

## SENATE JOINT RESOLUTION NO. 15

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

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

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

WHEREAS, Proposed Rule of Professional Conduct 8.4(g) provides it is professional misconduct for a  
 lawyer to 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,

1 marital status, or socioeconomic status in conduct related to the practice of law; and

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

7 WHEREAS, the ABA is incorporated as a nonprofit corporation under the laws of the State of Illinois, with  
8 the stated purpose of promoting the uniformity of legislation throughout the United States without regard to the  
9 50 sovereign state constitutions, thus it was created as a national political advocacy group with a social and  
10 political agenda; and

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

16 WHEREAS, the Illinois corporation in question, the ABA, states that it seeks to force a cultural shift in the  
17 legal profession through Proposed Rule 8.4(g), even though the ABA has determined that the conduct sought  
18 to be prohibited is so uncommon as to be nearly non-existent (ABA Standing Committee on Ethics, December  
19 22, 2015) and even though ABA's own Committee on Professional Discipline finds the rule to be unconstitutional,  
20 for a variety of constitutional reasons (ABA Standing Committee on Professional Discipline, March 10, 2016); and

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

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

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

29 WHEREAS, the Constitution for the State of Montana vests the power to enact legislation solely with the  
30 Legislature for the State of Montana, including legislation regarding the conduct Proposed Rule 8.4(g) seeks to

1 regulate; and

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

6 WHEREAS, Proposed Rule 8.4(g) would unlawfully attempt to prohibit attorneys from engaging in  
7 conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper  
8 and efficient operation of the judicial system, therefore the scope of Proposed Rule 8.4(g) exceeds the Supreme  
9 Court's constitutional authority to regulate the conduct of attorneys; and

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

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

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

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

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

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

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

4 WHEREAS, Proposed Rule 8.4(g) will deprive the Legislature of Montana specifically and the State of  
5 Montana generally, with candid, thorough, and zealous legal representation and will do so, pursuant to Proposed  
6 Rule 8.4(g)'s plain meaning, by imposing a speech code on attorneys and chilling their speech by making it  
7 professional misconduct for an attorney to socially or professionally say or do anything, including providing legal  
8 advice, which could be construed by any person or activist group as discriminatory; and

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

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

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

22  
23 NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE  
24 STATE OF MONTANA:

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

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

29 (a) the Constitution of the State of Montana reserves the power of legislation to the Legislature of  
30 Montana;

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

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

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

8 - END -