



**Why Alaska Should Not Adopt Proposed Rule 8.4(f):  
Alaska Bar Association is Receiving Comments until August 15, 2019**

The Alaska Bar Association is holding a public comment period until **August 15, 2019**, on its Proposed Rule of Professional Conduct 8.4(f)<sup>1</sup> that would essentially add ABA Model Rule 8.4(g)<sup>2</sup> to the Alaska Rules of Professional Conduct. ABA Model Rule 8.4(g) is the deeply-flawed and highly-criticized rule adopted by the American Bar Association in August 2016. It has been condemned by numerous scholars as a speech code for lawyers, as Professor Eugene Volokh, a nationally recognized First Amendment expert, explains in a two-minute Federalist Society video.<sup>3</sup>

**Take action before August 15, 2019:** Individuals may express their opposition to Proposed Rule 8.4(f) by sending comments to the Alaska Bar Association by email to [page@alaskabar.org](mailto:page@alaskabar.org), by mail to the Alaska Bar Association at 840 K Street, #100, Anchorage, Alaska 99501, or by calling Bar Counsel at (907) 272-7469. **The comment deadline is August 15, 2019.** Short email comments are as effective as lengthier comment letters. Ideas for comments may be found in this sample comment,<sup>4</sup> Christian Legal Society's comment letter,<sup>5</sup> or legal articles.<sup>6</sup>

Fortunately, ABA Model Rule 8.4(g) operates only in those states in which the highest court adopts it; to date, only the Vermont Supreme Court has adopted ABA Model Rule 8.4(g). After close scrutiny, many states have concluded that ABA Model Rule 8.4(g) is too flawed to impose on their bar members. They instead have chosen the prudent course of waiting to see whether other states adopt ABA Model Rule 8.4(g) to observe its real-life consequences for attorneys in those states.

At least eleven states have rejected or abandoned efforts to impose ABA Model Rule 8.4(g), including:

- **Formal rejection:** The state supreme courts of *Arizona*, *Idaho*, *South Carolina*, and *Tennessee* formally rejected ABA Model Rule 8.4(g) after holding comment periods.<sup>7</sup> The ABA itself lists nine states as declining to adopt the rule: *Arizona*, *Idaho*, *Illinois*, *Louisiana*, *Minnesota*, *Montana*, *Nevada*, *South Carolina*, and *Tennessee*.<sup>8</sup> CLS includes Texas and North Dakota on its list.
- **Petitions to adopt withdrawn:** Petitions to adopt ABA Model Rule 8.4(g) were withdrawn in *Nevada* (supreme court) and *Louisiana* (state bar committee) after comment periods.<sup>9</sup>

<sup>1</sup> The proposed rule is at <https://www.clsreligiousfreedom.org/alaska>.

<sup>2</sup> [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ABA%208.4\(g\)/Text%20of%20ABA%20Rule%20and%20Previous%20Comm ent%20\(1\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Text%20of%20ABA%20Rule%20and%20Previous%20Comm ent%20(1).pdf).

<sup>3</sup> The video is at <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

<sup>4</sup> [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ABA%208.4\(g\)/Alaska%20Proposed%20Rule%208.4\(f\)%20Sample%20Comm ent.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Alaska%20Proposed%20Rule%208.4(f)%20Sample%20Comm ent.pdf)

<sup>5</sup> [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ABA%208.4\(g\)/Christian%20Legal%20Society%20Comment%20Letter%20on %20Alaska%20Proposed%20Rule%208.4\(f\)%20Filed.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Christian%20Legal%20Society%20Comment%20Letter%20on %20Alaska%20Proposed%20Rule%208.4(f)%20Filed.pdf).

<sup>6</sup> See, e.g., Prof. Ronald Rotunda, "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," The Heritage Foundation, Oct. 6, 2016; 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 (2019); 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. Leg. Ethics 241 (2017); 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). See also, Prof. Volokh's Federalist Society debate at <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s> (Mar. 2017), and Prof. Rotunda's Federalist Society debate at <https://www.youtube.com/watch?v=V6rDPjqBcQg> (Nov. 2017).

<sup>7</sup> [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) (Tennessee);

[https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf) (Arizona);

[https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ISC%20Letter%20-%2020IRPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%2020IRPC%208.4(g).pdf) (Idaho);

<http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (South Carolina).

<sup>8</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* (June 13, 2019),

[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chart\\_adopt\\_8\\_4\\_g.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.pdf).

<sup>9</sup> <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>;

<https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

- **State legislature action:** The *Montana* Legislature adopted a joint resolution urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g). The Legislature was concerned 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,” as well as its effect on state legislators’ speech when speaking about legislative matters, talking to constituents, or campaigning.<sup>10</sup>
- **State bar activity:** The *Illinois* Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule.”<sup>11</sup> The *North Dakota* Joint Committee on Attorney Standards recommended rejection; a *Colorado* subcommittee tabled consideration; and the *Louisiana* Rules of Professional Conduct Committee, after a year studying Model Rule 8.4(g), voted not to recommend. Several state attorneys general, including *Texas* and *Tennessee*, have issued opinions stating the rule was likely unconstitutional.<sup>12</sup>

Proposed Rule 8.4(f) would make it professional misconduct for a lawyer “to 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” 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.”<sup>13</sup> The many problems with the rule include:

**1. Proposed Rule 8.4(f) would effectively impose ABA Model Rule 8.4(g) on Alaska Bar members and regulate nearly everything a lawyer says or does, including:**

- speaking at public events or presenting CLE courses;
- participating in panel discussions on controversial legal issues;
- publishing law review articles, blogposts, tweets, and op-eds;
- giving media interviews;
- teaching law school classes as faculty, adjunct faculty member, or guest lecturer;
- sitting on the boards of religious institutions, charities, or fraternities or sororities;
- belonging to organizations with membership or leadership requirements based on shared belief;
- volunteering at legal aid clinics;
- performing work for political or social action organizations, political parties, or campaigns;
- lobbying or testifying before legislative committees; or
- performing pro bono work for one’s congregation, religious college, or religious K-12 school.

**2. ABA Model Rule 8.4(g) is unconstitutional under the analyses in two recent United States Supreme Court decisions.** In June 2018, the United States Supreme Court held that government restrictions on professionals’ speech – including lawyers’ professional speech – are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, presumptively unconstitutional.<sup>14</sup> In June 2017, a unanimous United States Supreme Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is viewpoint discriminatory and, therefore, unconstitutional under the First Amendment.<sup>15</sup>

**3. The mens rea requirement is mere negligence.** A lawyer can violate the proposed rule without intending to do so or even being aware of having done so.

**4. Proposed Rule 8.4(f) would make bar disciplinary counsel the tribunal of first resort for complicated claims of discrimination and harassment.** Bar disciplinary counsel in some states have questioned whether their offices have adequate resources, including staffing, to enforce such a complex regulation.

<sup>10</sup> <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

<sup>11</sup> <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

<sup>12</sup> Tex. Att’y Gen. Op. KP0123 (Dec. 20, 2016), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>; Tenn. Att’y Gen. Op. 18-11, <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>.

<sup>13</sup> The proposed rule can be found at <https://www.clsreligiousfreedom.org/alaska>.

<sup>14</sup> *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

<sup>15</sup> *Maal v. Tam*, 137 S. Ct. 1744 (2017). *Id.* at 1753-1754, 1765; *see also, id.* at 1766 (unconstitutional to suppress speech that “demeans or offends”) (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).