



Why Connecticut Should Not Adopt Proposed Rule 8.4(7): Rules Committee Comment Deadline December 4, 2020

The Rules Committee of the Superior Court is considering whether to recommend adoption of [Proposed Rule 8.4\(7\)](#) to the Connecticut Supreme Court. Comments should be sent to the Rules Committee by **close of business, December 4, 2020**, by email to RulesCommittee@jud.ct.gov.

[Proposed Rule 8.4\(7\)](#) is essentially [ABA Model Rule 8.4\(g\)](#), the deeply-flawed and highly-criticized rule adopted by the American Bar Association in August 2016. ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers, as UCLA Professor Eugene Volokh, a nationally recognized First Amendment expert, explains in a [two-minute Federalist Society video](#). Every Connecticut lawyer should read these [ten points](#) about Proposed Rule 8.4(7)

Please take action before December 4: Send a short, respectful email to RulesCommittee@jud.ct.gov urging the Rules Committee to reject Proposed Rule 8.4(7), perhaps saying: **“I oppose adoption of Proposed Rule 8.4(7) because it threatens the First Amendment rights of Connecticut lawyers. Existing Rule 8.4(4) and its Commentary already adequately address any issues of bias and prejudice that should result in discipline. I respectfully request that the Rules Committee of the Superior Court reject Proposed Rule 8.4(7).”**

Other options include signing this [sample comment letter](#) and emailing it to RulesCommittee@jud.ct.gov or composing a comment letter using any reasons given in the [Christian Legal Society’s detailed comment letter](#).

Scholars have criticized ABA Model Rule 8.4(g).¹ Fortunately, ABA Model Rule 8.4(g) operates only in those states in which the highest court adopts it. After four years, only two states, Vermont and New Mexico, have adopted ABA Model Rule 8.4(g). After careful consideration, many states have concluded that ABA Model Rule 8.4(g) is too flawed and have instead chosen the prudent course of waiting to see whether other states adopt ABA Model Rule 8.4(g) and its real-life consequences for attorneys in those states. At least **fourteen** states have rejected or abandoned efforts to impose ABA Model Rule 8.4(g), including:

- **Formal rejection:** The state supreme courts of *Arizona, Idaho, Montana, New Hampshire, South Carolina, South Dakota, and Tennessee* formally rejected ABA Model Rule 8.4(g) after holding comment periods.² ABA Model Rule 8.4(g) has also been rejected in Illinois, Louisiana, Minnesota, Nevada, North Dakota, and Texas.
- **State legislature action:** The *Montana* Legislature adopted a joint resolution urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g). The Legislature was

¹ See, e.g., Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol’y 173 (2019); Prof. Ronald Rotunda, “*The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*,” The Heritage Foundation, Oct. 6, 2016; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and “Conduct Related to the Practice of Law,”* 30 Geo. J. Leg. Ethics 241 (2017); 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 (2017). See also, Prof. Volokh’s Federalist Society debate at <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s> (Mar. 2017), and Prof. Rotunda’s Federalist Society debate at <https://www.youtube.com/watch?v=V6rDPjqBcQg> (Nov. 2017).

² https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf (Tennessee); https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf (Arizona); [https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%2020IRPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%2020IRPC%208.4(g).pdf) (Idaho); <http://www.secourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (South Carolina).

concerned about the impact of ABA 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.”³

- **State bar activity:** The *Illinois* Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule.”⁴ The *North Dakota* Joint Committee on Attorney Standards recommended rejection. The *Louisiana* Rules of Professional Conduct Committee voted not to recommend.
- **State Attorneys General:** Several state attorneys general, including *Texas*, *Tennessee*, *Alaska*, *Louisiana*, *South Carolina*, and *Arizona* have issued opinions stating the rule was likely unconstitutional.⁵

Proposed Rule 8.4(7) would make it professional misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital status in conduct related to the practice of law.”

1. The proposed rule is broad in scope and would regulate nearly everything a lawyer says or does, including:

- speaking at public events, presenting CLE courses, or participating in panel discussions on controversial legal issues;
- writing law review articles, blogposts, tweets, and op-eds;
- giving media interviews;
- teaching law school classes as faculty, adjunct faculty member, or guest lecturer;
- sitting on the boards of single-sex fraternities or sororities;
- belonging to organizations with belief-based membership or leadership requirements;
- tweeting or re-tweeting anything someone disagrees with;
- performing work for political or social action organizations, political parties, or campaigns;
- lobbying or testifying before legislative committees; and
- providing pro bono work for religious congregations, colleges, or schools or sitting on their boards.

2. The proposed rule is unconstitutional under the analyses in two recent United States Supreme Court decisions.⁶ In June 2018, the United States Supreme 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. In June 2017, a unanimous United States Supreme Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is viewpoint discriminatory and, therefore, unconstitutional under the First Amendment.

3. The mens rea requirement is mere negligence. A lawyer can violate the proposed rule without intending to do so or even being aware of having done so, particularly concerning if implicit bias is claimed.

4. Proposed Rule 8.4(h) would make it professional misconduct for lawyers and law firms to engage in many current initiatives aimed at promoting diversity in their employment practices.

³ <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

⁴ <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

⁵ Alaska Att’y Gen. Comment letter (August 9, 2019), <http://www.law.state.ak.us/press/releases/2019/080919-Rule8.html>; Tex. Att’y Gen. Op. KP0123 (Dec. 20, 2016), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>; Tenn. Att’y Gen. Op. 18-11, <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>.

⁶ *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Matal v. Tam*, 137 S. Ct. 1744 (2017).