Why Proposed Rule 8.4(7) Should Not Be Adopted in Connecticut

Proposed Rule 8.4(7) is the equivalent of American Bar Association Model Rule 8.4(g), a deeply flawed rule adopted by the ABA at its annual meeting in San Francisco, California, in August 2016. Proposed Rule 8.4(7) makes it professional misconduct for a lawyer to engage in conduct related to the practice of law that he or she should reasonably know is harassment or discrimination on the basis of 15 different categories. "Conduct related to the practice of law" is defined to include nearly everything a lawyer does, including activities in connection with the practice of law. "Conduct" includes "verbal conduct" -- aka speech -- which is why UCLA Professor Eugene Volokh has deemed it a speech code for lawyers.

1. Scholars have rightly criticized ABA Model Rule 8.4(g) as a speech code for lawyers.

- Professor Eugene Volokh's two-minute video for Federalist Society at https://www.youtube.com/watch?v=AfpdWmlOXbA;
- Michael S. McGinniss, Dean of University of North Dakota School of Law, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession,* 42 Harv. J. L. & Pub. Pol'y 173 (2019);
- Professor Josh Blackman, *Ethics Teleforum: Model Rule 8.4(g) Update: What Attorneys Should Be Aware of in 2019/2020,* Sept. 25, 2019, https://fedsoc.org/events/ethics-cle-teleforum;
- Practitioners 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 (2017).

2. Since the ABA promulgated Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued two major free speech decisions that seriously call into question its constitutionality.

- *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (state restrictions on "professional speech" are presumptively *un*constitutional and subject to strict scrutiny because they are *content-based* restrictions on speech);
- Cassandra Burke Robertson, Chair of the ABA Appellate Litigation Subcommittee of the Section's Civil Rights Litigation Committee, is quoted as saying that while ABA Model Rule 8.4(g) 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." 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/;
- *Matal v. Tam*, 137 S. Ct. 1744 (2017) (federal law that prohibits trademarks for "disparaging" speech is unconstitutional *viewpoint-based restriction* on speech that cannot survive strict scrutiny).

3. Proposed Rule 8.4(7) would regulate lawyers' interactions with *anyone* while engaged in conduct related to the practice of law or when participating in business or professional activities or events in connection with the practice of law.

- Is a lawyer subject to discipline for her discussion of hypotheticals while presenting a CLE course?[1]
- Is a lawyer subject to discipline when participating in panel discussions touching on controversial political, religious, and social viewpoints? [2]
- Is a law professor subject to discipline for a law review article or a class discussion that explores controversial topics or expresses unpopular viewpoints?[3]
- Must lawyers abstain from writing blogposts or op-eds because they risk a bar complaint by an offended reader?
- Must lawyers forgo media interviews regarding cases they are handling or on topics about which they have some particularly insightful comments because anyone hearing the interview could file a complaint?[4]
- Can a lawyer lose his license to practice law for a tweet calling a female public official a sexist term?[5]

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[1] *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/.

[2] 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).

[3] *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.").

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

[5] 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.

- 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?[6]
- 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?

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

- 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?[7]
- Attorneys could also be subject to discipline for their membership in religious organizations that hold traditional religious beliefs and values if those beliefs or values are deemed by some to be discriminatory.[8]

5. Proposed Rule 8.4(7)'s threat to free speech is compounded by its use of a negligence standard rather than a knowledge requirement.

6. Fourteen states have rejected or abandoned efforts to adopt ABA Model Rule 8.4(g), while only two states, Vermont and New Mexico, have adopted it in full.

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[6] 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."

[7] *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.

[8] *See* Alaska Attorney General Letter to Alaska Bar Association Board of Governors (Aug. 9, 2019) at 14, http://www.law.state.ak.us/pdf/press/190809-Letter.pdf; *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 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.

- In 2016, the ABA wrote every state supreme court asking it to adopt ABA Model Rule 8.4(g). To date, fourteen states have either rejected it outright or abandoned initial efforts to adopt it. The Supreme Courts of Arizona, Idaho, Montana, New Hampshire, South Carolina, South Dakota, and Tennessee have formally rejected ABA Model Rule 8.4(g). The Montana Legislature passed a joint resolution against its adoption.[9] The Attorneys General of South Carolina, Alaska, Texas, Louisiana, and Tennessee have advised against its adoption, questioning its constitutionality. The boards of governors for the state bars of Nevada and Alaska requested its remand for further consideration after a public comment period. The Illinois State Bar Association Assembly refused to recommend it. Minnesota and North Dakota abandoned efforts to adopt it.
- In the four years since its adoption by the ABA, only two states – Vermont and New Mexico—have actually adopted ABA Model Rule 8.4(g). Two states – Maine and Pennsylvania – have adopted highly modified versions, which nonetheless are likely unconstitutional.
- The ABA's original claim in 2016 that twenty-four states had rules similar to ABA Model Rule 8.4(g) was highly inaccurate and has since been abandoned by the ABA.

7. Proposed Rule 8.4(7) could make it professional misconduct for attorneys to engage in hiring practices to promote diversity by favoring persons because they are women or belong to racial, ethnic, or sexual minorities.

- A highly regarded professional ethics expert, Thomas Spahn, has explained that "ABA Model Rule 8.4(g)'s flat prohibition covers any discrimination on the basis of race, sex, or any of the other listed attributes" and "extends to any lawyer conduct 'related to the practice of law,' including 'operating or managing a law firm or law practice.'"[10]

8. Proposed Rule 8.4(7) may limit lawyers' ability to accept, decline, or withdraw from representation.

- The Vermont Supreme Court has said that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule."[11]

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[9] *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.

[10] The District of Columbia Bar, Continuing Legal Education Program, Civil Rights and Diversity: Ethics Issues 5-6 (July 12, 2018) (quoting Comment [4] to ABA Model Rule 8.4(g)).

[11] Vermont Supreme Court, Order Promulgating Amendments to the Vermont Rules of Professional Conduct, July 14, 2017, at 3, https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf.

- Dean McGinniss, who teaches professional responsibility, says that "[d]espite its ostensible nod of non-limitation, Model Rule 8.4(g) offers lawyers no actual protection against charges of 'discrimination' based on their *discretionary* decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer."[12]

9. The Office of Disciplinary Counsel should not be expected to be the tribunal of first resort for an increased number of discrimination and harassment claims, including employment discrimination claims.

- Some state disciplinary counsel have voiced concerns regarding the adequacy of their already-stretched budgetary and staff resources for adjudicating complex harassment and discrimination claims.
- ABA Model Rule 8.4(g) does not provide the clear enforcement standards that are necessary when the loss of a lawyer's livelihood is at stake.

10. Connecticut should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for lawyers is borne out in other states. Proposed Rule 8.4(7) needs further study and should not be adopted in haste.

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[12] McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession,* 42 Harv. J.L. & Pub. Pol'y 173, 207-209 (2019).