WHY IDAHO ATTORNEYS SHOULD REJECT THE 2021 PROPOSED RESOLUTION

AN UNCONSTITUTIONAL SPEECH CODE FOR LAWYERS

THE RESOLUTION CLAIMS THAT A VARIANT OF ABA MODEL RULE 8.4(G) HAS BEEN APPROVED IN "A NUMBER OF STATES"

- Vermont and New Mexico are the only states to have adopted ABA Model Rule 8.4(g) in full.
- Maine, Connecticut, and Pennsylvania adopted narrower versions, but Pennsylvania's was ruled unconstitutional in December 2020. *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020).
- At least thirteen states have abandoned ABA Model Rule 8.4(g), or one of its variants, as unconstitutional or unworkable, including: Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas.
- In 2018, the Idaho Supreme Court rejected the 2017 Proposed Resolution, 3-2, which was a variant of ABA Model Rule 8.4(g), and is quite similar to the 2021 Proposed Resolution.
- Utah has had two comment periods without adopting the proposed rule; the Montana Legislature passed a resolution against an 8.4(g) proposal because of its concerns about its impact on the legislative process.

IN THE ONLY CASE INVOLVING A VARIANT OF ABA MODEL RULE 8.4(G), THE RULE WAS HELD UNCONSTITUTIONAL

- In *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020), *appeal voluntarily dismissed*, No. 20-3602 (3d Cir. Mar. 17, 2021), a federal district court found it violated the free speech clause.
- *Greenberg v. Haggerty II* is being briefed after Pennsylvania adopted a second version that is also likely to be found to be an unconstitutional restriction on attorneys' speech.
- The Committee's Memorandum cites a Colorado Supreme Court decision, *In re Abrams*, No. 20SA81 (Colo. June 7, 2021), but the Colorado Rule of Professional Conduct 8.4(g) at issue in that case was adopted years before ABA Model Rule 8.4(g) and is not a variant of that rule.

IN 2018, THE IDAHO SUPREME COURT REJECTED THE 2017 PROPOSED RULE BECAUSE IT NEEDED TO BE NARROWED IN ORDER "TO COMPORT WITH NEW UNITED STATES SUPREME COURT CASES." (IDAHO SUPREME COURT, SEPTEMBER 6, 2018)

- The Committee failed to narrow the 2021 Proposed Resolution "to comport with new United States Supreme Court cases."
- The 2021 Proposed Resolution continues to be unconstitutional under at least three recent Supreme Court decisions:
    - *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019)
    - *National Institute of Family and Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018)

NIFLA V. BECERRA, 138 S. CT. 2361 (2018)

- In *NIFLA*, the United States Supreme Court held that government restrictions on professionals' speech – including lawyers' professional speech – are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, *presumptively unconstitutional*.
- The federal district court in *Greenberg* relied on *NIFLA* to strike down Pennsylvania's 8.4(g) variant.

MATAL V. TAM AND *IANCU V. BRUNETTI*

- Like the 2017 Proposed Resolution, the 2021 Proposed Resolution defines "harassment" broadly as "*derogatory or demeaning verbal, written*, or physical conduct toward a person" who belongs to one of 11 protected classes.
- "Verbal [and] written conduct" is a euphemism for "speech." The 2021 Proposed Resolution regulates attorneys' speech.
- The Idaho Supreme Court rejected the 2017 Proposed Resolution, but the unconstitutional language remains in the 2021 Proposed Resolution.
- In *Matal*, a unanimous Supreme Court ruled that allowing government officials to determine whether speech is "derogatory or demeaning" permits viewpoint discrimination and chills speech. *Iancu* follows the same analysis as to the terms "slanderous and immoral."

THE 2021 PROPOSED RESOLUTION'S DEFINITION OF "HARASSMENT" IS UNCONSTITUTIONALLY BROAD

- A close reading of Proposed Comment [3] shows that even "[p]etty slights, annoyances, and isolated incidents" may "rise to the level of harassment" if "extremely serious."
- The 2021 Proposed Resolution applies to "unlawful" *discrimination*, but it also applies to any *harassment* whether or not it is "unlawful" or "lawful."

THE 2021 PROPOSED RESOLUTION'S SCOPE IS SO BROAD THAT IT REGULATES SUBSTANTIAL AMOUNTS OF LAWYERS' SPEECH

The 2021 Proposed Resolution applies to a lawyer when she is

- Representing a client *OR*
- Operating or managing a law practice *OR*
- In the course and scope of employment in a law practice.

THE COMMITTEE CLAIMS THAT THE 2021 RESOLUTION EXCLUDES BAR ASSOCIATION, BUSINESS, OR SOCIAL ACTIVITIES, BUT THE TEXT SAYS OTHERWISE.

- Bar association, business, or social activities certainly fall within "the course and scope of employment in a law practice."
- The plain textual reading of Proposed Comment [4], albeit circular, states that "participation in bar association, business, or social activities" falls within the scope of the 2021Proposed Resolution when the lawyer is acting in the course and scope of employment in a law practice (or representing a client or operating or managing a law practice).

THE 2021 PROPOSED RESOLUTION IS LACKING THE BASIC PROCEDURAL PROTECTIONS FOUND IN OTHER STATES THAT PROHIBIT "UNLAWFUL" DISCRIMINATION

- Illinois requires that before a complaint against an attorney for unlawful discrimination can be brought, a tribunal (other than a bar proceeding) must have found that the attorney has violated antidiscrimination laws.
- These tribunals have significantly stronger evidentiary and due process protections for the accused than do bar disciplinary proceedings.
- Disciplinary counsel often are reluctant to see a variant of ABA Model Rule 8.4(g) adopted because it increases their workload and consumes scarce enforcement resources as they now must determine whether lawyers have violated complex nondiscrimination laws.

THE 2021 RESOLUTION SHOULD BE REJECTED

The prudent course of action is to wait until other states experiment with variants of ABA Model Rule 8.4(g) in order to evaluate its actual impact on the lawyers in those states before imposing it on Idaho lawyers.