

July 29, 2019

Alaska Bar Association  
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Anchorage, Alaska 99501  
By email: [page@alaskabar.org](mailto:page@alaskabar.org)

**Re: The Bar Association Should Reject Proposed Rule 8.4(f)**

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

The following comments are in response to the Alaska Bar Association's announcement on May 30, 2019, that it is considering amending the Alaska Rules of Professional Conduct to add a new Rule 8.4(f) that would effectively impose the highly problematic ABA Model Rule 8.4(g) on members of the Alaska Bar.<sup>1</sup>

Proposed Rule 8.4(f) is directly patterned on the widely criticized black letter rule proposed by the American Bar Association in 2016, ABA Model Rule 8.4(g). 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.

A number of scholars have characterized ABA Model Rule 8.4(g) as a speech code for lawyers.<sup>2</sup> 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.<sup>3</sup> 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 protected speech under the First Amendment."<sup>4</sup>

Andrew Halaby and Brianna Long, who are Arizona practitioners, thoroughly examined ABA Model Rule 8.4(g) and concluded that it "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."<sup>5</sup> They recommend that "jurisdictions asked to adopt it should think long and hard about whether such a rule can be

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

<sup>2</sup>Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

<sup>3</sup>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>.

<sup>4</sup>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."

<sup>5</sup>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).

enforced, constitutionally or at all.” 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.”<sup>6</sup>

Furthermore, 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 demonstrate its unconstitutionality. First, under the Court’s analysis in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), Model Rule 8.4(g) is an unconstitutional *content*-based restriction on lawyers’ speech. The *Becerra* Court held that state restrictions on “professional speech” are presumptively unconstitutional and subject to strict scrutiny. Second, under the Court’s analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), 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 the past three years, official entities in Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, North Dakota, South Carolina, Tennessee, and Texas have weighed ABA Model Rule 8.4(g) and found it wanting. Alaska Bar members should not be made the subjects of the novel experiment that ABA Model Rule 8.4(g) represents. This is particularly true when the Committee has the prudent option of waiting to see what other jurisdictions decide to do and then observing the rule’s real-world consequences for attorneys in those states.

I respectfully ask that the Alaska Bar Association reject Proposed Rule 8.4(f). Instead, the Association should take the prudent course of waiting to see whether other states choose to experiment with ABA Model Rule 8.4(g) and then assessing the real-world consequences of that experiment on those states’ lawyers.

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<sup>6</sup> *Id.* at 204.