CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

July 29, 2019

Alaska Bar Association
840 K Street
#100
Anchorage, Alaska 99501
By email: page@alaskabar.org

RE: Comment Letter Opposing Proposed Amendment ARPC 8.4(f)

Dear Officers and Members of the Board of the Alaska Bar Association:

This comment letter is filed pursuant to the Alaska Bar Association's announcement on May 30, 2019, soliciting public comment on Proposed Rule 8.4(f) that would add the highly criticized, deeply flawed ABA Model Rule 8.4(g) to the Alaska Rules of Professional Conduct.

After three years of deliberations in many states across the country, Vermont is the only state to have adopted this defective rule. In contrast, at least eleven states have concluded, after careful study, that ABA Model Rule 8.4(g) is both unconstitutional and unworkable. These states have opted to take the prudent course of letting other states experiment with ABA Model Rule 8.4(g) in order to evaluate its actual effect on the lawyers in those states.

I. Scholars have explained that ABA Model Rule 8.4(g) is a speech code for lawyers.

A number of scholars have accurately characterized ABA Model Rule 8.4(g) as a speech code for lawyers. For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has summarized his view that ABA Model Rule 8.4(g) is a speech code that will have a serious impact on attorneys' speech in a two-minute video for the Federalist Society.[1]

The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.[2] Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, "[t]he ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling

[1] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA. Professor Volokh expanded on the many problems of ABA Model Rule 8.4(g) in a debate at the Federalist Society National Student Symposium. *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=b074xW5kvB8&t=50s.

[2] Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought,* The Heritage Foundation (Oct. 6, 2016), http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf. Professor Rotunda and Texas Attorney General Ken Paxton debated two proponents of Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention. *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.

protected speech under the First Amendment."[3] They observed that "[t]he language the ABA has adopted in Rule 8.4(g) and its associated Comments are similar to laws that the Supreme Court has invalidated on free speech grounds."[4]

Writing about the problem ABA Model Rule 8.4(g) poses for lawyers' speech in a *Wall Street Journal* commentary entitled *The ABA Overrules the First Amendment*, Professor Rotunda explained:

> In the case of rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.[5]

Professor Rotunda further developed his critique in a memorandum for the Heritage Foundation entitled *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*.[6]

Professor Josh Blackman has explained that "Rule 8.4(g) is unprecedented, as it extends a disciplinary committee's jurisdiction to conduct merely 'related to the practice of law,' with only the most tenuous connection to representation of clients, a lawyer's fitness, or the administration of justice."[7] Dean of the University of North Dakota School of Law and a professor of professional responsibility, Michael S. McGinniss, recently "examine[d] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."[8]

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[3] Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017 [hereinafter "Rotunda & Dzienkowski"], "§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech" & "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" in "§ 8.4-2 Categories of Disciplinable Conduct."

[4] *Id.* at "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

[5] Ron Rotunda, "*The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech*," *The Wall Street Journal,* Aug. 16, 2016, http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.

[6] Rotunda, *supra* note 2.

[7] Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g),* 30 Geo. J. Legal Ethics 241, 243 (2017).

[8] Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession,* 42 Harv. J. L. & Pub. Pol'y 173, 173 (2019). *See also,* George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political,* 32 Notre Dame J.L. Ethics & Pub. Pol'y 135 (2018).

In a thoughtful examination of the rule's legislative history, practitioners Andrew Halaby and Brianna Long conclude that ABA Model Rule 8.4(g) "is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities."[9] They recommend that "jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all."[10] And they conclude that "the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected."[11]

In adopting its new model rule, the ABA largely ignored over 480 comment letters,[12] most opposed to the rule change. Even 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 prior to the House of Delegates' vote.[13]

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.[14] But little was done to address these concerns. In their thoughtful explication of the legislative history of ABA Model Rule 8.4(g), Halaby and Long conclude that "the new model rule's afflictions derive in part from indifference on the part of rule change proponents, and in part from the hasty manner in which the rule change proposal was pushed through to passage."[15] In particular, the rule went through five versions, of which three versions evolved "in the two weeks before passage, none of these was subjected to review and comment by the ABA's broader membership, the bar at large, or the public."[16] Halaby and Long summarized the legislative history of the rule:

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[9] Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201, 257 (2017).
[10] *Id.*
[11] *Id.* at 204.
[12] American Bar Association website, Comments to Model Rule 8.4, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.
[13] Halaby & Long, *supra* note 9, at 220 & n.97 (listing the Committee's concerns as including: lack of empirical evidence of need for Rule; vagueness of key terms; enforceability; constitutionality; coverage of employment discrimination complaints; mens rea requirement; and potential limitation on ability to decline representation), *citing* Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MABA MODEL RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.
[14] Halaby & Long, *supra* note 9, at 216-223 (summarizing concerns expressed at the only public hearing on an early version of ABA Model Rule 8.4(g), as well as the main concerns expressed in the comment letters).
[15] *Id.* at 203.
[16] *Id.*

> Model Rule 8.4(g) and its associated comments evolved rapidly between the initial letter from the Goal III entities in July 2014, through initial circulation of Version 1 in July 2015, to final adoption of Version 5 the following August. There was solicitation of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.[17]

These scholars' red flags should not be ignored. ABA Model Rule 8.4(g) and Proposed Rule 8.4(f), which is closely patterned on it, pose serious problems for Alaska attorneys.

II. ABA Model Rule 8.4(g) is unconstitutional under two Supreme Court decisions handed down since it was promulgated.

Since the ABA adopted Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued two major free speech decisions that establish its unconstitutionality, *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), and *Matal v. Tam*, 137 S. Ct. 1744 (2017). The ABA Section of Litigation recently published an article confirming that several section members see the Court's *Becerra* decision as raising serious concerns about the overall constitutionality of ABA Model Rule 8.4(g):

> Model Rule 8.4(g) "is intended to combat discrimination and harassment and to ensure equal treatment under the law," notes Cassandra Burke Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section's Civil Rights Litigation Committee. While it 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," Robertson concludes. [18]

First, under the Court's analysis in *Becerra,* Model Rule 8.4(g) is an unconstitutional *content*-based restriction on lawyers' speech. The Court held that state restrictions on "professional speech" are presumptively unconstitutional and subject to strict scrutiny. The Court repudiated the idea that professional speech is less protected by the First Amendment than other speech. Three federal courts of appeals had recently ruled that "'professional speech' [w]as a separate category of speech that is subject to different rules" and, therefore, less protected by the

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[17] *Id.* at 233.
[18] 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/.

First Amendment.[19] In abrogating those decisions, the Court stressed that "*this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.*'"[20] The Court rejected the idea that "professional speech" was an exception "from the rule that content-based regulations of speech are subject to strict scrutiny."[21]

Second, under the Court's analysis in *Matal*, ABA Model Rule 8.4(g) is an unconstitutional *viewpoint*-based restriction on lawyers' speech that cannot survive the strict scrutiny triggered by viewpoint discrimination. In *Matal,* all nine justices agreed that a provision of a longstanding federal law allowing government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons was unconstitutional because "[i]t offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[22] Justice Alito, writing for a plurality of the Court, noted that "[s]peech 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.'"[23]

In his concurrence, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, Justice Kennedy stressed that "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate," particularly "if the ideas or perspectives are ones a particular audience might think offensive."[24] Justice Kennedy closed with a sober warning:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.[25]

Because ABA Model Rule 8.4(g) would punish lawyers' speech on the basis of its viewpoint and content, it is unconstitutional under the analyses in *Matal* and *Becerra.*

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[19] *National Institute of Family and Life Advocates v. Becerra,* 138 S. Ct. 2361, 2371 (2018).
[20] *Id.* at 2371-72 (emphasis added).
[21] *Id.* at 2371.
[22] *Matal v. Tam,* 137 S. Ct. 1744, 1751 (2017) (quotation marks and ellipses omitted).
[23] *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes,J., dissenting).
[24] *Id.* at 1767.
[25] *Id.* at 1769 (Kennedy, J., concurring).

III. Proposed Rule 8.4(f) would greatly expand the reach of the Professional Rules of Conduct into Alaska attorneys' lives and chill attorneys' expression of dissenting political, social, and religious viewpoints.

A. Proposed Rule 8.4(f) would regulate lawyers' interactions with anyone while engaged in the practice of law or when participating in business or social activities in connection with the practice of law.

Proposed Rule 8.4(f) would make *any* conduct professional misconduct that a lawyer "knows *or reasonably should know* is harassment or discrimination" on eleven separate bases ("race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status") whenever a lawyer is: "1) representing clients; 2) interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; 3) operating or managing a law firm or law practice; or 4) participating in bar association, business or social activities in connection with the practice of law."[26]

Simply put, Proposed Rule 8.4(f) would regulate a lawyer's "conduct . . . while . . . *interacting with . . . others* while engaged in the practice of law . . . or participating in . . . bar association, business *or social activities in connection with the practice of law*." The compelling question becomes: What conduct does Proposed Rule 8.4(f) *not* reach? Virtually everything a lawyer does can be characterized as "conduct . . . while . . . interacting with . . . others while engaged in the practice of law" or "participating in . . . business or social activities in connection with the practice of law." [27] 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.

Proponents of ABA Model Rule 8.4(g) have candidly observed that they sought a new black letter rule precisely because they wanted to regulate nonlitigating lawyers, such as "[a]cademics, nonprofit lawyers, and some government lawyers," as well as "[t]ax lawyers, real estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system."[28]

The definition of "[d]iscrimination and harassment" found in Comment [3] of ABA Model Rule 8.4(g) makes clear that "conduct" includes "harmful verbal or physical conduct that manifests bias or prejudice towards others." "Verbal conduct," of course, is "speech." Because Proposed Rule 8.4(f) leaves undefined "conduct," "discrimination," and "harassment," it is

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[26] *Proposed Amendment to ARPC 8.4(f)*, Alaska Bar Association E-News, May 30, 2019.
[27] *See* Halaby & Long, *supra* note 9, at 226 ("The proposed comment of Version 3 expanded the ambit of 'conduct related to the practice of law' to include virtually anything a working lawyer might do.")
[28] ABA Commission on Sexual Orientation and Gender Identity, *Memorandum to Standing Committee on Ethics and Professional Responsibility: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4*, at 5, 7 (Oct. 22, 2015), https://www.clsnet.org/document.doc?id=1125.

reasonable to assume that disciplinary counsel would look to the comments accompanying ABA Model Rule 8.4(g) in order to define those terms, particularly given how closely the language of Proposed Rule 8.4(f) tracks the language of ABA Model Rule 8.4(g).

This is highly problematic for lawyers who are frequently asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions regarding sensitive social and political issues. Their commentary is sought by the media regarding controversial issues in their community, state, and nation. Of course, lawyers are asked to speak *because they are lawyers*. And a lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Proposed Rule 8.4(f) raises numerous questions about whether various routine expressive activities could expose a lawyer to potential disciplinary action, including:

- Is a lawyer subject to discipline for her discussion of hypotheticals while presenting a CLE course?[29]
- Is a lawyer subject to discipline when participating in legal panel discussions that touch on controversial political, religious, and social viewpoints? [30]
- Is a law professor or adjunct faculty member subject to discipline for a law review article or a class discussion that explores controversial topics or expresses unpopular viewpoints?
- Must lawyers abstain from writing blogposts or op-eds because they risk a bar complaint by an offended reader?
- Must lawyers forgo media interviews on topics about which they have some particularly insightful comments because anyone hearing the interview could file a complaint?[31]
- Can a lawyer lose his license to practice law for a tweet calling a female public official a derogatory sexist term?[32]

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[29] *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 the 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/.

[30] 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).

[31] See *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comn'n. (May 15, 2018) discussed *infra* note 41.

- 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?[33]
- May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various groups as protected classes in a nondiscrimination law being debated in the state legislature?
- 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 consider "a license to discriminate") are also added?[34]
- Is a lawyer subject to discipline for comment letters she writes as a lawyer 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 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?
- Is a lawyer at risk for volunteer legal work for political candidates who take controversial positions?
- Is a lawyer at risk for any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political positions?[35]

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[32] 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.

[33] *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.

[34] 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." *See infra* notes 78 & 79.

[35] *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.").

Professor Eugene Volokh has explored whether discipline under ABA Model Rule 8.4(g) could be triggered by conversation on a wide range of topics at a local bar dinner, explaining:

> 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.
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> 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."[36]

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected because it constitutes a serious threat to a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, lawyers can ill-afford to wager their licenses on a rule that may be utilized to target their speech.

At bottom, rules inspired by ABA Model Rule 8.4(g) have a "fundamental defect," which is that they "wrongly assume[] that the only attorney speech that is entitled to First Amendment protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech."[37] Rules inspired by ABA Model Rule 8.4(g) create doubt as to whether particular speech is permissible and, therefore, will inevitably chill lawyers' public speech.[38] In all likelihood, it will chill speech on one side of

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[36] Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities*, The Washington Post, Aug. 10, 2016, 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=.f4beacf8a086.

[37] Tenn. Att'y Gen. Letter, Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 7 (hereinafter "Tenn. Att'y Gen. Letter"), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf. The letter is incorporated into Tennessee Attorney General Opinion 18-11; however, for purposes of quoting the letter, we cite to the page numbers of the letter rather than the opinion. ("[T]he goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.") (Emphasis in original.)

[38] *Id.* at 8 ("Even if the [Board of Professional Responsibility] may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any

current political and social issues, while simultaneously creating little disincentive for lawyers who speak on the opposing side of these controversies.[39] If so, public discourse and civil society will suffer from the ideological straitjacket that ABA Model Rule 8.4(g) seeks to impose on lawyers.

Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree.[40] Indeed, Alaska lawyers have already experienced at least one situation in which well-intentioned laws against discrimination were misused to threaten attorneys' speech. In 2018, the Anchorage Equal Rights Commission (AERC) filed a complaint against an Anchorage law firm alleging that the firm violated the Anchorage Municipal Code. The firm represented a religiously affiliated, private nonprofit shelter for homeless women, many of whom had been abused and battered by men. The firm represented the shelter in a proceeding arising from a discrimination complaint filed with the AERC, alleging that the shelter had refused admission to a biological male who identified as female. The shelter denied the complaint, explaining that it had denied shelter to the individual because, among other things, of its policy against admitting persons who were inebriated, but acknowledging that it had a policy against admitting biological men. The law firm responded to an unsolicited request for a media interview. When the interview was published providing the shelter's version of the facts, the AERC brought a discrimination claim against the law firm alleging it had published a discriminatory policy. The AERC complaint was dismissed, but only after several months of legal proceedings in which the law firm had to obtain outside counsel.[41]

B. 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.

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit organizations. These organizations provide incalculable good to people in their local communities, as well as nationally and internationally. They also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.[42]

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sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place.")

[39] McGinniss, *supra* note 8, at 217-249 (explaining the "justified distrust of speech restrictions" such as Model Rule 8.4(g), in light of its proponents' stated desire "for a cultural shift . . . to be captured in the rules of professional conduct").

[40] *See, e.g.,* Aaron Haviland, "I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong," The Federalist (Mar. 4, 2019), http://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/ (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

[41] *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comn'n (May 15, 2018).

[42] Tex. Att'y Gen. Op., *supra* note 35, at 4 ("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.")

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless arguably be "participating in [a] social activit[y] in connection with the practice of law." For example, a lawyer may be asked to help craft her congregation's policy regarding whether its clergy will perform marriages or whether it will host receptions for weddings that are contrary to its religious beliefs. 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 while "engaged in the practice of law," but surely a lawyer should not fear being disciplined for volunteer legal work she performs for her church or her alma mater.[43] By making Alaska Bar members hesitant to serve on their boards, Proposed Rule 8.4(f) would do real harm to religious and charitable institutions and hinder their good works in their communities.

C. Attorneys' membership in religious, social, or political organizations could be subject to discipline.

Proposed Rule 8.4(f) could chill lawyers' willingness to participate in political, cultural, or religious organizations that promote traditional values regarding sexual conduct and marriage. Would Proposed Rule 8.4(f) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? [44] Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

Professor Rotunda and Professor Dzienkowski have expressed concern that ABA Model Rule 8.4(g) would subject lawyers to discipline for attending events sponsored by the St. Thomas More Society, an organization of Catholic lawyers and judges who meet together to share their faith. Attending the Red Mass, an annual mass held by the Catholic Church for lawyers, judges, law professors, and law students, could be deemed a "social activit[y] in connection with the practice of law" that runs afoul of Proposed Rule 8.4(f) because of the Catholic Church's limitation of the priesthood to males, its opposition to abortion, or its teachings regarding marriage.[45]

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[43] *See* D.C. Bar Legal Ethics, Opinion 222, *supra* note 33. *See also,* Tenn. Att'y Gen. Letter, *supra* note 37, at 8 n.8 ("statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization" "could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)").

[44] For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibited all California state judges from participating in Boy Scouts. Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, http://www.courts.ca.gov/documents/sc15-Jan_23.pdf .

[45] Rotunda & Dzienkowski, *supra* note 3, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

State attorneys general have voiced similar concerns.[46] Several attorneys general have warned that "serving as a member of the board of a religious organization, participating in groups such as the Christian Legal Society, or even speaking about how one's religious beliefs influence one's work as an attorney" could "be deemed conduct 'related to the practice of law.'"[47]

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

The lack of a knowledge requirement is a serious flaw: "[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way."[48] As Professor Dane Ciolino, an ethics law professor at Loyola University New Orleans College of Law, has explained:

> [ABA Model Rule 8.4(g)] 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. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the 'objectively reasonable lawyer' will be constructed for purposes of making this determination.[49]
>
> "[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way."[50]

Similarly, in 2016, the Disciplinary Board of the Supreme Court of Pennsylvania criticized ABA Model Rule 8.4(g) because:

> The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently

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[46] Tex. Att'y Gen. Op., *supra* note 35, 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."); La. Att'y Gen. Op., *supra* note 35, 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.")

[47] Tenn. Att'y Gen. Letter, *supra* note 37, at 10.

[48] *Id.* at 5. *See* Halaby & Long, *supra* note 9, at 243-245.

[49] Prof. Dane S. Ciolino, *LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct*, Louisiana Legal Ethics (Aug. 6, 2017) (emphasis in original), https://lalegalethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/.

[50] *Id.* at 5.

> 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.[51]

IV. The ABA's original claim that twenty-four states have a rule similar to ABA Model Rule 8.4(g) is not accurate because only Vermont has a rule as expansive as ABA Model Rule 8.4(g).

When the ABA adopted Model Rule 8.4(g) in 2016, it claimed that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."[52] But this claim has been shown to be factually incorrect. As the most recent edition of the *Annotated Rules of Professional Conduct* states: "Over half of all jurisdictions have a specific rule addressing bias and/or harassment – *all of which differ in some way from the Model Rule [8.4(g)] and from each other*."[53]

No empirical evidence, therefore, supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers.[54] As even its proponents have conceded, ABA Model Rule 8.4(g) does not replicate any black letter rule adopted by a state supreme court before 2016. Twenty-four states and the District of Columbia had adopted some version of a black letter rule dealing with "bias" issues before the ABA promulgated Model Rule 8.4(g) in 2016; *however, each of these black letter rules was narrower than ABA Model Rule 8.4(g)*.[55] Thirteen states had adopted a comment rather than a black letter rule to deal with bias issues. Fourteen states, including Alaska, had adopted neither a black letter rule nor a comment.

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[51] The Pennsylvania Bulletin, *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct,* 46 Pa. B. 7519 (Dec. 3, 2016) (hereinafter "The Pennsylvania Bulletin"), http://www.pabulletin.com/secure/data/vol46/46-49/2062.html. Nevertheless, ABA Model Rule 8.4(g) resurfaced in Pennsylvania in July 2018, when the Disciplinary Board sought comment on yet another iteration of the rule. That version seemed to make lawyers potentially subject to disciplinary action for telling lawyer jokes. *See* Kim Colby, *Is Telling a "Lawyer Joke" Professional Misconduct? Pennsylvania Considers a Version of ABA Model Rule 8.4(g),* The Federalist Society Blog (July18, 2018), https://fedsoc.org/commentary/blog-posts/is-telling-a-lawyer-joke-professional-misconduct-pennsylvania-considers-a-version-of-aba-model-rule-8-4-g.

[52] *See, e.g.*, Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, https://www.scbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf, at 56-57.

[53] Ellen J. Bennett & Helen W. Gunnarsson, Ctr. for Prof. Resp., American Bar Association, *Annotated Model Rules of Professional Conduct* 743, (9th ed. 2019) (emphasis supplied).

[54] For this reason, the statement in a Memorandum dated April 23, 2019, to the Alaska Bar Association Board of Governors that "there have been few reports of problems with the proposed rule in other jurisdictions that have adopted similar language" is mistaken. Only Vermont has adopted ABA Model Rule 8.4(g) in full.

[55] *Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative* (July 16, 2015), App. B, *Anti-Bias Provisions in State Rules of Professional Conduct,* at 11-32, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.

A proponent of ABA Model Rule 8.4(g), Professor Stephen Gillers, has written that "[a]lthough courts in twenty-five American jurisdictions (twenty-four states and Washington, D.C.) have adopted anti-bias rules in some form, these rules differ widely."[56] He then highlights the primary differences between them and ABA Model Rule 8.4(g):

> Most contain the nexus "in the course of representing a client" or its equivalent. Most tie the forbidden conduct to a lawyer's work in connection with the "administration of justice" or, more specifically, to a matter before a tribunal. Six jurisdictions' rules require that forbidden conduct be done "knowingly," "intentionally," or "willfully." Four jurisdictions limit the scope of their rules to conduct that violates federal or state anti-discrimination laws and three of these require that a complainant first seek a remedy elsewhere instead of discipline if one is available. Only four jurisdictions use the word "harass" or variations in their rules.[57]

V. Official entities in Arizona, Idaho, Illinois, Montana, North Dakota, South Carolina, Tennessee, and Texas have rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada have abandoned efforts to impose it on their attorneys.

Federalism's great advantage is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see whether states (besides Vermont) adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states. This is particularly true when ABA Model Rule 8.4(g) has failed close scrutiny by official entities in many states.[58]

A. Several state supreme courts have rejected ABA Model Rule 8.4(g).

The Supreme Courts of **Arizona, Idaho, Tennessee,** and **South Carolina** have officially rejected adoption of ABA Model Rule 8.4(g). In August 2018, after a public comment period, the **Arizona** Supreme Court rejected a petition from the Central Arizona Chapter of the National Lawyer Guild urging adoption of ABA Model Rule 8.4(g).[59] A week later, on September 6,

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[56] 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, 208 (2017) (footnotes omitted). Professor Gillers notes that his spouse "was a member of the [ABA] Standing Committee on Ethics and Professional Responsibility, the sponsor of the amendment [of ABA Model Rule 8.4]." *Id.* at 197 n.2.
[57] *Id.* at 208.
[58] McGinniss, *supra* note 8, at 213-217.
[59] Arizona Supreme Court Order re: No. R-17-0032 (Aug. 30, 2018), https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf.

2018, the **Idaho** Supreme Court rejected a resolution by the Idaho State Bar Association to adopt a modified version of ABA Model Rule 8.4(g).[60] On April 23, 2018, after a public comment period, the Supreme Court of **Tennessee** denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).[61] The petition had been filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility. The Tennessee Attorney General filed a comment letter, explaining that a black letter rule based on ABA Model Rule 8.4(g) "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[62]

On September 25, 2017, the Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g).[63] In a letter to the Court, dated September 6, 2017, the State Bar President explained that "the language used in other jurisdictions was inconsistent and changing," and, therefore, "the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions."[64]

In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).[65] The Court acted after the state bar's House of Delegates, as well as the state attorney general, recommended against its adoption.[66]

On May 13, 2019, the **Maine** Supreme Court announced that it had adopted a modified version of ABA Model Rule 8.4(g).[67] The Maine rule is significantly narrower than the ABA Model Rule in several ways. First, the Maine rule's definition of "discrimination" is substantially more circumscribed than the ABA Model Rule's definition of "discrimination." Second, its

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[60] Idaho Supreme Court, Letter to Executive Director, Idaho State Bar (Sept. 6, 2018), https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf.
[61] 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.
[62] Tenn. Att'y Gen. Letter, *supra* note 37, at 1.
[63] The Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4*, Order (Sep. 25, 2017), https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf.
[64] Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), https://www.clsnet.org/document.doc?id=1124.
[65] 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), http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01 (if arrive at South Carolina Judicial Department homepage, select "2017" as year and then scroll down to "2017-06-20-01").
[66] South Carolina Op. Att'y Gen. (May 1, 2017), http://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf.
[67] State of Maine Supreme Judicial Court Amendment to the Maine Rules of Professional Conduct Order, 2019 Me. Rules 05 (May 13, 2019), https://www.courts.maine.gov/rules_adminorders/rules/amendments/2019_mr_05_prof_conduct.pdf. Alberto Bernabe, *Maine Adopts (a Different Version of) ABA Model Rule 8.4(g)-Updated,* Professional Responsibility Blog, June 17, 2019 (examining a few differences between Maine rule and ABA Model Rule 8.4(g)), http://bernabepr.blogspot.com/2019/06/maine-becomes-second-state-to-adopt-aba.html.

definition of "conduct related to the practice of law" is much narrower because it does not include "participating in bar association, business or social activities in connection with the practice of law." Third, it covers fewer protected categories. Despite these differences, when challenged, the Maine rule will likely be found unconstitutional because it overtly targets protected speech. See *supra* pp. 4-5.

On July 15, 2019, the **New Hampshire** Supreme Court announced that it was adopting New Hampshire Rule of Professional Conduct 8.4(g) but that its new rule was not ABA Model Rule 8.4(g). The New Hampshire Advisory Committee on Rules had proposed adoption of a rule closely modeled on ABA Model Rule 8.4(g), but the court declined to adopt the committee's proposed rule: "In light of the nascent and ongoing discussion regarding the model rule, the court declines to adopt the rule proposed by the Advisory Committee on Rules."[68]

On June 13, 2019, the ABA published a summary of the states' consideration of ABA Model Rule 8.4(g) to date. By the ABA's own count, nine states have declined to adopt Model Rule 8.4(g): **Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina,** and **Tennessee.** The ABA lists **Vermont** as the only state to have adopted 8.4(g).[69]

B. State attorneys general have identified core constitutional issues with ABA Model Rule 8.4(g).

On March 16, 2018, the Attorney General of **Tennessee** filed Opinion 18-11, *American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g),* attaching his office's comment letter to the Supreme Court of Tennessee, opposing adoption of a proposed rule closely modeled on ABA Model Rule 8.4(g).[70] The Attorney General concluded that the proposed rule "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[71]

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated 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."[72] The Attorney General declared that "[c]ontrary to . . . basic free speech principles, Model Rule 8.4(g)

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[68] The State of New Hampshire Supreme Court of New Hampshire Order, July 15, 2019, https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf.
[69] 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* (June 13, 2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.pdf.
[70] *American Bar Association's New Model Rule of Professional Conduct 8.4(g)*, 18 Tenn. Att'y Gen. Op. 11 (Mar. 16, 2018), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf.
[71] Tenn. Att'y Gen. Letter, *supra* note 37, at 1.
[72] Tex. Att'y Gen. Op., *supra* note 35, at 3, https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues."[73]

In September 2017, the **Louisiana** Attorney General concluded that "[t]he regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid."[74] Because of the "expansive definition of 'conduct related to the practice of law' and its "countless implications for a lawyer's personal life," the Attorney General found the Rule to be "unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct."[75]

Agreeing with the Texas Attorney General's assessment of the unconstitutionality of ABA Model Rule 8.4(g), the Attorney General of **South Carolina** determined that "a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of Religion and is void for vagueness."[76]

On May 21, 2018, the **Arizona** Attorney General filed a comment letter urging the Arizona Supreme Court to heed the opposition of other states, state attorneys general, and state bar associations to adoption of ABA Model Rule 8.4(g). He also noted the constitutional concerns that ABA Model Rule 8.4(g) raises as to free speech, association, and expressive association.[77]

C. A state legislature recognized the problems that ABA Model Rule 8.4(g) poses for legislators, witnesses, staff, and citizens.

On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).[78] The impact of 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

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[73] *Id.*
[74] La. Att'y Gen. Op., *supra* note 35.
[75] *Id.* at 6.
[76] 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.
[77] Attorney General Mark Brnovich, *Attorney General's Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court* (May 21, 2017), https://www.clsnet.org/document.doc?id=1145.
[78] *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.

they are working on legislative matters or testifying about legislation before Legislative Committees" greatly concerned the Montana Legislature.[79]

D. Several State Bar Associations Have Rejected ABA Model Rule 8.4(g).

On December 10, 2016, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois."[80] On September 15, 2017, the **North Dakota** Joint Committee on Attorney Standards voted not to recommend adoption of ABA Model Rule 8.4(g), expressing concerns that it was "overbroad, vague, and imposes viewpoint discrimination" and that it might "have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views."[81] On October 30, 2017, the **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of Model Rule 8.4(g), voted "not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court."[82]

VI. Proposed Rule 8.4(f) would make it professional misconduct for attorneys to engage in hiring practices that favor persons because they are women, belong to racial, ethnic, or sexual minorities, or represent a particular socioeconomic status.

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.'"[83] In written materials for a CLE presentation, Mr. Spahn concluded that ABA Model Rule 8.4(g) "thus prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc."[84]

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[79] *Id.* at 3. The Tennessee Attorney General similarly warned that "[e]ven statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra* note 37, at 8 n.8.

[80] Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals,* Illinois Lawyer Now, Dec. 15, 2016, https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals.

[81] Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. n Att'y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (Dec. 14, 2017), at https://perma.cc/3FCP-B55J.

[82] Louisiana State Bar Association, *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, Oct. 30, 2017, https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892.

[83] 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)). The written materials used in the program are on file with Christian Legal Society and may be purchased from the D.C. Bar CLE program.

[84] *Id.* at 6.

He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:[85]

> *[L]awyers will also have to comply with the new per se discrimination ban in their personal hiring decisions.* Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a "plus" when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms' head count on the basis of such attributes – but it is nevertheless discrimination. *In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.*

Mr. Spahn dismissed the idea that Comment [4] of ABA Model Rule 8.4(g) would allow these efforts to promote certain kinds of diversity to continue. Even though Comment [4] states that "[l]awyers may engage in conduct undertaken to promote diversity and inclusion . . . by . . . implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations," as the ethics expert explained, "[t]his sentence appears to weaken the blanket anti-discrimination language in the black letter rule, but on a moment's reflection it does not – and could not – do that." [86] He provided three reasons for his conclusion that efforts to promote certain kinds of diversity would violate the rule and, therefore, would need to cease.[87]

The potential consequences for firms' efforts to promote diversity if Proposed Rule 8.4(f) were adopted provides yet another reason to allow other jurisdictions to experiment with ABA Model Rule 8.4(g) in order to see its unintended consequences in those jurisdictions.

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[85] *Id.* at 7 (emphasis supplied).
[86] *Id.* at 5. *See also, id*. at 5-6 ("Perhaps that sentence was meant to equate 'diversity' with discrimination on the basis of race, sex, etc. But that would be futile – because it would fly in the face of the explicit authoritative prohibition in the black letter rule. It would also be remarkably cynical, by forbidding discrimination in plain language while attempting to surreptitiously allow it by using a code word.")
[87] Those three reasons are: 1) the language in comments is only guidance and not binding; 2) the drafters of the rule "clearly knew how to include exceptions to the binding black letter anti-discrimination rule" because two exceptions actually are contained in the black letter rule itself, so "[i]f the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule;" and 3) the comment "says nothing about discrimination" and "does not describe activities permitting discrimination on the basis of the listed attributes." The references could be to "political viewpoint diversity, geographic diversity, and law school diversity" which "would not involve discrimination prohibited in the black letter rule."

VII. Proposed Rule 8.4(f) could limit Alaska lawyers' ability to accept, decline, or withdraw from a representation.

The proponents of ABA Model Rule 8.4(g) generally claim that it will not affect a lawyer's ability to refuse to represent a client. They point to the language in the rule that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16." But in the one state to have adopted ABA Model Rule 8.4(g), the Vermont Supreme Court explained in its accompanying Comment [4] 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." The Vermont Supreme Court further explained that, *under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g).*"[88]

As Professor Rotunda and Professor Dzienkowski explain, Rule 1.16 actually "deals with when a lawyer must or may *reject* a client or *withdraw* from representation."[89] Rule 1.16 does not address *accepting* clients.[90] Moreover, as Professor Rotunda and Professor Dzienkowski have observed, Comment [5] to ABA Model Rule 8.4(g) would seem to limit any right to decline representation, if permitted at all, to "limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations."[91]

Dean McGinniss, a professional responsibility professor, agrees 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."[92] Because Model Rule 1.16 "addresses only when lawyers *must* decline representation, or when they may or must *withdraw* from representation" but not when they "are *permitted* to decline client representation," Model Rule 8.4(g) seems to only allow what was already required, not declinations that are discretionary. Dean McGinniss warns that "if state bar authorities consider a

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[88] 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 (emphasis supplied).
[89] Rotunda & Dzienkowski, *supra* note 3, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis supplied by the authors).
[90] A state attorney general concurs that "[a]n attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra* note 37, at 11.
[91] *See* Rotunda & Dzienkowski, *supra* note 3.
[92] McGinniss, *supra* note 8, at 207-209.

lawyer's declining representation . . . as 'manifest[ing] bias or prejudice,' they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g)."[93]

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that "[a] lawyer is under no obligation to accept every person who may wish to become a client *unless the refusal to accept a person amounts to unlawful discrimination*."[94] The facts before the Committee were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of "unlawful discrimination" for purposes of New York's Rule 8.4(g) a question of law beyond its jurisdiction, the Committee declined to "opine on whether a lawyer's refusal to represent a prospective client in a suit against the lawyer's own religious institution constitutes 'unlawful discrimination'" for purposes of New York's Rule 8.4(g).[95]

In *Stropnicky v. Nathanson*,[96] the Massachusetts Commission Against Discrimination found a law firm that specialized in representing women in divorce cases had violated state nondiscrimination law when it refused to represent a man.[97] As these examples demonstrate, reasonable doubt exists that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation.

VIII. Should state bar disciplinary boards become the tribunals of first resort for employment and other discrimination and harassment claims against attorneys and law firms?

Concerns have been expressed by some state bar disciplinary counsel as to whether bar disciplinary offices have adequate financial and staff resources for adjudicating complex harassment and discrimination claims, particularly of employment discrimination claims. For example, The Montana Office of Disciplinary Counsel (ODC) voiced concerns about the breadth of ABA Model Rule 8.4(g).[98] The ODC quoted from a February 23, 2016, email from the National Organization of Bar Counsel ("NOBC") to its members explaining that the NOBC

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[93] *Id.* at 207-208 & n.146, citing Stephen Gillers, *supra* note 56, at 231-32, as, in Dean McGinniss' words, "conceding that the United States Conference of Catholic Bishops' concerns about religious lawyers' loss of freedom in client selection under Model Rule 8.4(g) are well founded, though not a basis for objecting to the rule."
[94] N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).
[95] *Id.* New York's Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is narrower.
[96] 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, *Nathanson v. MCAD,* No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003).
[97] Rotunda & Dzienkowski, *supra* note 3, *in* "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."
[98] Office of Disciplinary Counsel, *In re the Model Rules of Professional Conduct: ODC's Comments re ABA Model Rule 8.4(g)*, *filed in* Montana Supreme Court, No. AF 09-0688 (Apr. 10, 2017), at 3, https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Letter%20of%20Chief%20Disciplinary%20Counsel%20Opposing%208.4.pdf.

Board had declined to take a position on then-proposed ABA Model Rule 8.4(g) because "there were a number of simple regulatory issues, not the least of which is the possibility of diverting already strained resources to investigate and prosecute these matters."[99]

The Montana ODC thought that "any unhappy litigant" could claim that opposing counsel had discriminated on the basis of "one or more of the types of discrimination named in the rule."[100] The ODC also observed that ABA Model Rule 8.4(g) did not require "that a claim be first brought before an appropriate regulatory agency that deals with discrimination."[101] In that regard, the ODC recommended that the court consider "Illinois' rule [that] makes certain types of discrimination unethical and subject to discipline" because it required that "the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or administrative agency" and required that "the conduct must reflect adversely on the lawyer's fitness as a lawyer."[102]

In December 2016, the Disciplinary Board of the Supreme Court of Pennsylvania identified two defects of ABA Model Rule 8.4(g). The first was the rule's "potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers."[103] The second defect was that "after careful review and consideration … the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities."[104] The Board at that time concluded that ABA 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 . . . 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.[105]

Thus, ABA Model Rule 8.4(g) generates several new concerns. Increased demand may drain the limited resources of the state bar if it becomes the tribunal of first resort for discrimination and harassment claims against lawyers. Serious questions arise about the evidentiary or preclusive effects that a state bar proceeding might have on other tribunals' proceedings. State bar tribunals have their own rules of procedure and evidence that may be

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[99] *Id.* at 3-4.
[100] *Id.*
[101] *Id.* at 3.
[102] *Id.* at 5.
[103] The Pennsylvania Bulletin, *supra* note 51.
[104] *Id.*
[105] *Id.*

significantly different from state and federal court rules. Often, discovery is more limited in bar proceedings than in civil court. And, of course, there is no right to a jury trial in state bar proceedings.

An attorney may be disciplined regardless of whether her conduct is a violation of any other law. Professor Rotunda and Professor Dzienkowski warn that Rule 8.4(g) "may discipline the lawyer who does not violate any statute or regulation [except Rule 8.4(g)] dealing with discrimination."[106] Nor is "an allegedly injured party [required] to first invoke the civil legal system" before a lawyer can be charged with discrimination or harassment.[107]

The threat of a complaint under Model Rule 8.4(g) could also be used as leverage in other civil disputes between a lawyer and a former client. Model Rule 8.4(g) even may be the basis of an implied private right of action against an attorney. Professor Rotunda and Professor Dzienkowski note this risk:

> If lawyers do not follow this proposed Rule, they risk discipline (e.g., disbarment, or suspension from the practice of law). In addition, Courts enforce the Rules in the course of litigation (e.g., sanctions, disqualification). Courts also routinely imply private rights of action from violation of the Rules – malpractice and tort suits by third parties (non-clients).[108]

Unsurprisingly, Professor Rotunda and Professor Dzienkowski disagree with the rule's proponents that lawyers "should rely on prosecutorial discretion because disciplinary boards do not have the resources to prosecute every violation." They warn that "[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas."[109]

A lawyer's loss of his or her license to practice law is a staggering penalty and demands a stringent process, one in which the standards for enforcement are clear and respectful of the attorneys' rights, as well as the rights of others. ABA Model Rule 8.4(g) and Proposed Rule 8.4(f) do not provide the clear enforcement standards that are necessary when the loss of one's livelihood is at stake.

Conclusion

Because Proposed Rule 8.4(f) could drastically chill lawyers' freedom to express their viewpoints on political, social, religious, and cultural issues, and for the additional reasons given in this letter, the Bar Association should reject it. At a minimum, the Bar Association should wait

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[106] Rotunda & Dzienkowski, *supra* note 3 (parenthetical in original).
[107] *Id.*
[108] *Id.*
[109] *Id.*

to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out if and when it is adopted in other states. There is no reason to make Alaska attorneys laboratory subjects in the ill-conceived experiment that ABA Model Rule 8.4(g) represents, particularly given that the sensible alternative of waiting is readily available. A decision to reject ABA Model Rule 8.4(g) can always be revisited, but the damage its premature adoption may do to Alaska attorneys cannot be undone.

The Christian Legal Society thanks the Bar Association for holding this public comment period and considering its comments.

Respectfully submitted,

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