CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

August 10, 2020

Alaska Bar Association
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By email: shanahan@alaskabar.org

RE: Comment Letter Opposing Proposed Alaska Rule of Professional Conduct 8.4(f)-(g)

Dear Officers and Members of the Board of Governors of the Alaska Bar Association:

This comment letter is filed pursuant to the Alaska Bar Association's announcement on May 7, 2020, soliciting public comment on adding Proposed Rules 8.4(f)-(g) to the Alaska Rules of Professional Conduct. CLS appreciates the significant improvements that the 2020 Proposed Rules have made to the 2019 Proposed Rule. We recognize and appreciate the hard work of the Committee on Professional Rules.

Christian Legal Society ("CLS") is a national association of Christian attorneys, law students, and law professors, founded in 1961, to help lawyers and law students integrate their faith with their practice of law. CLS's membership includes attorneys who practice law in Alaska. Women constitute a significant percentage of CLS's attorney and law student members and leaders. Its current president, as well as its immediate past president, are women who have practiced law for a number of years. The Director of its Center for Law and Religious Freedom is a lawyer and a woman. CLS opposes harassment and discrimination against any woman in the legal profession.

Due to free speech concerns, as well as prudential policy considerations, CLS urges the Board of Governors not to adopt Proposed Rules 8.4(f)-(g) as changes to the Alaska Rules of Professional Conduct. CLS believes that Proposed Rules 8.4(f)-(g) will inevitably have a chilling effect on Alaska attorneys' speech regarding political, ideological, religious, and social issues to the detriment of Alaska attorneys, their clients, and a free civil society.

CLS commends to the Board's consideration the recent, careful analysis of ABA Model Rule 8.4(g) by Professor Michael McGinniss, Dean of the University of North Dakota School of Law, entitled *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019).[1] Dean McGinniss "examine[d] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."[2]

[1] https://law.und.edu/_files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlpp-2019.pdf.
[2] *Id.* at 173.

I. Proposed Rule 8.4(f)-(g) Misses the Mark in Addressing Sexual Harassment.

The narrative for Proposed Rules 8.4(f)-(g) set out in the memorandum of April 23, 2020, is that the Proposed Rules were drafted to respond to the question: "Is sexual harassment of opposing counsel a violation of the Alaska Rules of Professional Conduct, and if so, which rule would apply?" If the purpose of the Proposed Rules is to provide an action for conduct that is "sexual harassment," one would expect the Proposed Rules to specifically address "sexual harassment." But the term "sexual harassment" does not appear in the Proposed Rules.

Instead, in addressing "harassment," Proposed Rule 8.4(f) makes it professional misconduct for a lawyer to engage in *any kind* of harassment in his or her "professional relations" with four groups of persons: employees of a tribunal or other law firm, parties, witnesses, or seated jurors. Note that the harassment is not limited to harassment of enumerated classes, including "sex." Instead, any harassment is covered of any persons in these four groups.

Proposed Rule 8.4(f) also makes it professional misconduct for an attorney to engage in invidious discrimination as to specific, enumerated protected classes. But "sex" is not one of the enumerated classes. Instead, the fourteen protected classes, as defined in Proposed Rule 8.4(g), are: "race, color, gender, sexual identity or orientation, religion, ethnicity or national origin, disability, age, marital status, pregnancy or parenthood, or status as a veteran."

"Gender" and "sex" have different legal meanings. And the term "*sexual* identity" is not a common term in nondiscrimination law. At a minimum, these terms invite confusion as to whether they cover sexual harassment.

If the goal is to make sexual harassment grounds for disciplinary action, Colorado's Rule of Professional Conduct 8.4(i) offers more straightforward and definitive language. Last year Colorado adopted a succinct rule of professional conduct, CRPC 8.4(i), which prohibits sexual harassment:

> It is professional misconduct for a lawyer to:
>
> . . .
>
> (i) engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities.
>
> Comment
>
> [5A] Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome. The substantive law of employment discrimination, including antiharassment statutes, regulations, and case law, may guide, but does not limit, application of paragraph (i). "Professional activities" are not limited to those that occur in a client-lawyer relationship.

Colorado's straightforward rule with 99 words accomplishes its purpose more clearly and directly than the Proposed Rules 8.4(f)-(g) with its 785 words. We suggest that the Colorado rule's economy of words would serve Alaska's attorneys better as well.

II. This is the Wrong Time to Experiment with a Rule that will Inevitably have a Chilling Effect on Alaska Attorneys' Speech Regarding Political, Ideological, Religious, and Social Issues.

Many proponents of ABA Model Rule 8.4(g) and its derivative rules, such as Proposed Rules 8.4(f)-(g), sincerely believe that such rules will only be used to punish lawyers who truly are bad actors. But recently we have witnessed too many people being punished, and their livelihoods placed at risk, for holding traditional religious views that may be currently disfavored by popular culture. Indeed, simply supporting freedom of speech has become controversial, as we have seen in recent weeks when well-known liberal signatories to a letter were publicly pressured to recant their support for freedom of speech and tolerance of others' differing beliefs.[3]

Sadly, we live in a time when the African-American Fire Chief of Atlanta, who had been appointed National Fire Marshal by President Obama, was fired because he wrote a book, on his own time and in his personal capacity, that mentioned his traditional religious beliefs regarding marriage and sexual conduct.[4] And the CEO of Mozilla was pressured to resign because of his religious beliefs regarding marriage.[5]

Even the legal culture has been infected with the willingness of some to suppress the free speech of those with whom they disagree. Conservative or religious law students are harassed at elite law schools simply because other students do not like their religious or political beliefs.[6]

Last summer, commenting on the 2019 Proposed Rule, the Alaska Attorney General warned that "[t]he idea that the Proposed Rule could be used to suppress an attorney's

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[3] *J.K. Rowling Joins 150 Public Figures Warning Over Free Speech*, British Broadcasting Corporation (July 8, 2020), https://www.bbc.com/news/world-us-canada-53330105.

[4] *Testimony Before the House Committee on Oversight and Government Reform on Religious Freedom & The First Amendment Defense Act*, 114th Cong. (July 12, 2016) (statement of Kelvin J. Cochran), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/2016-07-12%20Kelvin%20Cochran%20-%20Testimony.pdf .

[5] *Did Mozilla CEO Brendan Eich Deserve to Be Removed from His Position?*, Forbes (Apr. 11, 2014), https://www.forbes.com/sites/quora/2014/04/11/did-mozilla-ceo-brendan-eich-deserve-to-be-removed-from-his-position-due-to-his-support-for-proposition-8/#483d85c02158

[6] *See, e.g.*, Aaron Haviland, "I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong," The Federalist (Mar. 4, 2019), https://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/ (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed to Federalist Society members and guest speakers)

constitutionally protected speech on behalf of a client is far from speculative."[7] The Attorney General drew on his own personal experience when in private practice of being "unconstitutionally targeted with a complaint under municipal non-discrimination law for my representation of a faith-based women's shelter before the Anchorage Equal Rights Commission."[8] He expressed "little doubt that if the Proposed Rule is enacted, it will be weaponized in similar fashion to intimidate or punish attorneys for vigorously representing their clients."[9]

Last week the Judicial Conference Committee on Codes of Conduct withdrew a draft advisory opinion regarding judges' membership in the Federalist Society and the American Constitution Society, after receiving comments from approximately 300 judges. In withdrawing its proposal, the Committee noted that "judges confront a world filled with challenges arising out of emerging technologies, deep ideological disputes, a growing sense of mistrust of individuals and institutions, and an ever-changing landscape of competing political, legal and societal interests."[10]

Much more vulnerable than judges, lawyers are understandably reluctant to adopt a proposed black letter rule that threatens loss of their license to practice law for expressing their viewpoints on "deep ideological disputes." Lawyers – whether classical liberal, conservative, libertarian, free-thinker, or religious – understandably are unwilling to put their livelihoods at risk in a time of "emerging technologies" and "an ever-changing landscape of competing political, legal and societal interests."[11]

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[7] Attorney General Clarkson to Board of Governors of Alaska Bar Association at 10 (Aug. 9, 2019), http://www.law.state.ak.us/pdf/press/190809-Letter.pdf.

[8] *Id.* In 2018, the Anchorage Equal Rights Commission (AERC) filed a complaint against an Anchorage law firm alleging that the firm violated the Anchorage Municipal Code. The firm represented a religiously affiliated, private nonprofit shelter for homeless women, many of whom had been abused and battered by men. The firm represented the shelter in a proceeding arising from a discrimination complaint filed with the AERC, alleging that the shelter had refused admission to a person who was a biological male who identified as female. The shelter explained that it had denied shelter to the individual because, among other things, of its policy against admitting persons who were inebriated, but acknowledging that it had a policy against admitting biological men. The law firm responded to an unsolicited request for a media interview. When the interview was published providing the shelter's version of the facts, the AERC brought a discrimination claim *against the law firm* alleging it had published a discriminatory policy. The AERC complaint was dismissed, but only after several months of legal proceedings in which the law firm had to obtain outside counsel. See *Basler v. Downtown Hope Center, et al.*, Case No. 18-167, Anchorage Equal Rights Comn'n (May 15, 2018).

[9] *Id.* at 10-11 (referring to the 2019 Proposed Rule 8.4(f)).

[10] Memorandum from James C. Duff, Director, Administrative Office of the United States Courts to All United States Judges, "Update Regarding Exposure Draft – Advisory Opinion No. 117) Information" (July 30, 2020), https://aboutblaw.com/SkA.

[11] *Id.*

III. Three Recent Supreme Court Decisions Demonstrate the Likely Unconstitutionality of Rules Derived from ABA Model Rule 8.4(g), such as Proposed Rules 8.4(f)-(g).

Since the ABA adopted Model Rule 8.4(g), the United States Supreme Court has issued three free speech decisions bearing on its constitutionality: *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). The *Becerra* decision clarified that the First Amendment protects "professional speech" just as fully as other speech. There is no free speech carve-out that allows content-based restrictions on professional speech. The *Matal* and *Iancu* decisions affirm that viewpoint discrimination, even to advance good purposes, is impermissible.

A. *NIFLA v. Becerra* Protects Lawyers' Speech from Content-Based Restrictions.

Under the Court's analysis in *Becerra,* ABA Model Rule 8.4(g) is an unconstitutional *content*-based restriction on lawyers' speech. The Court held that government restrictions on professionals' speech – including lawyers' professional speech – are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, presumptively unconstitutional. That is, a government regulation that targets speech must survive strict scrutiny – a close examination of whether the regulation is narrowly tailored to achieve a compelling government interest.

The Court explained that "[c]ontent-based regulations 'target speech based on its communicative content.'"[12] "[S]uch laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'"[13] As the Court observed, "[t]his stringent standard reflects the fundamental principle that governments have '"no power to restrict expression because of its message, its ideas, its subject matter, or its content."'"[14]

The Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech. This is, of course, the operative assumption underlying ABA Model Rule 8.4(g) and rules derived from it.

The Court noted three recent federal courts of appeals that had ruled that "'professional speech' [w]as a separate category of speech that is subject to different rules" and, therefore, less protected by the First Amendment.[15] The Court then abrogated those decisions, stressing that "*this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.*'"[16] The Court rejected the idea

[12] 138 S. Ct. at 2371, quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[13] *Id.*
[14] *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[15] *Id.* at 2371.
[16] *Id.* at 2371-72 (emphasis added).

that "professional speech" was an exception "from the rule that content-based regulations of speech are subject to strict scrutiny."[17]

Instead, the Court was clear that a State's regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its "precedents have long protected the First Amendment rights of professionals" and "has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers."[18] Indeed, in a landmark case, *National Association for the Advancement of Colored People v. Button*,[19] involving regulation of attorneys' speech, the Court ruled that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," explaining:

> If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.[20]

B. ABA Formal Opinion 493 and Professor Aviel's Article Fail to Address the Supreme Court' Decision in *NIFLA v. Becerra*.

The ABA Section of Litigation recognized *Becerra's* impact in a recently published article. Several section members understood that the decision raised grave concerns about the overall constitutionality of ABA Model Rule 8.4(g):

> Model Rule 8.4(g) "is intended to combat discrimination and harassment and to ensure equal treatment under the law," notes Cassandra Burke Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section's Civil Rights Litigation Committee. While it serves important goals, *"the biggest question about Rule 8.4(g) has been whether it unconstitutionally infringes on lawyers' speech rights—and after the Court's decision in Becerra, it increasingly looks like the answer is yes*," Robertson concludes. [21]

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[17] *Id.* at 2371.
[18] *Id.* at 2374.
[19] 371 U.S. 415 (1963).
[20] *Id.* at 438-39.
[21] C. Thea Pitzen, *First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g)*

1. The ABA's Formal Opinion 493 Fails to Even Mention *Becerra.*

On July 15, 2020, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 493, "Model Rule 8.4(g): Purpose, Scope, and Application." The troubling document serves to underscore the breadth of ABA Model Rule 8.4(g) and the fact that it is intended to restrict lawyers' speech.[22] The opinion reassures that it will only be used for "harmful" conduct, which the rule makes clear includes "verbal conduct," i.e., "speech."[23] Of course, many have urged a greatly expanded definition of what constitutes "harmful" speech in recent years, even as many have questioned the value of free speech generally.

The opinion explains that the Rule's scope "is not restricted to conduct that is severe or pervasive."[24] Violations will "*often* be intentional and *typically* targeted at a particular individual or group of individuals." This merely confirms that a lawyer can be disciplined for speech that is not intended to harm and that does not "target" a particular person or group.[25]

The opinion claims that "[t]he Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern." But that is hardly reassuring because "matters of public concern" is a term of art in free speech jurisprudence that actually is used in the context of the broad limits the government can place on its employees' free speech. The category actually provides less protection for free speech than its words would suggest.[26] And it may possibly reflect the unacceptable notion that lawyers' speech is akin to government speech, a topic that Professor Aviel briefly mentions in her article.[27]

Constitutional?, ABA Section of Litigation Top Story (Apr. 3, 2019), https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond/ (emphasis added).

[22] American Bar Association Standing Comm. on Ethics and Prof. Resp., Formal Op., 493, *Model Rule 8.4(g): Purpose, Scope, and Application* (July 15, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf.

[23] *Id.* at 1.

[24] *Id.*

[25] *Id.*

[26] *Garcetti v. Cabellos*, 547 U.S. 410, 417 (2006) ("the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern"); *id.* at 418 ("To be sure, conducting these inquiries sometimes has proved difficult.")

[27] Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. L. Ethics 31, 34 (2018) ("[L]awyers have such an intimate relationship with the rule of law that they are not purely private speakers. Their speech can be limited along lines analogous with government actors because, in a sense, they embody and defend the law itself"). The mere suggestion that lawyers' speech is akin to government actors' speech, which is essentially government speech that is unprotected by the First Amendment, is deeply troubling and should be soundly rejected.

The opinion claims that ABA Model Rule 8.4(g) does not "limit a lawyer's speech or conduct in settings unrelated to the practice of law," but fails to mention how broadly the Rule defines "conduct related to the practice of law," for example, to include social settings.[28] But this ignores the Court's instruction in *Becerra* that lawyers' *professional* speech – not just their speech "unrelated to the practice of law" – is protected by the First Amendment under a strict scrutiny standard.

Perhaps most bewildering is the fact that Formal Opinion 493 *does not even mention the Supreme Court's Becerra decision*, even though it was handed down two years ago and has been frequently relied upon to show ABA Model Rule 8.4(g)'s constitutional deficiencies. The Formal Opinion's lack of mention, let alone analysis, of *Becerra* is inexplicable. The Formal Opinion has a four-page section that discusses "Rule 8.4(g) and the First Amendment," yet never mentions the Court's recent and highly relevant decisions in *Becerra*, *Matal*, and *Iancu.* Like the proverbial ostrich burying its head in the sand, the ABA seems determined not to grapple with the deep flaws of Model Rule 8.4(g).[29] State bars do not have that luxury.

Formal Opinion 493 concedes that its definition of the term "harassment" is not the same as the EEOC uses,"[30] citing *Harris v. Forklift Systems, Inc.*, which ruled that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview."[31] The ABA Model Rule 8.4(g)'s definition of "harassment" in Comment [3] includes "derogatory or demeaning verbal or physical conduct." Of course, this definition runs headlong into the Supreme Court's ruling that the mere act of government officials determining whether speech is "disparaging" is viewpoint discrimination that violates freedom of speech. In Formal Opinion 493, the ABA offers a new definition for "harassment" ("aggressively invasive, pressuring, or intimidating") that is not found in ABA Model Rule 8.4(g). Formal Opinion 493 signifies that the ABA recognizes that the term "harassment" is the Rule's Achilles' heel.

2. The Aviel Article Fails to Mention *Becerra* and, therefore, is not a Reliable Source of Information on the Constitutionality of Proposed Rules 8.4(f)-(g).

The Rules Committee expressly noted that, in drafting Proposed Rules 8.4(f)-(g), it had reviewed Professor Rebecca Aviel's article, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. L. Ethics 31 (2018). But Professor Aviel's article should not be relied upon in assessing Proposed Rules 8.4(f)-(g)'s chilling effect on lawyers' freedom of speech because it makes no mention of the Supreme Court's decision in *Becerra*. It seems probable that the article was written before the Supreme

[28] Formal Op. 493 at 1.
[29] *Id.* at 9-12.
[30] *Id.* at 4 & n.13.
[31] 510 U.S. 17, 21 (1993)

Court issued its *Becerra* opinion and, for that reason, is not helpful in assessing the constitutionality of a rule that involves lawyers' speech.

Of critical importance, Professor Aviel's article rests on the assumption that "regulation of the legal profession is legitimately regarded as a 'carve-out' from the general marketplace" that "appropriately empowers bar regulators to restrict the speech of judges and lawyers in a manner that would not be permissible regulation of the citizenry in the general marketplace."[32] *But this is precisely the assumption that the Supreme Court rejected in Becerra*. Contradicting Professor Aviel's assumption, the Court explained in *Becerra* that the First Amendment does not contain a carve-out for "professional speech."[33] Instead, the Court actually used lawyers' speech as an example of protected speech.

Interestingly, even without the *Becerra* decision to guide her, Professor Aviel conceded that ABA Model Rule 8.4(g) with its comments' "expansiveness may well raise First Amendment overbreadth concerns."[34] But because she wrote without benefit of *Becerra* and relied on basic assumptions repudiated by the Court in *Becerra*, her free speech analysis cannot be viewed as correct or authoritative.

C. Under *Matal v. Tam* and *Iancu v. Brunetti*, Proposed Rules 8.4(f)-(g) Fail a Viewpoint-Discrimination Analysis.

Under the Court's analysis in *Matal*, ABA Model Rule 8.4(g) is an unconstitutional *viewpoint*-based restriction on lawyers' speech. In *Matal*, a unanimous Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[35]

All justices agreed that a provision of a longstanding federal law, the Lanham Act, was unconstitutional because it allowed government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons. Allowing government officials to determine what words do and do not "disparage" a person "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[36] Justice Alito, writing for a plurality of the Court, noted that "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is

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[32] Aviel, *supra* note 27 at 39 (citation and quotation marks omitted); *see also id.* at 44.
[33] *Becerra*, 138 S. Ct. at 2371.
[34] Aviel, *supra* note 27, at 48.
[35] 137 S. Ct. at 1753-1754, 1765*; see also, id.* at 1766 (unconstitutional to suppress speech that "demeans or offends") (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).
[36] *Id.* at 1751 (quotation marks and ellipses omitted).

hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[37]

In his concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy stressed that "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate," particularly "if the ideas or perspectives are ones a particular audience might think offensive."[38] Justice Kennedy closed with a sober warning:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.[39]

Justice Kennedy explained that the federal statute was unconstitutional viewpoint discrimination because the government permitted "a positive or benign mark but not a derogatory one," which "reflects the Government's disapproval of a subset of messages it finds offensive," which is "the essence of viewpoint discrimination."[40] And it was viewpoint discriminatory even if it "applies in equal measure to any trademark that demeans or offends."[41]

In 2019, the Supreme Court reaffirmed its rigorous prohibition on viewpoint discrimination. The challenged terms in *Iancu* were "immoral" and "slanderous" and, once again, the Court found the terms were viewpoint discriminatory because they allowed government officials to pick and choose which speech to allow.

In her opinion for the Court, Justice Kagan explained that "immoral" and "scandalous" insert a "facial viewpoint bias in the law [that] results in viewpoint-discriminatory application."[42] The Lanham Act, was unconstitutional because:

> [I]t allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those

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[37] *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes,J., dissenting).
[38] *Id.* at 1767.
[39] *Id.* at 1769 (Kennedy, J., concurring).
[40] *Id.* at 1766 (Kennedy, J., concurring).
[41] *Id.*
[42] *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019).

> hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.[43]

D. Proposed Rules 8.4(f)-(g)'s Terms "Harassment" and "Legitimate" Are Viewpoint Discriminatory.

If a longstanding federal law, such as the Lanham Act, cannot withstand viewpoint-discrimination analysis, it seems even less likely that Proposed Rule 8.4(f)-(g) can withstand viewpoint-discrimination analysis. Its prohibitions turn on the definition of "harassment" found in Proposed Rule 8.4(g)(1), which states:

> "Harassment" means unwelcome conduct, whether verbal or physical, that has no reasonable relation to a legitimate purpose and is so severe or sustained that a reasonable person would consider the conduct intimidating or abusive.

Of course, "verbal conduct" is "speech." But the government is not supposed to determine, let alone punish, speech that lacks "a legitimate purpose."

So much rests on the term "legitimate." There are several definitions for "legitimate," none of which is helpful in understanding what speech Proposed Rules 8.4(f)-(g) permit and what conduct they make impermissible. For example, the Merriam-Webster Dictionary provides three definitions of "legitimate" that might apply. First, "legitimate" means "accordant with law or with established legal forms and requirements," But that definition makes "a legitimate purpose" circular: Proposed Rules 8.4(f)-(g) allows what the law allows. A second definition is that "legitimate" means "being exactly as intended or presented, neither spurious nor false." Again, this definition does not shed light on distinguishing a "legitimate purpose" from an "illegitimate purpose." A third definition is that "legitimate" means "conforming to recognized principles or accepted rules and standards." But again, this definition does not give substance to what is a "legitimate purpose."[44]

Proposed Rules 8.4(f)-(g) use "legitimate" to modify "purpose" in the definitions of "harassment" and "invidious discrimination." "Legitimate" also modifies "counseling or advocacy," so that "legitimate counseling or advocacy" is protected, whereas "illegitimate counseling or advocacy" is not.

Proposed Rule 8.4(f) asserts that it "does not prohibit a lawyer from engaging in *legitimate* counseling or advocacy when a person's membership in a protected class is material." And Proposed Rule 8.4(g)(1) defines "harassment" to include "unwelcome" speech "that has no reasonable relation to a legitimate purpose" if it is "so severe or sustained that a reasonable person would consider the conduct intimidating or abusive."

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[43] *Id.*

[44] https://www.merriam-webster.com/dictionary/legitimate

But the obvious question is who decides which speech is "legitimate" and which speech is "illegitimate"? By whose standards? By what standards?

As the Tennessee Attorney General explained in his letter opposing ABA Model Rule 8.4(g), "the [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." And the attorney general warned, "[t]he 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."[45]

As Andrew Halaby and Brianna Long observed in their survey of the ABA Model Rule's many problems, "the word 'legitimate' cries for definition."[46] 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."[47] This is particularly true when "the subject matter is socially, culturally, and politically sensitive."[48] Dean McGinniss expresses similar concerns about the meaning of "legitimate advocacy" and whose standard of "legitimacy" will be applied.[49]

This vagueness in the terms used by Proposed Rules 8.4(f)-(g) will chill lawyers' speech. Compounding the unconstitutionality, the terms fail to give lawyers fair notice of what speech might subject them to discipline. Proposed Rules 8.4(f)-(g) do not provide the clear enforcement standards that are necessary when the loss of one's livelihood is at stake.

IV. Proposed Rule 8.4(f) Could Limit Alaska Lawyers' Ability to Accept, Decline, or Withdraw from a Representation.

The proponents of ABA Model Rule 8.4(g) generally claim that it will not affect a lawyer's ability to refuse to represent a client. They point to 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." But 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." The Vermont Supreme Court further explained that, *under the mandatory withdrawal provision of*

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[45] Tenn. Att'y Gen. Letter, Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018), at 10, https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g /comments-3-16-2018.pdf. The letter is incorporated into Tennessee Attorney General Opinion 18-11.
[46] 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, 237 (2017).
[47] *Id.* at 238.
[48] *Id.*
[49] McGinniss, *supra* note 1, at 209-210.

Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)."[50]

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*."[51] 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).[52]

In *Stropnicky v. Nathanson*,[53] 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.[54] 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.

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."[55] Rule 1.16 does not address *accepting* clients.[56] Moreover, as Professor Rotunda and Professor Dzienkowski have observed, Comment [5] to ABA Model Rule 8.4(g) would seem to limit any right to decline representation, if permitted at all, to "limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations."[57]

Dean McGinniss, a professional responsibility professor, warns that "if state bar authorities consider a lawyer's declining representation . . . as 'manifest[ing] bias or prejudice,'

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[50] 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 (emphasis supplied).
[51] N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).
[52] *Id.* New York's Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is narrower.
[53] 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).
[54] Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017, "§ 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."
[55] *Id.*(emphasis supplied by the authors).
[56] The Tennessee attorney general concurs that "[a]n attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra* note 45, at 11.
[57] *See* Rotunda & Dzienkowski, *supra* note 54.

they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g).”[58] Dean McGinniss agrees that “[d]espite its ostensible nod of non-limitation, ABA Model Rule 8.4(g) offers lawyers no actual protection against charges of ‘discrimination’ based on their *discretionary* decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer.”[59] Because Model Rule 1.16 “addresses only when lawyers *must* decline representation, or when they may or must *withdraw* from representation” but not when they “are *permitted* to decline client representation,” ABA Model Rule 8.4(g) seems to only allow what was already required, not declinations that are discretionary.

Conclusion

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. Proposed Rules 8.4(f)-(g) do not provide the clear enforcement standards that are necessary when the loss of one’s livelihood is at stake. We respectfully request that the Board of Governors reject the proposal.

Christian Legal Society thanks the Bar Association for holding this public comment period and considering its comments.

Respectfully submitted,

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[58] McGinniss, *supra* note 1, at 207-208 & n.146, citing 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, 231-32 (2017), as, in Dean McGinniss’ words, “conceding that the United States Conference of Catholic Bishops’ concerns about religious lawyers’ loss of freedom in client selection under Model Rule 8.4(g) are well founded, though not a basis for objecting to the rule.”
[59] *Id.* at 207-209.