September 2019

Executive Office

The Disciplinary Board of the

Supreme Court of Pennsylvania

601 Commonwealth Avenue,

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Attn: Jesse G. Hereda, Executive Director

By email ([Dboard.comments@pacourts.us](mailto:Dboard.comments@pacourts.us)) or facsimile (717-231-3381)

**Re: Proposed Addition of New Rule of Professional Conduct 8.4(g)**

Dear Mr. Hereda:

This comment letter is filed pursuant to the Disciplinary Board’s Notice dated August 31, 2019, seeking public comment on its intention to recommend to the Supreme Court of Pennsylvania adoption of Proposed Rule of Professional Conduct 8.4(g) and accompanying Comments [3] and [4]. This letter opposes adoption of Proposed Rule 8.4(g) and its accompanying comments.

Three times in less than three years, the Disciplinary Board has announced its intention to recommend adoption of some version of ABA Model Rule 8.4(g). Twice, in 2017 and 2018, after hearing from members of the Pennsylvania Bar, the Board did not recommend the proposed rule change. For many of the same reasons as before, the Board *should not recommend* adoption of this latest Proposed Rule 8.4(g) and Proposed Comments [3] and [4].

Proposed Rule 8.4(g) is modeled on the deeply flawed and widely criticized ABA Model Rule 8.4(g), adopted by the ABA in 2016. After three years of deliberations in many states across the country, Vermont remains 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 Board reject Proposed Rule 8.4(g). It would seem only prudent to take the course of waiting to see whether other states choose to experiment with ABA Model Rule 8.4(g) and then observing 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]](#footnote-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]](#footnote-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]](#footnote-3) Other scholars have similarly raised red flags.[[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)

Moreover, 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.

Since 2016, 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. Most recently, on September 5, after a public comment period, the Board of Governors for the Alaska Bar Association withdrew a proposed rule modeled on ABA Model Rule 8.4(g). In a thoughtful letter that examined the flaws of the proposed rule, the Alaska Attorney General concluded that it was unconstitutional.[[7]](#footnote-7)

Pennsylvania attorneys should not be made the subjects of the novel experiment that ABA Model Rule 8.4(g) represents. I respectfully request that the Board *not* recommend adoption of Proposed Rule 8.4(g) to the Pennsylvania Supreme Court. I thank the Board for considering these comments.

Yours truly,

1. Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>. [↑](#footnote-ref-1)
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>. [↑](#footnote-ref-2)
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.” [↑](#footnote-ref-3)
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); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 241, 243 (2017). [↑](#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)
7. <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>. [↑](#footnote-ref-7)