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For The First Amendment Lawyers Association

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	Supreme Court No. R- **COMMENT OF FIRST AMENDMENT LAWYERS ASSOCIATION IN OPPOSITION TO PETITION TO AMEND ER 8.4, RULE 42**

This comment is filed pursuant to this Court's Order of January 18, 2018, soliciting public comment on Petition R-17-0032. In its petition, the National Lawyers Guild, Central Arizona Chapter (the "Lawyers Guild"), urges this Court to amend Rule 42, ER 8.4, by adopting ABA Model Rule 8.4(g) ("Rule 8.4(g)"). Rule 8.4(g) is a

flawed rule that is offensive to the First Amendment rights of attorneys, and this Court should refuse to adopt it.

The First Amendment Lawyers Association ("FALA") is a national, non-profit organization of approximately 200 members who represent the vanguard of First Amendment lawyers. Its central mission is to protect and defend the First Amendment from attack by both private and public incursion. Since its founding in the late 1960s, FALA's membership has been involved in several cases at the forefront of defining the First Amendment's protections. FALA has a marked interest in opposing the adoption of Rule 8.4(g), as the proposed rule is unconstitutionally vague and violates the First Amendment, and would lead to the suppression of protected speech that is only tangentially related to the practice of law.

1.0 Contents of Rule 8.4(g)

The American Bar Association ("ABA") adopted Rule 8.4(g) in August of 2016. The Lawyers Guild's Petition to adopt Rule 8.4(g) would add a subsection (h) to Arizona Rule of Professional Conduct 8.4, which would provide that it is professional misconduct for a lawyer to:

> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender, gender identity, marital status, or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

In addition to this subsection of existing Rule 8.4, Model Rule 8.4(g) includes three new accompanying comments defining various terms within Rule 8.4(g). The Petition does not explicitly include these new comments, but if the Rule were to be adopted these comments would assuredly be relied on for guidance. The most relevant of these are Comments 3 and 4.

Comment 3 defines "discrimination and harassment" under Rule 8.4(g) as including "harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature . . . ." The Comment also provides that

"[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)."

Comment 4 states that "Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar associations, business or social activities in connection with the practice of law." It also specifies that "[l]awyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations." Model Rule 8.4(g) thus explicitly permits discrimination so long as it is done for the sake of "diversity."

2.0 Most Other States Have Rejected ABA Model Rule 8.4(g) as Written, and the Only State That Failed to Do So Acted in the Absence of *Any* Comment on the Rule

The Petition states that 24 other jurisdictions have adopted anti-discrimination rules, but this misleads the Court because *almost no other state has adopted this version of Model Rule 8.4(g)*. Rule 8.4(g)

is not a duplicate of any other state's version of a rule dealing with bias, and has broad implications. Anti-discrimination rules may be permissible and even desirable, but *this particular one is not*.

Several states have *rejected* Rule 8.4(g) because it violates the First Amendment:

- In December of 2016, the Texas Attorney General issued a formal opinion stating that Rule 8.4(g) would violate the First Amendment because it restricts speech and conduct far beyond the context of practice of law. (*See* TX A.G. Opinion No. KP-0123, attached as **Exhibit 1**.)[1]
- In January 2017, Pennsylvania's Disciplinary Board proposed an anti-discrimination amendment to the State's Rule 8.4, but Pennsylvania explicitly rejected the language of ABA Rule 8.4(g), adopting instead a rule similar to the narrower Illinois Rule 8.4(j), which states that it would be misconduct to violate a federal,

[1] Available at: <https://www.texasattorneygeneral.gov/opinion/ken-paxton-opinions> (last accessed May 15, 2018).

state, or local statute that prohibits discrimination. (*See* Illinois Rules of Professional Responsibility, attached as **Exhibit 2**.)[2]

- In April 2017, the Montana legislature passed a joint resolution condemning Rule 8.4(g) as an unconstitutional attempt to restrict the First Amendment rights of attorneys. (*See* Montana Senate Joint Resolution No. 15, attached as **Exhibit 3**.)[3]
- In 2017, the Nevada Bar filed a petition to adopt Rule 8.4(g), but in September of 2017 withdrew it in the face of criticism of its constitutionality. (*See* request to withdraw petition to adopt Rule 8.4(g), attached as **Exhibit 4**.)
- In March 2018, the Tennessee Attorney General issued a formal opinion stating that Rule 8.4(g) "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct." (*See* Tenn. AG Opinion No. 18-11, attached as **Exhibit 5**.)[4]

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[2] Available at: <http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#8.4> (last accessed May 15, 2018).

[3] Available at: http://leg.mt.gov/bills/2017/billhtml/SJ0015.htm (last accessed May 15, 2018).

[4] Available at: <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf> (last accessed May 15, 2018).

These states rejected Rule 8.4(g) because it is unconstitutional. The only state to adopt Rule 8.4(g) is Vermont, and it only did so because no one filed any comments in opposition to it. There is no reason for Arizona to follow suit.

3.0 Rule 8.4(g) Violates the First Amendment

Lawyers do not surrender their First Amendment Rights for the privilege of practicing law.[5] Rule 8.4(g) punishes and restricts speech if it is "harmful," "demeaning," or "derogatory."[6] What do those words mean? For example, the speech must be "derogatory" to whom? The Rule does not say, and the proposed comments fail to provide any meaningful guidance, ensuring that no attorney in Arizona will have any idea when their use of language might run afoul of the rule.

Worse still, the Rule is not being pushed in order to confront a real problem. Rather, it will do nothing but ensure there is always a speech-trap for any lawyer who sticks his or her neck out on issues that

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[5] *See Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1054 (1991) (the Nevada Bar could not punish free speech that is protected by the First Amendment); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 469 (1988) (the First Amendment applies to state bar disciplinary actions through the Fourteenth Amendment).

[6] See Model Rules of Prof'l Conduct. 8.4(g) Cmt. 3 (Am. Bar Ass'n 2016).

might be controversial. It chills advocacy, chills activism, and makes the Bar the would-be-censor of anyone who holds a bar license.

A restriction on speech is content-based when it either seeks to restrict, or on its face restricts, a particular subject matter.[7] Any restriction on speech based on the message conveyed is presumptively unconstitutional.[8] This presumption becomes stronger when a government restriction is based not just on subject matter, but on a particular viewpoint expressed about that subject.[9] The government cannot be allowed to impose restrictions on speech where the rationale for the restriction is the opinion or viewpoint of the speaker.[10]

Rule 8.4(g) is incredibly broad and is an unconstitutional viewpoint-based restriction on speech because it only restricts speech espousing certain viewpoints regarding certain topics about certain

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[7] *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). A facially content-based restriction must satisfy strict scrutiny regardless of an allegedly benign government motive. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228-29 (2015).

[8] *See Turner Broadcasting System, Inc., v. FCC*, 512 U.S. 622, 641-43 (1994).

[9] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

[10] *See Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983); *see also Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (finding bar on registration of "disparaging" trademarks unconstitutional viewpoint-based discrimination).

groups of people.[11] Attorneys can say that all women are beautiful, but not that all men are pigs. They can say that senior citizens are wise, but not that kids are stupid. Under a literal reading of the rule, an attorney could extoll the virtues of Mormonism but would face possible disbarment for calling Pastafarianism a joke.

This viewpoint-based restriction on attorney speech will have a chilling effect on an attorney's ability to engage in disfavored political dialogues or debates. A lawyer's trade is to speak for and represent others, but Rule 8.4(g) pits an attorney's ability to speak for others against a threat of a bar complaint if someone considers the speech "offensive." In fact, the rule is drafted so broadly it could even punish expression of popular, mainstream opinions that someone on the ideological fringe finds offensive.

The point of protecting free speech is to shield the speaker who may say something misguided or hurtful in another's eyes.[12] Rule

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[11] See *R.A.V.*, 505 U.S. 377 ("The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.")

[12] *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (*citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 574 (1995)); *see also Texas v. Johnson*, 491 U. S. 397, 414 (1989) ("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

8.4(g) does more than restrict what an attorney may say in open Court; its plain language restricts what an attorney may say in a multitude of social situations, as well. If the Bar wishes to govern attorney speech in a courtroom, that is perhaps reasonable (though even there viewpoint discrimination would be presumptively unconstitutional). But, this proposed rule does far more than that. It is a measure that seeks to govern attorney speech no matter where and when it might occur, unless that speech is 100% disassociated from any tangent of the lawyer's practice.

The ABA defines speech "related" to the practice of law as: (1) representing clients; (2) interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; and (3) participating in social activities, such as attending bar association meetings, or other business or social activities in connection with the practice of law.[13] Rule 8.4(g) contradicts paramount First Amendment protections because it restricts an

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disagreeable"); *and see Roth v. United States*, 354 U.S. 476, 484 (1957) ("All ideas having even the slightest redeeming social importance, e.g., unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – fall within the full protection of the First Amendment").

[13] See Model Rules of Prof'l Conduct. 8.4(g) Cmt. 4 (Am. Bar Ass'n 2016).

attorney's ability to express an opinion or engage in good faith debate at a local bar meeting, and it would chill law professors and practitioners alike from writing engaging law review articles that may offend some.

An attorney could risk disciplinary action simply for making an argument, supported by factual data, with an unpopular conclusion. For example, if a female plaintiff in a workplace discrimination suit claimed the court should presume a policy of gender discrimination because all her co-workers are men, the defendant's attorney could face Bar discipline for countering with a study showing that gender discrimination is more common in co-ed offices.[14] Rule 8.4(g) has the potential to limit the development of the legal profession and stymie the continuing legal education of attorneys in Arizona. Perhaps not every potentially controversial topic would run afoul of Rule 8.4(g), but the *possibility* of violating the rule would inevitably cause lawyers in

[14] This problem is not solved by the rule's allowance of otherwise objectionable conduct that constitutes "legitimate advice or advocacy consistent with these Rules," either. There is no guidance as to what makes advocacy under this rule "legitimate" or "illegitimate."

Arizona to shy away from addressing any controversial issue in any setting remotely connected to the practice of law.[15]

Even worse, Rule 8.4(g) could very well make it an ethical violation simply to *represent* clients who are being sued for speech that mainstream society does not consider acceptable. For example, say a female college professor is fired for espousing the viewpoint in class that women are genetically superior to men, and then files a suit against the college for wrongful termination. An attorney may risk discipline for representing the woman and, outside the courtroom, making any statement about her viewpoint that is not a full-throated condemnation of it.[16] This could very easily lead to an environment where citizens with unpopular opinions would be precluded from obtaining effective legal representation. This same reasoning applies to controversial religious organizations; attorneys would be wary of

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[15] *See*, *e.g.*, *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) ("indefinite statutes" with "uncertain meanings" require that speakers "steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked") (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (internal citation omitted).

[16] Arizona Rule 1.2(b) establishes that representing a client is not an endorsement of that client's views or activities, but it does not take much imagination to conceive of a situation where an attorney declining to condemn a client's "discriminatory" viewpoint could invoke a disciplinary proceeding under Rule 8.4(g).

representing controversial organizations such as the Westboro Baptist Church, for fear of violating Rule 8.4(g) by making any statement about the Church or its views in any context other than direct courtroom advocacy.

As discussed in more detail below, FALA is in no way opposed to the Arizona Bar adopting a content-neutral rule that curtails harassment and discrimination. In fact, FALA would support a rule that accomplishes these worthy goals if the rule does not violate the First Amendment or other protections provided by the U.S. Constitution, such as due process. FALA stands firm, however, that it does not support rule 8.4(g), because it will be used as a weapon to silence attorneys with diverse opinions.

4.0 Distinguished First Amendment Scholars Have Spoken Out Against ABA Model Rule 8.4(g)

Many First Amendment scholars have spoken out against Rule 8.4(g), including:

- Distinguished First Amendment Professor Eugene Volokh[17] has noted that passing a law that disciplines attorneys for speech

[17] Professor Volokh is the editor of the *Volokh Conspiracy* at the *Washington Post* and is the author of the treatise *The First Amendment and Related Statues*

would stifle debate within the legal community for fear of disciplinary reprimand. (*See* Eugene Volokh, "Texas AG: Lawyer speech code proposed by American Bar Association would violate the First Amendment," WASHINGTON POST (Dec. 20, 2016), attached as **Exhibit 6**.)[18]

- Professor Ronald Rotunda[19] noted that under the ABA Model Rule, if two attorneys spoke on a panel, and an attorney said "Black Lives Matter," the attorney who responds "Blue Lives Matter" could be subject to discipline under this Rule. Candid debates about illegal immigration or gender-neutral bathrooms would likely involve discussions about national origin, sexual orientation, and gender identity, which means that participants in the debate would be subject to discipline, depending entirely on the speaker's stance or viewpoint. (*See* Rebecca Messall, et

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(West 2013). He teaches at the University of California Los Angles School of Law <http://www2.law.ucla.edu/volokh/>.

[18] Available at: <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/20/texas-ag-lawyer-speech-code-proposed-by-american-bar-association-would-violate-the-first-amendment/> (last accessed May 15, 2018).

[19] Professor Rotunda is the author of the treatise *American Constitutional Law* (Volumes 1 & 2) (West 2016) and *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters 2016). He teaches at Chapman University <https://www.chapman.edu/our-faculty/ronald-rotunda>.

al., "Statement on ABA Model Rule 8.4(g)," NATIONAL LAWYERS ASSOCIATION (Mar. 7, 2017), attached as **Exhibit 7**.)[20]

- Professor Josh Blackman[21] has noted that Rule 8.4(g) will affect the types of hypotheticals and debates law school professors can pose to students, because law professors who have active law licenses could worry about offending a student and being faced with a bar complaint. (See Josh Blackman, "My Rejected Proposal for the AALS President's Program on Diversity: The Effect of Model Rule of Professional Conduct 8.4(g) and Law School Pedagogy and Academic Freedom" (Nov. 15, 2016), attached as **Exhibit 8**.)[22]

The Court should heed the warnings of these preeminent First Amendment scholars and note the serious consequences the passage of 8.4(g) would have on free speech and debate. We should

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[20] Available at: <http://www.nla.org/nla-task-force-publishes-statement-on-new-aba-model-rule-8-4g/> (last accessed May 15, 2018).

[21] Professor Blackman is the author of *Reply: A Pause for State Courts Considering Model Rule 8.4(G) The First Amendment and "Conduct Related to the Practice of Law"*, 30 GEO. J. LEGAL ETHICS (2017). He teaches at South Texas College of Law <http://www.stcl.edu/about-us/faculty/josh-blackman/>.

[22] Available at: <http://joshblackman.com/blog/2016/11/15/my-rejected-proposal-for-the-aals-presidents-program-on-diversity-the-effect-of-model-rule-of-professional-conduct-8-4g-and-law-school-pedagogy-and-academic-freedom/> (last accessed May 15, 2018).

not seek to censor lawyers who engage in debate at bar conferences, in law school classrooms, and in law review articles. Rather, we should engage people we do not agree with, and present them with better arguments. If someone holds an offensive viewpoint, it is better to try to change that person's mind than to shut them up.

5.0 ABA Model Rule 8.4(g) is Unconstitutionally Vague

The government violates the due process clause of the Fifth and Fourteenth Amendments when it takes someone's life, liberty, or property without due process by passing a law that is so vague that that it does not give ordinary people fair notice of the conduct it punishes, or is so standard-less that it invites arbitrary enforcement.[23] Rule 8.4(g) is unconstitutionally vague because it does not draw a clear line between what conduct is "related to the practice of law" and what conduct is not. There is no clear line regarding what is merely an unpopular opinion, and what is discriminatory. Conduct that is *related* to law is incredibly vague, and as analyzed above, could include a multitude of activities.

[23] *See Johnson v. United States*, 135 S. Ct. 2551, 2553 (2015); *see also Kolender v. Lawson*, 461 U.S. 352 (1983).

The term "[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct."[24] In addition to being a guaranteed chill on speech, there is no way for any member of the legal community to know prospectively what language may be "derogatory or demeaning." Is this judged from the subjective viewpoint of the speaker's audience, the subjective viewpoint of a third party who hears the speech afterward, or some objective standard that is applied regardless of whether anyone actually found the statements "derogatory or demeaning?"

Furthermore, words or conduct that potentially fit this terminology will necessarily change over time, unnecessarily burdening attorneys with the obligation to continue educating themselves on these constantly shifting definitions. As explained below, if this is the Bar's goal, it should instead impose elimination-of-bias MCLE requirements. *See* Section 6.0, *infra*.

The definition of "discrimination" is no clearer; it "includes harmful verbal or physical conduct that manifests bias or prejudice towards others." This is an utterly unintelligible standard that

[24] Comment 3 to Rule 8.4(g).

necessarily requires attorneys to guess which statements are permitted and which are not. With the possibility of disciplinary action for a wrong statement, lawyers will inevitably curb speech they have a right to express.

In particular, Rule 8.4(g) punishes speech that discriminates against "socioeconomic status," a term that is not defined by the ABA or any other anti-discrimination statute. Socio-economic status is vague because there is no bright line rule about what this entails. A lawyer could be subject to discipline for "discriminating" against someone who is unable to pay a retainer fee. A lawyer could also be subject to discipline for speaking out against "the 1%" – as this could be deemed discriminatory on this basis.

Professor Volokh notes that the socioeconomic discrimination language is so vague that there are many examples of conduct that could lead to attorney discipline:

- A law firm preferring more-educated employees over less educated ones.
- A law firm preferring employees who went to high status institutions, such as Ivy League schools, over Tier 4 law schools.

- A solo practitioner who prefers a would-be partner who has more resources to help weather hard times, over a would-be partner who has zero savings.
- A law firm contracting with an expert witness and/or an expert consultant who is especially well-educated or has an especially prestigious employer.

(*See* Eugene Volokh, "Banning Lawyers From Discriminating Based on 'Socioeconomic Status' in Choosing Partners, Employees or Experts," WASHINGTON POST (Aug. 10, 2016), attached as **Exhibit 9**.)[25]

An additional problem with the vagaries inherent in these terms is that they **beg** for selective enforcement. Without any intelligible definitions of "harassment" or "discrimination," the Bar would be free to prosecute any attorney at any time; no one on Earth has failed to make a statement at some point in their life that someone could find offensive. Furthermore, the Bar is the sole arbiter of what is "harassment" or "discrimination," which has the potential of leading

[25] Available at: <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/05/banning-lawyers-from-discriminating-based-on-socioeconomic-status-in-choosing-partners-employees-or experts/?utm_term=.beabb7cea8fe> (last accessed May 15, 2018).

to the absurd result of an attorney being disciplined for making a "disparaging" statement that the allegedly "disparaged" audience does not actually find "disparaging."

Rule 8.4(g) is unconstitutionally vague because an ordinary person - even one schooled in the practice of law - would not be able to read the rule and understand what is conduct related to the practice of law or what statements constitute discrimination or harassment, and it encourages (and even necessitates) selective enforcement. Arizona must reject Rule 8.4(g).

6.0 The Arizona Bar Should Adopt an Elimination of Bias Rule, Rather than ABA Model Rule 8.4(g)

Eliminating bias from the profession is a laudable goal – and one that can be achieved through constitutional and honest means that are not subject to abuse. The Court should reject Rule 8.4(g) for the reasons stated above, but the Court should consider that there are many different anti-harassment and anti-discrimination rules that have already been adopted by other states. None of the rules adopted in other states are as broad as Rule 8.4(g).

If the Arizona Bar wants to craft a bias rule modeled from another state, there are two major distinctions between the language in other states' rules and Model Rule 8.4(g). These distinctions also highlight the major deficiencies with Rule 8.4(g).

(1) **Conduct:** Most states have a narrow interpretation of "conduct" and restrict only conduct in the course of representing a client. (*See* "Anti-Bias Provisions in the State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Language Choices Narrative" (July 16, 2015).)[26] Rule 8.4(g) has a sweeping approach that exposes attorneys to discipline for any conduct *related* to the practice of law (such as speaking on a panel at a bar meeting or engaging in a debate with a colleague).

(2) **Breaking the Law:** Most states limit discrimination to an act that breaks a federal, state, or local law and requires that there be a finding by a court that the attorney engaged in discrimination. Rule 8.4(g) is subjective and allows anyone who

[26] Available at: <http://www.american bar.org/content /dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf> (last accessed May 15, 2018).

is offended by something an attorney says to file a bar complaint at their discretion. Comment 3 to Rule 8.4(g) provides only that state law "may guide application of paragraph (g)," not that it is determinative.

A better option Arizona could adopt is a carrot rather than a stick approach: it could make one credit of Eliminating Bias a Mandatory Continuing Legal Education . States like California and Minnesota require attorneys to take elimination-of-bias as a CLE every year. FALA has incorporated eliminating bias credits into both 2017 FALA meetings, not only for the benefit of the members who need the credit, but because it is important for all members.

Eliminating bias in the profession is a worthy policy to pursue. The Arizona Bar should take steps to eliminate bias. However, adopting Model Rule 8.4(g) is absolutely the wrong way to approach this problem because it is unconstitutional on its face and violates the First Amendment.

7.0 Conclusion

A lawyer who violates the Rules of Professional Conduct may suffer serious consequences, which can range from a letter of

reprimand to disbarment. Rule 8.4(g) is the only model rule that dictates an attorney can be disciplined for something that has nothing to do with that attorney's ability to practice law or handle client trust accounts. Rather, it dictates what types of views an attorney is allowed to have and say publicly. Attorneys should be free to practice law without fear of voicing an unpopular opinion. Rule 8.4(g) has no rational relationship to securing the integrity of the practice of law in Arizona, and instead is one step removed from legislating thoughtcrime.

The existing measures in the Arizona Rules satisfy any interests that the proponents of this rule have stated. If Arizona truly believes that the existing rules do not prohibit attorneys from true unlawful discrimination, then it should adopt *constitutional* remedial measures.

Arizona should not join the dubious company of Vermont as a state to adopt ABA Model Rule 8.4(g). Members of the Arizona Bar took an oath to uphold the Constitution of the United States, and have a duty not to adopt a rule that violates the Constitution. Arizona should follow the lead of other states and heed the advice of this

nation's First Amendment scholars: Arizona should reject this proposed rule.

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