CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

March 10, 2016

ABA Ethics Committee
Center for Professional Responsibility
American Bar Association
17th Floor
321 North Clark Street
Chicago, Illinois 60654
Attn: Dennis A. Rendleman, Ethics Counsel

Re: Comments of the Christian Legal Society on Proposed Rule 8.4(g) and Comment (3)

Dear Committee Members:

The Christian Legal Society ("CLS") is a non-profit, interdenominational association of Christian attorneys, law students, and law professors, networking thousands of lawyers and law students in all 50 states since its founding in 1961. Among its many activities, CLS engages in two nationwide public ministries through its Christian Legal Aid ministry and its Center for Law & Religious Freedom.

Demonstrating its commitment to helping economically disadvantaged persons, the goal of CLS's Christian Legal Aid program is to meet urgent legal needs of the most vulnerable members of our society. CLS provides resources and training to help sustain approximately 60 local legal aid clinics nationwide. This network increases access to legal aid services for the poor, marginalized, and victims of injustice in America. Based on its belief that the Bible commands Christians to plead the cause of the poor and needy, CLS encourages and equips individual attorneys to volunteer their time and resources to help those in need in their communities. Legal issues addressed include: avoiding eviction or foreclosure; maintaining employment; negotiating debt-reduction plans; petitioning for asylum for those persecuted abroad; confronting employers or landlords who take advantage of immigrants; helping battered mothers obtain restraining orders; and advocating on behalf of victims of sex trafficking.

Demonstrating its commitment to pluralism and the First Amendment, for forty years, CLS has worked, through its Center for Law & Religious Freedom, to protect the right of all citizens to be free from discriminatory treatment based on their religious expression and religious exercise. CLS was instrumental in passage of the federal Equal Access Act of 1984 that protects the right of both religious and LGBT student groups to meet on public secondary school campuses. Equal Access Act ("EAA"), 20 U.S.C. §§ 4071-74. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting the EAA). *See, e.g.*, *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (EAA protects religious student groups' meetings); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (EAA protects LGBT student groups' meetings).

For forty years, CLS has protected free speech, religious exercise, assembly, and expressive association rights for all citizens, regardless of their race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status. The motivation for these comments regarding the proposed changes to Rule 8.4 is rooted in CLS's deep concern that the proposed rule will have a detrimental impact and a chilling effect on attorneys' ability to continue to engage in free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square. Moreover, the proposed rule contradicts longstanding ethical considerations woven throughout the Rules of Professional Conduct.

Because the Committee has not demonstrated an empirical need for the proposed changes to the rule and comment, CLS recommends that no changes be made.

But if the proposed rule and comment are to be adopted, CLS recommends numerous changes be made to the draft Rule 8.4(g) and the draft comment. The need for these important changes is explored throughout the discussion that follows, and the changes are summarized in the "Summary of Recommendations" at the conclusion of this letter.

The Proposed Rule's Negative Impact on Attorneys Generally

Before discussing the harm to attorneys' First Amendment rights that the proposed rule will certainly cause, we will briefly touch upon non-First Amendment harms that the proposed rule will likely cause.

1. The wisdom of imposing a "cultural shift" on all attorneys should give pause. From a broad perspective, the rule, if adopted, will break new and untested ground in terms of the purpose of the Rules of Professional Conduct. Typically, the Rules of Professional Conduct are grounded in one of three ethical philosophies: client-protective rules, officer-of-the-court rules, or profession-protective rules. But the proposed rule does not seem grounded in any of these existing models. Rather, it seems to inject a rule of conduct that is better understood as advancing a particular theory of social justice. Or, as the Memorandum of December 22, 2015, explains the proposed rule, there is "*a need for a cultural shift in understanding the inherent integrity of people* regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability[.]" Memorandum, Standing Committee on Ethics and Professional Responsibility, Draft Proposal to Amend Model Rule 8.4, Dec. 22, 2015, at 2 (hereinafter "Mem.").[1]

[1] We confess that we do not know what the term "the inherent integrity of people" means. We assume that the term is actually supposed to be something else, such as "the inherent equality of people," or "the inherent worth of people," or "the inherent dignity of people." If so, CLS affirms its shared belief in the inherent equality, dignity, and worth of every human being, a concept deeply rooted in Christianity, and reflected in the Declaration of Independence's foundational statement that all persons "are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence of 1776, The Organic Laws of the United States of America.

The wisdom of imposing a "cultural shift" on 1.3 million opinionated, individualistic, free-thinking lawyers should give pause. If history teaches any lesson, it is the grave danger created when a government, or a people group, or a movement tries to impose uniform cultural values on other people. The Twentieth Century provided searing lessons of inhumane repression through forced "cultural shifts," regardless of whether those efforts came from the right or the left of the political spectrum. As Justice Jackson pithily observed, "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). Justice Jackson's famous words are as true today as they were seventy years ago: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

2. A cardinal principle is to avoid new disciplinary rules or rule amendments that will do decidedly more harm than good. The proposed rule change almost certainly will create a huge imbalance between comparatively few instances where the rule punishes misconduct as intended, as opposed to numerous instances where the rule is wielded as a weapon against lawyers by disgruntled job applicants, rejected clients, opposing parties, or opposing counsel. The Committee does not provide any documentation of the need for the proposed rule, which suggests that there currently are relatively few instances when it has been necessary to punish a lawyer who truly is abusing his or her license in a manner to cause harm to others through harassment or discrimination. Specifically, the Committee cites no examples of discrimination or harassment in the legal profession, examples of people in these categories who are being denied access to the courts, or instances of misconduct by lawyers in this regard. On the other hand, it is completely foreseeable that the proposed rule will trigger thousands of complaints against lawyers by job applicants, rejected clients, and opposing parties, all claiming that a lawyer's conduct constituted harassment or knowing discrimination in one or more of the prohibited categories. Even if frivolous, these cases will be difficult and expensive to defend. And, because complainants have immunity, there will be no recourse against frivolous complaints.

Furthermore, as will be explained below, the harm is not just that the proposed rule hands disgruntled persons a tool for harassing lawyers in their everyday practice of law. The proposed rule also poses a real threat that lawyers will be disciplined for public speech on current political, social, religious, and cultural issues, as well as for their free exercise of religion, expressive association, and assembly.

3. The proposed rule is inconsistent with the existing Rules of Professional Conduct. It is generally accepted that a lawyer has no duty to accept a representation. The comment to Model Rule 6.2 provides: "A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant." Similarly, ABA Model Rule of Professional Conduct

1.16(b)(4) allows a lawyer to withdraw from a representation when a client insists on pursuing action that, while lawful, the lawyer considers "repugnant," or with which the lawyer has a "fundamental disagreement." Under the proposed rule, will these standards now be limited to exclude any situation touching on one of the protected categories?

Subjecting an attorney to discipline for refusing to represent a client is a new idea, one that flies in the face of longstanding deference to professional autonomy and freedom of conscience. In fact, Model Rule 6.2(c) recognizes that when a lawyer is forced to take on a cause that is "repugnant" to the lawyer, it may impair the lawyer's ability to represent the client. The proposed rule and comment also conflict with Model Rules 1.7(a)(2), 1.10(a)(1), and 1.10 cmt. [3], which specifically reference how "personal" and "political" beliefs of a lawyer can result in that lawyer's having a personal conflict of interest that renders her unable to represent the client.

The Rules of Professional Conduct should encourage lawyers to practice law according to conscience, in order to increase the number of lawyers, encourage zealous representation, enhance client choice, and expand access to justice for all. The proposed rule moves the profession in the opposite direction while infringing on professional autonomy and freedom of conscience without good cause.

Relatedly, ABA Model Rule of Professional Conduct 2.1 authorizes lawyers to give advice by referring to "moral" considerations. Is that rule to be limited also, or will the lawyer who gives moral advice be subject to discipline if the advice ventures into advice that some might perceive to be "harassing" or "discriminatory" regarding a protected category?

Because these questions are too important to leave unaddressed, we urge the addition of the following language to the proposed comment: "Consistent with longstanding principles behind the Rules of Professional Conduct, declining representation based on religious, moral, or ethical considerations is not proscribed by this rule."

4. The current comment's language "when such actions are prejudicial to the administration of justice" should be incorporated into the proposed rule. The Committee proposes deleting from the current comment that a lawyer violates the rule only when conduct is "prejudicial to the administration of justice." It admits that the text of the proposed revision is broader, encompassing all activity "related to the practice of law." Mem. at 4. This longstanding limitation should not be eliminated but instead should be included in the proposed rule itself. The "prejudicial to the administration of justice" language recognizes that, in almost every conceivable case when an individual might be denied service by one attorney (*e.g.*, refusal to author an amicus brief advocating social policy with which the attorney disagrees for religious reasons), another attorney is ready, willing, and able to take on that representation. In such situations, the administration of justice is in no way prejudiced.

Moreover, the "prejudicial to the administration of justice" language has long been included in the text of Rule 8.4(d). Thus, the meaning of the limitation has been discussed for

years by courts and ethicists. The introduction of the more expansive term "in conduct related to the practice of law" creates problematic uncertainty in the proposed rule's application, as addressed below. Including "prejudicial to the administration of justice" in the proposed rule will help minimize needless friction about whether challenged conduct is protected by the First Amendment and, thus, excepted from the scope of the revised rule.

The Proposed Rule's Negative Impact on Attorneys' First Amendment Rights

Two prominent weaknesses of the proposed rule, if adopted, necessitate addressing the proposed rule's inevitable conflict with attorneys' First Amendment rights.

1. The proposed rule's operative phrase, "harass or knowingly discriminate," poses significant threats to attorneys' freedoms of speech, expressive association, assembly, and free exercise of religion. To begin, "knowingly" should modify both "harass" and "discriminate." Just as a lawyer should not be disciplined for unintentional discrimination, neither should she be disciplined for unintentional harassment. For that reason, in the proposed rule, "knowingly" should be added to modify "harass," as well as "discriminate."

Second, the elasticity of the term "harass" needs to be addressed in the comment if the proposed rule is to have any hope of surviving either a facial or an as applied challenge to the proposed rule's unconstitutional vagueness or its infringement on free speech. To ameliorate the constitutional problems created by the term "harass," the proposed comment should adopt the United States Supreme Court's definition of "harassment" in the Title IX context, which is "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

For purposes of the proposed rule, therefore, the proposed comment should state: "The term 'harass' includes only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice." This language makes clear that "harassment" has an objective, rather than a subjective, standard. The consequences of disciplinary action against an attorney are too great to leave the definition of "harass" open-ended or subjective. "Harassment" should not be "in the eye of the beholder," whether that be the attorney or the alleged victim of harassment, but instead should be determined by an objective standard, as provided by the Supreme Court's seventeen-year-old definition of "harassment."

The need for such an objective definition of "harass" is apparent when one considers the courts' uniform rejection of university speech codes over the past two decades. The courts have found that speech codes violate freedom of speech because of the overbreadth of "harassment"

proscriptions and the potential for selective viewpoint enforcement.[2] For example, after noting the Supreme Court's application of the overbreadth doctrine to prevent a "chilling effect on protected expression," *DeJohn v. Temple Univ.*, 537 F.3d 301, 313-314 (3d Cir. 2008) (citing *Broadrick v. Okla.*, 413 U.S. 601, 630 (1973)), the Third Circuit quoted then-Judge Alito's words in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001):

> "Harassing" or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "[i]f 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 offensive or disagreeable."

DeJohn, 537 F.3d at 314 (quoting *Saxe*, 240 F.3d at 209, (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). The *DeJohn* court went on to explain, "[b]ecause overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases." *Id*. A lawyer's free speech should be no less protected than that of a student.

2. By expanding its coverage to include all "conduct related to the practice of law," the proposed rule encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment. As the Committee observes, "[t]he draft proposal would expand the coverage of the rule from conduct performed 'in the course of representing a client' to conduct that is 'related to' the practice of law." Mem. at 3. The Committee illustrates the broad scope of the rule by a variety of descriptions of lawyers' roles: "representatives of clients, officers of the legal system, and *public citizens* 'having special responsibility for the quality of justice'"; "advisors, advocates, negotiators, and evaluators for clients"; "third-party neutrals"; and "officers of the legal system, [who] participate in activities related to the practice of law through court appointments, bar association activities, *and other, similar conduct*." *Id.* (emphases supplied). It is unclear what conduct is not reached by "conduct related to the practice of law," particularly in light of the fact that the Committee has consciously rejected the more discrete description of scope "in the course of representing a client." *Id*. Because the phrase "conduct related to the practice of law" is so broad and undefined, the proposed

[2] *See, e.g.*, *McCauley v. Univ. of V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Blair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, 1998 WL 35867183 (E.D. Ky. 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989).

comment's reference to excepting conduct protected by the First Amendment is wholly inadequate. The phrase simply makes the proposed rule ripe to create confusion and uncertainty that is an unacceptable and unnecessary result.

a. Attorneys' service on boards of religious institutions may be subject to discipline if the proposed rule is adopted. Many lawyers sit on the boards of their churches, religious schools and colleges, and other religious non-profits. As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. But they also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.

For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities. A religious college may ask a lawyer on its board of trustees to review its housing policy or its student code of conduct. While drafting and reviewing legal policies may qualify as "conduct related to the practice of law," surely a lawyer should not be disciplined for volunteer legal work she performs for her church or her alma mater.

Equally importantly, a lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law." If the proposed rule is not clear that a lawyer's free exercise of religion, expressive association, assembly, and speech are protected when serving religious institutions, the chilling effect on her exercise of her First Amendment rights will be unacceptably high.

b. Attorneys' public speech on political, social, cultural, and religious topics may be subject to discipline if the proposed rule is adopted. Similarly, lawyers often are asked to speak to various community groups about current legal issues of the day, or to participate in panel discussions about the pros and cons of various legal positions on sensitive social issues of the day. Lawyers are asked to speak *because they are lawyers*, "public citizens 'having special responsibility for the quality of justice.'" Mem. at 3. Moreover, sometimes such speaking engagements are undertaken to increase the visibility of the lawyer's practice and create new business opportunities.

It seems highly likely that public speaking on legal issues falls within "conduct related to the practice of law." But even if some public speaking falls inside the line of "conduct related to the practice of law," while other public speaking falls outside the line, how is a lawyer to know? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of "sexual orientation" as a protected category in a nondiscrimination law being debated in one of the 28 states that lack such a provision? Is the lawyer subject to discipline if she speaks against amending a nondiscrimination law to include "sexual orientation," "gender

identity," or "marital status"? Would a lawyer's testimony before a state legislature or municipal commission be protected if it opposed amending these laws?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Thus, the proposed rule institutionalizes viewpoint discrimination for lawyers' public speech on some of the most important current political and social issues. "Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Again, the proposed rule's chilling effect on lawyers' free speech will be unacceptably high.

c. The proposed comment highlights a troubling gap between protected and unprotected speech under the proposed rule. This legitimate concern about whether a lawyer's public speech falls within "conduct related to the practice of law" highlights a substantial gap in the proposed rule's coverage that further threatens attorneys' First Amendment rights. The proposed comment states that the proposed rule "does not prohibit lawyers from referring to any particular status or group when such references are *material* and *relevant* to factual or legal issues or arguments *in a representation*." But lawyers often speak when they are not "in a representation" of a client but are merely offering their own views – *as a lawyer and a "public citizen"* — on sensitive legal issues. By including the qualifying phrase "in a representation," the comment may reasonably be inferred to mean that the proposed rule does "prohibit lawyers from referring to any particular status or group" when engaged in "conduct related to the practice of law" but not specifically "in a representation." This inference is supported by the Committee's particular emphasis on the distinction between the current comment's scope, that is, the narrower scope of "in the course of representing a client," and the proposed rule's broader scope as described by the phrase "in conduct related to the practice of law." This gap in protection for lawyers' speech seems to have been intentionally created by adding the phrase "in a representation" in the proposed comment. The sentence should be deleted from the comment.

d. Attorneys' membership in religious, social, or political organizations may be subject to discipline if the proposed rule is adopted: The proposed rule raises legitimate concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or some other religious belief implicated by the proposed rule's strictures. Religious organizations are sometimes denied access to the public square because they require their leaders to be religious. *Compare Alpha Delta Chi v. Reed*, 648 F.3d 790 (9th Cir. 2011) (religious student group could be denied recognition because of its religious membership and leadership requirements) *with CLS v.*

Walker, 453 F.3d 853 (7th Cir. 2006) (religious student group could not be denied recognition because of its religious leadership requirements).

According to some government officials, this basic exercise of religious liberty – the right of a religious group to choose its leaders according to its religious beliefs -- is "religious discrimination." But it is simple common sense and basic religious liberty that a religious organization's leaders should agree with its religious beliefs. As the Supreme Court has observed:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 710 (2012).

The proposed rule also raises severe doubts about the ability of lawyers to participate in political or social organizations that promote traditional values regarding sexual conduct and marriage. Last year, the California Supreme Court adopted a disciplinary rule that prohibits all California judges from participating in Boy Scouts because of the organization's values regarding sexual conduct. Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, *available at* http://www.courts.ca.gov/documents/sc15-Jan_23.pdf. Will the proposed rule subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Will the proposed rule subject lawyers to disciplinary action for belonging to a political organization that advocates for laws that promote traditional values regarding sexual conduct and marriage? The answers to these questions are not assuaged by the insuffient assurance in the proposed comment that conduct protected by the First Amendment will not be the subject of disciplinary action, particularly when the California Supreme Court is threatening disciplinary action against judges who participate in Boy Scouts.

e. The inadequacies of "material and relevant" as speech protections. The Committee explains that the proposed comment speaks in terms of not reaching "references [that] are material and relevant to factual or legal issues or arguments in a representation." Mem. at 5. In the Committee's opinion, this is a clearer standard than the current comment's statement that "[l]egitimate advocacy" is not covered. We would disagree that either a "material" or "relevant" standard is sufficiently clear when it comes to protecting free speech from suppression. Both are almost certainly unconstitutionally vague. But if forced to choose the

lesser of two evils, we would urge the retention of "legitimate advocacy" because it at least would seem to protect all advocacy, rather than causing the speaker to have to wonder what speech might be deemed "irrelevant" or "immaterial" and, thus, discipline-worthy. The Committee is correct that "material and relevant" are "concepts already known in the law." *Id.* But that does not mean they satisfy the First Amendment's requirements regarding free speech, particularly on political, social, cultural, and religious issues, or the Fourteenth Amendment's requirement that laws not be unconstitutionally vague.

f. The comment's assurance that the rule "does not apply to . . . conduct protected by the First Amendment" is completely inadequate to protect basic First Amendment rights. The Committee's assertion that the addition to the proposed comment of the language that "the Rule does not apply . . . to conduct protected by the First Amendment" is enough to "make[] clear that 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 the Rule" fails to give sufficient protection to our most basic civil liberties. For several reasons, the proposed rule and comment must be amended to give more than lip service to First Amendment rights for the reasons already discussed above and because:

1) *The First Amendment protects much more than a lawyer's "private sphere" of conduct.* The First Amendment actually places real limits on the government's ability to limit a lawyer's speech and conduct through bar rules. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 469 (1988) (First Amendment applied to state bar disciplinary actions through the Fourteenth Amendment). The Committee suggests that the scope of the comment's exception for "conduct protected by the First Amendment" is limited to a lawyer's "private sphere" of life. Mem. at 5. This suggests that "religious expression" and other related freedoms do not intersect with a lawyer's public, professional life. That is a common, but decidedly untrue, perception. Christians are enjoined by Scripture to bring their religious beliefs and practices to bear in their professions – indeed, to see their professions as their ministries of service to others – and to apply their Christian principles to the practice of their professions.

2) *The First Amendment protects much more than political speech.* A lawyer does not relinquish her right to speak freely when she receives her license to practice law. To the extent any restrictions are allowed, they are the same as applied to other individuals, except when they are appropriately tailored to the needs of the practice of the profession itself. Even when commercial speech such as attorney advertising is involved, restrictions "may be no broader than necessary to prevent . . . deception." *In re R.M.J.*, 455 U.S. 191, 203 (1982). Moreover, the "State must assert a substantial interest and the interference of speech must be in proportion to the interest served. Restrictions must be narrowly dawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest." *Id.*; *see also Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (lawyer's commercial speech "may not be subjected to blanket suppression"). Of course, here we are not concerned with commercial speech, and so the full protections of the First Amendment apply. But if lawyers' commercial

speech has been protected, how much more should their religious and political speech be protected as it relates to the practice of law?

The Comment says the rule "does not apply to . . . *conduct* protected by the First Amendment." (Emphasis added.) It is unclear whether "conduct" includes "speech," especially when the current comment's text that used the phrase "*words or* conduct" is to be eliminated, leaving the impression that "words or" was deliberately eliminated. (Emphasis added.) Clarification that "conduct" includes "speech" should be made in some form.

3) *The First Amendment protects much more than religious expression*. Reinforcing and undergirding the free speech and assembly protections is the additional First Amendment right (also applied to the States through the Fourteenth Amendment) to be free of regulation of the free exercise of religion. Associating with others who share one's religious faith or joining a group like CLS is typically a religious exercise for those individuals who do so. It cannot properly be targeted for discipline merely because CLS (or similar organizations) require their leaders and members to share the organizations' religious beliefs and standards of conduct.

It should be counterintuitive to accuse religious organizations of improper "religious discrimination." It is only *invidious* discrimination that is not constitutionally protected, and *religious* discrimination by *religious* organizations is, by definition, not invidious; rather, it is protected by both federal and state constitutions. Nondiscrimination policies proscribing discrimination on the basis of religion must be interpreted in light of the fact that such policies are intended to *protect* citizens when being religious, not to penalize them for being religious. A contrary "application of the nondiscrimination policy against faith-based groups undermines the very purpose of the nondiscrimination policy: protecting religious freedom." Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 914 (2009); *see also* Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, ch. 4 in Austin Surat, ed., *Legal Responses to Religious Practices in the United States* 194 (Cambridge Univ. Press 2012), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=2087599.

Moreover, it is basic religious liberty, not invidious discrimination, for religious organizations to require their leaders to agree with their religious beliefs. In its unanimous ruling in *Hosanna-Tabor*, the Supreme Court held that federal nondiscrimination laws did not outweigh the right of religious institutions to select their leaders. 132 S. Ct. at 710.

The free exercise of religion protects not only group exercises; it also reaches to individual actions and choices. This is at least implicitly acknowledged in the current Model Rules, which repeatedly recognize that a lawyer's decision whether to accept a representation is often a complex calculus involving moral and ethical judgments and enjoin attorneys to apply their moral judgments and consciences. For instance, the Model Rules' Preamble provides as follows:

> 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* . . . . [¶ 7 (emphasis added).]
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> . . . .
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> 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 . . . . [¶ 9 (emphasis added).]
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> . . . .
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> The Rules [of Professional Conduct] do not, however, exhaust the *moral and ethical considerations that should inform a lawyer*, for no worthwhile human activity can be competently defined by legal rules. The Rules simply provide a framework for the *ethical* practice of law. [¶ 16 (emphasis added).]

The First Amendment protects both a lawyer's conscience and her putting it into operation in the practice of law. Legitimate differences of opinion exist in our country concerning issues of sexual conduct. Unsurprisingly, many attorneys' views regarding sexual conduct reflect their religious convictions. A lawyer should not be compelled to undertake a representation that would require her to advocate viewpoints or facilitate activities that violate her religious convictions. Neither should a lawyer be compelled to undertake a representation that she considers to be immoral, unethical, or contrary to the public interest. Any new rule and comment should make clear that a lawyer's individual choices based on her sincerely held religious beliefs are protected by the First Amendment and may not be punished by the government, acting through a state bar's disciplinary code. A lawyer's objections based on moral or ethical considerations should likewise be protected.

Any such constitutional limitation (or associated limitation based on other law) should be put in the text of the rule itself, rather than in the respective comment. As the Committee notes, a major impetus for the proposed rule's elevation of the anti-discriminatory text that appears in the present comment to a rule is that comments are not authoritative, but only provide guidance for interpretation. Mem. at 1. The protection of constitutional rights should be given the same dignity and, for the same reasons, should be included in the rule itself rather than relegated to the comment.

4) *The First Amendment protects rights of association and assembly.* The First Amendment's right of assembly has also been incorporated and applied to the States through the Fourteenth Amendment. *DeJonge v. Ore.*, 299 U.S. 353 (1937); *see also Thomas v. Collins*, 323 U.S. 516 (1945); *Hague v. CIO*, 307 U.S. 496 (1939); *Herndon v. Lowry*, 301 U.S. 242 (1937). This right includes both the right to assemble peaceably for political, religious, and other purposes (at least for non-commercial purposes, *see Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)), and the right not to define a group's leadership and membership. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *cf. NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958) (upholding right not to keep membership identities private). Indeed, the ABA's amicus brief in *Hague v. CIO* championing the right of assembly is widely regarded as one of the most influential briefs of the last century. *See* John D. Inazu, *Liberty's Refuge* 54-55 (Yale Univ. Press 2012).

5) *Additional federal and state protections for speech, free exercise, association, and assembly will be triggered by the proposed rule change.* Many state constitutions have broader protections than those in the federal constitution's First Amendment. Federal statutes such as the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* (2012), also provide broader protection of freedoms enumerated in the First Amendment than the amendment itself provides. *See generally Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). It obviously would not be appropriate for the rule to cover conduct protected by applicable laws or state constitutions, even if it were not protected by the federal constitution. Words or conduct so protected cannot be "professional misconduct" and cannot be made subject to a "balancing" against nondiscrimination purposes, but must be fully excepted from application of any rule adopted. Therefore, a reference only to "First Amendment" limitations is problematically narrow.

The Proposed Rule's Negative Impact on Attorneys' Fourteenth Amendment Rights

Disciplinary proceedings by State bars are state actions that affect the property and reputational/liberty interests of the attorney involved. *See In re R.M.J.*, 455 U.S. 191, 203-204 (1982); *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 238-39 (1957); *Doe v. DOJ*, 753 F.2d 1092, 1111-12 (D.C. Cir. 1985). Thus, the due process protections of the Fourteenth Amendment of the U.S. Constitution adhere to such proceedings, including the disciplinary rules themselves. *See* U.S. Const. amend. XIV § 1.

A disciplinary rule that "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Cramp v. Bd. of Pub. Instruction of Orange Cnty., Fla.*, 368 U.S. 278, 287 (1961). As the Supreme Court recently summarized:

> Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them

> so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317-18 (2012); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1082 (1991) (reasoning that a "vague" disciplinary rule "offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement") (O'Connor, J., concurring); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (when a "law interferes with the right of free speech or of association a more stringent vagueness test should apply"); *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (internal quotation marks omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Summary of Recommendations

Because the Committee has not demonstrated an empirical need for the proposed changes to the rule and comment, CLS recommends that no changes be made.

But if the proposed rule and comment are to be adopted, CLS recommends the following with regard to the draft Rule 8.4(g) and its associated draft comments:

- Add to the proposed rule explicit protection for lawyers' right to freedom of speech, assembly, expressive association, and exercise of religion, by adding the following: "except when such conduct is undertaken because of the lawyer's sincerely held religious beliefs, or is speech or conduct protected by the First Amendment or other applicable federal or state laws."

- Add to the proposed comment the following language: "Consistent with longstanding principles behind the Rules of Professional Conduct, declining representation based on religious, moral, or ethical considerations is not proscribed by this rule."

- Add to the proposed comment the following language to protect lawyers' freedom of speech, assembly, expressive association, and exercise of religion: "This rule does not apply to speech or conduct undertaken by a lawyer because of his or her sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment, including the rights of free speech, assembly, expressive association, press, and petition, or speech or conduct otherwise protected by applicable federal or state laws."

- Replace the proposed rule's language "in conduct related to the practice of law" with the current comment's language "in the course of representing a client."

- Add "knowingly" before "harass."

- Add to the proposed comment the following definition of the term "harass," as defined in the context of Title IX by the United States Supreme Court in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999): "The term 'harass' includes only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice."

- Add to the proposed rule that a lawyer violates the rule only "when such conduct is prejudicial to the administration of justice," as the current comment states.

- Retain the current comment's sentence, slightly modified to align with the proposed rule, "Legitimate advocacy respecting the listed factors in the rule does not violate paragraph (g)," while deleting from the proposed comment, for reasons explained in Part II.2.c. & e., *supra*, the sentence "Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation."

- Retain the current comment's use of the term "words and conduct," modifying it to "speech and conduct," as opposed to the proposed comment's use of the term "conduct."

With these changes, the proposed rule and comment would read as follows:

"(g) in the course of representing a client, knowingly harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, when such conduct is prejudicial to the administration of justice, except when such conduct is undertaken because of the lawyer's sincerely held religious beliefs, or is speech or conduct protected by the First Amendment or other applicable federal or state laws."

Comment

"[3] Paragraph (g) applies only to conduct in the course of representing a client. Consistent with longstanding principles behind the Rules of Professional Conduct, declining representation based on religious, moral, or ethical considerations is not proscribed by this rule. This rule does not apply to speech or conduct undertaken by a lawyer because of his or her sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment, including the rights of free speech, assembly, expressive association, press, and petition, or speech or conduct otherwise

protected by applicable federal or state laws. Legitimate advocacy respecting the listed factors in the rule does not violate paragraph (g). The term "harass" includes only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice."

Thank you for your consideration of our concerns and suggested modifications to proposed Rule 8.4(g) and its associated draft comment.

Respectfully submitted,

/s/ David Nammo

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