CHRISTIAN LEGAL SOCIETY

*Seeking Justice with the Love of God*

June 5, 2018

The Honorable Leigh Ingalls Saufley, Chief Justice
The Honorable Donald G. Alexander, Senior Associate Justice
The Honorable Andrew M. Mead, Associate Justice
The Honorable Ellen A. Gorman, Associate Justice
The Honorable Joseph M. Jabar, Associate Justice
The Honorable Jeffrey L. Hjelm, Associate Justice
The Honorable Thomas E. Humphrey, Associate Justice
The State of Maine Supreme Judicial Court
205 Newbury Street Room 139
Portland, Maine 04112-0368

Attn: Matthew Pollack, Executive Clerk

**Re: Christian Legal Society Comment Letter Opposing Adoption of Proposed Rule 8.4(g)**

Dear Chief Justice Saufley, Justice Alexander, Justice Mead, Justice Gorman, Justice Jabar, Justice Hjelm, and Justice Humphrey:

This comment letter is filed pursuant to this Court's Notice of Opportunity for Comment, of May 22, 2018, inviting public comment on "(1) proposed amendments to the Maine Rules of Professional Conduct to prohibit harassment and discrimination by attorneys in conduct *or communication* related to the practice of law and (2) proposed amendments to the Maine Bar Rules to require attorneys to attend continuing education on harassment and discrimination."[1] As the Advisory Committee Note states, Proposed Rule 8.4(g) "is based on" the highly criticized and deeply flawed ABA Model Rule 8.4(g), adopted by the American Bar Association at its annual meeting in San Francisco, California, in August 2016. [2]

Because Proposed Rule 8.4(g) would operate as a speech code for Maine attorneys, Christian Legal Society respectfully requests that this Court reject its adoption. A number of scholars have correctly characterized ABA Model Rule 8.4(g) as a speech code for lawyers. For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has summarized his concerns about ABA Model Rule 8.4(g) and its impact on attorneys' speech in a two-minute video released by the Federalist Society.[3]

---

[1] State of Maine Supreme Judicial Court, *Notice of Opportunity for Comment* (May 22, 2018) (emphasis supplied), http://www.courts.maine.gov/rules_adminorders/rules/proposed/2018-5-22/prof_conduct_notice_2018-5-22.pdf.

[2] State of Maine Supreme Judicial Court, *Proposed Amendment to the Maine Rules of Professional Conduct* [hereinafter "Proposed Rule 8.4(g)"] 2 (May 22, 2018), http://courts.maine.gov/rules_adminorders/rules/proposed/2018-5-22/mr_prof_conduct_proposed_amends_2018-5-22.pdf. The text of Proposed Rule 8.4(g) is reprinted in Appendix 3 and ABA Model Rule 8.4(g) in Appendix 1 attached to this letter.

[3] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA (last visited May 1, 2018). Professor Volokh expanded on the

The late Professor Ronald Rotunda, a highly respected expert in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.[4] Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, "[t]he ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment."[5]

In a thoughtful examination of the rule's legislative history, practitioners Andrew Halaby and Brianna Long concluded that ABA Model Rule 8.4(g) "is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities."[6] They recommend that "jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all."[7] In their view, "the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected."[8]

Because of these concerns, several states have rejected or abandoned efforts to adopt ABA Model Rule 8.4(g). In the past 18 months, official entities in Nevada, Tennessee, Illinois, Montana, North Dakota, Pennsylvania, Texas, South Carolina, and Louisiana have weighed ABA Model Rule 8.4(g) and found it seriously wanting. *See infra* pp. 6-10. To date, only the Vermont Supreme Court has adopted it. Because Vermont implemented the rule quite recently, no empirical evidence yet exists as to its practical ramifications for Vermont attorneys.

Maine attorneys should not be made the subjects of the novel experiment that Proposed Rule 8.4(g) represents. This is particularly true when this Court has the prudent option of waiting to see what sister states decide to do. This Court should expressly reject Proposed Rule 8.4(g).

---

many problems of ABA Model Rule 8.4(g) in a debate with a proponent of Model Rule 8.4(g) at the Federalist Society National Student Symposium in March 2017. *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=b074xW5kvB8&t=50s (last visited May 1, 2018).

[4] Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf (last visited May 1, 2018). Professor Rotunda and Texas Attorney General Ken Paxton debated two leading proponents of Model Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention in a panel on *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, The Federalist Society (Nov. 20, 2017), https://www.youtube.com/watch?v=V6rDPjqBcQg (last visited May 1, 2018).

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

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

[7] *Id.*

[8] *Id.* at 204.

But at a minimum, this Court should wait to see whether other states adopt ABA Model Rule 8.4(g), and then observe the rule's practical consequences for attorneys in those states. There is no need for haste because current Maine Rules of Professional Conduct, in current Comment [3] accompanying Rule 8.4(d), already identify, as professional misconduct, bias and prejudice that occur in the course of representing a client if prejudicial to the administration of justice.

In addition, this Court should reject Proposed Rule 8.4(g) because it is facially unconstitutional. Proposed Rule 8.4(g) expressly regulates either "conduct *or communication*" in two equally unconstitutional ways. First, it is rare for a regulation or law to so forthrightly proclaim that it is regulating speech, and even rarer for such a regulation or law to survive the strict scrutiny that is triggered by explicit state regulation of "communication" apart from "conduct." Second, as explained *infra* at pp. 24-26, Proposed Rule 8.4(g) is facially unconstitutional because the Advisory Committee Note defines "harassment" as "derogatory or demeaning . . . communication."[9] Last year, in *Matal v. Tam*,[10] a unanimous Supreme Court made clear that a government prohibition on "derogatory or demeaning" speech is blatant viewpoint discrimination and, therefore, unconstitutional.[11] ABA Model Rule 8.4(g) was drafted before the Court's decision in *Matal*; and for that reason alone (although there are many other reasons as well), ABA Model Rule 8.4(g) is a poor paradigm upon which to pattern any rule that aspires to constitutionality.

The rest of this letter provides greater detail about the flaws of ABA Model Rule 8.4(g) and Proposed Rule 8.4(g), as follows:

- Part I explains why the ABA's original claim that twenty-four states have a rule similar to ABA Model Rule 8.4(g) is not accurate. Other than Vermont, no state has a rule that is as expansive as ABA Model Rule 8.4(g). *See infra* at pp. 4-5.

- Part II summarizes why at least nine states have rejected or refrained from adopting Model Rule 8.4(g). *See infra* at pp. 5-10.

- Part III examines three key substantial differences between current Comment [3] accompanying Maine's Rule 8.4(d) and ABA Model Rule 8.4(g) and Proposed Rule 8.4(g), as well as why current Comment [3] should not be replaced by Proposed Rule 8.4(g). *See infra* at pp. 10-14.

- Part IV details why ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) will have a substantial chilling effect on Maine attorneys' freedom of speech. *See infra* at pp. 14-27.

---

[9] Proposed Rule 8.4(g), *supra*, note 2, at 3.
[10] 137 S. Ct. 1744 (2017).
[11] *Id.* at 1754, 1765; *see also, id.* at 1766 (Kennedy, J., concurring).

- Part V notes that a lawyer could be disciplined for speech that he or she might not know would be considered a violation. *See infra* at pp. 27-28.

- Part VI explores the implications of ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) for a lawyer's traditional discretion to decide whether to represent a client. *See infra* at pp. 28-29.

- Part VII examines whether bar disciplinary processes provide adequate due process protections for lawyers and whether those offices have adequate financial and staff resources to become a primary adjudicator of a higher volume of discrimination claims. *See infra* at pp. 29-31.

## I. ABA Model Rule 8.4(g) Is Significantly Broader than the Various Anti-Bias Black-Letter Rules Adopted in Twenty-Four States.

When the ABA adopted Model Rule 8.4(g) in 2016, it claimed that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."[12] But this claim has been shown to be factually incorrect because the reality is that ABA Model Rule 8.4(g) has not been adopted by any state supreme court, except Vermont, and that was less than a year ago.

For that reason, no empirical evidence supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers. As even its proponents have had to concede, ABA Model Rule 8.4(g) does not replicate any prior black-letter rule adopted by a state supreme court. Before 2016, twenty-four states and the District of Columbia had adopted some version of a black-letter rule dealing with "bias" issues.[13] But each of these black-letter rules was narrower than ABA Model Rule 8.4(g).

For example, a proponent of ABA Model Rule 8.4(g), Professor Stephen Gillers, has written that "[a]lthough courts in twenty-five American jurisdictions (twenty-four states and

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

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

Washington, D.C.) have adopted anti-bias rules in some form, these rules differ widely."[14] He then highlights primary differences:

> Most contain the nexus "in the course of representing a client" or its equivalent. Most tie the forbidden conduct to a lawyer's work in connection with the "administration of justice" or, more specifically, to a matter before a tribunal. Six jurisdictions' rules require that forbidden conduct be done "knowingly," "intentionally," or "willfully." Four jurisdictions limit the scope of their rules to conduct that violates federal or state anti-discrimination laws and three of these require that a complainant first seek a remedy elsewhere instead of discipline if one is available. Only four jurisdictions use the word "harass" or variations in their rules.[15]

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

- Several states' black-letter rules apply only to *unlawful* discrimination and require that another tribunal first find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.

- Many states limit their rules to "conduct in the course of representing a client," in contrast to ABA Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law."

- Many states require that the misconduct be "prejudicial to the administration of justice."

- Almost no state black-letter rule enumerates all eleven of the ABA Model Rule 8.4(g)'s protected characteristics.

- No black-letter rule utilizes ABA Model Rule 8.4(g)'s "circular non-protection" for "legitimate advocacy . . . consistent with these rules."

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

---

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

[15] *Id.*

## II. Official Entities in Illinois, Montana, Pennsylvania, Texas, South Carolina, North Dakota, and Tennessee Have Rejected ABA Model Rule 8.4(g), and Nevada and Louisiana Have Abandoned Efforts to Impose It on Their Attorneys.

Federalism's great advantage is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see whether states (besides Vermont) adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states. This is particularly true when ABA Model Rule 8.4(g) has failed close scrutiny by several official entities in other states.

**State Supreme Courts:** The Supreme Courts of **Tennessee** and **South Carolina** have officially rejected adoption of ABA Model Rule 8.4(g). On April 23, 2018, the Supreme Court of **Tennessee** denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).[16] The petition had been filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility. The Tennessee Attorney General filed a comment letter, explaining that a black-letter rule based on ABA Model Rule 8.4(g) "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[17]

In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).[18] The Court acted after the state bar's House of Delegates, as well as the state attorney general, recommended against its adoption.[19]

On September 25, 2017, the Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g).[20] In a letter to the Court, dated September 6, 2017, the State Bar President explained that "the language used in other jurisdictions was inconsistent and changing," and, therefore, "the

---

[16] The Supreme Court of Tennessee, *In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g),* Order No. ADM2017-02244 (Apr. 23, 2018), https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf (last visited May 2, 2018).
[17] Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 1 (hereinafter "Tenn. Att'y Gen. Letter"), https://www.tn.gov/content/dam/tn/attorney general/documents/foi/rule84g/comments-3-16-2018.pdf (last visited May 1, 2018). The letter is incorporated into Tennessee Attorney General Opinion 18-11; however, for purposes of quoting the letter, we will cite to the page numbers of the letter itself and not the opinion.
[18] The Supreme Court of South Carolina, *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct Appellate Case No. 2017-000498*, Order (June 20, 2017), http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01 (if arrive at South Carolina Judicial Department homepage, select "2017" as year and then scroll down to "2017-06-20-01") (last visited May 2, 2018).
[19] South Carolina Op. Att'y Gen. (May 1, 2017) http://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf (last visited May 2, 2018).
[20] The Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4*, Order (Sep. 25, 2017), https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf (last visited May 2, 2018).

Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions."[21]

On March 20, 2018, the ABA published a summary of the states' consideration of ABA Model Rule 8.4(g) to date. By the ABA's own count, five states have declined to adopt Model Rule 8.4(g): **Illinois, Minnesota, Montana, Nevada,** and **South Carolina.** With **Tennessee** subsequently declining to adopt 8.4(g), the ABA's own count would then stand at six states having declined to adopt 8.4(g). The ABA lists **Vermont** as the only state to have adopted 8.4(g).[22]

**State Attorney General Opinions:** On March 16, 2018, the Attorney General of **Tennessee** filed Opinion 18-11, *American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g),* attaching his office's comment letter to the Supreme Court of Tennessee, opposing adoption of a proposed rule closely modeled on ABA Model Rule 8.4(g).[23] The Attorney General concluded that the proposed rule "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[24]

The opinion began by noting that the ABA Model Rule 8.4(g) "has been widely and justifiably criticized as creating a 'speech code for lawyers' that would constitute an 'unprecedented violation of the First Amendment' and encourage, rather than prevent, discrimination by suppressing particular viewpoints on controversial issues."[25] Noting the rule's application to "'verbal . . . conduct' – better known as speech,"[26] the opinion concluded that "any speech or conduct that could be considered 'harmful' or 'derogatory or demeaning' would constitute professional misconduct within the meaning of the proposed rule."[27]

The attorney general highlighted "several problematic features" of the proposed rule, including that:

> 1. "[T]he proposed rule would apply to virtually any speech or conduct that is even tangentially related to an individual's status as a lawyer, including, for example, a presentation at a CLE

[21] Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), https://www.clsnet.org/document.doc?id=1124 (last visited May 2, 2018).
[22] American Bar Assocation Center for Professional Responsibility Policy Implementation Committee, *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (Mar. 20, 2018), https://www.dropbox.com/s/6seu8x1i0m411l6/Model%20Rules%208_4%20Presentation_Final.wmv?dl=0.
[23] *American Bar Association's New Model Rule of Professional Conduct 8.4(g),* 18 Tenn. Att'y Gen. Op. 11 (Mar. 16, 2018), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf (last visited May 2, 2018).
[24] Tenn. Att'y Gen. Letter, *supra*, note 17, at 1.
[25] *Id.* at 1-2.
[26] *Id.* at 3.
[27] *Id.* at 4.

> event, participation in a debate at an event sponsored by a law-related organization, the publication of a law review article, and even a casual remark at dinner with law firm colleagues."[28]
>
> 2. "[T]he proposed rule would prohibit . . . a significant amount of speech and conduct that is not currently prohibited under federal or [state] antidiscrimination statutes."[29]
>
> 3. "[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way."[30]

The attorney general warned that the proposed rule "would profoundly transform the professional regulation of Tennessee attorneys." This transformation would occur because the rule "would regulate aspects of any attorney's life that are far removed from protecting clients, preventing interference with the administration of justice, ensuring attorneys' fitness to practice law, or other traditional goals of professional regulation."[31] Quite simply, ABA Model Rule 8.4(g) takes attorney regulation far beyond the traditional province of the rules of professional conduct.

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent."[32] The attorney general declared that "[c]ontrary to . . . basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues."[33]

In September 2017, the **Louisiana** Attorney General concluded that "[t]he regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid."[34] Because of the "expansive definition of 'conduct related to the practice of law' and its

---

[28] *Id.* at 3.
[29] *Id.* at 4.
[30] *Id.* at 5.
[31] *Id.* at 2.
[32] *Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney's statutory or constitutional rights (RQ-0128-KP)*, Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016) at 3, https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf (last visited May 2, 2018).
[33] *Id.*
[34] *ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution*, 17 La. Att'y Gen. Op. 0114 (Sept. 8, 2017) at 4,

"countless implications for a lawyer's personal life," the attorney general found the Rule to be "unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct."[35]

Agreeing with the Texas Attorney General's assessment of the unconstitutionality of ABA Model Rule 8.4(g), the Attorney General of **South Carolina** determined that "a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of religion and is void for vagueness."[36]

On May 21, 2018, the Arizona Attorney General filed a comment letter urging the Arizona Supreme Court to heed the opposition in other states, state attorneys general, and state bar associations to adoption of ABA Model Rule 8.4(g). He also noted the constitutional concerns that ABA Model Rule 8.4(g) raises as to free speech, association, and expressive association.[37]

**State Legislature:** On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).[38] The impact of Model Rule 8.4(g) on "the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees" greatly concerned the Montana Legislature.[39]

**State Bar Associations:** On December 10, 2016, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois."[40] On September 15,

---

https://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384 (last visited May 2, 2018).

[35] *Id.* at 6.

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

[37] Attorney General Mark Brnovich, *Attorney General's Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court* (May 21, 2017), https://www.clsnet.org/document.doc?id=1145.

[38] *A Joint Resolution of the Senate and the House of Representatives of the State of Montana Making the Determination that it would be an Unconstitutional Act of Legislation, in Violation of the Constitution of the State of Montana, and would Violate the First Amendment Rights of the Citizens of Montana, Should the Supreme Court of the State of Montana Enact Proposed Model Rule of Professional Conduct 8.4(G)*, SJ 0015, 65th Legislature (Mont. Apr. 25, 2017), http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf (last visited May 2, 2018).

[39] *Id.* at 3. The Tennessee Attorney General likewise warned that "[e]ven statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra*, note 17, at 8 n.8.

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

2017, the **North Dakota** Joint Committee on Attorney Standards voted to recommend rejection of ABA Model Rule 8.4(g). On October 30, 2017, the **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of Model Rule 8.4(g), voted "not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court."[41]

On December 2, 2016, the Disciplinary Board of the Supreme Court of **Pennsylvania** explained that ABA Model Rule 8.4(g) was too broad:

> It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a 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.[42]

## III. Proposed Model Rule 8.4(g) Would Impose a Significantly Heavier Burden on Maine Attorneys than Current Comment [3] Has Imposed.

Current Maine Comment [3] accompanies Maine Rule 8.4(d) and generally tracks former Comment [3] that previously accompanied ABA Model Rule 8.4(d) from 1998 to August 2016, when it was replaced by ABA Model Rule 8.4(g). Current Maine Comment [3] reads as follows:

> [3] Legitimate advocacy does not violate paragraph [8.4](d). However, by way of example, 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. Notwithstanding the foregoing, a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.[43]

The ABA intentionally drafted Model Rule 8.4(g) to be much broader than its former Comment [3]. (The Appendix to this letter contains the text of both ABA Model Rule 8.4(g) and

---

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

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

[43] Maine Rules of Prof. Conduct, Rule 8.4 cmt. 3.

Proposed Rule 8.4(g).) Comparing former Comment [3] with black-letter ABA Model Rule 8.4(g), the Rule's proponents explained:

> [Comment [3]] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. This limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms).[44]

**A. ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) are substantially broader as to the conduct regulated.**

Current Comment [3] regulates conduct when a lawyer is acting "in the course of representing a client." In contrast, ABA Model Rule 8.4(g) and Model Rule 8.4(g) apply when a lawyer is engaged "in conduct related to the practice of law." Comment [4] accompanying ABA Model Rule 8.4(g) defines "conduct related to the practice of law" as broadly as possible. It includes not only "representing clients," but also "interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business *or social activities* in connection with the practice of law." (Emphasis supplied.) As detailed *infra* at pp. 17-23, ABA Model Rule 8.4(g) applies to almost everything that a lawyer does, including social activities that are arguably related to the practice of law. It would also apply to *anyone* ("and others") that a lawyer interacts with during conduct related to the practice of law.

Indeed, without changing its substantive meaning, Comment [4]'s definition could be condensed to the following statement: "Conduct related to the practice of law includes . . . interacting with . . . others while engaged in the practice of law . . . and participating in . . . bar activities, business or social activities in connection with the practice of law." The rest of Comment [4] simply lists some examples of "interacting with others while engaged in the practice of law" and "participating in bar activities, business or social activities in connection with the practice of law."

Turning to Proposed Rule 8.4(g), the Advisory Committee Note that accompanies it is confusing as to the scope of the Proposed Rule. The Note describes Comments [3] through [5] that accompany ABA Model Rule 8.4(g), which obviously would include Comment [4], as "provid[ing] much useful guidance in the application of Model Rule 8.4(g)."[45] It then notes that

---

[44] *Working Discussion Draft, supra*, note 13, at 7-9, App. B, *Anti-Bias Provisions in State Rules of Professional Conduct*.

[45] Proposed Rule 8.4(g), *supra*, note 2, at 2.

"historically" the Court "has not adopted Comments when adopting amendments to the Rules of Professional Conduct."[46] It then "alert[s] practitioners to . . . points regarding application of Maine's Rule 8.4(g); a number of these points grow out of Comments [3] through [5] to ABA Model Rule 8.4."[47] The Advisory Committee Note makes the following "point" regarding "conduct related to the practice of law":

> "Related to the practice of law" as used in the Rule means occurring in the course of representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; or operating or managing a law firm or law practice. Declining representation, limiting one's practice to particular clients or types of clients, and advocacy of policy positions or changes in the law are not regulated by Rule 8.4(g).[48]

Once again, this language can be condensed to the following statement: "Related to the practice of law means . . . interacting with . . . others while engaged in the practice of law." The rest of the Advisory Committee Note simply lists examples of such interactions "with others."

Nor is it clear whether the bar disciplinary counsel may look to ABA Comment [4], and its express inclusion of "bar association, business, or social activities in connection with the practice of law," as "provid[ing] much useful guidance in the application of" Proposed Rule 8.4(g) and give it the broadest scope possible. As already discussed, the Advisory Committee Note instructs that "Comments [3] through [5] . . . provide much useful guidance."[49]

At best, the Advisory Committee Note is confusing as to the scope of the Proposed Rule 8.4(g). But it is clear that the scope of conduct that Proposed Model Rule 8.4(g) regulates ("conduct related to the practice of law") is much broader than the scope currently encompassed by Maine's current Comment [3] ("in the course of representing a client" and "actions . . . prejudicial to the administration of justice").

**B. ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) are not limited to conduct that is "prejudicial to the administration of justice."**

Current Comment [3] requires that a lawyer's actions be "prejudicial to the administration of justice" to qualify as professional misconduct. In contrast, ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) abandon this traditional limitation. As a result, a Maine attorney

---

[46] *Id.*
[47] *Id.*
[48] *Id.* at 3.
[49] *Id.* at 2.

would be subject to disciplinary liability even though his or her conduct had not prejudiced the administration of justice.

In a recent opinion finding ABA Model Rule 8.4(g) to be unconstitutional, the Tennessee Attorney General enlarged on this distinction between his state's similar current Comment [3] and ABA Model Rule 8.4(g):

> Proposed Rule 8.4(g) is not limited to speech and conduct that pertains to a pending judicial proceeding or that actually prejudices the administration of justice; rather, it reaches all speech and conduct in any way "related to the practice of law" – speech that is entitled to full First Amendment protection.[50]

**C. ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) dispense with the mens rea requirement of current Comment [3].**

Current comment [3] requires that a lawyer "knowingly" manifest bias or prejudice. In contrast, ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) substitute a negligence standard and make a lawyer liable for conduct that she "knows or reasonably should know" is "harassment or discrimination." Therefore, a Maine attorney could violate Model Rule 8.4(g) without actually knowing she had done so.

This change in the knowledge requirement is particularly perilous because the list of words and conduct that are deemed "discrimination" or "harassment" is ever expanding in often unanticipated ways. For example, the negligence standard of ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) might be interpreted to cover words or conduct that demonstrate "implicit bias"[51] or "intersectional discrimination."[52] Certainly nothing in ABA Model Rule 8.4(g) would prevent a charge of discrimination based on "implicit bias" or "intersectional discrimination" from being brought against an attorney. Such charges seem likely given that the rule's

---

[50] Tenn. Att'y Gen. Letter, *supra*, note 17, at 7.

[51] In urging adoption of ABA Model Rule 8.4(g) in 2016, its proponents frequently emphasized their concerns about implicit bias, that is, discriminatory conduct that occurs despite a lawyer having no conscious awareness that his or her conduct is discriminatory. *See* Halaby & Long, *supra,* note 5, at 216-217, 243-245. However, Halaby & Long eventually conclude that implicit-bias conduct probably would not fall within the "reasonably should know" standard. *Id.* at 244-245. We are not so certain. While not disputing that implicit bias occurs, we do not think it should be grounds for discipline and are concerned that the Rule will be invoked for complaints of implicit bias.

[52] At its mid-year meeting in February 2018, the ABA adopted Resolution 302, a model policy that "urges . . . all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity." ABA Res. 302 (Feb. 5, 2018), https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/302.pdf (last visited May 1, 2018).

"proponents repeatedly invoked that concept [of implicit bias] in arguing against any knowledge qualifier at all."[53]

## IV. Like ABA Model Rule 8.4(g), Proposed Rule 8.4(g) Threatens Attorneys' First Amendment Rights.

In adopting its new model rule, the ABA largely ignored over 480 comment letters,[54] most opposed to the rule change. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability, although the Committee dropped its opposition immediately prior to the House of Delegates' vote.[55]

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.[56] But little was done to address these concerns. In their scholarly examination of the legislative history of ABA Model Rule 8.4(g), Halaby and Long concluded that "the new model rule's afflictions derive in part from indifference on the part of rule change proponents, and in part from the hasty manner in which the rule change proposal was pushed through to passage."[57] In particular, the rule went through five versions, of which three versions evolved "in the two weeks before passage, none of these was subjected to review and comment by the ABA's broader membership, the bar at large, or the public."[58] Halaby and Long summarized the legislative history of the rule:

> Model Rule 8.4(g) and its associated comments evolved rapidly between the initial letter from the Goal III entities in July 2014, through initial circulation of Version 1 in July 2015, to final adoption of Version 5 the following August. There was solicitation

---

[53] Halaby & Long, *supra*, note 6, at 244 ("When a new anti-bias rule proved unsaleable without a knowledge qualifier, one was added, but only with the alternative 'reasonably should know' qualifier alongside. That addition was not subjected to comment by the public or by the bar or the ABA's broader membership.")(footnote omitted).
[54]American Bar Association website, Comments to Model Rule 8.4 (last visited May 2, 2018). http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html (last visited May 2, 2018).
[55] Halaby & Long, *supra*, note 6, at 220 & n.97 (listing the Committee's concerns as including: lack of empirical evidence of need for Rule; vagueness of key terms; enforceability; constitutionality; coverage of employment discrimination complaints; mens rea requirement; and potential limitation on ability to decline representation), *citing* Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair 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%20MABA MODEL RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.
[56] Halaby & Long, *supra*, note 6, at 216-223 (summarizing concerns expressed at the only public hearing on an early version of ABA Model Rule 8.4A(g), as well as the main concerns expressed in the comment letters).
[57] Halaby & Long, *supra*, note 6, at 203.
[58] *Id.*

of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.[59]

### A. ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) Would Operate as a Speech Code for Attorneys.

There are many areas of concern with Proposed Rule 8.4(g). 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 in the workplace and in the public square. Because lawyers often are the spokespersons and leaders in political, social, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on such issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief.

Indeed, Proposed Rule 8.4(g) expressly regulates either "conduct *or communication*." In this regard, it is even broader than ABA Model Rule 8.4(g) which speaks in terms of "verbal conduct." It is rare for a regulation or law to so forthrightly proclaim that it is regulating speech, and even rarer for such a regulation or law to survive the strict scrutiny that is triggered by explicit state regulation of "communication." As explained *infra* at pp. 24-26, Proposed Rule 8.4(g) is unconstitutional also because it defines "harassment" as "derogatory or demeaning . . . communication." Last year, in *Matal v. Tam*,[60] a unanimous Supreme Court made clear that a government prohibition on "derogatory or demeaning" speech is blatant viewpoint discrimination and, therefore, unconstitutional. Because ABA Model Rule 8.4(g) was drafted before the Court's decision in *Matal*, it is a poor model upon which to pattern any rule that aspires to constitutionality.

Two highly respected constitutional scholars have outlined their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. The late Professor Ronald Rotunda wrote a leading treatise on American constitutional law,[61] as well as co-authoring *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, co-published by the ABA.[62] In the 2017-2018 edition of the *Deskbook*, Professor Rotunda and Professor Dzienkowski observed that "[t]he language the ABA has adopted in Rule 8.4(g) and its associated Comments are similar to laws that the Supreme Court has invalidated on free speech grounds."[63]

---

[59] *Id.* at 233.
[60] 137 S. Ct. 1477 (2017).
[61] *See, e.g., American Constitutional Law: The Supreme Court in American History, Volumes I & II* (West Academic Publishing, St. Paul, MN. 2016); *Principles of Constitutional Law* (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).
[62] Rotunda & Dzienkowski, *supra*, note 5.
[63] *Id.* at "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

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

> In the case of rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.[64]

Professor Rotunda also wrote a lengthy critique of ABA Model Rule 8.4(g) for the Heritage Foundation, entitled *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*.[65] At the Federalist Society's 2017 National Lawyers Convention, Professor Rotunda and Texas Attorney General Ken Paxton participated in a panel discussion on ABA Model Rule 8.4(g) with a former ABA President and Professor Stephen Gillers.[66] Professor Rotunda and General Paxton highlighted the First Amendment problems with the Rule.

Influential First Amendment scholar and editor of the daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has similarly warned that the new rule is a speech code for lawyers.[67] In a debate at the Federalist Society's 2017 National Student Symposium, Professor Volokh demonstrated the flaws of Model Rule 8.4(g), which the rule's proponent seemed unable to defend.[68]

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

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

---

[64] 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.
[65] Rotunda, *supra*, note 4.
[66] The Federalist Society Debate (Nov. 20, 2017), *supra*, note 4.
[67] The Federalist Society video featuring Professor Volokh, *supra*, note 3.
[68] The Federalist Society Debate (Mar. 13, 2017), *supra*, note 3.

> 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."[69]

These scholars' red flags should not be ignored. Both ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) would create serious problems for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, grant media interviews, 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," ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) encompass nearly everything a lawyer does, including conduct and speech protected by the First Amendment.**

Because they expressly apply to all "conduct related to the practice of law," ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) raise troubling concerns for every Maine attorney. ABA Model Rule 8.4(g)'s new Comment [3] makes clear that "conduct" includes "speech": "discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others" and "[h]arassment includes . . . derogatory or demeaning *verbal* or physical conduct." (Emphasis supplied.) And, of course, Proposed Rule 8.4(g) forthrightly states that it regulates "communication."

Comment [4] confirms the extensive overreach of proposed ABA Model Rule 8.4(g). It states that "[c]onduct 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.)

As discussed *supra* at pp. 10-14, ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) greatly expand upon current Comment [3]. Both ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) are much broader in scope, applying to "conduct related to the practice of law," than current Comment [3], which applies only to conduct "in the course of representing a client." Furthermore, current Comment [3] conduct must be "prejudicial to the administration of justice"

---

[69] 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 (last visited May 2, 2018).

to subject a lawyer to discipline. In contrast, both ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) delete the traditional limitation of "prejudicial to the administration of justice."

As discussed *supra* at pp. 11-12, the Advisory Committee Note creates some confusion whether Proposed Rule 8.4(g) is to be interpreted to include all "conduct related to the practice of law" that is described in Comment [4] accompanying ABA Model Rule 8.4(g), including "bar association, business, and social activities." The Advisory Committee Note states that the ABA Comments [3] through [5] "provide much useful guidance" in the application of Proposed Rule 8.4(g), so it seems likely that Proposed Rule 8.4(g) may be interpreted to reach "bar association, business, and social activities." At the same time, the Advisory Committee Note does not specifically repeat that part of Comment [4], so it can also be argued that it does not reach those specific activities. This vagueness is itself a constitutional problem as the Fourteenth Amendment requires that regulated individuals have a right to know which conduct or communication is permissible and which is not. *See infra* at pp. 26-27. Regardless, Proposed Rule 8.4(g) reaches "conduct related to the practice of law" that can be summarized as "interacting with . . . others while engaged in the practice of law," which regulates a very broad range of attorney conduct and communication.

In reality, the substantive question becomes: What conduct does ABA Model Rule 8.4(g) *not* reach? Virtually everything a lawyer does is "conduct related to the practice of law."[70] Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Arguably, ABA Model Rule 8.4(g) includes all of a lawyer's "business or social activities" because there is no real way to delineate between those "business or social activities" that are related to the practice of law and those that are not. Quite simply, much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

Activities that may fall within the scope of both ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) as "conduct related to the practice of law" include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as faculty, adjunct faculty, or guest speaker
- publishing law review articles, blogposts, and op-eds
- giving media interviews
- 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

[70] *See* Halaby & Long, *supra* note 6, at 226 ("The proposed comment of Version 3 expanded the ambit of 'conduct related to the practice of law' to include virtually anything a working lawyer might do.")

- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- testifying before a legislative body
- writing a letter to one's government representatives
- serving one's congregation
- serving one's alma mater if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, and other vulnerable populations
- serving on the board of a fraternity or sorority
- volunteering with or working for political parties
- working with social justice organizations
- pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues[71]

ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) would make a lawyer subject to disciplinary liability for a host of expressive activities. Many of the above forms of communication would not come within the Advisory Committee Note's statement that "advocacy of policy positions or changes in the law are not regulated by Rule 8.4(g)."[72] For example, assisting a religious congregation to draft employment policies that restrict hiring only to persons of a particular religion would not qualify as "advocacy of policy positions or changes in the law" and would be regulated by Proposed Rule 8.4(g). Similarly, drafting employment policies that restrict hiring only to persons who follow the religious organizations' teachings on sexual conduct would not qualify as protected "advocacy of policy positions or changes in the law."

At bottom, ABA Model Rule 8.4(g) has a "fundamental defect," which is that "it wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech."[73]

---

[71] Tex. Att'y Gen. Op., *supra*, note 32, at 3 ("Given the broad nature of this rule, 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."); La. Att'y Gen. Op., *supra*, note 39, at 6 ("[A] lawyer who is asked his opinions, thoughts, or impressions on legal matters taking place in the news at a social function could also be found to be engaged in conduct related to the practice of law.").

[72] Proposed Rule 8.4(g), *supra*, note 2, at 3.

[73] Tenn. Att'y Gen. Letter, *supra*, note 17, at 2. *See id.* at 10 ("[T]he goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.")(Emphasis in original.)

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

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

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform marriages or whether it will host receptions for weddings that are contrary to its religious beliefs. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not fear being disciplined for volunteer legal work she performs for her church or her alma mater.[74]

By chilling attorneys' speech, ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) threaten 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 ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) create such a concern.[75] Because they discourage lawyers from providing counsel, whether paid or volunteer, in these contexts, they will have a stifling and chilling effect on lawyers' free speech and free exercise of religion when serving their congregations and religious 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. Their commentary is sought by the media regarding controversial issues in their community, state, and nation.

---

[74] Tenn. Att'y Gen. Letter, *supra*, note 17, at 8 n.8 ("statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization" "could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)").

[75] Tex. Att'y Gen. Op., *supra*, note 32, at 4 ("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.")

Of course, lawyers are asked to speak *because they are lawyers*. And a lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

**Writing –** Both Proposed Rule 8.4(g) and ABA Model Rule 8.4(g) include 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? Must lawyers forgo media interviews on topics about which they have some particularly insightful comments because anyone hearing the interview could file a complaint if offended? If so, public discourse and civil society will suffer from the ideological paralysis that such a rule imposes on lawyers.

**Speaking --** It would seem that most, if not all, public speaking by lawyers on legal issues falls within the scope of ABA Model Rule 8.4(g) and Proposed Rule 8.4(g). But even if some public speaking were to fall outside the parameters of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various protected characteristics in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in proposed ABA Model Rule 8.4(g)? What if she testifies for adding all protected categories but urges that a religious exemption be included in the legislation?

The 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. As a state attorney general recently advised:

> Even if the [Board of Professional Responsibility] may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place.[76]

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) and Proposed Rule 8.4(g) have the potential to suffocate attorneys' speech.

---

[76] Tenn. Att'y Gen. Letter, *supra*, note 17, at 8.

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

ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) raise severe doubts about the ability of lawyers to participate in political, social, cultural, 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.[77]

Note that membership or participation in these organizations is most certainly not "advocacy of policy positions or changes in the law," as described in the Advisory Committee Note. Therefore, membership and participation in these organizations would be subject to regulation under Proposed Rule 8.4(g).

Could ABA Model Rule 8.4(g) and 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 they subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) raise additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or numerous other religious beliefs implicated by proposed ABA Model Rule 8.4(g).

Professor Rotunda and Professor Dzienkowski expressed concern that ABA Model Rule 8.4(g) would subject lawyers to discipline for attending events sponsored by the St. Thomas More Society, an organization of Catholic lawyers and judges who meet together to share their faith. Attending the Red Mass, an annual mass held by the Catholic Church for lawyers, judges, law professors, and law students, could be deemed conduct related to the practice of law that runs afoul of the Rule because of the Catholic Church's limitation of the priesthood to males, its opposition to abortion, or its teachings regarding marriage, sexual conduct, or sexual identity.[78]

---

[77] Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, http://www.courts.ca.gov/documents/sc15-Jan_23.pdf (last visited May 2, 2018).

[78] Rotunda & Dzienkowski, *supra*, note 5, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

Several attorneys general have expressed similar concerns.[79] The Tennessee Attorney General warned that "serving as a member of the board of a religious organization, participating in groups such as the Christian Legal Society, or even speaking about how one's religious beliefs influence one's work as an attorney" could "be deemed conduct 'related to the practice of law.'"[80] Moreover, ABA Model Rule 8.4(g) "is far broader than Rule 3.6 of the Code of Judicial Conduct" because Rule 3.6's Comment [4] clarifies that a judge's membership in a religious organization does not violate the rule.[81] Maine similarly has an exception for judges' membership in a religious organization.[82] By contrast, ABA Model Rule 8.4(g) and Proposed Model Rule 8.4(g) "contain[] no exception for membership in a religious organization."[83]

### B. ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) Allow Unconstitutional Viewpoint Discrimination.

#### 1. ABA Model Rule 8.4(g) on its face discriminates on the basis of viewpoint.

As seen in its Comment [4], ABA Model Rule 8.4(g) would explicitly protect some viewpoints over others by allowing lawyers to "engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations."[84] Because "conduct" includes "verbal conduct," the proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not.

That is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he government must abstain from regulating speech when the specific motivating

---

[79] Tex. Att'y Gen. Op., *supra*, note 32, at 5 ("Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline."); La. Att'y Gen. Op., *supra*, note 34, at 6 ("Proposed 8.4(h) could apply to many of the faith-based legal societies such as the Christian Legal Society, Jewish Legal Society, and Muslim Legal Society.")

[80] Tenn. Att'y Gen. Letter, *supra*, note 17, at 10.

[81] *Id.* at 9.

[82] "(C) A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule." Maine Code of Judicial Conduct, Rule 3.6(C).

[83] Tenn. Att'y Gen. Letter, *supra*, note 17, at 9.

[84] Halaby and Long make the important point that "the terms 'diversity' and 'inclusion' themselves were left undefined" which creates a "quandary that the proponents of the model rule change left for those who might be asked to implement and enforce it in a real world lawyer discipline setting." Halaby & Long, *supra*, note 6, at 240.

ideology or the opinion or perspective of the speaker is the rationale for the restriction."[85] Yet proposed ABA Model Rule 8.4(g) explicitly promotes one viewpoint over others.[86]

Even more importantly, whether speech or action does or does not "promote diversity and inclusion" 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 uniformity.

Because enforcement of ABA Model Rule 8.4(g) gives government officials unbridled discretion to determine which speech is permissible and which is impermissible, which speech "promote[s] diversity and inclusion" and which does not, the rule clearly countenances viewpoint discrimination based on government officials' subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens' free speech is unconstitutional viewpoint discrimination.[87]

For that reason, the "most exacting level of scrutiny would apply to Proposed Rule 8.4(g) because it regulates speech and expressive conduct that is entitled to full First Amendment protection based on viewpoint."[88]

**2. Proposed Rule 8.4(g) and ABA Model Rule 8.4(g) define "harassment" in a way that a unanimous United States Supreme Court recently ruled was viewpoint discrimination.**

The Advisory Committee Note accompanying Proposed Rule 8.4(g) defines "harassment" as "derogatory or demeaning . . . communication."[89] Similarly, in its new Comment [3], ABA Model Rule 8.4(g) defines "harassment" to include "derogatory or demeaning verbal . . . conduct." Both definitions of "harassment" depart from the United States Supreme Court's much narrower definition of "harassment" as "harassment that is so *severe, pervasive, and objectively offensive* that it effectively bars the victim's access to an educational opportunity or benefit."[90] For that reason alone, neither Proposed Rule 8.4(g) nor ABA Model Rule 8.4(g) can survive a facial or as-applied challenge to 1) its unconstitutional vagueness under the Fourteenth Amendment or 2) its viewpoint discrimination under the First Amendment.

---

[85] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).
[86] Rotunda & Dzienkowski, *supra* note 5, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (noting that lawyers who belong to a religious "organization that opposes gay marriage . . . can face problems. If they belong to one that favors gay marriage, then they are home free.").
[87] *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).
[88] Tenn. Att'y Gen. Letter, *supra*, note 17, at 5, citing *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011).
[89] Proposed Rule 8.4(g), *supra*, note 2, at 3.
[90] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (emphasis added).

Note that Maine's current Comment [3] with its requirement that the professional misconduct be "prejudicial to the administration of justice" aligns with the Supreme Court's requirement that, to be harassment, conduct must "effectively bar[] the victim's access to an . . . opportunity or benefit." Unfortunately, both Proposed Rule 8.4(g) and ABA Model Rule 8.4(g) eliminate the requirement that conduct be "prejudicial to the administration of justice" before it can be subject to discipline.

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

The need for an objective definition of "harassment" is apparent in the courts' uniform rejection of university speech codes over the past two decades. The courts have found that speech codes violate freedom of speech because their "harassment" proscriptions are overbroad and unacceptably increase the risk of viewpoint discrimination. [91] For example, the Third Circuit struck down a campus speech policy "[b]ecause overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination." Quoting then-Judge Alito, the court wrote:

> "Harassing" or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."[92]

Finally, and most importantly, ABA Model Rule 8.4(g) was drafted without the benefit of the United States Supreme Court's recent decision in *Matal v. Tam.*[93] And Proposed Rule 8.4(g) seems to have been drafted without awareness of the *Matal* decision.

In *Matal*, a unanimous Court held that the long-established use of a prominent federal law to deny trademarks for terms that were "derogatory or offensive," even on racial or ethnic

---

[91] *See, e.g.*, *McCauley v. Univ. of V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Blair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, 1998 WL 35867183 (E.D. Ky. 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989).
[92] *DeJohn v. Temple Univ.*, 537 F.3d 301, 313-314 (3d Cir. 2008), *quoting Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001), *quoting Texas v. Johnson*, 491 U.S. 397, 414 (1989)).
[93] 137 U.S. 1744 (2017).

grounds, was unconstitutional viewpoint discrimination.[94] In his concurrence, which was joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, Justice Kennedy explained that it was unconstitutional viewpoint discrimination for a government agency to penalize speech that it deemed to be "derogatory":

> At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as "persons, living or dead, institutions, beliefs, or national symbols." Within that category, an applicant may register a positive or benign mark but not a *derogatory* one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.[95]

### C. Who determines whether advocacy is "legitimate" or "illegitimate" under proposed 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 ABA Model Rule 8.4(g) utterly circular. Like the proverbial dog chasing its tail, ABA Model Rule 8.4(g) protects "legitimate advice or advocacy" only if it is "consistent with" ABA Model Rule 8.4(g). That is, speech is permitted by ABA Model Rule 8.4(g) if it is permitted by ABA Model Rule 8.4(g).

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

"In fact, the proposed rule would effectively require enforcement authorities to be guided by their 'personal predilections' because whether a statement is 'harmful' or 'derogatory or

---

[94] *Id.* at 1754, 1765.

[95] *Id.* at 1766 (citations omitted) (emphasis added). The Tennessee Attorney General similarly relied on *Matal* for the proposition that "'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" Tenn. Att'y Gen. Letter, *supra*, note 15, at 6, *quoting Matal*, 137 S. Ct. at 1763; and *citing, Brown*, 564 U.S. at 791, 790 (noting that "disgust is not a valid basis for restricting expression"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting . . . ."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991)("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (internal quotation marks omitted)).

demeaning' depends on the subjective reaction of the listener. Especially in today's climate, those subjective reactions can vary widely."[96]

As Halaby and Long note in their survey of the Rule's many problems, "the word 'legitimate' cries for definition."[97] Indeed, "one difficulty with the 'legitimate' qualifier" is that "lawyers need to make the arguments in order to change the law, yet the new model rule obstructs novel legal arguments."[98] This is particularly true when "the subject matter is socially, culturally, and politically sensitive."[99]

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

## V. The Threat that Proposed Rule 8.4(g) and ABA Model Rule 8.4(g) Pose to Maine Attorneys' Freedom of Speech is Compounded by the Fact that They Impose a Negligence Standard rather than a Knowledge Requirement.

The lack of a knowledge requirement is a serious flaw for both Rules: "[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way."[100]

Indeed the Maine State Bar Association, in its earlier comments, specifically observed that "[a] rule that goes too far to label subjective behavior or behavior committed unknowingly or without intent may result in over-reporting and should be avoided."[101] But the MSBA's concern seems to have been ignored.

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

---

[96] Tenn. Att'y Gen. Letter, *supra*, at note 17, at 9 (citation and explanatory parenthetical omitted). *See id.* ("The lack of clarity in Proposed Rule 8.4(g)'s terms creates a substantial risk that determinations about whether expression is prohibited will be guided by the 'personal predilections' of enforcement authorities rather than the text of the rule. *Kolender v. Lawson*, 461 U.S. 352, 356 (1983) (internal quotation marks omitted).") *See also, id.* at 10 ("[T]he [Board of Professional Responsibility] would presumably get to draw the line between legitimate and illegitimate advocacy, creating a further risk that advocacy of controversial or politically incorrect positions would be deemed harassment or discrimination that constitutes professional misconduct.")

[97] Halaby & Long, *supra*, note 6, at 237.

[98] *Id.* at 238.

[99] *Id.*

[100] Tenn. Att'y Gen. Letter, *supra*, at note 17, at 5. *See* Halaby & Long, *supra*, note 6, at 243-245.

[101] Maine State Bar Association, *Comment form MSBA to proposed Rule 8.4(g) of the Maine Rules of Professional Conduct*, http://www.courts.maine.gov/rules_adminorders/rules/proposed/prof_conduct_comments/msba.pdf.

> [ABA Model Rule 8.4(g)] subjects to discipline not only a lawyer who *knowingly* engages in harassment or discrimination, but also a lawyer who *negligently* utters a derogatory or demeaning comment. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the objectively reasonable lawyer' will be constructed for purposes of making this determination.[102]

As the Tennessee Attorney General warned, "the proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way."[103]

Similarly, the Disciplinary Board of the Supreme Court of Pennsylvania criticized ABA Model Rule 8.4(g) because:

> The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.[104]

## VI. The Vermont Supreme Court has Interpreted ABA Model Rule 8.4(g) as Limiting a Lawyer's Ability to Accept, Decline, or Withdraw from a Representation in Accordance with Rule 1.16.

Proponents of ABA Rule 8.4(g) generally claim that it will not affect a lawyer's ability to refuse to represent a client. They point to the language in the Rule that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16." The Advisory Committee Note for Proposed Rule 8.4(g) includes similar language.[105]

But as Professor Rotunda and Professor Dzienkowski explain, Rule 1.16 actually "deals with when a lawyer must or may *reject* a client or *withdraw* from representation."[106] Rule 1.16 does not address *accepting* clients. The Tennessee Attorney General similarly suggests that "[a]n attorney who would prefer not to represent a client because the attorney disagrees with the

---

[102] Prof. Dane S. Ciolino, "LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct," *Louisiana Legal Ethics*, Aug. 6, 2017 (emphasis in original), https://lalegalethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/ (last visited May 2, 2018).
[103] Tenn. Att'y Gen. Letter, *supra*, note 17, at 5.
[104] The Pennsylvania Bulletin, *supra*, note 42.
[105] Proposed Rule 8.4(g), *supra*, note 2, at 2.
[106] Rotunda & Dzienkowski, *supra*, note 5, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis supplied by the authors).

position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g)."[107]

In the one state to have adopted ABA Model Rule 8.4(g), the Vermont Supreme Court explained in its accompanying Comment [4] that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." It further explained that, under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)."[108]

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that "[a] lawyer is under no obligation to accept every person who may wish to become a client *unless the refusal to accept a person amounts to unlawful discrimination*."[109] The facts before the Committee were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of "unlawful discrimination" for purposes of New York's Rule 8.4(g) a question of law beyond its jurisdiction, the Committee declined to "opine on whether a lawyer's refusal to represent a prospective client in a suit against the lawyer's own religious institution constitutes 'unlawful discrimination'" for purposes of New York's Rule 8.4(g).[110]

In *Stropnicky v. Nathanson*,[111] the Massachusetts Commission Against Discrimination found a law firm that specialized in representing women in divorce cases had violated state nondiscrimination law when it refused to represent a man.[112] As these examples demonstrate, reasonable doubt exists that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation.

## VII. Grave Reservations Exist Regarding Whether State Bars Should Be Tribunals of First Resort for Employment and Other Discrimination and Harassment Claims Against Attorneys and Law Firms.

At a public hearing on June 1, 2018, before the New Hampshire Supreme Court Advisory Committee on Rules, the New Hampshire bar disciplinary counsel voiced concerns about adoption of a rule patterned on ABA Model Rule 8.4(g) because it would burden their office's

---

[107] Tenn. Att'y Gen. Letter, *supra*, note 17, at 11.
[108] Vermont Supreme Court, *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, July 14, 2017, at 3, https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf.
[109] NY Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).
[110] *Id.* New York's Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is significantly narrower.
[111] 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003).
[112] Rotunda & Dzienkowski, *supra*, note 5, *in* "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

limited resources. Similarly, the Montana Office of Disciplinary Counsel filed comments with the Montana Supreme Court raising its concerns with the language of ABA Model Rule 8.4(g). The Office could "envision any unhappy litigant claiming discrimination . . . by another party's attorney."[113] The Office quoted concerns raised by the National Organization of Bar Counsel ("NOBC") about "the possibility of diverting already strained resources to investigate and prosecute these matters," although the NOBC "declined to take a position on whether Model Rule8.4(g) should be approved."[114]

Similarly, the Disciplinary Board of the Supreme Court of Pennsylvania identified two defects of ABA Model Rule 8.4(g). The first was the rule's "potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers."[115] The second defect was that "after careful review and consideration … the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities."[116]

Increased demand may drain the limited resources of the state bar if it becomes the tribunal of first resort for discrimination and harassment claims against lawyers. Serious questions arise about the evidentiary or preclusive effects that a state bar proceeding might have on other tribunals' proceedings. State bar tribunals have their own rules of procedure and evidence that may be significantly different from state and federal court rules. Often, discovery is more limited in bar proceedings than in civil court. And, of course, there is no right to a jury trial in state bar proceedings.

An attorney may be disciplined regardless of whether her conduct is a violation of any other law. Professor Rotunda and Professor Dzienkowski warn that Rule 8.4(g) "may discipline the lawyer who does not violate any statute or regulation [except Rule 8.4(g)] dealing with discrimination."[117] Nor is "an allegedly injured party [required] to first invoke the civil legal system" before a lawyer can be charged with discrimination or harassment.[118]

The threat of a complaint under Model Rule 8.4(g) could also be used as leverage in other civil disputes between a lawyer and a former client. Model Rule 8.4(g) even may be the basis of a private right of action against an attorney. Professor Rotunda and Professor Dzienkowski note this risk:

> If lawyers do not follow this proposed Rule, they risk discipline (e.g., disbarment, or suspension from the practice of law). In

---

[113] Office of Disciplinary Counsel, *ODC's Comments Re ABA Model Rule 8.4(g)* (filed Apr. 10, 2017), at 3, https://www.clsnet.org/document.doc?id=1147.
[114] *Id.* at 4.
[115] The Pennsylvania Bulletin, *supra*, note 42.
[116] *Id.*
[117] Rotunda & Dzienkowski, *supra*, note 5 (parenthetical in original).
[118] *Id.*

> addition, Courts enforce the Rules in the course of litigation (e.g., sanctions, disqualification). Courts also routinely imply private rights of action from violation of the Rules – malpractice and tort suits by third parties (non-clients).[119]

Unsurprisingly, Professor Rotunda and Professor Dzienkowski disagree with the Rule's proponents that lawyers "should rely on prosecutorial discretion because disciplinary boards do not have the resources to prosecute every violation." As discussed *supra* at pp. 24-27, "[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas."[120]

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

## Conclusion

Lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts in their social activities, their workplaces, and the public square without fear of losing their license to practice law. Because ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) would unconstitutionally chill lawyers' expression on political, social, religious, and cultural issues, this Court should reject both.

For the many reasons discussed above, this Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out if it is adopted and implemented in other states. There is no reason to make Maine attorneys laboratory subjects in the ill-conceived experiment that ABA Model Rule 8.4(g) represents. This is particularly true when sensible alternatives are readily available, such as waiting to see whether any other states (other than Vermont) adopt ABA Model Rule 8.4(g), and then observing its impact on attorneys in those states. A decision to reject ABA Model Rule 8.4(g) can always be revisited after other states have served as its testing ground.

---

[119] *Id.*
[120] *Id.*

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

Respectfully submitted,

/s/ David Nammo

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

**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.

STATE OF MAINE
SUPREME JUDICIAL COURT
**PROPOSED** AMENDMENT TO THE
MAINE RULES OF PROFESSIONAL CONDUCT

1. Rule 8.4 of the Maine Rules of Professional Conduct is amended as follows.

**MAINTAINING THE INTEGRITY OF THE PROFESSION**

. . . .

**RULE 8.4 *MISCONDUCT***

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate any provision of either the Maine Rules of Professional Conduct or the Maine Bar Rules, or knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or unlawful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Maine Rules of Professional Conduct, the Maine Bar Rules or law; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or law~~.~~; or

(g) engage in conduct or communication related to the practice of law that the lawyer knows or reasonable should know is harassment, or

discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity.

**Advisory Committee Note – _____ 2018**

Subsection (g) is added and is based on ABA Model Rule of Professional Conduct 8.4(g), with some modifications.

The Committee has omitted the final two sentences of the ABA Model Rule, not out of disagreement with their substance, but because they are unnecessary to the Rule text. Lawyers are free to accept and decline representations as they see fit, in accordance with Rule 1.16, and lawyers do not run afoul of subsection (g) by offering legal advice or advocacy on behalf of clients consistent with the Rules. The Committee endorses the substance of those omitted sentences.

The Committee has omitted from the list of types of prohibited discrimination "marital status" and "socioeconomic status." The Committee considered the Legislature's statement of anti-discrimination policy in the Maine's Human Rights Act, 5 M.R.S. § 4552, as well as application of that Act, in coming to the Committee's own conclusions on what to include or not include in a rule of attorney discipline.

Comments [3] through [5] to the ABA Model Rule provide much useful guidance in the application of Model Rule 8.4(g). Historically, the Maine Supreme Judicial Court has not adopted Comments when adopting amendments to the Rules of Professional Conduct. The Advisory Committee considers it important to alert practitioners to the following points regarding the application of Maine's Rule 8.4(g); a number of these points grow out of Comments [3] through [5] to ABA Model Rule 8.4.

"Discrimination" as used in this Rule means conduct or communication that as lawyer intends or reasonable should know manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in the Rule; to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.

"Harassment" as used in this Rule means derogatory or demeaning conduct or communication and includes unwelcome sexual advances, or other conduct or communication unwelcome due to its implicit or explicit sexual content.

"Related to the practice of law" as used in the Rule means occurring in the course of representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; or operating or managing a law firm or law practice. Declining representation, limiting one's practice to particular clients or types of clients, and advocacy of policy positions or changes in the law are not regulated by Rule 8.4(g).