THE NATIONAL LEGAL FOUNDATION

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June 5, 2018

Chief Justice Leigh I. Saufley
Senior Associate Justice Donald G. Alexander
Associate Justice Andrew M. Mead
Associate Justice Ellen A. Gorman
Associate Justice Joseph M. Jabar
Associate Justice Jeffrey L. Hjelm
Associate Justice Thomas E. Humphrey

Attn: Mr. Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04112-0368
(submitted via email: lawcourt.clerk@courts.maine.gov)

Re: Comment Letter of the National Legal Foundation and the Congressional Prayer Caucus Foundation re Proposed Amendments to the Maine Rules of Professional Conduct and the Maine Bar Rules to Prohibit Harassment and Discrimination

Dear Chief Justice Saufley, Justice Alexander, Justice Mead, Justice Gorman, Justice Jabar, Justice Hjelm, and Justice Humphrey:

The National Legal Foundation (NLF), joined by the Congressional Prayer Caucus Foundation,[1] respectfully submits these comments with regard to the proposal to amend Maine Rule of Professional Conduct 8.4 by adding a subsection (g) ("proposed rule") that is based on the ABA Model Rule 8.4(g) ("model rule"). The NLF is a public interest law firm dedicated to the defense of First Amendment liberties. We write on behalf of ourselves and donors and supporters, including those in Maine. 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, preserve America's Judeo-Christian heritage, and promote prayer, including as it has traditionally been exercised in Congress and other public places. CPCF reaches across

[1] Pursuant to the instructions for submitting comments, please note that the address and phone number for the National Legal Foundation and for me, as the submitter, can be found in the letterhead above. The address and phone number for the Congressional Prayer Caucus Foundation is as follows: 524 Johnstown Rd., Chesapeake, VA 23322; (757) 546-2190.

all denominational, socioeconomic, political, racial, and cultural dividing lines. CPCF has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-two states, including Maine.

We agree with much of what the Christian Legal Society (CLS) expressed in its comments, submitted to the Court today, June 5, 2018. Those comments note the substantial body of scholarly and professional criticism focusing on the model rule's constitutional deficiencies. CLS also ably summarizes the track record of the model rule to date, its potential for censoring speech and debate that undergird a free society, and its difficulty gaining traction because of its constitutional infirmities.

Those infirmities have been mitigated somewhat in the Maine proposed rule, notably by excluding the circular sentence that concludes the model rule ("This paragraph does not preclude legitimate advice or advocacy consistent with these Rules."), by excluding "marital status" from the list of protected categories, and by clarifying (and narrowing) what is meant by "conduct related to the practice of law."[2] The proposed rule, however, retains other problems present in the model rule, as noted in CLS's comments.

The model rule, followed significantly in the proposed rule, purports to put lawyers at the forefront of a cultural movement. Even if this cultural movement is justified, the model rule undermines basic fairness with respect to constitutionally protected, sincerely held religious beliefs and ethical standards.

The proposed rule change will make it easier to attack Maine lawyers' First Amendment rights. Lest this concern be thought hypothetical, it is instructive to consider the litigation in the United States District Court for the Middle District of Alabama.[3] In that case, a sitting state Supreme Court Justice running for reelection "expressed his personal views on a number of highly contentious legal and political issues that his constituents, and the country at large, are currently debating[.]"[4] The Southern Poverty Law Center (SPLC) was offended by the Justice's criticism of the majority opinion of the United States Supreme Court decision in *Obergefell v. Hodges,* 135 S.Ct. 2584 (2015)—an opinion also strongly criticized by the four dissenting justices—and filed an ethics complaint against the Justice for his "'assault [on] the authority and integrity of the federal judiciary,'"[5] which prompted an ethics investigation and ensuing litigation. The federal district court judge hearing the case "recognized the First Amendment issues implicated by SPLC's attempt to use a state agency to suppress speech . . . ."[6] On May 30, the parties submitted a proposed "Permanent Injunction and Judgment" granting the Alabama Supreme Court Justice a permanent injunction (and attorneys' fees) with respect to enforcing the canon in question "to proscribe or punish any public comment by a judge unless the public comment can

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[2] The Maine Advisory Committee's omission of the ABA model rule's constitutionally overbroad phrase "participating in bar association, business or social activities in connection with the practice of law" is particularly welcome.

[3] *Parker v. Judicial Inquiry Comm'n of the State of Ala.*, No. 2:16-CV-442-WKW, 2017 WL 3820958, (M.D. Ala., Aug. 31, 2017) and 2018 WL 1144981 (M.D. Ala., Mar. 2, 2018).

[4] *Id.*, 2017 WL 3820958 at 3.

[5] *Id.*, (quoting SPLC's complaint).

[6] *Id.* (internal quotation and citation omitted).

reasonably be expected to affect the outcome or impair the fairness of a proceeding pending or impending in any court." The injunction will also apply to two related canons.[7]

In considering the merits of the proposed rule, the turbulence encountered on the model rule's journey thus far is telling. As detailed in the CLS comments, numerous jurisdictions have noted grave reservations about the wisdom and constitutionality of the model rule. As CLS notes in its comments, the ABA's claim that multiple jurisdictions have adopted this rule is factually incorrect; only one (Vermont) has done so, and every state attorney general who has considered the proposed rule has found it constitutionally defective in multiple respects.

Much of the thinking and advocacy that undergird the push for the model rule's adoption also ignore credible and significant health and social science data that should signal skepticism in approaching the expansive scope of the proposed rule's language. There is well-founded concern that the proposed rule would align the State of Maine behind those who are most actively pushing an expansive definition of "sexual orientation" and "gender identity," to the degree that any "discrimination," broadly defined, will override religious, speech, assembly, and other freedoms.

Maine's Human Rights Law defines "sexual orientation" to include "a person's actual or perceived . . . gender identity or expression."[8] Although the category of "sexual orientation" (and, indirectly, "gender identity") is among statutorily protected categories in Maine for purposes of employment, housing, public accommodation, extension of credit, and education, 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 and transgender *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.[9]

Religiously Informed Views on Sexual Orientation and Gender Identity

Christians are called to love and serve all persons, including those with a homosexual orientation or those who feel a closer association to the gender other than their biological sex. However, most orthodox Christians (and those of other religions) sincerely believe that their Holy Scriptures (not to mention biology) identify same-sex intercourse and rejection of one's birth gender as both unnatural and immoral. Thus, although Christian lawyers would not (and overwhelmingly do not) refuse to take work from persons who identify themselves as homosexual or transgender *when the work does not involve supporting that lifestyle* (e.g.,

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[7] *Parker v. Judicial Inquiry Comm'n of the State of Ala.,* No. 2:16-CV-442-WKW (M.D. Ala., May 30, 2018) (proposed Permanent Injunction and Judgment (ecf # 108-1)).

[8] Me. Rev. Stat. Ann. tit. 5, §4552.9-C.

[9] 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 and transgender 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.

representation as a victim of a car accident), many would have 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 or gender identity to refuse to approve or support same-sex intercourse or gender "transformations." Rather, it recognizes 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. *E.g., Christian Legal Soc'y Chapter v. Martinez*, 130 S. Ct. 2971, 2980 (2010) (recounting state university's labeling of CLS chapter's requirement that leaders not engage in sexual intercourse outside marriage between a man and a woman as "sexual orientation" and "religious" discrimination, although the case was decided on other grounds). 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" discrimination. *E.g.*, *In re Klein*, Case Nos. 44-14 *et al.*, Final Order, Ore. Bureau of Labor and Indus. (July 2, 2015); *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n* (2015COA115), cert. granted, 137 S.Ct. 2290 (U.S. June 26, 2017) (No. 16-111) (argued Dec. 5, 2017). 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 the immorality of homosexual conduct.

The view that distinguishes the person from the activity may not be held currently by a majority of the ABA's leadership, but it is held by many lawyers in Maine and nationwide and is religiously, scientifically, and logically informed. It appears that those who sponsor adoption of the model rule are not satisfied with the pace of change across the country. The ABA Ethics Committee in its December 22, 2015, memorandum ("ABA Memorandum") quoted (at 2) from the "eloquence" of the Oregon New Lawyers Division that "[t]here is a need for a cultural shift in understanding." In uncritically accepting that there is such a "need" for a "cultural shift" and in seeking to advance it, the proponents of the proposed rule have taken an unwise step that should not be endorsed and followed by Maine. At a minimum, Maine's approach to this subject should be more nuanced to recognize and exempt constitutionally protected speech and conduct motivated by sincerely held religious beliefs and to clarify exactly what is being proscribed. Moreover, Maine's Constitution protects the exercise of religious freedom[10] and speech.[11] Lawyers, just as all other citizens of Maine, should be free to engage in religiously motivated speech and action.

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[10] Article I, Section 3 provides: "All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship; . . . ."

[11] Article 1, Section 4 provides: "Every citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty; . . . ."

Suggested Revisions to the Proposed Rule

We support the formulation of a black-letter ethics rule addressing inappropriate, invidious discrimination. Such a provision would properly address discrimination based on uncontroversial and constitutionally protected categories, such as race, religion, color, national origin, and sex. However, the inclusion of "sexual orientation" and "gender identity" as nondiscrimination categories in the proposed rule is ill-advised unless those terms are more carefully defined and limitations more clearly specified to prevent an unconstitutional application of the proposed rule.

1. Proposed use of "sexual orientation"

The category of "sexual orientation" should not be included in the text of the rule. 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.") Perhaps more importantly, the phrase "sexual orientation" should not encompass same-sex marriage, since the act of marriage, with its accompanying sexual intimacy, goes much beyond whether an individual is simply attracted to another person of the same sex. 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, refusal to represent an individual in a matter related to such conduct, or expressed opposition to such conduct."[12]

Without the clarification that "sexual orientation" discrimination does not encompass a lawyer's refusal to approve or support same-sex *conduct*, refusal to represent an individual in a matter related to such *conduct*, or expressed opposition 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 and assembly.

[12] 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 object to counseling homosexual individuals generally, she did not want to counsel them in preparation for a same-sex marriage, which she believed to be unethical. She, therefore, 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.)

Finally, if "sexual orientation" is included, the proposed rule should clarify that the category of "sex" does not include "sexual orientation" or "gender identity." Interpreting "sex" to include "sexual orientation" and "gender identity" is a position put forward in proposed federal regulations by the EEOC in the prior administration and upheld as a reasonable reading of the term by two en banc federal courts of appeals over vigorous dissents, but, as both history and current dissenting opinions demonstrate, they are not universally accepted or approved expansions of the category of "sex."[13]

2. Proposed use of "gender identity"

"Gender identity" should not be included in the proposed rule as a nondiscrimination category for several reasons.

- *The movement for official acknowledgement that taking transgender actions is "normal," and that such inclinations should even be encouraged, contrasts with social science studies documenting the dramatic, long-term deleterious effects on those who have elected to have transgender medical procedures performed.*[14] By including this term, the proposed rule helps perpetuate a pretense that ignores physical reality and social science results, unfairly and improperly accusing those who do not support transvestitism and gender transfers of "harassment" and "discrimination."
- *The term "gender identity" is unconstitutionally vague.* This term has no fixed meaning and, by definition, is the product of an individual, subjective determination that may conflict with how the individual objectively appears to others. Moreover, because of its subjectivity, the term is malleable and can even be used by an individual in a temporally

[13] 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*, 853 F.3d 339 (7th Cir. 2017) (*en banc*) and *Zarda v. Altitude Express, Inc.*, 2018 WL 1040820 (2d Cir. 2018) (*en banc*), two Circuits overruled prior precedent in their courts and concluded that Title VII's protected categories include sexual orientation as a subset of discrimination on the basis of sex. In *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), however, an Eleventh Circuit panel held that the protected categories under Title VII do not include sexual orientation.

[14] Dr. Paul McHugh, former Chief of Psychiatry at Johns Hopkins Hospital, noted that gender identity confusion is a mental disorder that deserves understanding, treatment, and prevention and that the suicide rate among those who had "reassignment" surgery is 20 times higher than that among non-transgender people. Dr. McHugh also noted studies show that 70% - 80% of children who express transgender feelings spontaneously lose such feelings over time. P. McHugh, "Transgender Surgery Isn't the Solution," 6/12/14 *Wall St. J.*, available at http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120 (last visited 5/11/18); *see also* Cal. Health Interview Study, *reported in* Center for American Progress, "How to Close the LGBT Health Disparities Gap," www.americanprogress.org/issues/lgbt/report/2009/12/21/7048 (last visited 5/11/18) ("[t]ransgender adults are much more likely to have suicide ideation" (2% heterosexual; 5% gay; 50% transgender)).

inconsistent manner.[15] Needless to say, such ambiguity in the term raises serious vagueness concerns. In fact, the ABA Ethics Committee, which drafted the proposed rule, demonstrated the ambiguity of the term when it stated (December 22, 2015, memorandum, at 5) that the term *gender identity* recognizes that "a new social awareness of the individuality of gender has changed the traditional binary concept of sexuality." Any "identity" subject to changeable, subjective "individuality" untethered to time or objective biology is, by definition, vague and subject to abuse.

To reiterate, Christians (and others) do not believe those with transgender inclinations are any less persons for having such inclinations, but that is not the same as approving and being able to support or advocate for *actions* taken in furtherance of that inclination or to advance its spread. Christians recognize that they themselves and all other persons take immoral actions. Christians are enjoined by their Scriptures to love and serve all persons, even though they do not approve of the immoral actions persons perform.[16]

Conclusion

For the reasons detailed above, we encourage the Maine Supreme Judicial Court not to adopt the proposed rule. If the proposed rule is adopted, we recommend the following revisions to the proposed text:

- Remove "sexual orientation" and "gender identity" as nondiscrimination categories for purposes of this rule.
- At a minimum, add additional language that "this rule does not include a lawyer's refusal to approve or support same-sex or gender transfer conduct, refusal to represent an individual in a matter related to such conduct, or expressed opposition to such conduct."

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.

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[15] "The term [transgender] includes androgynous and gender queer people, drag queens and drag kings, transsexual people, and those who identify as bi-gendered, third gender or two spirit. 'Gender identity' refers to one's inner sense of being female, male, or some other gender . . . . Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient . . ., individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities." *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 Tex. J. on C.L. & C.R. 101, 103-04 (2006). *See also DeJohn v. Temple Univ.*, 537 F.3d 301, 381 & n.20 (3d Cir. 2008) (noting fluidity of the term *gender*).

[16] *See John 8:2-11* (New Int'l Version) (story of Jesus not condemning the woman caught in adultery but telling her to"leave your life of sin").

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 and transgender conduct are immoral and deleterious to our civil society, as well as to the individuals involved. (*See, e.g., supra* at page 2, the details of the Alabama Judicial Inquiry Commission case.) The Maine Supreme Judicial Court should not provide a platform for such actions by adopting this proposed rule.

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

Sincerely,

Steven W. Fitschen
President, The National Legal Foundation
Senior Legal Advisor, Congressional Prayer Caucus Foundation