1629 K STREET NW, SUITE 300
WASHINGTON, D.C. 20006

HAMILTON LINCOLN
LAW INSTITUTE

Melissa A. Holyoak
Hamilton Lincoln Law Institute
1629 K Street NW, Suite 300
Washington, DC 20006
(573) 823-5377
melissa.holyoak@hlli.org

July 31, 2020

To the Utah Supreme Court:

I am a Utah-licensed attorney and file this letter on behalf of the Hamilton Lincoln Law Institute. We write in response to proposed revisions to Rule 8.4(g), Rule 8.4(h) and Rule 14-301.3 of the Utah Rules of Professional Conduct based, in part, on ABA Model Rule 8.4(g). We have serious concerns that the proposed revisions will chill speech of Utah lawyers.

First, attorneys can now be sanctioned under Rule 14-301 for "hostile, demeaning, humiliating, or discriminatory conduct" in all law-related activities. But Rule 14-301 does not provide an exception for legitimate advocacy, and thus attorneys risk sanction for "hostile" or "demeaning" conduct while zealously representing their clients.

Indeed, law-related activities include "Bar sections, or Bar Associations" and thus the Women Lawyers of Utah, the Minority Bar Association, or the LGBT & Allied Bar Association potentially risk sanction for "discriminatory conduct" by focusing on issues unique to their memberships. Law-related activities also extend to CLE events and social events including firm parties and bar functions. Social events often include exchanges that one person or another may view as "demeaning" or "humiliating," but now attorneys face sanctions based on these vague categories, raising significant First Amendment issues.

Further, the preamble of 14-301 warns lawyers that digital communications and social media may have a "widespread and lasting impact on their clients, themselves, other lawyers, and the judicial system." 14-301 potentially polices lawyers' expression on social media in violation of the First Amendment.

Second, Rule 14-301 would restrict *written* or *oral* presentations that may "disparage the integrity, intelligence, morals, ethics, or personal behavior of any person unless such matters are directly relevant under controlling substantive law." This restriction applies to CLE events, which would kill any meaningful debate of important, current social issues where legal and ethical matters converge—attorneys could be sanctioned for questioning an opponent's morals or ethics while disagreeing on topics such as, *inter alia*, the pandemic response, Black Lives Matters protests, defunding the police, etc.

Third, Comment 4 to Rule 8.4 permits lawyers to discuss "the benefits and challenges of diversity and inclusion" which necessarily implies that any discussions relating to any other antidiscrimination or antiharassment topics would be restricted. This content-based, or even potentially viewpoint-based, discrimination is unlawful. Its inclusion is particularly misplaced and troubling because an ordinary interpretation of "conduct that is an unlawful…practice under Title VII" would not include *any* academic discussions between lawyers.

Finally, Comment 5 to Rule 8.4 provides that "Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to 63 the United States Constitution or by Article I of the Utah Constitution." While this language is redundant given that the government cannot prohibit speech protected by the First Amendment, Comment 5 seemingly endorses the Rule's unlawful restrictions on speech as *exceptions* to protected speech. Similar language was included in New Hampshire's proposed rule—protecting a "lawyer's rights of free speech … consistent with these Rules"—which Professor Blackman criticized as "hollow" because engaging in free speech that was inconsistent with the rules placed attorneys at risk of discipline. *See* Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 Catholic U. L. Rev. 629, 640 (2019).

Although Comment 5 cannot legitimize the unlawful restrictions contained in the proposed revisions, it could nonetheless be strengthened by including the following language which was included in an earlier draft of ABA 8.4(g) from 2015: "This Rule does not apply to conduct protected by the First Amendment, as a lawyer does retain a 'private sphere' where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to this rule." *See* Blackman, 68 Catholic U. L. Rev. at 640 (recommending addition to Tennessee's proposed rule to "clarify that not only are values of free speech protected, but also those of freedom of association, as well as freedom of exercise").

Very truly yours,

Melissa A. Holyoak
President and General Counsel