



*Seeking Justice with the Love of God*

September 30, 2019

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**Re: The Proposed Amendment to the Pennsylvania Rules of Professional Conduct Regarding Misconduct, Proposed Rule 8.4(g)**

Dear Disciplinary Board Members:

This comment letter is filed pursuant to the Board's Notice on August 31, 2019,<sup>1</sup> that it plans to recommend to the Supreme Court of Pennsylvania that it adopt a new Rule of Professional Conduct 8.4(g).<sup>2</sup> The Proposed Rule 8.4(g) is derived from the highly criticized and deeply flawed ABA Model Rule 8.4(g), as promulgated by the ABA in August 2016.

This is the third time in three years that the Board has proposed a rule related to ABA Model Rule 8.4(g). The Board previously decided not to forward the 2016 proposed rule<sup>3</sup> and the 2018 proposed rule<sup>4</sup> to the Supreme Court. We very much appreciate the careful consideration that the Board is giving to this issue, which is one that could have long-term serious consequences for Pennsylvania Bar members. But for the reasons detailed below, the Board should similarly decide not to forward this latest version of Proposed Rule 8.4(g) to the Court.

After three years of deliberations by state supreme courts and state bar associations in many states across the country, Vermont remains the only state to have adopted ABA Model Rule 8.4(g). See Part 1, *infra*, at pp. 4-5. In contrast, at least eleven states have concluded, after careful study, that ABA Model Rule 8.4(g) is unconstitutional and unworkable. Official bodies in Arizona, Idaho, Illinois, Montana, North Dakota, South Carolina, Tennessee, and Texas have

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<sup>1</sup> The Disciplinary Board of the Supreme Court of Pennsylvania, *Disciplinary Board Seeks Comments on Proposed Harassment and Discrimination Rule* (Sept. 4, 2019), <https://www.padisciplinaryboard.org/news-media/news-article/1144/disciplinary-board-seeks-comments-on-proposed-harassment-and-discrimination-rule>.

<sup>2</sup> The Disciplinary Board of the Supreme Court of Pennsylvania, *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct*, 49 Pa. B. 4941 (Aug. 31, 2019), <https://www.pabulletin.com/secure/data/vol49/49-35/1309.html>.

<sup>3</sup> The Disciplinary Board of the Supreme Court of Pennsylvania, *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct*, 46 Pa. B. 7519 (Dec. 3, 2016), <https://www.pabulletin.com/secure/data/vol46/46-49/2062.html>.

<sup>4</sup> The Disciplinary Board of the Supreme Court of Pennsylvania, *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Regarding Misconduct*, 48 Pa. B. 2936 (May 19, 2018), <https://www.pabulletin.com/secure/data/vol48/48-20/773.html>.

rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada have abandoned proposals to adopt it. The latest state to hit “pause” on a version of ABA Model Rule 8.4(g) is Alaska. On September 5, 2019, the Board of Governors of the Alaska Bar Association remanded its proposed rule to its rules committee after the Alaska attorney general submitted a masterful comment letter examining the constitutional flaws in the proposed rule.<sup>5</sup> See Part II, *infra*, at pp. 5-10. 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. That is the course that the Board has taken twice before and that we ask it to continue to take.

This letter examines scholars’ powerful criticisms of ABA Model Rule 8.4(g). See Part III, *infra*, at 10-12. It then briefly discusses two recent United States Supreme Court decisions in which the Court’s analyses indicate that rules of professional conduct which restrict attorneys’ professional speech must withstand strict scrutiny as either content-based or viewpoint-based speech restrictions. See Part IV, *infra*, at 13-14.

ABA Model Rule 8.4(g) is a deeply flawed rule that merits the intense criticism it has received. Its potential to chill lawyers’ speech on important political, social, religious, and cultural issues is detailed in Part V, *infra*, at 14-20.

This letter then addresses the ways in which Proposed Rule 8.4(g) differs from ABA Model Rule 8.4(g). See Part VI, *infra*, at pp. 21-25. The modest modifications made to Proposed Rule 8.4(g) are insufficient to avoid many of the constitutional and practical problems that have caused so many states to reject ABA Model Rule 8.4(g). While two of its modifications are improvements, other modifications actually make Proposed Rule 8.4(g) worse than ABA Model Rule 8.4(g), which surely is not the intent but is the result.

Like ABA Model Rule 8.4(g), Proposed Rule 8.4(g) would significantly expand the state’s regulation of Pennsylvania attorneys’ expression, creating a chilling effect on their speech, as well as on their religious exercise. Proposed Rule 8.4(g) presents at least five new major defects, including:

*First*, Proposed Rule 8.4(g)’s attempt to provide some definition for “in the practice of law” fails to adequately limit the scope of regulated conduct in any way that Pennsylvania attorneys can be clear as to which of their words and conduct are regulated and which are not.

*Second*, Proposed Rule 8.4(g) falls into the trap of trying to regulate “words” that “manifest bias or prejudice” because “[t]he Board favors” having “a lawyer’s ethical obligations

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<sup>5</sup> Letter from Attorney General Kevin Clarkson to Board of Governors, Alaska Bar Association (Aug. 9, 2019)(hereinafter “Alaska Att’y Gen. Letter”), <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>; Letter from John Murtagh, Chairman, Alaska Rules of Professional Conduct Committee, to Robert Stone, President, Alaska Bar Association (Aug. 30, 2019) (hereinafter “Alaska Rules Comm. Letter”), [https://alaskabar.org/wp-content/uploads/Report.ARPCcmte.on8\\_4f.pdf](https://alaskabar.org/wp-content/uploads/Report.ARPCcmte.on8_4f.pdf).

under the RPC correspond to the conduct prohibited in the Code of Judicial Conduct.”<sup>6</sup> *But this premise is a mistake of the first magnitude.* Lawyers and judges serve two very different functions in our legal system. A judge’s foremost duty is to be impartial in administering justice. A lawyer’s foremost duty is *not to be impartial* but to zealously represent the interests of her client. For that reason, a regulation suitable for judges does not readily translate into a regulation suitable for lawyers, particularly when it is subject to strict scrutiny under the First Amendment.

*Third*, Proposed Rule 8.4(g) is exponentially broader than ABA Model Rule 8.4(g) because it prohibits *all words* that “manifest” “bias, prejudice, harassment, or discrimination.” Surprisingly, the 2019 Proposed Rule 8.4(g) actually sweeps more speech into its prohibition than does the overly broad ABA Model Rule 8.4(g). The latter prohibits speech that is harassment or discrimination based on, *but only based on*, the eleven protected classes that it lists. In contrast, Proposed Rule 8.4(g) is much broader in scope because it prohibits *all* words that knowingly manifest bias or prejudice, or engage in harassment or discrimination. *But Proposed Rule 8.4(g)’s prohibition is not limited to the list of eleven protected classes.* Because the list of eleven protected classes is preceded by “including but not limited to,” Proposed Rule 8.4(g) prohibits all words that “manifest bias, prejudice, harassment, or discrimination.” That is breathtakingly broad and most certainly unconstitutional.

*Fourth*, according to the Board’s commentary accompanying Proposed Rule 8.4(g), the Board is trying to limit the scope of prohibited conduct by defining “bias, prejudice, harassment, or discrimination” “as those terms are defined in federal, state or local statutes or ordinances.” But this attempt at using “federal, state or local statutes or ordinances” to define “bias, prejudice, harassment, or discrimination” raises a multitude of questions rather than providing clarification.

*Fifth*, and here we come to perhaps its most troubling aspect, Proposed Rule 8.4(g) will not apply uniformly to all Pennsylvania attorneys. The inclusion of local statutes or ordinances means that Proposed Rule 8.4(g) will apply to Pennsylvania lawyers differently depending on where they live in Pennsylvania. That is, speech spoken by a Philadelphia lawyer might constitute professional misconduct because it violates a Philadelphia nondiscrimination ordinance, while the same speech spoken by a Lancaster lawyer does not constitute professional misconduct because it does not violate Lancaster’s nondiscrimination ordinance. A good rule promotes consistency in its application. But Proposed Rule 8.4(g)’s application, by its very terms, will vary depending on the locality in which a lawyer practices, which hardly seems consistent or fair.

Both ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) would jeopardize law firms’ practices that are intended to achieve certain diversity goals in recruitment and hiring. See Part VII, *infra*, at 25-26. Both ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) create serious ramifications for lawyers’ ability to accept, decline, or withdraw from a representation, despite language attempting to protect that ability. See Part VIII, *infra*, at pp. 26-28. Both raise valid

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<sup>6</sup> See *supra* note 2, at 3.

concerns as to whether the Disciplinary Board has adequate resources to meet the potential increase in employment and other discrimination and harassment claims against attorneys and firms. See Part IX, *infra*, at pp. 28-31.

**I. The ABA’s original claim that twenty-four states have a rule similar to ABA Model Rule 8.4(g) is not accurate: Only Vermont has actually adopted 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.”<sup>7</sup> But this claim has been shown to be factually incorrect. As the 2019 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.*”<sup>8</sup>

No empirical evidence, therefore, supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers. 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).*<sup>9</sup> Thirteen states had adopted a comment rather than a black letter rule to deal with bias issues. Fourteen states had adopted neither a black letter rule nor a comment.

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.”<sup>10</sup> He then highlights the primary differences between them and ABA Model Rule 8.4(g):

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<sup>7</sup> 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.scbars.org/media/filer\\_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod\\_materials\\_january\\_2017.pdf](https://www.scbars.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf), at 56-57.

<sup>8</sup> Ellen J. Bennett & Helen W. Gunnarsson, Ctr. for Prof. Resp., American Bar Association, *Annotated Model Rules of Professional Conduct* 743, (9<sup>th</sup> ed. 2019) (emphasis supplied).

<sup>9</sup> *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](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf).

<sup>10</sup> 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.

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.<sup>11</sup>

## **II. 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.<sup>12</sup>

### **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).<sup>13</sup> In September 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).<sup>14</sup> The **Montana** Supreme Court “chose not to adopt” 8.4(g).<sup>15</sup> In April 2018, after a public comment period, the Supreme Court of **Tennessee** denied a

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<sup>11</sup> *Id.* at 208.

<sup>12</sup> 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, 213-217 (2019).

<sup>13</sup> 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](https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf).

<sup>14</sup> 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](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf).

<sup>15</sup> *In re Petition by the State Bar of Montana for Revisions to the Montana Rules of Professional Conduct*, AF 09-0688 (Mar. 1, 2019), at 3 n.2, [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/MT%20Petition%20and%20Memo.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Petition%20and%20Memo.pdf).

petition to adopt a slightly modified version of ABA Model Rule 8.4(g).<sup>16</sup> 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.”<sup>17</sup>

In September 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).<sup>18</sup> In a letter to the Court, 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.”<sup>19</sup>

In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).<sup>20</sup> The Court acted after the state bar’s House of Delegates, as well as the state attorney general, recommended against its adoption.<sup>21</sup>

In May 2019, the **Maine** Supreme Court announced that it had adopted a modified version of ABA Model Rule 8.4(g).<sup>22</sup> The Maine rule is significantly narrower than the ABA

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<sup>16</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>17</sup> Tenn. Att’y Gen. Letter, Letter from Attorney General Slattery to Supreme Court of Tennessee (Mar. 16, 2018) at 1 (hereinafter “Tenn. Att’y Gen. Letter”), [https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g\\_comments-3-16-2018.pdf](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.)

<sup>18</sup> 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>.

<sup>19</sup> 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>.

<sup>20</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), <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”).

<sup>21</sup> 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>.

<sup>22</sup> 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](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>. See The State of New Hampshire Supreme Court of New Hampshire Order 1, July 15, 2019, (“As of this writing, only one state, Vermont, has adopted a rule that is nearly identical to the model rule. Maine has adopted a rule that is

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 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 modifications, when challenged, the Maine rule will likely be found unconstitutional because it overtly targets protected speech. See *infra* pp. 12-14.

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, stating : “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.”<sup>23</sup>

On September 25, 2019, the ABA updated its 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.** For the reasons given below, we add **North Dakota** and **Texas.** The ABA lists **Vermont** as the only state to have adopted ABA Model Rule 8.4(g).<sup>24</sup>

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

In a letter dated August 5, 2019, the **Alaska** Attorney General submitted a comment letter to the Board of Governors of the Alaska Bar Association urging it *not* to recommend its Proposed Rule 8.4(f) to the Alaska Supreme Court.<sup>25</sup> On September 5, the Board of Governors announced that it was remanding the proposed rule to its Committee on Alaska Rules of Professional Conduct in response to its letter requesting a remand because of the “unprecedented” “amounts of comments.”<sup>26</sup>

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similar, but is not nearly identical, to Model Rule 8.4(g).”), <https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf>.

<sup>23</sup> 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>.

<sup>24</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. 25, 2019), [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).

<sup>25</sup> See Alaska Att’y Gen. Letter, *supra* note 5.

<sup>26</sup> Board of Governors Action Items, Sept. 5, 2019, <https://alaskabar.org/wp-content/uploads/19-9-action.pdf>; Alaska Rules Comm. Letter, *supra* note 5.

In March 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).<sup>27</sup> 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."<sup>28</sup>

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."<sup>29</sup> The Attorney General declared that "[c]ontrary to . . . basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues."<sup>30</sup>

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."<sup>31</sup> 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."<sup>32</sup>

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."<sup>33</sup>

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<sup>27</sup> *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>.

<sup>28</sup> Tenn. Att'y Gen. Letter, *supra* note 17, at 1.

<sup>29</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) (hereinafter "Tex. Att'y Gen. Op.") at 3, <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>.

<sup>30</sup> *Id.*

<sup>31</sup> *ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution*, 17 La. Att'y Gen. Op. 0114 (Sept. 8, 2017) (hereinafter "La. Att'y Gen. Op.") at 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.").

<sup>32</sup> *Id.* at 6.

<sup>33</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>.

In May 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.<sup>34</sup>

**C. The Montana 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).<sup>35</sup> 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 they are working on legislative matters or testifying about legislation before Legislative Committees” greatly concerned the Legislature.<sup>36</sup>

**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.”<sup>37</sup> 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.”<sup>38</sup> 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

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<sup>34</sup> 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>.

<sup>35</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), <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

<sup>36</sup> *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 17, at 8 n.8.

<sup>37</sup> 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>.

<sup>38</sup> 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>.

the House of Delegates or to the Supreme Court.”<sup>39</sup> In June 2019, however, the **South Dakota** Bar Association voted to send to the South Dakota Supreme Court a proposal to adopt a highly modified version of ABA Model Rule 8.4(g).<sup>40</sup>

### **III. 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.<sup>41</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>42</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>43</sup> 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.”<sup>44</sup>

Writing about the problem that 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:

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<sup>39</sup> 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>.

<sup>40</sup> State Bar of South Dakota, *State Bar of South Dakota 2019 Annual Meeting* 149 (June 2019), [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ABA%208.4\(g\)/June%20SD%20Bar%20Newsletter%202019.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/June%20SD%20Bar%20Newsletter%202019.pdf).

<sup>41</sup> 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>.

<sup>42</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>. 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>.

<sup>43</sup> 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 Disciplinary Conduct.”

<sup>44</sup> *Id.* at “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

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.<sup>45</sup>

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*.<sup>46</sup>

The Dean of the University of North Dakota School of Law, Michael S. McGinniss, a professor who teaches professional responsibility, 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*.”<sup>47</sup> 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.”<sup>48</sup>

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.”<sup>49</sup> 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.”<sup>50</sup> 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>51</sup>

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<sup>45</sup> 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>.

<sup>46</sup> Rotunda, *supra* note 42.

<sup>47</sup> McGinniss, *supra* note 12, at 173 (emphasis added). *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).

<sup>48</sup> Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 *Geo. J. Legal Ethics* 241, 243 (2017).

<sup>49</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).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 204.

In adopting its new model rule, the ABA largely ignored over 480 comment letters,<sup>52</sup> most opposed to the new rule. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule and raising concerns about its enforceability, although the Committee dropped its opposition immediately prior to the House of Delegates' vote.<sup>53</sup>

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.<sup>54</sup> 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."<sup>55</sup> Specifically, 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."<sup>56</sup> Halaby and Long summarized the legislative history of the rule:

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.<sup>57</sup>

These scholars' red flags should not be ignored. ABA Model Rule 8.4(g) and similar rules, such as Proposed Rule 8.4(g), pose serious concerns for Pennsylvania attorneys.

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<sup>52</sup>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](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html).

<sup>53</sup> Halaby & Long, *supra* note 49, 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%20MODEL%20RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MABA%20MODEL%20RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf).

<sup>54</sup> Halaby & Long, *supra* note 49, 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).

<sup>55</sup> *Id.* at 203.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 233.

**IV. ABA Model Rule 8.4(g) is unconstitutional under the analyses of two recent 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 confirm 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 showing that several section members grasp that the Court’s *Becerra* decision raises 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.<sup>58</sup>

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 First Amendment.<sup>59</sup> 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.’*”<sup>60</sup> 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.”<sup>61</sup>

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

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<sup>58</sup> 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/>.

<sup>59</sup> *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

<sup>60</sup> *Id.* at 2371-72 (emphasis added).

<sup>61</sup> *Id.* at 2371.

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.”<sup>62</sup> 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.’”<sup>63</sup>

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.”<sup>64</sup> 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.<sup>65</sup>

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*.

**V. ABA Model Rule 8.4(g) would greatly expand the reach of the professional rules of conduct into attorneys’ lives and chill attorneys’ expression of dissenting political, social, and religious viewpoints.**

Proponents of ABA Model Rule 8.4(g) 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.”<sup>66</sup>

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<sup>62</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (quotation marks and ellipses omitted).

<sup>63</sup> *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

<sup>64</sup> *Id.* at 1767.

<sup>65</sup> *Id.* at 1769 (Kennedy, J., concurring).

<sup>66</sup> 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>.

ABA Model Rule 8.4(g) defines “[d]iscrimination and harassment” to include “harmful verbal or physical conduct.” “Verbal conduct,” of course, is a euphemism for “speech.” 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(g) 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?<sup>67</sup>
- Is a lawyer subject to discipline when participating in legal panel discussions that touch on controversial political, religious, and social viewpoints?<sup>68</sup>
- 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?<sup>69</sup>
- Can a lawyer lose his license to practice law for a tweet calling a female public official a derogatory sexist term?<sup>70</sup>

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<sup>67</sup> 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/>.

<sup>68</sup> 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).

<sup>69</sup> See *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comm’n. (May 15, 2018) discussed *infra* note 76.

<sup>70</sup> 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](http://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu).

- 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, including its employment policies and decisions?<sup>71</sup>
- 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 currently 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?<sup>72</sup>
- 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?<sup>73</sup>

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

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<sup>71</sup> 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>.

<sup>72</sup> 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 *supra* notes 35 & 36.

<sup>73</sup> Tex. Att’y Gen. Op., *supra* note 29, at 3 (“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.”); La. Att’y Gen. Op., *supra* note 31, at 4 (“[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.”).

many households, and so on. One of the people is offended and files a bar complaint.

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."<sup>74</sup>

Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree.<sup>75</sup> Indeed, a troubling situation recently arose in Alaska, when the Anchorage Equal Rights Commission (AERC) filed a complaint against an Anchorage law firm alleging that the firm violated a municipal nondiscrimination law. The firm represented a religiously affiliated, private nonprofit shelter for homeless women, many of whom had been abused 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 eventually dismissed, but only after several months of legal proceedings.<sup>76</sup>

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, ABA Model Rule 8.4(g) has a "fundamental defect" because it "wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely

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<sup>74</sup> 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](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).

<sup>75</sup> 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).

<sup>76</sup> *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comm'n (May 15, 2018).

private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech.”<sup>77</sup> ABA Model Rule 8.4(g) creates doubt as to whether particular speech is permissible and, therefore, will inevitably chill lawyers’ public speech.<sup>78</sup> In all likelihood, it will chill speech on one side of current political and social issues, while simultaneously creating little disincentive for lawyers who speak on the opposing side of these controversies.<sup>79</sup> 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.

**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.<sup>80</sup>

As a volunteer on religious institutions’ boards, a lawyer may arguably be engaged “in conduct related to the practice of law” or “participating in [a] social activit[y] in connection with the practice of law.” Proposed Rule 8.4(g) and its Proposed Comment [4]. 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.<sup>81</sup> By making

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<sup>77</sup> Tenn. Att’y Gen. Letter, *supra* note 17, at 7 (“[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.)

<sup>78</sup> *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 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.”)

<sup>79</sup> McGinniss, *supra* note 12, 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”).

<sup>80</sup> Tex. Att’y Gen. Op., *supra* note 29, 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.”)

<sup>81</sup> See D.C. Bar Legal Ethics, Opinion 222, *supra* note 71. See also, Tenn. Att’y Gen. Letter, *supra* note 17, 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)”).

Pennsylvania Bar members hesitant to serve on their boards, Proposed Rule 8.4(g) 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(g) 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(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage?<sup>82</sup> 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(g) because of the Catholic Church's limitation of the priesthood to males, its opposition to abortion, or its teachings regarding marriage.<sup>83</sup>

State attorneys general have voiced similar concerns.<sup>84</sup> 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.'"<sup>85</sup>

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<sup>82</sup> 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](http://www.courts.ca.gov/documents/sc15-Jan_23.pdf).

<sup>83</sup> Rotunda & Dzienkowski, *supra* note 43, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

<sup>84</sup> Tex. Att'y Gen. Op., *supra* note 29, 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 31, 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.")

<sup>85</sup> Tenn. Att'y Gen. Letter, *supra* note 17, at 10.

**D. Proposed Rule 8.4(g)'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.”<sup>86</sup> 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.<sup>87</sup>

“[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.”<sup>88</sup>

Similarly, in 2016, this Board rightly 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 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.<sup>89</sup>

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<sup>86</sup> *Id.* at 5. See Halaby & Long, *supra* note 49, at 243-245.

<sup>87</sup> 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://lalegaethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/>.

<sup>88</sup> *Id.* at 5.

<sup>89</sup> See *supra* note 3, at 2.

**VI. Despite modest modifications, Proposed Rule 8.4(g) suffers from many of the same fundamental flaws as ABA Model Rule 8.4(g) and would chill Pennsylvania attorneys' expression of dissenting political, social, and religious viewpoints.**

As already noted, this is the third time in three years that the Board has proposed a rule related to ABA Model Rule 8.4(g). The Board previously decided not to forward the 2016 proposed rule<sup>90</sup> and the 2018 proposed rule<sup>91</sup> to the Supreme Court.

We very much appreciate the careful consideration that the Board is giving to this issue, which is one that could have long-term serious consequences for Pennsylvania Bar members. We commend the Board's decision to delete "knows or reasonably should know," as found in ABA Model Rule 8.4(g), in favor of "knowingly" as the intent standard for Proposed Rule 8.4(g).<sup>92</sup> We also commend the Board's decision to delete "legitimate" before "advice and advocacy." But despite its modifications, this latest Proposed Rule 8.4(g) should not be forwarded to the Supreme Court for many reasons.

**A. Proposed Rule 8.4(g) applies to attorneys' speech.**

Like ABA Model Rule 8.4(g) with its application to "verbal conduct," Proposed Rule 8.4(g) forthrightly admits that it applies to attorneys' "words or conduct." Because of the United States Supreme Court's decisions since 2016, Proposed Rule 8.4(g), like ABA Model Rule 8.4(g), would fail to clear the very high bar of "strict scrutiny" because it regulates attorneys' professional speech in ways that are content-based and viewpoint discriminatory.

**B. Proposed Rule 8.4(g) lacks an adequate definition of "in the practice of law."**

The scope of regulated "words and conduct" in both the 2018 and 2019 Proposed Rules 8.4(g) is "in the practice of law." The accompanying commentary for both the 2018 and 2019 proposed rules claims that the scope of "in the practice of law" is intended to be narrower than ABA Model Rule 8.4(g)'s scope of "conduct related to the practice of law." In particular, the 2018 and 2019 versions are not intended to reach social activities, unlike ABA Model Rule 8.4(g), which has a comment defining "conduct related to the practice of law" to include social activities "in connection with the practice of law."

But the 2019 Proposed Rule 8.4(g)'s attempt to provide some definition for "in the practice of law" fails to adequately limit the scope of regulated conduct in any way that Pennsylvania attorneys can be certain as to which of their words and conduct are regulated and which are not. Its proposed Comment [3] states that "in the practice of law" "*includes* participation in activities that are required for a lawyer to practice law, including but not limited

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<sup>90</sup> *Id.*

<sup>91</sup> See *supra* note 4.

<sup>92</sup> See *supra* note 2, at p. 3.

to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.” This attempt at definition remains too broad because it is not a closed or exclusive definition. By using the terms “includes” and “including but not limited to,” Comment [3] is not really a definition of “in the practice of law,” but more a listing of a few examples of words and conduct that will be regulated.

As the Board’s commentary noted when it announced the 2018 Proposed Rule 8.4(g), the “Pennsylvania RPC and the Pennsylvania Rules of Disciplinary Enforcement do not define what constitutes the practice of law.”<sup>93</sup> The Board noted that “generally, the Supreme Court of Pennsylvania has explained what specific activities constitute the practice of law on a case-by-case basis.” This is hardly reassuring when Pennsylvania attorneys will have so much riding on whether the words they speak are considered to be “in the practice of law.” This uncertainty will chill Pennsylvania attorneys’ speech.

**C. Proposed Rule 8.4(g) is exponentially broader than ABA Model Rule 8.4(g) because it prohibits *all words* that “manifest” “bias, prejudice, harassment, or discrimination.”**

The 2019 Proposed Rule 8.4(g) prohibits words and conduct by which an attorney knowingly “manifest[s] bias or prejudice, or engage[s] in harassment or discrimination.” The ABA Model Rule 8.4(g) prohibits conduct (including “verbal conduct”) “that the lawyer knows or reasonably should know is harassment or discrimination.” While the ABA’s black letter rule does not refer to “manifest[ing] bias or prejudice,” its accompanying Comment [3] defines “discrimination” as including “harmful verbal or physical conduct that manifests bias or prejudice towards others.”

Proposed Rule 8.4(g) falls into the trap of trying to regulate “words” that “manifest bias or prejudice” because “[t]he Board favors” having “a lawyer’s ethical obligations under the RPC correspond to the conduct prohibited in the Code of Judicial Conduct.”<sup>94</sup> *But this premise is a mistake of the first magnitude.* Lawyers and judges serve two very different functions in our legal system. A judge’s foremost duty is to be impartial in administering justice. A lawyer’s foremost duty is *not to be impartial* but to zealously represent the interests of her client. For that reason, a regulation suitable for judges does not readily translate into a regulation suitable for lawyers, which is subject to strict scrutiny under the First Amendment.

And even if the premise that lawyers and judges should be subject to the same rules were sound, Proposed 8.4(g) would fail because it does not even provide lawyers with the protections accorded to judges under the Pennsylvania Code of Judicial Conduct. For example, Rule 3.6 prohibits judges’ affiliation with discriminatory organizations. But its comments at least attempt to provide some guidance as to how to determine which organizations trigger this prohibition.<sup>95</sup>

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<sup>93</sup> See *supra* note 4, at 3.

<sup>94</sup> See *supra* note 2, at 3.

<sup>95</sup> Pa. St. CJC Rule 3.6, cmt. [2].

And at least, there is reassurance that “[a] judge’s membership in a religious organization as a lawful exercise of the freedom of religion is not a violation” of the rule.<sup>96</sup> Proposed Rule 8.4(g) lacks even this minimal reassurance.

Surprisingly, Proposed Rule 8.4(g) actually sweeps more conduct into its prohibition than does the overly broad ABA Model Rule 8.4(g). The latter prohibits conduct that is harassment or discrimination based on -- *but only based on* -- the eleven protected classes that it lists. In contrast, Proposed Rule 8.4(g) is much broader in scope because it prohibits *all* words and conduct that knowingly manifest bias or prejudice, or engage in harassment or discrimination. But Proposed Rule 8.4(g)’s prohibition is not limited to the list of eleven protected classes. *Because the list of eleven protected classes is preceded by “including but not limited to,” Proposed Rule 8.4(g) prohibits all words that “manifest bias, prejudice, harassment, or discrimination.”* That is breathtakingly broad and most certainly unconstitutional.

According to the Board’s commentary accompanying Proposed Rule 8.4(g), the Board is trying to limit the scope of prohibited conduct by defining “bias, prejudice, harassment, or discrimination” “as those terms are defined in federal, state or local statutes or ordinances.” But this attempt at using “federal, state or local statutes or ordinances” to define “bias, prejudice, harassment, and discrimination” does not work in the 2019 version any better than it worked in the 2018 version, which would have made it professional misconduct for a lawyer to tell “lawyer jokes.”<sup>97</sup>

While some of the worst language of the 2018 version has been deleted, the 2019 version remains equally problematic. As a practical matter, what exactly does it mean to define “bias, prejudice, harassment, or discrimination” “as those terms are defined in applicable federal, state or local statutes or ordinances”? Does it mean that the same limitations on the scope of federal, state and local statutes or ordinances apply to limit the scope of Proposed Rule 8.4(g)? For example, it is not “discrimination” under federal law for a religious employer to “discriminate” on the basis of religion when hiring or firing employees. Does that religious exemption protect lawyers who work for religious organizations when they choose to hire an attorney based on her religious beliefs? Does the 15-person limitation on the applicability of federal employment discrimination law mean that a solo practitioner or a small legal firm with 14 employees cannot be found to have engaged in harassment or discrimination otherwise prohibited by Proposed Rule 8.4(g)? Or does Proposed Rule 8.4(g) take the definitions of “bias, prejudice, harassment, or discrimination” in these laws but leaves behind the balanced protections included by Congress or the Pennsylvania General Assembly?

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<sup>96</sup> Pa. St. CJC Rule 3.6, cmt. [4].

<sup>97</sup> The 2018 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 (July 18, 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>.

Nor is it clear where the various definitions of “bias, prejudice, harassment, or discrimination” are to be found.<sup>98</sup> What happens when there is a conflict in the definitions at the federal, state, or local levels? Does Proposed Rule 8.4(g) look only to statutes and ordinances, or does it also prohibit “bias, prejudice, harassment, or discrimination” as defined by administrative agencies’ regulations or guidance, or a president’s or governor’s executive order? What if an administrative agency’s guidance arguably exceeds its statutory authority?

Proposed Rule 8.4(g) has an accompanying proposed Comment [4], which states that “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.” But “*guide*” is not the same as “*governs*.” As a result, the definitions of “bias, prejudice, harassment or discrimination” remain malleable and, therefore, unconstitutionally vague. The typical lawyer who may be an expert in real estate law, commercial transactions, securities law, intellectual property, or any of the other areas of legal expertise is unlikely to be well-versed in federal and state constitutional law or all the various discrimination laws. The typical lawyer will find it difficult to know which of her words constitute “bias, prejudice, harassment, or discrimination” under current federal, state, or local statutes or ordinances.

**D. The application of Proposed Rule 8.4(g) would vary depending on the locality in which a Pennsylvania attorney practices.**

Here we come to perhaps the most troubling aspect of Proposed Rule 8.4(g): It will not apply uniformly to all Pennsylvania attorneys. The inclusion of local statutes or ordinances means that Proposed Rule 8.4(g) will apply to Pennsylvania lawyers differently depending on where they practice law in Pennsylvania. That is, speech spoken by a Philadelphia lawyer might constitute professional misconduct because it violates a Philadelphia nondiscrimination ordinance, while the same speech spoken by a Lancaster lawyer does not constitute professional misconduct because it does not violate Lancaster’s nondiscrimination ordinance.

A good rule promotes consistency in its application. But Proposed Rule 8.4(g), by its very terms, promotes inconsistency in its application to Pennsylvania lawyers, which hardly seems wise or fair.

**E. Proposed Rule 8.4(g) is also problematic because it does not require that the prohibited “bias, prejudice, harassment, or discipline” be unlawful under federal, state, or local statutes or ordinances.**

The 2016 Proposed Rule 8.4(g) actually required that a lawyer be found by a *tribunal other than disciplinary counsel* to have acted *unlawfully* in violation of a federal, state or local law.<sup>99</sup> The 2018 and 2019 Proposed Rule 8.4(g) abandoned these important limitations. The tribunal of first and only resort may be the Disciplinary Board and its counsel, which is highly problematic as the Board recognized in its commentary accompanying the 2016 Proposed Rule

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<sup>98</sup> Alaska Att’y Gen. Letter, *supra* note 5, at 6-7.

<sup>99</sup> See *supra* note 3.

8.4(g).<sup>100</sup> Unlike the 2016 Proposed Rule 8.4(g), the 2019 Proposed Rule 8.4(g) looks to federal, state, or local nondiscrimination laws only for their definition of “bias, prejudice, harassment, or discrimination.” It does not require that the words or conduct actually violate those laws before they can serve as the basis for a disciplinary complaint against an attorney.

**VII. Proposed Rule 8.4(g) could 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.’”<sup>101</sup> 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.”<sup>102</sup>

He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:<sup>103</sup>

*[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

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<sup>100</sup> *Id.*

<sup>101</sup> 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.

<sup>102</sup> *Id.* at 6.

<sup>103</sup> *Id.* at 7 (emphasis supplied).

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.”<sup>104</sup> 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.<sup>105</sup>

The potential consequences for firms’ efforts to promote diversity 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 before adopting it in Pennsylvania.

### **VIII. Proposed Rule 8.4(g) could limit Pennsylvania 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).*”<sup>106</sup>

As Professor Rotunda and Professor Dzienkowski explained, Rule 1.16 actually “deals with when a lawyer must or may *reject* a client or *withdraw* from representation.”<sup>107</sup> Rule 1.16 does not address *accepting* clients.<sup>108</sup> Moreover, as Professor Rotunda and Professor

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<sup>104</sup> *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.”)

<sup>105</sup> 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.”

<sup>106</sup> 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](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf) (emphasis supplied).

<sup>107</sup> Rotunda & Dzienkowski, *supra* note 43, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise” (emphasis supplied by the authors).

<sup>108</sup> At least two state attorneys general concur 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

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.”<sup>109</sup>

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.”<sup>110</sup> 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 only to allow what was already required, not declinations that are discretionary. Dean McGinniss warns that “if state bar authorities consider a 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).”<sup>111</sup>

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.*”<sup>112</sup> 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).<sup>113</sup>

In *Stropnick v. Nathanson*,<sup>114</sup> 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.<sup>115</sup> 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.

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representation, may be accused of discriminating against the client under Proposed Rule 8.4(g).” Tenn. Att’y Gen. Letter, *supra* note 17, at 11; Alaska Att’y Gen. Letter, *supra* note 5, at 8-9.

<sup>109</sup> See Rotunda & Dzienkowski, *supra* note 43.

<sup>110</sup> McGinniss, *supra* note 12, at 207-209.

<sup>111</sup> *Id.* at 207-208 & n.146, citing Stephen Gillers, *supra* note 10, 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.”

<sup>112</sup> N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).

<sup>113</sup> *Id.* New York’s Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is narrower.

<sup>114</sup> 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).

<sup>115</sup> Rotunda & Dzienkowski, *supra* note 43, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

**IX. Does the Disciplinary Board have adequate resources to be the tribunal of first resort for an increased number of discrimination and harassment claims, including employment discrimination claims?**

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).<sup>116</sup> The ODC quoted from a February 23, 2016, email from the National Organization of Bar Counsel (“NOBC”) to its members explaining that the NOBC 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.”<sup>117</sup>

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.”<sup>118</sup> 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.”<sup>119</sup> 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.”<sup>120</sup>

In December 2016, this Board 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.”<sup>121</sup> 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.”<sup>122</sup> 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

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<sup>116</sup> 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](https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Letter%20of%20Chief%20Disciplinary%20Counsel%20Opposing%208.4.pdf).

<sup>117</sup> *Id.* at 3-4.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 3.

<sup>120</sup> *Id.* at 5.

<sup>121</sup> See *supra* note 3, at 2.

<sup>122</sup> *Id.*

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.<sup>123</sup>

Thus, ABA Model Rule 8.4(g) generates several new concerns. Increased demand may drain the limited resources of Disciplinary Board as it serves as the tribunal of first resort for an increased number of discrimination and harassment claims against lawyers and law firms. 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 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.”<sup>124</sup> Nor is “an allegedly injured party [required] to first invoke the civil legal system” before a lawyer can be charged with discrimination or harassment.<sup>125</sup>

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).<sup>126</sup>

Unsurprisingly, Professor Rotunda and Professor Dzienkowski disagree with the proponents of ABA Model Rule 8.4(g) that lawyers “should rely on prosecutorial discretion because disciplinary boards do not have the resources to prosecute every violation.” They warn

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<sup>123</sup> *Id.*

<sup>124</sup> Rotunda & Dzienkowski, *supra* note 43 (parenthetical in original).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

that “[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas.”<sup>127</sup>

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. ABA Model Rule 8.4(g) and Proposed Rule 8.4(g) do not provide the clear enforcement standards that are necessary when the loss of one’s livelihood is at stake.

### **Conclusion**

Lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts without fear of losing their license to practice law. Because Proposed Rule 8.4(g) will chill lawyers’ freedom to express their viewpoints on political, social, religious, and cultural issues, as well as for the additional reasons given in this letter, the Board should again “determine[] not to move forward with the proposed amendments, and renew[] its study of the issue.”<sup>128</sup> At a minimum, the Board should wait 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 Pennsylvania attorneys the laboratory subjects in the ill-conceived experiment that ABA Model Rule 8.4(g) represents. A decision to reject Proposed Rule 8.4(g) can always be revisited, but the damage its premature adoption may do to Pennsylvania attorneys cannot be undone.

Pennsylvania holds a special place in our nation’s history. The lawyers who gathered in Philadelphia in 1776 to write the Declaration of Independence would likely have added ABA Model Rule (g) to their list of grievances against King George. Those lawyers valued their freedom to speak disfavored political views above their “lives, fortunes, and sacred honor.” A speech code, no matter how well-intentioned, breaks faith with those bold lawyers. We respectfully urge the Board “to preserve and teach the necessity of freedom of speech for the generations to come”<sup>129</sup> and reject Proposed Rule 8.4(g).

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

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<sup>127</sup> *Id.*

<sup>128</sup> See *supra* note 4, at 1.

<sup>129</sup> *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

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Respectfully submitted,

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