

May 2021

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25 Beaver Street, 11th Fl.
New York, New York 10004

By email (rulecomments@nycourts.gov)

RE: Comment Letter Opposing Adoption of ABA Model Rule 8.4(g) or Similar Rule

Dear Ms. Millett:

I respectfully request that the New York State Unified Court System reject adoption of ABA Model Rule 8.4(g). After nearly five years of deliberations in many states across the country, only two states, Vermont and New Mexico, have fully adopted this highly flawed rule. In contrast, over a dozen states have concluded, after careful study, that ABA Model Rule 8.4(g) is both unconstitutional and unworkable. The prudent course is to wait and see whether other states choose to experiment with ABA Model Rule 8.4(g) and the practical effect of that experiment on the lawyers in those states.

This is particularly true because a federal district court recently struck down Pennsylvania's Rule 8.4(g), which was derived from ABA Model Rule 8.4(g). In *Greenberg v. Haggerty*, the court found that the rule would "hang over Pennsylvania attorneys like the sword of Damocles." The court further warned that "[e]ven if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into" an attorney's "words, speeches, notes, and written materials" would unconstitutionally chill attorneys' speech.¹

A number of scholars have characterized ABA Model Rule 8.4(g) as a speech code for lawyers.² The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.³ Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, "[t]he ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment."⁴ Professor Michael McGinniss, Dean of the

¹ *Greenberg v. Haggerty*, 491 F. Supp. 3d 12, 24-25 (E.D. Pa. 2021).

² Eugene Volokh, A Nationwide Speech Code for Lawyers?, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

³ Ronald D. Rotunda, The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought, The Heritage Foundation (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>.

⁴ Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017, "§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech" & "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" in "§ 8.4-2 Categories of Disciplinable Conduct."

University of North Dakota School of Law, raised similar concerns in his article analyzing ABA Model Rule 8.4(g).⁵

Two Arizona practitioners thoroughly examined ABA Model Rule 8.4(g) and concluded that it “is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities.”⁶ They recommend that “jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all.” And they conclude that “the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected.”⁷

Since the ABA adopted Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued three important free speech decisions that demonstrate its unconstitutionality. First, under the Court’s analysis in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), ABA Model Rule 8.4(g) is an unconstitutional content-based restriction on lawyers’ speech. In *Becerra*, the Supreme Court held that state restrictions on “professional speech” are presumptively unconstitutional and subject to strict scrutiny. Second, under the Court’s analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), ABA Model Rule 8.4(g) is an unconstitutional viewpoint-based restriction on lawyers’ speech that cannot survive strict scrutiny. Third, the Court repeated its *Matal* analysis in *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).

The *Greenberg* decision followed these three decisions in its ruling striking down Pennsylvania’s Rule 8.4(g).

New York attorneys should not be subject to an unconstitutional rule. I respectfully request that the Court reject ABA Model Rule 8.4(g). I thank the Court for considering these comments.

Yours truly,

⁵ Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol’y 173, 173 (2019).

⁶ Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201, 257 (2017).

⁷ *Id.* at 204.