



THE STATE
of **ALASKA**
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Board of Governors
c/o Robert Stone, President
Alaska Bar Association
P.O. Box 100279
Anchorage, AK 99510-0279

Re: *Proposed Rule of Professional Conduct 8.4(f)*

Dear Board of Governors:

The Alaska Bar Association has solicited comments on an amendment to the Alaska Rules of Professional Conduct. Proposed Rule of Professional Conduct 8.4(f) establishes a new category of professional misconduct. Lawyers who engage in conduct that they know or reasonably should know is harassment or discrimination on the basis of certain identity groups while practicing law, running a firm, or participating in activities connected to legal practice, can be sanctioned. With this rule, the Bar Association intends to promote professionalism, respectfulness, and inclusiveness in the legal profession. Yet the rule wanders far afield of those goals. Parts of the Proposed Rule laudably promote professionalism and respect by attorneys to all individuals regardless of personal traits or characteristics. However, by regulating the expression of ideas and religious practices, Proposed Rule 8.4(f) burdens attorneys' fundamental constitutional rights and threatens the core of what it means to be an attorney: protecting the rule of law, including the United States Constitution, and advocating zealously for clients.

The Proposed Rule would allow the Bar Association to sanction a broad range of expression protected by the United States and Alaska constitutions. Consider the following examples, all of which could be sanctioned under the proposed rule. A devout Catholic attorney, who holds a sincere religious conviction regarding the importance of traditional marriage and parenting, politely declines to assist a same-sex couple with an adoption and refers them to a colleague without such religious conviction. An attorney in a child custody hearing involving same-sex parents articulates her client's concern about

traditional family values in a way that, in the Bar disciplinary board's view, manifests bias. Or an attorney makes a comment about traditional family values to her expert witness while standing in line at Starbucks before a hearing, within earshot of opposing counsel. Or, the same comment is made by an attorney to a colleague working on a pro bono matter for a same-sex couple who wants to adopt, over lunch to a group of summer associates, at a Bar Association panel regarding the future of same-sex marriage, at a cocktail lounge during the annual Bar convention, at a Catholic Lawyers Guild meeting, or at home, to a neighbor who needs advice for his divorce. The only area of lawyerly life that Proposed Rule 8.4(f) does not touch is the private unexpressed mind.

This letter offers a brief history of Rule 8.4(f) before explaining its constitutional infirmities. Applications of Rule 8.4(f) will violate First Amendment freedoms, including freedom of speech, free exercise of religion, and freedom of association. The protected activity that Rule 8.4(f) regulates is substantial, inviting courts to invalidate the rule as overbroad. Rule 8.4(f) is also impermissibly vague because it lacks the specificity that would prevent discriminatory enforcement and put attorneys on notice about what types of conduct can be sanctioned.

The Alaska Bar Association should not recommend and the Alaska Supreme Court should not adopt a conduct rule that forces lawyers—members of a profession devoted to vigorous debate and the airing of difficult issues—to obey an orthodoxy. As a policy it is unwise, and as a law it is unconstitutional. Instead, the Bar Association should expressly limit the scope of Proposed Rule 8.4(f) to prohibiting illegal conduct under federal and state law, which can be regulated without offending the Constitution. While the goal of encouraging professionalism and mutual respect in the practice of law is worthy, the Proposed Rule sweeps far broader than the Constitution permits.

BACKGROUND

Since the 1970s, the legal profession has become increasingly diverse. As many women as men now attend law schools, and more than a quarter of law students belong to a minority group.¹ Changing demographics and cultural norms have raised awareness about sexual harassment and the underrepresentation of minorities at law firms.²

¹ Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for Courts Considering Model Rule 8.4(g)*, 30 *Georgetown J. Legal Ethics* 195, 197–98 (2017).

² See Ashley Badesch, *Lady Justice: The Ethical Considerations and Impacts of Gender-Bias and Sexual Harassment in the Legal Profession on Equal Access to Justice for Women*, 31 *Georgetown J. Legal Ethics* 497, 503 (2018); Claudia E. Haupt,

In August 2016, the American Bar Association amended the Model Rules of Professional Conduct to incorporate harassment and discrimination within the category of professional misconduct. Rule 8.4(g) makes it misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”³ Rule 8.4(g) neither prevents lawyers from accepting, declining, nor withdrawing from representation in compliance with Rule 1.16 nor “preclude[s] legitimate advice or advocacy.”⁴ Three comments clarify the meaning of “discrimination” and “harassment,”⁵ establish the scope of “conduct related to the practice of law,”⁶ and shield “diversity and inclusion” programs,⁷ the representation of “underserved populations,”⁸ and the exercise of peremptory strikes.⁹

States did not respond enthusiastically. Attorneys General in Texas, South Carolina, Louisiana, and Tennessee published opinions identifying constitutional infirmities in Rule 8.4(g) and cautioning their Supreme Courts against adopting the rule.¹⁰ The North Dakota Joint Committee on Attorney Standards recommended that the state retain the existing “prejudicial to the administration of justice” rule, which already prohibited knowing manifestations of bias or prejudice except as part of legitimate advocacy.¹¹ In Montana, a joint resolution of the state legislature warned the state Supreme Court that Rule 8.4(g) violated federal and state constitutions.¹² After considering Rule 8.4(g), Nevada did not change its misconduct rules¹³ and Maine chose

Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g), 19 U. Pa. J. Const. L. Online 1, 4 (2017).

³ Annual Model Rules of Prof’l Conduct r. 8.4(g) (Am. Bar Ass’n 2019).

⁴ *Id.*

⁵ *Id.* at r 8.4 cmt. 3.

⁶ *Id.* at r. 8.4 cmt. 4.

⁷ *Id.*

⁸ *Id.* at r. 8.4 cmt. 5.

⁹ *Id.*

¹⁰ Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol’y. 173, 215 (2019).

¹¹ *Id.* at 217.

¹² *Id.* at 215.

¹³ *Id.* at 214.

to prohibit only unlawful harassment or discrimination.¹⁴ Only one state, Vermont, has adopted the rule “substantially as written.”¹⁵

On June 13, 2019, the Alaska Bar Association released a “Proposed Amendment to ARPC 8.4(f)” to its members via email. Proposed Rule 8.4(f) reads:

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:

- (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.

The Bar Association later published in the April-June issue of the Alaska Bar Rag the text of the Proposed Rule that included a comment. The comment to the Proposed Rule states that “discrimination includes harmful verbal or physical conduct that manifests bias or prejudice to others based on perceived membership in one or more of the groups listed in paragraph (f).” The comment further states that “the substantive laws of anti-discrimination and anti-harassment statutes and case law provide guidance to the application of paragraph (f).” The comment also suggested some limitations on the scope of the Proposed Rule: “Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.” The comment also stated that a lawyer does not violate the Proposed Rule “by limiting the scope or subject matter of the lawyer’s practice to members of underserved populations in accordance with these Rules and other law.”

¹⁴ *Id.*

¹⁵ *Id.* at 213

Finally, the comment states that “[a] lawyer’s representation of a client does not constitute an endorsement of the client’s views or activities,” citing Rule of Professional Conduct 1.2(b).

The Bar Association has solicited comments on the Proposed Rule.

LEGAL ANALYSIS

I. Proposed Rule 8.4(f) is an unconstitutional restraint on expressive conduct.

Proposed Rule 8.4(f) would authorize the Bar Association to sanction attorneys for “verbal conduct”—*i.e.*, speech—that expresses unpopular or offensive ideas. The content-based viewpoint discrimination embodied in the Proposed Rule—constitutionally doubtful to begin with—is all the more dubious because of the Proposed Rule’s broad sweep. Under the Proposed Rule’s terms, the Bar Association could sanction an attorney for speech that has only the most tenuous connection to the practice of law. And the Proposed Rule does not limit sanction to only severe instances of harassment and discrimination. Instead, it would function as a civility code covering every aspect of a lawyer’s conduct, however peripheral to the administration of justice. For these reasons, the Proposed Rule likely would fail to satisfy the strict standards that apply to restraints on protected speech.

The Proposed Rule targets speech’s content—talking about an identity class, however tangentially—and more specifically, content expressing particular attitudes or dispositions. For example, an attorney who wears a Lynyrd Skynyrd hat emblazoned with the Confederate flag to a firm’s charity golf tournament is just as liable as an attorney who, in the course of defending a law school professor censured for throwing a student with the same hat out of the classroom, refers to the cap during a deposition as “redneck.” A disparaging comment about the student’s Southern origins could not be sanctioned, though, because regional identity is not covered by Rule 8.4(f). In fact, the comment to the Proposed Rule allows that some forms of discrimination are permissible, such as those aimed at recruiting or promoting “diverse employees.” The comment also invites a disciplinary board to determine selectively, based upon undeclared and undefined standards, when speech does or does not convey “bias or prejudice.”

Accordingly, Proposed Rule 8.4(f) represents an “egregious form” of speech restraint known as content-based viewpoint discrimination.¹⁶ The Proposed Rule “applies to particular speech because of the topic discussed or the message expressed”¹⁷ and takes as its rationale “the specific motivating ideology or the opinion or perspective of the speaker.”¹⁸ Although the Proposed Rule purports to target conduct, its failure to limit

¹⁶ *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

¹⁷ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

¹⁸ *Rosenberger*, 515 U.S. at 829.

actionable harassment and discrimination to severe instances means that the law can be used to punish activity that is primarily expressive in nature. Indeed, speech is actionable if in the eyes of the disciplinary board it “manifests bias or prejudice” and is “harmful,” a threshold so low and undefined that almost any remark in any context that the disciplinary board perceives as offensive could be sanctioned simply because giving offense is deemed harmful. And while giving offense can indeed be harmful, the Constitution does not allow the government to suppress speech for that reason.

Courts will apply the strictest level of scrutiny to assess a content-based viewpoint discriminatory rule like 8.4(f). The rule must be “(1) narrowly tailored, to serve (2) a compelling state interest.”¹⁹ A narrowly tailored law “does not ‘unnecessarily circumscrib[e] protected expression’”²⁰: “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative,”²¹ and “there must be a direct causal link between the restriction imposed and the injury to be prevented.”²² Viewpoint discrimination puts the most stringent burden on the government: the law is “presumptively invalid.”²³

The Proposed Rule likely fails strict scrutiny because it is not narrowly tailored. First, the range of expressive conduct that may be sanctioned under the law is expansive. The Proposed Rule does not adequately define harassment or discrimination, opening the door for the Bar Association to punish conduct that is primarily expressive in nature. No definition is provided for harassment. And discrimination is vaguely defined non-exclusively, to include “harmful verbal or physical conduct that manifests bias or prejudice,” and without specificity as to the intensity or kind of harm required.

The comment’s vague proviso that anti-harassment and anti-discrimination statutes and case law “provide guidance” to the application of the rule does little to define or clarify the Rule’s standards or to cabin the reach of the Proposed Rule. The Rule does not cite specific definitions or standards contained in specific laws, which vary widely in scope at the municipal, state, and federal levels. And whatever legal standards do exist, they merely “provide guidance” without appearing in the text of the Proposed Rule itself.

Most significantly, the suggestion that the standard of actionable conduct can be found in existing anti-harassment and anti-discrimination laws is inconsistent with the definition of “discrimination” articulated earlier in the comment. Alaska’s human rights law, for example, bars specific discriminatory acts in the fields of employment, public

¹⁹ *Republican Party of Minnesota v. White*, 536 U.S. 765, 775 (2002).

²⁰ *Id.* (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)).

²¹ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

²² *United States v. Alvarez*, 567 U.S. 709, 725 (2012).

²³ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992).

accommodations, the sale or rental of property, and more.²⁴ The Act prohibits specific acts with specific consequences: for example, offering different terms or conditions of employment due to a person’s membership in a protected class.²⁵ One of the most well-known anti-discrimination laws, Title VII, works in a similar way; indeed, verbal conduct unaccompanied by tangible adverse employment actions is actionable under Title VII only if it is severe enough to create a “hostile work environment.”²⁶ By contrast, the Proposed Rule defines actionable discrimination as any “harmful” “verbal conduct” that “manifests prejudice or bias.” The disconnect between how the Proposed Rule defines actionable discrimination and the various standards in (sometimes inconsistent) anti-discrimination statutes and case law that are supposed to “provide guidance” in its application, refute the notion that the Proposed Rule provides discernable guidance to attorneys or is limited to more severe conduct.

Such a broad rule is unlikely to be found narrowly tailored when it could easily be drawn to burden lawyers’ conduct only when it reaches a certain level of severity. An obvious less restrictive alternative would be to expressly calibrate conduct sanctionable under the Proposed Rule to specific statutes like Alaska’s criminal harassment statute (AS 11.61.200) or the standards courts have developed for actionable harassment under Title VII.

Second, because the Proposed Rule regulates expressive conduct far beyond the courtroom and even the law office, extending to “social activities in connection with the practice of law,” the Bar Association will struggle to show that the Proposed Rule is the least restrictive means of advancing the kinds of interests usually invoked to justify rules of professional conduct: protecting the administration of justice from prejudice,²⁷ promoting due process,²⁸ and ensuring public confidence in the judicial system.²⁹ Conventionally formulated rules support the integrity of legal proceedings by anchoring discourse to “traditional tools of the law”³⁰ and ensuring that courts need not “take burdensome steps” to maintain impartiality.³¹ They do so by regulating an attorney’s

²⁴ AS 18.80.210–18.80.255.

²⁵ AS 18.80.220(a)(1).

²⁶ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

²⁷ See *In re Vincenti*, 554 A.2d 470, 474 (N.J. 1989).

²⁸ See *In re Hinds*, 449 A.2d 483, 494 (N.J. 1982).

²⁹ See *In re Pyle*, 156 P.3d 1231, 1247 (Kan. 2007); *State ex rel. Oklahoma Bar Ass’n v. Porter*, 766 P.2d 958, 969 (Okla. 1988).

³⁰ *Grievance Adm’r v. Fieger*, 719 N.W.2d 123, 132 (Mich. 2006).

³¹ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1057 (1991). The Supreme Court had already enshrined this principle in *In re Snyder*, 472 U.S. 634, 644-45 (1985): “The

behavior where she serves as an “essential part of the machinery of justice, an ‘officer of the court’ in the most compelling sense.”³² When a lawyer is not acting in this capacity, these justifications no longer apply.

Third, in carving out some forms of discrimination that are permissible, the Proposed Rule seems under-inclusive, lacking the close means-to-end fit that is required to satisfy strict scrutiny. The Proposed Rule allows discrimination against veteran status, family status, or regional origin. And the comment to the Proposed Rule states that “limiting the scope or subject matter of the lawyer’s practice to members of underserved populations” does not violate the Rule’s ban on discrimination. This raises questions about what exactly counts as an “underserved population”—would a lawyer who represents Christians but not Wiccans in litigation over religious free exercise rights run afoul of the Rule? More to the point, the Bar’s position that some kinds of discrimination in legal practice are acceptable, but not others, calls into question the degree to which an anti-discrimination rule is necessary or effective in ensuring public confidence in the judicial system or protecting the administration of justice from prejudice. Lawyers are not taxi drivers who have to take all passengers,³³ so the practice of law should not be regulated as if they were. Moreover, the exceptions which expressly permit certain forms of discrimination undercut the notion that the Rule is designed to promote a compelling government interest in preventing discrimination.³⁴

The Bar’s insistence in the preface published in the Bar Rag that the Proposed Rule does not prohibit lawyers from limiting the scope and subject matter of their practice is not reflected in the text or comment to the Proposed Rule. The caveat that paragraph (f) “does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16” does little to narrow the Proposed Rule’s

license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.” As Justice Stewart, concurring in *In re Sawyer*, 360 U.S. 622, 646 (1959), wrote, “A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.”

³² *In re Sawyer*, 360 U.S. 622, 669 (1959) (Frankfurter, J., dissenting); *see also Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 489 (1988) (O’Connor, J., dissenting) (“[S]pecial ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.”).

³³ Martha Minow, *Foreward: Of Legal Ethics, Taxis, and Doing the Right Thing*, 20 W. New Eng. L. Rev. 5, 6 (1998).

³⁴ *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993).

reach. Rule of Professional Conduct 1.16 establishes specific reasons why a lawyer may not represent a client or may withdraw from representation and establishes a procedure for terminating representation. But it does not expressly authorize lawyers to represent or decline to represent anyone they want for any reason, so it does nothing to limit the effect of the Proposed Rule’s proviso that a lawyer may be sanctioned for discrimination “while . . . representing clients” or “operating . . . a law firm or law practice.” And the comment to the Proposed Rule confirms that a lawyer’s choice to represent or to decline to represent certain clients, or to advocate for certain issues, can be actionable because the Rule creates a safe-harbor for those who “limit[] the scope or subject matter of [their] practice to members of underserved populations”

The comment’s reference to Rule of Professional Conduct 1.2(b) does not accomplish anything significant either. The comment, citing Rule 1.2(b), states that “a lawyer’s representation of a client does not constitute an endorsement of the client’s views or activities.” That rule typically protects a lawyer “whose views on social and moral matters may differ significantly from the [client’s].”³⁵ But like Rule 1.16, it offers no protection to a lawyer who declines to represent certain kinds of clients because she disbelieves in their cause or has moral reservations. And it shields only the fact of the lawyer’s representation, not expressive conduct the lawyer undertakes in the course of representation.

In fact, Proposed Rule 8.4(f)’s exception for “legitimate advocacy”—presumably intended to assuage lawyers’ concerns about the Proposed Rule going too far—actually aggravates the viewpoint-discrimination problem. A disciplinary panel would need to make implicit distinctions between legitimate and illegitimate advocacy, raising the specter that the Bar Association might sanction attorneys for litigation on behalf of policies or groups that the disciplinary panel deems discriminatory—like litigation for or against affirmative action schemes, litigation representing individuals opposed to extending public accommodations law to transgender persons, or defending the constitutionally protected religious liberty and rights of conscience held by religiously motivated individuals or entities. The Supreme Court struck down a more extreme instance of this practice in *Legal Services Corp. v. Velazquez*.³⁶ There, a law funding public interest lawyering prohibited lawyers in the program from making constitutional challenges to certain statutes. The court held that “by seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power.”³⁷ A first principle in the American judiciary is “that lawyers are

³⁵ *Labrake v. State*, 152 P.3d 474, 482 (Alaska Ct. App. 2007).

³⁶ 531 U.S. 533 (2001).

³⁷ *Id.* at 545.

free to criticize the state of the law.”³⁸ Litigation can be “a form of political expression.”³⁹ And Rule 8.4(f) cannot be used to restrict the evolution of the law.

Lawyers do not forfeit their First Amendment rights when they sit for the bar. Although “states may regulate professional conduct, even though that conduct incidentally involves speech,”⁴⁰ “speech is not unprotected merely because it is uttered by legal professionals.”⁴¹ A court is likely to see Rule 8.4(f) as the kind of professional speech regulation that “pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.”⁴² As Justice Jackson wrote in *West Virginia State Board of Education v. Barnette*:⁴³

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . Compulsory unification of opinion achieves only the unanimity of the graveyard. . . . It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. . . . Authority here is to be controlled by public opinion, not public opinion by authority.⁴⁴

However well-intentioned Proposed Rule 8.4(f) may be, its current construction politicizes the disciplinary process. Worse, such a blunt instrument is sure to chill attorneys from engaging in everyday dialogues about the law and politics, not to mention stifle the zealous advocacy that clients deserve. The idea that the Proposed Rule could be used to suppress an attorney’s constitutionally protected speech on behalf of a client is far from speculative. As you may be aware, I recently was unconstitutionally targeted with a complaint under municipal non-discrimination law for my representation of a faith-based women’s shelter before the Anchorage Equal Rights Commission.⁴⁵ I have little doubt

³⁸ *Sawyer*, 360 U.S. at 631.

³⁹ *NAACP v. Button*, 371 U.S. 415, 429 (1963).

⁴⁰ *Nat’l Inst. of Family and Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2372 (2018).

⁴¹ *NIFLA*, 138 S. Ct. at 2371.

⁴² *Id.* at 2374 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994)).

⁴³ 319 U.S. 624 (1943).

⁴⁴ *Id.* at 640-41.

⁴⁵ See, e.g., *Discrimination complaint filed against shelter’s attorney*, Seattle Times, July 10, 2018, <https://www.seattletimes.com/nation-world/apxdiscrimination-complaint-filed-against-shelter-s-attorney/>; *Anchorage attorney faces discrimination complaint while defending faith-based homeless shelter*, KTUU, July 9, 2018,

that if the Proposed Rule is enacted, it will be weaponized in similar fashion to intimidate or punish attorneys for vigorously representing their clients.

A different rule, more narrowly tailored to permit sanctions for harassment or discrimination that is already illegal under federal and state law, would be much more likely to be both constitutional and effective. Federal and state anti-bias law successfully regulate harassing and discriminatory conduct where it is non-expressive, or where speech is merely incidental to it.⁴⁶ For example, the Supreme Court prevented Title VII from becoming a “general civility code” by instructing courts to hear causes of action only for conduct “severe or pervasive enough to create an objectively hostile or abusive work environment.”⁴⁷ Unfortunately, Proposed Rule 8.4(f) is a civility code that penalizes expressive conduct ranging from criminal to merely offensive (to some) or politically objectionable (depending upon one’s point of view).

The Bar Association’s goals could be achieved without burdening lawyers’ First Amendment rights by expressly linking Rule 8.4(f) to anti-bias laws that higher courts have vetted and refined, like Title VII. California’s Rule 8.4.1 is instructive, albeit not entirely sufficient.⁴⁸ The state inserted the word “unlawfully” before the terms “harass” and “discriminate.” That California Rule’s commentary also makes clear that “a lawyer does not violate this rule by otherwise restricting who will be accepted as clients for advocacy-based reasons, as required or permitted by these rules or other law.” Similar edits to Rule 8.4(f) to focus on “unlawful” conduct under federal and Alaska state law could save the rule from legal infirmity.

<https://www.ktuu.com/content/news/Anchorage-attorney-faces-discrimination-complaint-while-defending-faith-based-homeless-shelter--487725491.html>; Ken Ham, *Anchorage Equal Rights Commission Drops Charges Against Lawyer*, Answers in Genesis (Oct. 11, 2018), <https://answersingenesis.org/culture/anchorage-equal-rights-commission-drops-charges>.

⁴⁶ Cf. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001); *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1317 (11th Cir. 2017); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995); *Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993).

⁴⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

⁴⁸ Again, in Alaska what constitutes “unlawful” discrimination varies between federal and state law on the one hand and some municipal codes on the other hand.

II. Proposed Rule 8.4(f) could be applied selectively to punish religiously motivated conduct in violation of the First Amendment.

The application of Rule 8.4(f) to harassing or discriminatory conduct that stems from religious belief offends both the United States Constitution and the Alaska State Constitution.

To survive a First Amendment challenge, “a law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.”⁴⁹ A law that “in a selective manner impose[s] burdens only on conduct motivated by religious belief” is not generally applicable,⁵⁰ and a law is non-neutral if its “object . . . is to infringe upon or restrict practices because of their religious motivation.”⁵¹ “Facial neutrality is not determinative”: “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”⁵² A non-neutral or not generally applicable law must support a “compelling state interest” to “justif[y] the substantial infringement” of the free exercise clause, and the government must “demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”⁵³

There is substantial doubt about Proposed Rule 8.4(f)’s general applicability and neutrality towards religion. On its face the Proposed Rule burdens conduct regardless of whether religious or secular beliefs motivate the behavior, and those sources of belief may be indistinguishable. But there are reasons to believe a court would find the Proposed Rule is actually non-neutral. First, “if [a law] is crafted, whether intentionally or incidentally, to impede religious conduct,”⁵⁴ while permitting similar non-religiously motivated conduct will fail both the general applicability and neutrality tests. The safe-harbor for certain forms of discrimination described in the comment makes the rule under-inclusive in a way that suggests the Proposed Rule “in a selective manner” imposes burdens primarily on lawyers’ conduct when “motivated by religious belief,”

⁴⁹ *Lukumi*, 508 U.S. at 546.

⁵⁰ *Id.* at 543.

⁵¹ *Id.* at 5343.

⁵² *Id.* at 534.

⁵³ *Sherbert v. Verner*, 374 U.S. 398, 406-07. Note that in Alaska, the Alaska Supreme Court’s decisions in *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994) and *Frank v. State*, 604 P.2d 1068 (Alaska 1979) require the *Sherbert* equivalent to adjudicate claims under the Alaska State Constitution even when petitioner challenges a neutral law of general applicability.

⁵⁴ *Swanner*, 874 P.2d at 280 (paraphrasing *Church of the Lukumi Babalu Aye*).

undermining its claim to neutrality.⁵⁵ Second, as in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,⁵⁶ if the Proposed Rule is enforced in a selectively hostile way toward religious persons, it would likewise depart from neutrality. In *Masterpiece Cakeshop*, the Court found that a Colorado Commission departed subtly from neutrality when it “was neither tolerant nor respectful of [the baker’s] religious beliefs.”⁵⁷ Third, Proposed Rule 8.4(f) limits a lawyer’s capacity to advance legal arguments in favor of exclusive policies and limits her capacity to express religious beliefs that are viewed by some as discriminatory while she practices law. A lawyer of a certain faith might wish to represent clients challenging the rights of transgender people to certain public accommodations—for example, gender identified public bathrooms; a lawyer of a different faith might want to explain to a gathering of lawyers at a Bar event why permitting Satanists to offer invocations at town assembly meetings offends some people of the Christian faith. If the Proposed Rule is applied to what some might believe is “illegitimate” cause litigation supporting particular sincere religious belief, or to discourse about one’s religious beliefs that in the Bar’s view “manifests bias,” a court could treat Rule 8.4(f) as non-neutral and apply strict scrutiny. And as explained above, the Proposed Rule is not likely to survive strict scrutiny—this is principally true because the Rule selectively permits some forms of discrimination and discriminatory acts.⁵⁸

III. If used to sanction attorneys who belong to groups with exclusive membership practices or that advocate for policies the Bar deems discriminatory, Proposed Rule 8.4(f) violates the freedom of association.

Courts have recognized “as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”⁵⁹ Laws burdening the freedom of association “for expressive purposes” are valid only when “adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”⁶⁰ Not all forms of association are protected by the First Amendment right.

⁵⁵ *Lukumi*, 508 U.S. at 535 (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirements of facial neutrality. The Free Exercise Clause protects against government hostility which is masked, as well as overt.”).

⁵⁶ 138 S. Ct. 1719 (2018).

⁵⁷ *Id.* at 1731.

⁵⁸ *Lukumi*, 508 U.S. at 546-47.

⁵⁹ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

⁶⁰ *Id.* at 623.

“[T]o come within [the First Amendment’s] ambit, a group must engage in some form of expression, whether it be public or private.”⁶¹

Rule 8.4(f) could be used to sanction attorneys who participate in groups whose expressive practices are based on ideologies or religious beliefs that the Bar disciplinary board deems discriminatory—whether invidious or not.⁶² Those ideologies might include exclusive membership practices or advocacy for exclusionary policies. A lawyer who joined “The Wing,” a feminist club that does not allow male members, could be sanctioned under Rule 8.4(f), as could a lawyer who joined the Freedom From Religion Foundation or the Catholic Bar Association. Ideas and policies propounded by those groups could be perceived as harassing or discriminatory to men or women and persons of faith. If Rule 8.4(f) is applied to sanction lawyers for joining these organizations, the rule will not pass constitutional scrutiny. No compelling interest can justify suppressing an individual’s participation in groups simply because the groups express unpopular opinions, especially given that Rule 8.4(f) could have been written to avoid the possibility of viewpoint biased enforcement.

IV. Proposed Rule 8.4(f) would be in danger of being struck down in its entirety as unconstitutionally overbroad.

The overbreadth doctrine prevents “the chilling of protected expression.”⁶³ If the Bar Association passes Rule 8.4(f), many lawyers, “rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech[.]”⁶⁴ To prevent against overbroad regulations that chill expression, a court can strike down a law as facially invalid where (1) “it sweeps within its scope a wide range of both protected and non-protected expressive activity,”⁶⁵ (2) its overbreadth is “substantial . . . judged in relation

⁶¹ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

⁶² Again, the breadth of actionable discrimination under the Proposed Rule—“harmful verbal or physical conduct that manifests bias or prejudice” while “participating in . . . social activities in connection with the practice of law”—would seem to allow the Bar Association to punish an attorney for membership in such a group, or at least attendance at its meetings.

⁶³ *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989).

⁶⁴ *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

⁶⁵ *Hobbs v. Thompson*, 448 F.2d 456, 460 (5th Cir. 1971).

to the statute’s plainly legitimate sweep,”⁶⁶ and (3) “no ‘readily apparent construction suggests itself as a vehicle for rehabilitating the statute in a single [proceeding].’ ”⁶⁷

Proposed Rule 8.4(f) reaches a substantial amount of protected expressive conduct. Although it is difficult to predict where a court might come down on the Proposed Rule, circuit courts have found more specifically drafted and narrow university anti-bias codes substantially overbroad.⁶⁸ A lack of internal textual guidance can be a terminal defect. For example, in *Dambrot v. Central Michigan University*,⁶⁹ the Sixth Circuit Court decided that a University anti-bias code provided “nothing to ensure the University will not violate First Amendment rights even if that is not their intention. It is clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university.”⁷⁰ Proposed Rule 8.4(f) likewise could be used to punish expressive conduct regardless of political value. And as in *Dambrot*, the Bar Association’s good intentions or promises to apply the Proposed Rule narrowly would not save it from constitutional infirmity.

V. Proposed Rule 8.4(f) is unconstitutionally vague because it lacks standards to guide enforcement and give attorneys notice about what conduct is prohibited.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”⁷¹ Vague laws offend the Fifth Amendment because they fail to provide notice and are susceptible to discriminatory enforcement. A law is impermissibly vague if it does not “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited”⁷² or allows “arbitrary and discriminatory enforcement” by failing to “provide explicit standards.”⁷³ A vague law that involves First

⁶⁶ *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

⁶⁷ *Hobbs*, 448 F.2d at 460 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 491 (1965)).

⁶⁸ *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001).

⁶⁹ 55 F.3d 1177 (6th Cir. 1995).

⁷⁰ *Id.* at 1183.

⁷¹ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

⁷² *Id.*; see also *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 393 (1926) (“The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue.”).

⁷³ *Grayned*, 408 U.S. at 108.

Amendment activities may have a chilling effect for reasons similar to those justifying the overbreadth doctrine.⁷⁴

Vagueness arguments are viable in lawyer discipline cases because disciplinary hearings are punitive. Disbarments “are adversary proceedings of a quasi-criminal nature,”⁷⁵ and “the sanctions threatened under such proceedings, loss of professional status and livelihood, have been equated to criminal penalties.”⁷⁶ Even lesser punishments like suspension and public censure irreparably damage an attorney’s career. As Justice Black put it, “the right of a lawyer or Bar applicant to practice his profession is often more valuable to him than his home.”⁷⁷

Proposed Rule 8.4(f) is vague in both the type of conduct that is punishable and the contexts in which it may be punished. First, the operative terms “harassment,” “discrimination,” and “conduct” are unelaborated in the blackletter rule. While the comment does state that “discrimination includes harmful verbal or physical conduct that manifests bias or prejudice,” no standard sets the threshold quality or quantity of harm necessary to trigger the rule. In *United States v. Wunsch*,⁷⁸ the term “offensive personality” was found vague because it “could refer to any number of behaviors that many attorneys regularly engage in during the course of their zealous representation of their clients’ interests” and “it would be impossible to know when such behavior would be offensive enough to invoke the statute.”⁷⁹ The same problem exists here. Proposed Rule 8.4(f) requires an attorney to guess at the line where a comment becomes “harmful.” That guessing game is made all the more confusing by the proviso that “substantive laws of anti-discrimination and anti-harassment statutes and case law provide guidance” in the application of the Proposed Rule. As explained above, this proviso does not refer to any specific statutes or standards that could be consulted to guide one’s conduct. And there is a disconnect between the threshold at which conduct becomes actionable under prominent anti-discrimination statutes and the subjective “harmful” standard for actionable conduct under the Proposed Rule.

Second, Proposed Rule 8.4(f)(4) fails to put attorneys on notice about where and when their conduct is regulated. Conduct while “participating in bar association, business

⁷⁴ *Id.* at 109; see *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 871 (1997) (vagueness “raises special First Amendment concerns because of its obvious chilling effect on free speech”).

⁷⁵ *In re Ruffalo*, 390 U.S. 544, 551 (1968).

⁷⁶ *State v. Russell*, 610 P.2d 1122, 1130 (Kan. 1980).

⁷⁷ *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 174 (1971) (Black, J., dissenting).

⁷⁸ 84 F.3d 1110 (9th Cir. 1996).

⁷⁹ *Id.* at 1119.

or social activities in connection with the practice of law” leaves open-ended the type and degree of connection required. An attorney having a cup of coffee with a friend near the site of the annual Bar Convention might wonder whether she could be sanctioned if overheard speaking candidly.

A reasonable attorney familiar with Alaska’s rules and anti-bias law would still struggle to understand what conduct is impermissible. Although lawyers could bring their skills to bear on the problem by using statutory interpretation to eke out bright lines from murk or by drawing inferences from analogous cases, without better clues, a lawyer’s guess is not much better than an ordinary person’s. Courts will probably void a rule that demands that level of speculation, especially where it burdens protected expression.

CONCLUSION

Proposed Rule 8.4(f) attempts to discourage harassment and discrimination in the legal profession. Although this is a laudable goal, the Proposed Rule in its current form is extremely ill-advised. The breadth and vagueness of the Rule would allow the disciplinary board to sanction a lawyer for ideas and religiously motivated actions or speech simply because some might view them as offensive. So much constitutionally protected conduct and speech is regulated by Rule 8.4(f) that a prudent lawyer will think twice before speaking about sensitive topics in court or with clients or friends, before accepting or refusing sensitive cases, or before speaking candidly while participating in social and educational activities related to the practice of law. For these reasons Proposed Rule 8.4(f) is not only unconstitutional but also counter-productive. An appropriately constructed rule could accomplish the laudable ends without diminishing the strength of constitutional freedoms fundamental to the practice of law.

Sincerely,

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