Name: Tracey Lee

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ADM File Number: 2023-35

Comment:
The signatories within the attached document oppose the proposed amendments to Canon 3 of the Michigan Code of Judicial Conduct and Rule 6.5 of the Michigan Rules of Professional Conduct and strongly urge you not to pass the amendments.

MICHIGAN SUPREME COURT

PROPOSED AMENDMENTS TO RULE 6.5 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT AND CANON 3 OF THE MICHIGAN CODE OF JUDICIAL CONDUCT

ADM file No. 2023-35

JOINT COMMENT IN OPPOSITION

PROPOSED AMENDMENTS TO RULE 6.5 OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT

I. The Proposed Amendment

Amendments to Rule 6.5 of the Michigan Rules of Professional Conduct have been proposed. The proposed amendments (hereinafter sometimes referred to as "proposed Rule") would read:

Rule 6.5. Professional Conduct

(a) A lawyer shall not, by words or conduct manifest bias or prejudice for or against any person involved in the legal process, or engage in harassment against any person involved in the legal process, based upon race, color, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, height, weight, sexual orientation, marital status, familial status, socioeconomic status, or political affiliation, and to the extent possible, a lawyer shall not permit subordinate lawyers and nonlawyer assistants to do so.

(b) A lawyer serving as an adjudicative officer, shall not, by words or conduct manifest bias or prejudice for or against any person, or engage in harassment against any person, based upon race, color, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, height, weight, sexual orientation, marital status, familial status, socioeconomic status, or political affiliation, and to the extent possible, the lawyer shall not permit staff and others who are subject to the adjudicative officer's

direction and control to do so to persons who have contact with the adjudicative tribunal.

Comment:

Duties of the Lawyer

[Paragraph 1 unchanged.]

A lawyer must pursue a client's interests with diligence. This often requires the lawyer to frame questions and statements in bold and direct terms. The prohibition against manifesting bias or prejudice or engaging in harassment is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly. Obviously, it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly biased, prejudicial, or harassing. A lawyer's professional judgment must be employed here with care and discretion.

[Paragraphs 3-4 unchanged.]

A supervisory lawyer should make every reasonable effort to ensure that subordinate lawyers and nonlawyer assistants, as well as other agents, avoid biased, prejudicial, or harassing behavior toward persons involved in the legal process. Further, a supervisory lawyer should make reasonable efforts to ensure that the firm has in effect policies and procedures that do not discriminate against members or employees of the firm on the basis of the attributes identified in the rule. See Rules 5.1 and 5.3.

II. Comments

A. The Proposed Rule Is Unconstitutional

1. Attorney Speech is Constitutionally Protected

Citizens do not surrender their First Amendment speech rights when they become attorneys, including when they are acting in their professional capacities as lawyers. *NAACP v. Button*, 371 U.S. 415 (1963) (holding that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."); *see also Ramsey v. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn.*, 771 S.W.2d 116, 121 (Tenn. 1989) (holding that an attorney's statements that were disrespectful and in bad taste were nevertheless protected speech

and use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney's First Amendment rights, and stating that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights."); *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995) (stating that the substantive evil must be extremely serious and the degree of imminence must be extremely high before an attorney's utterances can be punished under the First Amendment).

Indeed, the ABA itself has acknowledged this very principle in an *amicus* brief it filed in the case of *Wollschlaeger. v. Governor of the State of Fla.*, 797 F.3d 859 (11th Cir. 2015). In its brief the ABA denied that a law regulating speech should receive less scrutiny merely because it regulates "professional speech." "On the contrary" – the ABA stated – "much speech by . . . a lawyer . . . falls at the core of the First Amendment. The government should not, under the guise of regulating the profession, be permitted to silence a perceived 'political agenda' of which it disapproves. That is the central evil against which the First Amendment is designed to protect." "Simply put" – the ABA stated – "states should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession . . . Indeed," – the ABA stated – "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created."

The ABA is, of course, correct in stating that "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression." Indeed, the U.S. Supreme Court reiterated this principle in *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018), in which it devoted a significant part of its opinion to the subject of professional

speech, stating: "[T]his Court's precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, . . .The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information" (internal citations omitted). The Court concluded that it was not presented with any persuasive reason for treating professional speech as a unique category of speech that is exempt from ordinary First Amendment principles.

In short, attorneys do not surrender their constitutional rights when they enter the legal profession – including with respect to their professional speech – and the state may not violate attorneys' constitutional rights under the guise of professional regulation.

2. The Proposed Rule Prohibits Constitutionally Protected Speech

Some proponents of the proposed amendments may claim that the Rule prohibits only conduct, not speech, and that any speech that is prohibited is speech that is merely incidental to the prohibited conduct. For that reason – they might claim – the Rule does not violate the First Amendment free speech rights of lawyers.

But that is incorrect. The proposed Rule prohibits "bias", "prejudice", and "harassment" and pure speech can constitute bias, prejudice, and harassment under the proposed Rule. This is clear from the proposed Rule itself because the Rule prohibits "*words* or conduct" that manifest bias, prejudice, or harassment. Therefore, the proposed Rule itself explicitly includes speech. In addition, the fact that rules like these prohibit speech is made clear from Comment [1] of the ABA

Model Rule 8.4(g) which, like the proposed amendments here, also prohibits "harassment" and "discrimination" (a synonym for bias and prejudice. See Thesaurus.com). Comment [1] of the Model Rule expressly prohibits what it calls "verbal conduct" – which is, of course, simply a euphemism for speech. The Comment elaborates that the Model Rule prohibits "derogatory," "demeaning," and "harmful" speech.

For that reason, the proposed Rule here does not prohibit conduct that incidentally involves speech. Instead, the Rule prohibits speech that incidentally involves professional conduct. *See* Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harvard J. Law & Pub. Policy 173, 247 (2019).

Courts have also rejected the attempt to avoid First Amendment violations by the expedient of characterizing speech as "conduct." *Otto, et al. v. City of Boca Raton, Florida, et al,* 981 F.3d 854 (11th Cir. 2020) citing *Wollschlaeger v. Gov., Fla*, at 1308 ("the enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and subject to manipulation.")

Thus, it is clear that the proposed Rule does, in fact, prohibit lawyer speech. And, as is discussed below, much of that speech is constitutionally protected. By prohibiting and threatening to punish attorneys for engaging in constitutionally protected speech, the proposed Rule violates attorneys' free speech rights.

3. Many Authorities Have Expressed Concerns About The Constitutionality Of Professional Conduct Rules Like The Rule Proposed Here

Although the Rule being proposed here is not identical to ABA Model Rule 8.4(g), the Rule proposed here is, in its essentials, very similar to the ABA Model Rule in that the essence of

both rules is to prohibit attorneys from engaging in speech or conduct that constitutes "harassment" or discrimination (described as "bias or prejudice" in the proposed Rule). And many authorities have pointed out the constitutional infirmities of ABA Model Rule 8.4(g).

When the ABA opened up Model Rule 8.4(g) for comment, a total of 481 comments were filed – and of those 481 comments, 470 of them opposed the Rule, many on the grounds that the Rule would be unconstitutional.

Indeed, the ABA's own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law Section, initially warned the ABA that Model Rule 8.4(g) may violate attorneys' First Amendment speech rights.

And prominent legal scholars, such as UCLA constitutional law professor Eugene Volokh and former U.S. Attorney General Edwin Meese, III, have opined that ABA Model Rule 8.4(g) is constitutionally infirm. *See* Eugene Volokh, "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities,*" Wash. Post, Aug. 10, 2016; *see also* Edwin Meese III, August Letter to ABA House of Delegates, http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf. Attorney General Meese wrote that ABA Model Rule 8.4(g) constitutes "a clear and extraordinary threat to free speech and religious liberty" and "an unprecedented violation of the First Amendment." *Id.*

Indeed, 52 law professors have signed a letter – titled *The Unconstitutionality of ABA Model Rule 8.4(g)* – in which they conclude that "the scholars who have signed this letter believe that ABA Model Rule 8.4(g) would, if adopted by any state, be clearly unconstitutional."

In addition, the authors of many law review articles have concluded that Model Rule 8.4(g) threatens attorneys' First Amendment rights. *See, e.g.*, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional & Blatantly Political*, 32 Notre Dame J.L. Ethics & Pub. Pol'y 135

(2018); Andrew F. Halaby and Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, & a Call For Scholarship*, 41 J. Legal Prof. 201 (2017) (the new Model Rule 8.4(g) has due process and First Amendment free expression infirmities); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment & "Conduct Related to the Practice of Law*," 30 Geo. J. Legal Ethics 241 (2017) (Model Rule 8.4(g) constitutes an unjustified incursion into constitutionally protected speech); Caleb C. Wolanek, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(G) Of The Model Rules of Professional Responsibility*, 40 Harv. J.L. & Pub. Policy 773 (June 2017) (Model Rule 8.4(g) goes too far and implicates the First Amendment); Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2018) (Model Rule 8.4(g) expands impulses within the legal profession to coerce viewpoint conformity and marginalize and deter dissenters); Bradley S. Abramson, *ABA Model Rule 8.4(g): Constitutional and Other Concerns for Matrimonial Lawyers*, 31 J. Am. Acad. Matrim. Law. 283 (2019)(Model Rule 8.4(g) would appear to prohibit constitutionally protected speech, chill constitutionally protected speech, and interfere with attorneys' free exercise of religion rights); Green, Bruce A. and Roiphe, Rebecca, *ABA Model Rule 8.4(g), Discriminatory Speech and the First Amendment* (January 14, 2022), 50 Hofstra L. Rev. 543 (ABA Model Rule 8.4(g) covers a significant amount of protected speech and is not narrowly tailored to serve any compelling government interest). *See also* Lindsey Keiser, *Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights,* 28 Geo. J. Legal Ethics 629 (Summer 2015) (rule violates attorneys' Free Speech rights); Dorothy Williams, *Attorney Association: Balancing Autonomy & Anti-Discrimination*, 40 J. Leg. Prof. 271 (Spring 2016) (rule violates attorneys' Free Association rights).

The National Lawyers Association's Commission for the Protection of Constitutional Rights has issued a Statement that ABA Model Rule 8.4(g) would violate an attorney's free speech, free association, and free exercise rights under the First Amendment to the U.S. Constitution. National Lawyers Association, https://www.nla.org/nla-task-force-publishes-statement-on-new-aba-model-rule-8.4g/ (last visited on Apr. 2, 2019).

Likewise, the national Catholic Bar Association has taken a public position that the Model Rule is unconstitutional.

In Montana the state legislature adopted a Joint Resolution – Montana Senate Resolution 15 – that, if the Supreme Court of Montana were to enact ABA Model Rule 8.4(g), such would constitute an unconstitutional act of legislation and violate the First Amendment rights of Montana lawyers. In response, the Montana Supreme Court declined to adopt the Rule.

Significantly, the Attorneys General of five States – Texas, South Carolina, Louisiana, Tennessee, and Arkansas – have issued official opinions that ABA Model Rule 8.4(g) is unconstitutionally vague and overbroad, and violates the free speech, free exercise of religion, and free association rights of attorneys. *See* Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016); S.C. Att'y Gen. Op. 14 (May 1, 2017); La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017); Tenn. Att'y Gen. Op. No. 18-11 (Mar. 16, 2018); Arkansas Att'y Gen. Op. No. 2020-055 (July 14, 2021). In addition, the Attorney General of Arizona has written that the Rule "raises significant constitutional concerns, including potential infringement of speech and association rights." Ariz. Att'y Gen.'s Comment to Petition to Amend ER 8.4, Rule 42, Ariz. Rules of the Sup. Ct., R-17-0032 (May 21, 2018). Similarly, the Attorney General of Alaska has opined that the Rule would "violate First Amendment freedoms, including freedom of speech, free exercise of religion, and freedom of association . . . As a policy it is unwise, and as a law it is unconstitutional." Letter of Alaska

Attorney General to the Board of Governors of the Alaska Bar Association (August 9, 2019). And, finally, the Attorney General of Nebraska, in opposing a similar rule there on constitutional grounds, stated that ABA Model Rule 8.4(g) has "been widely rejected by States, deemed unconstitutional by many State Attorneys General, declared unconstitutional by a least one federal court, and resoundingly criticized in legal scholarship." Comment on Proposed Amendments to Neb. Ct. R. of Prof. Cond. § 3-508.4 (May 2, 2022).

The essence of all the objections to Model Rule 8.4(g) is that a rule of professional conduct that prohibits discriminatory or harassing speech violates the constitutionally protected free speech and free exercise rights of attorneys. As will be seen, the same constitutional objections apply to the amendments proposed here.

4. The Proposed Rule Is Unconstitutionally Vague

Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. And the lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. For that reason, courts apply a more stringent vagueness test when a regulation interferes with the right of free speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

Vague laws present several due process problems. First, such laws may trap the innocent by not providing fair warning. Second, vague laws delegate policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. And third, such laws lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

(a) The Term "Harassment" is Unconstitutionally Vague

The proposed Rule prohibits attorneys from engaging in "harassment" on the basis of any of the protected classes. But the Rule does not define the term "harassment." Thus, the term "harassment" is subject to multiple interpretations – and no standard is provided by which an attorney can reasonably determine whether or not any particular speech or conduct might violate the Rule.

Indeed, the proposed Comment to the Rule admits as much, stating that "it is not possible to formulate a rule that will clearly divide what is properly challenging from what is impermissibly biased, prejudicial, or harassing." Thus the proposed Rule itself admits that it is vague and undefinable so that "[a] lawyer's professional judgment must be employed here with care and discretion."

The dictionary definition of the term "harass" is "to annoy persistently," "to create an unpleasant or hostile situation for [sic] especially by uninvited and unwelcome verbal or physical conduct," or "to subject persistently and wrongfully to annoying, offensive, or troubling behavior." Merriam-Webster Online Dictionary, harass, verb. So the proposed Rule threatens attorneys with professional discipline merely for engaging in speech that annoys someone or that someone finds unpleasant or offensive. But how is an attorney supposed to know what speech someone else may find annoying, unpleasant, or offensive?

For example, can simply being offended by an attorney's expressions constitute harassment? Might an attorney violate the Rule merely by sharing her religious beliefs with another attorney who finds such religious beliefs – or their expression – offensive? Could an attorney's body language – such as a dismissive hand gesture, a turning of

one's back, the shaking of one's head, or the rolling of one's eyes – constitute harassment? Could an attorney's clothing or apparel – such as wearing a "Make America Great Again" cap – violate the Rule? Or what if a lawyer had an African-American flag ("red, black, & green flag") or a raised black fist sticker on her briefcase – might that violate the Rule? If not, why not – since some would consider this speech derogatory or demeaning and, therefore, harassing.

Indeed, some courts have explicitly found that the term "harass" – in and of itself – is unconstitutionally vague. *See, e.g.*, *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996) (holding that the term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague).

Because the term "harassment" as used in the proposed Rule is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid violating the Rule.

It is instructive to observe that Comment [3] of Model Rule 8.4(g) provides that harassment includes *derogatory or demeaning verbal or physical conduct*. But what exactly is encompassed by the words "derogatory" and "demeaning" speech? Courts have found terms such as these unconstitutionally vague. *See, e.g.*, *Hinton v. Devine*, 633 F.Supp. 1023 (E.D. Pa. 1986) (holding that the term "derogatory" without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal. App. 4th 669

(Cal. App. 2012) (holding that a statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

Finally, the proposed Rule is silent as to whether or how the Rule may or may not relate to the substantive law of antidiscrimination and anti-harassment statutes and case law. So the Comment provides attorneys with no guidance whatsoever as to what the Rule prohibits or how it will be applied.

(b) The Terms "Bias" and "Prejudice" are Unconstitutionally Vague

The proposed Rule also prohibits speech and conduct that "manifest bias or prejudice" against members of the protected classes. But those terms, too, are unconstitutionally vague.

The terms "bias" and "prejudice" are synonymous. Merriam-Webster Online Dictionary, bias, noun and Merriam-Webster Online Dictionary, prejudice, noun. The term "prejudice" is defined as "an irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics." Merriam-Webster Online Dictionary, prejudice, noun. But, again, what sort of speech or conduct is encompassed by the terms bias and prejudice so as to violate the proposed Rule?

The terms "bias" and "prejudice" – standing alone – are unconstitutionally vague because attorneys cannot determine with any degree of reasonable certainty what speech and conduct may constitute biased or prejudicial speech or conduct. What parameters of speech or conduct may be deemed by the disciplinary authorities to manifest an "irrational attitude of hostility" toward members of one or more of the protected classes?

With respect to all three terms (harassment, bias, and prejudice) it is also important to emphasize that speech does not lose its constitutional protection just because someone might feel harassed by it or consider it biased, prejudiced, or hostile. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc*., 515 U.S. 557, 574 (1995) (stating that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (noting that an interest in protecting bystanders from feeling offended or angry is not sufficient to justify a ban on expression); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (striking down a ban on picketing near embassies where the purpose was to protect the emotions of those who reacted to the picket signs' message). *See also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011) (stating that "new categories of unprotected speech may not be added to the list [of unprotected speech – such as obscenity, incitement, and fighting words] by a legislature that concludes certain speech is too harmful to be tolerated").

Indeed, the U.S. Supreme Court has stated that the idea that free speech protection should be subject to a balancing test that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test, is a "startling and dangerous" proposition. *Id.* at 792; *see also United States v. Stevens*, 559 U.S. 460, 470 (2010) (holding that "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a

judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.")

(c) The Phrase "involved in the legal process" is Unconstitutionally Vague

The proposed Rule applies to any conduct of an attorney "for or against any person involved in the legal process." However, the proposed Rule does not define the meaning of the phrase "involved in the legal process."

There is no reason to believe that the phrase would be limited to those engaged in litigation – either civil or criminal – before a court of law, an administrative law judge, or a mediator or arbitrator, whether court-appointed or contractual, because people could be said to be involved in the legal process outside the context of litigation. Indeed, being involved in the legal process would also seem to encompass other activities in which lawyers engage whenever they're acting as attorneys – such as drafting a will or estate plan, providing legal advice to a business as to its operations, providing tax advice, or drafting a contract. It would also seem to apply to an attorney's client selection decisions because a prospective client could be said to be involved in the legal process when seeking legal representation. Indeed, it could be argued that the phrase "involved in the legal process" might apply to any and every activity in which an attorney is acting as an attorney. If that's the case, the phrase would also encompass other activities in which lawyers regularly engage as lawyers, such as bar association activities, teaching or attending law schools, teaching or attending CLEs, and operating or managing law firms.

Further, because what constitutes "the legal process" is unclear, it's also unclear who exactly the Rule applies to. It would seem the Rule would apply against judges, clerks, attorneys, parties, witnesses, court reporters, process servers, bailiffs, and law enforcement officers, all of whom are involved in the "legal process" as that term is applied to civil and criminal litigation. But it could also possibly apply against many others as well, including law firm employees, bar association personnel, law school teachers and employees, and any other person who interacts with attorneys.

When these questions are posed, it hardly need be said that what speech or conduct of a lawyer is speech or conduct "for or against a person involved in the legal process" is vague and subject to reasonable dispute.

Because a lawyer cannot, with any degree of reasonable certainty, determine what behavior of an attorney is conduct "for or against any person involved in the legal process" and what is not, the proposed Rule is unconstitutionally vague.

If attorneys face professional discipline for engaging in certain proscribed behavior, they are entitled to know, with reasonable precision, what behavior is being proscribed, and should not be left to speculate what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the Rule's essential terms, the proposed Rule is unconstitutional.

5. The Proposed Rule is Unconstitutionally Overbroad

Even if a law is clear and precise – thereby avoiding a vagueness challenge – it may nevertheless be unconstitutionally overbroad if it prohibits constitutionally protected speech.

Overbroad laws – like vague laws – deter protected activity. The crucial question in determining whether a law is unconstitutionally overbroad is whether the law sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. *Grayned*, 408 U.S. at 114-15.

Although some of the speech the proposed Rule prohibits might arguably be unprotected – such as speech that actually and substantially prejudices the administration of justice or speech that would actually and clearly render an attorney unfit to practice law – the proposed amendments would also sweep within their prohibitions lawyer speech that is clearly protected by the First Amendment, such as speech that might be offensive, disparaging, hostile, or hurtful and, therefore, considered at least by some as constituting discrimination or harassment, but that would not prejudice the administration of justice nor render the attorney unfit to practice law. *DeJohn v. Temple Univ.*, 537 F.3d 301 (2008) (holding that a University Policy on Sexual Harassment that prohibited "all forms of sexual harassment . . . including expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment" was unconstitutionally overbroad on its face).

Speech is not unprotected merely because it is harmful, derogatory, demeaning, or even discriminatory, harassing, offensive, or hostile. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) (holding that there is no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's

gender or national origin or that denigrate religious beliefs; harassing or discriminatory speech implicate First Amendment protections; there is no categorical rule divesting "harassing" speech of First Amendment protection).

Indeed, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder*, 562 U.S. at 458 (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley*, 515 U.S. at 574 (noting that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); s*ee also Johnson*, 491 U.S. at 414 (stating that "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *see also Telescope Media Group v. Lucer*o, 936 F.3d 740 (8th Cir. 2019)(observing that "regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be").

In fact, courts have found that terms such as "derogatory" and "demeaning" are unconstitutionally overbroad. *Hinton*, 633 F.Supp. 1023 (holding that the term "derogatory information" is unconstitutionally overbroad); *Summit Bank*, 206 Cal. App. 4th 669 (finding that a statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech); s*ee also Saxe*, 240 F.3d 200 (holding that a school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional because it is overbroad).

Indeed, that the proposed Rule is unconstitutionally overbroad is illustrated by the fact that, regardless of whether any attorney is ultimately prosecuted under the Rule for engaging in protected speech, the mere possibility that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – which is precisely what the overbreadth doctrine is designed to prevent. *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (noting that overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression.).

Therefore, because the proposed Rule will prohibit a broad swath of protected speech and would chill lawyers' speech, the Rule would not pass constitutional muster.

6. The Proposed Rule Will Constitute An Unconstitutional Content-Based Speech

By only proscribing speech that is biased, prejudicial, or harassing toward members of certain designated classes, the proposed Rule will constitute an unconstitutional content-based speech restriction. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (explaining that government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.); *see also Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (holding that an ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

Indeed, the U.S. Supreme Court reiterated this principle in a case that is directly relevant when considering the constitutional infirmities of the proposed Rule. In *Matal v Tam*, the Court found that a Lanham Act provision – prohibiting the registration of trademarks that may

"disparage" or bring a person "into contempt or disrepute" – facially unconstitutional, because such a disparagement provision ". . . offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." 137 Sup. Ct. 1744. In a concurring opinion joined by four Justices, Justice Kennedy described the constitutional infirmity of the disparagement provision as "viewpoint discrimination" – "an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Id*. at 1766. The problem, he pointed out, was that, under the disparagement provision, "an applicant may register a positive or benign [trade]mark but not a derogatory one" and that "This is the essence of viewpoint discrimination." *Id*. Likewise, under the proposed Rule here, attorneys may engage in positive or benign speech with regard to the protected classes, but not biased, prejudicial, or harassing speech. Under the Supreme Court's *Tam* decision, this is the essence of viewpoint discrimination, and presumptively unconstitutional.

"One reliable way to tell whether a law restricting speech is content-based is to ask whether enforcement authorities must 'examine the content of the message that is conveyed' to know whether the law has been violated." *Otto*, supra, at ___, citing *McCullen v. Coakley*, 573 U.S. 464, 479 (2014), quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984), That is precisely what enforcement authorities would have to do under the proposed Rule, because the content of a lawyer's speech will determine whether or not the lawyer has or has not violated the Rule. Enforcement authorities will have to examine the content of the complained of speech in order to determine whether the speech manifests bias or prejudice. If so, the speech restrictions constitute unconstitutional viewpoint-based speech restrictions. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (holding that the government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed). In *R.A.V.*, the Supreme Court struck

down, as facially unconstitutional, the city of St. Paul's Bias-Motivated Crime Ordinance because it applied only to fighting words that insulted or provoked violence "on the basis of race, color, creed, religion or gender," whereas expressed hostility on the basis of other bases were not covered. *Id*. In striking down the Ordinance, the Court stated: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id*. at 390. That is precisely what the proposed Rule does. For that reason, commentators have described professional rules such as the one being proposed here as speech codes for lawyers.

For those who would deny that the proposed Rule creates an attorney speech code, we need only point them to Indiana, a state that has adopted a black letter non-discrimination Rule similar to the Rule being proposed here. In *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Ind. 2010), an Indiana attorney was professionally disciplined under Indiana's Rule 8.4(g) for merely asking someone if they were "gay." And in *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Ind. 2010), an attorney had his license suspended for applying a racially derogatory term to himself. In both cases, the attorneys were professionally disciplined merely for using certain disfavored speech.

Because it constitutes an unconstitutional speech code for lawyers, the proposed Rule should be rejected.

7. The Proposed Rule Will Violate Attorneys' Free Exercise of Religion and Free Association Rights

The proposed Rule will also violate attorneys' constitutional right of free religious exercise because the Rule prohibits religious expression if such expression could be considered biased, prejudiced, or harassing.

The ACLU of New Hampshire opposed a similar rule – considered but not adopted – in that state, noting correctly that such rules threaten religious liberty because "one person's religious tenet could be another person's manifestation of bias." American Civil Liberties Union of New Hampshire, Letter to Advisory Committee on Rules, New Hampshire Supreme Court (May 31, 2018).

If the amendments proposed here are interpreted as applying to bar association or other professional activities, such as CLEs, the late Professor Rotunda pointed out how rules like this could infringe on attorneys' free exercise rights. The example he gave was Catholic attorneys who are members of the St. Thomas More Society, an organization of Catholic lawyers and judges. If the St. Thomas More Society should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, Professor Rotunda explained that those attorneys may be in violation of rules such as these because they have engaged in conduct in the legal process that could be considered discrimination based on sexual orientation. In fact, Professor Rotunda pointed out that an attorney might be in violation of a rule such as the one proposed here merely for being a member of such an organization. Rotunda, *supra* at 4-5. The fact that the Rule may prohibit such speech or membership indicates that the Rule will be unconstitutional.

To those who might deny the proposed Rule could or would be applied in that way, one need only note the actions of the CLE accrediting authorities in Minnesota. In May of 2018 the Minnesota Lavender Bar Association ("MLBA") – "a voluntary professional association of lesbian, gay, bisexual, transgender, gender queer, and allies, promoting fairness and equality for the LGBT community within the legal industry and for the Minnesota community" – objected to an accredited Continuing Legal Education presentation entitled "Understanding and Responding

to the Transgender Moment/St. Paul," which was co-sponsored by a Roman Catholic law school and addressed transgender issues from a Roman Catholic perspective. The MLBA complained that the CLE – which was pure speech – was "discriminatory and transphobic," "encourages bias by arguing against the identities [of transgender people]," was contrary to the bar's diversity efforts, and constituted "harassing behavior" under Rule 8.4(g) of the Model Rules of Professional Conduct. The MLBA further characterized the presentation as "transphobic rhetoric" and stated that "Discrimination is not legal education." Minn. Lavender Bar Ass'n, https://gumroad.com/mlba (last visited Apr. 2, 2019). As a result of the MLBA's complaint, the CLE accrediting body of the Minnesota Bar revoked its CLE accreditation of the presentation – reportedly the first time such retroactive revocation of CLE credit had ever occurred in Minnesota. *See* Barbara L. Jones, *CLE credit revoked*, Minnesota Lawyer (May 28, 2018).

In this real life example, the complained of behavior consisted of pure speech, was alleged to constitute "harassment" and discrimination and was punished by the state. In essence, that case stands for the proposition that the prohibition of "harassment" and "discrimination" as embodied in professional conduct rules, such as the one proposed here, will apply to and prohibit religious speech – speech that expresses a religious tenet of some, but to others is viewed as discrimination or harassment.

Religiously based legal organizations have consistently opposed professional conduct rules like the one being considered here on the ground that such rules threaten religious liberty. Those groups include the Catholic Bar Association – which has adopted a resolution stating that Model Rule 8.4(g) is not only unconstitutional, but that it is "incompatible with Catholic teaching and the obligations of Catholic lawyers" – as well as the Christian Legal Society. Both organizations have cause for concern because, as Professor Rotunda presciently warned, merely being members of

those organizations would violate rules like the Rule proposed here. How so? Because both organizations limit their membership based on religion. The Christian Legal Society requires its members to subscribe to a Christian statement of faith. The Catholic Bar Association requires its members to be practicing Roman Catholics. Therefore, if by participating in such legal organizations a lawyer is involved in the legal process, under the proposed amendments, both legal organizations "discriminate" on the basis of religion – something explicitly prohibited under the terms of the proposed Rule. The proposed Rule would, essentially, destroy both organizations.

Because the proposed Rule will violate attorneys' Free Exercise and Free Association rights, it should be rejected.

8. Assurances That the Proposed Rule Will Not Be Applied in an Unconstitutional Manner Does Not Cure the Rule's Constitutional Infirmities

Supporters of the proposed Rule may argue that, although the Rule could be applied in an unconstitutional manner, it will not be. However, such assurances will not remedy the Rule's constitutional infirmities.

First, proponents of the Rule do not have the authority to speak on behalf of a state's professional disciplinary authorities. Proponents of the Rule cannot say how the disciplinary authorities will or will not interpret or apply the Rule.

And second, this very argument was made and rejected in *U.S. v. Stevens*, 559 U.S. 460, supra. There, in a case challenging the constitutionality of a statute criminalizing certain depictions of animal cruelty, the U.S. Supreme Court addressed the government's claim that the statute was not unconstitutionally overbroad because the government would interpret the statute in a restricted manner so as to reach only "extreme" acts of animal cruelty, and that the government would not

bring an action under the statute for anything less. In response, the high court pointed out that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." The court pointed out the danger in putting faith in government representations of prosecutorial restraint, stating that "The Government's assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." *Id*. at 480.

In other words, far from curing its constitutional defects, representations that the proposed Rule will not be applied so as to violate the Constitution, constitute indirect admissions that the proposed Rule is, in fact, constitutionally infirm.

In arguing that the proposed Rule will not be applied unconstitutionally, proponents may also point to the Rule's Comment which states that "The prohibition against manifesting bias or prejudice or engaging in harassment is not inconsistent with the lawyer's right, where appropriate, to speak and write bluntly." But that provision does not cure the defects either.

It does not cure the defects, first, because the cited provision is circular. It requires that, in order to avoid the Rule's prohibitions, the attorney's right to speak and write bluntly must be "appropriate." But in order to be consistent with the Rule itself, the attorney's speech cannot be discriminatory or harassing. In other words, under the proposed Rule, attorney speech that constitutes bias, prejudice, or harassment can, by definition, never constitute appropriate advocacy because discriminatory or harassing speech is inconsistent with the Rule itself..

Finally, who will determine whether an attorney's speech is appropriate or inappropriate? The disciplinary authorities, of course, will make that determination, in their unfettered discretion, after the fact and, potentially, on political or ideological grounds.

9. Courts Have Struck Down Similar Rules as Unconstitutional.

In *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 33 (E.D. Pa. 2020), the Court enjoined enforcement of a Pennsylvania Rule of Professional Conduct based on ABA Model Rule 8.4(g). Many of the Court's findings echoed exactly what critics of the Model Rule – and Rules based thereon, such as the one being proposed here – have contended all along.

First, the Court found that – as set forth in the Supreme Court's *NIFLA* case – a lawyer's speech is protected First Amendment speech, even when the attorney is speaking in a professional capacity. Id. at 27. Second, the Court found that the Rule prohibited speech, not mere conduct, because it specifically applied to "words." Id. at 29. Third, the Court rejected the state's argument that the Rule was simply a legitimate exercise of its broad authority to regulate attorney speech under its professional regulatory authority. Id. at 29–30. And fourth – citing *Tam* – the Court determined that the Rule constituted unconstitutional viewpoint-based discrimination because the Rule allows attorneys to speak favorably about the protected classes, but not unfavorably. Id. at 30–32.

In its conclusion, the Court stated:

> [t]he government has created a rule that promotes a government-favored viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance.
>
> Id. at 32.

Pennsylvania did not appeal that decision. Instead, the Pennsylvania Supreme Court unilaterally adopted another version of an anti-discrimination/anti-harassment rule

that the Pennsylvania Supreme Court believed cured the earlier rule's constitutional defects. It was wrong.

In *Greenberg v. Goodrich*, 593 F.Supp.3d 174, 212–20 (E.D. Pa. 2022), the Court struck down the second rule as well, finding that the rule was a viewpoint and content-based restriction on speech in violation of the First Amendment and was unconstitutionally overbroad as well as unconstitutionally vague.

Hence, the only court to address the substantive constitutional issues raised by professional anti-discrimination/anti-harassment rules struck those rules down as unconstitutional.

Although the U.S. Court of Appeals for the Third Circuit subsequently reversed the District Court's decision, it did not reverse the decision on substantive grounds. It reversed on standing, noting that "[i]f facts develop that validate Greenberg's fears of enforcement, then he may bring a new suit to vindicate his constitutional rights." *Greenberg v. Lehocky,* 81 F.4th 376, 389 (3d Cir. 2023).

To our knowledge, the only other case to have raised the substantive issue of the constitutionality of a professional anti-discrimination/anti-harassment rule is *Cerame v. Bowler*, 2022 WL 3716422 (D. Conn. 2022), which was also dismissed for lack of standing. But the U.S. Court of Appeals for the Second Circuit recently reversed that decision, holding that, by complaining that the Connecticut Rule of Professional Conduct 8.4(7) violated the attorney's constitutional rights, the complaining attorney had "adequately alleged an injury in fact for Article III standing." *Cerame v. Slack*, 123 F.4th 72, 87 (2d Cir. 2024).

B. The Proposed Rule Would, For The First Time, Sever The Rules From The Legitimate Regulatory Interests Of The Legal Profession

The legal profession has a legitimate interest in proscribing attorney conduct that – if not proscribed – would either be so egregious as to render an attorney unfit to practice law or that would prejudice the administration of justice. Rule 8.4 of the Michigan Rules of Professional Conduct recognizes this principle by prohibiting attorneys from engaging in several types of conduct, all of which might either render an attorney unfit to practice law or would prejudice the administration of justice. Those types of conduct are:

(a) Violating or attempting to violate the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another;

(b) Engaging in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

(c) Engaging in conduct that is prejudicial to the administration of justice;

(d) Stating or implying an ability to influence improperly a government agency or official; or

(e) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The first proscribed conduct – violating or assisting others in violating the Professional Conduct Rules – is self-explanatory and obvious, since the Rules are enacted for the precise purpose of regulating the conduct of attorneys as attorneys. The Rules would hardly serve their purpose if an attorney's violation of them did not constitute professional misconduct.

The second and third proscriptions are targeted at attorney conduct which directly impacts

the attorney's ability to be entrusted with the professional obligations with which all attorneys are entrusted – namely, to serve their clients and the legal system with honesty, competency, and trustworthiness. But – revealingly – those Rules do not proscribe conduct that, although perhaps not praiseworthy, does not warrant the conclusion that the attorney engaging in such conduct is unfit to practice law. Indeed, it is worth noting that Rule 8.4(b) does not even conclude that all *criminal* conduct is a violation of the Rules of Professional Conduct. Instead, the Rule proscribes only criminal conduct that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer."

The fourth proscription is limited to conduct that actually prejudices the administration of justice.

And the fifth proscription targets what is clearly attorney conduct that, if engaged in, would adversely affect the integral operation of the judicial system – namely, improperly influencing a judge or judicial officer in conduct that violates the rules of judicial conduct or other law.

In short, Rule 8.4 has always – heretofore – been solely concerned with attorney conduct that would either adversely affect an attorney's fitness to practice law or that would seriously interfere with the proper and efficient operation of the judicial system.

The proposed Rule, however, takes the Rule in a completely new and different direction because, for the first time, the Rule would subject attorneys to discipline for engaging in conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system. Indeed, because the proposed Rule would not require *any* showing that the proscribed conduct prejudices the administration of justice or that such conduct adversely affects the offending attorney's fitness to practice law, the Rule will constitute a free-floating nondiscrimination/anti-harassment provision.

To fully appreciate what this departure from the historic principles of attorney regulation will mean, we can look at *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Ind. 2010). In that case the court held the offending conduct did not have any demonstrable prejudicial effect on the administration of justice or render the attorney unfit to practice law. It was deemed sufficient that the attorney had simply used certain offensive language.

Strikingly, if the proposed Rule is adopted, an attorney could actually engage in *criminal* conduct without violating the Rules (because Rule 8.4(b) only applies to a lawyer's "*criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer*") but could be disciplined merely for engaging in politically incorrect speech. In that respect, the proposed Rule would create a sort of "super offense," because unlike Rule 8.4(b) – which only prohibits criminal conduct that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer – the proposed Rule would prohibit all discriminatory or harassing behavior, without regard to whether or not such conduct is unlawful or whether it reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer – thereby treating allegedly discriminatory or harassing conduct as being worse than *criminal* conduct.

Because Rul 8.4(g) constitutes an extreme and dangerous departure from the principles and purposes historically underlying Michigan's attorney misconduct rules and the legitimate interests of professional regulation, the proposed Rule should be rejected.

C. The Proposed Rule Will Invade The Historically Recognized Right And Duty Of Attorneys To Exercise Professional Autonomy In Choosing Whether To Engage In Legal Representation.

If the proposed Rule is adopted, attorneys will be subject to discipline for acting in

accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases – because, under the proposed amendments, attorneys will not only be forced to take cases or clients they might have otherwise declined, they will be forced to take cases or clients the Rules of Professional Conduct forbid them to take.

The proposed Rule facially prohibits an attorney from manifesting bias or prejudice (ie, discriminating) against any person involved in the legal process. An attorney's client selection decisions clearly impact a prospective client's involvement in the legal process and, therefore, fall under the proposed Rule's anti-discrimination provisions. Hence, the proposed Rule will prohibit attorneys from engaging in discrimination when making their client and case selection decisions.

This is another alarming departure from the professional principles historically enshrined in Michigan's Rules of Professional Conduct and its predecessors, which have, before now, always respected the attorney's freedom and professional autonomy when it comes to choosing who to represent and what cases to accept.

Although the Rules *have* placed restrictions on which clients attorneys may *not* represent (see, for example, Michigan Rule 1.7 which precludes attorneys from representing clients or cases in which the attorney has a conflict of interest, and Rule 1.16(a) which requires attorneys to decline or withdraw from representation when representation would compromise the interests of the client), never before have the Rules required attorneys to *take* cases the attorney decides – for whatever reason – he or she does not want to take, or to represent clients the attorney decides – for whatever reason – he or she does not want to represent. (Although Rule 6.2 prohibits attorneys from seeking to avoid court-appointed representation, that Rule does not apply to an attorney's day-to-day voluntary client selection decisions – and even in its peculiar context of court-appointed representation the Rule expressly allows attorneys to decline such appointments "for good cause"

– including because the attorney finds the client or the client's cause repugnant. Rule 6.2(c))

Indeed, historically, the principle that attorneys were free to accept or decline clients or cases at will, for any or no reason, prevailed universally. See, for example, *Modern Legal Ethics*, Charles W. Wolfram, p. 573 (1986)("*a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.*"). The reasons underlying this historically longstanding respect for attorneys' professional autonomy in making client and case selection decisions are clear.

First, the Rules themselves respect an attorney's personal ethics and moral conscience. For example, the Preamble to [this state's] Rules provides that "*Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience*" and "*Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment . . .*".

If a lawyer is required to accept a client or a case to which the attorney has a moral objection, however, the Rules would have the effect of forcing the attorney to violate his or her personal conscience, would interfere with the lawyer's interest in remaining an ethical and upright person, and would prohibit lawyers from exercising their own moral judgment.

And second, the Rules impose upon attorneys a professional obligation to represent their clients zealously (Rule 1.3 Comment) and without personal conflicts (Rule 1.7(b)). A lawyer's ability to do that, however, would be compromised should the lawyer have personal or moral objections to a client or a client's case.

To force an attorney to accept a client or case the attorney does not want, and to then require the attorney to provide zealous representation to that client, is unfair to the attorney because doing so places conflicting and unresolvable obligations upon the lawyer.

But it will also harm clients because every client deserves an attorney who is not subject to or influenced by any interests which may, directly or indirectly, adversely affect the lawyer's ability to zealously, impartially, and devotedly represent the client's best interests.

We must always remember that a primary purpose of the Rules is to protect the public, by ensuring that attorneys represent their clients competently and without personal interests that will adversely affect the attorney's ability to provide clients with undivided and zealous representation. It recognizes the principle that the client's best interest is never to have an attorney who – for any reason – cannot zealously represent them or who has a personal conflict of interest with the client.

The proposed Rule, however, will force an attorney to represent clients who the attorney cannot represent zealously or who, on account of the attorney's personal beliefs about the client or the case, will not be able to represent without a personal conflict of interest. In that respect, the proposed Rule will harm clients.

Indeed, the proposed Rule, if adopted, would introduce insidious deception into the attorney-client relationship because – in order to avoid violating the Rule – some attorneys will be led to conceal their personal animosities from clients, thereby saddling clients with attorneys who – if the client knew of the attorney's animosities – the client would not retain.

For these reasons, too, the proposed Rule should be rejected.

D. The Proposed Rule Conflicts with Other Professional Obligations and Rules of Professional Conduct.

Another significant problem with the proposed Rule is that it conflicts with other professional obligations and Rules of Professional Conduct. For example:

1. The Proposed Rule Conflicts with Rule 1.7 (Conflicts of Interest). Rule 1.7 provides that: "*(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests . . .*"

The Rule does not define what constitutes a "lawyer's own interests" that might constitute a conflict. But the Restatement (Third) of the Law Governing Lawyers §125 (2000) does. It states that "*A conflict under this Section need not be created by a financial interest. . .* ***Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy belief***" (our emphasis).

So – on the one hand the proposed Rule requires an attorney to accept clients and cases, despite the fact that such clients or cases might run counter to the attorney's deeply held religious, philosophical, political, or public policy principles, while at the same time Rule 1.7 provides that accepting a client or a case – when the client or case runs counter to such beliefs of the attorney – would violate Rule 1.7's Conflict of Interest prohibitions.

2. Rule 1.3. Zealous Representation. Attorneys have a professional duty to represent their clients zealously. Indeed, the U.S. Supreme Court has stated that lawyers have a fundamental duty to zealously represent their clients. *Evans v. Jeff D.*, 475 U.S. 717, 758 (1986). See also *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994)(stating that "a lawyer's first duty is zealously to represent his or her client"). So, this is a fundamental professional duty, independent

of the Rules of Professional Conduct.

But Rule 1.3 also establishes such a duty. The Comment to Rule 1.3 (Diligence) states that "A lawyer should act . . . with zeal in advocacy upon the client's behalf."

"Zeal" means "*a strong feeling of interest and enthusiasm that makes someone very eager or determined to do something.*" Merriam-Webster.com/dictionary/zeal. Synonyms are "passion" and "fervor."

But how would an attorney be able to *zealously* represent a client whose case runs counter to the attorney's deeply held religious, political, philosophical, or public policy beliefs?

Under the proposed Rule, the attorney may not be allowed to reject a case or client she might otherwise reject – due to the attorney's personal beliefs – but then must also represent that client with passion and fervor, enthusiastically and in an eager and determined manner.

Is that humanly possible? We would submit that it is not. And we believe that is exactly why the Rules provide that, if a lawyer cannot do that – for whatever reason – even a discriminatory one – they must not take the case.

How is that conflict to be resolved?

3. The Proposed Rule Conflicts with Rule 6.2 (Accepting Appointments) – Rule 6.2 provides that "*A lawyer shall not seek to avoid appointment by a tribunal to represent a person* ***except for good cause****: such as: . . . (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client*" (our emphasis).

Although this Rule is technically applicable only to court appointments, it is important to what we are discussing here because it contains a principle that should be equally – if not more – applicable to an attorney's voluntary client-selection decisions. Namely, the Rule recognizes that

a client or cause may be so repugnant to a lawyer that the lawyer-client relationship would be impaired or the lawyer's ability to represent the client adversely affected.

Indeed, the Comment to Rule 6.2 sets forth the general principle that "*A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant*."

And yet, the proposed Rule would require an attorney to represent clients and cases the lawyer may find repugnant.

4. The Proposed Rule Conflicts with Rule 1.16 (Declining or Terminating Representation). Rule 1.16(a)(1) provides that: *(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the Rules of Professional Conduct or other law.* However, we have already seen that Rule 1.7 would prohibit an attorney from representing a client who – due to the lawyer's personal beliefs – the lawyer could not represent without a personal conflict of interest interfering with that representation, and Rule 1.3 would prohibit an attorney from representing a client if the attorney could not do so zealously, and Rule 6.2 provides that a lawyer may decline court-appointed representation if the attorney finds the client or the client's cause so repugnant as to interfere with the ability of the lawyer to provide un-conflicted representation. To represent clients in any of these situations would constitute a violation of the Rules of Professional Conduct. But adoption of the Rule being proposed here will require attorneys to accept clients and cases that – due to the attorney's personal beliefs about the client or the case – the attorney would otherwise have to decline. So, the proposed Rule conflicts with Rule 1.16 as well

In the event of an inevitable conflict, which Rule is going to prevail?

Indeed, the fact that the proposed Rule conflicts with other Professional Rules reveals a foundational problem with the proposed Rule – and that is that the proposed Rule is an attempt to

impose upon the legal profession a non-discrimination construct that is, in its basic premises, inconsistent with who attorneys are and what they professionally do. It is an attempt to force a round peg into a square hole.

In considering the proposed Rule, we must remember that the non-discrimination template on which the Rule is based is taken from the context of public accommodation laws – non-discrimination laws that are imposed in the context of merchants and customers. But lawyers are not mere merchants, and a lawyer's clients are not mere customers. Unlike merchants and customers, attorneys have *fiduciary relationships* with their clients.

Attorneys are made privy to the most confidential of their client's information and are bound to protect those confidentialities; they are bound to take no action that would harm their clients; and attorneys' relationships with their clients oftentimes last months or even years. And once an attorney is in an attorney-client relationship, the attorney oftentimes may not unilaterally sever that relationship. None of those things are true with respect to a merchant's relationship with a customer. So it is one thing to say a *merchant* may not pick and choose his *customers*. It is entirely another to say a *lawyer* may not pick and choose her *clients*.

No lawyer should be required to enter into what is, by definition, a fiduciary relationship with a client the attorney does not want – for whatever reason – to represent.

III. Conclusion

The proposed Rule is unconstitutional. It is unconstitutionally vague. It is unconstitutionally overbroad. And it constitutes an unconstitutional content-based speech restriction. It also violates attorneys' Free Speech, Free Exercise, and Free Association rights.

In addition to being constitutionally infirm, the proposed Rule would sever Michigan's Rules of Professional Conduct from the legitimate interests of the bar in regulating the legal

profession, conflict with other Rules of Professional Conduct and professional obligations attorneys have, and would authorize professional disciplinary authorities to discipline lawyers for non-commercial speech and conduct that neither prejudices the administration of justice nor renders attorneys unfit to practice law. It would create a strict liability speech code for lawyers. The proposed Rule would also harm clients by requiring attorneys who may harbor animosities toward certain clients or cases to conceal such animosities from prospective clients, thereby saddling clients with attorneys the client would not have retained had the client known of the attorneys' animosities.

For all these reasons, the proposed amendments to Rule 6.5 should be rejected.

PROPOSED AMENDMENTS TO CANON 3 OF THE MICHIGAN CODE OF JUDICIAL CONDUCT

I. <u>The Proposed Amendment</u>

Amendments to Canon 3 of the Michigan Code of Judicial Conduct have been proposed. The proposed amendments (hereinafter sometimes referred to as "proposed Amendments") would read:

> *A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice. In the performance of these duties, the following standards apply:*
>
> *A. Adjudicative Responsibilities:*
>
> *(14) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, based upon race,*

color, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, height, weight, sexual orientation, marital status, familial status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(15) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment as provided in MRPC 6.5.

(16) The restrictions of paragraphs (14) and (15) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

II. Comments

A. Judges Do Not Abandon Their Constitutional Rights When They Become Judges

Although the speech and conduct of judges are subject to regulation designed to preserve the integrity and impartiality of the judiciary, the state's right to regulate judges is not unlimited. Judges do not abandon their constitutional rights when they become judges. *Umphress v. Hall*, 133 F.4th 455 (5th Cir. 2025)(recognizing a Texas county judge's challenge to a state judicial canon requiring judges to conduct their extra-judicial activities in a manner that did not call into question their impartiality as violating the judge's First Amendment rights to free expression, expressive conduct, and religious exercise); *Earls v. North Carolina Judicial Standards Commission*, 703 F.Supp.3d 701 (M.D. North Carolina 2023)(recognizing an Associate Justice of the North Carolina Supreme Court's constitutional challenge to a state canon of judicial conduct prohibiting judges from making public comments that may disparage the integrity or impartiality of the judiciary).

Therefore, to be valid, canons of judicial conduct must pass constitutional muster.

B. The Proposed Amendments Are Unconstitutional

1. The Terms "Bias," "Prejudice," and "Harassment" are Unconstitutionally Vague.

For the same reasons as are set forth in our comments on the proposed amendments to Rule 6.5 of the Michigan Rules of Professional Conduct, the proposed Amendments to Canon 3 of the Judicial Code of Conduct are unconstitutional because the terms "bias," "prejudice," and "harassment" are unconstitutionally vague. Judges cannot determine with any degree of certainty what speech or conduct the Canon is prohibiting, nor what speech or conduct of attorneys appearing before a judge the judge is obligated to prohibit.

2. The Proposed Amendments are Unconstitutionally Overbroad

For the same reasons as are set forth in our comments on the proposed amendments to Rule 6.5 of the Michigan Rules of Professional Conduct, the proposed Amendments to Canon 3 of the Judicial Code of Conduct are unconstitutionally overbroad because they prohibit constitutionally protected speech.

Although some of the speech the proposed Amendments prohibit might arguably be unprotected – such as a judge's speech that actually prejudices the administration of justice or speech that would actually and clearly render a judge unfit to serve as a judge – the proposed amendments would also sweep within their prohibitions judicial speech that is clearly protected by the First Amendment, such as speech that might be offensive, disparaging, or hurtful and, therefore, considered at least by some as constituting discrimination or harassment, but that would

not prejudice the administration of justice nor render a judge unfit to hold a judicial position.

This is particularly true given that the amendments apply not only to a judge's speech or conduct vis-à-vis people appearing before the judge in the judge's judicial capacity, but also to court staff and others subject to the judge's direction and control but who do not have legal matters pending before the judge.

3. The Proposed Amendments Will Violate Judges' Free Exercise of Religion and Free Association Rights

The proposed Amendments to Canon 3 will also violate judges' constitutional right of free religious exercise because the Amendments prohibit religious expression if such expression could be considered biased, prejudiced, or harassing. As noted above, "one person's religious tenet could be another person's manifestation of bias." American Civil Liberties Union of New Hampshire, Letter to Advisory Committee on Rules, New Hampshire Supreme Court (May 31, 2018). Therefore, the Amendments proposed here will apply to and prohibit a judge's religious speech – speech that expresses a religious tenet of some, but to others is viewed as discrimination or harassment.

One obvious context in which the proposed Amendments could violate a judge's constitutional free exercise – and free speech – rights is when a gender confused individual insists that a judge refer to him or her by pronouns inconsistent with the individual's biological sex. The proposed Amendments could be interpreted to require a judge to use the preferred pronouns of individuals appearing before them or who are under the judge's direction or control such as court employees. Declining to do so could be considered discrimination or harassment. But if the judge's religious principles forbid the judge from referring to a person as a sex other than the person's

biological sex, the proposed Amendments would violate the judge's free exercise of religion rights under the First Amendment, as well as constitute compelled speech contrary to the U.S. Constitution's free speech guarantees.

Because the proposed Amendments will violate attorneys' Free Exercise rights, it should be rejected.

4. The Proposed Amendments Will Require Judges to Engage in Unconstitutional Conduct and May Subject Them to Liability.

The proposed Amendments impose upon judges the obligation to "*require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment as provided in MRPC 6.5*." But as demonstrated in our comments to the proposed amendments to Rule 6.5 of the Michigan Rules of Professional Conduct, MRPC 6.5 is itself unconstitutional because it violates the free speech, free exercise, and free association rights of attorneys. Therefore, the proposed Amendments to Canon 3 of the Judicial Code of Conduct require judges – who are agents of the state, *Sindi v. El-Moslimany*, 896 F.3d 1, 30 (2nd Cir. 2018)(stating that, "As a general matter, the First Amendment forbids the government, including the Judicial Branch, 'from dictating what we see or read or speak or hear.'") – to violate the free speech, free exercise, and free association rights of attorneys – and subjects judges to professional discipline should judges fail to do so.

Although judges have the authority to control their courtrooms, even that authority is not unlimited. Indeed, issues revolving around the use of preferred pronouns have already arisen. That issue is particularly relevant to the proposed amendments to Canon 3 here because some claim that not using a person's preferred pronouns constitutes discrimination. But at least one federal court

has concluded that a court has no authority to require litigants, judges, court personnel, or anyone else, to refer to gender-dysphoric individuals with preferred pronouns. *U.S. v. Varner*, 948 F.3d 250, 254-55 (5th Cir. 2020). Scholars have pointed out that requiring judges and others to use preferred pronouns would raise First Amendment free exercise and compelled speech issues. *Federal Courts – Judicial Power – Fifth Circuit Holds That Courts Cannot Compel Use of Preferred Pronouns*, 134 Harv. L. Rev. 2275 (April 2021).

In addition, the proposed Amendments to Canon 3 go beyond the authority of a judge in a courtroom. They extend to a judge's actions even outside the courtroom, such as in the furtherance of a judge's "administrative duties." Unlike a judge's judicial duties, where judges enjoy immunity for their actions, judge's do not enjoy absolute immunity in their administrative actions. *Meek v. County of Riverside*, 183, F.3d 962, 966 (9th Cir. 1999)(holding that a state court judge is generally not entitled to absolute immunity from liability arising out of a decision to fire a subordinate judicial employee because that decision is not a judicial or adjudicative act, but rather an administrative one, citing *Forrester v. White*, 484 U.S. 219, 229 (1988) in which a judge who fired a parole officer did not have absolute immunity from the parole officer's claim that the judge fired her on account of her gender in violation of the Equal Protection Clause of the Fourteenth Amendment). For that reason, a judge who violates a subordinate's constitutional rights – including free speech and/or free exercise rights – may not be immune from being sued by the subordinate for that violation.

Therefore, the proposed Amendments to Canon 3 require judges to engage in unconstitutional conduct and may subject them to personal liability for doing so.

IV. Conclusion

The proposed Amendments to Canon 3 of the Michigan Code of Judicial Conduct are

unconstitutional. They are unconstitutionally vague and unconstitutionally overbroad. They also violate judges' constitutional rights and require them to violate the constitutional rights of others, subjecting them to possible personal liability for doing so.

For all these reasons, the proposed amendments to Canon 3 of the Michigan Code of Judicial Conduct should be rejected.

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