



CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

June 26, 2017

The Honorable Michael A. Cherry, Chief Justice
The Honorable Michael L. Douglas, Associate Justice
The Honorable Kristina Pickering, Associate Justice
The Honorable Mark Gibbons, Associate Justice
The Honorable Lidia S. Stiglich, Associate Justice
The Honorable James W. Hardesty, Associate Justice
The Honorable Ron D. Parraguirre, Associate Justice
The Supreme Court of Nevada
201 South Carson Street
Carson City, Nevada 89701

Attn: Ms. Elizabeth A. Brown, Clerk of the Supreme Court

Re: *In the Matter of Amendments to Rule of Professional Conduct 8.4* (ADKT No. 0526)
Comment Letter Opposing Adoption of ABA Model Rule 8.4(g)

Dear Chief Justice Cherry, Justice Douglas, Justice Pickering, Justice Gibbons, Justice Stiglich,
Justice Hardesty, and Justice Parraguirre:

Founded in 1961, Christian Legal Society (“CLS”) is an interdenominational association of Christian attorneys, law students, and law professors that networks lawyers and law students in all fifty states, including Nevada. Among its many activities, CLS engages in two nationwide public ministries through its Christian Legal Aid ministry and its Center for Law & Religious Freedom.

Demonstrating its commitment to helping economically disadvantaged persons, CLS’s Christian Legal Aid program helps meet the urgent legal needs of the most vulnerable members of our society. 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. CLS also provides resources and training to assist approximately sixty local legal aid clinics nationwide.

Demonstrating its commitment to pluralism and the First Amendment, CLS works 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, 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 (8th 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.

I. This Court Should Not Subject Nevada Attorneys to a Rule that Has Not Been Adopted by Any Other State Supreme Court.

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 engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.¹ Unfortunately, in adopting the new model rule, the ABA largely ignored over 450 comment letters,² most opposed to the rule change. The ABA's own Standing Committee on Professional Discipline filed a comment letter³ questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability.

These comments focused on the chilling effect that Model Rule 8.4(g) will have on lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues. If adopted, Model Rule 8.4(g) would create ethical concerns 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. Because lawyers often are the spokespersons for political, social, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief in a diverse society.

The ABA claims that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."⁴ But this claim is factually incorrect: *ABA*

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.

² 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.

³ 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%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf. The Committee dropped its opposition immediately before the August 8th vote.

⁴ 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, at 1.

Model Rule 8.4(g) has not been adopted in any jurisdiction. Therefore, no empirical evidence supports the ABA's claim that Model Rule 8.4(g) "will not impose an undue burden on lawyers."

The ABA points to the fact that twenty-four states and the District of Columbia have black-letter rules dealing with "bias" issues.⁵ *But each of these black-letter rules differs from ABA Model Rule 8.4(g) in significant ways.* These significant differences between state black-letter rules and Model Rule 8.4(g)'s expansive scope, include:

- Many states' black-letter rules apply only to *unlawful discrimination* and require that another tribunal 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 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, a requirement that Model Rule 8.4(g) abandons but was foundational to its predecessor Comment 3.⁶
- Almost no state black-letter rule enumerates all eleven of the Model Rule 8.4(g)'s protected characteristics.
- No state black-letter rule contains Model Rule 8.4(g)'s circular non-protection for "legitimate advocacy . . . consistent with these rules."

Because no state has adopted Model Rule 8.4(g), the proposed rule has no track record. Nor is there any empirical evidence that demonstrates a need in Nevada for adoption of such an overly broad rule.

II. Official Bodies in Other States Have Urged Rejection of Model Rule 8.4(g).

Last week the Supreme Court of South Carolina became the first state supreme court to take official action regarding Model Rule 8.4(g) when it rejected its adoption. Order, Supreme

⁵ 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.

⁶ From 1998 to 2016, the ABA Model Rules contained Comment 3 to Rule 8.4(d). Model Rule 8.4(g) deletes that Comment 3 and substitutes three new comments. Comment 3 had 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.

Court of South Carolina, App. Case No. 2017-000498 (June 20, 2017).⁷ The Court explained that the House of Delegates of the South Carolina Bar had “recommend[ed] the Court decline to incorporate the ABA Model Rule amendments within Rule 8.4, RPC.” *Id.* The HOD also recommended a public comment period. After the comment period, “the Commissions on Lawyer and Judicial Conduct, whose members would initially be tasked with investigating alleged violations of any amended rule, informed the Court the Commissions share the same reservations expressed by the South Carolina Bar and others” and recommended that the rule not be adopted. *Id.* The Court noted that the Commissions intend further study of possible alternatives to Model Rule 8.4(g). *Id.*

The Attorney General of Texas has 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).⁸ The attorney general concluded that “[a] court would likely conclude that Model Rule 8.4(g) infringes upon” several fundamental rights enjoyed by attorneys, including:

- *Attorneys’ free speech:* After succinctly summarizing United States Supreme Court free speech doctrine, the attorney general concluded that “[c]ontrary to these basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys’ ability to engage in meaningful debate on a range of important social and political issues.” *Id.* at 3. Noting the “broad nature of this rule” as described in its accompanying Comment 4, the attorney general found that “a court could apply it to an attorney’s participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.” *Id.*
- *Attorneys’ free exercise of religion:* The attorney general explained that “Model Rule 8.4(g) could also be applied to restrict an attorney’s religious liberty and prohibit an attorney from zealously representing faith-based groups.” *Id.* at 4.
- *Attorneys’ freedom of association:* After noting Supreme Court precedent, the attorney general concluded that “[c]ontrary to this constitutionally protected right, however, Model Rule 8.4(g) could be applied to restrict an attorney’s freedom to associate with a number of political, social, or religious legal organizations” because the “Rule applies to an attorney’s participation in ‘business or social activities in connection with the practice of law.’” *Id.* at 5 (citing Comment 4 to Model Rule 8.4(g)). Model Rule 8.4(g) “could curtail” attorneys’ participation in “faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society . . . for fear of discipline.” *Id.* Furthermore, the rule “would likely inhibit attorneys’ participation” in “a number of other legal

⁷ <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01>.

⁸ <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>.

organizations [that] advocate for specific political or social positions on issues related to race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status.” *Id.*

- *Attorneys’ due process rights:* The attorney general concluded that the statute was not only overbroad because of its infringement on attorneys’ First Amendment rights, but also that a court would likely conclude that it violated the Fourteenth Amendment due to its unconstitutional vagueness because the rule fails to give fair notice of what conduct may be punished and invites arbitrary and discriminatory enforcement by failing to establish guidelines for those charged with enforcing the law. *Id.* at 5-6 (citing Comm’n for Lawyer Discipline v. Benton, 980 S.W.2d 425, 437 (1998)). The attorney general noted the lack of specificity in the terms: 1) “conduct related to the practice of law;” 2) “discrimination;” 3) “harassment;” and 4) “legitimate advice or advocacy consistent with these Rules.” *Id.* at 6.⁹

On December 10, 2017, the Illinois State Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule in Illinois. Opponents observed that rule does not define ‘discrimination’ and ‘harassment’ and raised concerns about subjecting lawyers to unfounded disciplinary complaints.”¹⁰

On December 2, 2017, the Disciplinary Board of the Supreme Court of Pennsylvania explained that 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 broadly defines “harassment” to include any “derogatory or demeaning verbal conduct” by a lawyer, and the rule subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.¹¹

On April 12, 2017, the Montana Legislature adopted a joint resolution expressing its view that Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana

⁹ The South Carolina Attorney General issued an opinion on May 1, 2017, reaching the same conclusion as the Texas Attorney General and expanding upon that analysis. S.C. Atty. Gen. Op., May 1, 2017, <http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf>.

¹⁰ <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

¹¹ <http://www.pabulletin.com/secure/data/vol46/46-49/2062.html>.

citizens and urging the Montana Supreme Court not to adopt Model Rule 8.4(g).¹² The impact of Model Rule 8.4(g) on “the speech of legislative staff and legislative witnesses . . . when they are working on legislative matters or testifying about legislation before Legislative Committees” greatly concerned the Montana Legislature. It also found that the rule’s “expansive scope endeavors to control the speech of Montanans, who are licensed by the Supreme Court of the State of Montana to practice law, when they speak or write publicly about legislation being considered by the Legislature.” The Legislature concluded that Model Rule 8.4(g) “would directly threaten every attorney . . . with the potential loss of their ability to pursue their chosen career [and] to provide for the needs of their family . . . because at any point in time an attorney could be forced to answer for vague complaints, even if the attorney has not participated in historically unprofessional practices, thereby threatening such attorney’s reputation, time, resources, and license to practice law.”

III. Model Rule 8.4(g) Operates as a Speech Code for Lawyers.

Influential First Amendment scholar and editor of *The Washington Post*’s daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has warned against adoption of Model Rule 8.4(g) because it will function as a speech code for lawyers. He explains its broad applicability to “conduct related to the practice of law,” as defined in proposed Comments 3 and 4 to include speech (that is, “verbal conduct”) in social activities, as well as bar and business activities, in connection with the practice of law:

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

¹²SJ15, “A Joint Resolution of the Senate and the House of Representatives of the State of Montana Making the Determination that it would be an Unconstitutional Act of Legislation, in Violation of the Constitution of the State of Montana, and would Violate the First Amendment Rights of the Citizens of Montana, should the Supreme Court of the State of Montana Enact Proposed Model Rule of Professional Conduct 8.4(G),” Apr. 12, 2017, available at <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

law.” The state bar, if it adopts this rule, might thus discipline you for your “harassment.”¹³

In a two-minute video released by the Federalist Society, Professor Volokh succinctly summarized why the model rule should be rejected.¹⁴ In a debate at the Federalist Society’s National Student Symposium in March 2017, Professor Volokh demonstrated the flaws of Model Rule 8.4(g) despite his debate opponent’s efforts to gloss over them.¹⁵

Another renowned constitutional scholar, Professor Ronald Rotunda of Chapman University Dale E. Fowler School of Law, also has warned against the chilling effect of ABA Model Rule 8.4(g) on attorneys’ freedom of speech. Professor Rotunda is known for his treatise on American constitutional law,¹⁶ as well as the ABA’s treatise on legal ethics.¹⁷ 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.”¹⁸ 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

¹³See, e.g., Prof. 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.

¹⁴Prof. Eugene Volokh, “A Nationwide Speech Code for Lawyers?,” *available at* <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

¹⁵Video of “Debate: Model Rule 8.4,” Federalist Society National Student Symposium Panel, March 15, 2017, *available at* <http://www.fed-soc.org/multimedia/detail/aba-model-rule-84-event-audiovideo>.

¹⁶See, 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).

¹⁷*Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016).

¹⁸Ron 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>.

Thought.”¹⁹ His analysis is essential to understanding the threat that the new rule poses to attorneys’ freedom of speech.

These significant red flags raised by leading First Amendment scholars should not be ignored. If adopted, Model Rule 8.4(g) will be used to chill lawyers’ expression of disfavored political, social, and religious viewpoints on a multitude of issues.

A. 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 its predecessor Comment [3], which applied only to conduct “in the course of representing a client.” Instead, the ABA’s Model Rule 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 former ABA Comment [3]. Third, the predecessor ABA 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.

¹⁹ 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>.

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 nonprofits
- 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

B. 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. 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 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 work 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 ABA Model Rule 8.4(g) causes such concerns. Because ABA Model 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.

C. 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 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 ABA Model 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 ABA Model 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, ABA Model Rule 8.4(g) suffocates attorneys' speech.

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

ABA Model 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 views on sexual conduct.²⁰

Would ABA Model 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 its adoption.

ABA Model 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.²¹ 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 freedom 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).

²⁰ 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.

²¹ See Texas A.G. Op., *supra* n.8, at 5.

E. ABA Model 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], ABA Model 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). ABA Model 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 sees exclusion. Where one person sees the promotion of diversity, another equally sincerely sees the promotion of conformity, uniformity, or orthodoxy.

Because enforcement of ABA Model 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 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

F. A Troubling Gap Exists Between Protected and Unprotected Speech Under ABA Model Rule 8.4(g).

ABA Model 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.

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

California State Bar authorities voiced serious concerns last year 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 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."²² 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.

Similarly, 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.²³ 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."²⁴ 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."²⁵ Any relevant evidence

²²Justice 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>.

²³Commission 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).

²⁴ *Id.*

²⁵ *Id.*

must be admitted, and hearsay evidence may be used. Third, “[i]n disciplinary proceedings, attorneys are not entitled to a jury trial.”²⁶

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.²⁷

Similarly, a recent memorandum outlining Pennsylvania’s Proposed Rule 8.4(g) correctly identified two defects of ABA Model Rule 8.4(g) that Pennsylvania’s Proposed Rule 8.4(g) would avoid.²⁸ Pennsylvania’s proposed rule would adopt a rule like several states have, including Illinois, Iowa, and California, that requires that a judicial or administrative tribunal, other than a state bar tribunal, find that an attorney committed *unlawful discrimination* before the state bar may entertain a disciplinary complaint against the attorney. The memorandum identifies the first defect of ABA Model Rule 8.4(g) to be its “potential for Pennsylvania’s lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers.” Mem. at 2. Second, as the Memorandum concluded, “after careful review and consideration . . . the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities.” *Id.*

Conclusion

Nevada attorneys should be free to practice law without the fear of false accusations of discrimination or harassment threatening their livelihood. The threat of losing one’s 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 attorney’s rights, as well as the rights of others.

Because no state has adopted ABA Model Rule 8.4(g), it has no track record. Nor is there any empirical evidence showing a need to adopt the excessively broad ABA Model Rule 8.4(g).

²⁶ *Id.*

²⁷ *Id.* at 13.

²⁸ “Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct,” 46 Pa.B. 7519 (Dec. 3, 2016) [“Memorandum”].

Letter to the Chief Justice and Associate Justices of the Supreme Court

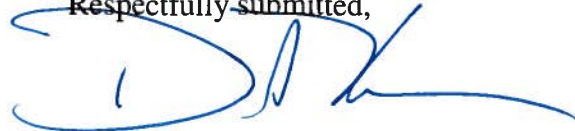
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Because adoption of the ABA Proposed Model Rule 8.4(g) would have a chilling effect on attorneys' First Amendment rights, it should not be adopted. Attorneys must remain free to engage in speech, religious exercise, assembly, and expressive association in their workplaces and the public square.

For the above reasons, we urge that the ABA Model Rule 8.4(g) not be adopted. Thank you for your consideration of these comments.

Respectfully submitted,



David Nammo
CEO & Executive Director
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, Virginia 22151
(703) 642-1070
dnammo@clsnet.org