The National Legal Foundation

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July 3, 2017

The Honorable Michael A. Cherry, Chief Justice
The Honorable Michael L. Douglas, Associate Justice
The Honorable Kristina Pickering, Associate Justice
The Honorable Mark Gibbons, Associate Justice
The Honorable Lidia S. Stiglich, Associate Justice
The Honorable James W. Hardesty, Associate Justice
The Honorable Ron D. Parraguirre, Associate Justice
The Supreme Court of Nevada
201 South Carson Street
Carson City, Nevada 89701

Attn: Ms. Elizabeth A. Brown, Clerk of the Supreme Court

Re: *In the Matter of Amendments to Rule of Professional Conduct 8.4* (ADKT No. 526)
Comments of The National Legal Foundation Opposing Adoption of ABA Model Rule 8.4(g)

Dear Chief Justice Cherry, Justice Douglas, Justice Pickering, Justice Gibbons, and Justice Stiglich, Justice Hardesty, and Justice Parraguirre:

The National Legal Foundation (NLF) writes in opposition to the adoption of ABA Model Rule 8.4(g). The 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 write on behalf of ourselves and donors and supporters, including those in Nevada. It 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 Constitutional deficiencies of proposed Rule 8.4(g) (the proposed rule) have been widely discussed and documented.[1] The growing body of scholarly and professional criticism focuses on the proposed rule's deficiencies with respect to:

- The First Amendment's Establishment, Free Exercise, and Free Speech clauses; and
- Its vagueness and overbreadth.

[1] 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). See also the three articles listed below.

The effort by the leadership of the ABA to bully attorneys into toeing the line with respect to the leadership's social engineering aspirations is illustrated in the title of three articles authored by two eminent Constitutional scholars:

- "The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech."[2]
- "The ABA Decision to Control What Lawyers Say: Support 'Diversity' But Not Diversity of Thought."[3]
- "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities."[4]

The ABA leadership's effort to undermine basic Constitutional protections for its members is inimical to our Country's fundamental principles of freedom and is yet another voice in the effort to shout down those who are not in lock-step with the "politically correct" world view in vogue among some of the cultural elite in our country. This attitude contrasts starkly with the freedoms upon which our country is based and under which it and its citizens have flourished. These concerns are magnified by Comment 4 to the proposed rule, which states that "the practice of law includes . . . participating in bar association, business or social activities in connection with the practice of law."

The ABA leadership's action in promoting this proposed rule betrays a totalitarian instinct to silence opposition from its members who disagree with it on issues that are central to an ongoing and important cultural discussion. The proposed rule, in its avowed purposed to put lawyers at the forefront of a cultural movement, instead attempts to coopt State bars and judiciaries to undermine basic fairness with respect to Constitutionally protected, sincerely held religious beliefs and ethical standards.

The other states that have so far considered the ABA's proposed 8.4(g) have all expressed concerns about the proposed rule and have declined to accept it. For example:

- The Texas Attorney General (letter dated December 20, 2016) wrote, "A court would likely conclude that the [proposed rule] . . ., if adopted in Texas, would unconstitutionally restrict freedom of speech, free exercise of religion, and freedom of

[2] The article was written by Professor Ronald Rotunda and may be found at https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418
[3] The article was written by Professor Ronald Rotunda and may be found at http://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought
[4] The article was written by Professor Euguene Volokh and may be found at 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

- association for members of the State Bar. In addition, a court would likely conclude that it was overbroad and void for vagueness."
- The South Carolina Solicitor General (letter dated May 1, 2017) expressed the belief of the state's Attorney General's office that, "if adopted, . . . the likelihood of a successful challenge to the Model Rule based upon the First Amendment and Due Process Clause is substantial and that a court could well conclude the Rule is unconstitutional." On June 20, 2017, the South Carolina Supreme Court issued an Order (Appellate Case No. 2017-00049, found at http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01) declining "to incorporate the ABA Model Rule within Rule 8.4, RPC, as requested by the ABA."

Much of the thinking and advocacy that undergird the push for the proposed rule's adoption also ignores 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 Nevada behind those who are most actively pushing an expansive definition of "sexual orientation," "gender identity," and "marital status," to the degree that any such "discrimination," broadly defined, will override religious and other freedoms.

With respect to the categories of "sexual orientation," "gender identity," 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 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.[5]

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, while Christian lawyers would not (and overwhelmingly do not) refuse to take work from persons who identify themselves as gay or transgender *when the work does not involve supporting that lifestyle* (e.g., representation as a

[5] 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.

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." 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. *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" or "marital status" 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, et al. v. Colo. Civil Rights Comm'n, et al.*, 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 2017 WL 2722428 , (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 currently by a majority of the ABA's or even the State Bar of Nevada's leadership, but it is held by many lawyers in Nevada and nationwide and is religiously, scientifically, and logically informed. And to some degree, this view has informed legislators at all levels of our government—from federal to local—in rejecting the addition of "sexual orientation," "gender identity," and "marital status" to their non-discrimination laws and policies.

Obviously, those who sponsor adoption of the proposed rule are not satisfied with the pace of change across the country. The ABA Ethics Committee in its December 22, 2015, memorandum, at 2 (hereinafter ("*ABA Memorandum"*) quoted 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 Nevada. At a minimum, Nevada's approach to this subject should be more 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 have no quarrel with 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, and sex. However, the inclusion of "sexual orientation," "gender identity," 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."[6]

[6] 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*

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.

Finally, if "sexual orientation" is included, the rule also should clarify that the term does not include "gender identity" and that the category of "sex" does not include either "sexual orientation" or "gender identity." These positions have been put forward in proposed federal regulations by the EEOC, but they are not generally accepted or approved expansions of the category of "sex." The proposed inclusion of "gender identity" to the categories of "sexual orientation" and "sex" indicates that the terms do not include each other, but this point should be made explicit to address in part the vagueness of the term *sexual orientation* (and *gender identity*).

2. Proposed use of "gender identity"

"Gender identity" should not be included in the 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.*[7] 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

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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.

[7] 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; *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 ("[t]ransgender adults are much more likely to have suicide ideation" (2% heterosexual; 5% gay; 50% transgender).

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 inconsistent manner.[8] 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 (*ABA Memorandum* 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.[9] At a minimum, if the proposed rule is adopted and this phrase is retained, the language suggested above for "sexual orientation" should be expanded to include "gender identity," to wit: "Paragraph (g) does not include a lawyer's refusal to approve or support same-sex or gender transfer conduct or to represent an individual in a matter related to such conduct."

3. <u>Proposed use of "marital status"</u>

The term *marital status* is hopelessly ambiguous. It is obviously not an inherent condition like

[8] "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*).

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

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*, 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 provides more questions than answers. If the reference to *Obergefell* is meant to suggest that a lawyer could not discriminate against those in a same-sex marriage, "marital status," in this context, adds nothing to "sexual orientation." Moreover, *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.[10] To the extent "marital status" is intended to cover the same-sex marriage status, it runs directly contrary to the statements of public policy still common and effective throughout this country that *disfavor* same-sex marriage, including Nevada. Nevada's Constitution in Article 1, Section 21 ("Limitation on recognition of marriage") provides: "Only a marriage between a male and female person shall be recognized and given effect in this state."

To the extent the ABA included "marital status" based on the implication that there is some kind of invidious discrimination against single parents, the support mustered for that was exactly zero. 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 could be construed to include, for example, when a Christian 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

[10] 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); *Williams v. Zbarez*, 448 U.S. 358 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977).

actions that are constitutionally protected.

Conclusion

For the reasons detailed above, we encourage the Supreme Court of Nevada to reject adoption of this proposed rule. If the rule is adopted, we recommend the following revisions to the current text:

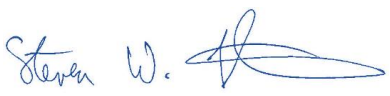
- Remove "sexual orientation" and "gender identity" as nondiscrimination categories. At a minimum:
    - add additional language to the rule that "this rule does not include a lawyer's refusal to approve or support same-sex or gender transfer conduct or to represent an individual in a matter related to such conduct;" and
    - add language to the rule that "the terms 'sex' and 'sexual orientation' do not overlap and do not overlap with the term 'gender identity.'"
- 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.

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. The Nevada Supreme 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