EXHIBIT 7

Rebecca Messall, et al.,
"Statement on ABA Model Rule 8.4(g),"
NATIONAL LAWYERS ASSOCIATION (Mar. 7, 2017)

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NLA Task Force Publishes Statement on New ABA Model Rule 8.4(g)

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March 7, 2017

NATIONAL LAWYERS ASSOCIATION

COMMISSION FOR THE PROTECTION OF CONSTITUTIONAL RIGHTS

STATEMENT ON ABA MODEL RULE 8.4(g)

The National Lawyers Association

The National Lawyers Association ("NLA") is a 501(c)(6) non-profit, non-partisan professional membership association founded in 1993 comprised of lawyers, legal scholars, professors, law students and other legal and policy professionals committed to expanding liberty, increasing individual freedom, promoting justice, and strengthening the rule of law in America. Since its founding, the NLA's membership has included thousands of attorneys in all 50 states.

On behalf of its members, the NLA's Commission for the Protection of Constitutional Rights established a special Task Force to closely examine the language of new Model Rule 8.4(g), the findings of which are summarized below. Based on this review, the NLA finds that Model Rule 8.4(g), if adopted by any state and enforced against any attorney, would violate the free speech, free association, and free exercise rights of that state's attorneys under the First Amendment to the Constitution of the United States.

The New ABA Model Rule 8.4(g)

The American Bar Association's House of Delegates adopted the ABA Model Rules of Professional Conduct, formerly known as the Model Rules of Professional Responsibility, in 1983. The Rules serve as models for the ethics rules of most states. In fact, the Model Rules have been adopted, in some form or another, by every state except California, as well as by the District of Columbia. Periodically, the ABA amends the Rules and encourages states to adopt the amended language as part of the states' Rules of Professional Conduct.

Given the fact that an attorney's violation of a state's ethics Rules has real consequences, which vary from state to state, but which can range from a reprimand to disbarment, it is critical that the constitutionality of any proposed amendment of the Rules be closely evaluated prior to s adoption – for once adopted by a state, the Rules have the force and effect of law.

On August 8, 2016, the American Bar Association's House of Delegates amended Model Rule 8.4 – the Attorney Misconduct Rule – of the Model Rules of Professional Conduct by adding a subsection (g) to the Rule.

The language of Model Rule 8.4(g) reads:

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 identity, marital status or socioeconomic status 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.

The ABA also adopted three new Model Comments to the new Rule 8.4(g).

Model Comment [3] attempts to clarify what the new Model Rule means by prohibiting "discrimination" and "harassment." According to Comment [3], discrimination includes "harmful verbal…conduct that manifest bias or prejudice toward others." "Harassment includes…derogatory or demeaning verbal….conduct."

Model Comment [4] provides examples of the type of attorney speech and conduct which is "related to the practice of law." According to the Comment, such conduct includes, but is not limited to, "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 association, business or social activities in connection with the practice of law."

FINDINGS OF THE NLA TASK FORCE ON MODEL RULE 8.4(g)

In accordance with its mandate, the NLA Task Force on Model Rule 8.4(g) focused only on the potential constitutional violations of the new Rule. The Task Force's findings are limited specifically to constitutional analysis. Other problems with the Rule, including that it, for the first time, expands attorney regulation and discipline into areas unconnected with prejudice to the administration of justice or conduct that renders an attorney unfit, and that it infringes upon attorneys' professional autonomy, are not addressed, only because such issues are outside the Task Force's mandate.

A. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of speech

Lawyers do not surrender their constitutional rights when they enter the legal profession. In re Primus, 436 U.S. 412, 432-33 (1978). See also Gentile v. State Bar of Nevada, 501 U.S. 1030, 1054 (1991)(disciplinary rules governing the legal profession cannot punish activity 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).

Although decisions of the United States Supreme Court have held that an attorney's free speech rights may be circumscribed to some extent in the courtroom during a judicial proceeding, as well as outside the courtroom when speaking about a pending case, Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991), Model Rule 8.4(g) extends far beyond the context of a judicial proceeding. It purports to restrict all speech that constitutes "discrimination" or "harassment" whenever such speech is – however attenuated – "related to the practice of law." Model Comment [3] makes clear that this includes any so-called "harmful," "derogatory," or "demeaning" speech.

But speech is not unprotected merely because it is unpopular, harmful, derogatory or demeaning. In fact, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. Snyder v. Phelps, 562 U.S. 443, 458 (2011). 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 disagreeable"). Therefore, if an attorney engages in speech – although unpopular, derogatory, demeaning, or offensive – but the speech does not prejudice the administration of justice or render the attorney unfit, such speech is constitutionally protected.

"All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – fall within the full protection of the First Amendment." Roth v. United States, 354 U.S. 476, 484 (1957). Contrary to these basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues.

Furthermore, by only proscribing speech that is unpopular, derogatory, demeaning, or harmful toward members of certain designated classes, the new Model Rule constitutes an unconstitutional content-based speech restriction. American Freedom Defense Initiative v. Metropolitan Transp. Authority, 880 F.Supp.2d 456 (S.D.N.Y. 2012) (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).

For example, under the new Rule a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that manifests discrimination on the basis of sexual orientation, while a lawyer who speaks in favor of same-sex marriage would certainly not be in violation of the Rule. That is a classic example of an unconstitutional content-based speech restriction.
"Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995).

Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provides a concrete example of how the new Model Rule may constitute an unconstitutional content-based speech restriction. He explains: "At a . . .bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.' Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally, another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline." The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016.

In other words, whether a lawyer has or has not violated the new Model Rule will be determined solely by reference to the content of the speaker's speech. Although attorneys may be speaking on the same subject matter, whether their speech violates the Rule will depend entirely upon the content of their speech. Some of the attorneys will be immune, based solely upon the content of their speech. Others could be prosecuted, based solely upon the content of their speech.

Indeed, in the few states that have already modified their respective Rule 8.4 in similar ways, such Rules are being enforced as clearly unconstitutional free-standing speech codes. See, for example, In the Matter of Stacy L. Kelley, 925 N.E.2d 1279 (Indiana Supreme Court 2010), in which an Indiana attorney was professionally disciplined for asking someone if they were "gay," and In the Matter of Daniel C. McCarthy, 938 N.E.2d 698 (Indiana 2010) in which an attorney had his license suspended for applying a racially derogatory term to himself.

B. Model Rule 8.4(g) violates attorneys' First Amendment right to free exercise of religion

Model Rule 8.4(g) would also infringe upon an attorney's First Amendment right to free exercise of religion. For example, in the same-sex marriage context, the U.S. Supreme Court has emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." Obergefell v. Hodges, 135 S. Ct. 25 84, 2607 (2015).

The new Model Rule, however, would discipline attorneys for expressing their religiously based opinions concerning same-sex marriage.

Professor Rotunda posits the example of Catholic attorneys who are members of an organization of Catholic lawyers and judges, like the Catholic Bar Association. If the Catholic Bar Association 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, those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. Indeed – he points out – attorneys might be in violation of the new Rule merely for being members of such an organization. The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, pp. 4-5. And yet, such speech and the right to belong to the Catholic Bar Association would both be constitutionally protected.

By prohibiting both, the new Rule would constitute an unconstitutional infringement on not only the free speech and free association rights of attorneys, but their free exercise rights as well.

C. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of association

"[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Roberts v. U.S.. Jaycees, 468 U.S. 609, 622 (1984). "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." Boy Scouts of America v. Dale, 530 U.S. 640, 647-48 (2000). The First Amendment protects rights of association and assembly.

The new Model Rule 8.4(g), however, would violate attorneys' constitutionally protected rights to associate freely.

Under the new Rule an attorney could not belong to a legal organization, such as the Christian Legal Society, that requires its attorney members to acknowledge and agree with a Christian Statement of Faith, because belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion. https://clsnet.org/page.aspx?pid=367. The Christian Legal Society also has a Community Life Statement in which members "renounce unbiblical behaviors, including . . . immoral conduct such

as . . . engaging in sexual relations other than within a marriage between one man and one woman." https://clsnet.org/page.aspx?pid=494. An attorney belonging to such an organization would violate the new Model Rule because, again, such would constitute conduct related to the practice of law, and would "discriminate" on the basis of marital status and, some may argue, sexual orientation.

Nor would the new Model Rule allow attorneys to be members of the Catholic Bar Association, which requires its attorney members to be practicing Catholics because, again, belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion.

Clearly, however, attorneys have a constitutional right to freely associate with other attorneys in pursuit of a wide variety of ends – including religious ends. The new Model Rule would clearly violate that right.

D. Model Rule 8.4(g) is unconstitutionally vague

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. Grayned, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Grayned, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. Grayned, supra, at 109.

The language of Rule 8.4(g) violates all these principles.

(a) The term "harassment" is unconstitutionally vague. The new Model Rule prohibits attorneys from engaging in harassment of anyone on the basis of one of the protected classes. But the term "harassment" is not defined in the Rule, is subject to varied interpretations, and no standard is provided to determine whether conduct is or is not harassing.

Does expressing disagreement with someone's religious beliefs constitute harassment based on religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment?

Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, 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). See also Are Stalking Laws Unconstitutionally Vague Or Overbroad, 88 Nw. U. L. Rev. 769, 782 (1994) (the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass.").

Because the term "harass" 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 inadvertently violating the Rule.

The new Comments to the Rule attempt to define the term "harassment," but in doing so actually raise additional concerns. For example, Comment [3] to the new Rule provides that harassment includes derogatory or demeaning verbal or physical conduct. Unfortunately, rather than clarifying (let alone limiting) the meaning of the term "harassment," the terms "derogatory" and "demeaning" present the same vagueness issues as the term they are intended to define. Indeed, because it is not clear what speech is encompassed by the words "derogatory" and "demeaning," courts have found those terms to be unconstitutionally vague. Hinton v. Devine, 633 F.Supp. 1023 (E.D. Pennsylvania 1986) (the term "derogatory" without further definition is unconstitutionally vague); Summit Bank v. Rogers, 206 Cal.App.4th 669 (Cal.App. 2012) (statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

(b) The term "discrimination" is unconstitutionally vague. It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it's also true that such statutes and ordinances do not – as does the new Model Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.
For example, Title VII does not merely provide that it shall be an unlawful employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that "It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2.

Likewise, the federal Fair Housing Act does not simply provide that one may not discriminate in housing based on race, color, religion, familial status, or national origin. It provides a description of what, specifically, is being prohibited: "[I]t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604. And the Act provides precise definitions of important

terms used in the Act, such as "dwelling," "person," "to rent," and "familial status." 42 U.S.C. § 3602.

Unlike other non-discrimination enactments, however, the new Model Rule simply states that "It is professional misconduct for a lawyer to: . . . (g) knowingly . . . discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law" – leaving to the attorney's imagination what sorts of speech and behavior might be encompassed in that proscription.

Making matters worse, Model Comments [3] to Model Rule 8.4(g) states that the term "discrimination" includes "harmful verbal or physical conduct that manifests bias or prejudice towards others." The term "harmful" – in the context of attorney speech and conduct – is unconstitutionally vague because attorneys cannot with any degree of reasonable certainty determine what speech and conduct may be prohibited and what may be allowed.

(c) The phrase "conduct related to the practice of law" is unconstitutionally vague. Whereas the previous Model Rule applied only to attorney conduct while the attorney is acting in the course of representing a client – a relatively narrow and reasonably determinable aspect of a lawyer's activities – the new Rule applies to any conduct of an attorney that is in any way "related to the practice of law." What conduct is related to the practice of law and what conduct is unrelated to the practice of law, however, is vague and not readily determinable.

The new Comment [4] attempts to provide guidance as to what the phrase "related to the practice of law" means. But not only is the Comment's definition nearly limitless – including within it 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 association, business or social activities in connection with the practice of law – but its list of activities related to the practice of law is an expressly non-exclusive list. Activities other than those expressly included in the Comment could also qualify as being in connection with the practice of law. But what those activities may be is difficult to determine. For example, does the phrase include comments made by an attorney while attending a birthday celebration for a law firm co-worker; or a statement made by an attorney at a cocktail party that the attorney is attending – at least in part – in order to make connections that will hopefully result in future legal work; or comments an attorney makes while serving on the governing board of the attorney's church and to whom the board periodically looks for church-related legal advice?

Because no attorney, with any reasonable degree of certainty, can determine what speech or conduct is or is not "related to the practice of law," the new Rule is unconstitutionally vague.

E. Model Rule 8.4(g) is unconstitutionally overbroad

Even if an enactment is otherwise clear and precise in what conduct it proscribes, the law may nevertheless still be unconstitutionally overbroad if its reach prohibits constitutionally protected conduct. Grayned, supra, at 114.

It is clear that the new Model Rule is not only unconstitutionally vague, it is also unconstitutionally overbroad because, although it may apply to attorney conduct that might be unprotected – such as conduct that actually and significantly prejudices the administration of justice or that would clearly render an attorney unfit to practice law – Model Rule 8.4(g) would also sweep within its orbit lawyer speech that is clearly protected by the First Amendment, such as speech that might be

unpopular, offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit.

The terms "harmful verbal conduct" and "derogatory or demeaning verbal conduct" sweep into their ambit much speech that is clearly constitutionally protected. As noted above, speech is not unprotected merely because it is harmful, derogatory or demeaning. Snyder v. Phelps, supra at 458. In fact, that is precisely the sort of speech that is constitutionally protected. Speech that no one finds offensive needs no protection.

Courts have found terms such as "derogatory" and "demeaning" unconstitutionally overbroad. Hinton v. Devine, supra (the term "derogatory information" is unconstitutionally overbroad); Summit Bank v. Rogers, supra (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). See also Saxe v. State College Area School Dist., 240 F.3d 200, 215 (3rd Cir. 2001) (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).

And it is irrelevant whether such speech would ever actually be prosecuted by disciplinary authorities under the new Rule. The fact that a lawyer could be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – the very danger the overbreadth doctrine is designed to prevent.

CONCLUSION

After carefully reviewing the new ABA Model Rule 8.4(g) and its Comments, the National Lawyers Association finds that the new ABA Model Rule 8.4(g), if adopted by any state and enforced against any attorney, would violate an attorneys' free speech, free association, and free exercise rights under the First Amendment to the Constitution of the United States. Therefore, the National Lawyers Association recommends that no state adopt Model Rule 8.4(g), and that any state that might have adopted Model Rule 8.4(g) take all steps necessary to repeal and remove subsection (g) from its Rules of Professional Conduct.

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About the NLA

The National Lawyers Association (NLA) is a voluntary association of lawyers in the United States. Founded in 1993, the NLA is a not-for-profit organization that helps to support and improve the legal profession.

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