

**ABA Model Rule 8.4(g)**  
**Christian Legal Society 2022 National Conference Presentation**  
**October 7, 2022**

**I. Examining ABA Model Rule 8.4(g)**

**A. The “legislative history” of ABA Model Rule 8.4(g)<sup>1</sup>**

1. A two-decade effort culminating in adoption in August 2016
2. Comment period March 2016<sup>2</sup>

**B. The text of former Comment [3] accompanying ABA Model Rule 8.4 in effect from 1998-2016**

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 findings that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

**C. The text of ABA Model Rule 8.4(g) adopted August 2016**

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.

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<sup>1</sup> Resources:

- 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).
- Eugene Volokh, Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>.
- 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. Legal Ethics 241 (2017) (opposed to rule).
- 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 (2017) (favorable to rule).
- Kim Colby, “*The Evolution of the New ABA Model Rule 8.4(g)*,” *The Christian Lawyer*, Vol. 12, No. 2 (Fall 2016), at 28, at <https://www.clsreligiousfreedom.org/pdfs/998.pdf>.

<sup>2</sup> Resource: David Nammo, Christian Legal Society Comment Letter to ABA Ethics Committee, March 10, 2016, at <https://www.christianlegalsociety.org/pdfs/930.pdf>.

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).”

#### **D. Comparison of Prior Comment [3] with Current ABA Model Rule 8.4(g)**

1. Was a comment; now a black-letter rule
2. Mens rea
  - a. Prior: “knowingly”
  - b. Current: “knows or reasonably should know”
3. Scope of conduct
  - a. Prior: “in the course of representing a client”
  - b. Current: “in conduct related to the practice of law” defined as:
    - (1) “interacting with . . . others while engaged in the practice of law”
    - (2) “operating or managing a law firm or law practice”
    - (3) “participating in bar association, business or social activities in connection with the practice of law”
4. Prohibited conduct
  - a. Prior: “manifests by words or conduct, bias or prejudice”
  - b. Current: “harassment or discrimination”
    - (1) “manifests bias or prejudice toward others”

- (2) “derogatory or demeaning verbal or physical conduct
- (3) “sexual harassment” which “includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature”
- c. “Substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g).” (Emphasis supplied.)
- 5. Protected classes
  - a. Prior: race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status
  - b. Current: adds ethnicity, gender identity, and marital status
- 6. Required injury
  - a. Prior: “prejudicial to the administration of justice”
  - b. Current: “undermines confidence in the legal profession and the legal system”
    - (1) Injury presumed
- 7. Protected activity
  - a. Prior: “Legitimate advocacy respecting the foregoing factors”
  - b. Current: “Legitimate advice or advocacy consistent with these rules”
- 8. Viewpoint neutral?
  - a. Prior: Yes, on its face
  - b. Current: No
    - (1) “Lawyers may engage in conduct undertaken to promote diversity and inclusion ... [in] recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations”
- 9. Limits whom you can represent?
  - a. Prior: No
  - b. Current: Potentially
    - (1) 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.
    - (2) But claims not to “limit ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16”
    - (3) Also claims not to “preclude legitimate advice or advocacy consistent with these rules”

**E. Pennsylvania’s Three Proposed Rules, including the Final Adopted Rule**

1. December 3, 2016, Version

(g) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer’s fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer’s fitness as a lawyer shall be determined after consideration of the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the

act was committed in connection with the lawyer's professional activities. If there is an alternative forum available to bring a complaint, no charge of professional misconduct may be brought pursuant to this paragraph until a court of administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

Comment: None

2. May 19, 2018, Version (underline = words not in August 2019 version)

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation (except employment discrimination unless resulting in a final agency or judicial determination). 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) Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.

(4) Harassment, as referred to in paragraph (g), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

(5) Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

3. August 31, 2019, Version (underline = words not in May 2018 version)

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or

expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. 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 advice or advocacy consistent with these Rules.

Comment:

[3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

4. June 8, 2020 Adopted as Final Version (Justice Mundy dissenting)  
(underline = words not in prior versions)

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. 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 advice or advocacy consistent with these Rules.

Comment:

[3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

[5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[6] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust

such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

### III. Pennsylvania's Rule Held Unconstitutional in *Greenberg v. Haggerty*

#### A. *Greenberg v. Haggerty*, 491 F.Supp. 3d 12 (E.D. Pa. 2020)

##### 1. Facts

On August 6, 2020, the Hamilton Lincoln Law Institute (HLLI) filed a civil rights suit against the members of Disciplinary Board of the Supreme Court of Pennsylvania to block implementation of new Pennsylvania Rules of Professional Conduct Rule 8.4(g) claiming the rule would chill free speech by Pennsylvania-licensed attorneys. HLLI brought suit on behalf of Zachary Greenberg, a Pennsylvania-licensed attorney working for a nonprofit organization that advocates on behalf of students' constitutional rights and regularly speaks at CLE and non-CLE events on a variety of hot-button legal issues including the constitutionality of hate speech regulation, Title IX's effect on the Due Process rights of individuals accused of sexual assault, and misconduct.

##### 2. Constitutional Claims

Greenberg argued that he risks violating the rule due to his job as a program officer for the nonprofit Foundation for Individual Rights in Education and the scope of the modified rule. He said he gives presentations about First Amendment cases at both CLE and non-CLE events, and those presentations can include offensive and derogatory language, including racial, homophobic and misogynistic slurs. "Greenberg believes it would be nearly impossible to illustrate United States First Amendment jurisprudence, such as by accurately citing and quoting precedent First Amendment cases, without engaging in speech that at least some members of his audience will perceive as biased, prejudiced, offensive, and potentially hateful," the complaint said.

##### 3. Free Speech Ruling<sup>3</sup>

On December 7, the U.S. District Court for the Eastern District of Pennsylvania ruled that Pennsylvania's newly-adopted Rule of Professional Conduct Rule 8.4(g) violates the First Amendment and granted a preliminary injunction that temporarily enjoins the Disciplinary Board of the Supreme Court of Pennsylvania from enforcing the new rule.

"There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open

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<sup>3</sup> Resources:

- Court's ruling: <https://storage.courtlistener.com/recap/gov.uscourts.paed.574138/gov.uscourts.paed.574138.29.0.pdf>.
- Josh Blackman, *Judge Kennedy Provides Roadmap to Stop ABA Model Rule 8.4(g)*, <https://reason.com/volokh/2020/12/08/judge-kennedy-provides-roadmap-to-stop-aba-model-rule-8-4g/>.
- Eugene Volokh, *Lawyer Speech Code Blocked on First Amendment Grounds*, <https://reason.com/volokh/2020/12/08/lawyer-speech-code-blocked-on-first-amendment-grounds/>.

for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance. Yet the government cannot set its standard by legislating diplomatic speech because although it embarks upon a friendly, favorable tide, this tide sweeps us all along with the admonished, minority viewpoint into the massive currents of suppression and repression. Our limited constitutional Government was designed to protect the individual's right to speak freely, including those individuals expressing words or ideas we abhor.”

## B. Post-decision

1. Pennsylvania Disciplinary Board filed an appeal in December 2020
2. Pennsylvania Disciplinary Board dropped its appeal in January 2021
3. Pennsylvania Supreme Court adopts new rule<sup>4</sup> (underline = new from June 20, 2020 version; [] = deleted from June 2020 version)

- a. Wording

(g) in the practice of law, knowingly engage in[by words or] conduct constituting[], knowingly manifest bias or prejudice, or engage in] harassment or discrimination[, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination] based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. 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 advice or advocacy consistent with these Rules.

Comment:

[3] For the purposes of paragraph (g), conduct in the practice of law includes [participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered](1) interacting with witnesses, coworkers, court personnel, lawyers, or others, while appearing in proceedings before a tribunal or in connection with the representation of a client; (2) operating or managing a law firm or law practice; (3) participation in judicial boards, conferences, or committees; continuous legal education seminars; bench bar conferences; and bar association activities where legal education credits are offered. The term “the practice of law” does not include speeches.

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<sup>4</sup> Resources:

- PA Supreme Court Order, [https://drive.google.com/file/d/1DFTVy5eVWZ6WHiqdkTW\\_cFu78-TEsee/view](https://drive.google.com/file/d/1DFTVy5eVWZ6WHiqdkTW_cFu78-TEsee/view).
- Josh Blackman, *Pennsylvania Supreme Court Adopts Revised Rule 8.4(g), Without Seeking Public Comment, Over Dissent*, <https://reason.com/volokh/2021/07/27/pennsylvania-supreme-court-adopts-revised-rule-8-4g-without-seeking-public-comment-over-dissent/>.

communications, debates, presentations, or publications given or published outside of the contexts described in (1)-(3).

[4] [The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.]”Harassment” means conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g). “Harassment” includes sexual harassment, which includes but is not limited to sexual advances, requests for sexual favors, and other conduct of a sexual nature that is unwelcome.

[5] “Discrimination” means conduct that a lawyer knows manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in paragraph (g); 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.

[[5]][6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[[6]][7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

- b. Adopted without a comment period
- c. Adopted over dissenting statement that the new rule “fail[s] to cure the Rule’s unconstitutional nature as articulated by Judge Kennedy in *Greenberg v. Haggerty*, 491 F.Supp. 3d 12 (E.D. Pa. 2020)”

#### **IV. Arguments For and Against Model Rule 8.4(g)**

##### **A. ABA Model Rule 8.4(g) is significantly broader than the various pre-existing anti-bias rules in 24 states.<sup>5</sup>**

1. Several apply only to unlawful discrimination adjudicated by a non-bar tribunal;

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<sup>5</sup> Resources:

- 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. Legal Ethics 241 (2017).
- Christian Legal Society, *A Comparison of State Black-letter Rules to ABA Model Rule 8.4(g)*, Feb. 2016, at <https://www.clsreligiousfreedom.org/pdfs/1004.pdf>.



2. Many limited to “conduct in the course of representing a client”;
3. Many require that the misconduct be “prejudicial to the administration of justice”;
4. Almost no state enumerates all eleven protected classes;
5. No state has the circular “protection” for “legitimate advocacy ... consistent with these rules.”

## **B. ABA Model Rule 8.4(g) likely will chill lawyers’ First Amendment Rights.<sup>6</sup>**

1. The analyses in three recent Supreme Court decisions regarding freedom of speech
  - a. *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018)<sup>7</sup>
    - 1) Government restrictions on professionals’ speech are generally subject to strict scrutiny because they are content-based speech restrictions.
    - 2) “[T]his Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’” *NIFLA*, 138 S. Ct. at 2371.
    - 3) Two exceptions in which professional speech is “afforded less protection” but “neither turn[] on the fact that professionals [a]re speaking.” *NIFLA*, 138 S. Ct. at 2372.
      - a) advertising: “laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech’” (“more deferential review”)
      - b) regulating conduct that *incidentally* involves speech

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### <sup>6</sup> Resources:

- Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>
- *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>.
- 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>.
- *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=V6rDPiqBcQg>.
- 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 Disciplinary Conduct.”
- David Nammo, Christian Legal Society Comment Letter to Arizona Supreme Court, May 3, 2018, at <https://www.clsnet.org/document.doc?id=1126>.
- David Nammo, Christian Legal Society Comment Letter to Office of the Secretary, Disciplinary Board of the Pennsylvania Supreme Court, July 17, 2018, at <https://www.clsnet.org/document.doc?id=1150>.
- 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. Legal Ethics 241 (2017).

### <sup>7</sup> Resources:

- Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, 19 U. Pa. J. Const. L. Online 1 (2017) (promoting idea that Model Rule 8.4(g) is constitutional because professional speech is less protected).
- Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. Va. L. Rev. 67 (2016) (arguing against carve-out of “professional speech” from strict scrutiny protection).
- Kim Colby, *ABA Model Rule 8.4(g) Cannot Survive the Supreme Court’s Recent Decisions in NIFLA and Matal*, The Federalist Society Blog, Aug. 24, 2018, at <https://fedsoc.org/commentary/blog-posts/aba-model-rule-8-4-g-cannot-survive-the-supreme-court-s-recent-decisions-in-nifla-and-matal>.
- David Nammo, Christian Legal Society Supplemental Comment Letter to New Hampshire Supreme Court’s Advisory Committee on Rules, September 6, 2018, at <https://www.clsnet.org/document.doc?id=1165>.

- 4) Court makes clear lawyers' speech is protected: its "precedents have long protected the First Amendment rights of professionals" and have "applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers." *NIFLA*, 138 S. Ct. at 2374.
  - 5) No discussion of *NIFLA* in ABA Formal Op. 493, *Model Rule 8.4(g): Purpose, Scope, and Application* (2020)  
[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-493.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf)
- b. *Matal v. Tam*, 137 S. Ct. 1744 (2017)/*Iancu v. Brunetti*, 139 S. Ct. 2294 (2019)
- 1) striking down federal statute as facially unconstitutional because it allowed government officials to penalize "disparaging" speech
  - 2) government prohibition on disparaging, derogatory, demeaning, or offensive speech is unconstitutional. *Matal*, 137 S. Ct. at 1753-54, 1765; *id.* at 1766 (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).
  - 3) "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Matal*, 137 S. Ct. at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes J., dissenting).
  - 4) Comment [4] of ABA Model Rule 8.4(g) defines "harassment" to include "derogatory or demeaning verbal . . . conduct," which clearly does not pass muster after *Matal*, and did not before *Matal* under the standard for establishing sexual harassment in the education context, as set forth in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) ("harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").
2. ABA Model Rule 8.4(g) encompasses nearly everything a lawyer does because of its broad scope that covers all "conduct related to the practice of law," including social activities.
  3. *Greenberg v. Haggerty*, 2020 WL 7227251 (E.D. Pa. Dec. 8, 2020): applies *NIFLA*, *Matal*, and *Iancu* to find that ABA Model Rule 8.4(g) violates lawyers' free speech.

### **C. ABA Model Rule 8.4(g) and attorneys' religious freedom**

1. Volunteer legal work on boards of their churches or other religious ministries.<sup>8</sup>
2. Membership in certain religious organizations.

### **D. State bar disciplinary counsel as adjudicators of first resort for employment and other discrimination and harassment claims.**

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<sup>8</sup> Resources:

- Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018), at <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>.
- *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 <https://www.clsreligiousfreedom.org/pdfs/994.pdf>.

1. Burden on limited resources of offices;
2. Unclear what the evidentiary or preclusive effects of a state bar proceeding might have on other tribunal's proceedings;
3. Discovery and evidentiary requirements are different, as well as no right to jury trial;
4. Use as a harassment tool by an unhappy former client or opposing counsel.

#### **E. Consequences for Lawyer's Ability to Accept, Decline, or Withdraw from Representation<sup>9</sup>**

#### **V. ABA Model Rule 8.4(g) in the 50 States**

- A. Vermont and New Mexico have fully adopted ABA Model Rule 8.4(g).<sup>10</sup>**
- B. Alaska, Connecticut, Maine, New Hampshire, and Pennsylvania have adopted significantly narrower versions with Pennsylvania's rule held unconstitutional.**
- C. Numerous states have considered ABA Model Rule 8.4(g) but not adopted it.**

1. Texas – AG opinion<sup>11</sup>
2. South Carolina – House of Delegates; AG opinion; Supreme Court order<sup>12</sup>
3. Montana – Legislature joint resolution<sup>13</sup>
4. Illinois – House of Delegates vote; comment period<sup>14</sup>
5. Louisiana – AG and District Attorneys opposed; rules committee voted not to proceed<sup>15</sup>

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#### <sup>9</sup> Resources:

- Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017, "§ 8.4-2(j)-2 "The New Rule 8.4 and the Free Speech Problems It May Raise" in "§ 8.4-2 Categories of Disciplinary Conduct."
- NY Eth. Op. 1111, N.Y. St. Bar Ass'n Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017).

<sup>10</sup> Vermont Supreme Court, July 2017, at <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4%28g%29.pdf>; New Mexico Rule of Professional Conduct 16-804, at <https://supremecourt.nmcourts.gov/uploads/files/Rule%2016-804.pdf>

<sup>11</sup> *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 <https://www.clsreligiousfreedom.org/pdfs/994.pdf>.

<sup>12</sup> 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).

<sup>12</sup> 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), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01>.

<sup>13</sup> *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, 65<sup>th</sup> Legislature (Mont. Apr. 25, 2017), [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/MT%20Legislature%20Joint%20Resolution.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Legislature%20Joint%20Resolution.pdf).

<sup>14</sup> Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals*, Illinois Lawyer Now, Dec. 15, 2016, <https://www.isba.org/iln/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals> (last visited May 2, 2018).

<sup>15</sup> Letter of Louisiana District Attorneys Association to President, Louisiana Bar Association, Aug. 31, 2017, at <https://www.clsnet.org/document.doc?id=1171>; *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, <https://lalegaethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384>.

6. Nevada – State bar petition withdrawn; comment period<sup>16</sup>
7. Tennessee – AG opinion; Supreme Court order<sup>17</sup>
8. Arizona – Supreme Court order<sup>18</sup>
9. Idaho – Supreme Court order<sup>19</sup>
10. Minnesota – ABA reports Minnesota rejected<sup>20</sup>
11. North Dakota – rules committee refused to recommend
12. Colorado – subcommittee tabled consideration
13. Alaska – AG letter<sup>21</sup>
14. South Dakota – unanimously rejected by the South Dakota Supreme Court<sup>22</sup>
15. Utah – rejected by state court; modified version under consideration for two plus years

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<sup>16</sup> 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).

<sup>17</sup> 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](https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf); Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018), at <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>.

<sup>18</sup> Arizona Supreme Court, Order dated Aug. 30, 2018, re: No. R-17-0032, at <https://www.clsnet.org/document.doc?id=1164>.

<sup>19</sup> Idaho Supreme Court, Letter to Executive Director, Idaho State Bar, Sept. 6, 2018, at <https://www.clsnet.org/document.doc?id=1169>.

<sup>20</sup> American Bar Association Center for Professional Responsibility Policy Implementation Committee, *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (Sept. 19, 2018), at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chart\\_adopt\\_8\\_4\\_g.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.authcheckdam.pdf).

<sup>21</sup> Letter to Board of Governors by Attorney General Clarkson, <http://www.law.state.ak.us/press/releases/2019/080919-Rule8.html>

<sup>22</sup> Supreme Court Letter to the State Bar from the Supreme Court, [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ABA%208.4\(g\)/Proposed\\_8.4\\_Rule\\_Letter\\_3\\_9\\_20.pdf?\\_ga=2.123527244.63216173.1597869883-1813493556.1578523608](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_20.pdf?_ga=2.123527244.63216173.1597869883-1813493556.1578523608)