

Christian Legal Society (“CLS”) is an interdenominational association of Christian attorneys, law students, and law professors, founded in 1961, to network lawyers and law students nationwide, including members in Utah. CLS opposes adoption of ABA Model Rule 8.4(g) because, if adopted, Model Rule 8.4(g) will have a chilling effect on lawyers’ expression of disfavored political, social, and religious viewpoints on a multitude of issues. If adopted, Model Rule 8.4(g) will create ethical concerns for attorneys who serve on nonprofit boards, speak publicly on legal topics, teach at law schools, advocate for legislation, or otherwise discuss current political, social, or religious issues. Because lawyers often serve as spokespersons for political, social, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief in a diverse society.

I. This Court Should Not Subject Utah Attorneys to a Rule that Has Not Been Adopted by Any Other State Supreme Court.

A. Utah already has Rule of Professional Conduct 8.4(d) and its Comment 3.

Utah Rule of Professional Conduct 8.4(d) currently provides that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” Utah has adopted Comment 3 to that rule, which provides:

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Utah R. Prof’l Conduct 8.4 cmt.3. Comment 3 is a verbatim adoption of Comment 3 that accompanied ABA Model Rule 8.4 from 1998 to 2016.

In August 2016, the ABA’s House of Delegates deleted its Comment 3 and adopted a new disciplinary rule, Model Rule 8.4(g), accompanied by three new comments, that makes it professional misconduct for a lawyer to engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf. Model Rule 8.4(g) greatly expands upon its predecessor Comment 3, which is Utah’s current Comment 3. First, Model Rule 8.4(g) has an accompanying comment that makes clear that “conduct” encompasses “speech,” when it states that “discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others.” (Emphasis supplied.) Second, Model Rule 8.4(g) is much broader in scope than Comment 3, which applies only to conduct “in the course of representing a client.” Instead, in a breathtaking expansion in regulatory scope, Model Rule 8.4(g) applies to all “conduct related to the practice of law,” including “business or social activities in connection with the practice of law.” Third, Comment 3 speaks in terms of “actions when prejudicial to the administration of

justice.” By deleting that qualifying phrase, Model Rule 8.4(g) greatly expands the reach of the rule into attorneys’ lives.

Unfortunately, in adopting its new model rule, the ABA largely ignored over 450 comment letters, most of them opposed to the rule change. https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html. The ABA’s own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability, although the Committee dropped its opposition immediately before the August 8th vote. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf

B. No jurisdiction has adopted Model Rule 8.4(g).

The ABA claims that “as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.” <https://clsnet.org/document.doc?id=993>. But this claim is factually incorrect: ABA Model Rule 8.4(g) has not been adopted in any jurisdiction. Therefore, no empirical evidence supports the ABA’s claim that Model Rule 8.4(g) “will not impose an undue burden on lawyers.”

The ABA points to the fact that twenty-four states and the District of Columbia have black-letter rules dealing with “bias” issues. But each of these black-letter rules differs from ABA Model Rule 8.4(g) in significant ways. These differences between state black-letter rules and Model Rule 8.4(g)’s expansive scope include:

- Many states’ black-letter rules apply only to *unlawful discrimination* and require that another tribunal find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.
- Many states, including Utah’s Comment 3, limit their rules to “conduct in the course of representing a client,” in contrast to Model Rule 8.4(g)’s expansive scope of “conduct related to the practice of law.”
- Many states, including Utah’s Comment 3, require that the misconduct be prejudicial to the administration of justice, a requirement that Model Rule 8.4(g) abandons.
- Almost no state black-letter rule enumerates all eleven of the Model Rule 8.4(g)’s protected characteristics.
- No state black-letter rule contains Model Rule 8.4(g)’s circular non-protection for “legitimate advocacy . . . consistent with these rules.”

Because no state has adopted Model Rule 8.4(g), the proposed rule has no track record. Nor is there any empirical evidence that demonstrates a need in Utah for its adoption.

II. Official Bodies in Illinois, Montana, Pennsylvania, Texas, and South Carolina Have Urged Rejection of Model Rule 8.4(g).

Last month, the Supreme Court of South Carolina became the first state supreme court to take official action regarding Model Rule 8.4(g) when it rejected adoption of the rule. Order, Supreme Court of South Carolina, App. Case No. 2017-000498 (June 20, 2017). <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01>. The Court explained that the House of Delegates of the South Carolina Bar had “recommend[ed] the Court decline to incorporate the ABA Model Rule amendments within Rule 8.4, RPC.” *Id.* The HOD also recommended a public comment period. After the comment period, “the Commissions on Lawyer and Judicial Conduct, whose members would initially be tasked with investigating alleged violations of any amended rule, informed the Court the Commissions share the same reservations expressed by the South Carolina Bar and others” and recommended that the rule not be adopted. *Id.*

In December 2016, the Texas Attorney General issued an opinion regarding ABA Model Rule 8.4(g). The Texas Attorney General opined 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.” <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>. The Texas Attorney General explained that “[a] court would likely conclude that Model Rule 8.4(g) infringes upon” several fundamental rights enjoyed by attorneys, including:

- *Attorneys’ free speech*: The attorney general concluded that “Model Rule 8.4(g) would severely restrict attorneys’ ability to engage in meaningful debate on a range of important social and political issues.” *Id.* at 3. The attorney general found that “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.” *Id.*
- *Attorneys’ free exercise of religion*: The attorney general explained that “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.” *Id.* at 4.
- *Attorneys’ freedom of association*: The attorney general concluded that “[c]ontrary to this constitutionally protected right, however, Model Rule 8.4(g) could be applied to restrict an attorney’s freedom to associate with a number of political, social, or religious legal organizations” because the “Rule applies to an attorney’s participation in ‘business or social activities in connection with the practice of law.’” *Id.* at 5 (citing Model Rule 8.4(g) cmt. 4). It “could curtail” attorneys’ participation in “faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society . . . for fear of discipline.” *Id.* Furthermore, the rule “would likely inhibit attorneys’ participation” in “a number of other legal organizations [that] advocate for specific political or social positions on issues related to race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status.” *Id.*

- *Attorneys' due process rights*: The attorney general concluded that a court would likely conclude that it violated the Fourteenth Amendment due to its unconstitutional vagueness due to its failure to give fair notice of punishable conduct. It also invites arbitrary and discriminatory enforcement by failing to establish guidelines for those charged with enforcing the law. *Id.* at 5-6. The attorney general particularly noted the lack of specificity in the terms: 1) “conduct related to the practice of law;” 2) “discrimination;” 3) “harassment;” and 4) “legitimate advice or advocacy consistent with these Rules.” *Id.* at 6.

The South Carolina Attorney General issued an opinion on May 1, 2017, expanding upon the Texas Attorney General’s analysis and conclusions.

<http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf>

On December 10, 2017, the Illinois State Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule in Illinois.” <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>. “Opponents observed that the rule does not define ‘discrimination’ and ‘harassment’ and raised concerns about subjecting lawyers to unfounded disciplinary complaints.”

On December 2, 2017, the Disciplinary Board of the Supreme Court of Pennsylvania explained that Model Rule 8.4(g) was too broad:

It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule broadly defines “harassment” to include any “derogatory or demeaning verbal conduct” by a lawyer, and the rule subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.

<http://www.pabulletin.com/secure/data/vol46/46-49/2062.html>.

On April 12, 2017, the Montana Legislature adopted a joint resolution expressing its view that Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens and urging the Montana Supreme Court not to adopt Model Rule 8.4(g).

<http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>. The impact of Model Rule 8.4(g) on “the speech of legislative staff and legislative witnesses . . . when they are working on legislative matters or testifying about legislation before Legislative Committees” greatly concerned the Montana Legislature. It also found that the rule’s “expansive scope endeavors to control the speech of Montanans, who are licensed by the Supreme Court of the State of Montana to practice law, when they speak or write publicly about legislation being considered by the Legislature.” The

Legislature concluded that Model Rule 8.4(g) “would directly threaten every attorney . . . with the potential loss of their ability to pursue their chosen career [and] to provide for the needs of their family . . . because at any point in time an attorney could be forced to answer for vague complaints, even if the attorney has not participated in historically unprofessional practices, thereby threatening such attorney’s reputation, time, resources, and license to practice law.”

III. Model Rule 8.4(g) Operates as a Speech Code for Lawyers.

First Amendment scholar and editor of The Washington Post’s daily legal blog, The Volokh Conspiracy, UCLA Professor Eugene Volokh has warned against adoption of Model Rule 8.4(g) because it will function as a speech code for lawyers. In a two-minute video released by the Federalist Society, Professor Volokh succinctly summarized why the model rule should be rejected. <https://www.youtube.com/watch?v=AfpdWmlOXbA>. In a debate at the Federalist Society’s National Student Symposium in March 2017, Professor Volokh demonstrated the flaws of Model Rule 8.4(g) despite his debate opponent’s efforts to gloss over them. <http://www.fed-soc.org/multimedia/detail/aba-model-rule-84-event-audiovideo>

Professor Volokh explains its broad applicability to “conduct related to the practice of law,” as defined in proposed Comments 3 and 4 to include speech (that is, “verbal conduct”) in social activities, as well as bar and business activities, in connection with the practice of law:

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 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.” 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=.d144d1fbe798.

Renowned constitutional scholar, Professor Ronald Rotunda of Chapman University Dale E. Fowler School of Law, also has warned against the chilling effect of ABA Model Rule 8.4(g) on attorneys’ freedom of speech. Known for his treatise on American constitutional law, as well as the ABA’s treatise on legal ethics, Professor Rotunda wrote an extensive critique of Model Rule 8.4(g), entitled “The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought,” <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>, as well as a Wall Street Journal article entitled “The ABA Overrides the First Amendment.” <https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418>

These significant red flags raised by leading First Amendment scholars should not be ignored. If adopted, Model Rule 8.4(g) will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues.

A. By expanding its coverage to include all “conduct related to the practice of law,” Model Rule 8.4(g) encompasses nearly everything a lawyer does, including speech protected by the First Amendment.

Model Rule 8.4(g) explicitly applies to all “conduct related to the practice of law.” Comment 4 to ABA Model Rule 8.4(g) delineates Model Rule 8.4(g)'s extensive scope: “Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law, operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.” (Emphasis supplied.)

Indeed, the question becomes, what conduct does Rule 8.4(g) not reach? Virtually everything a lawyer does is “conduct related to the practice of law.” Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

Activities that may fall within Model Rule 8.4(g)'s scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds
- giving guest lectures at law school classes
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to nonprofits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one's religious congregation
- serving one's alma mater college, if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving on the boards of fraternities or sororities
- volunteering with or working for political parties
- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues.

B. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their religious congregations, religious schools and colleges, and other religious ministries.

Many lawyers sit on the boards of their religious congregations, religious schools and colleges, and other religious nonprofit ministries, which face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance. As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not be disciplined for volunteer legal work she performs for her church or her alma mater.

By chilling attorneys' speech, the rule is likely to do real harm to religious institutions and their good work in their communities. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law," yet Model Rule 8.4(g) causes such concerns. Because Model Rule 8.4(g) seems to prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyer's free speech and free exercise of religion when serving religious congregations and institutions.

C. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline.

Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues. Of course, lawyers are asked to speak because they are lawyers. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Writing — "Verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar because that person perceives the speech as "manifest[ing] bias or prejudice towards others"? If so, public discourse and civil society will suffer from the ideological paralysis that Model Rule 8.4(g) will impose on lawyers, who are often at the forefront of new movements and unpopular causes.

Speaking — It would seem that most public speaking by lawyers on legal issues falls within Model Rule 8.4(g)'s prohibition. But even if some public speaking falls outside the parameters of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of "sexual

orientation” or “gender identity” as a protected category in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in Model Rule 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers’ public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including other lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, ABA Model Rule 8.4(g) suffocates attorneys’ speech.

D. Attorneys’ membership in religious, social, or political organizations may be subject to discipline.

ABA Model Rule 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibits all California state judges from participating in nonprofit youth organizations such as Boy Scouts because of the organization’s views on sexual conduct. http://www.courts.ca.gov/documents/sc15-Jan_23.pdf

ABA Model Rule 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs. See Texas A.G. Op., supra, at 5. Some government officials have claimed that the right of a religious group to choose its leaders according to its religious beliefs is “religious discrimination.” But it is simple common sense and basic religious freedom that a religious organization’s leaders should agree with its religious beliefs.

E. ABA Model Rule 8.4(g) Would Institutionalize Viewpoint Discrimination Against Many Lawyers’ Public Speech on Current Political, Religious, and Social Issues.

As seen in its new Comment 4, Model Rule 8.4(g) explicitly protects some viewpoints over others by allowing lawyers to “engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.” Because “conduct” includes “verbal conduct,” the proposed rule would impermissibly favor speech that “promote[s] diversity and inclusion” over speech that does not. But that is the very definition of viewpoint discrimination. The government is not allowed to enact laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Furthermore, what speech or action does or does not “promote diversity and inclusion” completely depends on the beholder’s subjective beliefs. Where one person sees inclusion, another sees exclusion. Where one person sees the promotion of diversity, another equally sincerely sees the promotion of conformity, uniformity, or orthodoxy.

Because enforcement of Model Rule 8.4(g) gives governmental actors unbridled discretion to determine which speech is permissible and which is impermissible, which speech “promote[s] diversity and inclusion” and which does not, the rule clearly countenances viewpoint discrimination based on governmental actors’ subjective biases. Courts have recognized that giving any government official such unbridled discretion to suppress citizens’ free speech is unconstitutional. *See, e.g., Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

IV. Bar Officials in California and Pennsylvania Have Expressed Serious Concerns as to whether State Bars Have the Resources to Become the Tribunal of First Resort for Employment Claims Against Attorneys and Law Firms.

California State Bar authorities voiced serious concerns last year when considering whether to modify their disciplinary rule to something more akin to the ABA Model Rule 8.4(g). California’s current Rule 2-400 requires that a separate judicial or administrative tribunal have found that a lawyer committed unlawful discrimination before disciplinary charges can be brought. According to Justice Lee Smalley Edmon, the presiding justice of the Second District, Division Three of the California Courts of Appeals and the Chair of the State Bar’s Second Commission for the revision of the Rules of Professional Conduct, “[t]he proposed elimination of current Rule 2-400(C)’s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings.” <http://www.calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx>. For that reason, she explained, an alternative was being offered to leave in place Rule 2-400(C)’s requirement that an attorney cannot be disciplined for unlawful discrimination unless a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law, and any appeal is final and leaves the finding of unlawful discrimination standing.

Similarly, an official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court’s adjudicatory process and the adjudicatory processes of the state civil courts. <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000016945.pdf>. In the words of the State Bar Court official, “the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings.” *Id.* First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different. “State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases.” *Id.* Any relevant evidence must be admitted, and hearsay evidence may be used. Third, “[i]n disciplinary proceedings, attorneys are not entitled to a jury trial.” *Id.*

The California Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement. It described the problems with the requirement's deletion as follows:

Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, . . . lack of [the State Bar's Office of Chief Trial Counsel] resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients. *Id.* at 16.

Similarly, a memorandum outlining Pennsylvania's Proposed Rule 8.4(g) correctly identified two defects of Model Rule 8.4(g) that Pennsylvania's Proposed Rule 8.4(g) would avoid. <http://www.pabulletin.com/secure/data/vol46/46-49/2062.html>. Pennsylvania's proposed rule is a rule like several states (including Illinois, Iowa, California, Minnesota, Ohio, and Washington) have that requires a judicial or administrative tribunal, other than a state bar tribunal, find that an attorney committed unlawful discrimination before the state bar may entertain a disciplinary complaint against the attorney. The memorandum identified the first defect of ABA Model Rule 8.4(g) to be its "potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers." *Mem.* at 2. Second, as the Memorandum concluded, "after careful review and consideration . . . the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities." *Id.*

V. Conclusion

For all the above reasons, we urge that Model Rule 8.4(g) not be adopted. Because no state has adopted Model Rule 8.4(g), it has no track record. Nor is there any empirical evidence showing a need to replace Utah's current Comment 3 with such an excessively broad rule as Model Rule 8.4(g). Its adoption would have a chilling effect on attorneys' First Amendment rights. Attorneys must remain free to engage in speech, religious exercise, assembly, and expressive association in their workplaces and the public square.