CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

November 2, 2020

The Honorable Andrew J. McDonald, Chair
The Honorable Holly Abery-Wetstone
The Honorable Barbara N. Bellis
The Honorable Susan Quinn Cobb
The Honorable John B. Farley
The Honorable Alex V. Hernandez
The Honorable Tammy T. Nguyen-O'Dowd
The Honorable Sheila M. Prats
The Honorable Anthony D. Truglia, Jr.
Rules Committee of the Superior Court

Attn: Joseph DelCiampo, Esq.

By email (joseph.delciampo@jud.ct.gov) and UPS two-day delivery

RE: Opposing Adoption of Connecticut Proposed Rule of Professional Conduct 8.4(7)

Dear Justice McDonald, Judge Abery-Wetstone, Judge Bellis, Judge Cobb, Judge Farley, Judge Hernandez, Judge Nguyen-O'Dowd, Judge Prats, and Judge Truglia:

This comment letter is filed to assist the members of the Rules Committee in their consideration of amending the Connecticut Rules of Professional Conduct to include a controversial new rule, Proposed Rule 8.4(7). Because Proposed Rule 8.4(7) is rooted in the deeply flawed and highly criticized ABA Model Rule 8.4(g), it should not be imposed on Connecticut attorneys. Leading scholars have determined ABA Model Rule 8.4(g) to be a speech code for lawyers.[1] A thoughtful recent 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), "examine[s] 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] In the four years that ABA Model Rule 8.4(g) has been urged upon state supreme

[1] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA. *See infra* Part I, pp. 6-9 (scholars' criticisms of ABA Model Rule 8.4(g)); Part IV, pp. 22-28 (recent United States Supreme Court free speech decisions regarding regulation of professional speech and viewpoint discrimination).

[2] Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol'y 173, 173 (2019), https://law.und.edu/_files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlpp-2019.pdf. A copy is enclosed with this letter.

courts, only two states have adopted it, and fourteen state supreme courts or state bar committees have rejected or abandoned it.[3]

Due to free speech concerns, as well as prudential policy considerations, Christian Legal Society (CLS) urges the Committee not to adopt Proposed Rule 8.4(7) because it will inevitably have a chilling effect on Connecticut attorneys' speech. 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' membership includes attorneys who practice law in Connecticut. Women constitute a significant percentage of CLS' attorney and law student leaders and members, including CLS' two immediate past presidents who are women who have practiced law for a number of years. CLS opposes harassment and discrimination against women or any member of a minority in the legal profession.

Adoption of Proposed Rule 8.4(7) would create far more problems than it would resolve. Moreover, it is unnecessary given that Connecticut Rule of Professional Conduct 8.4(4) already makes it "professional misconduct for a lawyer to [e]ngage in conduct that is prejudicial to the administration of justice." The Official Commentary for Connecticut Rule of Professional Conduct 8.4(4) instructs that "[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 subdivision (4) when such actions are prejudicial to the administration of justice."

Current Rule 8.4(4) is sufficient to address any professional misconduct that requires disciplinary action. Rather than urging premature adoption of Proposed Rule 8.4(7), this Committee 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 and when it is adopted in several other states. There is no reason to rush into making Connecticut attorneys the subject of the novel experiment that ABA Model Rule 8.4(g) and Proposed Rule 8.4(7) represent.

Indeed, Proposed Rule 8.4(7) undermines the wisdom found in the Preamble to the Connecticut Rules of Professional Conduct: "An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."[4]

Summary

Rooted in the deeply flawed and highly criticized ABA Model Rule 8.4(g), Proposed Rule 8.4(7) will inevitably have a chilling effect on Connecticut attorneys' speech regarding

[3] *See infra* Part VI, pp. 29-34 (describing states' responses to ABA Model Rule 8.4(g)).
[4] The Commission on Official Legal Publications, Connecticut Practice Book 2, Preamble, Rules of Professional Conduct (2020), https://www.jud.ct.gov/publications/PracticeBook/PB.pdf.

political, ideological, religious, and social issues to the detriment of Connecticut attorneys, their clients, and society in general.

A free society requires attorneys who speak their minds freely without fear of losing their license to practice law. In his law review article, Professor Michael McGinniss "examine[s] 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."[5] But liberal lawyers should also be concerned about Proposed Rule 8.4(7)'s disturbing implications for their ability to practice law. For example, attorneys who serve on their firms' hiring committees and make employment decisions in which, in order to achieve diversity goals, even modest preference is given based on race, sex, religion, or sexual orientation would be in violation of Proposed Rule 8.4(7).[6] Or an attorney who tweets a common but hurtful sexual term aimed at the President's spokeswoman could be subject to discipline under the proposed rule.[7] Or a law professor whose comments to the media inaccurately stereotype, by race and gender, the critics of ABA Model Rule 8.4(g) could be subject to discipline under the proposed rule.[8] Because the terms "harassment" and "discrimination" are difficult to define and hold greatly dissimilar meanings for different people, ABA Model Rule 8.4(g) and Proposed Rule 8.4(7) threaten lawyers' speech across the political, ideological, social, and religious spectrum.

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[5] McGinniss, *supra* note 2, at 173.

[6] Thomas Spahn, a highly respected professional ethics expert, has concluded that ABA Model Rule 8.4(g) "prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc." He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:

> Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a "plus" when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms' head count on the basis of such attributes – but it is nevertheless discrimination. *In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.*

The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues* 5-7 (July 12, 2018) (emphasis supplied). *See infra* at pp. 34-35 (explaining why diversity programs cannot be protected).

[7] Debra Cassens Weiss, *Big Law Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders*, ABA Journal, Oct. 1, 2018 (lawyer, honored in 2009 by the ABA Journal "for his innovative use of social media in his practice," apologized to firm colleagues, saying no "woman should be subjected to such animus"), https://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

[8] Eugene Volokh, *Professor Stephen Gillers (NYU) Unwittingly Demonstrates Why ABA Model Rule 8.4(g) Chills Protected Speech*, The Volokh Conspiracy, June 17, 2019, https://reason.com/2019/06/17/professor-stephen-gillers-nyu-unwittingly-demonstrates-why-aba-model-rule-8-4g-chills-protected-speech/. The article explains that in a media interview regarding ABA Model Rule 8.4(g), a proponent of the Rule (inaccurately) stereotyped critics of the Rule by race and gender, and suggests that the same comment made in the context of a bar association debate might be grounds for discipline under ABA Model Rule 8.4(g).

Sadly, we live at a time when many people, including lawyers, are increasingly willing to suppress the free speech of those with whom they disagree. Some lawyers purportedly have filed bar complaints in order to harass officeholders whose political views they dislike.[9] Yale law students have described significant harassment by fellow law students simply because they hold religious or conservative ideas.[10]

In July 2020, the Judicial Conference Committee on Codes of Conduct withdrew a draft advisory opinion that had said it was improper for judges to be members of the Federalist Society or the American Constitution Society, but permissible to belong to the American Bar Association. A comment letter signed by 210 federal judges took exception to the opinion's underlying "double standard" and "untenable" "disparate treatment" as reflected in "the Committee['s] oppos[ing] judicial membership in the Federalist Society while permitting membership in the ABA."[11] In withdrawing its proposal, the Judicial Conference 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."[12] Far less sheltered from these competing interests, lawyers daily confront such a world in their practice of law.

Many proponents of ABA Model Rule 8.4(g) and its derivative rules, such as Proposed Rule 8.4(7), sincerely believe that the Rule will only be used to punish lawyers who are bad actors. Unfortunately, we have recently witnessed too many times when people have lost their livelihoods for holding traditional religious views that may be currently disfavored by the popular culture. For example, the Fire Chief of Atlanta, an African-American man who had been appointed National Fire Marshal by President Obama, was fired because he wrote a book that

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[9] *See* Brian Sheppard, *The Ethics Resistance*, 32 Geo. J. Legal Ethics 235, 238 (2018):

> Ordinary ethics complaints have the capacity to ruin individual law careers and serve as cautionary examples to other lawyers. Ethics Resistance complaints have the additional capacity to prompt official action, alter staffing decisions at the highest levels of government, influence high-ranking lawyers' willingness to comply with investigations, and terminate or preempt relationships between lawyers and the politically powerful. Most importantly, they can change public perception regarding the moral integrity of an administration. And they can do this even if they do not result in a sanction.

[10] *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 (accurately or inaccurately) to Federalist Society members and guest speakers).

[11] Letter from 210 Federal Judges to Robert P. Deyling, Ass't Gen. Counsel, Administrative Off. of the U.S. Courts (Mar. 18, 2020), https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf.

[12] 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.

briefly referred to his religious beliefs regarding marriage and sexual conduct.[13] The CEO of Mozilla lost his position because he made a contribution that reflected his religious beliefs to one side of a political debate regarding marriage laws.[14]

Simply supporting the concept of freedom of speech has itself become controversial, as became obvious this July when well-known liberal signatories to a public letter in support of freedom of speech were publicly pressured to recant their support for free speech and its concomitant corollary of tolerance for others who hold different beliefs.[15]

Given the current climate, lawyers who hold classical liberal, conservative, libertarian, or religious viewpoints, understandably, are unwilling to support a black letter rule that could easily be misused to deprive them of their license to practice law. As a nationally recognized First Amendment expert has explained, ABA Model Rule 8.4(g) is a speech code that threatens lawyers' speech.[16]

Perhaps this is why after four years of deliberations by state supreme courts and state bar associations in many states across the country, Vermont and New Mexico are the only states to have adopted ABA Model Rule 8.4(g). In contrast, at least fourteen states have concluded, after careful study, that ABA Model Rule 8.4(g) is unconstitutional or unworkable. Many of those states have opted to take the prudent course of letting other states experiment with ABA Model Rule 8.4(g) in order to evaluate its actual effect on the lawyers in those states before imposing it on lawyers in their states.

This letter explains the numerous reasons why Proposed Rule 8.4(7) should not be recommended for adoption, including:

1. Scholars' criticism of its source, ABA Model Rule 8.4(g), as a speech code for lawyers (Part I, pp. 6-9);
2. Why current Connecticut Rule of Professional Conduct 8.4(4) with its accompanying commentary adequately addresses bias and prejudice in the legal profession (Part II, pp. 10-11);
3. Proposed Rule 8.4(7)'s overreach into attorneys' lives, particularly its chilling effect on their speech and religious exercise, which is exacerbated by its use of a negligence rather than knowledge standard (Part III, pp. 11-21);

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[13] *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).
[14] "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.
[15] "J.K. Rowling Joins 150 Public Figures Warning Over Free Speech," BBC (July 8, 2020), https://www.bbc.com/news/world-us-canada-53330105.
[16] Volokh, *supra* note 1.

4. Proposed Rule 8.4(7)'s unconstitutionality under the analyses in three recent United States Supreme Court decisions, which ABA Formal Opinion 493 ignored (Part IV, pp. 22-28);
5. The fact that only Vermont and New Mexico have adopted ABA Model Rule 8.4(g), contrary to an inaccurate claim that 24 states have a similar rule (Part V, pp. 28-29);
6. The fact that official bodies in Alaska, Arizona, Idaho, Illinois, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas have rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada have abandoned proposals to adopt it (Part VI, pp. 29-34);
7. Proposed Rule 8.4(7)'s unintended consequence of making it professional misconduct for law firms to engage in hiring practices intended to achieve certain diversity goals in law firms (Part VII, pp. 34-35);
8. Its ramifications for lawyers' ability to accept, decline, or withdraw from a representation (Part VIII, pp. 35-37); and
9. Whether the Office of Chief Disciplinary Counsel has adequate resources to meet the potential increase in employment and other discrimination and harassment grievance complaints against attorneys and firms (Part IX, pp. 37-40).

I. Scholars have explained that ABA Model Rule 8.4(g) is a speech code for lawyers.

A number of scholars have accurately 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 view, in a two-minute video, that ABA Model Rule 8.4(g) is a speech code that will have a serious impact on attorneys' speech.[17] Professor Volokh also explored its many flaws in a debate with a proponent of the model rule.[18]

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that "[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers' First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants."[19] She insists that "lawyer speech, association, and petitioning" are "rights [that] must be protected" because they "play a major role in checking the use of governmental and non-governmental power in the United States."[20] Or in the words of the Preamble to the Connecticut Rules of Professional Conduct: "An independent legal profession is an important

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[17] *Id.*
[18] *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=b074xW5kvB8&t=50s.
[19] Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).
[20] *Id.*

force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."[21]

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.[22] 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."[23] They 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."[24] In a *Wall Street Journal* commentary entitled *The ABA Overrules the First Amendment*, Professor Rotunda explained:

> 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.[25]

Professor Josh Blackman has explained that "Rule 8.4(g) is unprecedented, as it extends a disciplinary committee's jurisdiction to conduct merely 'related to the practice of law,' with only the most tenuous connection to representation of clients, a lawyer's fitness, or the administration of justice."[26]

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[21] *See supra* note 4.

[22] 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. Professor Rotunda and Texas Attorney General Ken Paxton debated two proponents of Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention. *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.

[23] 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."

[24] *Id.* at "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

[25] 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, https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.

[26] Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 241, 243 (2017). *See also*, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 Notre Dame J.L. Ethics & Pub. Pol'y 135 (2018).

Professor Michael S. McGinniss, the Dean of the University of North Dakota School of Law who teaches professional responsibility, warns against "the widespread ideological myopia about what it truly means to have a diverse and inclusive profession" that seems to be an impetus for ABA Model Rule 8.4(g).[27] He explains that a genuinely "diverse and inclusive profession . . . does not mean silencing or chilling diverse viewpoints on controversial moral issues on the basis that such expression manifests 'bias or prejudice,' is 'demeaning' or 'derogatory' because disagreement is deemed offensive, or is considered intrinsically 'harmful' or as reflecting adversely on the 'fitness' of the speaker."[28]

In a thorough examination of the rule's legislative history, practitioners Andrew Halaby and Brianna Long conclude 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."[29] 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."[30] 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."[31]

In adopting ABA Model Rule 8.4(g), the ABA largely ignored over 480 comment letters,[32] most opposed to the new rule. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule and raising concerns about its enforceability, although the Committee dropped its opposition immediately prior to the House of Delegates' vote.[33]

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[27] McGinniss, *supra* note 2, at 249.
[28] *Id.*
[29] 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).
[30] *Id.*
[31] *Id.* at 204.
[32] American Bar Association website, Comments to Model Rule 8.4, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.
[33] Halaby & Long, *supra* note 29, 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.

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.[34] But little was done to address these concerns. In their meticulous explication of the legislative history of ABA Model Rule 8.4(g), Halaby and Long conclude 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."[35] Specifically, 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."[36] 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 of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.[37]

These scholars' red flags should not be ignored. ABA Model Rule 8.4(g) and its progeny, like Proposed Rule 8.4(7), would dramatically shift the disciplinary landscape for Connecticut attorneys.

A similar red flag arises from the fact that Proposed Rule 8.4(7) has been rushed through the normal processes for significantly amending the Rules of Professional Conduct. The rushed process itself is troubling because it has preempted the careful study that Proposed Rule 8.4(7) warrants given its potential to negatively impact Connecticut attorneys. Given the haste with which Proposed Rule 8.4(7) has been rushed through a subcommittee and the county bar associations, we respectfully suggest that the Committee and Connecticut lawyers would benefit from a more widely publicized comment period. Extension of the comment period would ensure fairness for the many Connecticut lawyers who have been unaware of the expedited push to adopt Proposed Rule 8.4(7) and provide them with an adequate opportunity to be heard by the Committee.

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[34] Halaby & Long, *supra* note 29, at 216-223 (summarizing concerns expressed at the only public hearing on an early version of ABA Model Rule 8.4(g), as well as the main concerns expressed in the comment letters).
[35] *Id.* at 203.
[36] *Id.*
[37] *Id.* at 233.

II. Proposed Rule 8.4(7) would impose a significantly heavier burden on Connecticut attorneys than does current Rule of Professional Conduct 8.4(4).

Current Connecticut Rule of Professional Conduct 8.4(4) states: "[I]t is professional misconduct for a lawyer to . . . (4) Engage in conduct that is prejudicial to the administration of justice[.]" Its accompanying Commentary states: "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 subdivision (4) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate subdivision (4)."

The scope of Proposed Rule 8.4(7) is significantly broader than current Rule 8.4(4) and its accompanying comment ("Current Rule 8.4(4)") in several critical aspects, including:

A. Proposed Rule 8.4(7) is substantially broader in the conduct it regulates: The Current Rule 8.4(4) is limited to when a lawyer is acting "in the course of representing a client," whereas Proposed Rule 8.4(7) applies more broadly to when a lawyer is acting "in conduct related to the practice of law." Proposed Rule 8.4(7) in its commentary defines "conduct related to the practice of law" extremely broadly to reach far beyond conduct "in the course of representing clients." It defines "conduct related to the practice of law" to "*include*" (in other words, not limited to): "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 professional activities or events in connection with the practice of law*." (Emphasis supplied.) Proposed Rule 8.4(7) applies to *nearly everything that a lawyer does that is arguably related to the practice of law*. And it applies to *anyone* that a lawyer interacts with during any conduct arguably related to the practice of law. *See infra* pp.11-18.

B. Proposed Rule 8.4(7) is not limited to conduct that is "prejudicial to the administration of justice": Current Rule 8.4(4) requires that a lawyer's actions be "prejudicial to the administration of justice." Proposed Rule 8.4(7) abandons this traditional limitation, making a lawyer subject to disciplinary liability even though his or her conduct has not prejudiced the administration of justice. This greatly expands the regulatory reach of the proposed rule.

C. Proposed Rule 8.4(7) dispenses with the mens rea requirement of the Current 8.4(4): Current Rule 8.4(4) requires that a lawyer "knowingly" manifest bias or prejudice, whereas Proposed Rule 8.4(7) adopts a negligence standard by substituting "knows or reasonably should know." A lawyer could violate Proposed Rule 8.4(7) without even realizing he or she has done so. This change is particularly perilous because the list of words and conduct that are deemed "harassment" or "discrimination" is constantly expanding in novel and unanticipated ways. *See infra* pp. 18-20.

D. Proposed Rule 8.4(7) adds an additional eight protected categories: Current Rule 8.4(4) already protects "race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status." Proposed Rule 8.4(7) would add eight protected classes—gender identity, gender expression, marital status, ethnicity, color, veteran status, pregnancy, and ancestry—for a total of fifteen protected classes.[38]

III. Proposed Rule 8.4(7) Would Greatly Expand the Reach of the Professional Rules of Conduct into Connecticut Attorneys' Lives and Chill Their Speech.

A. Proposed Rule 8.4(7) would regulate lawyers' interactions with anyone while engaged in conduct related to the practice of law or in connection with the practice of law.

1. Who is reached: Proponents of ABA Model Rule 8.4(g) candidly observed that they sought a new black letter rule precisely because they wanted to regulate nonlitigating lawyers, such as "[a]cademics, nonprofit lawyers, and some government lawyers," as well as "[t]ax lawyers, real estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system."[39] But its reach and that of Proposed Rule 8.4(7) is a regulatory expansion that goes far beyond *who* is covered to *which* of a lawyer's activities are covered.

Proposed Rule 8.4(7) would make professional misconduct *any* "conduct related to the practice of law" "that the lawyer knows *or reasonably should know* is harassment or discrimination" on fifteen separate bases ("race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital status"). According to its Official Commentary, Proposed Rule 8.4(7)'s scope "includes," but is not limited to, whenever a lawyer is: "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 professional activities or events in connection with the practice of law*." (Emphasis supplied.)

Simply put, Proposed Rule 8.4(7) would regulate any "conduct . . . while . . . *interacting with* . . . *others* while engaged in the practice of law . . . or participating in bar association, business or professional activities or events *in connection with* the practice of law."

2. What is reached: The compelling question becomes: *What conduct doesn't Proposed Rule 8.4(7) reach*? Virtually everything a lawyer does can be characterized as conduct

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[38] "Socioeconomic status," which is protected by Current Rule 8.4(4), is not protected in Proposed Rule 8.4(7).
[39] ABA Commission on Sexual Orientation and Gender Identity, *Memorandum to Standing Committee on Ethics and Professional Responsibility: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4*, at 5, 7 (Oct. 22, 2015), https://www.clsnet.org/document.doc?id=1125.

while interacting with others while engaged in the practice of law.[40] 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. *See infra* at pp. 13-17.

This is of particular concern when "conduct" is euphemistically defined to include "harmful verbal conduct," which is speech. The Official Commentary for Proposed Rule 8.4(7) defines "harassment" and "discrimination" to include "harmful verbal conduct." Thus, like ABA Model Rule 8.4(g), Proposed 8.4(7) would regulate pure speech.

But of even greater concern, the Official Commentary seems to indicate that the operating assumption underlying Proposed Rule 8.4(7) is that most conduct falling within its scope, including "verbal conduct," is presumed to be discrimination. The Official Commentary states that "[n]ot *all* conduct that involves consideration of these characteristics [i.e., the fifteen protected categories] manifests bias or prejudice: there *may* be a legitimate nondiscriminatory basis for the conduct." Rather than providing reassurance, this statement amplifies the First Amendment problems with Proposed Rule 8.4(7): Whereas, the First Amendment presumes that speech is protected, Proposed Rule 8.4(7) seems to presume speech is not protected.

And who will determine whether there is "a legitimate nondiscriminatory basis for the conduct"? Who decides which speech is "legitimate" and which speech is "illegitimate"? By what standards? Whether speech or conduct does or does not have "a legitimate nondiscriminatory basis" completely depends on the beholder's—a government official's—subjective beliefs.

For example, consider a law firm's efforts to promote diversity in its partnership ranks, or a lawyer's participation in a panel discussion of affirmative action in college admissions. Where one person sees inclusion, another sees exclusion. Where one person sees diversity and inclusion, another may equally sincerely see discrimination. Are these the types of decisions that the staff of the Office of Chief Disciplinary Counsel really want to make or even should make?

Because enforcement of Proposed Rule 8.4(7) would give government officials unbridled discretion to determine which speech is "legitimate" and which is not "legitimate," it countenances viewpoint discrimination based on governmental officials' subjective biases. As courts have recognized, giving government officials unbridled discretion to suppress citizens' free speech is a form of unconstitutional viewpoint discrimination.[41]

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[40] *See* Halaby & Long, *supra* note 29, at 226 ("The proposed comment of Version 3 [of ABA Model Rule 8.4(g)] expanded the ambit of 'conduct related to the practice of law' to include virtually anything a working lawyer might do.")

[41] *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).

Finally, note that while the Official Commentary adds that "[d]iscrimination *includes* harmful verbal. . . conduct" "directed at an individual or individuals that manifests bias or prejudice on the basis of one or more of the protected categories," Proposed Rule 8.4(7) does not limit the potential complainants to the individuals to whom the speech is directed. Anyone hearing or reading a Connecticut lawyer's speech may file a grievance complaint. Needless to say, it is not good for the profession, or for a robust civil society, for a lawyer to be potentially subject to disciplinary action every time she speaks or writes on a topic that may cause anyone who hears or reads her words and disagrees with her ideas to file a disciplinary complaint.

At bottom, ABA Model Rule 8.4(g) and Proposed Rule 8.4(7) share a "fundamental defect" because each "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."[42] ABA Model Rule 8.4(g) and Proposed Rule 8.4(7) create doubt as to whether particular speech is permissible or "legitimate" and, therefore, will inevitably chill lawyers' public speech.[43] In all likelihood, it will chill speech on one side of current political and social issues, while simultaneously creating little disincentive for lawyers who speak on the opposing side of these controversies.[44] If so, public discourse, civil society, and clients will suffer from the ideological straitjacket that ABA Model Rule 8.4(g) and Proposed Rule 8.4(7) will impose on lawyers.

B. Proposed Rule 8.4(7) would dramatically increase Connecticut lawyers' exposure to disciplinary sanctions for their speech.

Proposed Rule 8.4(7) is a minefield for Connecticut lawyers who frequently speak to community groups, classes, and other audiences about current legal issues of the day. Lawyers frequently participate in panel discussions, present CLEs, write op-eds, or record podcasts regarding sensitive social and political issues. Their commentary is sought by the media regarding controversial issues in their community, state, and nation. Lawyers are asked to speak *because they are lawyers*. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility in order to create new professional opportunities.

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[42] Tenn. Att'y Gen. Letter, Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 7 (hereinafter "Tenn. Att'y Gen. Letter"), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf. ("[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.) The letter is incorporated into Tennessee Attorney General Opinion 18-11; however, for purposes of quoting the letter, we cite to the page numbers of the letter rather than the opinion.

[43] *Id.* at 8 ("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.").

[44] McGinniss, *supra* note 2, at 217-249 (explaining the "justified distrust of speech restrictions" such as Model Rule 8.4(g), in light of its proponents' stated desire "for a cultural shift . . . to be captured in the rules of professional conduct").

For example, Proposed Rule 8.4(7) raises numerous questions about whether various routine expressive activities could expose a lawyer to potential disciplinary action, including:

- Is a lawyer subject to discipline for her discussion of hypotheticals while presenting a CLE course?[45]
- Is a lawyer subject to discipline when participating in legal panel discussions that touch on controversial political, religious, and social viewpoints?[46]
- Is a law professor or adjunct faculty member subject to discipline for a law review article or a class discussion that explores controversial topics or expresses unpopular viewpoints?
- Must lawyers abstain from writing blogposts or op-eds because they risk a grievance complaint by an offended reader?
- Must lawyers forgo media interviews on topics about which they have some particularly insightful comments because anyone hearing the interview could file a grievance complaint?[47]
- Can a lawyer lose his license to practice law for a tweet calling a female public official a derogatory sexist term?[48]
- Is a lawyer subject to discipline for employment decisions made by religious or other charitable nonprofits if she sits on its board and ratifies its decisions or employment policies?[49]
- May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various groups as protected classes in a nondiscrimination law being debated in the state legislature?
- Is a lawyer at risk if she provides legislative testimony in favor of adding new protected classes to state or local civil rights laws, but only if religious exemptions (which some regard as "a license to discriminate") are also added?[50]

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[45] *See, e.g.*, Kathryn Rubino, *Did D.C. Bar Course Tell Attorneys That It's Totally Cool to Discriminate If that's What the Client Wants?*, Above the Law (Dec. 12, 2018) (reporting on attendees' complaints regarding an instructor's discussion of a hypothetical about sex discrimination and the applicability of the ethical rules during the mandatory D.C. Bar Professional Ethics course for newly admitted D.C. attorneys), https://abovethelaw.com/2018/12/did-d-c-bar-course-tell-attorneys-its-totally-cool-to-discriminate-if-thats-what-the-client-wants/.

[46] Volokh, *supra* note 8 (in a media interview regarding ABA Model Rule 8.4(g), a proponent of the Rule (wrongly) stereotyped opponents of the Rule by race and gender).

[47] See *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comn'n. (May 15, 2018) discussed *infra* note 56.

[48] Debra Cassens Weiss, *supra* note 7 (lawyer, honored in 2009 by the ABA Journal "for his innovative use of social media in his practice," apologized to firm colleagues for his sexist tweet at the President's spokeswoman), https://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

[49] *See* D.C. Bar Legal Ethics, Opinion 222 (1991) (punting the issue of whether a lawyer could be disciplined for arguably discriminatory employment decisions made by his church or a religious nonprofit while he was on its board), https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion222.cfm.

[50] The Montana Legislature passed a resolution expressing its concerns 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

- Is a lawyer subject to discipline for comment letters she writes as a lawyer expressing her personal views on proposed Title IX regulations, immigration issues, census questions, re-districting proposals, or capital gains tax proposals?
- Is a lawyer subject to discipline for refusing to use "preferred" pronouns that she believes are not objectively accurate?[51]
- Is a lawyer subject to discipline for serving on the board of an organization that discriminates based on sex, such as a social fraternity or sorority?
- Is a lawyer at risk for volunteer legal work for political candidates who take controversial positions?
- Is a lawyer at risk for any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political positions?[52]

Professor Eugene Volokh has explored whether discipline under ABA Model Rule 8.4(g) could be triggered by conversation on a wide range of topics at a local bar dinner, explaining:

> 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 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

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Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees." *See infra* notes 141 & 142.

[51] *See, e.g., Meriwether v. Shawnee State University*, 2020 WL 704615 (S.D. Ohio 2020), *on appeal*, No. 20-3289 (6th Cir., Mar. 16, 2020) (tenured professor disciplined by university for violating its nondiscrimination policies because he refused to address a transgender student using the student's preferred gender identity title and pronouns).

[52] *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://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf. ("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."); *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://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384, 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.").

> law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."[53]

Professor Josh Blackman similarly has a thought-provoking list of CLE topics that would expose their presenters to grievance complaints by persons who disagree with the ideas or beliefs that a lawyer expresses.[54]

As already noted, many people, including lawyers, seem eager to suppress the free speech of those with whom they disagree.[55] Many examples have already been noted *supra* at pp. 3-5. Yet another troubling situation arose two years ago in Alaska, when the Anchorage Equal Rights Commission (AERC) filed a complaint against an Anchorage law firm, alleging that the firm violated a municipal nondiscrimination law. The firm represented a religiously-affiliated nonprofit shelter for homeless women, many of whom had been abused 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 biological man who identified as a woman. The shelter explained that it had not admitted the individual because of its policy against admitting inebriated persons, but acknowledged that it also 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 eventually dismissed, but only after several months of legal proceedings.[56]

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish daily, lawyers can ill-afford to wager their licenses on a rule that may be utilized to punish their speech.

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[53] 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.

[54] Blackman, *supra* note 26 at 246.

[55] *See, e.g.*, Haviland, *supra* note 10 (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

[56] *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comn'n (May 15, 2018).

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

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit organizations. These organizations provide incalculable good to people in their local communities, as well as nationally and internationally. They also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.[57]

As a volunteer on a charitable institution's board, a lawyer arguably is engaged "in conduct related to the practice of law" when serving on the risk management committee or providing legal input during a board discussion about the institution's policies. For example, a lawyer may be asked to help craft her congregation's policy regarding whether its clergy will perform marriages or whether the institution's facilities may be used for wedding receptions 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 pro bono legal work that she performs for her church or her alma mater.[58] By making Connecticut lawyers hesitant to serve on these nonprofit boards, Proposed Rule 8.4(7) would do real harm to religious and charitable institutions and hinder their good works in their communities.

D. Attorneys' membership in religious, social, or political organizations could be subject to discipline.

Proposed Rule 8.4(7) could chill lawyers' willingness to associate with political, cultural, or religious organizations that promote traditional values regarding sexual conduct and marriage. Would Proposed Rule 8.4(7) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage?[59] Would lawyers be subject to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

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[57] Tex. Att'y Gen. Op., *supra* note 52, 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.").

[58] *See* D.C. Bar Legal Ethics, Opinion 222, *supra* note 50. *See also,* Tenn. Att'y Gen. Letter, *supra* note 42, 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)").

[59] For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibited all California state judges from participating in Boy Scouts. Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, https://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

The late 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.[60] State attorneys general have voiced similar concerns.[61] Several attorneys general have warned that "serving as a member of the board of a religious organization, participating in groups such as 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.'"[62]

E. Proposed Rule 8.4(7)'s potential for chilling Connecticut attorneys' speech is compounded by its use of a negligence standard rather than a knowledge requirement.

The lack of a knowledge requirement is a serious flaw: "[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."[63]

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

> [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.[64]

Proposed Rule 8.4(7) is perilous because the list of words and conduct deemed "discrimination" or "harassment" is ever shifting in often unanticipated ways. Its negligence

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[60] Rotunda & Dzienkowski, *supra* note 23, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."
[61] Tex. Att'y Gen. Op., *supra* note 52, 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 52, 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.").
[62] Tenn. Att'y Gen. Letter, *supra* note 42, at 10.
[63] *Id.* at 5. *See* Halaby & Long, *supra* note 29, at 243-245.
[64] 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/.

standard makes it entirely foreseeable that it could reach communication or conduct that demonstrates "implicit bias."[65] Nothing in Proposed Rule 8.4(7) prevents punishing a lawyer for communication based on implicit bias if someone thinks the lawyer "reasonably should have known" the communication was discriminatory.

F. Proposed Rule 8.4(7) does not preclude a finding of professional misconduct based on a lawyer's "implicit bias."

Dean McGinniss notes that "this relaxed mens rea standard" might even be used to "more explicitly draw lawyers' speech reflecting unconscious, or 'implicit,' bias within the reach of the rule."[66] Acting Law Professor Irene Oritseweyinmi Joe recently argued that while ABA Model Rule 8.4(g) "addresses explicit attorney bias, . . . it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias."[67] She explains that "the rule's use of 'knows or reasonably should know' arguably includes an understanding and reflection of unconscious bias and its effects."[68]

The proponents of ABA Model Rule 8.4(g) frequently emphasize their concerns about implicit bias, that is, conduct or speech that the lawyer is not consciously aware may be discriminatory.[69] On its webpages devoted to its "Implicit Bias Initiative," the ABA defines "implicit bias" and "explicit biases" as follows:[70]

> **Explicit biases:** Biases that are directly expressed or publicly stated or demonstrated, often measured by self-reporting, *e.g.*, "I believe homosexuality is wrong." A preference (positive or negative) for a group based on stereotype.
>
> **Implicit bias:** A preference (positive or negative) for a group based on a stereotype or attitude we hold that *operates outside of human awareness* and can be understood as a lens through which a person views the world

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[65] 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.

[66] McGinniss, *supra* note 2, at 205 & n.135.

[67] Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 Calif. L. Rev. 965, 975 (2020) (ABA Model Rule 8.4(g) "addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias.").

[68] *Id.* at 978 n.70.

[69] *See* Halaby & Long, *supra* note 29, at 216-217, 243-245. Halaby and 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.

[70] ABA Section on Litigation, *Implicit Bias Initiative, Toolbox, Glossary of Terms* (Jan. 23, 2012), https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox/glossary/#23

> that automatically filters how a person takes in and acts in regard to information. Implicit biases are usually measured indirectly, often using reaction times.

One can agree that implicit bias exists and still believe that bias "outside of human awareness" should not be grounds for a lawyer's loss of licensure or her suspension, censure, or admonition.[71] But nothing would prevent a charge of discrimination based on "implicit bias" from being brought against an attorney under Proposed Rule 8.4(7).[72] Such charges are foreseeable given that ABA Model Rule 8.4(g)'s "proponents repeatedly invoked that concept [of implicit bias] in arguing against any knowledge qualifier at all."[73]

G. Despite its nod to speech concerns, Proposed Rule 8.4(7) will chill speech and cause lawyers to self-censor in order to avoid grievance complaints.

Proposed Rule 8.4(7) itself recognizes its potential for silencing lawyers when it includes in its Official Commentary that "[a] lawyer's conduct does not violate paragraph (7) when the conduct in question is protected under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution." This provision affords no substantive protection for attorneys' speech: It merely asserts that the rule does not do what it in fact does.

Nor is it enough for government officials to promise to be careful in their enforcement of a rule that lawyers have reason to fear will suppress their speech. As the Supreme Court has observed, "The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige.* We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[74] Instead, the Court has rejected "[t]he Government's assurance that it will apply [a statute] far more restrictively than its language provides" because such an assurance "is pertinent only as an *implicit acknowledgment of the potential constitutional problems* with a more natural reading."[75]

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[71] Halaby & Long, *supra* note 29, at 245 ("Even crediting the existence of implicit bias as well as corresponding concerns over its impact on the administration of justice, one recoils at the dystopian prospect of punishing a lawyer over unconscious behavior."). *See also*, McGinnis, *supra* note 2, at 204-205; Dent, *supra* note 26, at 144.
[72] *See, e.g.*, Joe, *supra* note 67 (ABA Model Rule 8.4(g) "addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias."); *id.* at 978n.70 ("[T]he rule's use of 'knows or reasonably should know' arguably includes an understanding and reflection of unconscious bias and its effects.").
[73] Halaby & Long, *supra* note 29, 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).
[74] *United States v. Stevens*, 599 U.S. 460, 480 (2010).
[75] *Id.* (emphasis added).

In the landmark case, *National Association for the Advancement of Colored People v. Button*,[76] involving regulation of attorneys' speech, the Supreme 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.[77]

Proposed Rule 8.4(7) fails to protect a lawyer from complaints being filed against her based on her speech. It fails to protect a lawyer from an investigation into whether her speech is "harmful" and "manifests bias or prejudice on the basis of one or more of the [fifteen] protected categories." The provision fails to protect a lawyer from the expense of protracted litigation to defend her speech as protected speech. Litigation in free speech cases often lasts for years. It extracts great personal expense and a significant emotional toll. Even if the investigation or litigation eventually concludes that the lawyer's speech was protected by the First Amendment, the lawyer has had to inform courts that a complaint has been brought and she is under investigation whenever she applies for admission to another bar or seeks to appear pro hac vice in a case. In the meantime, her personal reputation will suffer damage through media reports.

The process will be the punishment, which brings us to the real problem with Proposed Rule 8.4(7). Rather than risk a prolonged investigation with an uncertain outcome, and then lengthy litigation, a rational, risk-adverse lawyer will self-censor. Because a lawyer's loss of her license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one's own speech than to risk a grievance complaint under Proposed Rule 8.4(7). The losers are not just the lawyers, but our free civil society that depends on lawyers to protect—and contribute to—the free exchange of ideas, which is its lifeblood.

IV. ABA Formal Opinion 493 Ignores Three Recent Supreme Court Decisions that Demonstrate the Likely Unconstitutionality of Rules Like Proposed Rule 8.4(7).

Since the ABA adopted Model Rule 8.4(g) in 2016, the United States Supreme Court has issued three free speech decisions that make clear that it unconstitutionally chills attorneys' speech: *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. That is, there is no free speech carve-out that countenances content-

[76] *NAACP v. Button*, 371 U.S. 415 (1963).
[77] *Id.* at 438-39.

based restrictions on professional speech. The *Matal* and *Iancu* decisions affirm that the terms used in Proposed Rule 8.4(7) create unconstitutional viewpoint discrimination.

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.'"[78] "[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.'"[79] 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."'"[80]

The Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech. As already noted, this is the operative assumption underlying ABA Model Rule 8.4(g) and Proposed Rule 8.4(7).

To illustrate its point, 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.[81] 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.*'"[82] The Court rejected the idea that "professional speech" was an exception "from the rule that content-based regulations of speech are subject to strict scrutiny."[83]

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

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[78] *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[79] *Id.*
[80] *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[81] *Id.* at 2371.
[82] *Id.* at 2371-72 (emphasis added).
[83] *Id.* at 2371.

rights of professionals" and "has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers."[84]

B. ABA Formal Opinion 493 and Professor Aviel's article fail to address the Supreme Court's decision in *NIFLA v. Becerra*.

1. ABA Formal Opinion 493 fails even to mention *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. [85]

But 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 document serves to underscore the breadth of ABA Model Rule 8.4(g) and the fact that it is intended to restrict lawyers' speech.[86] The opinion reassures that it will only be used for "harmful" conduct, which the rule makes clear includes "verbal conduct" or "speech."[87]

Formal Opinion 493 explains that the Rule's scope "is *not* restricted to conduct that is severe or pervasive."[88] 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 necessarily intended to harm and that does not "target" a particular person or

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[84] *Id.* at 2374.
[85] C. Thea Pitzen, *First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g) 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).
[86] 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.
[87] *Id.* at 1.
[88] *Id.* (emphasis added).

group.[89] Formal Opinion 493 runs directly counter to Proposed Rule 8.4(7)'s commentary that claims to cabin "harassment" to "severe or pervasive derogatory or demeaning" speech. (Note, however, that the operative word in Proposed Rule 8.4(7)'s commentary is "includes." That is "[h]arassment includes severe or pervasive derogatory or demeaning verbal or physical conduct" rather than language that confines "harassment" to "severe or pervasive derogatory or demeaning" speech.)

Formal Opinion 493 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 appears in the context of the broad limits that the government is allowed to place on its employees' free speech. The category actually provides *less* protection for free speech rather than more protection.[90] And it may even reflect the notion that lawyers' speech is akin to government speech, a topic that Professor Aviel briefly mentions in her article.[91] If lawyers' speech is treated as if it were the government's speech, then lawyers have minimal protection for their speech.

Formal Opinion 493 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 grapple with just how broadly the Rule defines "conduct related to the practice of law," for example, to include social settings.[92] In so doing, Formal Opinion 493 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 baffling 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 earlier and has been frequently relied upon to illuminate ABA Model Rule 8.4(g)'s constitutional deficiencies. This lack of mention, let alone analysis, of *Becerra* is inexplicable. Formal Opinion 493 has a four-page section that discusses "Rule 8.4(g) and the First Amendment," yet never mentions the United States Supreme Court's on-point decisions in *Becerra*, *Matal*, and *Iancu.* Like the proverbial ostrich burying its head in the sand, the ABA adamantly refuses to see the deep flaws of Model Rule 8.4(g).[93] This Committee does not have that luxury.

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[89] *Id.*

[90] *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.").

[91] 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.

[92] Formal Op. 493, *supra* note 86, at 1.

[93] *Id.* at 9-12.

Formal Opinion 493 concedes that its definition of the term "harassment" is not the same as the EEOC uses,"[94] 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."[95] 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 itself 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 Rule 8.4(7).

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), should not be relied upon in assessing Proposed Rules 8.4(7)'s chilling effect on lawyers' freedom of speech because it also fails to mention *Becerra*. It seems probable that the article was written before the Supreme Court issued *Becerra.* For that reason, the article 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."[96] *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."[97] Instead, the Court 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."[98] But because she wrote without the benefit of *Becerra* and relied on basic assumptions repudiated by the Court in *Becerra*, her free speech analysis cannot be relied upon as authoritative.

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[94] *Id.* at 4 & n.13.
[95] 510 U.S. 17, 21 (1993)
[96] Aviel, *supra* note 91, at 39 (citation and quotation marks omitted); *see also id.* at 44.
[97] *Becerra*, 138 S. Ct. at 2371.
[98] Aviel, *supra* note 91, at 48.

C. Under *Matal v. Tam* and *Iancu v. Brunetti*, Proposed Rule 8.4(7) fails 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. In his concurrence, Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, observed that it is unconstitutional to suppress speech that "*demeans* or offends."[99] The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[100]

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."[101] 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 hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[102]

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."[103] 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.[104]

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[99] *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) (emphasis supplied).
[100] *Id.* at 1753-1754, 1765 (plurality op.).
[101] *Id.* at 1751 (quotation marks and ellipses omitted).
[102] *Id.* at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting) (emphasis supplied).
[103] *Id.* at 1767 (Kennedy, J., concurring).
[104] *Id.* at 1769 (Kennedy, J., concurring).

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."[105] And it was viewpoint discriminatory even if it "applies in equal measure to any trademark that *demeans* or offends."[106]

In 2019, the Supreme Court reaffirmed its rigorous rejection of 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."[107] 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 hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.[108]

D. Proposed Rule 8.4(7)'s terms "harassment" and "discrimination" are viewpoint discriminatory.

Proposed Rule 8.4(7) cannot withstand viewpoint-discrimination analysis under the *Matal* and *Inacu* analyses. The definition of "harassment" in the proposed Official Commentary states:

> Harassment *includes* severe or pervasive *derogatory or demeaning verbal* or physical conduct. Harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. (Emphasis supplied.)

But in *Matal*, the Supreme Court unanimously 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

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[105] *Id.* at 1766 (Kennedy, J., concurring) (emphasis supplied).
[106] *Id.* (emphasis supplied).
[107] *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019).
[108] *Id.*

offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[109] 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."[110] Justice Alito reminded that "[s]peech 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.'"[111]

Like its definition of "harassment," Proposed Rule 8.4(7)'s definition of "discrimination" is unconstitutional viewpoint discrimination. The Official Commentary states that "[d]iscrimination includes harmful verbal or physical conduct directed at an individual or individuals that manifests bias or prejudice on the basis of one or more of the protected categories." But a rule that permits government officials to punish lawyers for speech that the government determines to be "harmful" is the epitome of an unconstitutional rule.

Besides creating unconstitutional viewpoint discrimination, the vagueness in the terms "harassment" and "discrimination" in Proposed Rule 8.4(7) necessarily will chill lawyers' speech. Compounding the unconstitutionality, the terms fail to give lawyers fair notice of what speech might subject them to discipline. Proposed Rule 8.4(7) does not provide the clear enforcement standards that are necessary when the loss of one's livelihood is at stake.

V. The ABA's Original Claim that 24 States have a Rule Similar to ABA Model Rule 8.4(g) is not Accurate Because only Vermont and New Mexico have Fully Adopted ABA Model Rule 8.4(g).

When the ABA adopted Model Rule 8.4(g), 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."[112] But this claim has been shown to be factually incorrect. As the 2019 edition of the *Annotated Rules of Professional Conduct* states: "Over half of all jurisdictions have a specific rule addressing bias and/or harassment – *all of which differ in some way from the Model Rule* [*8.4(g)*] *and from each other*."[113]

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[109] 137 S. Ct. at 1753-1754, 1765 (plurality op.); *see also, id.* at 1766 (unconstitutional to suppress speech that "demeans or offends") (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).
[110] *Id.* at 1767.
[111] *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes,J., dissenting)(emphasis supplied).
[112] *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.
[113] Ellen J. Bennett & Helen W. Gunnarsson, Ctr. for Prof. Resp., American Bar Association, *Annotated Model Rules of Professional Conduct* 743, (9th ed. 2019) (emphasis supplied).

No empirical evidence, therefore, supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers. As even its proponents have conceded, ABA Model Rule 8.4(g) does not replicate any 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 before the ABA promulgated Model Rule 8.4(g) in 2016; *however, each of these black letter rules was narrower than ABA Model Rule 8.4(g).*[114] Thirteen states had adopted a comment rather than a black letter rule to deal with bias issues. Fourteen states had adopted neither a black letter rule nor a comment.

A proponent of ABA Model Rule 8.4(g), Professor Stephen Gillers, wrote that "[a]lthough courts in twenty-five American jurisdictions (twenty-four states and Washington, D.C.) have adopted anti-bias rules in some form, these rules differ widely."[115] He then highlighted the primary differences between these pre-2016 rules and ABA Model Rule 8.4(g):

> 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.[116]

VI. Official Entities in Alaska, Arizona, Idaho, Illinois, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas have Rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada 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 and New Mexico, adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on

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[114] *Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative* (July 16, 2015), App. B, *Anti-Bias Provisions in State Rules of Professional Conduct*, at 11-32, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.

[115] 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 spouse "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.

[116] *Id.* at 208.

attorneys in those states. This is particularly true when ABA Model Rule 8.4(g) has failed to survive close scrutiny by official entities in many states.[117]

A. Several State Supreme Courts have rejected ABA Model Rule 8.4(g).

The Supreme Courts of **Arizona, Idaho, New Hampshire, South Dakota, Tennessee,** and **South Carolina** have officially rejected adoption of ABA Model Rule 8.4(g). In August 2018, after a public comment period, the **Arizona** Supreme Court rejected a petition from the Central Arizona Chapter of the National Lawyer Guild urging adoption of ABA Model Rule 8.4(g).[118] In September 2018, the **Idaho** Supreme Court rejected a resolution by the Idaho State Bar Association to adopt a modified version of ABA Model Rule 8.4(g).[119] In April 2018, after a public comment period, the Supreme Court of **Tennessee** denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).[120] 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."[121] In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).[122] The Court acted after the state bar's House of Delegates, as well as the state attorney general, recommended against its adoption.[123] In July 2019, the **New Hampshire** Supreme Court "decline[d] to adopt the rule proposed by the Advisory Committee on Rules."[124] In March 2020, the Supreme Court of **South Dakota**

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[117] McGinniss, *supra* note 2, at 213-217.
[118] Arizona Supreme Court Order re: No. R-17-0032 (Aug. 30, 2018), https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf.
[119] Idaho Supreme Court, Letter to Executive Director, Idaho State Bar (Sept. 6, 2018), https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf.
[120] 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.
[121] Tenn. Att'y Gen. Letter, *supra* note 42, at 1.
[122] 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").
[123] 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.
[124] Supreme Court of New Hampshire, Order (July 15, 2019), https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf. The court instead adopted a rule amendment that had been proposed by the Attorney Discipline Office and is unique to New Hampshire.

unanimously decided to deny the proposed amendment to Rule 8.4 because the court was "not convinced that proposed Rule 8.4(g) is necessary or remedies an identified problem."[125]

In May 2019, the **Maine** Supreme Court announced that it had adopted a modified version of ABA Model Rule 8.4(g).[126] The Maine rule is significantly narrower than the ABA Model Rule in several ways. First, the Maine rule's definition of "discrimination" differs from the ABA Model Rule's definition of "discrimination." Second, its definition of "conduct related to the practice of law" also differs. Third, it covers fewer protected categories. Despite these modifications, if challenged, the Maine rule will likely be found unconstitutional because it overtly targets protected speech. *See supra* pp. 21-25.

In June 2020, the **Pennsylvania** Supreme Court adopted a highly modified version to take effect December 8, 2020.[127] The novel new rule is not limited to specific protected classes, but instead seems to prohibit any "words or conduct" that "knowingly manifest bias or prejudice, or engage in harassment or discrimination" against *anyone*. Furthermore, the terms "bias," "prejudice," harassment," or discrimination" are defined by "applicable federal, state, or local statutes or ordinances," which seems to mean that words and conduct that are professional misconduct for a lawyer in Pittsburgh may not be for a lawyer in Lancaster.

In September 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).[128] In a letter to the Court, the State Bar President explained that "the language used in other jurisdictions was inconsistent and changing," and, therefore, "the Board of Governors

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[125] Letter from Chief Justice Gilbertson to the South Dakota State Bar (Mar. 9, 2020), https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_20.pdf.

[126] State of Maine Supreme Judicial Court Amendment to the Maine Rules of Professional Conduct Order, 2019 Me. Rules 05 (May 13, 2019), https://www.courts.maine.gov/rules_adminorders/rules/amendments/2019_mr_05_prof_conduct.pdf. Alberto Bernabe, *Maine Adopts (a Different Version of) ABA Model Rule 8.4(g)-Updated*, Professional Responsibility Blog, June 17, 2019 (examining a few differences between Maine rule and ABA Model Rule 8.4(g)), http://bernabepr.blogspot.com/2019/06/maine-becomes-second-state-to-adopt-aba.html. *See* The State of New Hampshire Supreme Court of New Hampshire Order 1, July 15, 2019, ("As of this writing, only one state, Vermont, has adopted a rule that is nearly identical to the model rule. Maine has adopted a rule that is similar, but is not nearly identical, to Model Rule 8.4(g)."), https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf.

[127]Supreme Court of Pennsylvania, Order, *In re Amendment of Rule 8.4 of the Pennsylvania Rules of Professional Conduct* (June 8, 2020), http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Entered%20-%20104446393101837486.pdf?cb=1.

[128] 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.

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."[129]

B. State Attorneys General have identified core constitutional issues with ABA Model Rule 8.4(g).

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."[130] The opinion 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."[131]

In 2017, 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."[132] 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."[133] Because of the "expansive definition of 'conduct related to the practice of law'" and its "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."[134]

In March 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).[135] After a thorough analysis, 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."[136]

In May 2018, the **Arizona** Attorney General filed a comment letter urging the Arizona Supreme Court to heed the opposition of other states, state attorneys general, and state bar

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[129] 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.
[130] Tex. Att'y Gen. Op., *supra* note 52, at 3.
[131] *Id.*
[132] South Carolina Att'y Gen. Op., *supra* note 123, at 13.
[133] La. Att'y Gen. Op., *supra* note 52.
[134] *Id.* at 6.
[135] *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.
[136] Tenn. Att'y Gen. Letter, *supra* note 42, at 1.

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.[137] In August 2019, the **Alaska** Attorney General provided a letter to the Alaska Bar Association during a public comment period that it held on adoption of a rule modeled on ABA Model Rule 8.4(g). The letter identified numerous constitutional concerns with the proposed rule.[138] The Bar Association's Rules of Professional Conduct recommended that the Board not advance the proposed rule to the Alaska Supreme Court but instead remand it to the committee for additional revisions after "[t]he amount of comments was unprecedented."[139] A second public comment period closed August 10, 2020.

C. The Montana Legislature recognized the problems that ABA Model Rule 8.4(g) poses for legislators, witnesses, staff, and citizens.

On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).[140] 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 legislature.[141]

D. Several state bar associations have rejected ABA Model Rule 8.4(g).

On December 10, 2016, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois."[142] On September 15, 2017, the **North Dakota** Joint Committee on Attorney Standards voted not to recommend adoption of ABA

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[137] 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.
[138] Letter from Alaska Attorney General to Alaska Bar Association Board of Governors (Aug. 9, 2019), http://www.law.state.ak.us/pdf/press/190809-Letter.pdf.
[139] Letter from Chairman Murtagh, Alaska Rules of Professional Conduct to President of the Alaska Bar Association (Aug. 30, 2019), https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Report.ARPCcmte.on8_.4f.pdf.
[140] *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.
[141] *Id.* at 3. The Tennessee Attorney General similarly 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 42, at 8 n.8.
[142] Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals,* Illinois Lawyer Now, Dec. 15, 2016, https://www.isba.org/barnews/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals.

Model Rule 8.4(g), expressing concerns that it was "overbroad, vague, and imposes viewpoint discrimination" and that it might "have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views."[143] 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."[144]

VII. Proposed Rule 8.4(7) Would Make it Professional Misconduct for Attorneys to Engage in Hiring Practices that Favor Persons Because they are Women or Belong to Racial, Ethnic, or Sexual Minorities.

A highly regarded professional ethics expert, Thomas Spahn, has explained that "ABA Model Rule 8.4(g)'s flat prohibition covers any discrimination on the basis of race, sex, or any of the other listed attributes" and "extends to any lawyer conduct 'related to the practice of law,' including 'operating or managing a law firm or law practice.'"[145] In written materials for a CLE presentation, Mr. Spahn concluded that ABA Model Rule 8.4(g) "thus prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc."[146]

He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:[147]

> *[L]awyers will also have to comply with the new per se discrimination ban in their personal hiring decisions.* Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a "plus" when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms' head count on the basis of such attributes – but it is nevertheless discrimination. ***In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.***

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[143] Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. n Att'y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (Dec. 14, 2017), at https://perma.cc/3FCP-B55J.
[144] 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.
[145] The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues* 5-6 (July 12, 2018) (quoting Comment [4] to ABA Model Rule 8.4(g)). The written materials used in the program are on file with Christian Legal Society and may be purchased from the D.C. Bar CLE program.
[146] *Id.* at 6.
[147] *Id.* at 7 (emphasis supplied).

Mr. Spahn dismissed the idea that Comment [4] of ABA Model Rule 8.4(g) would allow these efforts to promote certain kinds of diversity to continue. Even though Comment [4] states that "[l]awyers may engage in conduct undertaken to promote diversity and inclusion . . . by . . . implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations," as the ethics expert explained, "[t]his sentence appears to weaken the blanket anti-discrimination language in the black letter rule, but on a moment's reflection it does not – and could not – do that."[148]

Mr. Spahn provided three reasons for his conclusion that efforts to promote certain kinds of diversity would violate the rule and, therefore, would need to cease. *First*, the language in the comments is only guidance and not binding. The same is true for Proposed Rule 8.4(7)'s Commentary that attempts to save diversity programs from the blanket prohibition of the black letter rule. *Second*, the drafters of the rule "clearly knew how to include exceptions to the binding black letter anti-discrimination rule" because two exceptions actually are contained in the black letter rule itself, so "[i]f the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule." *Third*, the comment "says nothing about discrimination" and "does not describe activities permitting discrimination on the basis of the listed attributes." The references could be to "political viewpoint diversity, geographic diversity, and law school diversity" which "would not involve discrimination prohibited in the black letter rule." The same is true of Proposed Rule 8.4(7)'s discussion of diversity programs.

Proposed Rule 8.4(7)'s consequences for Connecticut lawyers' and their firms' efforts "to promote diversity, equity, and inclusion" provide yet another reason to reject the proposed rule. The substantial value of firms' programs to promote diversity, equity, and inclusion, as well as the importance of affinity legal groups based on gender, race, sexual identity, or other protected classes, would seem to far outweigh any practical benefits likely to come from Proposed Rule 8.4(7).

VIII. Proposed Rule 8.4(7) Could Limit Connecticut 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

[148] *Id.* at 5. *See also, id.* at 5-6 ("Perhaps that sentence was meant to equate 'diversity' with discrimination on the basis of race, sex, etc. But that would be futile – because it would fly in the face of the explicit authoritative prohibition in the black letter rule. It would also be remarkably cynical, by forbidding discrimination in plain language while attempting to surreptitiously allow it by using a code word.")

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 Rule 1.16(a), *"a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)*."[149]

As Professor Rotunda and Professor Dzienkowski explained, Rule 1.16 actually "deals with when a lawyer must or may *reject* a client or *withdraw* from representation."[150] Rule 1.16 does not address *accepting* clients.[151] 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."[152]

Dean McGinniss agrees that "[d]espite its ostensible nod of non-limitation, 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."[153] 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," Model Rule 8.4(g) seems only to allow what was already required, not declinations that are discretionary. Dean McGinniss warns that "if state bar authorities consider a lawyer's declining representation . . . as 'manifest[ing] bias or prejudice,' they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g)."[154]

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*."[155] 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

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[149] 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).
[150] Rotunda & Dzienkowski, *supra* note 23, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis supplied by the authors).
[151] A state 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 42, at 11.
[152] *See* Rotunda & Dzienkowski, *supra* note 23.
[153] McGinniss, *supra* note 2, at 207-209.
[154] *Id.* at 207-208 & n.146, citing Stephen Gillers, *supra* note 115, at 231-32, 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."
[155] N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).

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).[156]

In *Stropnicky v. Nathanson*,[157] 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.[158] 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.

In addressing representation issues, Proposed Rule 8.4(7) substituted the phrase "consistent with other Rules" for ABA Model Rule 8.4(g)'s phrase "in accordance with Rule 1.16." It is unclear whether this solves the problem because it is not clear what "consistent with other Rules" means in the context of a lawyer's ability "to accept, decline, or withdraw from representation." If the intent of Proposed Rule 8.4(7) is to ensure that lawyers are completely free to accept, decline, or withdraw from representation if it is adopted, then the phrase "consistent with these Rules" fails to protect.

IX. Does the Office of Disciplinary Counsel have Adequate Resources to Process an Increased Number of Discrimination and Harassment Claims, Including Employment Discrimination Claims?

Concerns have been expressed by some state bar disciplinary counsel as to whether bar disciplinary offices have adequate financial and staff resources for adjudicating complex harassment and discrimination claims, particularly employment discrimination claims. For example, the Montana Office of Disciplinary Counsel (ODC) voiced concerns about the breadth of ABA Model Rule 8.4(g).[159] The ODC quoted from a February 23, 2016, email from the National Organization of Bar Counsel ("NOBC") to its members explaining that the NOBC Board had declined to take a position on then-proposed ABA Model Rule 8.4(g) because "there

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[156] *Id.* New York's Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is narrower.
[157] 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).
[158] Rotunda & Dzienkowski, *supra* note 23, *in* "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."
[159] Office of Disciplinary Counsel, *In re the Model Rules of Professional Conduct: ODC's Comments re ABA Model Rule 8.4(g)*, *filed in* Montana Supreme Court, No. AF 09-0688 (Apr. 10, 2017), at 3, https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Letter%20of%20Chief%20Disciplinary%20Counsel%20Opposing%208.4.pdf.

were a number of simple regulatory issues, not the least of which is the possibility of diverting already strained resources to investigate and prosecute these matters."[160]

The Montana ODC thought that "any unhappy litigant" could claim that opposing counsel had discriminated on the basis of "one or more of the types of discrimination named in the rule."[161] The ODC also observed that ABA Model Rule 8.4(g) did not require "that a claim be first brought before an appropriate regulatory agency that deals with discrimination."[162] In that regard, the ODC recommended that the court consider "Illinois' rule [that] makes certain types of discrimination unethical and subject to discipline" because it required that "the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or administrative agency" and required that "the conduct must reflect adversely on the lawyer's fitness as a lawyer."[163]

Proposed Rule 8.4(7) generates similar concerns. Increased demand may drain the resources of the Office of Disciplinary Counsel as it serves as the tribunal of first resort for an increased number of discrimination and harassment claims against lawyers and law firms. 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.

In addition, Proposed Rule 8.4(7)'s Commentary is both confusing and concerning. It seems to require the Office of Disciplinary Counsel to understand complicated federal and state antidiscrimination and antiharassment laws well enough to apply them to discriminatory and harassment complaints brought under Proposed Rule 8.4(7). The Commentary instructs that "[t]he substantive law of antidiscrimination or antiharassment statutes and case law *should* guide application of [the rule], *where applicable*." (Note the less protective term "should" rather than "shall.") The Commentary continues that "[w]here the conduct in question is subject to federal or state antidiscrimination or antiharassment law, a lawyer's conduct does not violate [the rule] when the conduct does not violate such law." Essentially, the Office of Disciplinary Counsel will have to conduct their own trials to determine whether federal and state antidiscrimination or antiharassment laws have been violated. This is an extreme burden to place on that Office. This is why the Montana ODC recommended the Illinois rule which provides that "the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or

[160] *Id.* at 3-4.
[161] *Id.*
[162] *Id.* at 3.
[163] *Id.* at 5.

administrative agency."[164] The Illinois rule further requires that "any right of judicial review has been exhausted" before a disciplinary complaint can be acted upon.[165]

Moreover, 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."[166] Nor is "an allegedly injured party [required] to first invoke the civil legal system" before a lawyer can be charged with discrimination or harassment.[167]

The threat of a complaint under Proposed Rule 8.4(7) could also be used as leverage in other civil disputes between a lawyer and a former client. Proposed Rule 8.4(7) even may be the basis of an implied 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 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).[168]

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." They warn that "[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas."[169]

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 Rule 8.4(7) does not provide the clear enforcement standards that are necessary when the loss of one's livelihood is at stake.

Conclusion

Because Proposed Rule 8.4(7) will drastically chill lawyers' freedom to express their viewpoints on political, social, religious, and cultural issues, and for the additional reasons given in this letter, it should be rejected. At a minimum, the Court should wait to see whether the

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[164] *Id.* (referring to ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j)).
[165] ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j).
[166] Rotunda & Dzienkowski, *supra* note 23 (parenthetical in original).
[167] *Id.*
[168] *Id.*
[169] *Id.*

widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out if and when it is adopted in several other states. There is no reason to subject Connecticut attorneys to the ill-conceived experiment that ABA Model Rule 8.4(g) represents. A decision to not recommend Proposed Rule 8.4(7) can always be revisited, but the damage its premature adoption may do to Connecticut attorneys cannot be undone.

Given the haste with which Proposed Rule 8.4(7) has been rushed through a subcommittee and the county bar associations, we respectfully suggest that the Committee and Connecticut lawyers would benefit from a more widely publicized comment period. Extension of the comment period would ensure fairness for the many Connecticut lawyers who have been unaware of the expedited push to adopt Proposed Rule 8.4(7) and provide them with an adequate opportunity to be heard by the Committee.

Christian Legal Society thanks the Committee for considering its comments.

Respectfully submitted,

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