

**ABA Model Rule 8.4(g)**  
**Christian Legal Society 2022 National Conference Presentation**  
**October 6, 2023**

**I. Examining ABA Model Rule 8.4(g)**

**A. The “legislative history” of ABA Model Rule 8.4(g)<sup>1</sup>**

1. A two-decade effort culminating in adoption in August 2016
2. Comment period March 2016<sup>2</sup>

**B. The text of former Comment [3] accompanying ABA Model Rule 8.4 in effect from 1998-2016**

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 findings that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

**C. The text of ABA Model Rule 8.4(g) adopted August 2016**

It is professional misconduct for a lawyer to:

...

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

Comment [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination

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<sup>1</sup> Resources:

- 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).
- Eugene Volokh, Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>.
- Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and “Conduct Related to the Practice of Law,”* 30 Geo. J. Legal Ethics 241 (2017) (opposed to rule).
- Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 195 (2017) (favorable to rule).
- Kim Colby, “*The Evolution of the New ABA Model Rule 8.4(g)*,” *The Christian Lawyer*, Vol. 12, No. 2 (Fall 2016), at 28, at <https://www.clsreligiousfreedom.org/pdfs/998.pdf>.

<sup>2</sup> Resource: David Nammo, Christian Legal Society Comment Letter to ABA Ethics Committee, March 10, 2016, at [https://www.christianlegalsociety.org/wp-content/uploads/2022/10/ABA\\_Letter\\_CLS\\_Center\\_for\\_Law\\_and\\_Religious\\_Freedom.pdf](https://www.christianlegalsociety.org/wp-content/uploads/2022/10/ABA_Letter_CLS_Center_for_Law_and_Religious_Freedom.pdf).

includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

Comment [4] 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. Lawyers may 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.

Comment [5] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. See Rule 1.2(b).”

#### **D. Comparison of Prior Comment [3] with Current ABA Model Rule 8.4(g)**

1. Was a comment; now a black-letter rule
2. Mens rea
  - a. Prior: “knowingly”
  - b. Current: “knows or reasonably should know”
3. Scope of conduct
  - a. Prior: “in the course of representing a client”
  - b. Current: “in conduct related to the practice of law” defined as:
    - (1) “interacting with . . . others while engaged in the practice of law”
    - (2) “operating or managing a law firm or law practice”
    - (3) “participating in bar association, business or social activities in connection with the practice of law”

4. Prohibited conduct
  - a. Prior: “manifests by words or conduct, bias or prejudice”
  - b. Current: “harassment or discrimination”
    - (1) “manifests bias or prejudice toward others”
    - (2) “derogatory or demeaning verbal or physical conduct
    - (3) “sexual harassment” which “includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature”
  - c. “Substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g).” (Emphasis supplied.)
5. Protected classes
  - a. Prior: race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status
  - b. Current: adds ethnicity, gender identity, and marital status
6. Required injury
  - a. Prior: “prejudicial to the administration of justice”
  - b. Current: “undermines confidence in the legal profession and the legal system”
    - (1) Injury presumed
7. Protected activity
  - a. Prior: “Legitimate advocacy respecting the foregoing factors”
  - b. Current: “Legitimate advice or advocacy consistent with these rules”
8. Viewpoint neutral?
  - a. Prior: Yes, on its face
  - b. Current: No
    - (1) “Lawyers may engage in conduct undertaken to promote diversity and inclusion ... [in] recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations”
9. Limits whom you can represent?
  - a. Prior: No
  - b. Current: Potentially
    - (1) A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law.
    - (2) But claims not to “limit ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16”
    - (3) Also claims not to “preclude legitimate advice or advocacy consistent with these rules”

### III. Arguments for and Against ABA Model Rule 8.4(g)

#### A. ABA Model Rule 8.4(g) is significantly broader than the various pre-existing anti-bias rules in 24 states<sup>3</sup>

1. Several apply only to unlawful discrimination adjudicated by a non-bar tribunal
2. Many limited to “conduct in the course of representing a client”
3. Many require that the misconduct be “prejudicial to the administration of justice”
4. Almost no state enumerates all eleven protected classes
5. No state has the circular “protection” for “legitimate advocacy ... consistent with these rules”

#### B. ABA Model Rule 8.4(g) likely will chill lawyers’ First Amendment rights<sup>4</sup>

1. The analyses in two recent Supreme Court decisions regarding freedom of speech

- a. *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018)<sup>5</sup>

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<sup>3</sup> Resources:

- Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and “Conduct Related to the Practice of Law,”* 30 Geo. J. Legal Ethics 241 (2017).
- Christian Legal Society, *A Comparison of State Black-letter Rules to ABA Model Rule 8.4(g)*, Feb. 2016, at [https://thegoodbuyguy.com/wp-content/uploads/2022/10/1004\\_CLS\\_Center\\_for\\_Law\\_and\\_Religious\\_Freedom.pdf](https://thegoodbuyguy.com/wp-content/uploads/2022/10/1004_CLS_Center_for_Law_and_Religious_Freedom.pdf).

<sup>4</sup> Resources:

- Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>
- *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>.
- 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>.
- *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, The Federalist Society (Nov. 20, 2017), <https://www.youtube.com/watch?v=V6rDPjqBcQg>.
- 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.”
- David Nammo, Christian Legal Society Comment Letter to Arizona Supreme Court, May 3, 2018, at [https://www.christianlegalsociety.org/wp-content/uploads/2022/10/Christian\\_Legal\\_Society\\_Comment\\_Letter\\_on\\_Model\\_Rule\\_8.4g\\_Filed\\_Arizona\\_CLS\\_Center\\_for\\_Law\\_and\\_Religious\\_Freedom.pdf](https://www.christianlegalsociety.org/wp-content/uploads/2022/10/Christian_Legal_Society_Comment_Letter_on_Model_Rule_8.4g_Filed_Arizona_CLS_Center_for_Law_and_Religious_Freedom.pdf).
- David Nammo, Christian Legal Society Comment Letter to Office of the Secretary, Disciplinary Board of the Pennsylvania Supreme Court, July 17, 2018, at [https://www.christianlegalsociety.org/wp-content/uploads/2022/10/Christian\\_Legal\\_Society\\_PA\\_2018\\_Comment\\_Letter\\_Submitted\\_CLS\\_Center\\_for\\_Law\\_and\\_Religious\\_Freedom.pdf](https://www.christianlegalsociety.org/wp-content/uploads/2022/10/Christian_Legal_Society_PA_2018_Comment_Letter_Submitted_CLS_Center_for_Law_and_Religious_Freedom.pdf).
- Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and “Conduct Related to the Practice of Law,”* 30 Geo. J. Legal Ethics 241 (2017).

<sup>5</sup> Resources:

- Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, 19 U. Pa. J. Const. L. Online 1 (2017) (promoting idea that Model Rule 8.4(g) is constitutional because professional speech is less protected).
- Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. Va. L. Rev. 67 (2016) (arguing against carve-out of “professional speech” from strict scrutiny protection).
- Kim Colby, *ABA Model Rule 8.4(g) Cannot Survive the Supreme Court’s Recent Decisions in NIFLA and Matal*, The Federalist Society Blog, Aug. 24, 2018, at <https://fedsoc.org/commentary/blog-posts/aba-model-rule-8-4-g-cannot-survive-the-supreme-court-s-recent-decisions-in-nifla-and-matal>.

- 1) Government restrictions on professionals’ speech are generally subject to strict scrutiny because they are content-based speech restrictions.
  - 2) “[T]his Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’” *NIFLA*, 138 S. Ct. at 2371.
  - 3) Two exceptions in which professional speech is “afforded less protection” but “neither turn[] on the fact that professionals [a]re speaking.” *NIFLA*, 138 S. Ct. at 2372.
    - a) advertising: “laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech’” (“more deferential review”)
    - b) regulating conduct that *incidentally* involves speech
  - 4) Court makes clear lawyers’ speech is protected: its “precedents have long protected the First Amendment rights of professionals” and have “applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers.” *NIFLA*, 138 S. Ct. at 2374.
  - 5) No discussion of *NIFLA* in ABA Formal Op. 493, *Model Rule 8.4(g): Purpose, Scope, and Application* (2020)  
[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-493.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf)
- b. *Matal v. Tam*, 137 S. Ct. 1744 (2017)/*Iancu v. Brunetti*, 139 S. Ct. 2294 (2019)
- 1) striking down federal statute as facially unconstitutional because it allowed government officials to penalize “disparaging” speech
  - 2) government prohibition on disparaging, derogatory, demeaning, or offensive speech is unconstitutional. *Matal*, 137 S. Ct. at 1753-54, 1765; *id.* at 1766 (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).
  - 3) “Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *Matal*, 137 S. Ct. at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes J., dissenting).
  - 4) Comment [4] of ABA Model Rule 8.4(g) defines “harassment” to include “derogatory or demeaning verbal . . . conduct,” which clearly does not pass muster after *Matal*, and did not before *Matal* under the standard for establishing sexual harassment in the education context, as set forth in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (“harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit”).

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- David Nammo, Christian Legal Society Supplemental Comment Letter to New Hampshire Supreme Court’s Advisory Committee on Rules, September 6, 2018, at [https://www.christianlegalsociety.org/wp-content/uploads/2022/10/Christian\\_Legal\\_Society\\_Comment\\_Letter\\_on\\_Model\\_Rule\\_8.4g\\_Final\\_CLS\\_Center\\_for\\_Law\\_and\\_Religious\\_Freedom.pdf](https://www.christianlegalsociety.org/wp-content/uploads/2022/10/Christian_Legal_Society_Comment_Letter_on_Model_Rule_8.4g_Final_CLS_Center_for_Law_and_Religious_Freedom.pdf).

2. ABA Model Rule 8.4(g) encompasses nearly everything a lawyer does because of its broad scope that covers all “conduct related to the practice of law,” including social activities.

### **C. ABA Model Rule 8.4(g) and attorneys’ religious freedom**

1. Volunteer legal work on boards of their churches or other religious ministries<sup>6</sup>
2. Membership in certain religious organizations

### **D. State bar disciplinary counsel as adjudicators of first resort for employment and other discrimination and harassment claims**

1. Burden on limited resources of offices
2. Unclear what the evidentiary or preclusive effects of a state bar proceeding might have on other tribunal’s proceedings
3. Discovery and evidentiary requirements are different, as well as no right to jury trial
4. Use as a harassment tool by an unhappy former client or opposing counsel

### **E. Consequences for Lawyer’s Ability to Accept, Decline, or Withdraw from Representation<sup>7</sup>**

## **IV. ABA Model Rule 8.4(g) in the 50 States**

- A. Vermont and New Mexico have fully adopted ABA Model Rule 8.4(g).<sup>8</sup>**
- B. Alaska, Connecticut, Maine, New Hampshire, New York, and Pennsylvania have adopted significantly narrower versions.**

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<sup>6</sup> Resources:

- Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018), at <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.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 [https://thegoodbuyguy.com/wp-content/uploads/2022/10/994\\_CLS\\_Center\\_for\\_Law\\_and\\_Religious\\_Freedom.pdf](https://thegoodbuyguy.com/wp-content/uploads/2022/10/994_CLS_Center_for_Law_and_Religious_Freedom.pdf).

<sup>7</sup> Resources:

- Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, ed. April 2017, “§ 8.4-2(j)-2 “The New Rule 8.4 and the Free Speech Problems It May Raise” in “§ 8.4-2 Categories of Disciplinary Conduct.”
- NY Eth. Op. 1111, N.Y. St. Bar Ass’n Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017).

<sup>8</sup> Vermont Supreme Court, July 2017, at <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVPrP8.4%28g%29.pdf>; New Mexico Rule of Professional Conduct 16-804, at <https://supremecourt.nmcourts.gov/uploads/files/Rule%2016-804.pdf>

## C. Numerous states have considered ABA Model Rule 8.4(g) but not adopted it.

### 1. Arizona – Supreme Court order

In 2018, a petition was filed with the Arizona Supreme Court to amend its misconduct rules to add ABA Model Rule 8.4(g) as Arizona Rule of Professional Conduct 8.4(h). In the end, the court denied the petition.<sup>9</sup>

### 2. Colorado – adopted sexual harassment rule instead

On September 19, 2019, the Colorado Supreme Court amended Rule 8.4 of the Colorado Rules of Professional Conduct to include a prohibition on sexual harassment. It should be noted that Colorado is one of the states whose Rules of Professional Conduct specifically addressed bias in a rule prior to passage of ABA Model Rule 8.4(g).

### 3. Hawaii – court seemingly rejected ABA Model Rule 8.4(g)

On October 26, 2021, the Hawai'i Supreme Court issued an Order amending Rule 8.4 of the Hawaii Rules of Professional Conduct by adopting new subsection (h) and Comment [7], specifically addressing sexual harassment. In issuing this order, it appears that the Hawaii Supreme Court rejected proposed Rule 8.4(h), which was a version of ABA Model Rule 8.4(g) and instead adopted proposed new Rule 4.5 as new Rule 8.4(h).<sup>10</sup>

### 4. Idaho – Supreme Court order

Twice in two years (in both 2017 and 2018), the Idaho State Bar Association passed resolutions to ABA Model Rule 8.4(g)-like provisions to its state rules of professional conduct. Both times the Idaho Supreme Court rejected the resolution.<sup>11</sup> Three years later, in October 2021, the Idaho State Bar Association once again passed a resolution that would amend Idaho Rule of Professional Conduct 8.4 to include anti-discrimination and anti-harassment provisions. On January 20, 2023, the Idaho Supreme Court issued an order rejecting the recommendation. While commending “the Bar’s ... attempts to address unlawful discrimination and harassment in the legal profession, the court explained it could not adopt the resolution because the resolution violates the First Amendment and is also unconstitutionally overbroad and vague.”<sup>12</sup>

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<sup>9</sup> Arizona Supreme Court, Order dated Aug. 30, 2018, re: No. R-17-0032, at <https://www.clsnet.org/document.doc?id=1164>.

<sup>10</sup> Rule 8.4(h) In a professional capacity, a lawyer shall not engage in sexual harassment. “Professional capacity” under this Rule means acts, including communications, occurring in (1) the course of a client representation; (2) interactions with coworkers, court personnel, jurors, and witnesses; (3) the operation or management of a law firm, law practice, or organization with which the lawyer is employed, including acts at events sponsored by the law firm, law practice, or organization; and/or (4) bar association, bar organization, legal education conferences or events. “Sexual harassment” under this Rule means unwelcome sexual advances, requests for sexual favors, and/or other verbal or physical harassment of a sexual nature which a reasonable lawyer would know are offensive.

<sup>11</sup> Idaho Supreme Court, Letter to Executive Director, Idaho State Bar, Sept. 6, 2018, and Idaho Supreme Court order, January 20, 2023, at <https://www.christianlegalsociety.org/wp-content/uploads/2023/02/2023-Idaho-Published-Opinion.pdf>.

<sup>12</sup> Idaho Supreme Court Order dated January 20, 2023, at <https://www.christianlegalsociety.org/wp-content/uploads/2023/02/2023-Idaho-Published-Opinion.pdf>.

## 5. Illinois – ISBA Assembly vote

The Illinois State Bar Association Assembly voted, in 2016, to oppose adoption of ABA Model Rule 8.4(g) in Illinois.<sup>13</sup> But recently, the Illinois State Bar Assembly reversed course and approved a version of ABA Model Rule 8.4(g) for consideration by the Illinois Supreme Court. The proposal<sup>14</sup> hews closely to ABA Model Rule 8.4(g) by changing the standard from one of knowledge to one of negligence (“reasonably should know”) and making the rule applicable to “conduct in the practice of law,” including bar activities and social events.

The Illinois Supreme Court Rules Committee is holding a public hearing on this and other proposed rules changes on Wednesday, November 15, 2023, at 10:30 a.m., at the Administrative Office of the Illinois Courts, 222 N. LaSalle Street, 13th Floor. Those wishing to testify at the public hearing may sign up by sending an email to [RulesCommittee@illinoiscourts.gov](mailto:RulesCommittee@illinoiscourts.gov) no later than Wednesday, November 8, 2023. The committee is also accepting public comments on the proposed change. Written comments must be submitted no later than Wednesday, November 8, 2023, also to [RulesCommittee@illinoiscourts.gov](mailto:RulesCommittee@illinoiscourts.gov) or via mail to: Committee Secretary, Supreme Court Rules Committee, 222 N. LaSalle Street, 13th Floor, Chicago, IL 60601.

## 6. Louisiana – AG and District Attorneys opposed; rules committee voted not to proceed

In 2017, Louisiana considered adopting the model rule. The Louisiana District Attorneys Association sent a letter to the Louisiana State Bar Association formally opposing the proposed Rule 8.4(h) and the Attorney General for the State of Louisiana issued an opinion concluding that both ABA Model Rule 8.4(g) and the Louisiana State Bar Association’s proposed Rule 8.4(h) violate the First and Fourteenth Amendments of the United States Constitution.<sup>15</sup> Shortly thereafter, the Rules of Professional Conduct Committee of the Louisiana State Bar Association (“LSBA”) voted 7-4 not to recommend proposed Rule 8.4(h) to either the LSBA House of Delegates and the Louisiana Supreme Court.

## 7. Minnesota – ABA reports Minnesota rejected<sup>16</sup>

## 8. Montana – Legislature joint resolution; Supreme Court rejected

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<sup>13</sup> Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals*, Illinois Lawyer Now, Dec. 15, 2016, <https://www.isba.org/iln/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals> (last visited May 2, 2018).

<sup>14</sup> Proposal 22-06, at <https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/2414f0dd-db41-429f-88f2-8d8dcc2414ac/Proposal%2022-06%20Amends%20Rules%20of%20Professional%20Conduct%205.1%20and%208.4%20Offered%20by%20the%20ISBA.pdf>.

<sup>15</sup> Letter of Louisiana District Attorneys Association to President, Louisiana Bar Association, Aug. 31, 2017, at <https://www.clsnet.org/document.doc?id=1171>; *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://lalegaethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384>.

<sup>16</sup> American Bar Association Center for Professional Responsibility Policy Implementation Committee, *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (Sept. 19, 2018), at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chart\\_adopt\\_8\\_4\\_g\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g_authcheckdam.pdf).

The Montana Legislature passed a joint resolution<sup>17</sup> on April 12, 2017, in which it condemned ABA Proposed Model Rule 8.4(g).

On March 1, 2019, the State Bar of Montana, along with its Ethics Committee, petitioned the Supreme Court of Montana to revise 18 rules of the Montana Rules of Professional Conduct. In its Memorandum in Support of Petition, the State Bar of Montana mentioned in a footnote (at 3, n.2) that Montana Rule of Professional Conduct Rule 8.4(g) was not included in the review as it had “earlier been the subject of Court attention ... and the Supreme Court chose not to adopt the ABA’s Model Rule 8.4(g).”

#### 9. Nevada – State bar petition withdrawn; comment period

In 2017, the Board of Governors of the State Bar of Nevada (“Board”) filed a Petition with the Nevada Supreme Court to amend its Rules of Professional Conduct to include the ABA’s Model Rule 8.4(g). A few months later, during which time the court held an open comment period on the rule change request, the Board requested<sup>18</sup> that the petition to adopt ABA Model Rule 8.4(g) be withdrawn, and the court granted that request, withdrawing the petition to adopt the model rule.

#### 10. North Dakota – rules committee refused to recommend

In 2017, the North Dakota Supreme Court requested that its Joint Committee on Attorney Standards (“committee”) consider ABA Model Rule 8.4(g). the recent amendment by the American Bar Association to its Model Rule 8.4(g). After discussion of the model rule, the committee voted to table the issue until the committee's meeting in the fall. About six months later, the committee, after further discussion of ABA Model Rule 8.4(g), voted to reject ABA Model Rule 8.4(g). Members of the committee raised concerns ranging from the breadth of the rule to First Amendment issues.

#### 11. Oregon – rejected by subcommittee of the Oregon State Bar Legal Ethics

The subcommittee reviewed Oregon Rule of Professional Conduct Rule 8.4(a)(7), specifically comparing it to ABA Model Rule 8.4(g), and opted for retaining the current Oregon rule and against adopting ABA Model Rule 8.4(g).

#### 12. South Carolina – House of Delegates; AG opinion; Supreme Court order

On May 1, 2017, the South Carolina Attorney General's Office issued a written opinion<sup>19</sup> in which it concluded “that the likelihood of a successful challenge to the

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<sup>17</sup> *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, 65<sup>th</sup> Legislature (Mont. Apr. 25, 2017).

<sup>18</sup> Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017).

<sup>19</sup> South Carolina Att’y Gen. Op. (May 1, 2017) at 13, <http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf> (last visited May 2, 2018).

Model Rule based on the First Amendment and the Establishment Clause is substantial and that a court could well conclude the Rule is unconstitutional.” On June 20, 2017, the South Carolina Supreme Court issued an order announcing it would not incorporate ABA Model Rule 8.4(g) into the South Carolina Rules of Professional Conduct.

13. South Dakota – unanimously rejected by the South Dakota Supreme Court

In 2020, the South Dakota Supreme Court announced in a letter<sup>20</sup> to the South Dakota State Bar that the Court had unanimously denied the proposed Rule 8.4(g), which was an alternative version of ABA Model Rule 8.4(g). Specifically, the Court explained it “is not convinced that proposed Rule 8.4(g) is necessary or remedies an identified problem.”

14. Tennessee – AG opinion; Supreme Court order

The Tennessee Bar Association recommended that the Tennessee Supreme Court adopt a version of ABA Model Rule 8.4(g). The state AG submitted a comment letter<sup>21</sup> to the court opining that both ABA Model Rule 8.4(g) and Tennessee’s proposed version, if adopted, would violate the constitutional rights of Tennessee attorneys and would conflict with existing Tennessee Rules of Professional Conduct. After the comment period closed, the court denied the petition to adopt the proposed rule.<sup>22</sup>

15. Texas AG opinion<sup>23</sup>

In December 2016, the Texas AG issued an opinion that the model rule is unconstitutional and also violates attorneys’ free speech and free exercise of religion.

16. Utah – rejected by state court; modified version under consideration for four plus years

The Utah Supreme Court considered amending its rules of professional conduct by adopting ABA Model Rule 8.4(g) in 2017. In 2018, the Utah Supreme Court was again considering amending its rules of professional conduct by adopting a different version of the model rule. Then, in 2019, the Utah Supreme Court announced it was considering yet another version of ABA Model Rule 8.4(g).

17. Wisconsin – rejected by state supreme court

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<sup>19</sup> The Supreme Court of South Carolina, *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct Appellate Case No. 2017-000498*, Order (June 20, 2017), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01>.

<sup>20</sup> Supreme Court Letter to the State Bar from the Supreme Court, March 9, 2020.

<sup>21</sup> Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018), at

<https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>.

<sup>22</sup> The Supreme Court of Tennessee, *In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, Order No. ADM2017-02244 (Apr. 23, 2018), [https://www.tncourts.gov/sites/default/files/order\\_denying\\_8.4g\\_petition.pdf](https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition.pdf).

<sup>23</sup> *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 [https://thegoodbuyguy.com/wp-content/uploads/2022/10/994\\_CLS\\_Center\\_for\\_Law\\_and\\_Religious\\_Freedom.pdf](https://thegoodbuyguy.com/wp-content/uploads/2022/10/994_CLS_Center_for_Law_and_Religious_Freedom.pdf).

Almost two years after being petitioned by State Bar Standing Committee on Professional Ethics, on July 11, 2023, the Wisconsin Supreme Court issued an order denying the committee's petition asking the court to replace existing Supreme Court Rule 20:8.4(i) with ABA Model Rule 8.4(g).<sup>24</sup> The court held a closed administrative conference in April 2023 during which the justices discussed the petition and voted to deny it.

#### **D. Pennsylvania's Three Proposed Rules, including the Final Adopted Rule**

##### 1. December 3, 2016, Version

(g) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. If there is an alternative forum available to bring a complaint, no charge of professional misconduct may be brought pursuant to this paragraph until a court of administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

Comment: None

##### 2. May 19, 2018, Version (underline = words not in August 2019 version)

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation (except employment discrimination unless resulting in a final agency or judicial determination). This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comment:

(3) Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of

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<sup>24</sup> Wisconsin Supreme Court order, July 11, 2023, at <https://www.christianlegalsociety.org/wp-content/uploads/2023/07/Wisconsin-22-02-Final-Order.pdf>.

connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.

(4) Harassment, as referred to in paragraph (g), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

(5) Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

3. August 31, 2019, Version (underline = words not in May 2018 version)

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

Comment:

[3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

4. June 8, 2020, Adopted as Final Version (Justice Mundy dissenting)  
(underline = words not in prior versions)

(g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

Comment:

[3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.

[5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[6] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

5. *Greenberg v. Haggerty*, 491 F.Supp. 3d 12 (E.D. Pa. 2020)

On August 6, 2020, the Hamilton Lincoln Law Institute (HLLI) filed a civil rights suit against the members of Disciplinary Board of the Supreme Court of Pennsylvania to block implementation of new Pennsylvania Rules of Professional Conduct Rule 8.4(g) claiming the rule would chill free speech by Pennsylvania-licensed attorneys. HLLI brought suit on behalf of Zachary Greenberg, a Pennsylvania-licensed attorney working for a nonprofit organization that advocates on behalf of students' constitutional rights and regularly speaks at CLE and non-CLE events on a variety of hot-button legal issues including the constitutionality of hate speech regulation, Title IX's effect on the due process rights of individuals accused of sexual assault, and misconduct.

#### Constitutional Claims

Greenberg argued that he risks violating the rule due to his job as a program officer for the nonprofit Foundation for Individual Rights in Education and the scope of the modified rule. He said he gives presentations about First Amendment cases at both CLE and non-CLE events, and those presentations can include offensive and derogatory language, including racial, homophobic and misogynistic slurs.

"Greenberg believes it would be nearly impossible to illustrate United States First Amendment jurisprudence, such as by accurately citing and quoting precedent First Amendment cases, without engaging in speech that at least some members of his audience will perceive as biased, prejudiced, offensive, and potentially hateful," the complaint said.

## Free Speech Ruling<sup>25</sup>

The U.S. District Court for the Eastern District of Pennsylvania ruled that the newly-adopted rule violates the First Amendment and granted a preliminary injunction that temporarily enjoins the Disciplinary Board of the Supreme Court of Pennsylvania from enforcing the new rule.

“There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance.”

### 6. Post-decision

- a. Pennsylvania Disciplinary Board filed an appeal in December 2020
- b. Pennsylvania Disciplinary Board dropped its appeal in January 2021
- c. Pennsylvania Supreme Court adopts new rule<sup>26</sup> (underline = new from June 20, 2020, version; [] = deleted from June 2020 version) without a comment period

(g) in the practice of law, knowingly engage in[by words or] conduct constituting[, knowingly manifest bias or prejudice, or engage in] harassment or discrimination[, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination] based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude advice or advocacy consistent with these Rules.

Comment:

[3] For the purposes of paragraph (g), conduct in the practice of law includes [participation in activities that are required for a lawyer to practice law, including

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#### <sup>25</sup> Resources:

- Court’s ruling: <https://storage.courtlistener.com/recap/gov.uscourts.paed.574138/gov.uscourts.paed.574138.29.0.pdf>.
- Josh Blackman, *Judge Kennedy Provides Roadmap to Stop ABA Model Rule 8.4(g)*, <https://reason.com/volokh/2020/12/08/judge-kenney-provides-roadmap-to-stop-aba-model-rule-8-4g/>.
- Eugene Volokh, *Lawyer Speech Code Blocked on First Amendment Grounds*, <https://reason.com/volokh/2020/12/08/lawyer-speech-code-blocked-on-first-amendment-grounds/>.

#### <sup>26</sup> Resources:

- PA Supreme Court Order, [https://drive.google.com/file/d/1DFTVy5eVWZ6WHiqpdKTW\\_cFu78-TEsee/view](https://drive.google.com/file/d/1DFTVy5eVWZ6WHiqpdKTW_cFu78-TEsee/view).
- Josh Blackman, *Pennsylvania Supreme Court Adopts Revised Rule 8.4(g), Without Seeking Public Comment, Over Dissent*, <https://reason.com/volokh/2021/07/27/pennsylvania-supreme-court-adopts-revised-rule-8-4g-without-seeking-public-comment-over-dissent/>.

but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered](1) interacting with witnesses, coworkers, court personnel, lawyers, or others, while appearing in proceedings before a tribunal or in connection with the representation of a client; (2) operating or managing a law firm or law practice; (3) participation in judicial boards, conferences, or committees; continuous legal education seminars; bench bar conferences; and bar association activities where legal education credits are offered. The term “the practice of law” does not include speeches, communications, debates, presentations, or publications given or published outside of the contexts described in (1)-(3).

[4] [The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.]”Harassment” means conduct that is intended to intimidate, denigrate or show hostility or aversion toward a person on any of the bases listed in paragraph (g). “Harassment” includes sexual harassment, which includes but is not limited to sexual advances, requests for sexual favors, and other conduct of a sexual nature that is unwelcome.

[5] “Discrimination” means conduct that a lawyer knows manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in paragraph (g); to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.

[[5]][6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[[6]][7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

## 7. *Greenberg v. Lehocky*,

### a. District Court

Greenberg filed the suit again after the new rule was adopted. The district court enjoined enforcement of the new rule for the same reasons as before.

b. Third Circuit

The Third Circuit reversed, holding that Greenberg lacked standing to bring his challenge. The court said Rule 8.4(g) does not arguably prohibit anything Greenberg plans to do. According to the court, the rule covers only knowing or intentional harassment or discrimination against a person. Nothing in Greenberg's planned speeches comes close to meeting this standard. The court said Rule 8.4(g) does not generally prohibit him from quoting offensive words or expressing controversial ideas, nor will the defendants impose discipline for his planned speech. Per the court, any chill to his speech is not objectively reasonable or cannot be fairly traced to the rule.