April 5, 2019

New Hampshire Supreme Court

One Charles Doe Drive

Concord, NH 03301

Attn: Eileen Fox, Clerk of Court

By email: rulescomment@courts.state.nh.us

**Re: Comment Letter Opposing Proposed Rule of Professional Conduct 8.4(g)**

Dear Chief Justice Lynn, Justice Hicks, Justice Bassett, Justice Hantz Marconi, and Justice Donovan:

This comment letter is filed pursuant to this Court’s Order dated February 11, 2019, soliciting public comment on the recommendation of the New Hampshire Supreme Court Advisory Committee on Rules (“Committee”) to add a new Rule of Professional Conduct 8.4(g).[[1]](#footnote-1)

The Committee has recommended that a new rule – essentially the widely-criticized ABA Model Rule 8.4(g) – be imposed on the members of the New Hampshire Bar. It is significant to note that after more than two years of deliberations in many states across the country, Vermont is the only state to have adopted the defective ABA Model Rule 8.4(g). In contrast, at least eleven states have concluded, after careful study, that ABA Model Rule 8.4(g) is both unconstitutional and unworkable. Indeed, the Committee itself noted “that the proposal has generated an enormous number of comments, some of which have suggested that the proposal may be unconstitutional” and, as a result, “also voted to recommend that the Court hold a hearing before the full Court on the proposal,” which will be held on April 12.[[2]](#footnote-2) This Court should take the prudent course of waiting to see whether other states choose to experiment with ABA Model Rule 8.4(g) and the practical effect of that experiment on the lawyers in those states.

A number of scholars have characterized ABA Model Rule 8.4(g) as a speech code for lawyers.[[3]](#footnote-3) The late Professor Ronald Rotunda, a highly-respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers’ First Amendment rights.[[4]](#footnote-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]](#footnote-5)

Andrew Halaby and Brianna Long, who are Arizona practitioners, thoroughly examined ABA Model Rule 8.4(g) and concluded that it “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]](#footnote-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.” And they conclude that “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.”[[7]](#footnote-7)

Furthermore, since the ABA adopted Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued two major free speech decisions that demonstrate its unconstitutionality. First, under the Court’s analysis in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), ABA Model Rule 8.4(g) is an unconstitutional *content*-based restriction on lawyers’ speech. The *NIFLA* Court held that state restrictions on “professional speech” are presumptively unconstitutional and subject to strict scrutiny. Second, under the Court’s analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), ABA Model Rule 8.4(g) is an unconstitutional *viewpoint*-based restriction on lawyers’ speech that cannot survive the strict scrutiny triggered by viewpoint discrimination.

 Because of its expansive scope, at least eleven states have rejected or abandoned efforts to adopt ABA Model Rule 8.4(g). In the past two-and-a-half years, official entities in Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, North Dakota, South Carolina, Tennessee, and Texas have weighed ABA Model Rule 8.4(g) and found it wanting. To date, only the Vermont Supreme Court has adopted it.

New Hampshire attorneys should not be made the subjects of the novel experiment that ABA Model Rule 8.4(g) represents. This is particularly true when the Court has the prudent option of waiting to see what other jurisdictions decide to do and then observing the rule’s real-world consequences for attorneys in those states.

Thank you for considering these comments.

 Yours truly,

1. The State of New Hampshire Supreme Court Advisory Committee on Rules, *Report to the Court* (February 8, 2019), at 5 [hereinafter “Committee Report”], at<https://www.courts.state.nh.us/committees/adviscommrules/reports/February-8-2019-Report-to-the-Court.pdf>. [↑](#footnote-ref-1)
2. *Id*. at 2. [↑](#footnote-ref-2)
3. Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>. [↑](#footnote-ref-3)
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>. [↑](#footnote-ref-4)
5. 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.” [↑](#footnote-ref-5)
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). [↑](#footnote-ref-6)
7. *Id.* at 204. [↑](#footnote-ref-7)