CHRISTIAN LEGAL SOCIETY

*Seeking Justice with the Love of God*

January 16, 2020

Chief Justice David E. Gilbertson
Justice Janine M. Kern
Justice Steven R. Jensen
Justice Mark E. Salter
Justice Patricia J. DeVaney
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

Attn: Shirley A. Jameson-Fergel, Clerk of the Supreme Court

By Two-Day United Parcel Service

**RE: In the Matter of the Proposed Amendment to Appendix to Chapter 16-18, South Dakota Rules of Professional Conduct, Maintaining the Integrity of the Profession Rule 8.4, Misconduct**
**Notice of Rules Hearing No. 141, February 11, 2020**

Dear Chief Justice Gilbertson, Justice Kern, Justice Jensen, Justice Salter, and Justice DeVaney:

This comment letter is filed pursuant to the Court's Notice of Rules Hearing No. 141, dated December 12, 2019. For the reasons detailed below, Christian Legal Society ("CLS") objects to the proposed amendment to the Appendix to Chapter 16-18, South Dakota Rules of Professional Conduct, which would amend current Rule 8.4 by adding Proposed Rule 8.4(g). CLS has members who practice law in South Dakota.

Accompanying this letter are reprints of an article by Professor Michael McGinniss, now 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). Because of its thoughtful and careful discussion of ABA Model Rule 8.4(g), we have enclosed a reprint for each justice.

This letter analyzes both the language of Proposed Rule 8.4(g) and ABA Model Rule 8.4(g). The impetus for adding Proposed Rule 8.4(g) to the South Dakota Rules of Professional Conduct is fueled by a nationwide effort, beginning in 2016, to add ABA Model Rule 8.4(g) to each state's rules of professional conduct. For that reason, this letter also discusses the highly criticized and deeply-flawed ABA Model Rule 8.4(g). Proposed Rule 8.4(g) differs in some ways from ABA Model Rule 8.4(g), but there are enough similarities to make an understanding of the ABA Model Rule necessary. For example, Proposed Rule 8.4(g) does not define several of its key terms, creating a legitimate concern that its missing definitions may be supplied by definitions of the same terms as found in the comments accompanying ABA Model Rule 8.4(g).

Those comments have been the subject of deserved criticism, in part because they employ definitions that raise substantial constitutional problems.

## I. Proposed Rule 8.4(g) should not be adopted because its redundancy with existing Rule 8.4(d) and existing Comment [3] make it unnecessary.

Basically, Proposed Rule 8.4(g) would make it professional misconduct for a lawyer to "engage in harassing or discriminatory conduct by the known use of words or actions based upon race, sex, religion, national origin, disability, age, or sexual orientation when that conduct is directed to . . . others and that conduct is prejudicial to the administration of justice." The proposed rule then includes four limitations on its scope.

Proposed Rule 8.4(g) is rightly limited to conduct that "is prejudicial to the administration of justice." Yet that makes Proposed Rule 8.4(g) redundant because existing Rule 8.4(d) already makes it professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

Proposed Rule 8.4(g)'s redundancy is compounded by existing Comment [3], which accompanies Rule 8.4(d) and already makes it misconduct for a lawyer to manifest "bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status" when "representing a client" and "such actions are prejudicial to the administration of justice." Current Rule 8.4(d) and Comment [3] already provide an adequate basis for disciplining attorneys for bias or prejudice.

## II. Proposed Rule 8.4(g) should not be adopted because its language creates ambiguities for lawyers.

There are several problems with Proposed Rule 8.4(g). First, like ABA Model Rule 8.4(g), it applies to "words" and, therefore, creates a speech code that will chill lawyers' speech, particularly socially conservative or religious viewpoints. For this reason, ABA Model Rule 8.4(g) has been criticized by several constitutional scholars.

Second, and contributing to the "speech code" problem, Proposed Rule 8.4(g) is ambiguous as to "when" it applies to an attorney's speech. Proposed Rule 8.4(g) is not limited to lawyer's conduct "in the course of representing a client," as is current Comment [3]. Instead, by its terms, the language applies to all of a lawyer's speech to "others" but not to "legitimate advocacy. . . in any legal proceeding, action or forum where said counsel provides advice." This indicates its broad applicability, but it is not clear what constitutes a "forum where said counsel provides advice."

Third, Proposed Rule 8.4(g) provides no definitions for "harassing" conduct, "discriminatory conduct," or "legitimate advocacy." Because ABA Model Rule 8.4(g) provides inadequate definitions for "harassment or discrimination" in its accompanying comment, it

seems probable that problematic Comment may become a source for defining "harassing or discriminatory conduct" for South Dakota attorneys.[1] But the ABA Model Rule's definitions are unconstitutional under the Supreme Court's analyses in two recent decisions. 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. The *Becerra* Court held that state restrictions on "professional speech" are presumptively unconstitutional and subject to strict scrutiny. Under the Court's analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), ABA Model Rule 8.4(g) is an unconstitutional viewpoint-based restriction on lawyers' speech that cannot survive the strict scrutiny triggered when the government engages in viewpoint discrimination.

Fourth, Proposed Rule 8.4(g)'s mens rea standard is also ambiguous. It refers to "the *known* use of words," which fails to identify a particular level of intent. "Known" means "recognized" or "familiar," which is not the same as "knowingly," which means "deliberately." The phrase "known use of words" seems to mean that the attorney is known to have used the words at issue, but it does not require that she used them deliberately or intentionally. This ambiguity as to the mens rea standard is problematic.

Before examining these problems in more detail, CLS would note that its current president, as well as its immediate past president, are women who have practiced law for a number of years. Women constitute a significant percentage of CLS' members. For that reason, CLS stresses that if the purpose of the proposed rule is to address sexual harassment and discrimination, better language than Proposed Rule 8.4(g) exists to address that issue.

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

Both Proposed Rule 8.4(g) and ABA Model Rule 8.4(g) apply to "words" even apart from "actions" and, therefore, are likely to chill South Dakota lawyers' speech. In the reprint that accompanies this letter, Dean of the University of North Dakota School of Law Michael S. McGinniss "examine[d] multiple aspects of the ongoing [ABA] 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]

---

[1] ABA Model Rule 8.4(g), Comment [3] provides in part: "Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct." The vagueness of these definitions has been criticized by many. *See, e.g.*, Alaska Attorney General Letter to Alaska Bar Association Board of Governors at 6-7 (Aug. 9, 2019), http://www.law.state.ak.us/pdf/press/190809-Letter.pdf. These definitions are also likely to be found unconstitutional under two recent Supreme Court decisions. *See infra* at pp. 11-13.

[2] 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). Dean McGinniss teaches professional responsibility and served twelve years in the Office of Disciplinary Counsel for the Delaware Supreme Court.

That concern has been expressed by a number of scholars who have accurately characterized ABA Model Rule 8.4(g) as a speech code for lawyers. A nationally-recognized First Amendment scholar, Professor Eugene Volokh of UCLA School of Law, has summarized his view that ABA Model Rule 8.4(g) is a speech code that will have a serious impact on attorneys' speech in a two-minute video for the Federalist Society.[3] Professor Josh Blackman has explained that "[ABA Model] 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."[4]

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.[5] 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."[6] 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."[7] Professor Rotunda further developed his critique in a memorandum for the Heritage Foundation entitled *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*.[8]

In a thoughtful examination of its 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;

---

[3] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA. Professor Volokh expanded on the many problems of ABA Model Rule 8.4(g) in a debate at the Federalist Society National Student Symposium. *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=b074xW5kvB8&t=50s.

[4] 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).

[5] 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.

[6] 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."

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

[8] Rotunda, *supra* note 5. *See also*, 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), http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.

as well as due process and First Amendment free expression infirmities."[9] 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."[10] And 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."[11]

In adopting its new model rule, the ABA largely ignored over 480 comment letters,[12] 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.[13]

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.[14] Little was done, however, to address these concerns. In their thorough explication of the legislative history of ABA Model Rule 8.4(g), Halaby and Long concluded 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."[15] 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."[16] 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

---

[9] 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).
[10] *Id.*
[11] *Id.* at 204.
[12] 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.
[13] Halaby & Long, *supra* note 9, 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.
[14] Halaby & Long, *supra* note 9, 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).
[15] *Id.* at 203.
[16] *Id.*

> 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.[17]

These scholars' red flags should not be ignored. ABA Model Rule 8.4(g) and rules derived from it, such as Proposed Rule 8.4(g), pose legitimate concerns for lawyers.

**2. Proposed Rule 8.4(g) expands the reach of the Professional Rules of Conduct into South Dakota attorneys' lives and may chill their expression of dissenting political, social, and religious viewpoints.**

**a. Proposed Rule 8.4(g)'s ambiguity as to when it applies to lawyers' speech is problematic.**

Contributing to the "speech code" problem is Proposed Rule 8.4(g)'s ambiguity as to "when" it applies to an attorney's speech. Unlike existing Comment [3] that accompanies Rule 8.4(d), Proposed Rule 8.4(g) is not limited to a lawyer's conduct "in the course of representing a client." Instead, by its terms, the language applies to all of a lawyer's speech to "others." An exception is made for "legitimate advocacy . . . in any legal proceeding, action or forum where said counsel provides advice." This indicates that Proposed Rule 8.4(g) has broad applicability, but its limits are blurry because what constitutes a "forum where said counsel provides advice" is not clear.

The compelling question becomes: What speech does Proposed Rule 8.4(g) *not* reach? What is "legitimate advocacy" and who decides what is "legitimate advocacy"?[18] But "legitimate advocacy"—whatever it is—is only protected in "any legal proceeding, action or forum where said counsel provides advice." This suggests that "legitimate advocacy" may be unprotected if the words are spoken in a situation in which the attorney is not providing legal advice, which encompasses important areas of attorney speech.

At the time of its adoption, 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."[19] Proposed Rule 8.4(g) seems equipped to regulate lawyers in settings in which they work but are not "provid[ing] advice." The ambiguity of what constitutes a "legal . . . forum" leaves attorneys guessing as to

---

[17] *Id.* at 233.
[18] Alaska Att'y Gen. Letter, *supra* note 1, at 9.
[19] 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.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/ABA%20SOGI%20Comm%202015-10-22.pdf.

when their speech is protected or unprotected. Both ambiguities are further compounded by the use of the modifier "legitimate" to qualify "advocacy."

Lawyers are frequently asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions regarding sensitive social and political legal issues. Their commentary is sought by the media regarding controversial issues in their community, state, and nation *because they are lawyers*.

Like ABA Model Rule 8.4(g), Proposed Rule 8.4(g) raises numerous questions about whether various routine expressive activities have the potential to expose a lawyer to possible disciplinary action, including:

- Is a lawyer subject to discipline for her discussion of hypotheticals while presenting a CLE course?[20]
- Is a lawyer subject to discipline when participating in panel discussions touching on controversial political, religious, and social viewpoints?[21]
- Is a law professor subject to discipline for a law review article or a class discussion that explores controversial topics or expresses unpopular viewpoints?[22]
- Must lawyers abstain from writing blogposts or op-eds because they risk a bar 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 complaint?[23]

---

[20] *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-the-client-wants/.

[21] 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 (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).

[22] *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.").

- Can a lawyer lose his license to practice law for a tweet calling a female public official a sexist term?[24]
- 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?[25]
- 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?[26]
- 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 under ABA Model Rule 8.4(g) for socio-economic 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?

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

---

[23] In *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comn'n. (May 15, 2018), discussed *infra* note 29, a discrimination complaint was lodged against an attorney for his accurate comments in a media interview that he gave on behalf of his client.

[24] 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"), http://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

[25] *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.

[26] 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." *See infra* note 68.

> 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 law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."[27]

Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree.[28] Indeed, a troubling situation recently arose 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, private nonprofit shelter for homeless women, many of whom had been abused by men, in a proceeding arising from a discrimination complaint filed with the AERC alleging that the shelter had refused admission to a biological male who identified as female. The shelter denied the complaint, explaining that it had denied shelter to the individual because, among other things, of its policy against admitting persons who were inebriated, but acknowledging that it 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.[29]

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be deployed to discipline a lawyer for his or her speech on controversial issues should be rejected because it constitutes a serious threat to a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. 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

---

[27] 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.

[28] *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), http://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).

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

these controversies.[30] In a time when respect for First Amendment rights seems to diminish by the day, lawyers can ill-afford to wager their licenses and livelihoods on a rule that may be utilized to target their speech.

**b. Attorneys may become reluctant to belong to religious organizations or to serve 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 frequent legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.[31] Drafting and reviewing legal policies may qualify as "provid[ing] advice," but surely a lawyer should not fear being disciplined for volunteer legal work she performs for her church or her alma mater.[32] By making attorneys think twice about serving on their boards, ABA Model Rule 8.4(g) could do real harm to religious and charitable institutions and hinder their good works in their communities.

ABA Model Rule 8.4(g) has been recognized as having the potential to chill lawyers' willingness to participate in political, cultural, or religious organizations that promote traditional values regarding sexual conduct and marriage. Would the model rule subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage?[33] Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

---

[30] 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").

[31] *See* Alaska Att'y Gen. Letter, *supra* note 1, at 14; *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) (hereinafter "Tex. Att'y Gen. Op.") 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."), https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

[32] *See* D.C. Bar Legal Ethics, Opinion 222, *supra* note 25; Letter from Attorney General Slattery to Supreme Court of Tennessee (Mar. 16, 2018) 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)") (hereinafter "Tenn. Att'y Gen. Letter"), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g /comments-3-16-2018.pdf. 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.

[33] 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), http://www.courts.ca.gov/documents/sc15-Jan_23.pdf .

Professor Rotunda and Professor Dzienkowski have 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. Attending the Red Mass, an annual mass held by the Catholic Church for lawyers, judges, law professors, and law students, could run afoul of ABA Model Rule 8.4(g) because of the Catholic Church's limitation of the priesthood to men, its opposition to abortion, or its teachings regarding marriage.[34]

State attorneys general have voiced similar concerns,[35] warning that "serving as a member of the board of a religious organization, participating in groups such as the 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'" for purposes of ABA Model Rule 8.4(g).[36]

### 3. Under the analyses of two recent United States Supreme Court decisions, ABA Model Rule 8.4(g) is unconstitutional.

Since the ABA adopted Model Rule 8.4(g), the Supreme Court has issued two major free speech decisions that demonstrate its unconstitutionality, *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), and *Matal v. Tam*, 137 S. Ct. 1744 (2017). The ABA Section of Litigation has published an article in which several section members concurred that the *Becerra* decision raises serious concerns about the model rule's overall constitutionality:

> 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

---

[34] Rotunda & Dzienkowski, *supra* note 6, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

[35] *See* Alaska Att'y Gen. Letter, *supra* note 1, at 14; Tex. Att'y Gen. Op., *supra* note 31, 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."); *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.") 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://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384.

[36] Tenn. Att'y Gen. Letter, *supra* note 32, at 10.

> concludes.[37]

Under the Court's analysis in *Becerra,* ABA Model Rule 8.4(g) is an unconstitutional *content*-based restriction on lawyers' speech. The *Becerra* Court held that state restrictions on "professional speech" are presumptively unconstitutional and subject to strict scrutiny. The Court repudiated the idea that professional speech is less protected by the First Amendment than other speech. Three federal courts of appeals had recently 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.[38] In abrogating those decisions, the Court stressed 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.*'"[39] 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."[40]

Under the Court's analysis in *Matal,* ABA Model Rule 8.4(g) is an unconstitutional *viewpoint*-based restriction on lawyers' speech that cannot survive the strict scrutiny triggered by viewpoint discrimination. In *Matal,* all nine justices agreed that a provision of a longstanding federal law allowing government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons was unconstitutional because "[i]t offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[41] 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.'"[42]

In his concurrence, joined by Justice Ginsburg, Justice Sotomayor, and Justice 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."[43] 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

---

[37] 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/.
[38] *National Institute of Family and Life Advocates v. Becerra,* 138 S. Ct. 2361, 2371 (2018).
[39] *Id.* at 2371-72 (emphasis added).
[40] *Id.* at 2371.
[41] *Matal v. Tam,* 137 S. Ct. 1744, 1751 (2017) (quotation marks and ellipses omitted).
[42] *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer,* 279 U.S. 644, 655 (1929) (Holmes,J., dissenting).
[43] *Id.* at 1767.

> 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.[44]

Because ABA Model Rule 8.4(g) would punish lawyers' speech on the basis of its viewpoint and content, it is unconstitutional under the analyses in *Matal* and *Becerra.* Proposed Rule 8.4(g) is similarly constitutionally suspect because it is entirely foreseeable that ABA Model Rule 8.4(g) and its comments will become the source for defining "harassing or discriminatory conduct" as used in Proposed Rule 8.4(g). Proposed Rule 8.4(g) does not define those terms, probably because to do so leads to the constitutional problems exemplified by ABA Model Rule 8.4(g) when considered in the light of *Becerra* and *Matal.* It is terribly difficult to define "harassing" speech in a way that meets strict scrutiny under the First Amendment.

## III. Official entities in Arizona, Idaho, Illinois, Montana, North Dakota, South Carolina, Tennessee, and Texas have rejected ABA Model Rule 8.4(g), and Alaska, 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 attorneys in those states. This is particularly true when ABA Model Rule 8.4(g) has failed close scrutiny by official entities in many states, including three of South Dakota's neighbors – North Dakota, Montana, and Minnesota.[45]

### A. Several state supreme courts have rejected ABA Model Rule 8.4(g).

The Supreme Courts of **Arizona, Idaho, Montana, 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).[46] 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).[47] The **Montana** Supreme

---

[44] *Id.* at 1769 (Kennedy, J., concurring).
[45] McGinniss, *supra* note 2, at 213-217 and *infra* pp. 13-17.
[46] 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.
[47] 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.

Court chose not to adopt 8.4(g).[48] 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).[49] 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."[50] In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).[51] The Court acted after the state bar's House of Delegates, as well as the state attorney general, recommended against its adoption.[52]

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).[53] 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 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."[54]

In May 2019, the **Maine** Supreme Court announced that it had adopted a modified version of ABA Model Rule 8.4(g).[55] The Maine rule is significantly narrower than the ABA Model Rule in several ways. First, the Maine rule's definition of "discrimination" is substantially

---

[48] *In re Petition by the State Bar of Montana for Revisions to the Montana Rules of Professional Conduct,* AF 09-0688 (Mar. 1, 2019), at 3 n.2, https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Petition%20and%20Memo.pdf.

[49] 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.

[50] Tenn. Att'y Gen. Letter, *supra* note 32, at 1.

[51] 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").

[52] 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.

[53] 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.

[54] 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.

[55] 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.

more circumscribed than the ABA Model Rule's definition of "discrimination." Second, its definition of "conduct related to the practice of law" is much narrower because it does not include "participating in bar association, business or social activities in connection with the practice of law." Third, it covers fewer protected categories. Despite these modifications, when challenged, the Maine rule will likely be found unconstitutional because it overtly targets protected speech.[56]

On July 15, 2019, the **New Hampshire** Supreme Court announced that it was adopting New Hampshire Rule of Professional Conduct 8.4(g) but that its new rule was not ABA Model Rule 8.4(g). The New Hampshire Advisory Committee on Rules had proposed adoption of a rule closely modeled on ABA Model Rule 8.4(g), but the court declined to adopt the committee's proposed rule, stating, "In light of the nascent and ongoing discussion regarding the model rule, the court declines to adopt the rule proposed by the Advisory Committee on Rules."[57]

On October 18, 2019, the ABA published its summary of the states' consideration of ABA Model Rule 8.4(g) to date. By the ABA's own count, nine states have declined to adopt Model Rule 8.4(g): **Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina,** and **Tennessee.** For reasons explained below, we add **North Dakota, Alaska,** and **Texas**. **Vermont** and **New Mexico** are the only states to have adopted ABA Model Rule 8.4(g).[58]

### B. State attorneys general have identified core constitutional issues with ABA Model Rule 8.4(g).

A superb, recent discussion of ABA Model Rule 8.4(g) is found in the **Alaska** Attorney General's comment letter of August 19, 2019, in which he urges rejection of "a conduct rule that forces lawyers—members of a profession devoted to vigorous debate and the airing of difficult issues—to obey an orthodoxy."[59] He notes that "[s]tates did not respond enthusiastically" to ABA Model Rule 8.4(g).[60]

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),* opposing adoption of a proposed rule closely modeled on ABA Model Rule 8.4(g).[61] The Attorney General concluded

---

[56] See *supra* pp. 11-13.
[57] The State of New Hampshire Supreme Court of New Hampshire Order (July 15, 2019), https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf.
[58] American Bar Association Center for Professional Responsibility Policy Implementation Committee, *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (Oct. 18, 2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.pdf.
[59] Alaska Att'y Gen. Letter, *supra* note 1, at 2.
[60] *Id.* at 3.
[61] *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.

that the proposed rule "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[62]

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."[63] The Attorney General 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."[64]

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."[65] 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."[66]

Agreeing with the Texas Attorney General's assessment of the unconstitutionality of ABA Model Rule 8.4(g), 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."[67]

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 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.[68]

### 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 on the constitutional rights

---

[62] Tenn. Att'y Gen. Letter, *supra* note 32, at 1.
[63] Tex. Att'y Gen. Op., *supra* note 31, at 3.
[64] *Id.*
[65] La. Att'y Gen. Op., *supra* note 35, at 4.
[66] *Id.* at 6.
[67] South Carolina Att'y Gen. Op. (May 1, 2017) at 13, http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf.
[68] 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.

of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).[69] 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.[70]

**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."[71] On September 15, 2017, the **North Dakota** Joint Committee on Attorney Standards voted not to recommend adoption of ABA 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."[72] 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."[73] On September 5, 2019, the Board of Governors of the **Alaska** Bar Association unanimously voted to remand a version of ABA Model Rule 8.4(g) back to the Alaska Bar Association's Rules Committee for further action. This decision followed the recommendation made on August 29, 2019, by the Chair of the Alaska Bar Association's Rules of Professional Conduct Committee that the Rules Committee, after having reviewed "unprecedented amounts of comments," voted 8-1 to recommend to the Board of Governors that it not submit the proposed rule to the Alaska Supreme Court, but instead remand the matter back to the Rules Committee for further drafting.[74]

---

[69] *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.

[70] *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 32, at 8 n.8.

[71] Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals*, Illinois Lawyer Now, Dec. 15, 2016, https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals.

[72] 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.

[73] 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.

[74] Board of Governors Action Items (Sept. 5, 2019), https://alaskabar.org/wp-content/uploads/19-9-action.pdf; Letter from John Murtagh, Chairman, Alaska Rules of Professional Conduct Committee, to Robert Stone, President, Alaska Bar Association (Aug. 30, 2019), https://alaskabar.org/wp-content/uploads/Report.ARPCcmte.on8_.4f.pdf.

After over three 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 twelve states have concluded, after careful study, that ABA Model Rule 8.4(g) is both unconstitutional and unworkable. These 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.

Christian Legal Society thanks the Court for its consideration of its comments.

Respectfully submitted,

/s/ David Nammo

David Nammo
CEO & Executive Director
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, Virginia 22151
(703) 894-1087
dnammo@clsnet.org

Encl: Reprint of Dean McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019)