



Seeking Justice with the Love of God

January 31, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2017-02244 – Comment Letter of Christian Legal Society Opposing Amending Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by Adopting a New RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This comment letter is filed pursuant to the Order of the Supreme Court of Tennessee, dated November 21, 2017, which solicits written comments on whether to adopt proposed RPC 8.4(g). Because RPC 8.4(g) would operate as a speech code for Tennessee attorneys, Christian Legal Society opposes its adoption.

Proposed RPC 8.4(g) essentially replicates the highly criticized and deeply flawed ABA Model Rule 8.4(g), as adopted by the American Bar Association at its annual meeting in San Francisco, California, in August 2016. The proponents of proposed RPC 8.4(g) acknowledge in their Petition to this Court that proposed RPC 8.4(g) “is patterned after” ABA Model Rule 8.4(g).¹

ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers.² Fortunately, it can only operate in those states in which the highest court adopts it, and

¹ Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g) [hereinafter “Pet.”] at 1, http://www.tba.org/sites/default/files/filed_tsc_rule_8_rpc_8.4_g.pdf.

² For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, discusses why ABA Model Rule 8.4(g) would impose a speech code on lawyers in a Federalist Society video at <https://www.youtube.com/watch?v=AfpdWmlOXbA>. Professor Volokh debated a proponent of ABA Model Rule 8.4(g) at the Federalist Society National Student Symposium in March 2017. <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>. Highly respected constitutional scholar and ethics expert, Professor Ronald Rotunda, and Texas Attorney General Ken Paxton debated two leading proponents of Model Rule 8.4(g) at the Federalist Society National Lawyers Convention in November 2017. <https://www.youtube.com/watch?v=V6rDPjqBcQg>. Professor Rotunda also has written a lengthy memorandum about the Rule’s threat to lawyers’ First Amendment rights. Ronald D. Rotunda, “*The ABA Decision to Control*

to date, only the Vermont Supreme Court has adopted it. Because the rule took effect in Vermont less than five months ago, no empirical evidence yet exists as to the effect its implementation will have on attorneys.

This Court should reject proposed RPC 8.4(g) because its extremely broad scope will irreparably harm Tennessee attorneys' First Amendment rights. But at a minimum, this Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out by what happens in another state. Otherwise Tennessee attorneys will be the laboratory subjects for the ill-conceived experiment that ABA Model Rule 8.4(g) represents. There is no reason to impose on Tennessee attorneys a rule rife with risk, when a wise and readily available option for this Court is to wait to see whether other states adopt ABA Model Rule 8.4(g), and then to observe its impact on attorneys in those states.

Proposed RPC 8.4(g) is so deeply flawed that its proponents, in their Petition to this Court urging its adoption, find it necessary to state that "proposed Rule 8.4(g) leaves *a sphere of private thought and private activity* for which lawyers will remain free from regulatory scrutiny."³ A "sphere of private thought" may be the best that lawyers living under a totalitarian regime can hope for; but lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts publicly and without fear in their social activities, their workplaces, and the public square. Proposed RPC 8.4(g) would drastically curtail that freedom.

A rule that is so broad in scope and so vague in meaning that its proponents feel the need to reassure the lawyers who will be regulated by it that they will be left "a sphere of private thought and private activity . . . free from regulatory scrutiny" is a rule that this Court should reject. A lawyer's license to practice law should not depend on whether he or she – either unwittingly or intentionally -- steps outside of a nebulous, undefined "sphere of private thought and private activity."

Nor is there need for haste because current Comment [3], which already accompanies RPC 8.4(d), adequately meets any need. There is no pressing reason to revisit this Court's recent decision in 2013 to retain current Comment [3] rather than adopt a black-letter rule. Current Comment [3] satisfactorily meets any need without creating new threats to attorneys' freedom of speech.

In 2013, in contrast to its current posture, the Tennessee Bar Association opposed adoption of a black-letter rule. Its reasons for opposition to a black-letter rule remain as valid today as they were a scant five years ago. In its comment letter to this Court, dated March 27, 2013, the TBA "explain[ed] how it is possible to be staunchly opposed to invidious discriminatory conduct of any sort and yet steadfastly opposed" to adding a new black-letter rule

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>.

³ Pet. at 6.

to RPC 8.4.⁴ Specifically, “[t]he TBA believe[d] that when this Court originally adopted Comment [3] more than a decade ago it made the right decision.”⁵

The TBA 2013 Comment Letter focused on three flaws that, five years later, are embedded in proposed RPC 8.4(g):

1. Disciplinary liability for speech: The TBA in 2013 was opposed to “replac[ing] the language ‘in the course of representing a client’ [the scope of current Comment [3]] with the more expansive ‘in a professional capacity.’”⁶ But this is precisely what proposed RPC 8.4(g) would do if adopted. Proposed RPC 8.4(g) would supplant current Comment [3] and its limited scope of “in the course of representing a client” with the much broader scope of “in conduct related to the practice of law.” As the TBA 2013 Comment Letter explained, the expansive scope of “in a professional capacity” “would appear to subject a lawyer to potential disciplinary liability” on several new fronts, including: “(1) service in the General Assembly; (2) speaking in public, including at CLEs; (3) advertising their legal services; and (4) authoring and publishing books/treatises, articles, or opinion columns.”⁷

In 2013, the TBA recognized that, if adopted, the expansive scope of “in a professional capacity” “could result, for example, in any number of constitutional challenges regarding the First Amendment rights of lawyers.”⁸ The TBA asked whether “a lawyer-legislator [could] be subjected to discipline under [the proposed 2013 rule] for introducing a bill to prohibit (or permit) the display of religious symbols on public property?”⁹ The TBA asked whether “a divorce lawyer [could] be subjected to discipline for broadcasting advertisements indicating that they only represent one gender in divorce proceedings?”¹⁰ Five years later, these same threats to Tennessee attorneys’ freedom of speech would materialize if proposed RPC 8.4(g) were adopted because, as Comment [4] accompanying proposed RPC 8.4(g) explicitly states, “conduct related to the practice of law” includes “bar association, business *or social activities* in connection with the practice of law.” See pp. 10-16, *infra*, for a more detailed discussion.

2. Disciplinary liability for employment decisions: The TBA in 2013 recognized that “a lawyer who makes a decision whether to hire (or not hire) someone also would likely qualify as engaging in conduct in their professional capacity.”¹¹ As a result, a lawyer could be subject “to potential disciplinary liability for a decision not to hire a job applicant and could do so even

⁴ Comment of the Tennessee Bar Association in re: Proposed Amendment to Tennessee Rule of Professional Conduct 8.4, No. M2013-00379-SC-RL1-RL, Mar. 27, 2013, [hereinafter “TBA 2013 Comment Letter”] at 1, <http://www.tba.org/sites/default/files/Rule%208%204%20Comment%203-28-13.pdf>.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ *Id.* at 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

in instances where federal laws addressing bias or prejudice in making employment decisions would not otherwise apply.”¹² Again, proposed RPC 8.4(g)’s Comment [4] confirms the TBA’s concern because it explicitly states that “conduct related to the practice of law includes . . . operating or managing a law firm or practice.”

3. Negligence standard for disciplinary liability: The TBA in 2013 opposed language that would punish “conduct that, unknown to the lawyer, manifests bias or prejudice.”¹³ But proposed RPC 8.4(g) would punish a lawyer for conduct that he or she does not realize is discrimination or harassment.¹⁴ Proposed RPC 8.4(g) implements a negligence standard that hangs like the sword of Damocles over the head of every Tennessee attorney.

At bottom, current Comment [3] strikes the appropriate balance between the public interest and Tennessee attorneys’ First Amendment rights. In contrast, proposed RPC 8.4(g) threatens Tennessee attorneys’ First Amendment rights. The reasons for the TBA’s opposition in 2013 remain equally valid today.

Tennessee should not become the second state, in company only with Vermont, to adopt the newly minted, deeply flawed ABA Model Rule 8.4(g). Instead, it should wait to see if other states choose to roll the dice with ABA Model Rule 8.4(g) and learn from other states’ experience before adopting a new black-letter rule that will chill Tennessee attorneys’ speech.

I. This Court Should Retain Current Comment [3] Rather than Adopt the Deeply Flawed Proposed RPC 8.4(g).

A. A comparison of the texts of current Comment [3] and proposed RPC 8.4(g) leaves no doubt that proposed RPC 8.4(g) should be rejected.

A mere five years ago, in 2013, this Court considered whether to adopt a black-letter rule that was significantly narrower than the proposed RPC 8.4(g) before the Court today. After deliberation, this Court wisely chose to retain current Comment [3] rather than impose a black-letter rule on Tennessee attorneys. Current Comment [3] largely tracked the Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 to August 2016. Current Comment [3] reads as follows:

[3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socio economic status, violates paragraph (d) when such actions are prejudicial

¹² *Id.*

¹³ *Id.* at 2.

¹⁴ In a puzzling reversal, the Tennessee Bar Association in its Petition now criticizes current Comment [3] because it “seems to only bar discriminatory conduct ‘knowingly’ performed.” Pet. at 3.

to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

Compare the narrow scope of current Comment [3] to the breadth of proposed RPC 8.4(g) and its accompanying comments, which read as follows:

“It is professional misconduct for a lawyer to:

“(g) 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 RPC 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

“Comment:

“[3] 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).

“[4] 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 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, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations. Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation.

“[4a] Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer’s speech or conduct unrelated to the practice of law cannot violate this Section.

“[5a] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).

“[5b] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law.

“[5c] Lawyers should be mindful of their professional obligations under RPC 6.1 to provide legal services to those who are unable to pay, and their obligation under RPC 6.2 not to avoid appointments from a tribunal except for good cause. Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socioeconomic status merely by charging and collecting reasonable fees and expenses for a representation.

“[5d] A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. See RPC 1.2(b).”

B. Proposed RPC 8.4(g) would impose a significantly heavier burden on Tennessee attorneys than does current Comment [3].

The scope of RPC 8.4(g) is significantly broader than current Comment [3] in several critical aspects, including:

1. Proposed RPC 8.4(g) is substantially broader in the conduct it regulates: Current Comment [3] is limited to when a lawyer is acting “in the course of representing a client,”

whereas proposed RPC 8.4(g) applies when a lawyer is acting “in conduct related to the practice of law,” which is defined as broadly as possible to include not only “representing clients,” but also “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.” (Emphasis supplied.) As detailed below at pp. 10-16, proposed RPC 8.4(g) would apply to *almost everything that a lawyer does, including his or her social activities* that are arguably related to the practice of law. It would also apply to *anyone* that a lawyer interacts with during any conduct arguably related to the practice of law.

2. Proposed RPC 8.4(g) is not limited to conduct that is “prejudicial to the administration of justice”: Current Comment [3] requires that a lawyer’s actions be “prejudicial to the administration of justice” before professional misconduct can be found. Proposed RPC 8.4(g) abandons this traditional limitation on a finding of professional misconduct, leaving a lawyer subject to disciplinary liability even though his or her conduct has not prejudiced the administration of justice, which greatly expands the regulatory reach of the proposed rule.

3. Proposed RPC 8.4(g) dispenses with the mens rea requirement of current Comment [3]: Current comment [3] requires that a lawyer “knowingly” manifest bias or prejudice, whereas proposed RPC 8.4(g) adopts a negligence standard by including “reasonably should know.” A lawyer could violate proposed RPC 8.4(g) without even realizing he or she has done so. This change is particularly perilous because the list of words and conduct that are deemed “discriminatory” or “harassing” is ever expanding in novel and unanticipated ways.

4. Proposed RPC 8.4(g) adds three new protected categories: Current Comment [3] already protects “race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status.” Proposed RPC 8.4(g) would add gender identity, marital status, and ethnicity to protect eleven different characteristics of individuals.

II. Only the Vermont Supreme Court has adopted 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 burden on lawyers.”¹⁵ *But this claim is factually incorrect because ABA Model Rule 8.4(g) has not been adopted by any state bar, except Vermont.* Vermont’s implementation of ABA Model Rule 8.4(g) began less than five months ago, on September 18, 2017.

¹⁵ 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, available at https://www.sbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf, at 56-57.

As a result, no empirical evidence exists to support the claim that ABA Model Rule 8.4(g) “will not impose an undue burden on lawyers.” Tennessee should not become the testing ground for this deeply flawed rule.

Despite the ABA’s claim to the contrary, 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.¹⁶ *But each of these black-letter rules is narrower than ABA Model Rule 8.4(g).*

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

- Many 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, including Tennessee, 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.

Because no state, except Vermont five months ago, has adopted ABA Model Rule 8.4(g), it has no track record in any state. Empirical evidence demonstrating a need in Tennessee for the adoption of the proposed rule has not been provided. Current Comment [3] already adequately addresses any need.

¹⁶ Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Prof. Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.

III. Official Bodies in Illinois, Maine, Montana, Pennsylvania, Texas, and South Carolina Have Rejected Model Rule 8.4(g), and Nevada and Louisiana Have Abandoned Efforts to Impose It on Their Attorneys.

In several states, the state supreme court, state legislature, state attorney general, state bar association, professional ethics committee, or supreme court disciplinary counsel has already officially opposed adoption of ABA Model Rule 8.4(g).

Two state supreme courts have officially rejected adoption of ABA Model Rule 8.4(g). In June 2017, the Supreme Court of **South Carolina** became the first state supreme court to take official action regarding ABA Model Rule 8.4(g) when it rejected adoption of the rule.¹⁷ The Court acted after the House of Delegates of the South Carolina Bar, as well as the South Carolina Attorney General, recommended against its adoption.¹⁸ On November 30, 2017, the Supreme Court of **Maine** announced it had “considered, but not adopted, the ABA Model Rule 8.4(g).”¹⁹

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).²⁰ 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.”

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.”²¹

On December 2, 2016, the Disciplinary Board of the Supreme Court of **Pennsylvania** 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

¹⁷ <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01>.

¹⁸ <http://2hsvz0174ah31vgem16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf>.

¹⁹ http://www.courts.maine.gov/rules_adminorders/rules/proposed/mr_prof_conduct_proposed_amend_2017-11-30.pdf at 2 (announcing comment period on alternative language).

²⁰ <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>.

²¹ <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>.

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.²²

On December 10, 2016, the **Illinois** State Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule in Illinois.”²³

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).²⁴ 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.²⁵

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.”²⁶

It is instructive that, after examining more closely ABA Model Rule 8.4(g), official bodies in numerous states have concluded that it is too flawed to impose on attorneys. The great advantage of a federalist system is that one state can reap the benefit of other states’ trial-and-error. Prudence counsels a course of waiting to see whether states (besides Vermont) adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states.

IV. Proposed RPC 8.4(g)’s Expansive Scope Threatens All Attorneys’ First Amendment Rights.

In August 2016, the American Bar Association’s House of Delegates adopted a new disciplinary rule, ABA Model Rule 8.4(g), making it professional misconduct for a lawyer to engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.²⁷ Unfortunately, in adopting the new model rule, the ABA

²² <http://www.pabulletin.com/secure/data/vol46/46-49/2062.html>.

²³ <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

²⁴ <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

²⁵ *Id.* at 3.

²⁶ <https://www.lsb.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

²⁷ The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission,

largely ignored over 450 comment letters,²⁸ most opposed to the rule change. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).²⁹

ABA Model Rule 8.4(g) poses a serious threat to attorneys' First Amendment rights; therefore, its clone, proposed RPC 8.4(g), should be rejected. If adopted, proposed RPC 8.4(g) would have a chilling effect on Tennessee attorneys' free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square.³⁰

A. Proposed RPC 8.4(g) Would Operate as a Speech Code for Attorneys.

There are many areas of concern with the proposed rule. Perhaps 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, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on such issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief.

Two highly respected constitutional scholars have written about their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. Professor Ronald Rotunda has written a treatise on American constitutional law,³¹ as well as the ABA's treatise on

Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016,

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

²⁸American Bar Association website, Comments to Model Rule 8.4,

http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.

²⁹Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016,

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

³⁰The Attorney General of Texas issued an opinion 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." Texas A.G. Op. No. KP-0123, 2016 WL 7433186 (Dec. 20, 2017), <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>.

³¹See, e.g., AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME I – INSTITUTIONAL POWERS (West Academic Publishing, St. Paul, MN. 2016); AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME II – LIBERTIES (West Academic Publishing, St. Paul, MN. 2016); Principles of Constitutional Law (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).

legal ethics.³² He initially wrote about the problem ABA Model Rule 8.4(g) poses for lawyers' speech in a *Wall Street Journal* article entitled "The ABA Overrules the First Amendment,"³³ where he explained that:

In the case of rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.

Professor Rotunda also wrote a lengthy critique of ABA Model Rule 8.4(g) for the Heritage Foundation, entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought."³⁴ His analysis is essential to understanding the threat that the new rule poses to attorneys' freedom of speech.

At the Federalist Society's 2017 National Lawyers Convention, Professor Rotunda and Texas Attorney General Ken Paxton participated in a panel discussion with former ABA President Paulette Brown and Professor Stephen Gillers on ABA Model Rule 8.4(g).³⁵ In the opinion of many, the proponents of the rule failed to provide adequate responses to the free speech concerns it creates.

Influential First Amendment scholar and editor of the daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has similarly warned that the new rule is a speech code for lawyers in a two-minute video released by the Federalist Society.³⁶ In a debate at the Federalist Society's 2017 National Student Symposium, Professor Volokh demonstrated the flaws of Model Rule 8.4(g), despite the rule's proponent's unsuccessful attempts to gloss over its flaws.³⁷

³² *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016). In their April 2017 update to the *Deskbook*, Professor Rotunda and Professor John S. Dzienkowski provide extensive criticism of ABA Model Rule 8.4(g). *Legal Ethics, Law. Deskbk. Prof. Resp.* (2017-2018 ed.), §§8.4-2(j)-1 – 8.4-2(j)-6.

³³ Ron Rotunda, "The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech," *The Wall Street Journal*, Aug. 16, 2016, <http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418>.

³⁴ 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>.

³⁵ <https://www.youtube.com/watch?v=V6rDPjqBcQg>.

³⁶ <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

³⁷ <https://www.youtube.com/watch?v=cOivGxOUx4g>.

Professor Volokh has also given examples of potential violations of Model Rule 8.4(g):

Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."³⁸

These scholars' red flags should not be ignored. The proposed rule would create a multitude of potential problems for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, or otherwise engage in public discussions regarding current political, social, and religious questions.³⁹

1. By expanding its coverage to include all "conduct related to the practice of law," proposed RPC 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.

Proposed RPC 8.4(g) raises troubling new concerns for every Tennessee attorney because it explicitly applies to all "conduct related to the practice of law." Its accompanying Comment [3] makes clear that "conduct" encompasses "speech," when it states that "discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others" and that "[h]arassment includes . . . derogatory or demeaning *verbal* or physical conduct." (Emphasis supplied.)

Accompanying Comment [4] explicitly delineates the extensive reach of proposed RPC 8.4(g): "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,

³⁸ Eugene Volokh, "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities," The Washington Post, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

³⁹ See also, TBA 2013 Comment Letter at 3.

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.” (Emphasis supplied.)

As already discussed at pp. 4-7, *supra*, proposed RPC 8.4(g) greatly expands upon current Comment [3]. Proposed RPC 8.4(g) is much broader in scope than current Comment [3], which applies only to conduct “in the course of representing a client.” Instead, proposed RPC 8.4(g) applies to all “conduct related to the practice of law,” including “business or social activities in connection with the practice of law.” This is a breathtaking expansion of the scope of current Comment [3]. Furthermore, current Comment [3] speaks in terms of “actions when prejudicial to the administration of justice.” By deleting that qualifying phrase, proposed RPC 8.4(g) also greatly expands the reach of the rule into attorneys’ lives.

Indeed the substantive question becomes, what conduct does proposed RPC 8.4(g) *not* reach? Virtually everything a lawyer does is “conduct related to the practice of law.” Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Arguably, the rule includes all of a lawyer’s “business or social activities” because there is no real way to delineate between those “business or social activities” that are related to the practice of law and those that are not. Quite simply, much of a lawyer’s social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

Activities likely to fall within the proposed RPC 8.4(g)’s scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds
- giving guest lectures at law school classes
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to nonprofits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one’s congregation
- serving one’s alma mater if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving on the board of a fraternity or sorority
- volunteering with or working for political parties

- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues

Recall that in its 2013 Comment Letter the TBA observed that the expansive scope of “in a professional capacity” “would appear to subject a lawyer to potential disciplinary liability” on several new fronts, including: “(1) service in the General Assembly; (2) speaking in public, including at CLEs; (3) advertising their legal services; and (4) authoring and publishing books/treatises, articles, or opinion columns.”⁴⁰ Proposed RPC 8.4(g) would make a lawyer subject to disciplinary liability for a host of expressive activities.

2. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their congregations, religious schools and colleges, or other religious ministries.

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit ministries. These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. These ministries also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.

As a volunteer on religious institutions’ boards, a lawyer may not be “representing a client,” but may nonetheless be engaged in “conduct related to the practice of law.” For example, a lawyer may be asked to help craft her church’s policy regarding whether its clergy will perform marriages or whether it will host receptions for weddings that are contrary to its religious beliefs. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as “conduct related to the practice of law,” but surely a lawyer should not fear being disciplined for volunteer legal work she performs for her church or her alma mater.

By chilling attorneys’ speech, the rule is likely to do real harm to religious institutions and their good works in their communities. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of “conduct related to the practice of law,” yet proposed RPC 8.4(g) creates such concerns. Because proposed RPC 8.4(g) seems to prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyers’ free speech and free exercise of religion when serving their congregations and religious institutions.

⁴⁰ TBA 2013 Comment Letter at 3. *See also*, the Joint Resolution of the Montana Legislature, <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

3. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline.

Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues. Of course, lawyers are asked to speak *because they are lawyers*. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Writing -- "Verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar? If so, public discourse and civil society will suffer from the ideological paralysis that proposed RPC 8.4(g) will impose on lawyers.

Speaking -- It would seem that all public speaking by lawyers on legal issues falls within proposed RPC 8.4(g)'s prohibition. But even if some public speaking were to fall outside the parameters of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various protected characteristics in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in proposed RPC 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, proposed RPC 8.4(g) chills attorneys' speech.

4. Attorneys' membership in religious, social, or political organizations would be subject to discipline.

Proposed RPC 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a

disciplinary rule that prohibits all California state judges from participating in Boy Scouts because of the organization's teaching regarding sexual conduct.⁴¹

Would proposed RPC 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

Proposed RPC 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or numerous other religious beliefs implicated by proposed RPC 8.4(g).⁴² Some have gone so far as to claim that the right of a religious group to choose its leaders according to its religious beliefs is "discrimination."

B. Proposed RPC 8.4(g) Would Institutionalize Viewpoint Discrimination Against Many Lawyers' Public Speech on Current Political, Religious, and Social Issues.

As seen in Comment [4] that accompanies proposed RPC 8.4(g), the rule would explicitly protect some viewpoints over others by allowing lawyers to "engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations." Because "conduct" includes "verbal conduct," the proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not.

That is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."⁴³ Yet proposed RPC 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, whether speech or action does or does not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees

⁴¹ Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

⁴² <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>.

⁴³ *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of uniformity.

Because enforcement of proposed RPC 8.4(g) gives governmental officials unbridled discretion to determine which speech is permissible and which is impermissible, which speech “promote[s] diversity and inclusion” and which does not, the rule clearly countenances viewpoint discrimination based on governmental officials’ subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens’ free speech is unconstitutional viewpoint discrimination.⁴⁴

C. Who determines whether advocacy is “legitimate” or “illegitimate” under proposed RPC 8.4(g)?

Proposed RPC 8.4(g) cursorily states that it “does not preclude *legitimate* advice or advocacy *consistent with these rules*.” But the qualifying phrase “consistent with these rules” makes proposed RPC 8.4(g) utterly circular. Like the proverbial dog chasing its tail, proposed RPC 8.4(g) protects “legitimate advice or advocacy” only if it is “consistent with” proposed RPC 8.4(g). That is, speech is permitted by proposed RPC 8.4(g) if it is permitted by proposed RPC 8.4(g).

The epitome of an unconstitutionally vague rule, proposed RPC 8.4(g) violates the Fourteenth Amendment as well as the First Amendment. Again, who decides which speech is “legitimate” and which speech is “illegitimate”? By what standards? By whose standards? 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.

D. Proposed RPC 8.4(g)’s threat to free speech is compounded by the fact that it utilizes a negligence standard rather than a knowledge requirement.

As Professor Dane Ciolino, an ethics law professor at Loyola University New Orleans College of Law, has explained:

[ABA Model Rule 8.4(g)] 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. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the

⁴⁴ 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).

‘objectively reasonable lawyer’ will be constructed for purposes of making this determination.⁴⁵

E. The Two Sentences Added to Ameliorate Proposed RPC 8.4(g)’s Damage to Attorneys’ Free Speech Are Meaningless.

Proposed RPC 8.4(g) is a speech code for Tennessee lawyers. In its Petition urging adoption of proposed RPC 8.4(g), the Tennessee Bar Association claims that it has added two sentences which will adequately protect Tennessee attorneys’ First Amendment rights. But a cursory reading of the added sentences demonstrates that claim to be false.

Sentence #1: Comment [4a] to proposed RPC 8.4(g) would add this sentence: “Section (g) does not restrict any speech or conduct *not* related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer’s speech or conduct *unrelated* to the practice of law cannot violate this Section.” (Emphasis supplied.)

This sentence plainly provides no protection for attorneys’ speech because, by its very terms, proposed RPC 8.4(g) applies to “conduct related to the practice of law.” By contrast, Comment [4a] speaks only of “speech or conduct *not* related to the practice of law.” (Emphasis supplied.) Therefore, Comment [4a] is meaningless.

Sentence #2: Proposed Comment [4] would add this sentence: “*Legitimate* advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation.” (Emphasis supplied.)

Yet again, this is an empty sentence that provides no protection for attorneys’ free speech. It begs the question of what is “*legitimate* advocacy” and, equally importantly, who decides whether a lawyer’s words are protected “*legitimate* advocacy” or unprotected “*illegitimate* advocacy.” A rule that gives government officials unbridled discretion to determine which speech is “legitimate advocacy” and which speech is “illegitimate advocacy,” which speech is “permissible” and which is “impermissible,” is unconstitutional viewpoint discrimination.⁴⁶

⁴⁵ Prof. Dane S. Ciolino, “LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct,” *Louisiana Legal Ethics*, Aug. 6, 2017, <https://lalegaethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/> (original emphasis). *See also*, TBA 2013 Comment Letter at 2.

⁴⁶ *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).

V. 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.

The Vermont Supreme Court adopted ABA Model Rule 8.4(g), including its provision 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 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).”⁴⁷ The Vermont Supreme Court’s Comment [4] creates reasonable doubt that Rule 1.16 provides adequate protection for attorneys’ ability to accept, decline, or withdraw from a representation.

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.*”⁴⁸ (Emphasis supplied.) 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 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).⁴⁹

VI. Bar Officials in California and Pennsylvania Have Expressed Grave Reservations About Whether State Bars Have the Resources to Act as Tribunals of First Resort for Employment Claims Against Attorneys and Law Firms.

In 2013, the Tennessee Bar Association was concerned that a black-letter rule could subject a lawyer “to potential disciplinary liability for a decision not to hire a job applicant and could do so even in instances where federal laws addressing bias or prejudice in making employment decisions would not otherwise apply.”⁵⁰ For that reason, in addition to others, the TBA opposed supplanting current Comment [3] with a black-letter rule.

Similarly, a recent memorandum outlining Pennsylvania’s proposed Rule 8.4(g) correctly identified two defects of ABA Model Rule 8.4(g). The memorandum identified the first defect to

⁴⁷ [https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVPrP8.4\(g\).pdf](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVPrP8.4(g).pdf).

⁴⁸ NY Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017).

⁴⁹ *Id.*

⁵⁰ TBA 2013 Comment Letter at 3.

be the rule’s “potential for Pennsylvania’s lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers.”⁵¹ The second defect was that “after careful review and consideration . . . the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities.”⁵²

Likewise, California State Bar authorities have voiced serious concern when considering whether to modify their disciplinary rule to something more akin to the ABA Model Rule 8.4(g). California’s current Rule 2-400 requires that a separate judicial or administrative tribunal first have found that a lawyer committed unlawful discrimination before disciplinary charges can be brought. According to Justice Lee Smalley Edmon, the presiding justice of the Second District, Division Three of the California Courts of Appeals and the Chair of the State Bar’s Second Commission for the revision of the Rules of Professional Conduct, “[t]he proposed elimination of current Rule 2-400(C)’s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings.”⁵³ For that reason, she explained, an alternative was being offered to leave in place Rule 2-400(C)’s requirement that an attorney cannot be disciplined for unlawful discrimination unless a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law and any appeal is final and leaves the finding of unlawful discrimination standing.

An official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court’s adjudicatory process and the state civil courts’ adjudicatory processes.⁵⁴ In the words of the State Bar Court official, “the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings.”⁵⁵ First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different. “State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases.”⁵⁶ Any relevant evidence must be admitted, and hearsay evidence may be used. Third, “[i]n disciplinary proceedings, attorneys are not entitled to a jury trial.”⁵⁷

⁵¹ “Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct,” 46 Pa.B. 7519 (Dec. 3, 2016), <https://www.pabulletin.com/secure/data/vol46/46-49/2062.html>.

⁵² *Id.*

⁵³ Justice Lee Smalley Edmon, “*Wanted: Input on Proposed Changes to the Rules of Professional Conduct*,” California Bar Journal, August 2016, <http://calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx>.

⁵⁴ Commission Provisional Report and Recommendation: Rule 8.4.1 [2-400], at 9, [http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20X/RRC%20-%208.4.1%20\[2-400\]%20-%20Rule%20-%20DFT5%20\(02-19-16\)%20w-ES-PR.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20X/RRC%20-%208.4.1%20[2-400]%20-%20Rule%20-%20DFT5%20(02-19-16)%20w-ES-PR.pdf).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

The California Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement. It described the problems with the requirement's deletion as follows:

Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, . . . lack of [the State Bar's Office of Chief Trial Counsel] resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.⁵⁸

A lawyer's loss of his or her license to practice law is a heavy penalty and demands a stringent process, one in which the standards for enforcement are rigorous and respectful of the attorneys' rights, as well as the rights of others. Comment [3] that accompanies RPC 8.4(d) already provides a carefully crafted balance and should be retained.

Conclusion

Proposed RPC 8.4(g) is so deeply flawed that its proponents, in their Petition to this Court urging its adoption, find it necessary to state that "proposed Rule 8.4(g) leaves a *sphere of private thought and private activity* for which lawyers will remain free from regulatory scrutiny."⁵⁹ A "sphere of private thought" may be the best that lawyers living under a totalitarian regime can hope for; but lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts publicly and without fear in their social activities, their workplaces, and the public square. Because proposed RPC 8.4(g) would drastically curtail that freedom, this Court should reject it.

At a minimum, this Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out by its implementation in other states. There is no reason to make Tennessee attorneys laboratory subjects in the ill-conceived experiment that proposed RPC 8.4(g) represents. This is particularly true because sensible alternatives are readily available, such as waiting to see whether any other states adopt ABA Model Rule 8.4(g) and observing its impact on attorneys in those states. A decision to reject proposed 8.4(g) can always be revisited after other states have served as its testing ground.

Christian Legal Society thanks the Court for ordering this public comment period and considering these comments.

⁵⁸ *Id.* at 13.

⁵⁹ *Pet.* at 6.

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January 31, 2018

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