

Ten Reasons Why Proposed Rule 8.4(j) Should not be Adopted in Illinois

American Bar Association Model Rule 8.4(g) is a deeply flawed rule adopted at its annual meeting in August 2016. The rule proposed in Illinois – Proposed Rule 8.4(j) – is closely modeled after ABA Model Rule 8.4(g). Because Proposed Rule 8.4(j) so closely resembles ABA Model Rule 8.4(g), the same reasons why ABA Model Rule 8.4(g) should be rejected apply equally to Proposed Rule 8.4(j).

Proposed Rule 8.4(j) would make it professional misconduct for a lawyer to “engage in conduct in the practice of law” that he or she “knows or reasonably should know is harassment or discrimination on the basis of” 17 different categories. Conduct “in the practice of law” is defined to include nearly everything a lawyer does, from representing clients to participating in “law-related professional activities,” including bar association and social events. “Conduct” includes “verbal conduct” – aka speech – which is why UCLA Professor Eugene Volokh has deemed ABA Model Rule 8.4(g) a speech code for lawyers.

1. Since the ABA promulgated Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued three major free speech decisions that seriously call into question its constitutionality, a federal district court has held it unconstitutional, and even the ABA itself has questions the model rule’s constitutionality.

- *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___, 138 S. Ct. 2361 (2018) (state restrictions on “professional speech” are presumptively unconstitutional because they are content-based restrictions on speech)
- *Matal v. Tam*, 582 U.S. ___, 137 S. Ct. 1744 (2017) and *Iancu v. Brunetti*, 588 U.S. ___, 139 S. Ct. 2294 (2019) (federal law prohibiting “disparaging” or “immoral” speech is unconstitutional viewpoint-based restriction on speech)
- *Greenberg v. Haggerty*, 491 F.Supp.3d 12 (E.D. Pa. 2020) (ruling Pennsylvania’s version of ABA Model Rule 8.4(g) unconstitutional); *Greenberg v. Goodrich*, 593 F. Supp. 3d 174 (2022) (holding that Pennsylvania’s new version of ABA Model Rule 8.4(g) is also unconstitutional) (rev’d for lack of standing, *Greenberg v. Lehocky*, 81 F.4th 376 (3rd Cir. 2023))
- Cassandra Burke Robertson, Chair of the ABA Appellate Litigation Subcommittee of the Section’s Civil Rights Litigation Committee, is quoted as saying that while ABA Model Rule 8.4(g) 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.” 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/topstories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond/>

2. Numerous states have rejected or abandoned efforts to adopt ABA Model Rule 8.4(g).

- In 2016, the ABA wrote to every state supreme court asking it to adopt ABA Model Rule 8.4(g). To date, sixteen states have either rejected it outright or abandoned initial efforts to adopt it. The Supreme Courts of Arizona, Hawaii, Idaho, Montana, New

Hampshire, South Carolina, South Dakota, and Tennessee have formally rejected ABA Model Rule 8.4(g). The latest state supreme court to reject ABA Model Rule 8.4(g) hails from Illinois's northern neighbor; the *Wisconsin Supreme Court issued an order on July 11, 2023, declining to adopt the model rule.*¹ The Montana Legislature passed a joint resolution against its adoption.² The Attorneys General of Alaska, Arizona, Arkansas, Louisiana, Nebraska, South Carolina, Texas, and Tennessee have advised against its adoption, calling into question its constitutionality. The boards of governors for the state bars of Nevada and Alaska requested its remand for further consideration after a public comment period. State bar association committees in Louisiana and Oregon voted not to recommend it. In 2017, even the Illinois State Bar Association refused to recommend it. Minnesota and North Dakota abandoned efforts to adopt it.

- In the seven years since its adoption by the ABA, only Vermont and New Mexico actually adopted ABA Model Rule 8.4(g). Six states – Alaska, Connecticut, Maine, New Hampshire, New York, and Pennsylvania – adopted highly modified versions, in many instances only after the state supreme court rejected ABA Model Rule 8.4(g) itself. Twice now, a federal district court has held Pennsylvania's version unconstitutional.³
- The ABA's original claim in 2016 that twenty-four states had rules similar to ABA Model Rule 8.4(g) was inaccurate and has since been abandoned by the ABA.

3. ABA Model Rule 8.4(j) would regulate lawyers' interactions with anyone while engaged in conduct in the practice of law or when participating in law-related professional activities or events, including law firm or bar association educational or social events.

- Is a lawyer subject to discipline when participating in panel discussions touching on controversial political, religious, and social viewpoints?⁴
- Is a law professor subject to discipline for a law review article or a class discussion that explores controversial topics or expresses unpopular viewpoints?⁵

¹ See <https://www.christianlegalsociety.org/wp-content/uploads/2023/07/Wisconsin-22-02-Final-Order.pdf>.

² *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>.

³ *Greenberg v. Haggerty*, 491 F.Supp.3d 12 (E.D. Pa. 2020) (ruling Pennsylvania's version of ABA Model Rule 8.4(g) unconstitutional); *Greenberg v. Goodrich*, 593 F. Supp. 3d 174 (E.D. Pa. 2022) (holding that Pennsylvania's new version of ABA Model Rule 8.4(g) is also unconstitutional) (rev'd for lack of standing, *Greenberg v. Lehocky*, 81 F.4th 376 (3rd Cir. 2023)).

⁴ 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-stephengillers-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 (wrongly) stereotyped opponents 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).

⁵ *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,

- Must lawyers abstain from writing blogposts or op-eds because they run the risk of a bar complaint by an offended reader?
- Must lawyers forgo media interviews regarding cases they are handling or on topics about which they have some particularly insightful comments because anyone hearing the interview could file a complaint?⁶
- Can a lawyer lose his license to practice law for a political tweet calling a female public official a sexist term?⁷
- 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 deem “a license to discriminate”) are also added?⁸
- Is a lawyer at risk for his volunteer political activity for political candidates who take controversial positions?
- Is a lawyer subject to discipline for comment letters she writes expressing her personal views on proposed Title IX regulations, immigration issues, census questions, re-districting proposals, or capital gains tax proposals?
- Is a lawyer who is running for public office subject to discipline for socioeconomic discrimination if she proposes that college loans be forgiven only for graduates earning below a certain income level?
- 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 subject to discipline for her discussion of hypotheticals while presenting a CLE course?⁹

2016) (hereinafter “Tx. Att’y Gen. Op.”) 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) (hereinafter “La. Att’y Gen. Op.”), <https://lalegalethics.org/wpcontent/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.”).

⁶ In *Basler v. Downtown Hope Center*, Case No. 18-167, Anchorage Equal Rights Comm’n. (May 15, 2018), a discrimination complaint was lodged against an attorney for his accurate comments in a media interview that he gave on behalf of his client.

⁷ Debra Cassens Weiss, *BigLaw Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders*, ABA Journal (Oct. 1, 2018) (noting that the lawyer had been honored in 2009 by the ABA Journal “for his innovative use of social media in his practice”), https://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

⁸ 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 Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees.”

⁹ 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 a 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-theclient-wants/>.

4. 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.

- 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?¹⁰
- Are attorneys subject to discipline for their membership in religious organizations that hold traditional religious beliefs and values if those beliefs or values are deemed by some to be discriminatory?¹¹

5. Proposed Rule 8.4(j)'s threat to free speech is compounded by its use of a negligence standard rather than a knowledge requirement and removes procedural protections found in the current Rule 8.4(j).

- A lawyer can violate Proposed Rule 8.4(j) without intending to do so or without 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.”
- Under current Illinois Rule 8.4(j), misconduct requires an attorney “violate a federal, state or local statute or ordinance ... that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer’s fitness as a lawyer. ... No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.” Proposed Rule 8.4(j) removes these important procedural safeguards.

¹⁰ 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>.

¹¹ See Alaska Attorney General Letter to Alaska Bar Association Board of Governors (Aug. 9, 2019) at 14, <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>; Tx. Att’y Gen. Op., *supra* note 3, 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 3, 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.”), <https://lalegaethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule8.4f.pdf?x16384>.

6. Scholars have rightly criticized ABA Model Rule 8.4(g), on which Proposed Rule 8.4(j) is modeled, as a speech code for lawyers.

- Professor Eugene Volokh’s two-minute video for Federalist Society at <https://www.youtube.com/watch?v=AfpdWmlOXbA>
- 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).¹²
- Michael S. McGinniss, Dean of University of North Dakota School of Law, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol’y 173 (2019)
- Professor Josh Blackman, *Ethics Teleforum: Model Rule 8.4(g) Update: What Attorneys Should Be Aware of in 2019/2020*, Sept. 25, 2019, <https://fedsoc.org/events/ethics-cle-teleforum>
- Practitioners 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)

7. Proposed Rule 8.4(j) could make it professional misconduct for attorneys to engage in hiring practices to promote diversity by favoring persons because they are women or belong to racial, ethnic, or sexual minorities.

- A highly regarded professional ethics expert 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.’”¹³ Proposed Rule 8.4(j) has the same prohibition.

8. Proposed Rule 8.4(j) may limit lawyers’ ability to accept, decline, or withdraw from representation.

- The Vermont Supreme Court has said that “[t]he optional 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.”¹⁴
- Dean McGinniss, who teaches professional responsibility, says 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.”¹⁵

¹² 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](https://www.youtube.com/watch?v=V6rDPjqBcQg) Federalist Society debate at <https://www.youtube.com/watch?v=V6rDPjqBcQg> (Nov. 2017).

¹³ 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)).

¹⁴ 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](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf).

¹⁵ McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol’y 173, 207-209 (2019).

9. The Office of Disciplinary Counsel should not be expected to be the tribunal of first resort for an increased number of discrimination and harassment claims, including employment discrimination claims.

- Some state disciplinary counsel have voiced concerns regarding the adequacy of their already-stretched budgetary and staff resources for adjudicating complex harassment and discrimination claims.
- Proposed Rule 8.4(j) does not provide the clear enforcement standards that are necessary when the loss of a lawyer's livelihood is at stake.

10. Illinois should wait and see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for lawyers is borne out in states that have adopted it.

- There is no reason to subject Illinois attorneys to the experiment that ABA Model Rule 8.4(g) and, by extension, Proposed Rule 8.4(j) represent.
- The damage that premature adoption of Proposed Rule 8.4(j) may do to Illinois attorneys can never be undone, while a decision to not adopt Proposed Rule 8.4(j) can always be revisited.