April 3, 2019

Rules Review Committee

District of Columbia Bar

901 4th Street, N.W.

Washington, DC 20001

Attn: Hope C. Todd, D.C. Bar Legal Ethics Counsel

By email: [ethics@dcbar.org](mailto:ethics@dcbar.org)

**Re: Comment Letter Opposing the Amendment of D.C. Rule 9.1 to Include ABA Model Rule 8.4(g)**

Dear Members of the D.C. Bar Rules of Professional Conduct Review Committee:

This comment letter is filed pursuant to this Committee’s announcement dated February 4, 2019, soliciting public comment from Bar members and others on its final draft report and recommendations to amend D.C. Rules of Professional Conduct 9.1 and 8.4. Specifically, the Committee “recommends amendments to D.C. Rule 9.1 based on [ABA] Model Rule 8.4(g), with some minor differences,” as well as “an amendment to Comment [3] to Rule 8.4 that would cross reference Rule 9.1.”[[1]](#footnote-1)

The Committee is recommending that a widely criticized black letter rule, ABA Model Rule 8.4(g), be imposed on the members of the District of Columbia Bar. But after two years of deliberations in many states across the country, Vermont is the only state to have adopted this defective rule. In contrast, at least eleven states have concluded, after careful study, that ABA Model Rule 8.4(g) is both unconstitutional and unworkable. The District of Columbia Bar should take the prudent course of waiting to 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.[[2]](#footnote-2) 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.[[3]](#footnote-3) 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.”[[4]](#footnote-4)

Andrew Halaby and Brianna Long, who are 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]](#footnote-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.” 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.”[[6]](#footnote-6)

Furthermore, since the ABA adopted Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued two major free speech decisions that demonstrate its unconstitutionality. First, under the Court’s analysis in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), Model Rule 8.4(g) is an unconstitutional *content*-based restriction on lawyers’ speech. The *NIFLA* Court held that state restrictions on “professional speech” are presumptively unconstitutional and subject to strict scrutiny. Second, 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 by viewpoint discrimination.

Because of its expansive scope, at least eleven states have rejected or abandoned efforts to adopt ABA Model Rule 8.4(g). In the past two-and-a-half years, official entities in Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, North Dakota, South Carolina, Tennessee, and Texas have weighed ABA Model Rule 8.4(g) and found it wanting. To date, only the Vermont Supreme Court has adopted it.

D.C. attorneys should not be made the subjects of the novel experiment that ABA Model Rule 8.4(g) represents. This is particularly true when the Committee has the prudent option of waiting to see what other jurisdictions decide to do and then observing the rule’s real-world consequences for attorneys in those states. There is no need for haste because current Rule 9.1 already makes it professional misconduct for lawyers to discriminate in employment, and current Comment [3] to Rule 8.4 already deems bias and prejudice in the course of representing a client to be professional misconduct if the conduct is prejudicial to the administration of justice.

Yours truly,

1. District of Columbia Bar Rules of Professional Conduct Review Committee, *Proposed Amendments to Selected Rules of the D.C. Rules of Professional Conduct* (February 2019), at 10, 29-32, 80-89 [hereinafter “Committee Report”], at<http://www.dcbar.org/bar-resources/legal-ethics/upload/Rules-Review-Committee-Report-for-Public-Comment-2019.pdf>. [↑](#footnote-ref-1)
2. Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA. [↑](#footnote-ref-2)
3. 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>. [↑](#footnote-ref-3)
4. 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.” [↑](#footnote-ref-4)
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). [↑](#footnote-ref-5)
6. *Id.* at 204. [↑](#footnote-ref-6)