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15-A CONSTITUTIONAL LAW

U.S. CONST. amend. I La. Const. art. V § 5(B)
U.S. CONST. amend. XIV

ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(h) violate the First and Fourteenth Amendments of the United States Constitution.

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Dear Mr. Montgomery:

Our office received your request for an opinion regarding the constitutionality of ABA Model Rule of Professional Conduct 8.4(g) which expands the definition of professional misconduct for lawyers. In August of 2016, the ABA House of Delegates added paragraph (g) to ABA Model Rule 8.4 to provide that 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, marital status or socioeconomic status in conduct 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.

As a result of the ABA's adoption, the Louisiana State Bar Association ("LSBA") formed the Rule 8.4 Subcommittee (the "Subcommittee") following the September 28, 2016 meeting of the LSBA's Rules of Professional Conduct Committee.[1] The Subcommittee has proposed the following subsection [proposed Rule 8.4(h)] be added to Louisiana's current Rule 8.4 to provide that it is professional misconduct for a lawyer to:

> engage in conduct in connection with the practice of law that the lawyer knows or reasonably should know involves discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability. This Rule does not prohibit legitimate advocacy when race, color, religion, age, gender, sexual

[1] LSBA RULES OF PROFESSIONAL CONDUCT COMMITTEE, *Rule 8.4 Subcommittee Report*, (Mar. 24, 2017), http://files.lsba.org/documents/News/LSBANews/RPCSubFinalReport.pdf (last visited Aug. 22, 2017).

> orientation, national origin, marital status, or disability are issues, nor does it limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.[2]

The LSBA Rules of Professional Conduct Committee has not yet taken any position on the Subcommittee's proposed Rule 8.4(h) and instead has chosen to seek written comments from the public regarding the full text of ABA Model Rule 8.4(g).[3] You are concerned that ABA Model Rule 8.4(g) violates the constitutional guarantees of the United States Constitution because the rule restrains the speech and actions of lawyers in a wide variety of areas outside of the courtroom. Due to these restrictions the rule may violate a lawyer's right to freedom of speech, freedom of association, and free exercise of religion. Additionally you are concerned that due to the vague terms included in the rules, they might violate a lawyer's due process rights under the Fourteenth Amendment.

We begin our analysis by noting that pursuant to La. Const. art. V §5(B), the Louisiana Supreme Court has exclusive original jurisdiction of disciplinary proceedings against a member of the bar. "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."[4] However, it is well established that a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.[5] "[B]road rules framed to protect the public and to preserve respect for the administration of justice must not work a significant impairment of 'the value of associational freedoms.'"[6]

First Amendment of the United States Constitution – Freedom of Speech

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

As noted by both the Louisiana Supreme Court and the United States Supreme Court the "liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due

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[2] LSBA RULES OF PROFESSIONAL CONDUCT COMMITTEE, *Rule 8.4 Subcommittee Report- EXECUTIVE SUMMARY* (Mar. 24, 2017), http://files.lsba.org/documents/News/LSBANews/RPCExecutiveSummary.pdf (last visited August 22, 2017).

[3] "LSBA Rules of Professional Conduct Committee Seeking Written Comments on ABA Model Rule 8.4(g)," https://www.lsba.org/NewsArticle.aspx?Article=71844d90-d6ee-4204-acdb-fbd1a8cca05e (last visited August 22, 2017).

[4] *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991).

[5] *NAACP v. Button*, 371 U.S. 415, 439 (1963).

[6] *In re Primus*, 436 U.S. 412, 426 (1978).

Process Clause of the Fourteenth Amendment from invasion by state action."[7] These rights are also guaranteed in our State Constitution.[8] "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."[9] Speech may not be prohibited because it concerns subjects offending our sensibilities.[10] The fact that some in society may find speech offensive is not a sufficient reason for suppressing it.[11] The First Amendment protects, "[a]ll ideas having even the slightest redeeming social importance."[12]

In order to decide whether a regulation restricting speech is constitutional, a court must first determine whether the regulation is content-based or content-neutral so that the appropriate analysis can be applied.[13] Content-neutral speech restrictions are those that are justified without reference to the content of the regulated speech. As a general rule, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."[14] Content-neutral regulations are subject to an intermediate level of scrutiny.[15]

"Content-Based laws include both regulations that target speech based on the viewpoints expressed and regulations that target speech on the basis of subject matter or topic."[16] "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or view expressed are content based."[17] The United States Constitution prohibits restrictions on free speech "because of disapproval of the ideas expressed."[18] "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."[19] "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[20] Content-based regulations are presumptively invalid.[21]

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[7] *In re Warner*, 05-1303 (La. 4/17/09), 21 So.3d 218, 228; *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 779 (1978).
[8] La. Const. art. I, §§ 2, 7, 8, and 9.
[9] *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000).
[10] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002).
[11] *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978); *Reno v. ACLU*, 521 U.S. 844, 874 (1997).
[12] *In re Warner*, 21 So.3d at 241, (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).
[13] *Id.*
[14] *In re Warner*, 21 So.3d at 243,)citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994)).
[15] *Id.*
[16] *In re Warner*, 21 So.3d at 244-45.
[17] *Id.*
[18] *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).
[19] *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).
[20] *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991), (citing *Cohen v. California*, 403 U.S. 15, 24 (1971)).
[21] *R. A. V.*, 505 U.S. at 382, citing *Simon & Schuster, Inc.* 502 U.S. at 115; *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 536 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

The regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid. On judicial review, ABA Model Rule 8.4(g) would be subject to a strict scrutiny analysis. ABA Model Rule 8.4(g) would only be found valid if (1) the regulation serves a compelling governmental interest, and (2) the regulation is narrowly tailored to serve that compelling interest.[22]

The Louisiana Supreme Court examined and applied the strict scrutiny analysis to a content-based regulation in *In Re Warner*. In *Warner* the court considered the constitutionality of La. S. Ct. Rule XIX, §16 which imposed confidentiality requirements on all participants in an attorney disciplinary proceeding. In discussing the first part of the strict scrutiny test, the court stated:

> [T]he first component of the compelling interest analysis requires the government to assert an interest served by the regulation in question, such as the need to address a perceived problem, protect a group from harm, or cure some ill in society. *However, "[m]ere speculation of harm does not constitute a compelling state interest." The state must effectively demonstrate "that the harms it recites are real and that its restriction [of speech] will in fact alleviate them to a material degree*" "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny . . . will vary up or down with the novelty and plausibility of the justification raised."[23]

The Subcommittee report to the LSBA Rules of Professional Conduct Committee notes that the Subcommittee examined matters of lawyer behavior in other jurisdictions and in the State of Louisiana.[24] The group reviewed 57 pages of case summaries prepared and provided by the ABA Center for Professional Responsibility in response to the Subcommittee's request for "any information on disciplinary cases from around the U.S. involving harassment and/or discrimination—and involving some version of ABA model Rule 8.4."

Most of the cases identified by the ABA involved a particular state's version of ABA Model Rule 8.4(d) or (g) which was narrower in scope than ABA Model Rule 8.4(g). No disciplinary cases were found from Louisiana applying Rules 8.4(d) or 8.4(g) to situations involving harassment and/or discrimination. (The Louisiana Rules of Professional Conduct already incorporate Rule 8.4(d) which states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of

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[22] *In re Warner*, 21 So. 3d at 249-50, (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002); *Playboy Entertainment Group*, 529 U.S. at 813; *Burson v. Freeman*, 504 U.S. 191, 198 (1992); *Simon & Schuster*, 502 U.S. at 118; *Boos v. Barry*, 485 U.S. 312, 321-22 (1988); *Consolidated Edison*, 447 U.S. at 540 (government must show regulation is "precisely drawn means" of serving compelling state interest)).

[23] *In re Warner*, 21 So. 3d at 227 (citations omitted) (emphasis added).

[24] LSBA RULES OF PROFESSIONAL CONDUCT COMMITTEE, *Rule 8.4 Subcommittee Report* at p. 1.

justice." Rule 8.4(d) encompasses the majority, if not all, of the conduct proposed Rule 8.4(h) seeks to address).

The Subcommittee's report failed to identify any cases in Louisiana where a lawyer engaged in harassment or discrimination that was prejudicial to the administration of justice (which is currently prohibited by Rule 8.4(d) in the Louisiana Rules of Professional Conduct). Despite the lack of Louisiana cases, the Subcommittee felt that some sort of regulation that would "cover an attorney's actions that might occur outside of the attorney's law practice or involving non-attorneys" was necessary.[25] Since no Louisiana discrimination cases which fell outside the existing Louisiana Rules of Professional Conduct were identified by the Subcommittee, and lacking any further evidence that such a restriction on speech is necessary to cure a real harm, it is unlikely a court would find there is a compelling state interest. Accordingly, it is our opinion that a court would likely find ABA Model Rule 8.4(g) violates a lawyer's freedom of speech under the First Amendment.

First Amendment of the United States Constitution – Overbreadth

The free speech guarantee of the First Amendment "gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere."[26] "The Government may not suppress lawful speech as the means to suppress unlawful speech."[27] The overbreadth doctrine prohibits the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.[28] In the First Amendment context, a law that punishes activities which may be legitimately regulated is impermissibly overbroad if it includes within its prospective reach speech or conduct protected by the First Amendment.[29]

ABA Model Rule 8.4(g) is a content-based regulation which has the effect of suppressing a lawyer's conduct, actions, and speech in an array of areas and settings outside a lawyer's professional practice. Comment 4 to ABA Model Rule 8.4 illustrates the extensive areas to which the rule is intended to apply and states:

> Conduct related to the practice of law includes 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. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting,

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[25] *Id* at pp. 1, 10.
[26] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002).
[27] *Id.* at 255.
[28] *Id.*
[29] *State v. Schirmer*, 94-2631 (La. 11/30/94), 646 So.2d 890, 900-01, (citing *City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)).

> hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

The expansive definition of "conduct related to the practice of law" has countless implications for a lawyer's personal life. For example, a private interaction or conversation between a lawyer and any other person at a social activity sponsored by a law firm or bar association meets this definition. Similarly, a lawyer who is asked his opinions, thoughts, or impressions on legal matters taking place in the news at a social function could also be found to be engaged in conduct related to the practice of law. We note other jurisdictions have observed that this definition constitutes overreach into every attorney's free speech, opinions, and social activities and could encompass a lawyer's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.[30]

The phrase "conduct related to the practice of law" in Comment 4 encompasses many areas and scenarios outside of the courtroom that are entitled to First Amendment protection. It is therefore our opinion that ABA Model Rule 8.4(g) is unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct.

First Amendment of the United States Constitution – Freedom of Association and Free Exercise of Religion

As discussed above, the phrase "conduct related to the practice of law" as defined in Comment 4 to ABA Model Rule 8.4 is overbroad. Comment 4 notes the Rule applies to a lawyer's participation in "business or social activities in connection with the practice of law."[31] Lawyers participate in a wide variety of associations that engage in expressive conduct which could run afoul of ABA Model Rule 8.4(g), including faith-based legal organizations and activist organizations that promote a specific political or social platform.[32]

The United States Supreme Court has held that "implicit 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."[33] A regulation touching the "freedom of association must be narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State."[34] "Protection of the right to expressive association is especially important in preserving political and cultural diversity and in shielding

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[30] Tx. Att'y. Gen. Op. No. KP-0123, Senate Joint Resolution No. 15 of the 2017 Montana Legislature, Op. S.C. Att'y Gen., 2017 WL 1955652.
[31] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS'N 2016).
[32] As noted by the Texas Attorney General, Proposed Rule 8.4(h) could apply to many of the faith-based legal societies such as the Christian Legal Society, Jewish Legal Society, and Muslim Legal Society.
[33] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000), (quoting *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984)).
[34] *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966).

dissident expression from suppression by the majority."[35] "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[36]

ABA Model Rule 8.4(g) could also result in lawyers being punished for practicing their religion. The United States Supreme Court specifically noted in *Obergefell v. Hodges* that "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."[37] However, this type of advocacy appears to be prohibited by ABA Model Rule 8.4(g). Although *Obergefell* specifically envisioned a person who was opposed to same-sex marriage due to their particular religious doctrine, the analysis may be applied to other areas. Under Rule 8.4(g) a lawyer who acts as a legal advisor on the board of their church would be engaging in professional misconduct if they participated in a march against same-sex marriage or taught a class at their religious institution against divorce (*i.e.*, marital status). The United States Supreme Court has explicitly recognized that "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, and to their own deep aspirations."[38] Accordingly, it is our opinion that a court would likely find ABA Model Rule 8.4(g) violates the First Amendment because it can be applied in a manner that unconstitutionally restricts a lawyer's participation and involvement with both faith-based and secular groups that advocate or promote a specific religious, political, or social platform.

Fourteenth Amendment of the United States Constitution – Vagueness

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.[39] The enactment must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited.[40] To avoid arbitrary and discriminatory enforcement the enactment must provide explicit standards for those who apply them.[41] Where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms."[42] This inevitably leads to persons steering "far wider of the 'unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[43]

The terms "harassment" and "discrimination" in ABA Model Rule 8.4(g) are defined by Comment 3 as follows:

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[35] *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).
[36] *Id.*
[37] *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015).
[38] *Id.*
[39] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

> Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

Although sexual harassment clearly is prohibited by this definition and is well defined in jurisprudence, the terms "discrimination" and "harassment" are not. Discrimination is defined by Comment 3 as "harmful verbal or physical conduct that manifests bias or prejudice towards others" and harassment is defined as "derogatory or demeaning verbal or physical conduct." Far from providing explicit standards, the definitions in Comment 3 further complicate and muddle the meanings of the words used in ABA Model Rule 8.4(g) such that a person of common intelligence does not know what is prohibited.

As noted by the United States Supreme Court in examining the word "annoy,"

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning.[44]

For the same reasons we think a court could find the terms "harassment" and "discrimination" as defined by Comment 3 to be unconstitutionally vague and a violation of the Fourteenth Amendment. The Rule does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. As noted by the United State Supreme Court conduct that is harmful, derogatory, or demeaning to some may not be to others and invites arbitrary and discriminatory enforcement.

Subcommittee Proposed Rule 8.4(h)

Proposed Rule 8.4(h) defines professional misconduct as conduct that the "lawyer knows or reasonably should know *involves* discrimination prohibited by law."[45] The word "involve" is defined as, "a. To have as a necessary feature or consequence; entail, b. To relate to or affect or c. To cause to burn; spread to."[46] The use of the word "involve" seems to indicate that an actual violation of a law is not required for a finding of

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[44] *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971).
[45] (emphasis added).
[46] *Involve*, The American Heritage Dictionary of the English Language, 5th ed., https://ahdictionary.com/word/search.html?q=involve (last visited August 24, 2017).

professional misconduct. For instance, if the alleged discrimination is merely related to conduct that is prohibited by law then under Rule 8.4(h) a lawyer would be subject to discipline. It is impossible to ascertain what behavior would be *related to* discrimination prohibited by law. Considering the uncertainty of the standard set forth in 8.4(h) a court would likely find proposed Rule 8.4(h) violates the Fourteenth Amendment due to vagueness since its prohibitions are not clearly defined.

Proposed Rule 8.4(h) also uses the term "conduct in connection with the practice of law" which, as discussed above, includes many areas and scenarios outside of the courtroom that are entitled to First Amendment protection. For the reasons discussed previously, it is our opinion that a court would likely find proposed Rule 8.4(h) is overbroad and a violation of the First Amendment.

We also note the "legitimate advocacy" exception of proposed Rule 8.4(h) is narrower than the exception in ABA Model Rule 8.4(g). The proposed rule only excepts legitimate advocacy when "race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability are issues." No guidance is provided as to when something would be considered an "issue" and it is unclear whether something must be directly related to the cause of action of the case or merely a component of an argument presented for a court's consideration. Moreover, it is unclear whether the exception applies only once a case has been filed or whether it is equally applicable to such actives such as writing a demand letter, negotiating a contract, or participating in mediation. The inherent vagueness of the exception has the potential to discourage lawyers from making legitimate arguments on behalf of their clients for fear of violating the rule.

The existing Rules of Professional Conduct and Louisiana laws against discrimination address the perceived problems identified in the Subcommittee's report. There has been no demonstration that there is a need for proposed Rule 8.4(h) in Louisiana. Rule 8.4(d) addresses actions of lawyers which are prejudicial to the administration of justice and includes actions which are prejudicial to the administration of justice because they are discriminatory. This is clearly evident in the Louisiana Supreme Court's rulings on 8.4(d) misconduct. The Louisiana Supreme Court has stated that "[t]he proscription against conduct that is prejudicial to the administration of justice most often applies to litigation-related misconduct. *However, La. St. Bar art. XVI, R. 8.4(d) also reaches conduct that is uncivil, undignified, or unprofessional, regardless of whether it is directly connected to a legal proceeding.*"[47]

In conclusion, it is the opinion of this office that a court would likely find ABA Model Rule 8.4(g) unconstitutional under the First and Fourteenth Amendments. Although proposed Rule 8.4(h) seeks to avoid many of the constitutional infirmities of the Model Rule, the proposed rule does not clearly define what type of behavior is prohibited and suffers from the same vagueness and overbreadth issues as ABA Model Rule 8.4(g).

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[47] *In re Downing*, 05-1553 (La. 05/17/06), 930 So.2d 897, 898 (emphasis added).

We hope that this opinion has adequately addressed the questions you have submitted. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

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