

State of Alaska  
DEPARTMENT OF LAW

## PRESS RELEASE

### Attorney General expresses constitutional concerns on proposed ethics rule

---

August 9, 2019

(Anchorage, AK) – Attorney General Kevin G. Clarkson today sent a letter to the Alaska Bar Association warning of constitutional problems with the Alaska Rules of Professional Conduct Committee’s proposed rule that aims to prohibit harassment and discrimination in connection with the practice of law.

“Parts of the Proposed Rule laudably promote professionalism and respect by attorneys to all individuals regardless of personal traits or characteristics,” wrote Attorney General Clarkson. “However, by regulating the expression of ideas and religious practices,” the proposed rule “burdens attorneys’ fundamental constitutional rights and threatens the core of what it means to be an attorney: protecting the rule of law, including the United States Constitution, and advocating zealously for clients.”

Proposed Rule of Professional Conduct 8.4(f) would make it “professional misconduct” for a lawyer to engage in conduct that the lawyer “knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, age, sexual orientation, gender identity, marital status, or socioeconomic status” in any context that has a “connection with the practice of law,” from the representation of clients to legal education and “social activities.” A comment by the Bar accompanying the proposed rule defines discrimination broadly to include “harmful verbal or physical conduct that manifests bias or prejudice to others.” It does not define harassment.

Clarkson cautioned that by allowing the Bar to punish lawyers for speech that the Bar deems “harmful” because of its perceived bias, the proposed rule likely violates the First Amendment by giving the Bar the power to suppress controversial or unpopular ideas when voiced by lawyers, whether in defense of their clients or on their own behalf. The proposed rule “politicizes the disciplinary process” and “is sure to chill attorneys from engaging in everyday dialogues about the law and politics, not to mention stifle the zealous advocacy that clients deserve,” Clarkson warned. He observed that the rule could be used to punish a broad range of conduct, from a lawyer who declines to assist a same-sex couple formalizing an adoption due to sincere religious convictions to a lawyer who engages in legal networking through her membership in The Wing, a feminist club that does not permit male members.

“However well-intentioned Proposed Rule 8.4(f) may be,” Clarkson wrote, the risk that the rule would be “used to suppress an attorney’s constitutionally protected speech on behalf of a client is far from speculative.”

Clarkson recounted his own experience of being unconstitutionally targeted with a complaint under the Municipality of Anchorage’s civil rights law for his legal representation of a faith-based women’s shelter

before the Anchorage Equal Rights Commission. "I have little doubt that if the Proposed Rule is enacted, it will be weaponized in similar fashion to intimidate or punish attorneys for vigorously representing their clients," he warned.

Attorney General Clarkson suggests that the Bar could achieve the same goal "without burdening lawyers' First Amendment rights by expressly linking Rule 8.4(f) to anti-bias laws that higher courts have vetted and refined, like Title VII." In the opinion of the Attorney General, a rule linking the prohibited conduct to harassment or discrimination that is already illegal under federal or state law would be constitutional and ultimately more effective.

The Alaska Bar Association has solicited feedback on the proposed rule from its members, requesting that comments be received no later than August 15, 2019.

- [Letter to Alaska Bar Association](#) - PDF(227KB)

# # #

**Department Media Contact:** Senior Assistant Attorney General Cori Mills at (907) 465-2132 or [cori.mills@alaska.gov](mailto:cori.mills@alaska.gov).

---

The Attorney General and Department of Law staff may not provide legal advice to private citizens or organizations. Please contact an attorney if you need legal advice. The [Alaska Lawyer Referral Service](#) or your local bar association may be able to assist you in locating a lawyer.

Alaska Department of Law

1031 West 4th Avenue, Suite 200

Anchorage, AK 99501-1994

[attorney.general@alaska.gov](mailto:attorney.general@alaska.gov)

Phone: (907) 269-5100 | Fax: (907) 276-3697

TTY: 907-258-9161

COPYRIGHT © [STATE OF ALASKA](#) · [DEPARTMENT OF LAW](#) · [EMAIL THE WEBMASTER](#)