



# CHRISTIAN LEGAL SOCIETY

*Seeking Justice with the Love of God*

The Honorable Lloyd A. Karameier  
Chief Justice of the Illinois Supreme Court  
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Springfield, Illinois 67201

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Via email ([kmurphy@illinoiscourts.gov](mailto:kmurphy@illinoiscourts.gov)) and UPS Overnight

Re: Comments of Christian Legal Society on Model Rule 8.4(g)

Dear Chief Justice Karameier and Associate Justices of the Illinois Supreme Court:

The Christian Legal Society (“CLS”) is an Illinois not-for-profit corporation that is an interdenominational association of Christian attorneys, law students, and law professors, networking thousands of lawyers and law students in all fifty states. Incorporated in 1961 under Illinois’ “General Not For Profit Corporation Act,” CLS was headquartered in Oak Park, Illinois, for over two decades. CLS’s membership includes many attorneys who practice in Illinois, two attorney chapters in Chicago and Northern Illinois, and law student chapters at several Illinois law schools.

Among its many activities, CLS engages in two nationwide public ministries through its Christian Legal Aid ministry and the Center for Law & Religious Freedom. Demonstrating its commitment to helping economically disadvantaged persons, the goal of CLS’s Christian Legal Aid program is to meet urgent legal needs of the most vulnerable members of our society. CLS provides resources and training to help sustain approximately sixty local legal aid clinics nationwide, including two that serve Illinois citizens. This network increases access to legal aid services for the poor, the marginalized, and the victims of injustice. Based on its belief that the Bible commands Christians to plead the cause of the poor and needy, CLS encourages and equips individual attorneys to volunteer their time and resources to help those in need in their communities.

Demonstrating its commitment to pluralism and the First Amendment, for forty years, CLS has worked, through its Center for Law & Religious Freedom, to protect the right of all citizens to be free from discriminatory treatment based on their religious expression and religious exercise. CLS was instrumental in passage of the federal Equal Access Act of 1984 that protects

the right of both religious and LGBT student groups to meet on public secondary school campuses. Equal Access Act (“EAA”), 20 U.S.C. §§ 4071-74. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS’s role in drafting the EAA). *See, e.g., Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (EAA protects religious student groups’ meetings); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8<sup>th</sup> Cir. 2008) (EAA protects LGBT student groups’ meetings). For forty years, CLS has protected free speech, religious exercise, assembly, and expressive association rights for all citizens, regardless of their race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

**I. Illinois Supreme Court Rules 8.4(d) and (j) Should Be Preserved Because They Already Prohibit Discrimination by Lawyers and Perform an Excellent Job of Serving the Public and the Profession.**

**A. Current Illinois Rules 8.4(d) and (j) already provide adequate protection.**

The current Illinois Supreme Court Rule of Professional Conduct Rule 8.4 already prohibits discrimination by attorneys. The current rule is written in a thoughtful and temperate manner that fairly balances the interests of both attorneys and the public. Specifically, current Rules 8.4(d) and (j) provide that:

It is professional misconduct for a lawyer to:

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(d) engage in conduct that is prejudicial to the administration of justice;

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(j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

**COMMENT**

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

the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

**B. There has been no empirical showing of a need to abandon current Rules 8.4(d) and (j).**

Rules 8.4(d) and (j), as currently written, have served both the public and the legal profession well. They provide a carefully crafted balance between the need to prevent unlawful discrimination with the need to respect attorneys' constitutional rights. The current rule protects the public from unlawful discrimination while simultaneously allowing individual attorneys to practice law free from the fear of false accusations of discrimination that would threaten their license to practice their livelihood. There has been no demonstrated empirical need for the drastic change that adoption of Model Rule 8.4(g) would impose.

**II. Proposed Rule 8.4(g) should not be adopted by the Illinois Supreme Court Because It Greatly Expands the Scope of the Rule in Ways that Needlessly Threaten Attorneys' First Amendment Rights.**

In August 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, Model Rule 8.4(g), making it professional misconduct for a lawyer to knowingly engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.<sup>1</sup> Unfortunately, in adopting the new model rule, the ABA largely ignored over 450 comment letters,<sup>2</sup> most opposed to the rule change. The ABA's own Standing Committee on Professional Discipline filed a comment letter<sup>3</sup> 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).

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<sup>1</sup> Model Rule 8.4(g) and its accompanying comments are in the attached Appendix 1. 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, 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](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf).

<sup>2</sup> American 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](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html).

<sup>3</sup> Letter 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%20e%20Comments%20FINAL%20Protected.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20e%20Comments%20FINAL%20Protected.authcheckdam.pdf).

The ABA's new Model Rule 8.4(g) poses a serious threat to attorneys' First Amendment rights and should be rejected. If adopted, the proposed rule would have a chilling effect on attorneys' ability to engage in free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square.

Because no state has adopted ABA Model Rule 8.4(g), the proposed rule has no track record whatsoever. There is no empirical evidence to demonstrate a need in Illinois for the adoption of the proposed rule. Nor does the proposed rule solve a problem that is not already adequately addressed by application of the current Rule 8.4(j) that makes attorneys subject to discipline for unlawful discrimination, as well as the current Rule 8.4(d) that subjects them to discipline for conduct that prejudices the administration of justice.

The ABA argues that twenty-four states and the District of Columbia have adopted black-letter rules dealing with "bias" issues.<sup>4</sup> All state black-letter rules are narrower in significant ways than Model Rule 8.4(g)'s expansive scope. Examples of the differences between state black-letter rules and Model Rule 8.4(g)'s expansive scope include the following:

- Many states' black-letter rules, such as current Illinois Rule 8.4(j), prohibit *unlawful discrimination* and require that another tribunal find that an attorney has engaged in unlawful discrimination before disciplinary charges can be brought;
- Many states' rules apply to "conduct in the course of representing a client," in contrast to Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law;"
- Many states' black-letter rules, such as Illinois Rule 8.4(j), require that misconduct be prejudicial to the administration of justice, unlike Model Rule 8.4(g).

**A. Model Rule 8.4(g) operates 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

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<sup>4</sup> Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/language\\_choice\\_narrative\\_with\\_appendices\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf). Twelve states have adopted a comment, but not a black-letter rule, while fourteen states have neither adopted a rule nor a comment addressing bias.

speech, free exercise of religion, and freedom of political belief in a diverse society that continually births movements for justice in a variety of contexts.

Two renowned 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, who taught at the University of Illinois College of Law from 1974 until 2002 and remains the Albert E. Jenner, Jr., Professor of Law Emeritus, authored a treatise on American constitutional law,<sup>5</sup> as well as the ABA's treatise on legal ethics.<sup>6</sup> He demonstrated the problem Model Rule 8.4(g) poses for lawyers' speech in a *Wall Street Journal* article entitled "The ABA Overrules the First Amendment."<sup>7</sup> 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 recently published an extensive critique of Model Rule 8.4(g), entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought,"<sup>8</sup> which is attached as Appendix 3 to this letter. His analysis is essential to understanding the threat that the new rule poses to attorneys' freedom of speech.

Influential First Amendment scholar and editor of *The Washington Post's* daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has similarly described the new rule as a speech code for lawyers, explaining:<sup>9</sup>

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<sup>5</sup> See, 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).

<sup>6</sup> *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016).

<sup>7</sup> 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>.

<sup>8</sup> 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>.

<sup>9</sup> 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](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).

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.”

These significant red flags raised by leading First Amendment scholars 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.

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

Proposed Rule 8.4(g) raises troubling new concerns for every attorney because it explicitly applies to all “conduct related to the practice of law.” Comment [4] to ABA Model Rule 8.4(g) explicitly delineates Model Rule 8.4(g)'s extensive reach: “Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law, operating or managing a law firm or law practice; and participating in bar association, business *or social activities in connection with* the practice of law.” (Emphasis supplied.)

Note that Model Rule 8.4(g) greatly expands upon its predecessor Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 through July 2016. First, the proposed Model Rule 8.4(g) has an accompanying comment that makes clear that “conduct” encompasses “speech,” when it states that “discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others.” (Emphasis supplied.) Second, Model Rule 8.4(g) is much broader in scope than either its predecessor Comment [3], which applied only to conduct “in the course of representing a client.”<sup>10</sup> Instead, the ABA's Model Rule 8.4(g) applies to all

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<sup>10</sup> Comment [3] to Model Rule 8.4(d) was in place from 1998-2016 and is found in the attached Appendix 2.

“conduct related to the practice of law,” including “business or social activities in connection with the practice of law.” As will be discussed below, this is a breathtaking expansion of the scope of former Comment [3], as well as current Illinois Rule 8.4(j). Third, the predecessor Comment [3] speaks in terms of “actions when prejudicial to the administration of justice.” By deleting that qualifying phrase, the new Rule 8.4(g) also greatly expands the reach of the rule into attorneys’ lives.

Indeed, the substantive question becomes, what conduct does Rule 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. Most likely, the rule includes all “business or social activities in connection with the practice of law” because there is no real way to delineate between the two. 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.

For example, activities likely to fall within the proposed Rule 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 non-profits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one’s religious congregation
- serving one’s alma mater college, 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 boards of fraternities or sororities
- 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

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

Many lawyers sit on the boards of their religious 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. But they 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 same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities. 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 be 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 Rule 8.4(g) causes such concerns. Because proposed Rule 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 lawyer's free speech and free exercise of religion when serving religious congregations and institutions.

**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, uses controversial words to make a point, or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar because that person perceives the speech as "manifest[ing] bias or prejudice towards others"? If so, public discourse and civil society will suffer from the ideological paralysis that



proposed Rule 8.4(g) will impose on lawyers, who are often at the forefront of new movements and unpopular causes.

**Speaking** -- It would seem that all public speaking by lawyers on legal issues falls within proposed Rule 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 "sexual orientation" or "gender identity" as a protected category 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 Model Rule 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 Rule 8.4(g) chills attorneys' speech.

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

Proposed Rule 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.<sup>11</sup>

Would proposed Rule 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? These are serious concerns that mitigate against adoption of proposed Rule 8.4(g).

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<sup>11</sup> Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, *available at* [http://www.courts.ca.gov/documents/sc15-Jan\\_23.pdf](http://www.courts.ca.gov/documents/sc15-Jan_23.pdf).

Proposed Rule 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 the proposed rule's strictures. For example, according to some government officials, the right of a religious group to choose its leaders according to its religious beliefs is "religious discrimination." But it is simple common sense and basic religious liberty that a religious organization's leaders should agree with its religious beliefs. As the Supreme Court explained in a recent unanimous opinion:

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

*Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 710 (2012).

**B. Proposed Rule 8.4(g) would institutionalize viewpoint discrimination against many lawyers' public speech on current political, religious, and social issues.**

As seen in the ABA's Comment [4], proposed Rule 8.4(g) explicitly protects 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.

But 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." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Proposed Rule 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, what speech or action does or does not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of conformity, uniformity, or orthodoxy.

Because enforcement of Rule 8.4(g) gives governmental actors 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 actors’ subjective biases. Courts have recognized that giving any government official such unbridled discretion to suppress citizens’ free speech is unconstitutional. See, e.g., *Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4<sup>th</sup> Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7<sup>th</sup> Cir. 2001).

**C. A troubling gap exists between protected and unprotected speech under proposed Rule 8.4(g).**

Proposed Rule 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 Rule 8.4(g) utterly circular. Like the proverbial dog chasing its tail, Rule 8.4(g) protects “legitimate advice or advocacy” only if it is “consistent with” Rule 8.4(g). That is, speech is permitted by Rule 8.4(g) if it is permitted by Rule 8.4(g).

This circularity itself compounds the threat proposed Rule 8.4(g) poses to attorneys’ freedom of speech. The epitome of an unconstitutionally vague rule, Rule 8.4 violates the Fourteenth Amendment as well as the First Amendment. Again, who decides what speech is permissible? By what 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 to disagree and file a disciplinary complaint to silence the attorney.

**III. Current Rule 8.4(j) Avoids Severe Due Process Problems that Model Rule 8.4(g) Would Create.**

Adoption of Model Rule 8.4(g) would eliminate the requirement of current Rule 8.4(j) that a disciplinary charge cannot be brought until 1) a court has found that unlawful discrimination has occurred and 2) appeal rights have been exhausted. In effect, adoption of Model Rule 8.4(g) would give the State Bar original jurisdiction to adjudicate discrimination claims against Illinois attorneys.

California has Rule 2-400 that is quite similar to the current Illinois Rule 8.4(j). While it is not considering adoption of Model Rule 8.4(g), California is debating whether to abandon its longstanding requirement that a separate judicial or administrative tribunal 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.”<sup>12</sup> 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.

In addition, 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.<sup>13</sup> 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.”<sup>14</sup> 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.”<sup>15</sup> 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.”<sup>16</sup>

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.<sup>17</sup>

The same concerns should be weighed as Illinois considers abandoning current Rule 8.4(j). The threat of losing one’s license to practice law is a heavy penalty and demands a

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<sup>12</sup>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>.

<sup>13</sup> 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/RRC2%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/RRC2%20-%208.4.1%20[2-400]%20-%20Rule%20-%20DFT5%20(02-19-16)%20w-ES-PR.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 13.

stringent process, one in which the standards for enforcement are rigorous and respectful of the attorneys' rights as well as the rights of others.

#### **IV. Significant Modifications Would Be Needed Before Proposed Rule 8.4(g) Could Pass Constitutional Muster.**

##### **A. Proposed Rule 8.4(g)'s serious problems must be remedied before further consideration.**

Because an empirical need for its adoption has not been demonstrated, the Illinois Supreme Court should not adopt Model Rule 8.4(g) but instead should retain current Rule 8.4(j), which has served the profession well. Indeed, the proposed Model Rule 8.4(g) would need several modifications designed to protect attorneys' First Amendment rights before it would merit consideration for adoption. Those modifications include the following:

1. In the first sentence, delete "in conduct related to the practice of law" and substitute language from the ABA's predecessor Comment [3] and the current Comment [3] accompanying current Illinois Rule 8.4(j), which apply, first, to conduct "in the course of representing a client" and, second, "when such conduct is prejudicial to the administration of justice." Add both "in the course of representing a client" and "when such conduct is prejudicial to the administration of justice" back into the rule.

2. Anchor the definitions of "discrimination" and "harassment," by adding the sentence: "The substantive law of antidiscrimination and anti-harassment statutes and case law determines the conduct to which paragraph (g) applies."

3. Include the Supreme Court's definition of "harassment" in order to avoid violating the First Amendment, by adding the following sentence: "The term 'harassment' shall be defined, in accordance with the United States Supreme Court's decision in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), as conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice."

4. Provide explicit protection for lawyers' freedoms of speech, assembly, expressive association, religious exercise, and press, by adding the following sentence: "This paragraph does not apply to speech or conduct undertaken by a lawyer because of sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment or applicable federal or state laws."

5. Modify the last sentence to read: "Advocacy respecting the foregoing factors does not violate this paragraph." Note that this modification deletes the modifier "legitimate," because it gives a government actor unconstitutional unbridled discretion to determine whether advocacy is "legitimate" or not "legitimate." Such unbridled discretion violates the First Amendment's prohibition on viewpoint discrimination, as well as the Fourteenth Amendment's prohibition on

laws that are unconstitutionally vague. Similarly, the deletion of the phrase “consistent with these rules” eliminates the sentence’s circularity, which is unconstitutional because it gives a government actor unbridled discretion in determining which advocacy is “consistent with these rules,” and which is not. Again, this unbridled discretion violates the First Amendment’s prohibition on viewpoint discrimination and the Fourteenth Amendment’s prohibition on laws that are unconstitutionally vague.

With those modifications, the proposed Model Rule 8.4(g) would read (additions underlined and deletions in brackets):

“It is professional misconduct for a lawyer to: . . .

“(g) engage in conduct, in the course of representing a client, 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 when such conduct is prejudicial to the administration of justice [in conduct related to the practice of law]. This paragraph does not apply to speech or conduct undertaken by a lawyer because of sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment or applicable federal or state laws. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. Advocacy respecting the foregoing factors does not violate this paragraph. [This paragraph does not preclude legitimate advice or advocacy consistent with these rules.] The substantive law of antidiscrimination and anti-harassment statutes and case law determines the conduct to which paragraph (g) applies. The term “harassment” shall be defined in accordance with the United States Supreme Court’s decision in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999), as conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to the administration of justice.”

**B. The ABA’s new Comments accompanying Model Rule 8.4(g) are seriously flawed.**

CLS does not recommend that the proposed Rule 8.4(g) include the ABA’s new Comment [3], Comment [4], and Comment [5]. But if those comments were added, several additional modifications would be necessary, including:

1. In Comment [3], delete the sentence stating that “discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others.” Several of these terms are unconstitutionally vague and give government actors unbridled discretion in enforcement of the rule. Specifically, what is the standard for determining what “verbal or physical conduct” is “harmful” or “manifests bias or prejudice”?

2. Comment [3] threatens attorneys’ First Amendment rights because “verbal conduct” is simply another term for “speech.” Therefore, delete the phrases “verbal conduct” and

“derogatory or demeaning verbal conduct.” By deleting these phrases, the current second, third, and fourth sentences are tightened to reduce redundancy and to avoid infringing on speech by focusing on prohibiting actual physical conduct. The three sentences are reduced to one sentence which reads: “Harassment includes sexual harassment, such as unwelcome sexual advances, requests for sexual favors, and other unwelcome physical conduct of a sexual nature.”

3. Because the rule no longer applies to all “conduct related to the practice of law,” delete the first sentence of Comment [4]. The phrase “conduct related to the practice of law” particularly threatens the First Amendment because Comment [4] interprets “conduct related to the practice of law” to include “participating in bar association, business or social activities in connection with the practice of law,” making the rule applicable to most, if not all, that a lawyer does.

4. Delete the second sentence of Comment [4] because it violates the First Amendment’s basic prohibition on viewpoint discrimination by stating that: “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.”

5. Delete “alone” from the first sentence in Comment [5] (which would become Comment [4]), so that an attorney is not subject to discipline for exercising peremptory challenges.

With these modifications, the Comments would read as follows:

“Comment [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. The term “harassment” is defined, in accordance with the United States Supreme Court’s decision in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), as conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to the administration of justice. Harassment includes sexual harassment, such as unwelcome sexual advances, requests for sexual favors, and other unwelcome physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law determines the conduct to which paragraph (g) applies.<sup>18</sup>

“Comment [4] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not establish a violation of paragraph (g). 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. A lawyer may charge and collect reasonable fees and expenses for a representation.

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<sup>18</sup> Most of Comment [3] would not be necessary if the proposed Rule 8.4(g) were modified as proposed in Part II.A.

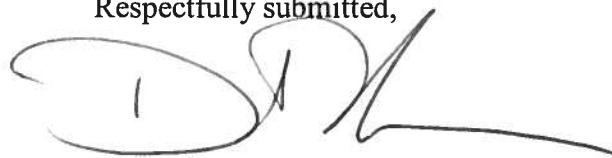
Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b)."

### Conclusion

Because adoption of proposed Model Rule 8.4(g) would have a chilling effect on attorneys' First Amendment rights, it should not be adopted. Attorneys must remain free to engage in speech, religious exercise, assembly, and expressive association in their workplaces and the public square. Because no state has adopted ABA Model Rule 8.4(g), the proposed rule has no track record. Nor is there any empirical evidence showing a need to abandon current Rules 8.4(d) and (j). For all of these reasons, we urge that proposed Model Rule 8.4(g) not be adopted and that current Rules 8.4(d) and (j) be retained.

Thank you for your consideration of these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'DNAMMO', with a long horizontal flourish extending to the right.

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**Appendix 1: ABA Model Rule 8.4(g) and comments adopted August 2016**

On August 8, 2016, the ABA House of Delegates adopted new Model Rule 8.4(g) and three accompanying comments, which provide 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 Rule 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) undermines 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).

Comment [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 law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Comment [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). 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. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).

**Appendix 2: Predecessor Comment [3] to Model Rule 8.4(d), 1998-2016**

In 1998, the ABA adopted Comment [3] to Rule 8.4(d), which stated:

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.