August 2019

Chief Justice Mark S. Cady
Justice David Wiggins
Justice Brent R. Appel
Justice Thomas D. Waterman
Justice Edward M. Mansfield
Justice Susan Christensen
Justice Christopher McDonald
Iowa Supreme Court
1111 East Court Avenue
Des Moines, Iowa 50319
By email: rules.comments@iowacourts.gov

Re: Chapter 32 Amendments:
Comment Letter Opposing Proposed Amendment Rule 32:8.4(g),
page 33, lines 44-46; page 34, lines 1-46; page 35, line 1

Dear Chief Justice Cady, Justice Wiggins, Justice Appel, Justice Waterman, Justice Mansfield, Justice Christensen, and Justice McDonald:

This comment letter is filed pursuant to the Court's Order of August 1, 2019, seeking public comment on several proposed rules. This letter opposes adoption of the proposed amendment to Rule 32:8.4(g) and its accompanying comments (page 33, lines 44-46; page 34, lines 1-46; and page 35, line 1).

Proposed Rule 32:8.4(g) is drawn verbatim from the widely criticized ABA Model Rule 8.4(g), proposed by the ABA in 2016. After three years of deliberations in many states across the country, Vermont is the only state to have adopted this defective rule in full. In contrast, at least eleven states have concluded, after careful study, that ABA Model Rule 8.4(g) is both unconstitutional and unworkable. I respectfully request that the Court reject Proposed Rule 32:8.4(g). It would seem to me prudent to take the 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.[1] 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.[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

[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.

intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment."[3] Other scholars have similarly raised red flags.[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] 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]

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 *Becerra* 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.

In the past three 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 ABA Model Rule 8.4(g) in full.

Iowa attorneys should not be made the subjects of the novel experiment that ABA Model Rule 8.4(g) represents. This is particularly true when *current* Rule 32:8.4(g) already makes it professional misconduct to engage in sexual harassment and unlawful discrimination. Furthermore, current Comment [3] that accompanies Rule 32:8.4(d) 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.

I respectfully request that the Court reject Proposed Rule 32:8.4(g). I thank the Court for considering these comments.

Yours truly,

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[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).

[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.