The National Legal Foundation

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SUBJECT: Rule 8.4(g) Subcommittee Recommendation

Via email only: RLemmler@lsba.org

Dear Mr. Lemmler:

Thank you for the opportunity to comment on the Louisiana State Bar Association (LSBA) Rule 8.4(g) Subcommittee's recommendation. The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. We comment on behalf of ourselves and donors and supporters, including those in Louisiana. The NLF has had a significant federal and state court practice since 1985, including representing numerous parties and *amici* before the Supreme Court of the United States and the supreme courts of several states.

The Congressional Prayer Caucus Foundation (CPCF) is an organization established to protect religious freedom and preserve America's Judeo-Christian heritage, while reaching across all denominational, socioeconomic, political, racial, and cultural dividing lines. CPCF has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders in all 50 states, including Louisiana.

We commend the LSBA subcommittee for its stated desire to clarify the behavior that would be proscribed by the draft rule change and for endeavoring to ensure that it does not over-reach in its coverage and is not susceptible to abuse by those who wish to restrict constitutionally protected speech by attorneys—a goal that unfortunately was not met in the American Bar Association's proposed Rule 8.4(g).[1]

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1 The Constitutional deficiencies of the ABA's proposed Rule 8.4(g) have been widely discussed and documented in a growing body of scholarly and professional criticism. (See, for example: Professor Josh Blackman's article, "Reply: A Pause for State Courts Considering Model Rule 8.4(g)" in the *Georgetown Journal of Legal* Ethics, Vol. 30, 2017 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888204); Professor Ronald Rotunda's article, "The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech." (https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418); and

However, we are concerned that the draft language proposed by the Subcommittee does not fully accomplish the goal of proscribing legally prohibited discrimination and promoting confidence in the administration of justice while also honoring the constitutionally protected rights of Louisiana attorneys.

Rather than repeat information the LSBA has already received, we note here our agreement with the concerns expressed by the Christian Legal Society (CLS) in its comments submitted to the LSBA on August 14, 2017. For emphasis, we note specifically the potential overreach in what activities might be covered by the proposed language. As CLS noted in its comments (pages 7-8 of 11):

> "The Subcommittee Report would substitute 'in connection with the practice of law' for ABA Model Rule 8.4(g)'s 'related to the practice of law.' But 'in connection with the practice of law' is not narrower than 'related to the practice of law.' If anything, it would seem broader."

Much of the thinking and advocacy that undergirds the push for adoption of the ABA's proposed rule ignores credible and significant health and social science data that should signal skepticism about the expansive scope of the proposed rule's language. There is well founded concern that the proposed rule would align the State of Louisiana behind those who are most actively pushing for an expansive definition of "sexual orientation" and "marital status" that will override religious and other freedoms.

With respect to the categories of "sexual orientation" and "marital status," there are a number of relevant considerations that urge caution in their use in a rule of this sort. We outline several of them below, in part to explain more fully the key difference between homosexual *inclinations* and *conduct* and in part to reinforce that the public policy debate on such conduct is not closed but is still being informed by substantial health and social science evidence. (See, e.g., Mayer & McHugh, "Sexuality and Gender," 50 *The New Atlantis* 8 (Fall 2016), noting (1) that there is limited evidence that social stressors such as discrimination and stigma contribute to the elevated risk of poor mental health outcomes for non-heterosexual populations and (2) that more high-quality longitudinal studies are necessary for the "social stress model" to be a useful tool for understanding public health concerns.)

<u>Religiously Informed Views on Sexual Orientation</u>

Christians are called to love and serve all persons, including those with a homosexual orientation. However, most orthodox Christians (and those of other religions) sincerely believe that their Holy Scriptures (not to mention biology) identify same-sex intercourse as both unnatural and immoral. Thus, while Christian lawyers would not (and overwhelmingly do not) refuse to take work from persons who identify themselves as gay *when the work does not involve supporting that lifestyle* (e.g., representation as a victim of a car accident), many would have

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Professor Eugene Volokh's article, "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities." (https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?utm_term=.601be9a57646).)

ethical qualms in working for such a person or organization if the representation directly or indirectly advanced the cause of such lifestyles or helped entrench their participants in it. It is *not* discrimination on the basis of sexual orientation to refuse to approve or support same-sex intercourse. It is the difference between personhood and activity. Persons are just as much persons if they never engage in sexual intercourse, of whatever kind.

The orthodox Christian view that separates the person from the offensive activity is not generally accepted by either the LGBT community or, increasingly, administrative and judicial officials. Christian attorneys are often representing citizens whose refusals, made for religious reasons, to support the LGBT lifestyle or participate in LGBT events are attacked as "sexual orientation" or "marital status" discrimination. *E.g.*, *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 137 S.Ct. 2290, (June 26, 2017) (No. 16-111). The proposed rule, if adopted without change, could be used in similar ways against attorneys acting in accord with their basic Constitutional freedoms. And, of course, this could affect not just Christian attorneys, but also those of other faiths, such as Judaism and Islam, that teach that homosexual conduct is immoral.

The view that distinguishes the person from the activity may not be held by a majority of the ABA, but it is held by many lawyers in Louisiana and nationwide and is religiously, scientifically, and logically informed. Those who sponsor adoption of the proposed ABA rule are not satisfied with the pace of change across the country. The ABA Ethics Committee in its December 22, 2015, memorandum uncritically accepted that there is a "need" for a "cultural shift." In seeking to advance it, the proponents of the proposed rule have taken an unwise step that should not be endorsed and followed by Louisiana. At a minimum, the State Bar's approach to this subject should be sufficiently nuanced to recognize and exempt speech and conduct motivated by sincerely held religious beliefs and to clarify exactly what is being proscribed.

Suggested Revisions to the Proposed Rule

We support a black-letter ethics rule addressing inappropriate, invidious discrimination, which would properly address discrimination based on uncontroversial and constitutionally protected categories, such as race, religion, and sex. However, the addition of "sexual orientation" and "marital status" as nondiscrimination categories is ill-advised unless those terms are more carefully defined and limitations more clearly specified to prevent unconstitutional application of the proposed rule.

1. Proposed use of "sexual orientation"

The category of "sexual orientation" should not be included. It is not a category uniformly recognized throughout the country, and it is subject to misinterpretation and abuse. *See* Todd A. Salzman & Michael G. Lawler, *The Sexual Person* 150 (2008) ("The meaning of the phrase 'sexual orientation' is complex and not universally agreed upon.")

If used, however, the proposed rule should include an explanation that "sexual orientation" discrimination does not encompass the refusal to approve or support same-sex conduct, be that conduct intercourse, marriage, advocacy, or some other activity. Suitable clarifying language would be along these lines: "The [proposed] rule does not extend to a lawyer's refusal to

approve or support same-sex conduct or to represent an individual in a matter related to such conduct."[2]

Without the clarification that "sexual orientation" discrimination does not encompass a lawyer's refusal to approve or support same-sex *conduct* or to represent an individual in a matter related to such *conduct*, lawyers could be driven out of the practice because of their sincerely held and Constitutionally protected religious beliefs. To use the proposed rule to coerce an attorney to represent clients to support the advancing of conduct that the attorney considers harmful to both the individuals involved and to our society violates several constitutional protections, including compelled speech.

2. Proposed use of "marital status"

The term *marital status* is hopelessly ambiguous. It is not an inherent condition like race, ethnicity, or sex, but what exactly it covers is unclear, and its meaning is not well settled or accepted.

The ABA Ethics Committee indicated (ABA Memorandum, at 5) that it included this term based on the U.S. Supreme Court's *Obergefell* decision and on "the rise in single parenthood." This explanation yields more questions than answers. *Obergefell* did not overturn the public policy of many States that still *disfavors* same-sex marriage, even though those States may no longer prohibit a civil ceremony. (In this respect, the right of a same-sex couple to a civil marriage parallels the right of a woman to a pre-viability abortion. Although such abortions may not be prohibited by governments, *see Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), the Supreme Court has repeatedly upheld the right of federal, state, and municipal governments to disfavor abortion and not to fund the practice. *E.g., Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989).) To the extent "marital status" is intended to cover the same-sex marriage

[2] That such clarification is needed is demonstrated by *Ward v. Wilbanks*, No. 09-cv-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010), *rev'd sub nom.*, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), and other recent cases. Ward was dismissed from her graduate counseling program by a state university because, although she did not have objection to counseling homosexual individuals generally, she did not want to counsel them about same-sex marriage, which she believed to be unethical, and sought to refer such counseling to others, instead. The school was not satisfied with this resolution and found her beliefs inconsistent with the American Counseling Association Code of Ethics, which prohibits discrimination on the basis of sexual orientation. The school (and the district court) rejected the distinction between personhood (which homosexuals share with all other persons) and conduct (such as same-sex marriage and relations). (The Sixth Circuit did not reach the issue, but reversed because the student was not given the opportunity to show that the refusal to allow her to refer was applied to her in a discriminatory manner due to her speech and faith.) With respect to whether Title VII of the Civil Rights Act of 1964 extends to "sexual orientation," there is a split among the U.S. Circuit Courts of Appeal. In *Hively v. Ivy Tech Community College*, No. 15-1720, 2017 WL 1230393 (7th Cir. 2017) (*en banc*), the court concluded "that discrimination on the basis of sexual orientation is a form of sex discrimination" under Title VII. In *Evans v. Georgia Regional Hospital*, No. 15-15234, 850 F.3d 1248 (11th Cir. 2017), however, the court held that the protected categories under Title VII do not include sexual orientation.

status, it runs directly contrary to the statements of public policy still common and effective throughout this country that *disfavor* same-sex marriage, including Louisiana. Louisiana's Constitution, Article XII ("General Provisions"), Section 15 ("Defense of Marriage"), provides, in part: "Marriage in the state of Louisiana shall consist only of the union of one man and one woman." In addition, Louisiana's Civil Code, Article 3520 (b) ("Marriage") provides, in part: "A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana…."

To the extent that "marital status" was included based on the implication that there is some kind of invidious discrimination against single parents, the ABA provided no evidence to support such an implication. The reason why representation (or employment at a law firm) would be refused because a person is single but has a child goes unarticulated and its occurrence unproven. Nondiscrimination categories should not be proliferated without cause.

On its face, it is also conceivable that "marital status" discrimination would include, for example, when an attorney, for religious reasons, refused to craft a prenuptial agreement for previously divorced individuals because the lawyer held the belief that the Bible disallows most remarriage after divorce if the divorced spouse is still alive. Similarly, would a family law attorney who refuses for religious reasons to assist a same-sex couple adopt a child have engaged in improper "marital status" discrimination?

The "marital status" category is simply too vague, pliable, and potentially subject to abuse to be used in the proposed rule. It fails due process analysis and could intrude on many decisions and actions that are constitutionally protected.

<u>Conclusion</u>

For these reasons, we encourage the LSBA to reconsider its recommended draft of Rule 8.4(h). If some version of the rule is adopted, we recommend the following revisions to the current text:

- Remove "sexual orientation" as a nondiscrimination category. At a minimum:
    - add additional language to the rule that "this rule does not include a lawyer's refusal to approve or support same-sex conduct or to represent an individual in a matter related to such conduct;" and
- Remove "marital status" as a nondiscrimination category.

Christians do, indeed, believe that all people are created equal by God, and they also believe that God has set moral absolutes for behavior for those he has created, including that life is sacred from conception to natural death, that sexual intercourse is only ethical when between a man and woman married to each other, and that violating God's moral norms does not bring true liberty either to an individual or to a culture. Social science amply supports the wisdom of these religious principles.

In its State Constitution, Louisiana safeguards the right of its citizens, whatever their profession, to be free of discrimination based on their beliefs. Article 1, Section 3 ("Right to Individual Dignity") states that "No law shall arbitrarily, capriciously, or unreasonably discriminate against

a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations." Article 1, Section 7 ("Freedom of Expression") provides that "No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom."

The Louisiana Attorney General (Opinion Letter 17-0114, dated September 8, 2017) noted his office's opinion "that a court would likely find ABA Model Rule 8.4(g) violates a lawyer's freedom of speech under the First Amendment" (page 5), that it "is unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct" (page 6), that a court would likely find it "violates the First Amendment because it can be applied in a manner that unconstitutionally restricts a lawyer's participation and involvement with both faith-based and secular groups that advocate or promote a specific religious, political, or social platform" (page 7), and that the use of "discrimination" and "harassment" in the ABA's comment number 3 to its model rule could be found to be unconstitutionally vague (page 8).

With respect to 8.4(h) as proposed by the LSBA subcommittee, the Attorney General in the same letter concludes that "[a]lthough proposed Rule 8.4(h) seeks to avoid many of the constitutional infirmities of the [ABA] Model Rule, the proposed rule does not clearly define what type of behavior is prohibited and suffers from the same vagueness and overbreadth issues as ABA Model Rule 8.4(g)." (page 9)

The text of the proposed rule is susceptible of being used to attack those who sincerely hold religiously based views on and object to what they understand to be sexual libertinism. This is no idle threat, as the desire of some in the LGBT movement is quite evident to punish and drum out of the public conversation any who disagree with them and who express their religious beliefs that homosexual conduct is immoral and deleterious to our civil society, as well as to the individuals involved. The Louisiana State Bar Association should not assist in providing a platform for such actions by recommending this proposed rule as currently drafted.

Thank you for the opportunity to provide these comments and for your consideration of them.

Sincerely,

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