

October 12, 2023

Illinois Supreme Court Rules Committee

By email (RulesCommittee@illinoiscourts.gov)

RE: Comment Letter Opposing Adoption of Proposal 22-06 Amending 8.4

Dear Rules Committee:

Thank you for seeking input on Proposal 22-06 to amend Illinois Rules of Professional Conduct Rule 8.4(j). Although I laud the effort to prevent harassment and discrimination in the legal profession, approving a vague and overbroad rule like Proposed Rule 8.4(j)—one that impinges on the First Amendment rights of Illinois attorneys—is not the tool to accomplish this especially when the existing rules are more than sufficient. Proposed Rule 8.4(j) should not be imposed on Illinois lawyers.

Proposed Rule 8.4(j) is simply a modified version of ABA Model Rule 8.4(g), adopted by the ABA in 2016. After seven years of deliberations in many states across the country, only two states—Vermont and New Mexico—have fully adopted this highly flawed rule. In contrast, at least fourteen states have concluded, after careful study, that ABA Model Rule 8.4(g) is both unconstitutional and unworkable. The Supreme Court of Wisconsin is the latest state to have rejected ABA Model Rule 8.4(g), doing so just a few months ago on July 11, 2023.

I respectfully request that the Committee reject the proposal to amend Illinois Rule 8.4(j) to make it conform to ABA Model Rule 8.4(g). Instead, the prudent course is to wait and see whether other states choose to experiment with ABA Model Rule 8.4(g) and the practical effect of that experiment on the lawyers in those states.

A number of scholars have characterized ABA Model Rule 8.4(g) as a speech code for lawyers.¹ The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics and the former Albert E. Jenner, Jr. Professor of Law at the University of Illinois., warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.² 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."³ Professor Michael McGinniss, Dean of the University of North Dakota School of Law, raised similar concerns in a recent article.⁴

¹ Eugene Volokh, A Nationwide Speech Code for Lawyers?, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

² 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>.

³ Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017, "§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech" & "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" in "§ 8.4-2 Categories of Disciplinable Conduct."

⁴ 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, 173 (2019).

Two Arizona practitioners thoroughly examined ABA Model Rule 8.4(g) and concluded that it “is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities.”⁵ 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.” 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.”⁶

Since the ABA adopted Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued three free speech decisions that demonstrate it is unconstitutional. Under the Court’s analysis in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), ABA Model Rule 8.4(g) is an unconstitutional content-based restriction on lawyers’ speech. In *Becerra*, the Supreme Court held that state restrictions on “professional speech” are presumptively unconstitutional and subject to strict scrutiny. Under the Court’s unanimous analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), ABA Model Rule 8.4(g) is an unconstitutional viewpoint-based restriction on lawyers’ speech.

Illinois attorneys should not be subject to a rule that closely resembles one of questionable constitutionality nor one that has not been adequately tested in other states. I respectfully request that the Committee reject Proposal 22-06 and leave Illinois Rules of Professional Conduct Rule 8.4(j) as it currently is written. I thank the Committee for considering these comments.

Yours truly,

⁵ 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).

⁶ *Id.* at 204.