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The Institute for Christian Legal Studies (ICLS), a Cooperative Ministry of Regent University School of Law and Christian Legal Society.

The Mission of ICLS is to train and encourage Christian law students, law professors, pre-law advisors, and practicing lawyers to seek and study Biblical truth, including the natural law tradition, as it relates to law and legal institutions, and to encourage them in their spiritual formation and growth, their compassionate outreach to the poor and needy, and the integration of Christian faith and practice with their study, teaching, and practice of law.

STATEMENT OF PURPOSE

The mission of the *Journal of Christian Legal Thought* is to equip and encourage legal professionals to seek and study biblical truth as it relates to law, the practice of law, and legal institutions.

Theological reflection on the law, a lawyer's work, and legal institutions is central to a lawyer's calling; therefore, all Christian lawyers and law students have an obligation to consider the nature and purpose of human law, its sources and development, and its relationship to the revealed will of God, as well as the practical implications of the Christian faith for their daily work. The Journal exists to help practicing lawyers, law students, judges, and legal scholars engage in this theological and practical reflection, both as a professional community and as individuals.

The Journal seeks, first, to provide practitioners and students a vehicle through which to engage Christian legal scholarship that will enhance this reflection as it relates to their daily work, and, second, to provide legal scholars a peer-reviewed medium through which to explore the law in light of Scripture, under the broad influence of the doctrines and creeds of the Christian faith, and on the shoulders of the communion of saints across the ages.

Given the depth and sophistication of so much of the best Christian legal scholarship today, the Journal recognizes that sometimes these two purposes will be at odds. While the *Journal of Christian Legal Thought* will maintain a relatively consistent point of contact with the concerns of practitioners, it will also seek to engage intra-scholarly debates, welcome inter-disciplinary scholarship, and encourage innovative scholarly theological debate. The Journal seeks to be a forum where complex issues may be discussed and debated.

EDITORIAL POLICY

The Journal seeks original scholarly articles addressing the integration of the Christian faith and legal study or practice, broadly understood, including the influence of Christianity on law, the relationship between law and Christianity, and the role of faith in the lawyer's work. Articles should reflect a Christian perspective and consider Scripture an authoritative source of revealed truth. Protestant, Roman Catholic, and Orthodox perspectives are welcome as within the broad stream of Christianity.

However, articles and essays do not necessarily reflect the views of the Institute for Christian Legal Studies, Christian Legal Society, Regent University School of Law, or other sponsoring institutions or individuals.

To submit articles or suggestions for the Journal, send a query or suggestion to Mike Schutt at mschutt@clsnet.org.

LIVING SMALL IN THE LAW

By Michael P. Schutt, Editor in Chief

> [Y]ou … yourselves have been taught by God to love one another. …But we urge you, brothers, to do this more and more, and to aspire to live quietly, and to mind your own affairs, and to work with your hands, as we instructed you, so that you may walk properly before outsiders and be dependent on no one.[1]

In a beautiful passage from Marilyn Robinson's *Gilead*, the Reverend John Ames meditates, near the end of his life, on mortality:

> I have been thinking about existence lately… I know this is all mere apparition compared to what awaits us, but it is only lovelier for that. There is a human beauty in it. And I can't believe that, when we have all been changed and put on incorruptibility, we will forget our fantastic condition of mortality and impermanence, the great bright dream of procreating and perishing that meant the whole world to us. In eternity this world will be Troy, I believe, and all that has passed here will be the epic of the universe, the ballad they sing in the streets.[2]

What a thought! That *this* life in *this* world could be "the epic of the universe, the ballad they sing in the streets" of heaven is both challenging and comforting. It rescues us from a neo-Gnosticism that declares this world to be evil and checks our longing to just "fly away, o glory." It brings encouragement to those in despair over the state of politics or public discourse or justice. It is a wonderful hope expressed in a lovely passage.

Yet there is also something improperly seductive about living an "epic."

For example, we are sometimes reminded that we are to be "wild at heart" or "radical." We want to "leave a mark" that is "hard to erase." We hope to "change the world" in our mist-short lifetimes. Too often, when we dream of our legacy as lawyers or parents or humans, we bemoan or regret the ordinary: the regular client, the above-average spouse and kids, the short-term mission, the small-scale life.

But the "fantastic" epic of which Reverend Ames speaks in *Gilead* is centered on ordinary life. The scenes of this epic are played out in the nursery, the parlor, the hearth, the office, the board room, the chapel, and the funeral home.

It turns out that the epic battle is for marital fidelity, family discipline, basic stewardship, and personal humility.

G.K. Chesterton was onto a variation of this idea in *Heretics*. Though he writes of the great "romance," rather than an "epic," he notes the attraction—the romance—of "large empires and large ideas":

> It is not fashionable to say much nowadays of the advantages of the small community. We are told that we must go in for large empires and large ideas. There is one advantage, however, in the small state, the city, or the village, which only the willfully blind can overlook. The man who lives in a small community lives in a much larger world. He knows much more of the fierce varieties and uncompromising divergences of men. The reason is obvious. In a large community we can choose our companions. In a small community our companions are chosen for us.[3]

Chesterton argues that it is not travel or commerce or politics that broadens our horizons; it is not escaping our neighborhood to make our fortune that opens up our world. It is living in a neighborhood and encountering the ordinary men and women on our street. It is living in a family and engaging the ideas, idiosyncrasies, and foibles on display day to day. The epic plain of battle is not in celebrity or movements or issues; it is the ordinary family.

Chesterton speaks of the particularly modern seduction that beckons us to leave the street where we live to

[1] 1 Thessalonians 4:9-12 (ESV).
[2] Marilyn Robinson, Gilead (2004).
[3] G.K. Chesterton, Heretics, Chapter 14 (1905).

pursue our romantic ideas and to encounter the wide world. Yet it is precisely *leaving* that *narrows* our world, bringing us to a place where we choose our friends based on our own prejudices and sympathies, rather than being forced to deal with the folks we are stuck with. The Bible word for the folks we are "stuck with," of course, is *neighbors*.

If life is the great romance, the sprawling epic, the grand story that the poets and artists tell us it is, perhaps our roles are merely bit parts. Or perhaps it is the other way around, as Chesteron and Robinson might suggest. Maybe the real life Hektor or Roland or Gawain is the man faithful to his wife for 40 years, the child honoring and caring for her parents in their old age, the woman serving week by week the widow who lives next door. Perhaps the epic heroes are the couples who stay married through thick and thin, the single moms who keep two jobs and care for their children, the workers who daily serve customers in small ways, the lawyers who quietly protect the assets of small businesses.

What seem to us small roles are in fact the heroic ones. They are heroic because they cause us to interact with those frightful pinnacles of God's creation—human beings:

> We make our friends; we make our enemies; but God makes our next-door neighbour. Hence he comes to us clad in all the careless terrors of nature; he is as strange as the stars, as reckless and indifferent as the rain. He is Man, the most terrible of the beasts. That is why the old religions and the old scriptural language showed so sharp a wisdom when they spoke, not of one's duty towards humanity, but one's duty towards one's neighbour.[4]

If any of this is close to the truth, we ought to seek to live quiet, ordinary lives in light of the great commandment to love those with whom we are stuck. The partners we have, the siblings God gave us, the neighbors on our street, the people that clean our offices, the folks we see every Sunday in church, our spouses, our children, our employers and employees.

Our dream of the epic life can be recalibrated by God's grace to chase only what is before us. The beauty of this is that it will keep us from distraction. So often we miss those standing right in our path who really need us, while we search in the trees or the sky or the future for those in hypothetical need.

John Calvin spoke of God's grace in the doctrine of vocation as a solution to this problem:

> He knows the boiling restlessness of the human mind, the fickleness with which it is borne hither and thither, its eagerness to hold opposites at one time in its grasp, its ambition. Therefore, lest all things should be thrown into confusion by our folly and rashness, he has assigned distinct duties to each in the different modes of life. And that no one may presume to overstep his proper limits, he has distinguished the different modes of life by the name of callings. Every man's mode of life, therefore, is a kind of station assigned him by the Lord, that he may not be always driven about at random.[5]

In our quest for the grail, for the epic life, we are often tossed hither and thither, driven about at random. As we attend to our call—and our Caller—we do not presume to overstep our limits, but we seek to love our neighbors as we find them, whether in our homes, our neighborhoods, or our law offices.

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[4] *Id.*

[5] John Calvin, 3 Institutes 10.6.

THE CHRISTIAN THEOLOGY OF LAW: AN INTRODUCTION

By Eric Enlow, Dean, Handong International School of Law

> Our light and momentary troubles are achieving for us an eternal glory that far outweighs them all. So we fix our eyes not on what is seen, but on what is unseen. For what is seen is temporary, but what is unseen is eternal.
>
> —2 Corinthians 4:17-8

> Let the most blessed David supply my exordium [introduction], or rather let Him Who spoke in David, and even now yet speaks through him. For indeed the very best order of beginning every speech and action, is to begin from God, and to end in God.
>
> —Gregory Nazianzus, *Exordium*, Oration 2

This introduction discusses introduction itself. What is the role of the prologue and the essence of the exordium? For what are forewords, insinuations, and proems? This is an unusual subject for an introduction, requiring a prefatory apology. Here it is: the classical rhetoricians, who wrote a great deal on the nature of introductions, recognized that an introduction can rightly apologize for a composition's unusual form. On the other hand, introductions ought mainly to prepare the audience for the argument. The introduction exists to serve the argument by attracting attention to it, winning goodwill, preparing the hearers to understand. But my argument here—which is, that considering the Christ-given glory to come, law is introductory—will perhaps seem buried in this long introductory discussion of introductions. Yet such a danger must be realized to prepare the argument. For contrary to the precepts of classical rhetoric, according to which introduction may not argue, this introduction is itself an analogy central to my main argument. It doesn't prepare you for the argument, it is the argument. In that sense, it's a bad introduction. But if you find this overdevelopment of the introduction destructive, it is a really good analogy for the overdevelopment and misestimation of the law. Those who approach law wrongly, as the logos rather than the prologue, make the same mistake as this overdeveloped introduction. It is an essential part of my argument to demonstrate that overdevelopment of the introduction can distract from the argument, as overdevelopment of the law distracts from Christ, or as focus on our "light and momentary troubles" distracts from our "eternal glory" in Him.

Rather than making a point critical to the speech, a good introduction to a speech, unlike this prologue, readies the audience for the reception of the speech's argument, its logos. As Quintilian says, the proem has "no other object but to prepare the hearer … by securing his good will, his attention, his desire for further information."[1] The speaker also uses the introduction to develop "ethos," credibility, on the classical model to render the audience teachable or docile, to remove prejudice; one reaches out to the audience and gives or demonstrates good to them, builds authority and interest.

Now this is necessary because, as classical rhetoricians observed about their juries and God about mankind, the audience is bad; it lacks the immediate capacity to engage the *logos*. Audiences, whether gathered in courts or legislatures or for other purposes in the agora, do not perform their public duties. They have prejudices, laziness, disinterest in the truth. In this sense, the preface is a pedagogue, providing preliminary discipline against an audience's childish vices—disdain for duty, distraction, disinterest—but not offering mature instruction, at least not until the audience is ready. If this sounds familiar, it is because this discussion of the introduction parallels the account of the purpose of the law in the Scriptures. Mankind, like an undisciplined and inattentive audience, lacks the character necessary to receive the Logos; law prepares the audience in the same way that an introduction does by bringing Mankind to a sense of its need.

As we motivate children, the introduction uses threats and rewards, in addition to simple instruction. With rhetorical pleasures and easy symbols, the introduction offers rewards for attention, threatens loss of

[1] Quintilian, Institutes 4.5.

important truth in the case of inattention, and recalls audience members to their own real identity, that is, to their duty of fairness and responsibility to listen. It also conveys a little something about what is to come, but only suggestively, only with gestures and outlines, intimations and insinuations; it helps build context and supplies the *res gestae* for the narration and confirmation. The introduction often tells immediately agreeable stories; it makes promises to encourage hope in the argument to come. All these show the speaker in a good light to build up faith. Under the classical theory, the speaker points to his own "ethos," his own character, how he has labored for the speech, and the proofs of his own fairness and benevolence, in order to draw out the same character in his audience. Thus, God introduces the Decalogue by reminding the Israelites that He "brought them out of the land of slavery."[2] The Law itself is carefully introduced in Genesis by the story of the creation of the world from nothing, the most gracious gift imaginable.

But unless the argument is about the speaker himself, the cultivation of the ethos of the speaker is not at all the goal of the introduction. The *telos* is something qualitatively and transcendentally different. The future reception of the argument is the goal, even though rhetorical beauty, the hope for the truth, and the present faith in the speaker are goods, too. Even God's Word is not simply a revelation of theological truth in the abstract, but of a powerful truth that seeks to transform the hearts of men by the indictment of sin and, with the invitation of the Gospel, to bring men into a relationship of faith with God. The introduction, no matter how perfect, indeed, especially if it is perfect, is not structured solely according to present goods but the future goods needed for the argument. This is why the orator can dispense with classical introduction for some audiences, like this one, that are already disciplined, mature, and interested in the subject—here the relation between theology and law.

Even God's Word is not simply a revelation of theological truth in the abstract, but of a powerful truth that seeks to transform the hearts of men by the indictment of sin and, with the invitation of the Gospel, to bring men into a relationship of faith with God.

But even where introductions are needed, introductions, even great introductions to successful arguments, are little praised after the whole speech is delivered. (Though sometimes it may be referenced in order to understand the speaker's intent.) The prologue's good, its necessity for the audience, is limited to its time. It is necessary but also necessarily superseded, like a stage of life. The bud has its present charms, charms that anticipate those of the flower, but it is sterile, unlike the flower, which in turn cannot carry a seed like the fruit. But the bud is a stage that must be passed through in order to reach the flower, the flower to reach the fruit. Whatever goods the bud presents cannot be understood properly if one forgets that it is a stage toward the flower and the fruit. The bud, though charming and suggesting the flower, is misunderstood if it is studied in itself.

Similarly, the child cannot do the work of a man—though he can play games that suggest work—but the growth and education and play of the child must precede the work of the man. The child's game has its charms and so do childish attitudes. But they are misunderstood if we seek to value them without reference to maturity. They are charming only as a stage in relation to maturity. So, too, the introduction must be passed through before the *logos* of the argument itself can be embraced. The speaker must establish his *ethos*, make his introduction, before displaying his *logos*, stating his argument (and he must make his argument before summoning the concluding *pathos*, driving the argument home into the will of his audience according to the typology of classical rhetoric). But once the virtues of the argument are embraced, then the introduction itself is no longer of use.

Why should the introduction be forgotten and go unpraised? Suppose a speech begins with a humorous anecdote. The interest attracted with the engaging story is completely fulfilled with the acceptance of the argument. If the argument cannot sustain the interest that one initiated by the introduction, then the speech fails. But if the argument can sustain the good will of the audience, it embodies all the *ethos* that was created by the introduction but now sustains it through the very experience of the merits of the promised *logos* itself. The body of the argument once understood by the audience now sustains and directs the interest and understanding of the audience. The introductory promises about what the argument will do, the threats about important truths

[2] Exodus 20:2.

that will be lost if attention is not paid, the inducements of pleasing phrases are no longer necessary, once the audience accepts the argument. The pedagogic function of the introduction is unnecessary once the audience has come to see the value of the argument itself. The power of the argument does all the work that the promises or threats of the introduction once did. If an audience agrees with a speech or a theoretical audience sees the aim of a demonstration, they find that the purpose of the introduction is fulfilled in the success of the narration and confirmation, which is its *telos*.

The law is introduction, engaging us in a moving discussion about what is right and wrong, just and unjust. We must take it very, very seriously if it is to do its introductory work.

All this overdeveloped introduction to my argument about law and theology is my argument. For surely it shows that an introduction misunderstood and mis-developed can obscure an argument. If you find that this introduction is overwhelming the argument, isn't this a danger for our own approach to law? For what if law is introductory? What if *sub specie aeternitatis*, it is a child or a bud, not a man or flower? Then, it is meant to be regarded and valued with an eye toward what will come. It is a story meant to engage the interest of an audience otherwise too distracted from its real interests, not to be taken as the purpose of the speech. What if law is a stage that must be passed through and be superseded? Then, we must be careful in working it out and understanding it to limit and shape it to what is to come, rather than what is now.

If law is introductory, our theories of law must distinguish and mark out its introductory character, both as an explanation of its failure not to do the principal work reserved for the argument and for its justification, which will be based wholly on what comes next. The basic Christian critique of non-theological jurisprudence—which is not to say atheistic jurisprudence, which suffers from bad theology rather than no theology—is that law really might be introductory. Whether this is so can only be determined by one who knows whether this age is a stage toward something eternal, or, to put it another non-temporal way, whether the ordinary is ordered to something transcendent, God. This requires theology. Law can only be praised, criticized, or evaluated properly when its position in the metaphysical and eschatological order is properly understood. If, as Christians understand, everything is is to be "recapitulated" or brought "together under one head" in Christ when "the time will have reached their fulfillment," then our civil laws must be understood as something introductory to that fulfillment.[3] If "thrones, powers, rulers, authorities" were created, by Christ and for Christ, as part of God's plan to reconcile all things to Himself in peace by Christ's blood shed on the Cross, then our law must be understood as something introductory to Christ.[4] On a Christian account, since we believe all these things, our civil laws are to be understood and praised ultimately insofar as it is taken as an introductory symbol of something else.

But is it possible that law—I mean here a real functioning, practical, living, positive law of a real nation—is it possible that such a law could be merely introductory? Certainly. In fact, it is a central tenet of Christianity that law can be introductory, indeed, that the very best law may be introductory. This is precisely what Christ taught about the divine positive law summed up in God's own voice at Sinai. To call it "introductory" is no deprecation of the divine law; on the contrary, it is its praise that it is a perfect introduction by which the sinful audience of man was prepared, and still is prepared, for Christ. One of the reasons that the divine law given to the Jews was a perfect law is that the law itself taught that it was introductory.[5] The law teaches the service at a sanctuary that is a copy and shadow of what is in heaven. This is why Moses was warned when he was about to build the tabernacle: "See to it that you make everything according to the pattern shown you on the mountain."[6] The pattern prepares now but is only penultimate. The ultimate is what the law leads us into, what it introduces, for *ducere* is to lead. If we anthropomorphize the law, this introduction is a pedagogue, one who leads a child.[7]

[3] Ephesians 1:9-10

[4] Colossians 1:16-20

[5] *See, e.g.*, Hebrews 8:5.

[6] Exodus 26:30.

[7] Galatians 3:23-24 "But before faith came, we were kept in custody under the law, being shut up to the faith which was later to be revealed. Therefore the Law has become our tutor [pedagogue] to lead us to Christ, that we may be justified by faith.

Is it really possible that our law is just an introduction to something else? The opposite view would be that it is impossible that there is something greater than our law, impossible that law is not meaningful in itself, wrong that it could refer to a value other than itself. If this is true, experience tells us that this is sad news indeed. Admittedly, among the positivists, this is sometimes claimed for law methodologically, *i.e.*, that law should not refer to anything outside itself. But as the inclusive positivists show, this does not mean very much because law can include within itself anything, like substantive morality, by reference. And, this was a common view of Roman and medieval jurisprudence. Specifically, that law included not only the moral knowledge of man, but also the theological knowledge of God. Or, in Leibniz' view, that jurisprudence was a way that we know God as theology was a way of learning the law of the Kingdom of God. And this makes sense if law in its broadest sense is an introduction to the principles of kingdoms, and God is revealed to us in the good news of the kingdom of God.

The law *is* introduction, engaging us in a moving discussion about what is right and wrong, just and unjust. We must take it very, very seriously if it is to do its introductory work. Judges must judge; judgments paid; sentences served. Otherwise, we will never be drawn to a sense of ourselves. The goods of law must be real, or we will never be drawn to a sense of God. But as we discover, even when the law is best pursued, it lacks the *logos* to fulfill all the goods that it puts into view, the fulfillment that Christians know comes through Christ. The law at its worst leaves us cynical and uninterested in the divine. This is the great indictment of U.S. law today. The law at its best fills us with a hunger for righteousness and justice that we recognize cannot be fulfilled within the ambit of human ingenuity and energy. At this point, we are prepared for the Logos, the argument of Christ's offer of Himself to us. The summation or conclusion of this argument is the *pathos* of Christ, the Cross and the Resurrection, by which all is recapitulated, the creation, the law, everything into the inauguration of the kingdom of God, by which our orientation to the law is no longer in the authority of the law itself but by faith in Christ.

Is it possible that our law is just an introduction to something else? In moral and political terms, this is equivalent to asking whether the order of our laws either encompasses the whole of life or is unrelated to what is of fundamental value. The Christian answer is that there is a unity between what is really valuable in life—faithfulness and mercy and justice—and the law. But that the

great value of life is not completed and realized now. We do not claim that law and politics are devoid of value, but that its value is derivative from the value of what is eternal, that they are introductory. One does not deny the value of the introduction of a speech by saying that it is wholly subservient to the argument. One praises the introduction rightly only by saying that after it, we paid more attention to the argument to come.

Law is a substantial symbol, something in itself, but also something for another. That is the very nature of an introduction. It is entertaining like allegory while it shows the referent allegorized to an audience who is perhaps not fully comprehending, but more rapt by the symbols' shape than remembering what is symbolized. It is a pedagogue or educator—supervising developing children to protect them from immediate physical harms—while preparing them for a different kind of life where they will protect themselves and live according to an entirely different principle. This is not to say that law or the bud or the child lacks any present value, only that its present value is of a different order than the value for which it prepares. And, this is not true for law alone. Yes, Christians should approach law differently once they are aware of its introductory character. But as Paul said in 2 Corinthians 4:17-8, we are doing this in all things, not ignoring our light and momentary troubles, but recognizing that their true glorious meaning can be determined only in relation to what is to come, in the yet unseen but eternal glory of Christ.

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SPEAKING OF RELIGIOUS FREEDOM

Proposed Pennsylvania Rule of Professional Conduct 8.4(g)

By Kimberlee Wood Colby

Editor's note: The Disciplinary Board of the Pennsylvania Supreme Court is currently deciding whether to adopt revisions to their ethics code by adopting Proposed Rule 8.4(g), modeled on ABA Model Rule 8.4(g). CLS has stood against ABA Model Rule 8.4(g), and the Pennsylvania proposal is particularly dangerous, because of its breadth. Christian Legal Society's Center for Law & Religious Freedom has filed comments in every state where significant amendments are being considered. The article below is based on the CLS letter to the Pennsylvania Disciplinary Board. The letter is helpful in its description of the dangers of the ABA's model rule and as an update on the status of the debate across the nation.

Christian Legal Society filed a comment letter with the Board on February 3, 2017, regarding proposed changes to the Pennsylvania Rules of Professional Conduct that would have adopted a modified version of ABA Model Rule 8.4(g). After review, the Board astutely "determined not to move forward" with that proposal.[1] Unfortunately, the Board now has before it another version of ABA Model Rule 8.4(g) that would impose on Pennsylvania attorneys a speech code just as unconstitutional and unwise as the deeply flawed and highly criticized ABA Model Rule 8.4(g).

This letter explains why the current proposal is unconstitutional in light of the United States Supreme Court's decision last month in *National Institute of Family and Life Advocates v. Becerra*,[2] which held that government restrictions on professionals' speech—including lawyers' professional speech—are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, presumptively unconstitutional. The proposed language is also unconstitutional under the 2017 United States Supreme Court decision in *Matal v. Tam*.[3] There a unanimous Court held that a section of a preeminent federal statute was facially unconstitutional because it allowed government officials to restrict "derogatory" speech.[4]

In addition to being unconstitutional, the current proposal is unwise. Pennsylvania attorneys should not be made the subjects of the novel experiment that Proposed Rule 8.4(g) represents. This Board has the prudent option of waiting to see what other states decide to do. Several states already have rejected, or abandoned efforts to adopt, ABA Model Rule 8.4(g). Over the past 18 months, official entities in Nevada, Tennessee, Illinois, Montana, North Dakota, Texas, South Carolina, and Louisiana have weighed ABA Model Rule 8.4(g) and found it seriously wanting. Only the Vermont Supreme Court has adopted it, and no empirical evidence yet exists as to its practical ramifications for Vermont attorneys. This Board should wait to see whether other states adopt ABA Model Rule 8.4(g), and then observe the rule's practical consequences for attorneys in those states.

A number of scholars have correctly characterized ABA Model Rule 8.4(g) as a speech code for lawyers. For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has summarized his concerns about ABA Model

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1 The Pennsylvania Bulletin, *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Regarding Misconduct*, 45 Pa. B. 2936 (May 19, 2018) ("Following extensive review and discussion of the numerous comments and suggestions received in response to the published proposal, the Board determined not to move forward with the proposed amendments, and renewed its study of the issue."), https://www.pabulletin.com/secure/data/vol48/48-20/773.html (last visited July 14, 2018).

2 *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2018 WL 3116336 (U.S. June 26, 2018) ("*NIFLA*").

3 *Matal v. Tam*, 137 S. Ct. 1744 (2017).

4 *Id.* at 1747; *see also, id.* at 1766 (unconstitutional to suppress speech that "demeans or offends") (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).

Rule 8.4(g) and its impact on attorneys' speech in a two-minute video released by the Federalist Society.[5]

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.[6] 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."[7] Professor Josh Blackman has written a respected scholarly response to the primary arguments made by the rule's proponents.[8]

In a thoughtful examination of the rule's legislative history, practitioners Andrew Halaby and Brianna Long conclude that ABA Model Rule 8.4(g) "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."[9] 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."[10] In their view, "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."[11]

While there are many areas of concern with the proposed rule, the most troubling is the likelihood that it will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues. Because lawyers often are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on such issues should be rejected because it constitutes a serious threat to freedom of speech, free exercise of religion, and freedom of political belief.

Quite simply, Proposed Rule 8.4(g) would have been denounced by the lawyers who gathered in Philadelphia from 1775 to 1787 to write the Declaration of Independence and the Constitution. Those lawyers valued their freedom to speak disfavored political views above their "lives, fortunes, and sacred honor." A speech code, like Proposed Rule 8.4(g), breaks faith with those bold lawyers. We respectfully urge this Board "to preserve and teach the necessity of freedom of speech for the generations to come"[12] and reject Proposed Rule 8.4(g).

1. PROPOSED RULE 8.4(G) IS FACIALLY UNCONSTITUTIONAL UNDER THE UNITED STATES SUPREME COURT'S RECENT RULING IN *NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES V. BECERRA*.

The ink has not yet dried on the United States Supreme Court's June 26, 2018, ruling in *National Institute of*

[5] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA (last visited May 1, 2018). Professor Volokh expanded on the many problems of ABA Model Rule 8.4(g) in a debate with a proponent of Model Rule 8.4(g) at the Federalist Society National Student Symposium in March 2017. *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=b074xW5kvB8&t=50s (last visited May 1, 2018).

[6] 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 (last visited May 1, 2018). Professor Rotunda and Texas Attorney General Ken Paxton debated two leading proponents of ABA Model Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention in a panel on *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, The Federalist Society (Nov. 20, 2017), https://www.youtube.com/watch?v=V6rDPjqBcQg (last visited May 1, 2018).

[7] Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017 [hereinafter "Rotunda & Dzienkowski"], "§ 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."

[8] Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law,"* 30 Georgetown Journal of Legal Ethics 241 (2017).

[9] 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) (hereinafter "Halaby & Long").

[10] *Id.*

[11] *Id.* at 204.

[12] *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

Family and Life Advocates v. Becerra ("*NIFLA*"). For that reason alone, the Board should pause to consider a new, directly applicable Supreme Court decision that was handed down after the Board announced Proposed Rule 8.4(g). The *NIFLA* decision makes clear that both Proposed Rule 8.4(g) and ABA Model Rule 8.4(g) are facially unconstitutional.

a. Proposed Rule 8.4(g) threatens to punish broad swaths of speech. Proposed Rule 8.4(g) expressly regulates lawyers' speech. It is rare for a regulation to so forthrightly proclaim that it is regulating speech, and even rarer for such a regulation or law to survive the strict scrutiny that is triggered by explicit state regulation of "speech." Proposed Rule 8.4(g) specifically targets speech, expressly punishing lawyers for what they say. Its broad scope will expose lawyers to possible discipline for telling lawyer jokes ("attempted humor based upon stereotypes") and for political speech (manifesting bias based on "political affiliation").

As the Supreme Court reaffirmed in NIFLA, *a government regulation that targets speech must survive strict scrutiny, which closely examines whether the regulation is narrowly tailored to achieve a compelling government interest.*

As the Supreme Court reaffirmed in *NIFLA*, a government regulation that targets speech must survive strict scrutiny, which closely examines whether the regulation is narrowly tailored to achieve a compelling government interest. Because it would censor or chill huge swaths of protected speech, Proposed Rule 8.4(g) fails strict scrutiny.

Proposed Rule 8.4(g) punishes "words" that "manifest bias or prejudice . . . including *but not limited to*" thirteen characteristics. In other words, the list of thirteen characteristics is only the beginning, not the end, of the list of lawyers' speech that can trigger disciplinary action. Indeed, the Board itself has explained that "[p]roposed comments (3), (4), and (5) provide guidance to attorneys on the types of behavior covered by proposed paragraph 8.4(g), while explicitly stating that *the examples provided are not limited to that list of behaviors.*"[13]

Comment (3) exacerbates the proposed rule's unconstitutional overbreadth by giving a list of "[e]xamples of manifestations of bias or prejudice" that is likewise unlimited. Again, the examples "include but are not limited to" the examples listed. That is, the list is the beginning, not the end, of the proposed rule's overreach. And, as explained below, even if the list actually did enumerate all the speech covered by the proposed rule, it would still be unconstitutionally overbroad and viewpoint discriminatory under the United States Supreme Court's 2017 decision in *Matal v. Tam*.

Nearly every example listed in Comment (3) is an example of speech that the First Amendment protects *because it protects speech that offends*: "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; . . . suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics."

Comment (4)'s definition of "harassment" is also unconstitutionally overbroad when it restricts speech "that denigrates or shows hostility or aversion toward a person on bases *such as*" and then lists twelve characteristics. Again, the phrase "such as" shows that this list is the beginning, not the end, of the characteristics that might trigger disciplinary action.

Simply reading Comment (3) and Comment (4) drives home the impossibility of enforcing the proposed rule in any constitutional manner. Will the Disciplinary Board publish a list of taboo words? Will there be a comprehensive list of banned "epithets," "slurs," and "demeaning nicknames"? Will the Board define the difference between impermissible "negative stereotyping" and permissible "positive stereotyping"? (Such a definition will itself be *per se* viewpoint discriminatory and, therefore, unconstitutional.) May a lawyer not refer in briefs, legislative testimony, or law review articles to studies that include statistics regarding the "race, ethnicity, or nationality" of victims of police brutality (which is a crime) or victims of hate crimes (which is by definition based on race, ethnicity, or nationality)? Is the Department of Justice lawyer who publishes such statistics as part of her job engaged in professional misconduct?

Proposed Rule 8.4(g) is an enforcement nightmare. In a landmark case, the United States Supreme Court ruled that "a State may not, under the guise of

[13] *The Pennsylvania Bulletin*, *supra*, note 1 (emphasis added).

prohibiting professional misconduct, ignore constitutional rights,"[14] explaining:

> If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.[15]

b. The Supreme Court's analysis in *NIFLA* makes plain that Proposed Rule 8.4(g) is a content-based speech restriction that violates the First Amendment. As the Supreme Court explained just a few weeks ago, "[c]ontent-based regulations 'target speech based on its communicative content.'"[16] "[S]uch laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" [17] As the Supreme Court explained, "[t]his stringent standard reflects the fundamental principle that governments '"have no power to restrict expression because of its message, its ideas, its subject matter, or its content."'"[18]

As we have seen, Proposed Rule 8.4(g) is specifically targeted at speech because of its content. The proposed rule and its comments repeatedly prohibit speech based on its content; therefore, it is "presumptively unconstitutional" unless it is narrowly tailored to serve a compelling state interest. But Proposed Rule 8.4(g) is light-years from being "narrowly tailored." First, the three lists of expressly-regulated speech (as found in the main paragraph, as well as Comment (3) and Comment (4)) are very broad in scope and prohibit vast amounts of protected speech. Second, these lists by their terms are not comprehensive. Instead, they explicitly speak in terms of "including, but not limited to" the twelve listed categories. No speech is safe from the reach of Proposed Rule 8.4(g); therefore, it is an unconstitutional content-based speech restriction.

c. In *NIFLA*, the Supreme Court rejected the notion that professional speech is less protected by the First Amendment than other speech. Three circuits, including the Third Circuit, recently ruled that "'professional speech' [w]as a separate category of speech that is subject to different rules" and less protection under the First Amendment.[19] In *NIFLA*, the Supreme Court resoundingly rejected the idea that "professional speech" was an exception "from the rule that content-based regulations of speech are subject to strict scrutiny," explicitly abrogating a Third Circuit decision that had so held.[20]

The Supreme Court reiterated the lesson of numerous earlier cases that "[s]peech is not unprotected merely because it is uttered by 'professionals.'"[21] The Court observed that there were "two circumstances" in which it "afforded less protection for professional speech" but "neither [circumstance] turned on the fact that professionals were speaking."[22] One circumstance in which it "applied more deferential review" were "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'"[23] As the Court continued to explain, professional speech is not commercial speech except in the "advertising" context, in which the disclosure of "factual, noncontroversial information" may be required. Obviously, Proposed Rule 8.4(g) is not primarily concerned with advertising. The other circumstance is when states "regulate professional conduct, even though that conduct *incidentally* involves speech."[24] But again, Proposed Rule 8.4(g) targets speech and is not aimed solely at conduct that incidentally involves speech. As the Court observed in *NIFLA*, "neither line of precedents is implicated here."[25]

In *NIFLA*, the Court was clear that a state's regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that

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14 *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 439 (1963).
15 *Id.* at 438.
16 *NIFLA*, 138 S. Ct. at 2371, quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
17 *Ibid.*
18 *NIFLA*, 138 S. Ct. at 2371, quoting *Reed*, 135 S. Ct. at 2226, quoting *Police Dept. of Chicago v. Mosley*, 208 U.S. 92, 92 (1972).
19 *NIFLA*, 138 S. Ct. at 2371.
20 *Id.*, abrogating *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3rd Cir. 2014).
21 *NIFLA*, 138 S. Ct. at 2371-2372.
22 *Id.* at 2372.
23 *Id.*
24 *Id.* at 2373 (emphasis added).
25 *Id.* at 2372.

it "has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers."[26]

A regulation that targets speech and prohibits broad swaths of protected speech, as Proposed Rule 8.4(g) does, cannot survive strict scrutiny. A regulation that discriminates on the basis of viewpoint, as Proposed Rule 8.4(g) does, cannot survive strict scrutiny, as the Court held in 2017 in *Matal v. Tam*.

2. PROPOSED RULE 8.4(G) IS FACIALLY UNCONSTITUTIONAL UNDER THE UNITED STATES SUPREME COURT'S UNANIMOUS RULING IN *MATAL V. TAM*.

ABA Model Rule 8.4(g) was drafted before the Court's decision in *Matal*, and for that reason alone, is a poor paradigm upon which to pattern any rule that aspires to constitutionality. In *Matal v. Tam*, a unanimous Supreme Court made clear that a government prohibition on derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[27]

All Justices agreed that provisions of a prominent federal law that denied trademarks for terms that "may disparage or bring into contempt or disrepute"[28] living or dead persons, even on racial or ethnic grounds, was unconstitutional because "[i]t offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[29] Justice Alito, writing for a plurality of the Court, noted that "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[30]

In his concurrence, which was joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, Justice Kennedy explained that the provision was unconstitutional as viewpoint discrimination because the government permitted "a positive or benign mark but not a derogatory one," which "reflects the Government's disapproval of a subset of messages it finds offensive"—"the essence of viewpoint discrimination."[31] And it was viewpoint discriminatory even if it "applies in equal measure to any trademark that demeans or offends."[32]

Justice Kennedy stressed that "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate," particularly "if the ideas or perspectives are ones a particular audience might think offensive."[33] Justice Kennedy closed with a sober warning:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society. [34]

Under the Supreme Court's analysis in *Matal*, Proposed Rule 8.4(g) is unconstitutionally viewpoint discriminatory on three separate grounds. **First,** nearly every example listed in Comment (3) is an example of speech that requires the Board to engage in viewpoint discrimination in order to determine whether the speech is impermissible as "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; … suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics." Because enforcement of Proposed Rule 8.4(g) gives government officials unbridled discretion to determine which speech is permissible and which is impermissible, the proposed rule clearly countenances viewpoint discrimination based on government officials' subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens' free speech is itself unconstitutional viewpoint discrimination.[35]

Second, Comment (4)'s definition of "harassment" is also unconstitutionally viewpoint discriminatory because it prohibits speech "that denigrates or shows hostility or aversion toward a person." Similarly, in its

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[26] *Id.* at 2374.
[27] *Matal*, 137 S. Ct. at 1754, 1765; *see also, id.* at 1766 (Kennedy, J., concurring).
[28] *Id.* at 1751 (quotation marks and ellipses omitted).
[29] *Id.* at 1754, 1765.
[30] *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).
[31] *Id.* at 1766 (Kennedy, J., concurring).
[32] *Id.*
[33] *Id.* at 1767.
[34] *Id.* at 1769 (Kennedy, J., concurring).
[35] *See, e.g., Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

Comment [3], ABA Model Rule 8.4(g) defines "harassment" to include "derogatory or demeaning verbal … conduct." Both definitions of "harassment" depart from the Supreme Court's much narrower definition of "harassment" as "harassment that is so *severe, pervasive, and objectively offensive* that it effectively bars the victim's access to an educational opportunity or benefit."[36]

Of course, the consequences of disciplinary action against an attorney are too great to leave the definition of "harass" so open-ended and subjective. "Harassment" should not reside "in the eye of the beholder," but instead should be determined by an objective standard, as provided by the United States Supreme Court.

The need for an objective definition of "harassment" is apparent in the courts' uniform rejection of university speech codes over the past two decades. The courts have found that speech codes violate freedom of speech because their "harassment" proscriptions are overbroad and unacceptably increase the risk of viewpoint discrimination.[37] For example, the Third Circuit struck down a campus speech policy "[b]ecause overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination." Quoting then-Judge Alito, the court wrote:

> "Harassing" or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."[38]

The courts have found that speech codes violate freedom of speech because their "harassment" proscriptions are overbroad and unacceptably increase the risk of viewpoint discrimination.

Third, Proposed Rule 8.4(g) and ABA Model Rule 8.4(g) are viewpoint discriminatory because they state that they "do[] not preclude *legitimate* advice or advocacy consistent with these Rules." (Emphasis added.) Again, who decides which speech is "legitimate" and which speech is "illegitimate"? By what standards? By whose standards? "In fact, the proposed rule would effectively require enforcement authorities to be guided by their 'personal predilections' because whether a statement is 'harmful' or 'derogatory or demeaning' depends on the subjective reaction of the listener. Especially in today's climate, those subjective reactions can vary widely."[39]

As Halaby and Long note in their survey of the many problems created by ABA Model Rule 8.4(g), "the word 'legitimate' cries for definition."[40] Indeed, "one difficulty with the 'legitimate' qualifier" is that "lawyers need to make the arguments in order to change the law, yet the new model rule obstructs novel legal arguments."[41] This

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36 *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (emphasis added).

37 *See, e.g., McCauley v. Univ. of V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Blair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, 1998 WL 35867183 (E.D. Ky. 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989).

38 *DeJohn v. Temple Univ.*, 537 F.3d 301, 313-314 (3d Cir. 2008), quoting *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001), quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

39 Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 9 (hereinafter "Tenn. Att'y Gen. Letter"), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf (last visited May 1, 2018). *See id.* ("The lack of clarity in Proposed Rule 8.4(g)'s terms creates a substantial risk that determinations about whether expression is prohibited will be guided by the 'personal predilections' of enforcement authorities rather than the text of the rule. *Kolender v. Lawson*, 461 U.S. 352, 356 (1983) (internal quotation marks omitted).") *See also, id.* at 10 ("[T]he [Board of Professional Responsibility] would presumably get to draw the line between legitimate and illegitimate advocacy, creating a further risk that advocacy of controversial or politically incorrect positions would be deemed harassment or discrimination that constitutes professional misconduct.")

40 Halaby & Long, *supra*, note 9, at 237.

41 *Id.* at 238.

is particularly true when "the subject matter is socially, culturally, and politically sensitive."[42]

Quite simply, it is not good for the profession, or for a robust civil society, for lawyers to be potentially subject to disciplinary action every time they speak or write on a topic that may cause someone who disagrees to file a disciplinary complaint to silence them.

3. IF PROPOSED RULE 8.4(G) IS ADOPTED, PENNSYLVANIA LAWYERS WILL BE SUBJECT TO DISCIPLINE FOR TELLING LAWYER JOKES.

Proposed Rule 8.4(g) is so broad that, if it were adopted, it literally would make lawyer jokes punishable as professional misconduct. The proposed rule would punish a lawyer's "words" that "knowingly manifest … bias or prejudice … including *but not limited to* bias, prejudice, or harassment based upon [thirteen listed characteristics]." But note this critical fact: the list of thirteen characteristics is not a limited or exclusive list.

Proposed Comment (3) offers "[e]xamples of manifestations of bias or prejudice," including "attempted humor based upon stereotypes." Lawyer jokes, of course, are the epitome of "attempted humor based upon stereotypes." Thus, on its face, Proposed Rule 8.4(g) would punish lawyers for telling lawyer jokes.

Indeed, any "attempted humor based upon stereotypes" of any kind would be punishable. No more jokes about mothers-in-law, doctors, accountants, or government bureaucrats would be allowed. And jokes about President Trump, Senator Bernie Sanders, or any other politicians would be taboo as either "attempted humor" based on "a stereotype" or "political affiliation."[43]

4. IF PROPOSED RULE 8.4(G) IS ADOPTED, PENNSYLVANIA LAWYERS WILL BE SUBJECT TO DISCIPLINE FOR POLITICAL SPEECH THAT IS AT THE CORE OF THE FIRST AMENDMENT'S PROTECTIONS.

Even if the "impermissible speech" were actually confined to the list of thirteen characteristics, Proposed Rule 8.4(g) would still be overbroad because it punishes political speech, which is at the core of the First Amendment's protections. The proposed rule will punish a lawyer for speech that "knowingly manifest[s] bias or prejudice" based on "political affiliation," which means that any lawyer's political speech is now subject to disciplinary action if it is arguably "in the practice of law." Lawyers who serve in the legislature, work on legislative staffs, testify at legislative hearings, lobby for or against particular legislation or regulations, advise political campaigns, or serve on administrative boards will now have to carefully choose their words to avoid "manifest[ing] bias or prejudice" based on "political affiliations" or "stereotypes." As the Supreme Court noted in an early case upholding lawyers' First Amendment rights against a state law regulating attorney conduct: "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[44]

Proposed Rule 8.4(g) falls into the trap of trying to regulate "words" that "manifest bias or prejudice" based on "political affiliation" because "[t]he Board modeled its proposed rule language on the Pennsylvania Code of Judicial Conduct" because it wanted "a lawyer's ethical obligations under the RPC" to "correspond to the conduct prohibited in the Code of Judicial Conduct." But this premise is a mistake of the first magnitude. Lawyers and judges serve two very different functions in our legal system. A judge's foremost duty is to be impartial in administering justice. A lawyer's foremost duty is *not to be impartial* but to zealously represent the interests of her client. For that reason, a regulation suitable for judges (which are nonetheless subject to strict scrutiny under the First Amendment) does not easily translate into a regulation suitable for lawyers.

5. THE ABA'S ORIGINAL CLAIM THAT TWENTY-FOUR STATES HAVE A RULE SIMILAR TO ABA MODEL RULE 8.4(G) IS NOT ACCURATE BECAUSE ONLY VERMONT HAS A RULE AS EXPANSIVE AS ABA MODEL RULE 8.4(G).

When the ABA adopted Model Rule 8.4(g) in 2016, it claimed that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue

[42] *Id.*

[43] *Cf. Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring) ("The logic of the Government's rule is that a law could be viewpoint neutral even if it provided that public officials could be praised but not condemned.")

[44] *NAACP v. Button*, 371 U.S. at 433; *id.* at 435 ("It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes.").

burden on lawyers."[45] But this claim has been shown to be factually incorrect. The reality is that ABA Model Rule 8.4(g) has not been adopted by any state supreme court, except Vermont, and that was only a year ago.

For that reason, no empirical evidence supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers. As even its proponents have had to concede, ABA Model Rule 8.4(g) does not replicate any prior black-letter rule adopted by a state supreme court. Before 2016, twenty-four states and the District of Columbia had adopted some version of a black-letter rule dealing with "bias" issues.[46] But each of these black-letter rules was narrower than ABA Model Rule 8.4(g).

For example, a proponent of ABA Model Rule 8.4(g), Professor Stephen Gillers, has written that "[a]lthough courts in twenty-five American jurisdictions (twenty-four states and Washington, D.C.) have adopted anti-bias rules in some form, these rules differ widely."[47] He then highlights primary differences:

> Most contain the nexus "in the course of representing a client" or its equivalent. Most tie the forbidden conduct to a lawyer's work in connection with the "administration of justice" or, more specifically, to a matter before a tribunal. Six jurisdictions' rules require that forbidden conduct be done "knowingly," "intentionally," or "willfully." Four jurisdictions limit the scope of their rules to conduct that violates federal or state anti-discrimination laws and three of these require that a complainant first seek a remedy elsewhere instead of discipline if one is available. Only four jurisdictions use the word "harass" or variations in their rules.[48]

Basic differences exist between state black-letter rules and ABA Model Rule 8.4(g):

- Several states' black-letter rules apply only to *unlawful* discrimination and require that another tribunal first find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.
- Many states limit their rules to "conduct in the course of representing a client," in contrast to ABA Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law."
- Many states require that the misconduct be "prejudicial to the administration of justice."
- Almost no state black-letter rule enumerates all eleven of the ABA Model Rule 8.4(g)'s protected characteristics.
- No black-letter rule utilizes ABA Model Rule 8.4(g)'s "circular non-protection" for "legitimate advocacy … consistent with these rules."

Thirteen states have adopted a comment, rather than a black-letter rule, dealing with "bias" issues. Fourteen states have adopted neither a black-letter rule nor a comment addressing "bias" issues.

Finally, it should be noted that if Proposed Rule 8.4(g) is adopted, Pennsylvania will have a rule that is broader than any other state. For that reason alone, the Board should not adopt the proposed rule.

6. OFFICIAL ENTITIES IN ILLINOIS, MONTANA, TEXAS, SOUTH CAROLINA, NORTH DAKOTA, AND TENNESSEE HAVE REJECTED ABA MODEL RULE 8.4(G), AND NEVADA AND LOUISIANA HAVE ABANDONED EFFORTS TO IMPOSE IT ON THEIR ATTORNEYS.

Federalism's great advantage is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see whether states (besides Vermont)

[45] *See, e.g.*, Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, https://www.scbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf, at 56-57.

[46] Letter from James J.S. Holmes, Chair, ABA Commission on Sexual Orientation and Gender Identity, et al., to Paula Frederick, Chair, ABA Standing Committee on Ethics & Professional Responsibility (May 7, 2014), in ABA Standing Committee on Ethics and Professional Responsibility, *Working Discussion Draft—Revisions to Model Rule 8.4 Language Choice Narrative* (July 16, 2105), App. A, at 10-36, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf (last visited May 1, 2018).

[47] Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 195, 208 (2017) (footnotes omitted). Professor Gillers notes that his wife "was a member of the [ABA] Standing Committee on Ethics and professional Responsibility, the sponsor of the amendment [of ABA Model Rule 8.4]." *Id.* at 197 n.2.

[48] *Id.*

adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states. This is particularly true when ABA Model Rule 8.4(g) has failed close scrutiny by several official entities in other states.

a. State Supreme Courts. The Supreme Courts of **Tennessee** and **South Carolina** have officially rejected adoption of ABA Model Rule 8.4(g). On April 23, 2018, the Supreme Court of Tennessee denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).[49] The petition had been filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility. The Tennessee Attorney General filed a comment letter, explaining that a black-letter rule based on ABA Model Rule 8.4(g) "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[50]

In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).[51] The South Carolina Court acted after the State Bar's House of Delegates, as well as the state attorney general, recommended against its adoption.[52]

On September 25, 2017, the Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g).[53] In a letter to the Court, dated September 6, 2017, the State Bar President explained that "the language used in other jurisdictions was inconsistent and changing," and, therefore, "the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions."[54]

On March 20, 2018, the ABA published a summary of the States' consideration of ABA Model Rule 8.4(g) to date. By the ABA's own count, five states have declined to adopt Model Rule 8.4(g): **Illinois**, **Minnesota**, **Montana**, **Nevada**, and **South Carolina**. With **Tennessee** subsequently declining to adopt 8.4(g), the ABA's own count would then stand at six states having declined to adopt 8.4(g). The ABA lists **Vermont** as the only state to have adopted 8.4(g).[55]

b. State Attorney General Opinions. On March 16, 2018, the Attorney General of **Tennessee** filed Opinion 18-11, *American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)*, attaching his office's comment letter to the Supreme Court of Tennessee, opposing adoption of a proposed rule closely modeled on ABA Model Rule 8.4(g).[56] The Attorney General concluded that the proposed rule "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[57]

The opinion began by noting that ABA Model Rule 8.4(g) "has been widely and justifiably criticized as creating a 'speech code for lawyers' that would constitute an 'unprecedented violation of the First Amendment' and encourage, rather than prevent, discrimination by suppressing particular viewpoints on controversial issues."[58]

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[49] The Supreme Court of Tennessee, *In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, Order No. ADM2017-02244 (Apr. 23, 2018), https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf (last visited May 2, 2018).

[50] Tenn. Att'y Gen. Letter, *supra*, note 40, at 1.

[51] The Supreme Court of South Carolina, *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct Appellate Case No. 2017-000498*, Order (June 20, 2017), http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01 (if arrive at South Carolina Judicial Department homepage, select "2017" as year and then scroll down to "2017-06-20-01") (last visited May 2, 2018).

[52] South Carolina Op. Att'y Gen. (May 1, 2017) http://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf (last visited May 2, 2018).

[53] The Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4*, Order (Sep. 25, 2017), https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf (last visited May 2, 2018).

[54] Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), https://www.clsnet.org/document.doc?id=1124 (last visited May 2, 2018).

[55] American Bar Assocation Center for Professional Responsibility Policy Implementation Committee, *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (Mar. 20, 2018), https://www.dropbox.com/s/6seu8x1i0m411l6/Model%20Rules%208_4%20Presentation_Final.wmv?dl=0.

[56] *American Bar Association's New Model Rule of Professional Conduct 8.4(g)*, 18 Tenn. Att'y Gen. Op. 11 (Mar. 16, 2018), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf (last visited May 2, 2018).

[57] Tenn. Att'y Gen. Letter, *supra*, note 40, at 1.

[58] *Id.* at 1-2.

Noting the rule's application to "'verbal … conduct'—better known as speech,"[59] the opinion concluded that "any speech or conduct that could be considered 'harmful' or 'derogatory or demeaning' would constitute professional misconduct within the meaning of the proposed rule."[60]

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent."[61] The attorney general declared that "[c]ontrary to … basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues."[62]

In September 2017, the **Louisiana** Attorney General concluded that "[t]he regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid."[63] Because of the "expansive definition of 'conduct related to the practice of law' and its "countless implications for a lawyer's personal life," the attorney general found the Rule to be "unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct."[64]

Agreeing with the Texas Attorney General's assessment of the unconstitutionality of ABA Model Rule 8.4(g), the Attorney General of **South Carolina** determined that "a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of religion and is void for vagueness."[65]

On May 21, 2018, the Arizona Attorney General filed a comment letter urging the Arizona Supreme Court to heed the opposition in other states, including that of state attorneys general and state bar association, to adoption of ABA Model Rule 8.4(g). He also noted the constitutional concerns that ABA Model Rule 8.4(g) raises as to free speech, association, and expressive association.[66]

c. State Legislature. On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).[67] The impact of Model Rule 8.4(g) on "the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees" greatly concerned the Montana Legislature.[68]

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[59] *Id.* at 3.

[60] *Id.* at 4.

[61] *Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney's statutory or constitutional rights (RQ-0128-KP),* Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016) at 3, https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf (last visited May 2, 2018).

[62] *Id.*

[63] *ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution*, 17 La. Att'y Gen. Op. 0114 (Sept. 8, 2017) at 4, https://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384 (last visited May 2, 2018).

[64] *Id.* at 6.

[65] South Carolina Att'y Gen. Op. (May 1, 2017) at 13, http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf (last visited May 2, 2018).

[66] Attorney General Mark Brnovich, *Attorney General's Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court* (May 21, 2017), https://www.clsreligiousfreedom.org/sites/default/files/site_files/AZ.pdf.

[67] *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)*, SJ 0015, 65th Legislature (Mont. Apr. 25, 2017), http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf (last visited May 2, 2018).

[68] *Id.* at 3. The Tennessee Attorney General likewise warned that "[e]ven statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra*, note 40, at 8 n.8.

d. State Bar Associations. On December 10, 2016, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois."[69] On September 15, 2017, the **North Dakota** Joint Committee on Attorney Standards voted to recommend rejection of ABA Model Rule 8.4(g). On October 30, 2017, the **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of Model Rule 8.4(g), voted "not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court."[70]

These actions in other states all vindicate the position taken on December 2, 2016, by this Board when it explained that ABA Model Rule 8.4(g) was too broad:

> It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule … subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.[71]

7. THE VERMONT SUPREME COURT HAS INTERPRETED ABA MODEL RULE 8.4(G) AS LIMITING A LAWYER'S ABILITY TO ACCEPT, DECLINE, OR WITHDRAW FROM A REPRESENTATION IN ACCORDANCE WITH RULE 1.16.

Proponents of ABA Model Rule 8.4(g) generally claim that it will not affect a lawyer's ability to refuse to represent a client. They point to its language, repeated in Proposed Rule 8.4(g), that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16."

But as Professor Rotunda and Professor Dzienkowski explain, Rule 1.16 actually "deals with when a lawyer must or may *reject* a client or *withdraw* from representation."[72] Rule 1.16 does not address *accepting* clients. The Tennessee Attorney General similarly suggests that "[a]n attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g)."[73]

In the one state to have adopted ABA Model Rule 8.4(g), the Vermont Supreme Court explained in its accompanying Comment [4] that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." It further explained that, under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)."[74]

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that "[a] lawyer is under no obligation to accept every person who may wish to become a client *unless the refusal to accept a person amounts to unlawful discrimination*."[75] The facts before the Committee were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of "unlawful discrimination" for purposes of New York's Rule 8.4(g) a question of law

[69] Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals*, Illinois Lawyer Now, Dec. 15, 2016, https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals (last visited May 2, 2018).

[70] Louisiana State Bar Association, *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, Oct. 30, 2017, https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892 (last visited May 2, 2018).

[71] The Pennsylvania Bulletin, *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct*, 46 Pa. B. 7519 (Dec. 3, 2016), http://www.pabulletin.com/secure/data/vol46/46-49/2062.html.

[72] Rotunda & Dzienkowski, *supra*, note 8, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis supplied by the authors).

[73] Tenn. Att'y Gen. Letter, *supra*, note 40, at 11.

[74] Vermont Supreme Court, *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, July 14, 2017, at 3, https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf.

[75] NY Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).

beyond its jurisdiction, the Committee declined to "opine on whether a lawyer's refusal to represent a prospective client in a suit against the lawyer's own religious institution constitutes 'unlawful discrimination'" for purposes of New York's Rule 8.4(g).[76]

In *Stropnicky v. Nathanson*,[77] the Massachusetts Commission Against Discrimination found a law firm that specialized in representing women in divorce cases had violated state nondiscrimination law when it refused to represent a man.[78] As these examples demonstrate, reasonable doubt exists that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation.

Proposed Rule 8.4(g) has several additional problems that this letter will not explore. For example, Proposed Rule 8.4(g) applies broadly to all conduct that is "related to the practice of law." But, as the Board's memorandum admits, "[t]he Pennsylvania RPC and the Pennsylvania Rules of Disciplinary Enforcement do not define what constitutes the practice of law."[79] Another example is that Proposed Rule 8.4(g) does not apply to employment discrimination claims, but the actual language on this point is incomprehensible, and, therefore, unconstitutionally vague.[80]

CONCLUSION

Lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts without fear of losing their license to practice law. Because it would drastically curtail lawyers' freedom to express their viewpoints on political, social, religious, and cultural issues, this Board should again "determine[] not to move forward with the proposed amendments, and renew[] its study of the issue."[81] This is particularly true given the United States Supreme Court's decision three weeks ago in *NIFLA v. Becerra*, and last year in *Matal v. Tam*.

For the reasons discussed, there is no reason to make Pennsylvania attorneys laboratory subjects in the ill-conceived experiment that Proposed Rule 8.4(g) represents. This is particularly true when sensible alternatives are readily available, such as waiting to see whether any other states join Vermont in adopting Model Rule 8.4(g).

A decision to wait can always be revisited after other states have served as the testing ground for ABA Model Rule 8.4(g). A judicious pause will allow the Board to examine *NIFLA* and *Matal*. A pause will also allow the Board to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out in other states before imposing it on Pennsylvania lawyers.

Lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts without fear of losing their license to practice law.

Kim Colby has worked for the Center for Law and Religious Freedom since graduating from Harvard Law School in 1981. She has represented religious groups in numerous appellate cases, including two cases heard by the United States Supreme Court, as well as on dozens of amicus briefs in federal and state courts. She was involved in congressional passage of the Equal Access Act in 1984.

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[76] *Id.* New York's Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is significantly narrower.

[77] 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003).

[78] Rotunda & Dzienkowski, *supra*, note 7, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

[79] The Pennsylvania Bulletin, *supra*, note 1.

[80] The language is "(except employment discrimination unless resulting in a final agency or judicial determination)."

[81] The Pennsylvania Bulletin, *supra*, note 1.

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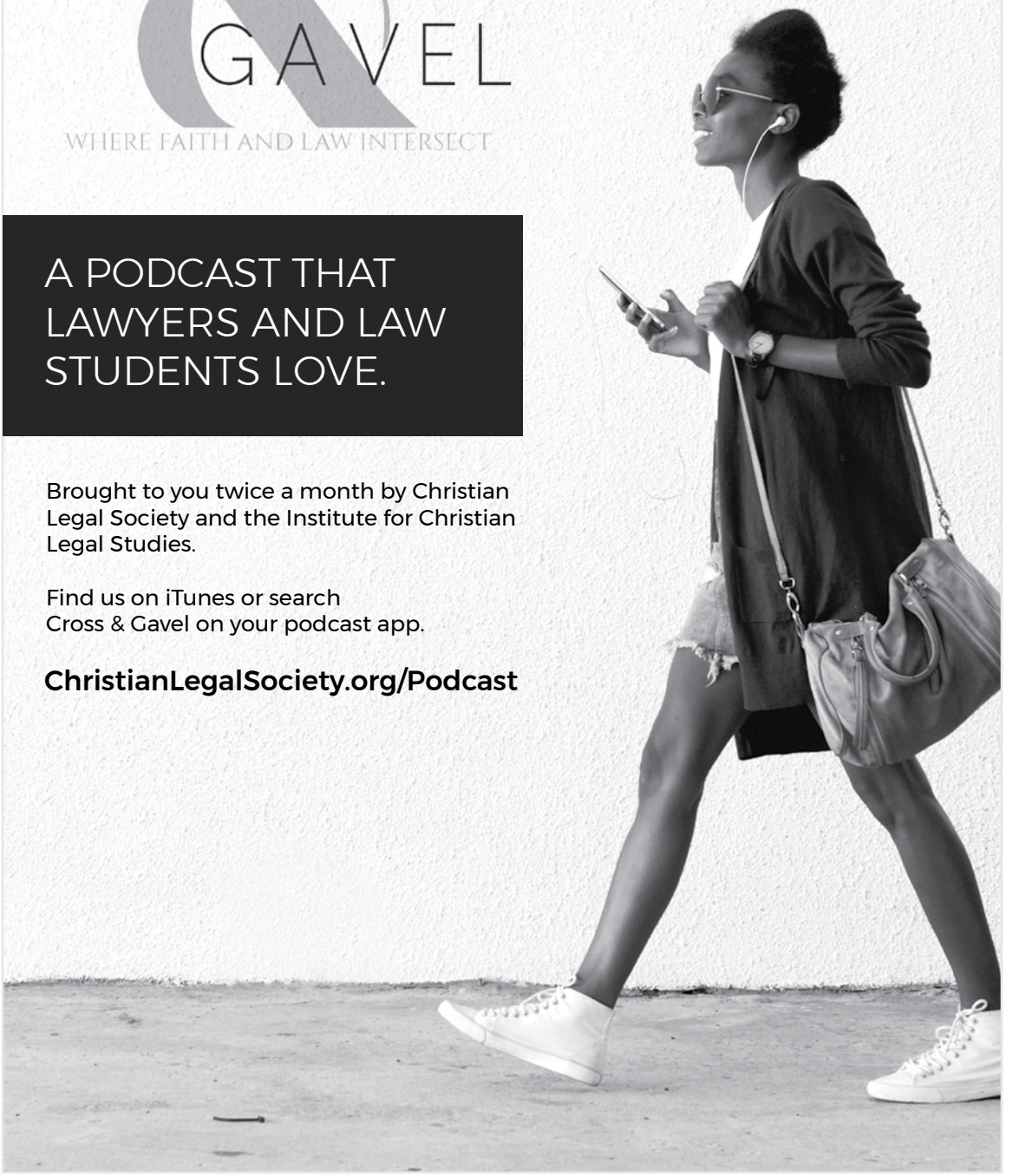

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