CHRISTIAN LEGAL SOCIETY

Why Illinois Should Not Adopt Proposed Rule 8.4(j)

The Illinois Supreme Court Rules Committee is seeking input on a proposal by the Illinois State Bar Association to revise Illinois Rules of Professional Conduct Rule 8.4(j). Proposed Rule 8.4(j) hews closely to ABA Model Rule 8.4(g) by changing the standard from one of knowledge to one of negligence ("reasonably should know") and making the rule applicable to "conduct in the practice of law," including law firm and bar association activities and social events. Comments opposing adoption of the proposed rule change should be submitted to the Rules Committee by **November 8, 2023.** Comments should be sent by email to RulesCommittee@illinoiscourts.gov or via mail to Committee Secretary, Supreme Court Rules Committee, 222 N. LaSalle Street, 13th Floor, Chicago, IL 60601.

ABA Model Rule 8.4(g) is the deeply flawed and highly criticized rule adopted by the American Bar Association in August 2016. ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers, as UCLA Professor Eugene Volokh, a nationally recognized First Amendment expert, explains in a two-minute Federalist Society video. The late Professor Ron Rotunda, who was on the University of Illinois Law School faculty, was also a strong opponent of ABA Model Rule 8.4(g).[1] CLS has outlined ten key problems with Proposed Rule 8.4(j) and reasons why it should not be adopted.

Please act before November 8, 2023, to oppose adoption of this proposal.

1. Send an email with short comments to the Rules Committee Secretary at RulesCommittee@illinoiscourts.gov urging the Rules Committee to reject Proposed Rule 8.4(j). The email could simply say: **"I oppose adoption of Proposed Rule 8.4(j) because it threatens the First Amendment rights of Illinois attorneys. Existing Supreme Court Rules 8.4(d) and 8.4(j) already adequately address prejudicial conduct and discrimination on the basis of sex, race, religion, national origin, disability, age, sexual orientation or socioeconomic status. I respectfully request the Committee reject Proposed Rule 8.4(j)."**

2. Another option includes signing a sample comment letter and emailing it to the above email address.

3. The Rules Committee is also holding a **public hearing** on Proposed Rule 8.4(j). The hearing will be on **Wednesday, November 15**, beginning at **10:30 am**, at the Administrative Office of the Illinois Courts, 222 N. LaSalle Street, 13th Floor, in Chicago. Those wishing to testify at the public hearing can sign up by emailing the Rules Committee no later than **Wednesday, November 8, 2023,** also at RulesCommittee@illinoiscourts.gov.

[1] Prof. Ronald Rotunda, "*The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*," The Heritage Foundation, Oct. 6, 2016; Prof. Rotunda's Federalist Society debate at https://www.youtube.com/watch?v=V6rDPjqBcQg (Nov. 2017).

Key problems with ABA Model Rule 8.4(g) on which Proposed Rule 8.4(j) is modeled: Respected scholars have criticized ABA Model Rule 8.4(g) as a speech code for lawyers.[2] Fortunately, ABA Model Rule 8.4(g) operates only in those states in which the highest court adopts it. After seven years, only two states – Vermont and New Mexico – have adopted ABA Model Rule 8.4(g). Six states – Alaska, Connecticut, Maine, New Hampshire, New York, and Pennsylvania – adopted a modified version of ABA Model Rule 8.4(g), most only after declining to adopt the model rule itself. A federal district court has ruled – twice now – that Pennsylvania's version of ABA Model Rule 8.4(g) is unconstitutional.[3]

After careful consideration, many states have concluded that ABA Model Rule 8.4(g) is too flawed to adopt and have instead chosen the prudent course of waiting to see whether other states adopt ABA Model Rule 8.4(g) and its real-life consequences on attorneys in those states. At least **sixteen** states have rejected or abandoned efforts to impose ABA Model Rule 8.4(g) – or a version thereof – including:

- **State bar activity:** The *Illinois* Bar Association Assembly previously "voted overwhelmingly to oppose adoption of the rule."[4] The *North Dakota* Joint Committee on Attorney Standards recommended rejection. The *Louisiana* Rules of Professional Conduct Committee voted not to recommend its adoption.
- **Formal rejection:** The state supreme courts of *Arizona*, *Hawaii*, *Idaho*, *Montana*, *New Hampshire*, *South Carolina*, *South Dakota*, *Tennessee*, and *Wisconsin* formally rejected ABA Model Rule 8.4(g) after holding comment periods.[5] ABA Model Rule 8.4(g) has also been rejected or abandoned by other official entities in *Illinois*, *Louisiana*, *Minnesota*, *Nevada*, *North Dakota*, *Oregon*, and *Texas*.
- **State legislature action:** The *Montana* State Legislature adopted a joint resolution urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g) because of the impact ABA Model Rule 8.4(g) could have 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."[6]
- **State Attorneys General:** Several state attorneys general – including those in *Alaska*, *Arizona*, *Louisiana*, *South Carolina*, *Tennessee*, and *Texas* – have issued opinions stating the rule is likely unconstitutional.[7]

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[2] *See, e.g.*, Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law,"* 30 Geo. J. Leg. Ethics 241 (2017); Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201 (2017). *See also*, Prof. Volokh's Federalist Society debate at https://www.youtube.com/watch?v=b074xW5kvB8&t=50s (Mar. 2017).

[3] *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020); *Greenberg v. Goodrich*, 593 F. Supp. 3d 174 (2022) (E.D. Pa. 2022), rev'd for lack of standing, *Greenberg v. Lehocky*, 81 F.4th 376 (3rd Cir. 2023).

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

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

[6] http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf.

[7] *See, e.g.*, Alaska Att'y Gen. Comment letter (August 9, 2019), http://www.law.state.ak.us/press/releases/2019/080919-Rule8.html; Tex. Att'y Gen. Op. KP0123 (Dec. 20, 2016),

Proposed Rule 8.4(j) would prohibit a lawyer from "engag[ing] in conduct in the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, gender expression, marital status, military or veteran status, pregnancy, or socioeconomic status."

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

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

2. **The proposed rule is unconstitutional under the analyses in three recent United States Supreme Court decisions.**

   In 2018, the Supreme Court held that government restrictions on professionals' speech – including lawyers' professional speech – are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, presumptively unconstitutional.[8] In 2017 and again in 2019, a unanimous Supreme Court made clear that a government prohibition on disparaging, derogatory, demeaning, offensive, immoral, or scandalous speech is viewpoint discriminatory and, therefore, unconstitutional under the First Amendment.[9]

3. **The mens rea requirement is mere negligence.**

   A lawyer can violate the proposed rule without intending to do so or even being aware of having done so. This is particularly concerning if implicit bias is considered to fall within the broad definitions of "discrimination" and "harassment."

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https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf; Tenn. Att'y Gen. Op. 18-11, https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf.

[8] *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___, 138 S. Ct. 2361 (2018).

[9] *Matal v. Tam*, 582 U.S. ___, 137 S. Ct. 1744 (2017); *Iancu v. Brunetti*, 588 U.S. ___, 139 S. Ct. 2294 (2019).