Memorandum in Support of 2021 I.R.P.C. 8.4 Proposed Amendments

In 2020, active members of the Idaho State Bar ("ISB") responded to a survey concerning harassment and discrimination in the Idaho legal community. According to the survey results, two in five attorneys have been a victim of discrimination during their legal career. One out of four have been harassed in the profession. The victims in the survey results were disproportionately female; approximately half of the female respondents had been harassed at least once during their career, and 75% reported incidents of discrimination. The survey respondents expressed a desire to change the Idaho Rules of Professional Conduct to combat harassment and discrimination they have observed in Idaho's legal community.

The American Bar Association's Model Rule of Professional Conduct 8.4(g) ("MRPC 8.4(g)") prohibits attorneys from engaging in discrimination or harassment in conduct related to the practice of law. In September 2016, the ISB Board of Commissioners asked its Professionalism & Ethics Section ("Section") to analyze MRPC 8.4(g) for the purpose of recommending its potential for adoption in Idaho. The Section formed the Anti-Discrimination Anti-Harassment Committee ("Committee"), who spent nearly a year researching and drafting an amended version of MRPC 8.4(g) to propose for adoption in the Idaho Rules of Professional Conduct. The resulting draft rule submitted by the Section ("2017 Proposed Rule") was approved and co-sponsored by the ISB Board of Commissioners. The 2017 Proposed Rule subsequently passed bar membership with approximately 62% of the votes. However, in a 3-2 decision issued on September 5, 2018, the Idaho Supreme Court rejected the 2017 Proposed Rule and encouraged the Committee to revisit the rule in the future.

In the years that have followed, the 2017 Proposed Rule has undergone several rounds of revision. The Committee considered existing advisory and judicial opinions[1] that analyzed First Amendment challenges against similar antidiscrimination rules, including MRPC 8.4(g), with the goal of striking an appropriate balance between preserving First Amendment rights and achieving MRPC 8.4(g)'s objectives. The Committee is confident that the rule proposed today strikes this balance. Its confidence is based, in part, on several developments that took place during the revision process. For instance, the Committee paid particular attention to two opinions analyzing the constitutionality of a proposed antidiscrimination rule, each further detailed in the sections below.

[1] To date, two courts and three state attorney generals have published opinions analyzing the constitutionality of a proposed antidiscrimination rule. *See In re Abrams*, No. 20SA81 (Colo. June 7, 2021); *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Penn. 2020); La. Att'y Gen. Op. No. 17-0114, 2017 WL 4466513 (Sept. 8, 2017); S.C. Att'y Gen. Op., 2017 WL 1955652 (May 1, 2017); Tx. Att'y Gen. Op. No. KP-0123, 2016 WL7433186 (Dec. 20, 2016).

The Proposed Rule is Narrower than MPRC 8.4(g)

MRPC 8.4(g) has been criticized for its arguable overbreadth and potential infringement on rights protected by the First Amendment. The rule presented today ("Proposed Rule") reflects the Committee's efforts to address those concerns. Unlike MRPC 8.4(g), the Proposed Rule is limited to *unlawful* discrimination, which means that an attorney's conduct must amount to a violation of state or federal antidiscrimination law in order to come within the Rule's reach with regard to discrimination. The Rule's scope of conduct for both discrimination and harassment is otherwise narrowed to conduct (a) in the representation of a client, (b) in operating or managing a law practice, and (c) in the course and scope of employment in a law practice. This reflects a clear departure from MRPC 8.4(g)'s vague reference to "conduct *related to* the practice of law," which seeps into settings where free speech rights should be fully embraced (such as social events). For good measure, the Proposed Rule's commentary expressly excludes bar association, business, or social activities outside of those contexts. Finally, MRPC 8.4(g) provides no clear definition of "harassment," and instead punts the question of qualifying conduct to substantive anti-harassment law. The Proposed Rule not only defines harassment, but also limits the rule's reach to *severe* or *pervasive* harassment, therefore drawing lines that are wholly absent from the face of MRPC 8.4(g). In addition, these changes mimic the language of existing employment laws regulating harassment in the employment setting—laws which have not been found to be facially invalid.

The Proposed Rule is Narrower than Other States' Antidiscrimination Rules

In December 2020, a federal Pennsylvania court struck down the state's antidiscrimination rule ("Pennsylvania Rule") on First Amendment grounds.[2] At that time, this decision was the sole judicial opinion that addressed the constitutionality of antidiscrimination rules in professional conduct codes. However, in June 2021, the Colorado Supreme Court upheld Colorado's long-standing antidiscrimination rule ("Colorado Rule") against a First Amendment challenge. The Colorado Rule was significantly narrower in scope than the Pennsylvania Rule and therefore passed constitutional muster. One month later, the Pennsylvania Supreme Court enacted an amended version of the previously-invalidated Pennsylvania Rule, one that was constructed to preserve the First Amendment rights that the previous version had left unprotected. The Committee closely followed these developments during the revision process. As a result, the Proposed Rule is narrower in scope than <u>any</u> antidiscrimination rule found unconstitutional by judicial or advisory opinion to date, including the Colorado Rule and Pennsylvania Rule.[3]

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[2] *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Penn. 2020).

[3] The three advisory opinions issued by state attorney generals analyzed the constitutionality of MPRC 8.4(g) in its original form. As explained in the preceding section, the Proposed Rule is narrower than MRPC 8.4(g).

The (invalidated) Pennsylvania Rule applied to all conduct "in the practice of law," which was loosely defined as all activities "that are required for a lawyer to practice law." By contrast, the Proposed Rule carefully defines the limited settings in which it applies, much like the Colorado Rule. In addition, "harassment" is defined *at length* in the language of the Proposed Rule and its commentary, including examples and a list of factors, whereas the Pennsylvania Rule provided no substantive definition for harassment.

The Proposed Rule is Narrower than the Version Proposed in 2017 (*i.e.,* the 2017 Proposed Rule)

Likewise, today's Proposed Rule is even narrower than the version proposed by the Committee in 2017. For example, the 2017 Proposed Rule borrowed overbroad language from MRPC 8.4(g) to define the scope of conduct subject to its anti-harassment provision. The 2017 Proposed Rule prohibited harassment in "conduct related to the practice of law"—a phrase frequently attacked in judicial and advisory opinions for free speech, vagueness, and overbreadth violations. "Conduct related to the practice of law" was defined using a non-exhaustive list of activities that included participating in bar association activities, business activities, and social activities. After analyzing the existing judicial and advisory opinions, the Committee narrowed the Proposed Rule's scope to apply in three well-defined settings: (a) in the representation of a client, (b) in operating or managing a law practice, and (c) in the course and scope of employment in a law practice. Finally, the Proposed Rule expressly *excludes* conduct that takes place at bar association activities, business activities, and social activities.