

1 SENATE JOINT RESOLUTION NO. 15

2 INTRODUCED BY D. HOWARD

3
4 A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF
5 MONTANA MAKING THE DETERMINATION THAT IT WOULD BE AN UNCONSTITUTIONAL ACT OF
6 LEGISLATION, IN VIOLATION OF THE CONSTITUTION OF THE STATE OF MONTANA, AND WOULD
7 VIOLATE THE FIRST AMENDMENT RIGHTS OF THE CITIZENS OF MONTANA, SHOULD THE SUPREME
8 COURT OF THE STATE OF MONTANA ENACT PROPOSED MODEL RULE OF PROFESSIONAL CONDUCT
9 8.4(G).

10
11 WHEREAS, the Supreme Court of the State of Montana, at the urging of an Illinois not-for-profit
12 corporation -- the American Bar Association (ABA)-- entered its Order of October 26, 2016, In Re The Rules of
13 Professional Conduct No. AF 09-0688, proposing to adopt ABA Proposed Rule of Professional Conduct 8.4(g);
14 and

15 WHEREAS, by the close of the Supreme Court's 45 day public comment period the People of Montana
16 overwhelming expressed their virtually unanimous opposition to Proposed Rule 8.4(g) through hundreds of
17 comments pointedly observing that the proposed rule seeks to destroy the bedrock foundations and traditions
18 of American independent thought, speech, and action, and in response, rather than reject the proposed rule at
19 the close of the comment period, the Supreme Court of the State of Montana relentlessly pursues adoption of
20 Proposed Rule 8.4(g) by extending the time to consider it; and

21 WHEREAS, Proposed Rule of Professional Conduct 8.4(g) provides it is professional misconduct for a
22 lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination
23 on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity,
24 marital status, or socioeconomic status in conduct related to the practice of law; and

25 WHEREAS, Comment [4] to ABA Model Rule 8.4(g) clearly details Model Rule 8.4(g)'s expansive
26 over-reach into every attorney's free speech, opinions, and social activities, when it states: "Conduct related to
27 the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers,
28 and others while engaged in the practice of law, operating or managing a law firm or law practice; and
29 participating in bar association, business or social activities in connection with the practice of law"; and

30 WHEREAS, the ABA is incorporated as a nonprofit corporation under the laws of the State of Illinois, with

1 the stated purpose of promoting the uniformity of legislation throughout the United States without regard to the
2 50 sovereign state constitutions, thus it was created as a national political advocacy group with a social and
3 political agenda; and

4 WHEREAS, the ABA, in its legal capacity as a nonprofit corporation is not legally authorized to give legal
5 advice, but rather is engaged in political advocacy and pursues its agenda by proposing rules that may serve as
6 models for the ethics rules of individual states, even though it has no legal capacity to speak on behalf of any
7 attorney nor as the mouthpiece of attorneys throughout the United States, but may only speak as a political
8 advocacy group on behalf of its own corporate social and political agenda; and

9 WHEREAS, the Illinois corporation in question, the ABA, states that it seeks to force a cultural shift in the
10 legal profession through Proposed Rule 8.4(g), even though the ABA has determined that the conduct sought
11 to be prohibited is so uncommon as to be nearly non-existent (ABA Standing Committee on Ethics, December
12 22, 2015) and even though ABA's own Committee on Professional Discipline finds the rule to be unconstitutional,
13 for a variety of constitutional reasons (ABA Standing Committee on Professional Discipline, March 10, 2016); and

14 WHEREAS, pursuant to Article III, section 1, of the Montana Constitution, the power of the government
15 of this state is divided into three distinct branches -- legislative, executive, and judicial -- and that no person or
16 persons charged with the exercise of power properly belonging to one branch shall exercise any power properly
17 belonging to either of the others; and

18 WHEREAS, pursuant to Article V, section 1, of the Montana Constitution, the legislative power is vested
19 in a Legislature consisting of a Senate and a House of Representatives; and

20 WHEREAS, the Montana Supreme Court may make rules governing admission to the bar and the
21 conduct of its members; and

22 WHEREAS, the Constitution for the State of Montana vests the power to enact legislation solely with the
23 Legislature for the State of Montana, including legislation regarding the conduct Proposed Rule 8.4(g) seeks to
24 regulate; and

25 WHEREAS, the Constitution of the State of Montana vests the Supreme Court with the authority to
26 regulate the conduct of members of the bar, such power is not without limits and such power is limited to
27 regulating conduct which adversely affects the attorney's fitness to practice law, or seriously interferes with the
28 proper and efficient operation of the judicial system; and

29 WHEREAS, Proposed Rule 8.4(g) would unlawfully attempt to prohibit attorneys from engaging in
30 conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper

1 and efficient operation of the judicial system, therefore the scope of Proposed Rule 8.4(g) exceeds the Supreme
2 Court's constitutional authority to regulate the conduct of attorneys; and

3 WHEREAS, Proposed Rule 8.4(g)'s expansive scope endeavors to control the speech of state legislators,
4 who are licensed by the Supreme Court of the State of Montana to practice law, whether they are speaking on
5 the Senate floor on legislative matters, speaking to constituents about their positions on legislation, or
6 campaigning for office; and

7 WHEREAS, Proposed Rule 8.4(g)'s expansive scope endeavors to control the speech of legislative staff
8 and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when
9 they are working on legislative matters or testifying about legislation before Legislative Committees; and

10 WHEREAS, Proposed Rule 8.4(g)'s expansive scope endeavors to control the speech of Montanans,
11 who are licensed by the Supreme Court of the State of Montana to practice law, when they speak or write publicly
12 about legislation being considered by the Legislature; and

13 WHEREAS, Proposed Rule 8.4(g) infringes upon and violates the First Amendment Rights, including
14 Freedom of Speech, Free Exercise of Religion and Freedom of Association, of Montanans who are licensed by
15 the Supreme Court of the State of Montana to practice law, by prohibiting social conduct and speech which is
16 protected by the First Amendment; and

17 WHEREAS, in order to fulfill their oath to protect and defend the Constitution of the State of Montana,
18 the Legislators of the State of Montana must ascribe the genuine meaning to the words in the Constitution of the
19 State of Montana, for otherwise it is a meaningless collage of alphabetic symbols and the word "conduct" clearly
20 does not include the concept of "speech"; and

21 WHEREAS, for the reasons set forth in this resolution, adoption of Proposed Rule 8.4(g), by the Supreme
22 Court of the State of Montana, exceeds the authority vested in it by the Constitution for the State of Montana, to
23 regulate the conduct of the members of the bar; and

24 WHEREAS, for the reasons set forth in this resolution, adoption of Proposed Rule 8.4(g), by the Supreme
25 Court for the State of Montana, violates the Constitution for the State of Montana Article III, section 1, by usurping
26 the legislative power of the Legislature for the State of Montana; and

27 WHEREAS, Proposed Rule 8.4(g) will deprive the Legislature of Montana specifically and the State of
28 Montana generally, with candid, thorough, and zealous legal representation and will do so, pursuant to Proposed
29 Rule 8.4(g)'s plain meaning, by imposing a speech code on attorneys and chilling their speech by making it
30 professional misconduct for an attorney to socially or professionally say or do anything, including providing legal

1 advice, which could be construed by any person or activist group as discriminatory; and

2 WHEREAS, Rule 8.4(g) would directly threaten every attorney in the State of Montana, twenty-four hours
3 per day, with the potential loss of their ability to pursue their chosen career, to provide for the needs of their
4 family, and to pursue life, liberty, and the pursuit of happiness, because at any point in time an attorney could be
5 forced to answer for vague complaints, even if the attorney has not participated in historically unprofessional
6 practices, thereby threatening such attorney's reputation, time, resources, and license to practice law; and

7 WHEREAS, Proposed Rule 8.4(g) will deprive Montanans and associations of Montanans, with candid,
8 thorough, and zealous legal representation, and Proposed Rule 8.4(g) will do so pursuant to its plain meaning
9 by imposing a speech code on attorneys and chilling their speech by making it professional misconduct for an
10 attorney to say or do anything, including providing legal advice, which could be construed by any person as
11 discriminatory; and

12 WHEREAS, contrary to the ABA's world view, there is no need in a free civil society, such as exists in
13 Montana, for the cultural shift forced by the proposed rule, and even if such a need did exist, the Supreme Court
14 has no constitutional power to enact legislation of any sort, particularly legislation forcing cultural shift.

15
16 NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE
17 STATE OF MONTANA:

18 (1) That should the Supreme Court of the State of Montana adopt Proposed Rule 8.4(g), it would be an
19 unconstitutional exercise power by that Court.

20 (2) That if Proposed Rule 8.4(g) is adopted by the Supreme Court of the State of Montana, such rule is
21 unconstitutional and thereby null and void because:

22 (a) the Constitution of the State of Montana reserves the power of legislation to the Legislature of
23 Montana;

24 (b) the scope of Proposed Rule 8.4(g) exceeds the Supreme Court's constitutional power to regulate the
25 speech and conduct of attorneys; and

26 (c) Proposed Rule 8.4(g) infringes upon the First Amendment rights of the Citizens of Montana.

27 (3) That the Secretary of State send a copy of this resolution to the President of the United States, the
28 United States Supreme Court, the Speaker of the United State House of Representatives, the Majority Leader
29 of the United States Senate, to each member of the Montana Congressional Delegation, the Montana Supreme
30 Court, the Governor of every State in the Union, the American Bar Association, and the Montana Bar Association.

31 - END -