Public Policy Position
ADM File No. 2023-35: Proposed Amendments of MCJC 3 and MRPC 6.5

The Religious Liberty Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 247 members. The Religious Liberty Law Section is not the State Bar of Michigan and the position expressed herein is that of the Religious Liberty Law Section only and not the State Bar of Michigan. The State Bar's position is to support ADM File No. 2023-35 with further amendments retaining the existing "courtesy and respect" language in both Canon 3 and Rule 6.5 and adding a reference to the Professionalism Principles to the comment on Rule 6.5. The State Bar has authorized the Section to submit its position.

The Religious Liberty Law Section has a public policy decision-making body with 9 members. On June 30, 2025, the Section adopted its position after an electronic discussion and vote. 9 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, 0 members did not vote.

Oppose

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STATE BAR OF MICHIGAN

RELIGIOUS LIBERTY LAW SECTION

Comment of the State Bar of Michigan Religious Liberty Law Section

ADM File No. 2023-35

Before the Michigan Supreme Court

June 30, 2025

The Religious Liberty Law Section is a voluntary membership section of the State Bar of Michigan, comprised of approximately 250 members. The Religious Liberty Law Section is not the State Bar of Michigan and the position expressed herein is that of the Religious Liberty Law Section only. Following a discussion and vote, our Section's public policy decision-making body, a nine-member governing council, unanimously endorse submission of this comment.

Thank you for the opportunity to comment on ADM File No. 2023-35, which proposes amendments to Canon 3 of the Michigan Code of Judicial Conduct and Rule 6.5 of the Michigan Rules of Professional Conduct.

As the section of the State Bar of Michigan dedicated to issues of religious liberty law, we respectfully submit the following concerns regarding the proposed changes. We oppose the amendments and urge the Court to retain the existing rules.

THE PROPOSED AMENDMENTS

Canon 3 would prohibit a judge, in the performance of judicial duties, from using "words" that "manifest bias or prejudice, or engage in harassment" based on characteristics including race, sex, gender identity or expression, religion, and sexual orientation. Rule 6.5 applies the same speech code to attorneys.

THE CURRENT PROVISIONS OF CANON 3 AND RULE 6.5 SATISFACTORILY REGULATE THE CONDUCT OF JUDGES AND LAWYERS

Both the current Canon and Rule governing conduct of attorneys mandate that lawyers and judges treat everyone courteously and respectfully. It is neither appropriate nor, in this instance, constitutional, to fix something that is not broken.

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FIRST AMENDMENT CONCERNS

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech...." U.S. Const. amend I. Amending Canon 3 and Rule 6.5 to regulate speech substantially infringes on such constitutionally protected liberty.

First Amendment Liberties Apply to the Governing Authorities Here

The liberty protected by the First Amendment is applicable to the States via the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (Free Speech).

Underlying Governing Principles

The First Amendment embodies the foundational principle that every individual has the right to determine for themselves which ideas merit expression, reflection, and adherence. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). It envisions a diverse nation where all are free to think and speak as they choose. *303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023). It protects not only "the freedom to think as you will and to speak as you think" but also the right to express views to which the government may disagree—even sharply so. *Id.* at 584, (cleaned up); see also *id.* at 586 (holding that the First Amendment protects views the government deems to be "deeply misguided") (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574 (1995)); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660–61 (2000)).

First Amendment protections are not reserved for favored viewpoints or government-approved motives. They extend equally to "speakers whose motives others may find misinformed or offensive." *Id.* at 595. Critically, "the government may not compel a person to speak its own preferred messages." *Id.* at 586 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 585 U.S. 755, 766 (2018)).

As the Court held in *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), the First Amendment guarantees the right to express any thought free from government censorship. "The essence of this forbidden censorship is content control," which would "completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* (cleaned up).

Free Speech Clause: Content-Based Regulation of Expression Violates the First Amendment

The proposed amendments to Canon 3 and Rule 6.5 impose content-based restrictions on expression by judges and attorneys. As amended, Canon 3 would prohibit a judge, in the

performance of judicial duties, from using "words" that "manifest bias or prejudice, or engage in harassment" based on characteristics including race, sex, gender identity or expression, religion, and sexual orientation. Rule 6.5 likewise applies the same content-based speech regulation to attorneys. This is textbook content-based regulation. A state "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Regulation is content-based "if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Such regulation is presumptively unconstitutional and must satisfy strict scrutiny—the highest form of judicial review. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *Reed*, 576 U.S. at 163; *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992).

The proposed amendments here depend on what is spoken. Because the amendments regulate both the topic and viewpoint of the lawyer and judge, they necessarily are content based. Here, the State proposes rules that prohibit specific viewpoints and topics, thereby regulating not only the content but also the speaker's perspective. This inherently triggers strict scrutiny. Such rules pose "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or [to] manipulate the public debate through coercion rather than persuasion." *Turner*, 512 U.S. at 641; *NIFLA v. Becerra*, 585 U.S. at 771 (2018).

The State attempts to evade First Amendment scrutiny by labeling disfavored speech as "conduct." But the Supreme Court has consistently held that speech does not lose its constitutional protection merely because it is uttered during the performance of professional duties. Attorneys do not forfeit their First Amendment rights as citizens when they enter the legal profession, including when acting in their official capacity. As the Supreme Court held in *NAACP v. Button*, 371 U.S. 415 (1963), "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." Even if a rule appears to target conduct, it triggers heightened scrutiny when the "conduct" is, in essence, expression. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010); *NIFLA*, 585 U.S. at 767. The Court has rejected such mischaracterization of speech as a pretext for censorship. *NAACP v. Button*, 371 U.S. at 439.

By banning certain *words* labeled as manifestations of bias or harassment, the amendments impermissibly restrict expression rooted in religious conscience—while tolerating expression that affirms the State's preferred views on sex and gender. Such selective prohibition is quintessential viewpoint discrimination. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); *R.A.V.*, 505 U.S. at 391; *303 Creative LLC v. Elenis*, 600 U.S. at 588, 603 (2023).

Because viewpoint discrimination is so egregious, states "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,* 515 U.S. at 829. Such speech is not unprotected merely because it is uttered by a professional (including legal counselors and judges). *NIFLA*, 585 U.S. at 767.

Professional speech remains fully protected because it fosters "an uninhibited marketplace of ideas in which truth ultimately prevails." *Id.* at 772 (cleaned up). Michigan does not hold the "unfettered power" to reduce a group's First Amendment liberty "by simply imposing a licensing requirement." *Id.* at 773. Using the Canons or Rules of Professional Conduct to censure and sanction legal professionals significantly impairs those citizens' First Amendment liberties. The U.S. Supreme Court has repeatedly struck down content-based and compelled speech regimes under strict scrutiny. See *Reed*, 576 U.S. at 155 (invalidating sign code based on content); *R.A.V.*, 505 U.S. at 382 (content-based law "presumptively invalid"); *Janus v. AFSCME*, 585 U.S. 878 (2018) (compelled financial support of private speech on public matters violates First Amendment); See also, *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995).

As the U.S. Supreme Court emphasized in *Janus*, the First Amendment is "essential to our democratic form of government, and it furthers the search for truth. Whenever…a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends." *Janus*, 585 U.S. at 893. The proposed amendments, by imposing viewpoint-based content restrictions on lawyers and judges, violate these core First Amendment principles and cannot survive constitutional scrutiny. This speech code should not be adopted.

Free Exercise Clause: Substantially Interfering with the Free Exercise of Religious Conscience Violates the First Amendment

The First Amendment guarantees the free exercise of religion, shielding individuals from government actions that substantially burden their sincerely held beliefs. The Supreme Court has consistently affirmed this principle, striking down laws that penalize religious exercise—whether by denying benefits for Sabbath observance (*Sherbert v. Verner*, 374 U.S. 398 (1963)) or criminalizing parents for religiously motivated withdrawal from public schooling (*Wisconsin v. Yoder*, 406 U.S. 205 (1972)). Such interference triggers the highest level of constitutional scrutiny. Nonetheless, the proposed amendments proscribe religious expression if someone considers that such an exercise of conscience constitutes bias, prejudice, or harassment. As even the ACLU has conceded, though, "one person's religious tenet could be another person's manifestation of bias." American Civil Liberties Union of New Hampshire, Letter to Advisory Committee on Rules, New Hampshire Supreme Court (May 31, 2018).

The proposed amendments substantially burden religious conscience by threatening professional discipline for exercises of conscience grounded in sincerely held beliefs—particularly on matters of sex, gender identity, and sexual orientation. Yet the Supreme Court has made clear that "religious and philosophical objections" to SOGI issues are constitutionally protected. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. at 631 (citing *Obergefell v. Hodges*, 576 U.S. 644, 679–80 (2015)). The First Amendment "ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Id.*

Government may not prescribe orthodoxy—political, religious, or otherwise—nor may it dictate what shall be deemed offensive. *Masterpiece*, 584 U.S. at 638. As the Court explained, the Constitution prohibits government from enacting regulations that are hostile to religious beliefs or that "presuppose the illegitimacy" of those beliefs. *Id.* (citing *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993)). Even a "slight suspicion" of religious animus demands heightened constitutional scrutiny. *Id.*

The proposed amendments effectively require religious professionals to renounce or conceal their religious identity to remain licensed. Such coercion fundamentally conflicts with the Free Exercise Clause. The government may not condition professional status on the abandonment of religious conscience. *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 466 (2017). When government penalizes religious expression, it must survive "the most rigorous" scrutiny. *Lukumi*, 508 U.S. at 546; *Fulton*, 593 U.S. at 541. That standard demands that the government pursue only interests "of the highest order" and use means narrowly tailored to avoid burdening religious practice. *Trinity Lutheran*, 582 U.S. at 466 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628); *Fulton*, 593 U.S. at 541.

To be clear, the Supreme Court has also acknowledged the need to protect all citizens from unjust indignities. As *Masterpiece Cakeshop* emphasized, disputes involving religion and sexual orientation "must be resolved with tolerance, without undue disrespect to sincere religious beliefs," and without subjecting individuals "to indignities when they seek goods and services in an open market." 584 U.S. at 640.

Nevertheless, the Free Exercise Clause does not permit the government to suppress or punish religious viewpoints to serve ideological conformity. If the State can achieve its policy goals without burdening religion, it must do so. *Fulton*, 593 U.S. at 541. The proposed amendments fail this test and therefore violate the First Amendment.

Religious Expression is Doubly Protected under the First Amendment

The United States Supreme Court recently reaffirmed that "…a [n]atural reading" of the First Amendment leads to the conclusion that "the Clauses have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of religious conscience. *Kennedy v. Bremerton School District*, 597 U.S. 507, 523, 532 (2022). In such situations, *Kennedy* reaffirmed the application of strict scrutiny. *Id.* Here the proposed amendments substantially interfere with judges' and counselors' expressive exercise of their religious conscience and identity. When the government substantially interferes with a citizen's religious expression and conscience, that government action must face "strict scrutiny." *Kennedy,* 597 U.S. at 523, 532. These amendments cannot, therefore, survive constitutional scrutiny.

DUE PROCESS CONCERNS

A. The Proposed Amendments are Unconstitutionally Vague

If a person must guess at what a rule means, or if the proscriptions are not clearly defined, then the rule cannot stand. See, e.g., *Grayned v City of Rockford*, 408 US 104 (1972). Indeed, the U.S. and Michigan Constitutions require due process, the essence of which is fair notice of that which the law proscribes. US Const, Am XIV; Const 1963, art 1, § 17. When a law regulating expression lacks clear notice of what it prohibits, it raises special First Amendment concerns due to the chilling effect on free speech. As a result, courts apply a stricter vagueness standard to such laws. *Holder v. Humanitarian Law Project*, 561 U.S. at 19.

Prof. Chemerinsky has observed that "[a] law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted." Chemerinsky, *Constitutional Law – Principles and Policies*, 3rd Ed, pgs. 941-942 (discussing *Kolender v Lawson*, 461 US 352 (1983)). The Michigan Supreme Court has held that a law may be found unconstitutionally vague if it: 1) fails to provide fair notice of what conduct is prohibited; 2) encourages arbitrary and discriminatory enforcement; or 3) is overbroad and impinges on First Amendment freedoms. *People v Lino*, 447 Mich 567, 575-576; 527 NW2d 434 (1994).

The United States Supreme Court further explains the vagueness doctrine this way:

> As generally stated, the void-for-vagueness doctrine requires... sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement…the more important aspect of vagueness doctrine is…the requirement that a legislature establish minimal guidelines to govern law enforcement.

Kolender, 461 US at 357-358 (1983) (internal citations omitted). Because the proposed amendments fail to provide these minimal guidelines, they may permit "a standardless sweep" that allows government authorities "to pursue their personal predilections." *Id.* The U.S. Supreme Court further held that "[w]hen speech is involved, rigorous adherence to those requirements are necessary to ensure that ambiguity does not chill protected speech." *FCC v Fox*, 132 S Ct. 2307, 2317 (2012).

The language of the proposed rules renders them unconstitutionally vague. What does *bias* mean? What does *prejudice* mean? What does *harassment* mean? Lawyers and judges cannot know because they intentionally are not told in the Canon or Rule. Because the ambiguous language prevents notice of what constitutes misconduct, government authorities can arbitrarily define the offense *after* the commission of the expression. The drafters of the proposed amendments provide no standard for a legal professional to reasonably understand what the provisions proscribe. Even the proposed Comment to the Rule concedes this fundamental problem, acknowledging that "it is not possible to formulate a rule that will

clearly divide what is properly challenging from what is impermissibly biased, prejudicial, or harassing." This admission underscores the inherent vagueness of the "standard" and its potential to chill legitimate expression. Moreover, the U.S. Supreme Court has repeatedly made clear that speech does not lose its constitutional protection simply because someone finds it offensive, biased, prejudiced, or even harassing; the First Amendment safeguards even speech that others find upsetting or disturbing. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995); *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989).[1]

B. The Proposed Amendments are Unconstitutionally Overbroad

The key question in assessing whether a law is unconstitutionally overbroad is whether it prohibits a substantial amount of speech that the First and Fourteenth Amendments protect. *Grayned v. City of Rockford*, 408 U.S. 104, 114–15 (1972). Thus, a government action "may be invalidated on its face...if the overbreadth is'ubstantial.'" *Airport Comm'rs v Jews for Jesus*, 482 U.S. 569 (1987); *People v Rapp*, 492 Mich 67, 73 (2012). Because speech does not lose its constitutional protection simply because someone finds it upsetting or disturbing, the proposed amendments encompass an enormous amount of constitutionally protected expression, making them wildly overbroad. The unconstitutional overbreadth of the proposed amendments are evident in their chilling effect on protected speech. Even if no legal professional is ever actually disciplined under the provisions for engaging in constitutionally protected expression, the mere possibility of discipline is enough to deter lawyers from speaking freely. That chilling effect is exactly what the overbreadth doctrine exists to prevent. See *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (explaining that the overbreadth doctrine is designed to guard against the suppression of protected expression). Because the proposed Rule would prohibit a wide range of protected speech and deter lawyers from engaging in constitutionally protected expression, it cannot withstand constitutional scrutiny.

CONCLUSION

For the reasons discussed herein, we oppose the proposed amendments and recommend keeping the current Canon and Rule requiring lawyers and judges to treat everyone with courtesy and respect.

State Bar of Michigan Religious Liberty Law Section

[1] Many other undefined terms in the proposed amendments are likewise unconstitutionally vague. What is the meaning or definition of "*involved in the legal process*"in the context of the proposed rule? What is the meaning or definition of "*gender identity or expression*" in the context of the proposed rule? What is the meaning or definition of "*sexual orientation*" in the context of the proposed rule? What is the meaning or definition of "*religion*"in the context of the proposed rule?