MEMORANDUM

To: Idaho Attorneys

Re: Proposed New Nondiscrimination Rule for Idaho Attorneys, Proposed 2021 I.R.P.C. 8.4

Date: November 2, 2021

Time Sensitive

At their October 9, 2021 meeting, the Idaho State Bar Board of Commissioners voted to support a proposed Resolution ("the 2021 Proposed Rule") that would amend Idaho Rule of Professional Conduct 8.4 to include anti-discrimination and anti-harassment provisions. A similar resolution was rejected by the Idaho Supreme Court in 2018.

The Resolution will be voted on by bar members who attend the 2021 Roadshow, and then proceed through the 2021 resolution process as outlined on the Idaho State Bar website. *See* 2021 Resolution (Roadshow) Schedule. The Roadshow dates and locations are as follows:

1st District, Coeur d'Alene **Nov. 4** - noon
2nd District, Moscow **Nov. 4** - 6:00 p.m.
3rd District, Nampa **Nov. 15** - 6:00 p.m.
4th District, Boise **Nov. 16** - Noon (virtual meeting)
5th District, Twin Falls **Nov. 10** - 6:00 p.m.
6th District, Pocatello **Nov.10** - noon
7th District, Idaho Falls **Nov. 9** - noon

The purpose of this memorandum is to urge Idaho attorneys to attend their district meeting and oppose the proposed Resolution and its proposed changes to Idaho Rule of Professional Conduct 8.4. The 2021 Proposed Rule is a variant of the highly controversial and deeply flawed ABA Model Rule 8.4(g), which has been rejected or abandoned by over a dozen states in the five years since its promulgation in August 2016.[1]

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[1] After five years of careful study by state supreme courts and state bar associations in many states across the country, at least thirteen states have abandoned ABA Model Rule 8.4(g), or a variant, as unconstitutional or unworkable. In addition to the Idaho Supreme Court, states whose high court or state bar associations have rejected a variant of 8.4(g) include: Arizona, Illinois, Louisiana, Minnesota, Montana, Nevada, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas. Utah has held two public comment periods but has not adopted it. Vermont and New Mexico are the only states to have adopted ABA Model Rule 8.4(g) in full. Maine, Connecticut, and Pennsylvania adopted narrower versions, although Pennsylvania's was ruled unconstitutional in December 2020 in *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020).

The *Greenberg* decision is the only court decision regarding ABA Model Rule 8.4(g) or a variant thereof. The federal district court struck down Pennsylvania's rule as facially unconstitutional. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), *appeal voluntarily dismissed*, No. 20-3602 (3d Cir. Mar. 17, 2021). Pennsylvania's latest attempt at a revised rule is again tied up in litigation in federal district court.

The Anti-Discrimination Anti-Harassment Committee's Memorandum in Support of 2021 I.R.P.C. 8.4 Proposed Amendments, https://isb.idaho.gov/wp-content/uploads/Memo-In-Support-of-Proposed-IRPC-8.4g.pdf, cites a Colorado Supreme Court decision, *In re Abrams*, No. 20SA81 (Colo. June 7, 2021). But the Colorado Rule of Professional Conduct 8.4(g) at issue in that case was adopted years before ABA Model Rule 8.4(g) and is not a variant of that rule.

State attorneys general have issued opinions critical of ABA Model Rule 8.4(g) in Alaska, Arizona, Louisiana, South Carolina, Tennessee, and Texas. *See. e.g.*, Tenn. Att'y Gen. Letter, Letter from Attorney General

1. The Idaho Supreme Court rejected the 2017 Proposed Rule because it did not comport with United States Supreme Court precedent, and the 2021 Proposed Rule continues to be unconstitutional under the same Supreme Court precedent.

In 2017, the Idaho State Bar Board of Commissioners proposed a rule (the 2017 Proposed Rule) that had the same basic flaws as the 2021 Proposed Rule. After a public comment period in 2018, the Idaho Supreme Court rejected the 2017 Proposed Rule by a 3-2 vote. The 2017 Proposed Rule was drafted by the Anti-Discrimination Anti-Harassment Committee after it was formed by the Professionalism & Ethics Section in 2016, the year that the ABA promulgated Model Rule 8.4(g).

In rejecting the 2017 Proposed Rule, the Idaho Supreme Court encouraged the Committee to revisit the rule in the future "in hopes of narrowing the rule *to comport with new United States Supreme Court cases.*"[2] In September 2021, the Anti-Discrimination Anti-Harassment Committee circulated its 2021 Proposed Rule.[3]

But the 2021 Proposed Rule is not narrower than the 2017 Proposed Rule, nor does it comport with the "new United States Supreme Court cases" to which the Idaho Supreme Court referred. Instead, it ignores three recent United States Supreme Court cases, each of which demonstrates that the 2021 Proposed Rule is an unconstitutional restriction on attorneys' speech. The 2021 Proposed Rule fails to meet the standards set forth in the United States Supreme Court cases to which the Idaho Supreme Court was referring: *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *National Institute of Family and Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018). Nor does the 2021 Proposed Rule comport with the 2019 Supreme Court decision in *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), a case applying the *Matal* analysis.[4]

Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 10 (hereinafter "Tenn. Att'y Gen. Letter"), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf ("[T]he goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.") (Emphasis in original.)

In 2017, the Montana Legislature passed a joint resolution condemning ABA Model Rule 8.4(g) when a version was under consideration by the Montana Supreme Court. *A Joint Resolution of the Senate and the House of Representatives of the State of Montana Making the Determination that it would be an Unconstitutional Act of Legislation, in Violation of the Constitution of the State of Montana, and would Violate the First Amendment Rights of the Citizens of Montana, Should the Supreme Court of the State of Montana Enact Proposed Model Rule of Professional Conduct 8.4(G)*, SJ 0015, 65th Legislature (Mont. Apr. 25, 2017), https://leg.mt.gov/bills/2017/billhtml/SJ0015.htm.

[2] Letter of Chief Justice Burdick to Diane Minnich, Executive Director, ISB, dated September 6, 2018, https://isb.idaho.gov/wp-content/uploads/Court-order-on-17-01.pdf.

[3] The Committee also circulated its Memorandum in Support of 2021 I.R.P.C. 8.4 Proposed Amendments (Memorandum), https://isb.idaho.gov/wp-content/uploads/Memo-In-Support-of-Proposed-IRPC-8.4g.pdf. On October 9, 2021, the Commissioners voted to advance the Resolution. The purpose of this memorandum is to address some of the claims made in the Committee's Memorandum.

[4] In July 2020, the ABA issued Formal Opinion 493 in an attempt to "unstall" ABA Model Rule 8.4(g). Remarkably, ABA Formal Opinion 493 fails to mention—let alone explain how ABA Model Rule 8.4(g) survives constitutional analysis under—the United States Supreme Court decisions in *NIFLA*, *Matal*, and *Iancu*.

a. *NIFLA* protects lawyers' speech from content-based speech restrictions, like the 2021 Proposed Rule.

While *NIFLA* did not directly involve ABA Model Rule 8.4(g), the Court's analysis makes clear that ABA Model Rule 8.4(g) and its variants are unconstitutional *content*-based restrictions on lawyers' speech. In *NIFLA*, the United States Supreme Court held that government restrictions on professionals' speech – including lawyers' professional speech – are generally subject to strict scrutiny review because they are content-based speech restrictions and, therefore, *presumptively unconstitutional*.

The Court explained that "[c]ontent-based regulations 'target speech based on its communicative content.'"[5] "[S]uch laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'"[6] The Court rejected the idea that "professional speech" was an exception "from the rule that content-based regulations of speech are subject to strict scrutiny."[7] The Court stressed that "*this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.*'"[8] The Court reaffirmed that its "precedents have long protected the First Amendment rights of professionals" and "has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers."[9] As the Court observed, "[t]his stringent standard reflects the fundamental principle that governments have '"no power to restrict expression because of its message, its ideas, its subject matter, or its content."'"[10]

The operative assumption underlying ABA Model Rule 8.4(g) and the 2021 Proposed Rule is that professional speech is less protected by the First Amendment than other speech. But the Court rejected that basic premise. Indeed, in striking down Pennsylvania's Rule 8.4(g), the federal district court relied on *NIFLA* to "find[] that Rule 8.4(g) does not cover 'professional speech' that is entitled to less protection," but instead "[t]he speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment."[11]

b. Under *Matal* and *Iancu*, the 2021 Proposed Rule invites unconstitutional viewpoint discrimination.

Separately, the 2021 Proposed Rule's broad definition of "harassment" renders it unconstitutional under the United States Supreme Court's decisions in *Matal* and *Iancu.* The 2021 Proposed Rule defines "harassment" as "*derogatory or demeaning verbal,* written, or physical conduct toward a person based upon" eleven different categories. (Of course, "*verbal and written conduct" are euphemisms for "speech."*) But the Supreme Court in *Matal* and again in *Iancu* ruled that government officials may not determine whether speech is "derogatory or

[5] *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[6] *Id*.
[7] *Id.* at 2371.
[8] *Id.* at 2371-72 (emphasis added).
[9] *Id.* at 2374.
[10] *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[11] *Greenberg,* 491 F. Supp. 3d at 27-30.

demeaning" because that invites viewpoint discrimination. Therefore, laws or rules violate the First Amendment if they create opportunities for viewpoint discrimination and chilling speech.

As the federal district court held in *Greenberg*, under the Court's analysis in *Matal*, ABA Model Rule 8.4(g) is an unconstitutional viewpoint-based restriction on lawyers' speech.[12] In *Matal*, a unanimous Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. In his concurrence, Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, observed that it is unconstitutional to suppress speech that "demeans or offends."[13] The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[14]

All nine justices agreed that a provision of a longstanding federal law, the Lanham Act, was unconstitutional because it allowed government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons. Allowing government officials to determine what words do and do not "disparage" a person "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[15] Justice Alito, writing for a plurality of the Court, noted that "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[16]

In his concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy stressed that "[t]he danger of viewpoint discrimination is that the government will remove certain ideas or perspectives from a broader debate," particularly "if the ideas or perspectives are ones a particular audience might think offensive."[17] Justice Kennedy closed with a sober warning:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.[18]

Justice Kennedy explained that the federal statute allowed unconstitutional viewpoint discrimination because the government permitted "a positive or benign mark but not a

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[12] *Id.* at 30-32.
[13] *Matal v. Tam,* 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) (emphasis supplied).
[14] *Id.* at 1753-1754, 1765 (plurality op.).
[15] *Id.* at 1751 (quotation marks and ellipses omitted).
[16] *Id.* at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting) (emphasis supplied).
[17] *Id.* at 1767 (Kennedy, J., concurring).
[18] *Id.* at 1769 (Kennedy, J., concurring).

derogatory one," which "reflects the Government's disapproval of a subset of messages it finds offensive," which is "the essence of viewpoint discrimination."[19]

In 2019, in *Iancu v. Brunetti*, the Supreme Court reaffirmed its rigorous rejection of viewpoint discrimination in *Matal*. The challenged statutory terms in *Iancu* were "immoral" and "scandalous" and, once again, the Court found the terms were viewpoint discriminatory because they allowed government officials to pick and choose which speech to allow.

In her opinion for the Court, Justice Kagan explained that the terms "immoral" and "scandalous" insert a "facial viewpoint bias in the law [that] results in viewpoint-discriminatory application."[20] The Lanham Act, was unconstitutional because:

> [I]t allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.[21]

While the 2021 Proposed Rule says that "the harassment must be severe or pervasive enough to create an environment that is intimidating or hostile to a reasonable person," its accompanying Proposed Comment [3] makes clear that "[p]etty slights, annoyances, and isolated incidents" may "rise to the level of harassment" "if they are extremely serious."

Equally concerning, the 2021 Proposed Rule dispenses with the mens rea requirement of Current Comment [3] that accompanies Current I.R.P.C. 8.4(d). Current Comment [3] requires that a lawyer "knowingly" manifest bias or prejudice. But the 2021 Proposed Rule adopts a negligence standard by substituting "knows or reasonably should know." A lawyer could violate the 2021 Proposed Rule without even realizing he or she has done so. This change is particularly perilous as the list of words that are deemed "harassment" or "discrimination" is constantly expanding in novel and unanticipated ways. And the concept of "implicit bias" adds a further layer of complexity.

The Current I.R.P.C. 8.4(d) and Current Comment [3] are adequate to address any discrimination or harassment that should be disciplined. Therefore, the 2021 Proposed Resolution is unnecessary.

2. Despite claims to the contrary, the 2021 Proposed Rule is extremely broad in scope and would regulate almost all of an Idaho attorney's speech.

Two aspects of the 2021 Proposed Rule are particularly important to understand. First, the scope of attorneys' speech that is regulated is quite broad. Second, while the 2021 Proposed

[19] *Id.* at 1766 (Kennedy, J., concurring) (emphasis supplied).
[20] *Iancu v. Brunetti,* 139 S. Ct. 2294, 2300 (2019).
[21] *Id.*

Rule's scope as to *discrimination* is limited to "unlawful" discrimination, the Proposed Rule's scope as to *harassment* is *not* limited to "*unlawful*" harassment.

First, the 2021 Proposed Rule regulates attorneys' speech in three contexts: 1) "in representing a client;" 2) in "operating or managing a law practice;" *or* 3) "in the course and scope of employment in a law practice." Most of what lawyers do is "in the course and scope of employment in a law practice." It is hard to see how the 2021 Proposed Rule's scope differs in any significant degree from ABA Model Rule 8.4(g)'s broad scope of regulating "conduct related to the practice of law."

The Committee's Memorandum inaccurately claims that the 2021 Proposed Rule "expressly excludes conduct that takes place at bar association, business, or social activities" (Memorandum at 3). *But that is not what the 2021 Proposed Rule's text says.* The circularity of Proposed Comment [4] is very troubling: "'In representing a client or operating or managing a law practice or in the course and scope of employment in a law practice' does not include participation in bar association, business, or social activities *outside the context of representing a client or operating or managing a law practice or acting in the course and scope of employment in a law practice*." Thus, the 2021 Proposed Rule undoubtedly applies to bar association, business, and social activities. That is, the 2021 Proposed Rule regulates the very conduct for which ABA Rule 8.4(g) has been justly criticized and rejected.

3. The 2021 Proposed Rule covers all "harassment," whether it is "lawful" or "unlawful."

Second, the 2021 Proposed Rule applies only to "unlawful" *discrimination*, but it applies to all *harassment, regardless of whether the harassment is "unlawful" or "lawful*."

Even the limitation to "unlawful" discrimination raises concerns about the uniform application of the 2021 Proposed Rule. Discrimination laws can vary by locality. What constitutes discrimination for purposes of the Proposed Rule would vary depending on the locality in which an Idaho attorney practices law.

Nor does the limitation to "unlawful" discrimination include protections found in other states that make it misconduct for an attorney to engage in "unlawful" discrimination. For example, Illinois requires that before a complaint against an attorney for unlawful discrimination can be brought, a tribunal—other than a bar proceeding—must have found that the attorney has violated anti-discrimination laws. Typically, these tribunals have stronger evidentiary and due process protections for the accused than do bar disciplinary proceedings. And bar counsel often are reluctant to see ABA Model Rule 8.4(g) or its variants adopted because they recognize that their workload and scarce enforcement resources may be overburdened if they are responsible for determining whether lawyers have violated complex nondiscrimination laws and regulations.

The 2021 Proposed Rule creates several other serious concerns. But the concerns already discussed adequately illustrate why the 2021 Proposed Rule should be rejected. Many states have adopted the prudent course of waiting while other states experiment with ABA Model Rule 8.4(g) and its variants in order to evaluate its actual impact on the lawyers in those states before imposing it on lawyers in their states. Rejecting the 2021 Proposed Rule would seem a prudent and constitutionally wise course for Idaho attorneys to choose.