Agenda

Supreme Court's Advisory Committee on the Rules of Professional Conduct

August 3, 2020
5:00 to 7:00 p.m.

Via Webex

Welcome, introduction of new members, and approval of minutes	Tab 1	Simón Cantarero, Chair
Combining the LPP Rules of Professional Conduct with the Attorney Rules of Professional Conduct	Tab 2	Elizabeth Wright, Steve Johnson
Review of comments to Rules 8.4(g) and (h) and 14-301 (comment period closed August 1, 2020) and suggested changes	Tab 3	Adam Bondy, Alyson McAllister, Judge Mike Edwards, Steve Johnson, Dan Brough, Simón Cantarero
Regulatory Reform update		Simón Cantarero

2020 Meeting Schedule:

September 21

October 19

November 16

Tab 1

Draft August 3 Meeting Minutes

Attached are the draft minutes from last month's meeting for the committee's review and approval.

Utah Supreme Court's
Advisory Committee on the Rules of Professional Conduct

Draft Meeting Minutes

August 3. 2020
Via WebEx
The Meeting commenced at 5:03 p.m.

Simón Cantarero, Chair

Attendees:
Simón Cantarero, Chair
Adam Bondy
Hon. James Gardner
Steven G. Johnson (Emeritus)
Joni Jones
Philip Lowry
Alyson Carter McAllister
Amy Oliver
Austin Riter
Gary Sackett (Emeritus)
Cory Talbot
Katherine Venti
Billy Walker

Not Present
Daniel Brough
Time Conde
Hon. Michael Edwards

Excused
Padma Veeru-Collings

Staff:
Nancy Sylvester
Jurhee Rice, Recording Secretary

Guests:
Jacquelyn Carlton, Office of Legislative Research
Elizabeth Wright, Utah State Bar

Committee Webpage: http://www.utcourts.gov/committees/RulesPC/

Welcome and approval of the May 18, 2020 meeting date's minutes: Simón Cantarero, Chair

Simón Cantarero welcomed everyone to the meeting and asked for approval of the minutes.

Amy Oliver moved to approve the May 18, 2020 minutes. Cory Talbot seconded the motion, and it passed unanimously.

1. **Discussion-Combining the LPP Rules of Professional Conduct with the Attorney Rules of Professional Conduct:** Elizabeth Wright, Utah State Bar

The Supreme Court asked the Bar and other rule drafters to combine as many lawyer and LPP rules as possible. The lawyer rules are currently in Chapter 14 of the Supreme Court Rules of Professional Practice and the LPP rules are in Chapter 15. Generally, the LPP rules mirror the lawyer rules but it is very confusing to have two nearly identical sets of rules. At the LPP Committee's request, Elizabeth Wright prepared a draft combination of the lawyer and LPP Rules of Professional Conduct.

As with other rules that are being combined or applied to both license categories, the term "lawyer" is defined as both a lawyer and LPP except where it cannot because of the limited nature of the LPP license. This definition is also being used in rules like the Rules of Evidence for which it would have been daunting and repetitive to insert "LLP" into every rule. The Rules of Evidence now say they apply to LPPs except where they cannot because of the limited nature of the LPP practice. The limitations in the LPP practice are listed in Rule 14-802.

The Committee has requested the following be reviewed and/or added to the combined rules prior to submission to the Supreme Court:

a. Elizabeth Wright and Steven Johnson will add comment(s) showing how the merged rule(s) deviates from the ABA model rule and URCP 86 and the definitions of LPP, lawyer and attorney.
b. Define lawyer using RPC definition under Rule 14-506: anything deemed the practice of law.
c. Under section 14-802 (c), the Committee recommends revision and uniform use of the term lawyer within the document.
d. Under URCP 86: A lawyer includes LPPs. Must define when the scope of practice exceeds that of the LPP.

It is anticipated that the Court will rescind the current LPP rules in lieu of merging the LPP rules with the attorney rules.

Any additional comments or questions should be forwarded to Nancy Sylvester or Simón Cantarero so they may be forward to Ms. Elizabeth Wright by the end of the month.

2. **Discussion: Regulatory Reform-Overview of Comments:** Cory Talbot

   Many of the comments address the policies, but do not look specifically at fixing language. Most comments asked the Court to either not proceed or proceed with caution. The Subcommittee concluded that the policy-based comments went beyond the scope of what the Committee was tasked to do.

   The Subcommittee addressed the following drafting concerns:

   a. The Subcommittee previously discussed requiring liability insurance but determined it was unnecessary because any entity engaged in the practice of law would be subject to the rules of professional conduct.
   b. The Subcommittee previously addressed whether the disclosure language under 5.4(B) is adequate and does not feel additional changes are needed at this time.
   c. The Subcommittee discussed whether fee sharing could be clarified and concluded that fee sharing is a term used throughout the rules, and its use here is clear.
   d. The Subcommittee did not address how fee sharing may increase the costs with non-lawyers, as this is another policy argument that exceeds the scope of the Committee.

   The Committee will communicate the different categories of comments along with Committee recommendations to the Court. Simón Cantarero will draft a proposed letter addressing the categories of comments and will distribute to the Committee for review and comment prior to submission to the Court.

3. **Discussion: Status of comments to Rule 8.4(g) and (h) and amendments to 14-301 (comment period closed August 1, 2020).**

   Comments were overwhelmingly in opposition to the rules and amendments. A discussion of the comments to Rule 8.4(g) and (h) and amendments to 14-301 will be tabled until next meeting to allow further review of comments. Adam Brody to report back at next meeting.

4. **Other business**

   Simón Cantarero proposed the following changes to the meeting schedule: No objections were raised to the proposed changes.

   August 31, 2020 at 5:00 p.m.
   October 05, 2020 at 5:00 p.m.
   November 02, 2020 at 5:00 p.m.
   December 07, 2020 at 5:00 p.m. (tentative)

The meeting adjourned at 6:07 p.m. The next meeting will be held on August 31, 2020 at 5:00 p.m. via WebEx.

Tab 2

Discussion-Combining the LPP Rules of Professional Conduct with the Attorney Rules of Professional Conduct:

The Supreme Court asked the Bar and other rule drafters to combine as many lawyer and LPP rules as possible. The lawyer rules are currently in Chapter 14 of the Supreme Court Rules of Professional Practice and the LPP rules are in Chapter 15. Generally, the LPP rules mirror the lawyer rules but it is very confusing to have two nearly identical sets of rules. At the LPP Committee's request, Elizabeth Wright prepared a draft combination of the lawyer and LPP Rules of Professional Conduct.

As with other rules that are being combined or applied to both license categories, the term "lawyer" is defined as both a lawyer and LPP except where it cannot because of the limited nature of the LPP license. This definition is also being used in rules like the Rules of Evidence for which it would have been daunting and repetitive to insert "LLP" into every rule. The Rules of Evidence now say they apply to LPPs except where they cannot because of the limited nature of the LPP practice. The limitations in the LPP practice are listed in Rule 14-802.

The Committee has requested the following be reviewed and/or added to the combined rules prior to submission to the Supreme Court:

a. Elizabeth Wright and Steven Johnson will add comment(s) showing how the merged rule(s) deviates from the ABA model rule and URCP 86 and the definitions of LPP, lawyer and attorney.
b. Define lawyer using RPC definition under Rule 14-506: anything deemed the practice of law.
c. Under section 14-802 (c), the Committee recommends revision and uniform use of the term lawyer within the document.
d. Under URCP 86: A lawyer includes LPPs. Must define when the scope of practice exceeds that of the LPP.

It is anticipated that the Court will rescind the current LPP rules in lieu of merging the LPP rules with the attorney rules.

Tab 3

Comments to Rule 8.4(g) and (h) and and Rule 14-301 (comment period closed August 1, 2020)

The subcommittee met and made the following changes to propose to the committee as a whole.

Rule 6.51 – Modify (c)(2) to read "receives no fees directly from those matters."
Rule 8.4 – Modify (g) to read "engage in any conduct that is listed as a discriminatory or prohibited employment practice under Sec 2000e-2 [Section 703] of Title VII of the Civil Rights Act of 1964, as amended, or under Section 34A-5-106 of the Utah Antidiscrimination Act, as amended, or pursuant to applicable court cases, notwithstanding the number of employees in the lawyer's firm;"
Rule 8.4 – Comment [3]: eliminate the sentence regarding peremptory challenges
Rule 8.4 – Ask the committee as a whole to consider whether (h) should be held in committee until the standards in 14-301 have been reviewed for aspirational/mandatory language.

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July 31, 2020

To the Utah Supreme Court:

I am a Utah-licensed attorney and file this letter on behalf of the Hamilton Lincoln Law Institute. We write in response to proposed revisions to Rule 8.4(g), Rule 8.4(h) and Rule 14-301.3 of the Utah Rules of Professional Conduct based, in part, on ABA Model Rule 8.4(g). We have serious concerns that the proposed revisions will chill speech of Utah lawyers.

First, attorneys can now be sanctioned under Rule 14-301 for "hostile, demeaning, humiliating, or discriminatory conduct" in all law-related activities. But Rule 14-301 does not provide an exception for legitimate advocacy, and thus attorneys risk sanction for "hostile" or "demeaning" conduct while zealously representing their clients.

Indeed, law-related activities include "Bar sections, or Bar Associations" and thus the Women Lawyers of Utah, the Minority Bar Association, or the LGBT & Allied Bar Association potentially risk sanction for "discriminatory conduct" by focusing on issues unique to their memberships. Law-related activities also extend to CLE events and social events including firm parties and bar functions. Social events often include exchanges that one person or another may view as "demeaning" or "humiliating," but now attorneys face sanctions based on these vague categories, raising significant First Amendment issues.

Further, the preamble of 14-301 warns lawyers that digital communications and social media may have a "widespread and lasting impact on their clients, themselves, other lawyers, and the judicial system." 14-301 potentially polices lawyers' expression on social media in violation of the First Amendment.

Second, Rule 14-301 would restrict *written* or *oral* presentations that may "disparage the integrity, intelligence, morals, ethics, or personal behavior of any person unless such matters are directly relevant under controlling substantive law." This restriction applies to CLE events, which would kill any meaningful debate of important, current social issues where legal and ethical matters converge—attorneys could be sanctioned for questioning an opponent's morals or ethics while disagreeing on topics such as, *inter alia*, the pandemic response, Black Lives Matters protests, defunding the police, etc.

Third, Comment 4 to Rule 8.4 permits lawyers to discuss "the benefits and challenges of diversity and inclusion" which necessarily implies that any discussions relating to any other antidiscrimination or antiharassment topics would be restricted. This content-based, or even potentially viewpoint-based, discrimination is unlawful. Its inclusion is particularly misplaced and troubling because an ordinary interpretation of "conduct that is an unlawful…practice under Title VII" would not include *any* academic discussions between lawyers.

Finally, Comment 5 to Rule 8.4 provides that "Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to 63 the United States Constitution or by Article I of the Utah Constitution." While this language is redundant given that the government cannot prohibit speech protected by the First Amendment, Comment 5 seemingly endorses the Rule's unlawful restrictions on speech as *exceptions* to protected speech. Similar language was included in New Hampshire's proposed rule—protecting a "lawyer's rights of free speech … consistent with these Rules"—which Professor Blackman criticized as "hollow" because engaging in free speech that was inconsistent with the rules placed attorneys at risk of discipline. *See* Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 Catholic U. L. Rev. 629, 640 (2019).

Although Comment 5 cannot legitimize the unlawful restrictions contained in the proposed revisions, it could nonetheless be strengthened by including the following language which was included in an earlier draft of ABA 8.4(g) from 2015: "This Rule does not apply to conduct protected by the First Amendment, as a lawyer does retain a 'private sphere' where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to this rule." *See* Blackman, 68 Catholic U. L. Rev. at 640 (recommending addition to Tennessee's proposed rule to "clarify that not only are values of free speech protected, but also those of freedom of association, as well as freedom of exercise").

Very truly yours,

Melissa A. Holyoak
President and General Counsel

I comment as a member of the Utah Bar and as General Counsel to the Utah Legislature. Pursuant to Utah Constitution Article VI, Section 32 (2), I am empowered to "provide and control all legal services for the Legislature unless otherwise provided by statute." No relevant statute restricts my ability to comment on this rule in my capacity as general counsel to the Utah Legislature. In submitting this comment, I do not speak for, or represent the views of, the Utah Legislature or any of its individual members.

I appreciate the efforts made by the Utah Supreme Court and the Supreme Court's Advisory Committee on the Rules of Professional Conduct to address the concerns raised by legislative lawyers and others in the previous comments submitted regarding the proposed changes to Rule 8.4(h) of the Rules of Professional Conduct and Rule 14-301, Standards of Professionalism and Civility (Standards). (See, original comments from legislative attorneys attached as Appendix A.) Despite the modifications to the Rules, there are still issues with how the Standards will be interpreted and enforced under the proposed Rule 8.4(h) because: 1) the Standards do not clarify what provisions are mandatory; 2) the Standards remain broad and ambiguous; and 3) the application of proposed Rule 14-301 to conduct outside the daily practice of law is still unclear.

First, it is still unclear whether the preamble, numbered provisions, and comments in the Standards constitute an entire rule, or whether each numbered provision of the Standards is a rule itself. The newly amended version of the Standards provides that Rule 8.4(h) "makes the provisions of this rule mandatory for all lawyers." We are not certain what is considered a "provision" and how the preamble and comments to the Standards are to be treated. For example, the preamble to the Rules of Professional Conduct states that "[t]he comment accompanying each rule explains and illustrates the meaning and purpose of the rule" and "are intended as guides to interpretation, but the text of each rule is authoritative." Utah R. Prof. Conduct, Preamble. And the Preamble to the Rules provides "general orientation" to the Rules. *Id.* The Standards do not contain any such language that clarifies the treatment of the preamble, numbered provisions, and comments in the Standards. Consequently, it is unclear whether the requirements of the general preamble to the Rules of Professional Responsibility apply to proposed Rule 14-301 or if the preamble, numbered provisions, and comments for that Rule are, collectively, the Rule.

Second, we recognize the efforts of the Court and the Advisory Committee to clarify Standard #3. But, even with these changes, the Standards could still be subject to a variety of interpretations and cover a broad range of conduct, including conduct outside the practice of law. *See, e.g.,* Utah Standards of Prof'l & Civility 14-301, Preamble ("A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms."). Taking the "at all times" language of the preamble literally, and reading that language in conjunction with the proposed rules, it appears that lawyers may be disciplined for violating the civility standards if they are uncivil with their families or friends, in daily contacts in the community, in political campaigns or when acting as a public official, or generally in anything that they do. This may be the intent of the proposed rules changes, but, if so, it should be made explicit. The existing uncertainty about whether attorneys are subject to rules governing civility outside their daily law practice will create compliance and enforcement issues after the rules are implemented.

There is concern that the language used in the Standards is broad and, at times, vague and open to subjective application, including terms such as "superiority," "humiliating," "disrespect," "annoy,"

and "intimidate." *See also* Utah Standards of Prof'l & Civility 14-301, Standard 3, cmt. (providing a definition for "law-related activities," which is an open definition). And the comments in the Standards are not written in an explanatory or commentary style that helps clarify the numbered provisions in the Standards. *See, e.g., id.* (providing that lawyers "should refrain from expressing, scorn, superiority, or disrespect" without any clarification of what part of the numbered provision this statement refers to).

Not only does this ambiguity prevent a lawyer from knowing how to conform his or her conduct to the Standards, but it also makes it difficult to know when a lawyer's conduct should be reported under Rule 8.3. *See* Utah R. of Prof'l Conduct 8.3 cmt. 1 ("Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct.").

I attach by reference the previous comment submitted by legislative attorneys, which provided a variety of hypotheticals to the Court and the Advisory Committee that we think highlight the difficulty in understanding what conduct rises to the level of a violation. Yet, the revised Standards have not addressed some of our concerns. We still question the breadth of the conduct the Standards will cover, given the preamble to the Standards provides: "[a]lthough for ease of usage the term "court" is used throughout, these standards should be followed by all judges and lawyers in all interactions with each other and in any proceedings in this State." And we wonder how the Standards will affect lawyers like us who represent elected officials, especially elected officials who are lawyers. Are we expected to advise our clients that they need to be civil and professional in legislative proceedings or meetings? Do we report a lawyer-client whose behavior in a legislative proceeding or meeting would appear to violate Rule 8.4(h)? It would be helpful for us if the Court amended the Standards to clarify the circumstances where the lawyers' civil and professional conduct is expected.

For these reasons, before enacting Rule 8.4(h) and incorporating the Standards into the Rules of Professional Conduct, we ask that the Utah Supreme Court and its Advisory Committee consider revising the Standards to address the concerns we have raised. Those revisions might include: (1) clarifying how the preamble, numbered provisions, and comments in the Standards are to be treated; (2) adding or clarifying language throughout the Standards; (3) amending existing comments in the Standards to clarify and explain the numbered provisions; and (4) adding comments to numbered provisions without comments. Specifically, the application of the civility requirements to situations outside the daily practice of law should be addressed affirmatively.

Thank you for considering these comments regarding the changes to Rule 8.4 and the Standards. I am available to discuss these issues further, either formally or informally, if that would be useful.

Respectfully,

John L. Fellows
General Counsel, Utah Legislature

Appendix A: Previous Comment (May 3, 2019)

We comment as members of the Utah Bar and do not speak for, or represent the views of, the Utah Legislature or any of its individual members. We support efforts by the Utah Supreme Court's Advisory Committee on the Rules of Professional Conduct to foster civility and professionalism in the practice of law, but we are concerned with how the Standards of Professionalism and Civility (Standards) will be enforced under proposed Rule 8.4(h) of the Rules of Professional Conduct, which provides that it is "professional misconduct for a lawyer to egregiously violate, or engage in a pattern of repeated violations" of the Standards.

First, there is no definition for the Standards in Rule 8.4(h). Because an "egregious" violation, or a "pattern of repeated violations," of the Standards is misconduct under Rule 8.4(h), lawyers need to know whether the Standards include the preamble, numbered provisions, comments, and cross-references, or only the numbered provisions. Rule 8.4(h) would be clearer if the Utah Supreme Court provided a definition for the Standards in the definitions section of the Rules or in the comment for Rule 8.4.

Second, our understanding is that the Standards are aspirational, as indicated by the preamble and comments of the Standards. If the Standards were drafted with aspirational intent, how can the Standards now be interpreted as enforceable? Certain Standards could be subject to a variety of interpretations and cover a broad range of conduct, including conduct beyond the practice of law. See, e.g., Utah Standards of Prof'l & Civility 14-301, Preamble ("A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms.").

We recognize that "civility" and "professionalism" are needed in the practice of law, but how should they be enforced? By incorporating the Standards into the Rules of Professional Conduct, lawyers will have an obligation to report violations of the Standards under Rule 8.3. See Utah R. of Prof'l Conduct 8.3 cmt. 1 ("Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct."). But the Standards themselves do not offer much guidance on what should be reported. For example, Standard #1 directs lawyers to "treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner." The comment explains that dignity and professionalism are not limited to the courtroom, but extend to telephone calls, emails, meetings, and other exchanges and that lawyers must refrain from "inappropriate language, maliciousness, or insulting behavior" in those interactions. Similarly, Standard #3 states that "[l]awyers shall avoid hostile, demeaning, humiliating, intimidating, harassing, or discriminatory conduct with all other counsel, parties, judges, witnesses, and other participants in all proceedings." The comment for Standard #3 incorporates communications and expressions by lawyers, including expressions of "scorn, superiority, or disrespect." Yet, terms such as "dignity," "inappropriate," "insulting," "intimidating," "scorn," "superiority," and "disrespect" are vague and subjective, leaving lawyers to guess the Standards' meaning and application.

The following scenarios highlight the potential effects of the ambiguities in the Standards:

1. During a trial, a defense lawyer criticizes how the police and the prosecutor handled the case, suggesting that the police and prosecutor acted dishonestly. As the defense lawyer cross-examines

police officers, the defense lawyer's statements and questions attempt to demonstrate that the police and prosecutor have engaged in questionable behavior. This is a frequent strategy used by the defense lawyer when defending the defense lawyer's clients, although there is a lack of evidence of any dishonesty or mishandling of a case. Has the defense lawyer violated Standard #3 by attributing improper conduct to the prosecutor, or by disparaging the ethics or integrity of the prosecutor and police officers who were participants in the proceedings?

2. A client calls Lawyer 1 multiple times a week at work and home, leaving malicious messages for Lawyer 1. Lawyer 1 contacts Lawyer 2 who represents the client. Lawyer 2 admits that Lawyer 2 has not advised the client not to engage in uncivil behavior. Lawyer 2 also admits that it is Lawyer 2's practice to advise clients about engaging in civil and appropriate conduct only when there is evidence that the client has engaged in uncivil or inappropriate conduct. Has Lawyer 2 violated the obligation to advise clients on civility, courtesy, and fair dealing under Standard #2 because it is not Lawyer 2's practice to advise clients beforehand? Should Lawyer 1 report Lawyer 2 for misconduct?

3. In city council meetings, Lawyer 1, a city attorney, observes Lawyer 2, a city council member, openly criticize other city council members and launch into tirades about individuals or groups protesting decisions made by the City Council. When Lawyer 2 disagrees with a participant in a meeting, Lawyer 2 aggressively questions the participant. Would the Standards apply to Lawyer 2 in Lawyer 2's capacity as an elected official, and if so, does Lawyer 1 have an obligation to report Lawyer 2 for violations of Standards #1 and #3?

4. Lawyer 1 frequently works opposite Lawyer 2. Lawyer 2 makes abrasive and spiteful statements about Lawyer 1 in the presence of Lawyer 1's clients during settlements and depositions. Lawyer 1 finally lashes out in a settlement, making negative statements, including the use of profanity, about Lawyer 2. Lawyer 1 tells Lawyer 2 that Lawyer 1 is going to report Lawyer 2 to the Office of Professional Conduct for Lawyer 2's repeated uncivil and unprofessional conduct. Lawyer 2 responds that Lawyer 2 is also going to report Lawyer 1 to the Office of Professional Conduct for Lawyer 1's negative and obscene statements during the settlement. Have Lawyer 1 and Lawyer 2 violated Standards #1 and #3?

Because the proposed rule would modify the Standards from aspirational to enforceable, we recommend that, before enacting the rule, the Utah Supreme Court and its Advisory Committee consider revising the Standards to address the concerns we have raised. Those revisions might include: (1) defining what is a Standard for purposes of Rule 8.4(h), (2) evaluating whether certain Standards should be removed, and (3) amending the Standards to eliminate vague provisions and to add definitions or more specific directives, including examples, on the civil and professional conduct required under each Standard. This would give lawyers a better understanding of the type of misconduct under Rule 8.4(h) that is subject to enforcement and that must be reported to the Office of Professional Conduct. Thank you for considering our comments regarding the proposed Rule 8.4(h).

John L. Fellows
General Counsel

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Andrea Valenti Arthur
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Kurt P. Gasser
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Shannon C. Halverson
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Lee A. Killian
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Patricia Owen
Associate General Counsel

Robert H. Rees
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Thomas R. Vaughn
Associate General Counsel

Amy L. West
Associate General Counsel

IN THE UTAH SUPREME COURT

Request for Public Comment on Proposed Amendments to Rule 8.04 Rules of Professional Conduct and Rule 14-301 of the Standards of Professionalism and Civility	**)**	**Joint Comment in Opposition to Proposed Amendments to Rule 8.04 Rules of Professional Conduct and Rule 14-301 of the Standards Professionalism and Civility**

The Utah licensed attorneys listed below respectfully submit this Comment on the proposed amendments to Rule 8.04 of the Utah Rules of Professional Conduct and Rule 14-301 of the Standards of Professionalism and Civility.

I. The Proposed Amendments

It is being proposed that Rule 8.04 of the Utah Rules of Professional Conduct be amended by amending subsections (g) and (h) to the Rule so as to read as follows:

> *It is professional misconduct for a lawyer to:*
>
> *(g) engage in conduct that is an unlawful, discriminatory, or retaliatory employment practice under Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act, except that for the purposes of this paragraph and in applying those statutes, "employer" shall mean any person or entity that employs one or more persons; or*
>
> *(h) egregiously violate, or engage in a pattern of repeated violations, of Rule 14-301 if such violations harm the lawyer's client or another lawyer's client or are prejudicial to the administration of justice.*

The proposed amendments would also amend the Comments to Rule 8.04 as follows:

> *[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race; color; sex; pregnancy, child birth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion, national origin; disability; sexual orientation; gender identity; or genetic information may violate paragraph (d) when such actions are prejudicial to the administration of justice. The protected classes listed in this paragraph are consistent with those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a) (2016), and in federal statutes and is not intended to be an exhaustive list as the statutes*

may be amended from time to time. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's findings that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law governs the application of paragraph (g), except that for purposes of determining a violation of paragraph (g), the size of a law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from a representation, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of paragraph (g). Lawyers may discuss the benefits and challenges of diversity and inclusion without violating paragraph (g). Unless otherwise prohibited by law, implementing or declining to implement initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).

[5] Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

[6] 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 should also be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay and their obligations 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 a lawyer of the client's views or activities. See Rule 1.2(b).

[9] This rule differs from ABA Model Rule 8.4(g) to the extent that it changes paragraph (g), adds new paragraph (h), and modifies the comments accordingly.

Further, the proposed amendments would amend Rule 14-301 of the Standards of Professionalism and Civility as follows:

Preamble . . . Finally, the term "standard" has historically pointed to the aspirational nature of this rule. But Rule 8.4(h) now makes the provisions of this rule mandatory for all lawyers.

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Neither written submissions or oral presentations shall disparage the integrity, intelligence, morals, ethics, or personal behavior of any person unless such matters are directly relevant under controlling

substantive law.

Lawyers shall avoid hostile, demeaning, humiliating, or discriminatory conduct in law-related activities. Discriminatory conduct includes all discrimination against protected classes as those classes are enumerated in the Utah Antidiscrimination Act of 1965, Utah Code sec. 34A-5-106(1)(a), and federal statutes, as amended from time to time.

Comment. Lawyers should refrain from expressing scorn, superiority, or disrespect. [Unconstitutional] *Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any person in the legal process, even if a client requests it.*

Law-related activities include, but are not limited to, settlement negotiations; depositions; mediations; court appearances; CLE's; events sponsored by the Bar, Bar sections, or Bar associations; and firm parties.

II. Comments

A. The Proposed Amendments, for the First Time, Incorporate The Amended Standards of Professionalism and Civility Into the Rules of Professional Conduct.

In order to fully appreciate the magnitude of the changes the proposed amendments would effect, one must note that, under the proposed amendments, violations of Utah's Standards of Professionalism and Civility would, for the first time, constitute violations of the Rules of Professional Conduct. This is clear from two provisions of the proposed amendments.

The first pertinent provision of the proposed amendments is proposed Rule of Professional Conduct 8.04(h), which provides that *It is professional misconduct for a lawyer to:(h) egregiously violate, or engage in a pattern of repeated violations, of Rule 14-301* [of the Standards of Professionalism and Civility] *if such violations harm the lawyer's client or*

another lawyer's client or are prejudicial to the administration of justice. Thus, the proposed amendments directly incorporate Rule 14-301 of the Standards of Professionalism and Civility into Rule 8.04(h) of the Rules of Professional Conduct.

The other relevant provision is the proposed amendment to the Preamble of the Standards of Professionalism and Civility, which provides that: *the term "standard" has historically pointed to the aspirational nature of this rule. But Rule 8.4(h) now makes the provisions of this rule mandatory for all lawyers (our emphasis).*

In other words, the proposed amendment to Rule of Professional Conduct 8.04(h) expressly incorporates Rule 14-301 of the Standards of Professionalism and Civility into Rule 8.04(h), and the proposed amendments to the Standards of Professionalism and Civility expressly recognize that the Standards are being made a mandatory rule for lawyers under proposed Rule 8.04(h).

This is an important point because, by incorporating the proposed amendments to the Standards of Professionalism and Civility into the proposed amendments to the Rules of Professional Conduct, the advocates of the proposed amendments have proposed what appears to be a small and limited change to the face of the Rules of Professional Conduct – but have then greatly expanded that apparently small change by incorporating into the new Rule a much more expansive set of rules that share many of the constitutional and other infirmities of ABA Model Rule 8.4(g).

Hence, in analyzing the effect of the proposed amendments, one must analyze together the proposed amendments to Rule 8.04 of the Rules of Professional Conduct and the proposed amendments to Rule 14-301 of the Standards of Professionalism and Civility, because the proposed amendments render them one and the same.

For that reason, our comment on the proposed amendments to the Rules of Professional Conduct and the proposed amendments to the Standards of Professionalism and Civility will be considered together, as they must.

B. The Proposed Amendments Are Unconstitutional.

1. Attorney Speech is Constitutionally Protected.

Citizens do not surrender their First Amendment speech rights when they become attorneys, including when they are acting in their professional capacities as lawyers. *NAACP v. Button*, 371 U.S. 415 (1963) (holding that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."); *see also Ramsey v. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn.*, 771 S.W.2d 116, 121 (Tenn. 1989) (holding that an attorney's statements that were disrespectful and in bad taste were nevertheless protected speech and use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney's First Amendment rights, and stating that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights."); *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995) (stating that the substantive evil must be extremely serious and the degree of imminence must be extremely high before an attorney's utterances can be punished under the First Amendment).

Indeed, the ABA itself has acknowledged this very principle in an *amicus* brief it filed in the case of *Wollschlaeger. v. Governor of the State of Fla.*, 797 F.3d 859 (11th Cir. 2015). In its brief the ABA denied that a law regulating speech should receive less scrutiny merely because it regulates "professional speech." "On the contrary" – the ABA stated – "much speech by . . . a

lawyer . . . falls at the core of the First Amendment. The government should not, under the guise of regulating the profession, be permitted to silence a perceived 'political agenda' of which it disapproves. That is the central evil against which the First Amendment is designed to protect." "Simply put" – the ABA stated – "states should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession . . . Indeed," – the ABA stated – "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created."

The ABA is, of course, correct in stating that "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression." Indeed, the U.S. Supreme Court recently reiterated this principle in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), 2018 WL 3116336, in which it devoted a part of its opinion to the subject of professional speech, stating: "[T]his Court's precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, . . .The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information" (internal citations omitted). 138 S. Ct. 2361, 2374. The Court concluded that it was not presented with any persuasive reason for treating professional speech as a unique category of speech that is exempt from ordinary First Amendment principles.

In short, attorneys do not surrender their constitutional rights when they enter the legal

profession – including with respect to their professional speech – and the state may not violate attorneys' constitutional rights under the guise of professional regulation.

2. The Proposed Amendments Prohibit Constitutionally Protected Speech.

Some proponents of the proposed amendments might contend that the amendments prohibit only conduct, not speech, and that any speech that is prohibited is speech that is merely incidental to the prohibited conduct. For that reason – they might claim – the amendments do not violate the First Amendment free speech rights of lawyers.

But that is incorrect. The proposed amendments – particularly the proposed amendments to the Rules of Civility and Professionalism, which are, by incorporation, explicitly made a part of proposed Rule 8.04(h) – prohibit lawyers from engaging in "*hostile, demeaning, humiliating, or discriminatory conduct in law-related activities;.*" from making "*written submissions or oral presentations* [] [that] *disparage the integrity, intelligence, morals, ethics, or personal behavior of any person unless such matters are directly relevant under controlling substantive law;"* from *"expressing scorn, superiority, or disrespect;"* and from *"manifesting bigotry, discrimination, or prejudice toward any person in the legal process."* All these provisions prohibit pure speech.

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

A relatively recent event in Minnesota illustrates the point. In May of 2018 the Minnesota Lavender Bar Association ("MLBA") – "a voluntary professional association of lesbian, gay, bisexual, transgender, gender queer, and allies, promoting fairness and equality for the LGBT community within the legal industry and for the Minnesota community" – objected to an

accredited Continuing Legal Education presentation entitled "Understanding and Responding to the Transgender Moment/St. Paul," which was co-sponsored by a Roman Catholic law school and addressed transgender issues from a Roman Catholic perspective. The MLBA complained that the CLE – which was pure speech – was "discriminatory and transphobic," "encourages bias by arguing against the identities [of transgender people]," was contrary to the bar's diversity efforts, and constituted "harassing behavior" under Rule 8.4(g) of the Model Rules of Professional Conduct. The MLBA further characterized the presentation as "transphobic rhetoric" and stated that "Discrimination is not legal education." Minn. Lavender Bar Ass'n, https://gumroad.com/mlba (last visited Apr. 2, 2019). As a result of the MLBA's complaint, the CLE accrediting body of the Minnesota Bar revoked its CLE accreditation of the presentation – reportedly the first time such retroactive revocation of CLE credit had ever occurred in Minnesota. *See* Barbara L. Jones, *CLE credit revoked*, Minnesota Lawyer (May 28, 2018).

In this real-life example, the complained of behavior consisted of pure speech, was alleged to constitute harassment and discrimination – and was punished by the state. And the same result could occur under the amendments proposed here, because the amendments prohibit speech that could be considered by some as "hostile, demeaning, humiliating, or discriminatory" "in law-related activities," specifically including CLE's and other Bar events.

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

3. The Proposed Amendments Are Unconstitutionally Vague.

Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. And the lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. For that reason, courts apply a more stringent vagueness test when a regulation interferes with the right of free speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

Vague laws present several due process problems. First, such laws may trap the innocent by not providing fair warning. Second, vague laws delegate policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. And third, such laws lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

(a) The Terms "Hostile, Demeaning, Humiliating, Discriminatory, Disparag[ing], "Expressing Scorn, Superiority, or Disrespect," or "Manifesting Bigotry, Discrimination, or Prejudice" are all Unconstitutionally Vague.

The proposed amendments prohibit lawyers from engaging in "hostile, demeaning, humiliating, or discriminatory" speech, or speech that "disparage[s] the integrity, intelligence, morals, ethics, or personal behavior of any person," or that "express[es] scorn, superiority, or disrespect," or that "manifest[s] bigotry, discrimination, or prejudice toward any person in the legal process." However, these terms are not defined in the proposed amendments and, therefore, do not give lawyers sufficient guidance as to what behavior is being proscribed.

For example, the word "hostile" simply means "antagonistic," "not friendly, warm, or generous," "not hospitable." https://www.dictionary.com/browse/hostile#

(last visited 7/7/2020). But lawyers commonly engage in speech and conduct that others could consider antagonistic, unfriendly, ungenerous, and inhospitable. Sending a demand letter or threatening to file or filing a lawsuit against someone are themselves inherently antagonistic and unfriendly acts. And lawyers oftentimes engage in behavior that is inherently "antagonistic" or "unfriendly" in depositions, settlement negotiations, and even transactional negotiations. So how is an attorney to know what sorts of speech and conduct are prohibited by the amendments and which are not? Under Title VII, a "hostile" work environment is prohibited, but in the Title VII employment context prohibited hostility does not mean a mere offensive utterance. *Faragher v. City of Boca Raton*, 524U.S. 775, 777-78(1998). Under the proposed amendments, though, no such limiting definitions are provided to assist lawyers in determining which behaviors violate the amendments and which do not. Therefore, attorneys are left to guess – at their peril – whether their behavior, expressed in an inherently adversarial judicial system, may violate the proposed amendments.

Similarly, the word "demeaning" simply means "debasing" or "degrading." http://www.dictionary.com/browse/demeaning# (last visited 7/7/2020). But, again, lawyers – operating in the American adversarial system of justice – commonly engage in speech and conduct that others could consider to be debasing or degrading. So how is an attorney to know what sort of speech and conduct is prohibited by the amendments and which is not?

The word "humiliating" means "lowering the pride, self-respect, or dignity of a person." http://www.dictionary.com/browse/humiliating# (last visited 7/7/2020). But,

again, lawyers commonly engage in speech and conduct that others would probably consider humiliating. Is it not humiliating to every defendant to be the subject of allegations that they have engaged in criminal conduct, been negligent, defrauded or defamed someone, breached a promise, abused the discovery process, failed to comply with a court order, or engaged in some other unlawful conduct? So how is an attorney to know which sort of speech and conduct is prohibited by the amendments and which is not?

The term "discriminatory" is also unconstitutionally vague. One might contend that the word "discriminatory" is widely used and easily understood. And it is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it is also true that such statutes and ordinances do not – as does the proposed amendments – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination. For example, the federal Fair Housing Act provides a detailed description of what sorts of acts, specifically, are prohibited under the Act in the context of housing. *See* 42 U.S.C. § 3604. Similarly, Title VII specifies what sorts of acts constitute discrimination under the statute in the context of employment. *See* 42 U.S.C. § 2000e-2. Although proposed Rule8.4(g), which is limited to the employment context, would address this category of discrimination and theoretically be limited by it, proposed Rule 8.4(h) would not because proposed Rule 8.4(h) applies to attorney speech and conduct generally and outside the employment context. Proposed Rule 8.4(h) simply prohibits "*discriminatory conduct in law-related activities."*– thereby leaving to the attorney's imagination what sorts of speech and behavior might be encompassed in that

proscription.

The word "disparaging" means "to speak of or treat slightingly; depreciate; belittle" or "to bring reproach or discredit upon" or "lower the estimation of." http://www.dictionary.com/browse/disparage# (last visited 7/7/2020). But, again, is it not disparaging for every defendant to be the subject of allegations that they have engaged in criminal conduct, been negligent, defrauded or defamed someone, breached a promise, abused the discovery process, failed to comply with a court order, or engaged in some other unlawful conduct? So how is an attorney to know which sorts of speech and conduct are prohibited by the amendments and which are not? Would some not consider a lawyer who – at a CLE addressing transgender issues – questions whether men can be women or women be men, to be depreciating or belittling transgender individuals and, therefore, in violation of the proposed amendments?

To "scorn" means "to treat or regard with contempt or disdain http://www.dictionary.com/browse/scorn# (last visited 7/7/2020) and the word "disrespect" means to be discourteous or rude. http://www.dictionary.com/browse/disrespect# (last visited 7/7/2020). Under the proposed amendments, would an attorney who, at a law firm dinner party, expresses her Roman Catholic religious belief that homosexual behavior is fundamentally disordered, be in violation of the rule, since some would consider such a belief as disrespecting homosexual individuals and regarding them with contempt or disdain?

(b) The Term "Harm" is Unconstitutionally Vague.

Proposed Rule 8.4(h) prohibits attorneys from violating Rule 14-301 of the Standards of Professionalism and Civility – which prohibits lawyers from engaging in "hostile, demeaning, humiliating, or discriminatory" speech, or speech that "disparage[s] the integrity, intelligence, morals, ethics, or personal behavior of any person," or that "harm[s] the lawyer's client or another lawyer's client," or that "express[es] scorn, superiority, or disrespect," or that "manifest[s] bigotry, discrimination, or prejudice toward any person in the legal process" – if such violations "harm the lawyer's client or another lawyer's client" (our emphasis).

However, the term "harm" is unconstitutionally vague because attorneys cannot determine with any degree of reasonable certainty what speech and conduct may "harm" the lawyer's client or another lawyer's client under the Rule. Indeed, the word "harm" encompasses a wide range of injury, from "physical injury or mental damage" to "hurt" to "moral injury; evil; [and] wrong." *Harm*, Dictionary.com, http://www.dictionary.com/browse/harm (last visited July 7, 2020). So "harm" to a client, whether one's own or another attorney's, can encompass an almost limitless range of allegedly injurious effects on others. Mental damage, for example, could easily be interpreted to include real, imagined, or even feigned, emotional distress at being exposed to expression someone finds offensive or upsetting. And a whole host of expressions could subjectively considered "morally injurious," "evil," or "wrong."

Remember that speech does not lose its constitutional protection just because it is "harmful." *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557,

574 (1995) (stating that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (noting that an interest in protecting bystanders from feeling offended or angry is not sufficient to justify a ban on expression); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (striking down a ban on picketing near embassies where the purpose was to protect the emotions of those who reacted to the picket signs' message). *See also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011) (stating that "new categories of unprotected speech may not be added to the list [of unprotected speech – such as obscenity, incitement, and fighting words] by a legislature that concludes certain speech is *too harmful* to be tolerated") (emphasis added).

Indeed, the U.S. Supreme Court has stated that the idea that free speech protection should be subject to a balancing test that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test, is a "startling and dangerous" proposition. *Id.* at 792; *see also United States v. Stevens*, 559 U.S. 460, 470 (2010) (holding that "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.")

(c) The Phrase "Law-Related Activities" is Unconstitutionally Vague.

The proposed amendments prohibit lawyers from engaging in "*hostile, demeaning, humiliating, or discriminatory conduct in law-related activities.*" And the

proposed amendments go on to define *"law-related activities"* to *"include, but* [are] *not limited to, settlement negotiations; depositions; mediations; court appearances; CLE's; events sponsored by the Bar, Bar sections, or Bar associations; and firm parties.*

It hardly need be said, though, that what conduct is "law-related" and what conduct is not, is vague and subject to reasonable dispute.

The phrase is vague, first, because the term "law-related" need not be related to the practice of law, or even the professional activities of lawyers, at all.

Considering some hypothetical situations brings the problem into focus. It is clear that the proposed prohibitions would apply to comments made by an attorney while attending a law firm retirement party for a law firm co-worker, because the proposed rule expressly applies to firm parties. But would it also include comments made while the attorneys are walking to their vehicles after the party has ended? Would it apply to comments one attorney makes to another while car-pooling to or from work? Would it include comments an attorney makes while teaching a religious liberty law class at the attorney's church? Or sitting on his church's governing board, where he is sometimes asked for his professionally informed opinion on some matter before the board? Or when attending an alumni function at the law school the attorney attended? Or when publishing a letter to the editor of a newspaper when the author is identified therein as a lawyer? Or, for that matter, in any behavior in which the actor is identified as being a lawyer? The answers to these inquiries are far from self-evident.

And it is not just our opinion that the phrase "law-related activities" is unconstitutionally vague. The Chair of the ABA Policy & Implementation Committee, which is charged with advocating for the Model Rules of Professional Conduct, while

serving on an ABA CLE panel discussing Model Rule 8.4(g), was asked what the phrase "related to the practice of law" in Model Rule 8.f(g) meant? In response, he stated "I don't have an answer for you." "It is extraordinarily broad." "I don't know where it begins or where it ends." *Model Rule 8.4 – Update, Discussion, and Best Practices in a #MeToo World*, August 2, 2018. And the phrase "law-related activities" is even broader than "related to the practice of law" because the phrase "law-related activities" is not limited to attorney speech and conduct in "the practice of law."

Because a lawyer cannot, with any degree of reasonable certainty, determine what behavior of an attorney is "law-related" and what is not, the proposed amendments are unconstitutionally vague.

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

Because of the vagueness of many of the proposed amendments' essential terms, the proposed amendments are unconstitutional.

4. The Proposed Amendments Are Unconstitutionally Overbroad.

Even if a law is clear and precise – thereby avoiding a vagueness challenge – it may nevertheless be unconstitutionally overbroad if it prohibits constitutionally protected speech.

Overbroad laws – like vague laws – deter protected activity. The crucial question in determining whether a law is unconstitutionally overbroad is whether the law sweeps within its

prohibitions what may not be punished under the First and Fourteenth Amendments. *Grayned*, 408 U.S. at 114-15.

Although some of the speech the proposed amendments prohibit might arguably be unprotected – such as speech that actually and seriously prejudices the administration of justice by undermining a specific judicial proceeding, or speech that would actually and clearly render an attorney unfit to practice law – the proposed amendments would also sweep within their prohibitions lawyer speech that is clearly protected by the First Amendment, such as speech that might be considered, at least by some, as constituting "hostile, demeaning, humiliating, or discriminatory" speech, or speech that "disparage[s] the integrity, intelligence, morals, ethics, or personal behavior of any person," or that "harm[s] the lawyer's client or another lawyer's client," or that "express[es] scorn, superiority, or disrespect," or that "manifest[s] bigotry, discrimination, or prejudice toward any person in the legal process," but that would not prejudice the administration of justice nor render the attorney unfit to practice law. *DeJohn v. Temple Univ.*, 537 F.3d 301 (2008) (holding that a University Policy on Sexual Harassment that prohibited "all forms of sexual harassment . . . including expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment" was unconstitutionally overbroad on its face).

Speech is not unprotected merely because it is harmful, derogatory, demeaning, or even discriminatory or harassing. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) (holding that there is no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs; harassing or discriminatory speech implicate First Amendment protections; there is no categorical rule divesting "harassing" speech of First

Amendment protection).

Indeed, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder*, 562 U.S. at 458 (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley*, 515 U.S. at 574 (noting that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); s*ee also Johnson*, 491 U.S. at 414 (stating that "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *see also Matal v. Tam*, 137 Sup. Ct. 1744 (2017) (stating that the government's attempt to prevent speech expressing ideas that offend strikes at the heart of the First Amendment) and *Telescope Media Group v. Lucer*o, 936 F.3d 740 (8th Cir. 2019)(observing that "regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be").

In fact, courts have specifically found that terms such as "derogatory" and "demeaning" are unconstitutionally overbroad. *Hinton*, 633 F.Supp. 1023 (holding that the term "derogatory information" is unconstitutionally overbroad); *Summit Bank*, 206 Cal. App. 4th 669 (finding that a statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech); s*ee also Saxe*, 240 F.3d 200 (holding that a school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional because it is overbroad).

The broad reach of the proposed amendments are well illustrated by the fact that the amendments specifically extend their reach to "firm parties." This broad reach is the same problem presented by ABA Model Rule 8.4(g). Senior Ethics Counsel Lisa Panahi and Ethics Counsel Ann Ching of the Arizona State Bar, in their January 2017 article "Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g)," in the *Arizona Attorney*, stated that an attorney could be professionally disciplined under Model Rule 8.4(g)'s prohibition on discriminatory or harassing conduct in business or social activities "related to the practice of law" for telling an offensive joke at a law firm dinner party. The late Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provided another example of the broad reach of broad professional rules like the one being proposed here. Writing of ABA Model Rule 8.4(g), he stated: "If one lawyer tells another, at the water cooler or a bar association meeting on tax reform, 'I abhor the idle rich. We should raise capital gains taxes,' he has just violated the ABA rule by manifesting bias based on socioeconomic status." Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Legal Memorandum No. 191 at 4, The Heritage Foundation (Oct. 6, 2016). (The same result would ensue under the amendments proposed here because, although the protected classes under the proposed amendments do not, like ABA Model Rule 8.4(g), include "socioeconomic status," the proposed amendments prohibit lawyers from engaging in any "*hostile, demeaning, humiliating, or discriminatory conduct in law-related activities"* without limiting such discrimination to those particular protected classes.)

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

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

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

5. The Proposed Amendments Will Constitute Unconstitutional Content-Based Speech Restrictions.

In proscribing speech that is *hostile, demeaning, humiliating, or discriminatory* toward members of certain designated classes, the proposed Rule will constitute an unconstitutional content-based speech restriction. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (explaining that government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.); *see also Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (holding that an ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

Indeed, the U.S. Supreme Court recently reiterated this principle in a case that is directly relevant when considering the constitutional infirmities of the proposed amendments. In *Tam*, the Court found that a Lanham Act provision – prohibiting the registration of trademarks that may

"disparage" or bring a person "into contempt or disrepute" – facially unconstitutional, because such a disparagement provision – even when applied to a racially derogatory term – ". . . offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." 137 Sup. Ct. 1744. In a concurring opinion joined by four Justices, Justice Kennedy described the constitutional infirmity of the disparagement provision as "viewpoint discrimination" – "an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Id*. at 1766. The problem, he pointed out, was that, under the disparagement provision, "an applicant may register a positive or benign [trade]mark but not a derogatory one" and that "This is the essence of viewpoint discrimination." *Id*. Likewise, under the proposed Rule here, attorneys may engage in positive or benign speech with regard to the protected classes, but not derogatory, demeaning, or harmful speech. Under the Supreme Court's *Tam* decision, this is the essence of viewpoint discrimination, and presumptively unconstitutional.

The late Professor Rotunda provided a concrete example of how the professional rules like the amendments proposed here may constitute an unconstitutional content-based speech restriction, stating that "At another bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.' Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally, another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline." Rotunda, *supra*.

Under the proposed amendments, the content of a lawyer's speech will determine whether or not the lawyer has or has not violated the rule. For example, a lawyer who speaks against same-sex marriage may be in violation of the rule for engaging in speech that some

consider to be discriminatory based on sexual orientation or marital status, while a lawyer who speaks in favor of same-sex marriage would not be. Or as the Minnesota case discussed above illustrates, one may speak favorably about transgender issues, but not unfavorably. These are classic examples of unconstitutional viewpoint-based speech restrictions. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (holding that the government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed). In *R.A.V.*, the Supreme Court struck down, as facially unconstitutional, the city of St. Paul's Bias-Motivated Crime Ordinance because it applied only to fighting words that insulted or provoked violence "on the basis of race, color, creed, religion or gender," whereas expressed hostility on the basis of other bases were not covered. *Id*. In striking down the Ordinance, the Court stated: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id*. at 390. That is precisely what the proposed Rule does. For that reason, commentators have described Model Rule 8.4(g) as a speech codes for lawyers.

For those who would deny that the proposed amendments create an attorney speech code, we need only point them to Indiana, a state that has adopted a black letter non-discrimination rule. In *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Ind. 2010), an Indiana attorney was professionally disciplined under Indiana's Rule 8.4(g) for merely asking someone if they were "gay." And in *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Ind. 2010), an attorney had his license suspended for applying a racially derogatory term to himself. In both cases, the attorneys were professionally disciplined merely for using certain disfavored speech.

Because it constitutes an unconstitutional speech code for lawyers, the proposed amendments should be rejected.

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

The proposed amendments will also violate attorneys' constitutional right of free religious exercise because the amendments prohibit religious expression if such expression could be considered hostile, demeaning, humiliating, or discriminatory.

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

So, for example, the proposed amendments would prohibit attorneys from engaging in "bigotry" and "prejudice." But "bigotry" means a "stubborn and complete intolerance of any creed, belief, or opinion that differs from one's own." http://www.dictionary.com/browse/bigotry.# (last visited 7/9/2020) and "prejudice" means "unreasonable feelings, opinions, or attitudes, especially of a hostile nature, regarding an ethnic, social, or religious group." http:/www.dictionary.com/browse/prejudice# (last visited 7/9/2020). But lawyers of faith may very well have religiously informed beliefs that, to others, might appear intolerant or hostile. The proposed amendments would professionally condemn such beliefs.

As an illustration of this, the late Professor Rotunda posited the example of Catholic attorneys who are members of the St. Thomas More Society, an organization of Catholic lawyers and judges. If the St. Thomas More Society should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, Professor Rotunda explained that those attorneys may be in violation of the

rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. In fact, Professor Rotunda pointed out that an attorney might be in violation of the rule merely for being a member of such an organization. Rotunda, *supra* at 4-5. The fact that the proposed amendments may prohibit such speech or membership indicates that the proposed amendments will be unconstitutional.

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

Religiously based legal organizations have consistently opposed professional conduct rules like the one being considered here in Utah on the ground that such rules threaten religious liberty. Those groups include the Catholic Bar Association – which has adopted a resolution stating that Model Rule 8.4(g) is not only unconstitutional, but that it is "incompatible with Catholic teaching and the obligations of Catholic lawyers" – as well as the Christian Legal Society. Both organizations have cause for concern because, as Professor Rotunda presciently warned, merely being members of those organizations would violate rules like the amendments being proposed here. How so? Because both organizations could be considered "law related

activities" and both limit their membership based on religion. The Christian Legal Society requires its members to subscribe to a Christian statement of faith. The Catholic Bar Association requires its members to be practicing Roman Catholics. Therefore, both legal organizations "discriminate" on the basis of religion in a law-related activity– something explicitly prohibited under the terms of the proposed amendments. The proposed amendments would, essentially, destroy both organizations.

Because the proposed amendments will violate attorneys' Free Exercise (and Free Association) rights, they should be rejected.

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

Under a literal reading of the proposed amendments, a law firm's race or sex-based affirmative action hiring practices would constitute a violation because the proposed Rule 8.4(h) makes clear that it is professional misconduct for a lawyer in any law related activity to discriminate on the basis of race or sex. Therefore, any hiring or other employment practices that favor applicants or employees on the basis of either of those characteristics are forbidden.

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

Indeed, the proposed Comment [4] to the proposed Rule 8.4(g) makes this practice, of protecting favored speech and suppressing disfavored speech, explicit because Comment [4] to the Rule contains an express exception for *implementing initiatives aimed at recruiting, hiring,*

retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, providing that such are not violations of paragraph (g).

So, if an attorney engages in discriminatory conduct that furthers a *politically correct* interest, the disciplinary authority will find that the discrimination is undertaken to promote diversity or inclusion, or to serve an underserved population – and for that reason does not violate the Rule. But if an attorney engages in discriminatory conduct that furthers a *politically incorrect* interest, the state will prosecute that attorney for violating the Rule. And because the terms "*hostile, demeaning, humiliating, or discriminatory*" are vague and overbroad, professional disciplinary authorities will be able to interpret those terms in ways that result in selective prosecution of politically incorrect or disfavored speech, while protecting politically correct or favored speech.

This phenomenon has already been observed in other similar contexts. For example, a Civil Rights Commission in Colorado prosecuted a Christian baker for declining to bake a wedding cake for a same-sex couple, but refused to prosecute three other bakers who refused to bake a cake for a Christian, finding that the first constituted illegal discrimination but that the second did not. The reason underlying this disparate treatment was obvious – in the first the complaining party was a member of a politically favored class, while in the second the complaining party was a member of a disfavored one. The U.S. Supreme Court condemned that unequal treatment, stating that it constituted a "clear and impermissible hostility toward the religious beliefs" of the baker the Commission selectively chose to prosecute. *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1729 (2018).

These exceptions also render the proposed amendments unconstitutional because – by

prohibiting only disfavored discriminatory messages, while allowing favored ones – the proposed amendments create a viewpoint-based speech restriction. *See R.A.V.*, 505 U.S. 377.

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

8. Assurances That the Proposed Amendments Will Not Be Applied in an Unconstitutional Manner Does Not Cure the Amendments' Constitutional Infirmities.

Proposed Comment [5] to Rule 8.04 provides that: *Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.* This provision was apparently added in order to address the concern that, although the proposed amendments could be applied in an unconstitutional manner, they will not be – and to assuage attorneys' concerns about the proposed amendments' constitutional infirmities. However, such a "savings clause" is ineffective to cure the proposed amendments' constitutional infirmities.

First, proponents of the proposed amendments do not have the authority to speak on behalf of a state's professional disciplinary authorities. Proponents of the amendments cannot say how the disciplinary authorities will or will not interpret or apply the proposed amendments.

And second, this very argument was made and rejected in *Stevens*, supra. There, in a case challenging the constitutionality of a statute criminalizing certain depictions of animal cruelty, the U.S. Supreme Court addressed the government's claim that the statute was not

unconstitutionally overbroad because the government would interpret the statute in a restricted manner so as to reach only "extreme" acts of animal cruelty, and that the government would not bring an action under the statute for anything less. In response, the high court pointed out that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." The court pointed out the danger in putting faith in government representations of prosecutorial restraint, and stated that "The Government's assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." *Id*. at 480.

In other words, far from curing its constitutional defects, representations such as that provided in the proposed Comment [5] of the proposed amendments – that the amendments will not be applied so as to violate the Constitution – constitute indirect admissions that the proposed amendments are, in fact, constitutionally infirm.

In arguing that the proposed Rule will not be applied unconstitutionally, proponents may also point to the Rule's provision that "*Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).* But that provision does not cure the defects either.

It does not cure the defects, first, because the cited provision is circular. In order to qualify as "legitimate" the advice or advocacy must, of course, be consistent with the Rules. But in order to be consistent with the Rules (in particular with proposed Rule 8.4(h) itself, incorporating the Rules of Professionalism and Civility), the advice or advocacy cannot be "hostile, demeaning, humiliating, or discriminatory." In other words, under the proposed Rule, advice or advocacy that could be considered to constitute hostile, demeaning, humiliating, or

discriminatory speech or conduct can, by definition, never constitute legitimate advocacy because hostile, demeaning, humiliating, or discriminatory advice or advocacy is inconsistent with proposed Rule 8.4(h) itself.

Further, by stating that the Rule will not prohibit "legitimate advocacy" the proposed Rule – for the first time – creates the concept of *illegitimate* advocacy. Advocating for clients is the very essence of what lawyers do. If the proposed Rule is adopted, however, an attorney will need to worry whether her advocacy might be considered "illegitimate" and, therefore, a violation of professional ethics. And having to worry about that will chill the lawyer's speech and interfere with the attorney's ability to provide her client with zealous representation.

Finally, who will determine whether an attorney's advocacy is legitimate or illegitimate? The disciplinary authorities, of course, will make that determination, in their unfettered discretion, after the fact and, potentially, on political or ideological grounds.

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

If the proposed amendments are adopted, attorneys will be subject to discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases – because, under the proposed amendments, attorneys will not only be forced to take cases or clients they might have otherwise declined, they will be forced to take cases or clients the Rules of Professional Conduct forbid them to take.

1. Proposed Rule 8.4(h) Provides No Exception For Attorney Client Selection Decisions

In countering this contention, proponents of the amendments will undoubtedly point to Comment [4] of the proposed amendments, which provides that: "*[4] Paragraph (g) does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from a representation.*" However, this provision applies, on its face, only to proposed Rule 8.4(g) – not proposed Rule 8.4(h) – and proposed Rule 8.4(g) applies only to "*unlawful, discriminatory or retaliatory employment practice*[s] *under Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act*" (our emphasis). But neither of those statues would even apply to an attorney's client selection decisions because the relationship between a lawyer and his or her clients does not constitute an employment relationship under either statute.

Proposed Rule 8.4(h), on the other hand, prohibits conduct that violates Rule 14-301 of the Standards of Professionalism and Civility, which prohibits lawyers from engaging in any "*discriminatory conduct in law-related activities.*" And, unlike proposed Rule 8.4(g), the proposed amendments contain nothing that exempts a lawyer's client selection decisions from Rule 8.4(h)'s prohibitions. Therefore, since a lawyer's client selection decisions are clearly a law-related activity, the proposed amendments must prohibit lawyers from engaging in "discriminatory conduct" in exercising their client selection decisions.

And we know that limiting the client selection decision exemption to proposed Rule 8.4(g) and not extending it to proposed Rule 8.4(h) is not just an oversight, because the drafters of the proposed amendment knew how to make provisions applicable to both 8.4(g) and (h) if they wanted. So, for example, the proposed amendments specifically provide that: "*Comment [5]. Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution*" (our emphasis).

So, in short, contrary to the assertions of the Rule's proponents, the proposed Rule *will* apply to an attorney's client selection decisions and *will* prohibit attorneys from declining representation of particular clients if to do so could be considered discriminatory.

2. The Proposed Amendments Constitute An Alarming Departure From the Historically and Professionally Recognized Right of Attorneys to Select Their Own Clients.

This is an alarming departure from the professional principles historically enshrined in Utah's Rules of Professional Conduct and its predecessors, which have, before now, always respected the attorney's freedom and professional autonomy when it comes to choosing who to represent and what cases to accept.

Although the Rules *have* placed restrictions on which clients attorneys may *not* represent (see, for example, Rule 1.7 which precludes attorneys from representing clients or cases in which the attorney has a conflict of interest, and Rule 1.16(a) which requires attorneys to decline or withdraw from representation when representation would compromise the interests of the client), never before have the Rules required attorneys to *take* cases the attorney decides – for whatever reason – he or she does not want to take, or to represent clients the attorney decides – for whatever reason – he or she does not want to represent. (Although Rule 6.2 prohibits attorneys from seeking to avoid court appointed representation, that Rule does not apply to an attorney's day-to-day voluntary client selection decisions – and even in its peculiar context of court-appointed representation the Rule expressly allows attorneys to decline such appointments "for good cause" – including because the attorney finds the client or the client's cause repugnant.)

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

Charles W. Wolfram, p. 573 (1986)("*a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.*"). The reasons underlying this historically longstanding respect for attorneys' professional autonomy in making client and case selection decisions are clear.

First, the Rules themselves respect an attorney's personal ethics and moral conscience. For example, section [7] of the Preamble to Utah's Rules provides that "*Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience*" and section [9] of the Preamble provides that "*Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment . . .*"

If a lawyer is required to accept a client or a case to which the attorney has a moral objection, however, the Rules would have the effect of forcing the attorney to violate his or her personal conscience, would interfere with the lawyer's interest in remaining an ethical person, and would prohibit lawyers from exercising their own moral judgment.

And second, the Rules impose upon attorneys a professional obligation to represent their clients zealously (Comment [1] to Rule 1.3) and without personal conflicts (Rule 1.7(a)(2)). A lawyer's ability to conform to those duties, however, would be compromised should the lawyer have personal or moral objections to a client or a client's case.

To force an attorney to accept a client or case the attorney does not want, and to then require the attorney to provide zealous representation to that client, is unfair to the attorney

because doing so places conflicting and unresolvable obligations upon the lawyer. But it will also harm clients because every client deserves an attorney who is not subject to or influenced by any interests which may, directly or indirectly, adversely affect the lawyer's ability to zealously, impartially, and devotedly represent the client's best interests.

We must always remember that a primary purpose of the Rules is to protect the public, by ensuring that attorneys represent their clients competently and without personal interests that will adversely affect the attorney's ability to provide clients with undivided and zealous representation. It recognizes the principle that the client's best interest is never to have an attorney who – for any reason – cannot zealously represent them or who has a personal conflict of interest with the client.

The proposed amendments to the Rules, however, will force an attorney to represent clients who the attorney cannot represent zealously or who, on account of the attorney's personal beliefs about the client or the case, will not be able to represent without a personal conflict of interest. In that respect, the proposed amendments will harm clients.

Indeed, the proposed amendments, if adopted, would introduce insidious deception into the attorney-client relationship because – in order to avoid violating the Rule – some attorneys will be led to conceal their personal animosities from clients, thereby saddling clients with attorneys who – if the client knew of the attorney's animosities – the client would not retain.

For these reasons, too, the proposed amendments should be rejected.

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

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

a. The Proposed Amendments Conflict with Rule 1.7 (Conflicts of Interest). Rule 1.7 provides that: "*(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or* ***by a personal interest of the lawyer***" (our emphasis). And Restatement (Third) of the Law Governing Lawyers §125 (2000) clarifies that: "*A conflict under this Section need not be created by a financial interest. . .* ***Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy belief***" (our emphasis).

So – on the one hand the proposed Rule requires an attorney to accept clients and cases, despite the fact that such clients or cases might run counter to the attorney's deeply held religious, philosophical, political, or public policy principles, while at the same time Rule 1.7 provides that accepting a client or a case – when the client or case runs counter to such beliefs of the attorney – would violate Rule 1.7's Conflict of Interest prohibitions.

b. The Proposed Amendments Conflict With Rule 1.3. (Zealous Representation). Attorneys have a professional duty to represent their clients zealously. Indeed, the U.S. Supreme Court has stated that lawyers have a fundamental duty to zealously represent their clients. *Evans v. Jeff D.*, 475 U.S. 717, 758 (1986). See also *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994)(stating that "a lawyer's first duty is zealously to represent his or her client"). So, this is a fundamental professional duty, independent of the Rules of Professional Conduct. But Rule 1.3 of the Utah Rules of Professional Conduct also establishes such a duty. The Comment to Rule 1.3 (Diligence) states that "A lawyer must . . . act . . .with zeal in advocacy upon the client's behalf."

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

But how would an attorney be able to *zealously* represent a client whose case runs counter to the attorney's deeply held religious, political, philosophical, or public policy beliefs?

Under proposed Rule 8.4(h), the attorney may not be allowed to reject a case or client she might otherwise reject – due to the attorney's personal beliefs – but then must also represent that client with passion and fervor, enthusiastically and in an eager and determined manner.

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

How is that conflict to be resolved?

c. The Proposed Amendments Conflict with Rule 6.2 (Accepting Appointments). – Rule 6.2 provides that "*A lawyer shall not seek to avoid appointment by a tribunal to represent a person* ***except for good cause****: such as: . . . (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client*" (our emphasis).

Although this Rule is technically applicable only to court appointments, it is important to what we are discussing here because it contains a principle that should be equally – if not more – applicable to an attorney's voluntary client-selection decisions. Namely, the Rule recognizes that a client or cause may be so repugnant to a lawyer that the lawyer-client relationship would be impaired or the lawyer's ability to represent the client be adversely affected.

Indeed, the Comment to Rule 6.2 sets forth the general principle that "*A lawyer ordinarily is*

not obliged to accept a client whose character or cause the lawyer regards as repugnant."

And yet, the proposed amendments would require an attorney to represent clients and cases the lawyer may find repugnant.

d. The Proposed Amendments Conflict with Rule 1.16 (Declining or Terminating Representation). Rule 1.16(a)(1) provides that: *(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the Iowa Rules of Professional Conduct or other law*. However, we have already seen that Rule 1.7 would prohibit an attorney from representing a client who – due to the lawyer's personal beliefs – the lawyer could not represent without a personal conflict of interest interfering with that representation; and Rule 1.3 would prohibit an attorney from representing a client if the attorney could not do so zealously; and Rule 6.2 provides that a lawyer may decline court appointed representation if the attorney finds the client or the client's cause so repugnant as to interfere with the ability of the lawyer to provide un-conflicted representation. To represent clients in any of these situations would constitute a violation of the Rules of Professional Conduct. But the proposed amendments will require attorneys to accept clients and cases that – due to the attorney's personal beliefs about the client or the case – the attorney would otherwise have to decline. So, the proposed amendments is in conflict with Rule 1.16 too.

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

Indeed, the fact that the proposed amendments conflict with other Professional Rules reveals a foundational problem with the proposed amendments – and that is that the proposed amendments are an attempt to impose upon the legal profession a non-discrimination construct that is, in its basic premises, inconsistent with who attorneys are and what they professionally do. It is an attempt to force a round peg into a square hole.

In considering the proposed amendments, we must remember that the non-discrimination template on which the proposed amendments are based is taken from the context of public accommodation laws – non-discrimination laws that are imposed in the context of merchants and customers. But lawyers are not mere merchants, and a lawyer's clients are not mere customers. Unlike merchants and customers, attorneys have *fiduciary relationships* with their clients.

Attorneys are made privy to the most confidential of their client's information, and are bound to protect those confidentialities; they are bound to take no action that would harm their clients; and attorneys' relationships with their clients oftentimes last months or even years. And once an attorney is in an attorney-client relationship, the attorney oftentimes may not unilaterally sever that relationship. None of those things are true with respect to a merchant's relationship with a customer. So it is one thing to say a *merchant* may not pick and choose his *customers*. It is entirely another to say a *lawyer* may not pick and choose her *clients*.

No lawyer should be required to enter into what is, by definition, a fiduciary relationship with a client the attorney does not want – for whatever reason – to represent.

D. The Proposed Rule is Unnecessary and Will Unnecessarily Burden Utah's Professional Disciplinary Authorities.

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

First, proposed Rule 8.4(h) prohibits conduct that prejudices the administration of justice. And proposed Comment [3] provides that *A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race; color; sex; pregnancy, child birth, or pregnancy-related conditions; age, if the individual is 40 years of age*

or older; religion, national origin; disability; sexual orientation; gender identity; or genetic information may violate paragraph (d) <u>when such actions are prejudicial to the administration of justice</u> (our emphasis).

But Rule 8.4(d) already prohibits attorney conduct that prejudices the administration of justice. And, in fact, sexual harassment has been professionally disciplined in other states under Rule 8.4(d). *See, e.g., Attorney Grievance Comm'n of Md. v. Goldsborough*, 624 A.2d 503 (Ct. App. Maryland 1993) (holding that nonconsensual kissing of clients and spanking clients and employees can violate Rule 8.4(d) prohibiting lawyer from engaging in conduct that is prejudicial to the administration of justice). Likewise, harassing and discriminatory judicial behavior – as well as discriminatory and harassing conduct of attorneys in proceedings before judicial tribunals – are already addressed in the Utah Code of Judicial Conduct, Rule 2.3(B) and (C).

For all these reasons, the proposed amendments are redundant and unnecessary.

In addition, harassment and discrimination in the legal workplace – which proposed Rule 8.4(g) would address – are also already addressed in Title VII at the federal level, as well as in Utah's employment nondiscrimination laws, including §34A-5-106 of the Utah Antidiscrimination Act.

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

Further, proposed Rule 8.4(g) makes employment discrimination and harassment a professional, as well as a statutory, offense, divorced from antidiscrimination and harassment

laws because, under proposed Rule 8.4(g), "*Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of paragraph (g).*" This could very well subject attorneys to multiple prosecutions and inconsistent obligations and results. Lawyers could be forced to defend against parallel prosecutions, being pursued by different prosecutorial authorities, all at the same time. And, because different legal and evidentiary standards may apply in different proceedings, attorneys could – under the same set of facts – be exonerated from allegations of having violated an employment nondiscrimination or harassment law, but still be found to have engaged in harassing or discriminatory conduct that violates the Rules of Professional Conduct, or vice versa. Some states have recognized the importance of this issue by requiring that any claim against an attorney for unlawful discrimination be brought for adjudication before a tribunal other than a disciplinary tribunal before being brought before a disciplinary tribunal. See, for example, Illinois Rules of Professional Conduct Rule 8.4(j) and New York Rules of Professional Conduct Rule 8.4(g).

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

III. Conclusion

The proposed amendments are unconstitutional. They are unconstitutionally vague. They are unconstitutionally overbroad. And they constitute an unconstitutional content-based speech restriction. They also violate attorneys' Free Speech, Free Exercise, and Free Association rights.

In addition to being constitutionally infirm, the proposed amendments would sever Utah's Rules of Professional Conduct from the legitimate interests of the bar in regulating the legal profession, conflict with other Rules of Professional Conduct and professional obligations attorneys have, and would authorize professional disciplinary authorities to discipline lawyers for

non-commercial speech and conduct that neither prejudices the administration of justice nor renders attorneys unfit to practice law. The proposed amendments would also subject attorneys to duplicative prosecutions, as well as inconsistent obligations and results. And they would harm clients.

For all these reasons, the proposed amendments to Rule 8.04 of the Utah Rules of Professional Conduct and Rule 14-301 of the Standards of Professionalism and Civility should be rejected.

Respectfully submitted,

Danny C. Leavitt #15185

Frank D. Mylar #5116

Thaddeus W. Wendt #11977

UTAH STATE COURTS

Nancy Sylvester <nancyjs@utcourts.gov>

FW: Proposed Rule of Professional Conduct 8.04 and Rule of Professionalism 14-301

2 messages

Dan Brough Mon, Aug 3, 2020 at 9:31 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>, Simón Cantarero

Daniel K. Brough, Attorney

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From: Sean A. Monson
Sent: Saturday, August 1, 2020 5:43 PM
To: Dan Brough
Subject: Proposed Rule of Professional Conduct 8.04 and Rule of Professionalism 14-301

Dan,

I hope you are doing well. I tried to comment on the website regarding the proposed rule changes (Rule of Professional Conduct 8.04 and Rule of Professionalism 14-301) but was not able to do so even though I understand that today is the comment deadline. My lack of technical prowess is my personal demon. I see that you are on the rules committee so I am taking the liberty of giving you my perspective on the proposed rules.

There are a number of comments concerning the proposed rules but I think the last comment by Bryan Bernard sums up the concerns I have. Imposing an obligation on an attorney to not discriminate against or harass a witness or adverse party because of that individual's membership in a protected class is hopelessly vague. What is harassment under the proposed rule? Questioning a witness while using a higher pitched voice? Demanding that the witness be precise in his or her answers? I simply have no idea how I am supposed to conduct a deposition without potentially running afoul of the proposed rules. And I might not even know if a witness is a member of a protected class while conducting the deposition. Do I get to ask the witness if he or she has a disability? What is the definition of a disability? Many disabilities are not apparent just by interacting with someone. Further, how do I reconcile the obligation to be a vigorous advocate for my client with the obligations outlined in the proposed rules?

Title VII and the Utah anti-discrimination statute are grounded in the idea that it is unlawful to treat someone differently in the terms and conditions of that person's employment because of his or her membership in a protected class. Unlawful harassment is premised on a finding that an employer creates or permits a work environment in which inappropriate comments or conduct (based on membership in one of the protected classes) is so severe or pervasive that it alters the terms and conditions of someone's employment. These standards are meaningless when applied to a deposition. How do we determine that a witness has been discriminated or harassed in violation of the rule when the standards adopted to understand the rule are ultimately grounded in the idea of treating someone differently in the terms and conditions of their employment? In short, the case law and standards that the proposed rules adopt provide no meaningful guidance regarding how to interpret the rules.

Thanks for considering my thoughts. While the proposed rules have admirable aspirations, they create unintended landmines for practitioners.

Sean

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Simón Cantarero Mon, Aug 3, 2020 at 10:40 AM
To: Dan Brough
Cc: Nancy Sylvester <nancyjs@utcourts.gov>

[Quoted text hidden]

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SINCE 1923.

July 15, 2020

To the Utah Supreme Court:

We write in response to proposed revisions to the Utah Rules of Professional Conduct based, in part, on ABA Model Rule 8.4(g). We previously submitted a comment to the Utah Supreme Court in May 2019.[1] The Utah Supreme Court now seeks comments on revisions to Rule 8.4(g), Rule 8.4(h), and Rule 14-301.[2] The interplay between these provisions is complicated. Indeed, we have not seen any other state propose such a convoluted framework. This complexity, we fear, will mask the serious problems underlying the proposal. We will consider each provision in turn.

First, Rule 14-301 establishes "standards of professionalism and civility." The proposal makes several critical changes. Rule 14-301 would now provide that "Lawyers *shall* avoid hostile, demeaning, or humiliating, or discriminatory conduct in law related activities." Rule 14-301 also prohibits lawyers from "expressing scorn, superiority, or disrespect." And the rule explains that "Law-related activities include, but are not limited to, settlement negotiations; depositions; mediations; court appearances; CLE's; events sponsored by the Bar, Bar sections, or Bar associations; and firm parties." This Rule would also seem to prohibit "[w]ritten submissions" and "oral presentations" at CLE events that "disparage the integrity, intelligence, morals, ethics, or personal behavior of any person unless such matters are directly relevant under controlling substantive law."

The lofty standards in Rule 14-301 were previously aspirational. But the addition of the word "shall" demonstrates that these dictates are mandatory. In our May 2019 letter, we explained the First Amendment problems with vague standards like "hostile, demeaning, or humiliating." We incorporate those arguments by reference. Additionally, this rule would expressly attend to social activities, such as bar functions, debates, and other law-related gatherings. This rule will invariably chill speech on pressing matters of social concern.[3] Finally, Rule 14-301 does not contain a exception for "legitimate advocacy." (Rule 8.4(g) has this exception, but it does not extend to Rule 8.4(h) and Rule 14-301). Therefore, "demeaning conduct" would be forbidden, even if it was part of legitimate advocacy. In its present form, the mandatory duty in Rule 14-301 should be rejected.

Second, Rule 8.4(h) would now be "professional misconduct for a lawyer to… egregiously violate, or engage in a pattern of repeated violations of, Rule 14-301 if such violations harm the lawyer's client or another lawyer's client or are prejudicial to the administration of justice." Rule

[1] *See* https://bit.ly/2019UtahLetter.

[2] *See* https://www.utcourts.gov/utc/rules-comment/2020/06/17/rules-of-professional-conduct-and-rules-governing-the-utah-state-bar-comment-period-closes-august-1-2020/.

[3] *See* Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATHOLIC UNIVERSITY LAW REVIEW 629 (2019), https://ssrn.com/abstract=3528792; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law*," 30 GEORGETOWN JOURNAL OF LEGAL ETHICS 241 (2017), https://ssrn.com/abstract=2888204.

8.4(h) cross-referenced Rule 14-301. The latter provides, "Finally, the term 'standard' has historically pointed to the aspirational nature of this rule. But Rule 8.4(h) now makes the provisions of this rule mandatory for all lawyers." In other words, a violation of the standard in Rule 14-301 would run afoul of Rule 8.4(h). A single violation of Rule 14-301 may not be enough to violate Rule 8.4(h). The action must be "egregious[]," or represent a "pattern of repeated violations." We think this language is trying to approximate—without saying so expressly—the "severe or pervasive" requirement from employment discrimination law. If this is the proper intent, the rule should state so expressly. Even so, this standard has additional First Amendment concerns when this rule is applied to law-related activities. This concern is even greater when the standard is applied to public debates at bar functions. In its present form, Rule 8.4(h) should be rejected.

Finally, Rule 8.4(g) has several problems. First, Comment [4] explains, "Discrimination or harassment *does not need to be previously proven by a judicial or administrative tribunal* or fact-finder in order to allege or prove a violation of paragraph." In other words, a mere allegation of harassment—no matter how unfounded—could give rise to misconduct. Second, Comment [4] states "Lawyers may discuss the benefits and challenges of diversity and inclusion without violating paragraph." This comment imposes an overt form of content discrimination. Discussions about "diversity and inclusion" are presumably immunized. But discussions about other issues that affix race, sex, and other factors could give rise to liability. Third, Comment [4] *only* applies to Rule 8.4(g). It does not apply to Rule 8.4(h),which provides the linkage to Rule 14-301. In its present form, Rule 8.4(g) and Comment 4 should be rejected.

It would be our pleasure to provide any further insights to inform your deliberations.

Sincerely,

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