attorney makes while teaching a religious liberty class at the attorney's church?

Because no attorney, with any degree of certainty, can determine what behavior is

or is not "related to the practice of law," the new Rule is unconstitutionally vague.

If attorneys face professional discipline for engaging in certain proscribed behavior, they are entitled to know precisely what behavior is being proscribed, and should not be left to guess what the proscription might encompass. Nor should the proscriptions be so vague as to allow disciplinary authorities to enforce the Rule in arbitrary or discriminatory ways. Anything less is a deprivation of due process..

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

3. The Proposed Rule is Unconstitutionally Overbroad.

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

It is clear that the Subcommittee's proposed Rule is not only unconstitutionally vague, it is also unconstitutionally overbroad because, although it may apply to attorney conduct that might be unprotected – such as conduct that actually prejudices the administration of justice or that would clearly render an attorney unfit to practice law – the proposed Rule would also sweep within its orbit a great deal of lawyer speech that is clearly protected by the First Amendment, such as speech that might be derogatory, disparaging, or harmful but that would not prejudice the administration of justice nor render the attorney unfit.

It does not take a constitutional scholar to recognize that "harmful," "humiliating," and "derogatory or demeaning" speech sweeps into their ambit speech that is clearly constitutionally protected. Speech is not unprotected merely because it is harmful, derogatory or demeaning. In

fact, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). See also, *Texas v. Johnson*, 491 U.S. 397, 414 (1989)("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

For this reason courts have found terms such as "derogatory" and "demeaning" unconstitutionally overbroad. *Hinton v. Devine*, supra (the term "derogatory information" is unconstitutionally overbroad); *Summit Bank v. Rogers*, supra (statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech). See also *Saxe v. State College Area School Dist.*, 240 F.3d 200, 215 (3rd Cir. 2001)(school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional).

The broad reach of the Subcommittee's proposed Rule is well illustrated by the example that Senior Ethics Counsel Lisa Panahi and Ethics Counsel Ann Ching of the Arizona State Bar give in their article "Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g), " *Arizona Attorney*, January 2017, page 34. In discussing the new ABA Model Rule upon which the Subcommittee's proposed Rule is based, and which contains many of the same overbroad terms, they state that an attorney could be professionally disciplined under the Rule merely for telling an offensive joke at a law firm dinner party. Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provides another

example of the broad reach of the Rule. He writes: "*If one lawyer tells another, at the water cooler or a bar association meeting on tax reform, 'I abhor the idle rich. We should raise capital gains taxes,' he has just violated the ABA rule by manifesting bias based on socioeconomic status.*" *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, p. 4

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

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

For these reasons, the Subcommittee's proposed Rule would not pass constitutional muster.

4. **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 Subcommittee's proposed Rule will constitute an unconstitutional content-based speech restriction. *American Freedom Defense Initiative v. Metropolitan Transp. Authority*, 880 F.Supp.2d 456 (S.D.N.Y. 2012)(ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or

sexual orientation is an unconstitutional content-based violation of the First Amendment).

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

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

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

himself.

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

The Subcommittee's proposed Rule will also violate an attorney's free exercise of religion and freedom of association rights. As an illustration of this problem, Professor Rotunda posits the example of Catholic attorneys who are members of the St. Thomas More Society, an organization of Catholic lawyers and judges. If the St. Thomas More Society should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, Professor Rotunda explains that those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination [or harassment] based on sexual orientation. Indeed – he points out – attorneys might be in violation of the Rule merely for being members of such an organization. *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, pp. 4-5. But, clearly, that speech and an attorney's membership in such an organization are both constitutionally protected. The fact that the Rule may prohibit either indicates that the Rule will be unconstitutional.

Because the proposed Rule is clearly unconstitutional, it should be rejected.

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

The legal profession has a legitimate interest in proscribing attorney conduct that – if not

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

(a) Violating the Rules of Professional Conduct;

(b) Committing criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

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

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

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

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

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

The second and third proscriptions are targeted at attorney conduct which directly impacts the attorney's ability to be entrusted with the professional obligations with which all attorneys are entrusted – namely, to serve their clients and the legal system with honesty and trustworthiness. But– revealingly – those Rules do not proscribe conduct that, although perhaps

not praiseworthy, does not warrant the conclusion that the attorney engaging in such conduct is unfit to practice law. Indeed, it is worth noting that Rule 8.4(b) does not even conclude that all *criminal* conduct is a violation of the Rules of Professional Conduct. Instead, the Rule proscribes only criminal conduct "*that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.*" As Comment [2] to Idaho's current Rule 8.4 explains: "*Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication.. . . . Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category*" (our emphasis).

The fourth type of proscribed conduct is conduct that would prove prejudicial to the administration of justice. Historically, conduct falling within the parameters of this proscription has been limited to misconduct that would seriously interfere with the proper and efficient functioning of the judicial system. For example, the Supreme Court of Oregon analyzed this provision and determined that prejudice to the administration of justice referred to actual harm or injury to judicial proceedings. See, for example, *In re Complaint as to the Conduct of David R. Kluge*, 66 P.3d 492 (Or. 2003), which held that to establish a violation of this Rule it must be shown that the accused lawyer's conduct occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding. And in *In re Complaint as to the Conduct of Eric Haws*, 801 P.2d 818, 822-823 (Or. 1990), the court noted that the Rule encompasses attorney conduct such as failing to appear at trial; failing to appear at depositions;

interfering with the orderly processing of court business, such as by bullying and threatening court personnel; filing appeals without client consent; repeated appearances in court while intoxicated; and permitting a non-lawyer to use a lawyer's name on pleadings. See also, *Iowa Supreme Court Attorney Disciplinary Board v. Wright*, 758 N.W.2d 227, 230 (Iowa 2008)(Generally, acts that have been deemed prejudicial to the administration of justice have hampered the efficient and proper operation of the courts or of ancillary systems upon which the courts rely); *Rogers v. The Mississippi Bar*, 731 So.2d 1158,1170 (Miss. 1999)(For the most part this rule has been applied to those situations where an attorney's conduct has a prejudicial effect on a judicial proceeding or a matter directly related to a judicial proceeding); *In re Hopkins*, 677 A.2d 55, 60-61 (D.C.Ct.App. 1996)(In order to be prejudicial to the administration of justice, an attorney's conduct must (a) be improper, (b) bear directly upon the judicial process with respect to an identifiable case or tribunal, and (c) must taint the judicial process in more than a *de minimus* way, that is, at least potentially impact upon the process to a serious and adverse degree); and *In re Karavidas*, 999 N.E.2d 296, 315 (Ill. 2013)(In order for an attorney to be found guilty of having prejudiced the administration of justice, clear and convincing proof of actual prejudice to the administration of justice must be presented). Therefore, this provision, too, is directed at attorney conduct that exposes the judicial process itself to serious harm.

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

In short, Idaho's Rule 8.4 has always – heretofore – been solely concerned with attorney conduct that might render an attorney unfit to practice law or that seriously interferes with the

proper and efficient operation of the judicial system.

The Subcommittee's proposed Rule 8.4(g), however, takes Rule 8.4 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 Subcommittee's proposed Rule would not require *any* showing that the proscribed conduct prejudice the administration of justice or that such conduct adversely affects the offending attorney's fitness to practice law, the proposed Rule will constitute a free-floating speech code – the only restriction on which will be that the conduct be "related to the practice of law."

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

Strikingly, if the proposed Rule is adopted, an attorney could actually engage in *criminal* conduct without violating the Rules (see, for example, *Formal Opinion Number 124 (Revised) – A Lawyer's Use of Marijuana* (October 19, 2015)(a lawyer's use of marijuana, which would constitute a federal crime, does not necessarily violate Colo.R.P.C. 8.4(b))), because Rule 8.4(b) only applies to a lawyer's "*criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*," but could be disciplined merely for engaging in politically incorrect speech.

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

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

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

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

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

Some contend that the proposed Rule will not require an attorney to accept any client or case the attorney does not want to accept – pointing to the language of the Rule that provides: "*This subsection does not limit the ability of a lawyer to accept, decline or withdraw from a representation as otherwise permitted by these Rules*." But the Rules nowhere address the

question of what clients or cases an attorney is "permitted to decline." The Rules only address the question of which clients and cases an attorney is not permitted to accept. For example, an attorney is not permitted to take a case the attorney would otherwise accept if the case or client would present the attorney with a conflict of interest. But the Rules nowhere address the situation where an attorney does not want to accept a case or client despite the fact that the attorney *is permitted* to do so. So there are no Rules upon which a lawyer could rely in declining to represent a case or client that the Rules do not forbid.

Does anyone really believe that – under the proposed Rule – a male family law attorney could decline to represent a woman in a divorce case simply because the attorney has made a decision to represent only men in divorce cases? I think not. Such a lawyer would be in facial violation of the proposed Rule. He would be engaged in conduct in representing a client or in operating a law practice that the lawyer knows or reasonably should know is discrimination on the basis of sex. Or how about an adoption attorney who is committed to the LGBTQ community and, therefore, represents only same-sex adopting couples in adoption proceedings? In doing so such an attorney would be engaged in conduct in representing a client or in operating a law practice that she should know is discrimination on the basis of sexual orientation and would, therefore, be in violation of the Rule.

So this is another grave departure from the professional principles historically enshrined in Idaho'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.

Indeed, up until now, the principle that attorneys were free to accept or decline clients or cases at will, for any or no reason, prevailed universally. See, for example, *Modern Legal*

Ethics, Charles W. Wolfram, p. 573 (1986)("*a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.*").

There are, of course, good reasons why the profession has left to the attorney the professional decision as to which cases the attorney will accept and which the attorney will decline and which clients the attorney will or will not represent.

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 detrimental to the client, because every client deserves an attorney who is not subject to or influenced by any interests – including, indeed perhaps especially, discriminatory ones – which may, directly or indirectly, adversely affect the lawyer's ability to zealously, impartially, and devotedly represent the client's interests.

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

Should a gay attorney be forced to represent the Westboro Baptist Church? Should an African American attorney be forced to represent a member of the KKK? Should a Jewish lawyer be forced to represent a neo-Nazi? And, if so, would these attorneys be able to provide zealous representation to these clients? To pose these questions is sufficient to answer them, in

the negative. And yet that is exactly what the proposed Rule would do.

For these reasons, too, the Subcommittee's proposed Rule 8.4(g) should be rejected.

D. There Is No Need For the New Model Rule Because the Idaho Rules of Professional Conduct Already Contain Provisions Sufficient To Address Discrimination.

Given the fact, as addressed above, that the only legitimate interest the bar has in proscribing attorney conduct is in proscribing conduct that either renders an attorney unfit to practice law or that prejudices the administration of justice, Idaho's current Rules of Professional Conduct are already sufficient to address serious cases of harassment or discrimination.

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

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

addressed in the Code of Judicial Ethics.

Also, Rule 4.4 of the Idaho Rules of Professional Conduct already specifically addresses discrimination. Rule 4.4(a)(1) provides that: "*In representing a client, a lawyer shall not: (1) use means that have no substantial purpose other than to embarrass, delay, or burden a third person, including conduct intended to appeal to or engender bias against a person on account of that person's gender, race, religion, national origin, or sexual preference, whether that bias is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants*." Much of the Subcommittee's proposed Rule is already covered by Rule 4.4 – but in a much more limited and appropriate way.

Therefore, the proposed Rule is unnecessary.

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

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

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

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

Where *is* the evidence that the legal profession in this state is so rife with harassment and invidious discrimination that the Rules of Professional Conduct simply *must* be amended to address the problem?

Those who would support this effort to amend Rule 8.4 would have to believe that – despite the lack of any actual evidence that attorneys are, in fact, pervasively engaged in invidious harassment and discrimination, many of their fellow lawyers are so vile and depraved that, unless the professional disciplinary authorities are armed with a new precedent-setting tool enabling them to encroach upon the sanctity of all lawyers' professional autonomy, not to mention their personal consciences and constitutional rights, dictating to attorneys who they must represent and which cases they must accept and disciplining them for using politically incorrect speech – lawyers, on the whole, cannot be trusted to behave honorably. I have greater respect for and confidence in my fellow members of Idaho's legal profession.

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

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

At first glance, this provision might appear to assist attorneys, by getting them "off the hook"

– so to speak – from having to worry about becoming morally complicit in a client's behavior. But, in fact, that's precisely the problem with the Rule. By adopting this Rule the state is presuming to take on the role of the attorney's spiritual advisor.

To understand why this is so, consider the Catechism of the Catholic Church, which explicitly teaches that it is a sin for one to become complicit in the sins of others – by participating in them, by advising them, by not hindering them, or by protecting them.

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

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

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

Indeed, by preemptively depriving attorneys of the claim that representing a client will make them complicit in a client's behavior – the very purpose of this provision of the proposed Rule appears to be to foreclose attorneys from being able to assert religious or moral considerations in making client selection decisions – thereby forcing attorneys to either act against their conscience or face professional discipline.

No state should adopt a Rule that would do that.

III. Conclusion

For all the foregoing reasons, the proposed Rule 8.4(g) and its Comments should not be adopted.