



*Seeking Justice with the Love of God*

February 16, 2018

The Honorable Roger S. Burdick, Chief Justice  
The Honorable Joel D. Horton, Justice  
The Honorable Robyn M. Brody, Justice  
The Honorable G. Richard Bevan, Justice  
The Idaho Supreme Court  
P.O. Box 83720  
Boise, ID 83720-0101

**Re: Comment Letter Opposing Adoption of Proposed I.R.P.C. 8.4(g)**

Dear Chief Justice Burdick, Justice Horton, Justice Brody, and Justice Bevan:

If adopted, proposed I.R.P.C. 8.4(g) would operate as a speech code for Idaho attorneys. In too many ways, proposed I.R.P.C. 8.4(g) retains the flaws of the highly criticized and deeply flawed ABA Model Rule 8.4(g), which was adopted by the American Bar Association at its annual meeting in San Francisco, California, in August 2016.

ABA Model Rule 8.4(g) has been condemned by highly respected scholars as a speech code for lawyers.<sup>1</sup> Fortunately, it can only operate in those states in which the highest court adopts it; and to date, only the Vermont Supreme Court has adopted it. Because the rule took effect in Vermont only five months ago, no empirical evidence yet exists as to the effect its implementation will have on bar members.

This Court should reject proposed I.R.P.C. 8.4(g) because its broad scope will irreparably harm Idaho attorneys' First Amendment rights. See pp. 6-15. This is particularly true because proposed I.R.P.C. 8.4(g) was drafted without the benefit of the United States Supreme Court's decision in *Matal v. Tam*, 137 U.S. 1744 (June 19, 2017). It would be prudential for this Court to "remand" I.R.P.C. 8.4(g) for reconsideration in light of the *Matal* decision. See pp. 21-22.

At a minimum, this Court 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 other states adopt it. Otherwise Idaho attorneys will be the laboratory subjects for the ill-conceived experiment that

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<sup>1</sup> For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, discusses why ABA Model Rule 8.4(g) would impose a speech code on lawyers in a Federalist Society video at <https://www.youtube.com/watch?v=AfpdWmlOXbA>. Professor Volokh debated a proponent of ABA Model Rule 8.4(g) at the Federalist Society National Student Symposium in March 2017. <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>. Highly respected constitutional scholar and ethics expert, Professor Ronald Rotunda, and Texas Attorney General Ken Paxton debated two leading proponents of Model Rule 8.4(g) at the Federalist Society National Lawyers Convention in November 2017. <https://www.youtube.com/watch?v=V6rDPjqBcOg>. Professor Rotunda also has written a lengthy memorandum about the Rule's threat to lawyers' First Amendment rights. 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>.

ABA Model Rule 8.4(g) represents. There is no reason to impose a risky rule on Idaho attorneys, when this Court has a readily available option of waiting and seeing whether other states adopt ABA Model Rule 8.4(g), and then observing its impact on those states' attorneys.

Nor is there need for haste because current Comment [3], which already accompanies I.R.P.C. 8.4(d), adequately meets any extant need. Unlike proposed I.R.P.C. 8.4(g), current Comment [3] strikes the appropriate balance between disciplinary concerns and Idaho attorneys' First Amendment rights. In contrast, proposed I.R.P.C. 8.4(g) threatens Idaho attorneys' First Amendment rights.

Idaho should not become the second state, in company only with Vermont, to adopt the newly minted, deeply flawed ABA Model Rule 8.4(g). Instead, it should wait to see if other states choose to roll the dice with ABA Model Rule 8.4(g) and learn from other states' experience before adopting a new black-letter rule that will chill Idaho attorneys' speech.

**I. Proposed I.R.P.C. 8.4(g) Would Impose a Significantly Heavier Burden on Idaho Attorneys than Does Current Comment [3].**

The texts of current Comment [3] and the proposed I.R.P.C. 8.4(g) can be found in the Appendix attached at the end of this letter. The scope of I.R.P.C. 8.4(g) is significantly broader than current Comment [3] in several critical aspects, including the following four ways:

**1. Proposed I.R.P.C. 8.4(g) is remarkably broader in the conduct it regulates:** Current Comment [3] is limited to when a lawyer is acting "in the course of representing a client," whereas proposed I.R.P.C. 8.4(g) applies much more broadly. In the context of harassment, proposed I.R.P.C. 8.4(g) expands the scope of disciplinary liability to all "conduct related to the practice of law," which is defined as broadly as possible to include not only "representing clients," but also "interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business *or social activities* in connection with the practice of law." Proposed Comment [4] (emphasis added.)

As discussed below at pp. 7-13, proposed I.R.P.C. 8.4(g) would apply to *almost everything that a lawyer does, including his or her social activities* if they are arguably related to the practice of law. It would also apply to *anyone* that a lawyer interacts with during any conduct arguably related to the practice of law.

Even in the context of discrimination, proposed I.R.P.C. 8.4(g) would substantially broaden the scope of disciplinary liability beyond the current Comment [3]. It would apply beyond conduct "in representing a client" to include conduct in the "operating or managing a law practice."

**2. Proposed I.R.P.C. 8.4(g) is not limited to conduct that is “prejudicial to the administration of justice”:** Current Comment [3] requires that a lawyer’s actions be “prejudicial to the administration of justice” before professional misconduct can be found. Proposed I.R.P.C. 8.4(g) abandons this traditional limitation, leaving a lawyer subject to disciplinary liability even though his or her conduct has not prejudiced the administration of justice, greatly expanding the regulatory reach of the proposed rule.

**3. Proposed I.R.P.C. 8.4(g) dispenses with the mens rea requirement of current Comment [3]:** Current Comment [3] requires that a lawyer “knowingly” manifest bias or prejudice, whereas proposed I.R.P.C. 8.4(g) adopts a negligence standard by including conduct that a lawyer “reasonably should know” violates the proposed rule. A lawyer could violate proposed I.R.P.C. 8.4(g) without even realizing he or she has done so. This change is particularly perilous because the list of words and conduct that are deemed “discriminatory” or “harassing” is ever expanding in novel and unanticipated ways.

**4. Proposed I.R.P.C. 8.4(g) adds three new protected statuses:** Current Comment [3] already protects “race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status.” Proposed I.R.P.C. 8.4(g) would add gender identity, marital status, and ethnicity to current Comment [3]’s list of protected statuses.

## **II. Only the Vermont Supreme Court has 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>2</sup> *But this claim is factually incorrect. ABA Model Rule 8.4(g) has not been adopted by any state’s highest court, except Vermont.* Vermont’s implementation of ABA Model Rule 8.4(g) began less than five months ago, on September 18, 2017.

As a result, no empirical evidence exists to support the claim that ABA Model Rule 8.4(g) “will not impose an undue burden on lawyers.” Idaho should not become the testing ground for this deeply flawed rule.

Despite the ABA’s claim to the contrary, ABA Model Rule 8.4(g) does not replicate any prior black-letter rule adopted by a state’s highest court. Before 2016, twenty-four states and the District of Columbia had adopted some version of a black-letter rule dealing with “bias” issues.<sup>3</sup> *But each of these black-letter rules is narrower than ABA Model Rule 8.4(g).*

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<sup>2</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, available at [https://www.sbar.org/media/filer\\_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod\\_materials\\_january\\_2017.pdf](https://www.sbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf), at 56-57.

<sup>3</sup> Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Prof. Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015,

Basic differences exist between state black-letter rules and ABA Model Rule 8.4(g):

- Many states' black-letter rules apply only to *unlawful discrimination* and require that a tribunal other than the state bar first find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.
- Many states limit their rules to “conduct in the course of representing a client,” in contrast to ABA Model Rule 8.4(g)'s expansive scope of “conduct related to the practice of law.”
- Many states require that the misconduct be prejudicial to the administration of justice.
- Almost no state black-letter rule enumerates all eleven of the ABA Model Rule 8.4(g)'s protected characteristics.
- No black-letter rule utilizes ABA Model Rule 8.4(g)'s “circular non-protection” for “legitimate advocacy . . . consistent with these rules.”

Thirteen states, including Idaho, have adopted a comment, rather than a black-letter rule, dealing with “bias” issues. Fourteen states have adopted neither a black-letter rule nor a comment addressing “bias” issues.

Because no state, except Vermont, has adopted ABA Model Rule 8.4(g), it has no track record in any state. (Vermont's implementation began just five months ago.) Empirical evidence demonstrating a need in Idaho for the adoption of the proposed rule has not been provided. And current Comment [3] already adequately addresses any need.

### **III. Official Bodies in Illinois, Maine, Montana, Pennsylvania, Texas, and South Carolina Have Rejected Model Rule 8.4(g), and Nevada and Louisiana Have Abandoned Efforts to Impose It on Their Attorneys.**

In several states, the state supreme court, state legislature, state attorney general, state bar association, professional ethics committee, or disciplinary counsel has already officially opposed adoption of ABA Model Rule 8.4(g). The reasons for opposition center on the fact that it will function as a speech code for lawyers, is a novel social experiment in the regulation of attorneys, raises significant due process issues, and is likely to overwhelm the scarce resources of

disciplinary counsel. After consideration, many states have concluded that they do not want to become the laboratory for testing this deeply flawed rule.

Two state supreme courts have officially rejected adoption of ABA Model Rule 8.4(g). In June 2017, the Supreme Court of **South Carolina** rejected adoption of the rule.<sup>4</sup> The Court acted after the House of Delegates of the South Carolina Bar, as well as the South Carolina Attorney General, recommended against its adoption.<sup>5</sup> On November 30, 2017, the Supreme Court of **Maine** announced it had “considered, but not adopted, the ABA Model Rule 8.4(g).”<sup>6</sup>

On September 25, 2017, the Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g).<sup>7</sup> In a letter to the Court, dated September 6, 2017, the State Bar President explained that “the language used in other jurisdictions was inconsistent and changing,” and therefore, “the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions.”

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>8</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 Montana Legislature.<sup>9</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>10</sup>

On December 2, 2016, the Disciplinary Board of the Supreme Court of **Pennsylvania** explained that ABA Model Rule 8.4(g) was too broad:

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<sup>4</sup> <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01>.

<sup>5</sup> <http://2hsvz0174ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf>.

<sup>6</sup> [http://www.courts.maine.gov/rules\\_adminorders/rules/proposed/mr\\_prof\\_conduct\\_proposed\\_amend\\_2017-11-30.pdf](http://www.courts.maine.gov/rules_adminorders/rules/proposed/mr_prof_conduct_proposed_amend_2017-11-30.pdf) at 2 (announcing comment period on alternative language).

<sup>7</sup> <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>.

<sup>8</sup> <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>.

It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.<sup>11</sup>

On December 10, 2016, the **Illinois** State Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule in Illinois.”<sup>12</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 the House of Delegates or to the Supreme Court.”<sup>13</sup>

It is instructive that, after examining more closely ABA Model Rule 8.4(g), official bodies in numerous states have concluded that it is too defective to impose on attorneys. The great advantage of a federalist system is that one state can reap the benefit of other states’ trial-and-error. Prudence counsels a course of 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.

#### **IV. The Expansive Scope of ABA Model Rule 8.4(g) and Proposed I.R.P.C. 8.4(g) Threatens Idaho Attorneys’ Freedom of Expression and Free Exercise of Religion.**

To understand why proposed I.R.P.C. 8.4(g) should not be adopted, it is necessary to analyze the severe defects of ABA Model Rule 8.4(g). The claim that proposed I.R.P.C. 8.4(g) has cured the defects of ABA Model Rule 8.4(g) is unsupported, as will be shown in Part VIII at pp. 18-22 below. But first it is necessary to examine the defects of ABA Model Rule 8.4(g) because proposed I.R.P.C. 8.4(g) shares those flaws.

In August 2016, the American Bar Association’s House of Delegates adopted a new disciplinary rule, ABA Model Rule 8.4(g), making it professional misconduct for a lawyer to engage in harassment or discrimination in conduct related to the practice of law on the basis of

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<sup>11</sup> <http://www.pabulletin.com/secure/data/vol46/46-49/2062.html>.

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

<sup>13</sup> <https://www.lisba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

eleven protected characteristics.<sup>14</sup> Unfortunately, in adopting the new model rule, the ABA largely ignored over 450 comment letters,<sup>15</sup> most opposed to the proposed 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 change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).<sup>16</sup>

ABA Model Rule 8.4(g) poses a serious threat to attorneys' First Amendment rights. Similarly, proposed I.R.P.C. 8.4(g) would have a chilling effect on Idaho attorneys' free speech, religious exercise, assembly, and expressive association.<sup>17</sup>

**A. ABA Model Rule 8.4(g) and Proposed I.R.P.C. 8.4(g) Would Function as a Speech Code for Attorneys.**

There are many areas of concern with the proposed rule. Perhaps the most troubling is its potential use to punish lawyers for expressing disfavored political, social, and religious viewpoints on a multitude of controversial issues. Because lawyers often are the spokespersons and leaders in political, social, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on such issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief.

Two highly respected constitutional scholars have written about their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. Professor Ronald Rotunda has written a treatise on American constitutional law,<sup>18</sup> as well as the ABA's treatise on

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<sup>14</sup> The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016, [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/final\\_revised\\_resolution\\_and\\_report\\_109.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf).

<sup>15</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>16</sup> Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the 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%20MRPC%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%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf).

<sup>17</sup> The Attorney General of Texas issued an opinion 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." Texas A.G. Op. No. KP-0123, 2016 WL 7433186 (Dec. 20, 2017), <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>.

<sup>18</sup> See, e.g., AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME I – INSTITUTIONAL POWERS (West Academic Publishing, St. Paul, MN. 2016); AMERICAN

legal ethics.<sup>19</sup> He initially wrote about the problem ABA Model Rule 8.4(g) poses for lawyers' speech in a *Wall Street Journal* article entitled "The ABA Overrules the First Amendment,"<sup>20</sup> where he explained that:

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.

Professor Rotunda also wrote a lengthy critique of ABA Model Rule 8.4(g) for the Heritage Foundation, entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought."<sup>21</sup> His analysis is essential to understanding the threat that the new rule poses to attorneys' freedom of speech.

At the Federalist Society's 2017 National Lawyers Convention, Professor Rotunda and Texas Attorney General Ken Paxton participated in a panel discussion with former ABA President Paulette Brown and Professor Stephen Gillers on ABA Model Rule 8.4(g).<sup>22</sup> In the opinion of many, the proponents of the rule failed to provide adequate responses to the free speech concerns it creates.

Influential First Amendment scholar and editor of the daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has similarly warned that the new rule is a speech code for lawyers in a two-minute video released by the Federalist Society.<sup>23</sup> In a debate at the Federalist Society's 2017 National Student Symposium, Professor Volokh demonstrated the flaws of ABA Model Rule 8.4(g), despite the rule's proponent's unsuccessful attempts to gloss over its flaws.<sup>24</sup>

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CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME II – LIBERTIES (West Academic Publishing, St. Paul, MN. 2016); Principles of Constitutional Law (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).

<sup>19</sup> *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016). In their April 2017 update to the *Deskbook*, Professor Rotunda and Professor John S. Dzienkowski provide extensive criticism of ABA Model Rule 8.4(g). *Legal Ethics, Law. Deskbk. Prof. Resp.* (2017-2018 ed.), §§8.4-2(j)-1 – 8.4-2(j)-6.

<sup>20</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>21</sup> Ronald D. Rotunda, "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," The Heritage Foundation, Oct. 6, 2016, <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>.

<sup>22</sup> <https://www.youtube.com/watch?v=V6rDPjqBcQg>.

<sup>23</sup> <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

<sup>24</sup> <https://www.youtube.com/watch?v=cOivGxOUx4g>.

Professor Volokh has also given examples of potential violations of ABA Model Rule 8.4(g):

Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

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>25</sup>

These red flags should not be ignored. The proposed rule would create a multitude of potential problems for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, or otherwise engage in public discussions regarding current political, social, and religious questions.

**1. By expanding its coverage to include all "conduct related to the practice of law," proposed I.R.P.C. 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.**

Proposed I.R.P.C. 8.4(g) raises troubling new concerns for every Idaho attorney because it explicitly applies to all "conduct related to the practice of law" in the harassment context. First, the proposed rule is explicit that "conduct" encompasses "speech," when it states that "[h]arassment is derogatory or demeaning *verbal, written, or physical* conduct." (Emphasis added.) In the discrimination context, the proposed rule speaks in terms of conduct, but that also includes speech, because otherwise it would not be necessary to include the language that it does not "preclude advice or advocacy consistent with these Rules." I.R.P.C. 8.4(g).

Second, the accompanying proposed Comment [4] makes plain the extensive reach of proposed I.R.P.C. 8.4(g): "Conduct related to the practice of law includes: representing clients;

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<sup>25</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).

interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business *or social activities* in connection with the practice of law.” (Emphasis added.)

As discussed at pp. 2-3, proposed I.R.P.C. 8.4(g) greatly expands upon current Comment [3]. Proposed I.R.P.C. 8.4(g) is much broader in scope than current Comment [3], which applies only to conduct “in the course of representing a client.” Instead, proposed I.R.P.C. 8.4(g), in its definition of harassment, applies to all “conduct related to the practice of law,” including “business or social activities in connection with the practice of law.” In the discrimination definition, the proposed rule, expands beyond “in representing a client” to include “operating or managing a law practice.” This is a breathtaking expansion of the scope of current Comment [3]. Furthermore, current Comment [3] speaks in terms of “when such actions are prejudicial to the administration of justice.” But proposed I.R.P.C. 8.4(g) deletes that qualification and thereby greatly expands the reach of the rule into attorneys’ lives.

Indeed, the substantive question becomes: What conduct does proposed ABA Model Rule 8.4(g) *not* reach? Virtually everything a lawyer does is “conduct related to the practice of law.” Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Arguably, the rule includes all of a lawyer’s “business or social activities” because there is no real way to delineate between those “business or social activities” that are related to the practice of law and those that are not. Quite simply, much of a lawyer’s social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

Activities likely to fall within the proposed 8.4(g)’s scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds
- giving guest lectures at law school classes
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to nonprofits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one’s congregation
- serving one’s alma mater if it is a religious institution of higher education

- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving on the board of a fraternity or sorority
- volunteering with or working for political parties
- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues

Proposed I.R.P.C. 8.4(g) would make a lawyer subject to disciplinary liability for a host of expressive activities.

**2. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their congregations, religious schools and colleges, or other religious ministries.**

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

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to help craft her church'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 related to 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.

By chilling attorneys' speech, the rule is likely to do real harm to religious institutions and their good work in their communities. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law," yet proposed I.R.P.C. 8.4(g) creates such concerns. Because proposed I.R.P.C. 8.4(g) seems to regulate lawyers when providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyers' free speech and free exercise of religion when serving their congregations and religious institutions.

In a powerpoint presented to the Idaho State Bar Professionalism & Ethics Section, dated June 6, 2017,<sup>26</sup> the proponents of proposed I.R.P.C. 8.4(g) attempted to address this concern, but

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<sup>26</sup> "ABA Model Rule 8.4(g): CLE Presented to the ISB Professionalism & Ethics Section June 6, 2017," at 10, <https://isb.idaho.gov/wp-content/uploads/Idaho-Draft-Rule-8.4g-CLE-004.pdf>.

their attempt failed to reassure. It posed the question as “I serve on the board of a church that, as a policy, does not perform gay marriages. What if, as part of my duties on the board, I speak in favor of that policy. Am I subject to discipline under this rule?” Its answer was that “[t]he rule does not prohibit you from freely expressing a viewpoint in your role on the board.” But the question and answer sidestep the real scenario of a lawyer not simply “expressing a viewpoint” but actually doing the substantive legal work of drafting or reviewing the policy. This is clearly legal work that goes beyond “expressing a viewpoint.”

### **3. Attorneys’ public speech on political, social, cultural, and religious topics would be subject to discipline.**

Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions regarding the pros and cons of various legal questions regarding sensitive social and political issues. Of course, lawyers are asked to speak *because they are lawyers*. A lawyer’s speaking engagements often have a dual purpose of increasing the lawyer’s visibility and creating new business opportunities.

**Writing** -- “Conduct” includes written communication, as I.R.P.C. 8.4(g) explicitly states. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar? If so, public discourse and civil society will suffer from the ideological paralysis that proposed I.R.P.C. 8.4(g) will impose on lawyers.

**Speaking** -- It would seem that all public speaking by lawyers on legal issues falls within proposed I.R.P.C. 8.4(g)’s prohibition. But even if some public speaking were to fall outside the parameters of “conduct related to the practice of law,” how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various protected characteristics in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a state legislative committee against amending a nondiscrimination law to add any or all the protected statuses listed in proposed I.R.P.C 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?<sup>27</sup>

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<sup>27</sup> The Montana Legislature cited similar concerns in its joint resolution opposing adoption of Model Rule 8.4(g). Joint Resolution SJ 15 at 3 (April 12, 2017) (Model Rule 8.4(g) could adversely affect “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”), <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including lawyers, are eager to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, proposed I.R.P.C. 8.4(g) chills attorneys' speech.

**4. Attorneys' membership in religious, social, or political organizations would be subject to discipline.**

Proposed I.R.P.C. 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibits all California state judges from participating in Boy Scouts because of the organization's teaching regarding sexual conduct.<sup>28</sup>

Would proposed I.R.P.C. 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? 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?

Proposed I.R.P.C. 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or numerous other religious beliefs implicated by proposed I.R.P.C. 8.4(g). As the Texas Attorney General observed in his opinion, "Model Rule 8.4(g) could be applied to restrict an attorney's freedom to associate with a number of political, social, or religious legal organizations."<sup>29</sup>

**B. ABA Model Rule 8.4(g) Would Institutionalize Viewpoint Discrimination Against Many Lawyers' Public Speech on Current Political, Religious, and Social Issues.**

As seen in Comment [4] that accompanies ABA Model Rule 8.4(g), the rule would explicitly protect some viewpoints over others by allowing lawyers to "engage in conduct

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<sup>28</sup> 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>29</sup> Tex. A.G. Op. No. KP-0123, December 20, 2016, at 5, <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>.

undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.” Because “conduct” includes “verbal conduct,” the proposed rule would impermissibly favor speech that “promote[s] diversity and inclusion” over speech that does not.

That is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is “an egregious form of content discrimination,” and that “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”<sup>30</sup> Yet ABA Model Rule 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, whether speech or action does or does not “promote diversity and inclusion” completely depends on the beholder’s subjective beliefs. Where one person sees inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of uniformity.

Because enforcement of Model Rule 8.4(g) would give governmental officials unbridled discretion to determine which speech is permissible and which is impermissible, which speech “promote[s] diversity and inclusion” and which does not, the rule clearly countenances viewpoint discrimination based on governmental officials’ subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens’ free speech is unconstitutional viewpoint discrimination.<sup>31</sup>

Evidently, the proponents of I.R.P.C. 8.4(g) recognized that the language in Comment [4] that accompanies ABA Model Rule 8.4(g) was blatant viewpoint discrimination, because they deleted the sentence that protected “conduct undertaken to promote diversity and inclusion.” But by deleting the sentence, the proponents seem to concede that such conduct would violate I.R.P.C. 8.4(g). That is, the ABA felt it necessary to include explicit language in its Comment [4] in order to protect “initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations” from being found discriminatory under ABA Model Rule 8.4(g). The deletion of the protective language would suggest that law firms that sponsor such initiatives might be subject to a disciplinary complaint by disgruntled applicants or employees under I.R.P.C. 8.4(g).

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<sup>30</sup> *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

<sup>31</sup> *See, e.g., Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4<sup>th</sup> Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7<sup>th</sup> Cir. 2001).

**C. Who determines whether advocacy is “legitimate” or “illegitimate” for purposes of ABA Model Rule 8.4(g)?**

ABA Model Rule 8.4(g) cursorily states that it “does not preclude *legitimate* advice or advocacy *consistent with these rules*.” The epitome of an unconstitutionally vague rule, ABA Model Rule 8.4(g) violates the Fourteenth Amendment as well as the First Amendment. Who decides which speech is “legitimate” and which speech is “illegitimate”? By whose standards? It is not good for the profession, or for a robust civil society, for lawyers to be potentially subject to disciplinary action every time they speak or write on a topic that may cause someone who disagrees to file a disciplinary complaint to silence them.

Evidently recognizing that the use of “legitimate” created yet another significant constitutional hurdle for ABA Model Rule 8.4(g), the proponents of proposed I.R.P.C. 8.4(g) commendably deleted the modifier “legitimate.” Unfortunately, they retained the qualifying phrase “consistent with these rules,” which makes proposed I.R.P.C. 8.4(g) utterly circular. Like the proverbial dog chasing its tail, proposed I.R.P.C. 8.4(g) protects “advice or advocacy” only if it is “consistent with these rules,” including proposed I.R.P.C. 8.4(g). That is, speech is permitted by proposed I.R.P.C. 8.4(g) if it is permitted by proposed I.R.P.C. 8.4(g).

**V. ABA Model Rule 8.4(g)’s and Proposed I.R.P.C. 8.4(g)’s Threat to Lawyers’ Constitutional Rights is Compounded by the Fact that They Utilize a Negligence Standard rather than a Knowledge Requirement.**

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>32</sup>

**VI. The Vermont Supreme Court has Interpreted ABA Model Rule 8.4(g) as Limiting a Lawyer’s Ability to Accept, Decline, or Withdraw from a Representation in accordance with Rule 1.16.**

The Vermont Supreme Court adopted ABA Model Rule 8.4(g), including its provision that it “does not limit the ability of a lawyer to accept, decline, or withdraw from a representation

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<sup>32</sup> Prof. Dane S. Ciolino, “LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct,” *Louisiana Legal Ethics*, Aug. 6, 2017, <https://lalegaethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/> (original emphasis).

in accordance with Rule 1.16.” But 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.” It 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>33</sup> The Vermont Supreme Court’s Comment [4] creates reasonable doubt that Rule 1.16 provides adequate protection for attorneys’ ability to accept, decline, or withdraw from a representation.

Also of concern, 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>34</sup> (Emphasis added.) 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>35</sup>

## **VII. Bar Officials in California and Pennsylvania Have Expressed Grave Reservations About Whether State Bars Have the Resources to Act as Tribunals of First Resort for Employment Claims Against Attorneys and Law Firms.**

A memorandum outlining Pennsylvania’s proposed Rule 8.4(g) correctly identified two defects of ABA Model Rule 8.4(g). The memorandum identified the first defect to be 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>36</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>37</sup>

Likewise, California State Bar authorities voiced serious concern when considering whether to modify their disciplinary rule to something more akin to the ABA Model Rule 8.4(g). California’s current Rule 2-400 requires that a separate judicial or administrative tribunal first have found that a lawyer committed unlawful discrimination before disciplinary charges can be brought. According to Justice Lee Smalley Edmon, the presiding justice of the Second District,

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<sup>33</sup> [https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVPr8.4\(g\).pdf](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVPr8.4(g).pdf).

<sup>34</sup> NY Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017).

<sup>35</sup> *Id.*

<sup>36</sup> “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>37</sup> *Id.*

Division Three of the California Courts of Appeals and the Chair of the State Bar's Second Commission for the revision of the Rules of Professional Conduct, "[t]he proposed elimination of current Rule 2-400(C)'s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings."<sup>38</sup> For that reason, she explained, an alternative was being offered to leave in place Rule 2-400(C)'s requirement that an attorney cannot be disciplined for unlawful discrimination unless a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law and any appeal is final and leaves the finding of unlawful discrimination standing.

An official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court's adjudicatory process and the state civil courts' adjudicatory processes.<sup>39</sup> In the words of the State Bar Court official, "the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings."<sup>40</sup> First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different. "State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases."<sup>41</sup> Any relevant evidence must be admitted, and hearsay evidence may be used. Third, "[i]n disciplinary proceedings, attorneys are not entitled to a jury trial."<sup>42</sup>

The California Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement. It described the problems with the requirement's deletion as follows:

Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, . . . lack of [the State Bar's Office of Chief Trial Counsel] resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in

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<sup>38</sup>Justice Lee Smalley Edmon, "*Wanted: Input on Proposed Changes to the Rules of Professional Conduct*," California Bar Journal, August 2016, <http://calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx>.

<sup>39</sup>Commission Provisional Report and Recommendation: Rule 8.4.1 [2-400], at 9, [http://ethics.calbar.ca.gov/Portals/9/documents/2d\\_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20\[2-400\]%20-%20Rule%20-%20DFT5%20\(02-19-16\)%20w-ES-PR.pdf](http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20[2-400]%20-%20Rule%20-%20DFT5%20(02-19-16)%20w-ES-PR.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

otherwise unrelated civil disputes between lawyers and former clients.<sup>43</sup>

A lawyer's loss of his or her license to practice law is a heavy penalty and demands a stringent process, one in which the standards for enforcement are rigorous and respectful of the attorneys' rights, as well as the rights of others. Current Comment [3] that accompanies I.R.P.C. 8.4(d) already provides a carefully crafted balance and should be retained.

### **VIII. Proposed I.R.P.C. 8.4(g)'s Attempts to Ameliorate ABA Model Rule 8.4(g)'s Damage to Attorneys' Free Speech Are Inadequate.**

Despite commendable attempts to apply the proverbial "lipstick to a pig," proposed I.R.P.C. 8.4(g), like its progenitor ABA Model Rule 8.4(g), would function as a speech code for Idaho lawyers. ABA Model Rule 8.4(g) is too deeply flawed to fix by making a few cosmetic changes that largely consist of rearranging words and phrases. For that reason, proposed I.R.P.C. 8.4(g) should be rejected. The stakes are too high for Idaho lawyers to adopt a rule like I.R.P.C. 8.4(g) that, despite commendable efforts, suffers from such serious constitutional and administrative defects.

#### **A. Is it wise to treat discrimination and harassment differently?**

In an attempt to salvage ABA Model Rule 8.4(g), the proponents of I.R.P.C. 8.4(g) adopted the novel approach of bifurcating the rule into two separate definitions of discrimination and harassment. The approach is odd because harassment is, of course, a subset of discrimination, rather than an independent type of harm. For example, Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. 2000(e), prohibits discrimination in employment based on race, color, national origin, religion, and sex. It does not speak in terms of "harassment," but over time, harassment has been recognized as one manifestation of discrimination and, therefore, prohibited by Title VII.

For that reason, it seems strange to bifurcate the two. And it seems even stranger when one realizes that in bifurcating discrimination and harassment, I.R.P.C. 8.4(g) proceeds to treat harassment as a greater harm than discrimination. To be sure, both are serious harms, but one might expect proposed I.R.P.C. 8.4(g) to be equally concerned with both discrimination and harassment.

But, instead, I.R.P.C. 8.4(g) gives broader scope to the conduct that will trigger disciplinary action for harassment than for discrimination. For harassment, proposed I.R.P.C. 8.4(g) expands the scope of disciplinary liability to all "conduct related to the practice of law," which is defined as broadly as possible to include not only "representing clients," but also "interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar

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<sup>43</sup> *Id.* at 13.

association, business *or social activities* in connection with the practice of law.” Proposed Comment [4] (emphasis added.) For discrimination, proposed I.R.P.C. 8.4(g) would substantially broaden the scope of disciplinary liability beyond the current Comment [3] to include not only conduct “in representing a client” but also conduct in “operating or managing a law practice.” But the scope of the discrimination provision would still be narrower than the scope of the harassment provision for reasons that are not clear.

Moreover, the discrimination provision would be tethered to “unlawful discrimination,” while the harassment provision would apply to harassment whether or not it was unlawful. It is not clear why a lawyer could lose his or her ability to practice law for unintentionally engaging in harassment that is not unlawful. To repeat, both harassment and discrimination are serious harms, but so is taking away a person’s livelihood by taking away his or her license to practice law.

**B. Does the state bar have the resources to meet the burden that Proposed I.R.P.C. 8.4(g) imposes?**

It should also be noted that the attempt to limit I.R.P.C. 8.4(g) by limiting its application to “unlawful discrimination” is inadequate because the proposed rule fails to include the requirement found in several other states’ provisions that the discrimination be found to be unlawful by a tribunal *other than* the state bar’s adjudicatory process. States such as Illinois require that the conduct have been found to be unlawful discrimination by a tribunal other than the bar disciplinary process before a complaint can even be initiated. Proposed I.R.P.C. 8.4(g) omits this crucial protection for lawyers.

As already explained at pp. 16-18, the proposed rule would impose on state disciplinary counsel an entirely new and expansive responsibility to adjudicate complex questions of whether a lawyer’s conduct is unlawful discrimination, including in “operating or managing a law practice.” Is this a burden the bar disciplinary counsel want to assume? Those in California and Pennsylvania did not.

**C. Shouldn’t proposed I.R.P.C. 8.4(g) use the United States Supreme Court’s definition of harassment instead of a much broader definition?**

The elasticity of the term “harassment,” as defined in proposed I.R.P.C. 8.4(g), is an unconstitutional departure from the United States Supreme Court’s definition of “harassment,” which is “harassment that is so *severe, pervasive, and objectively offensive* that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (emphasis added). For that reason, proposed I.R.P.C. 8.4(g)’s definition of “harassment” diminishes the likelihood that the proposed rule can survive either a facial or an as-applied challenge to its unconstitutional vagueness under the Fourteenth Amendment or its infringement on free speech under the First Amendment.

The consequences of disciplinary action against an attorney are too great to leave the definition of “harass” open-ended or subjective. “Harassment” should not be “in the eye of the beholder,” whether that be the attorney or the alleged victim of harassment, but instead should be determined by an objective standard, as provided by the United States Supreme Court’s nineteen year-old definition of “harassment.”

The need for such an objective definition of “harassment” is apparent when one considers the courts’ uniform rejection of university speech codes over the past two decades. The courts have found that speech codes violate freedom of speech because of the overbreadth of “harassment” proscriptions and the potential for selective viewpoint enforcement.<sup>44</sup> For example, after noting the Supreme Court’s application of the overbreadth doctrine to prevent a “chilling effect on protected expression,” *DeJohn v. Temple Univ.*, 537 F.3d 301, 313-314 (3d Cir. 2008) (citing *Broadrick v. Okla.*, 413 U.S. 601, 630 (1973)), the Third Circuit quoted then-Judge Alito’s words in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001):

“Harassing” or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.”

*DeJohn*, 537 F.3d at 314 (quoting *Saxe*, 240 F.3d at 209, (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). See generally, *Matal v. Tam*, 137 S. Ct. 1744 (2017). *The DeJohn* court went on to explain, “[b]ecause overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases.” *Id.* A lawyer’s free speech should be no less protected than that of a student.

The United States Supreme Court defines “harassment” as conduct that is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis*, 526 U.S. at 633. In stark contrast, I.R.P.C. 8.4(g) changes the Supreme Court’s definition of “harassment” to be “severe or pervasive” and deletes “objectively offensive.”

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<sup>44</sup> See, e.g., *McCauley v. Univ. of V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Blair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, 1998 WL 35867183 (E.D. Ky. 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989).

Moreover, current Comment [3]’s requirement that the conduct be “prejudicial to the administration of justice” aligns with the Supreme Court’s further definitional requirement that conduct to be harassment must “effectively bar[] the victim’s access to an educational opportunity or benefit.” But I.R.P.C. 8.4(g) eliminates the requirement that the conduct be “prejudicial to the administration of justice.”

The breadth of proposed I.R.P.C. 8.4(g)’s definition of harassment is sobering. In a sentence that is intended to reassure but accomplishes the opposite, proposed Comment [3] states that “[p]etty slights, annoyances, and isolated incidents, *unless extremely serious*, will not rise to the level of harassment.” But, of course, that means that a lawyer realistically could be disciplined for “petty slights, annoyances, and isolated incidents” if determined to be “extremely serious.”

Finally and most importantly, proposed I.R.P.C. 8.4(g) suffers from the fact that it was drafted without the benefit of the United States Supreme Court’s decision in *Matal v. Tam*, 137 U.S. 1744 (2017), which was decided on June 19, 2017. There a unanimous Court held that the application of a federal law to deny a trademark because a term was “derogatory or offensive” on various grounds, including racial or ethnic grounds, violated the Free Speech Clause. *Id.* at 1754, 1765.

In his concurrence joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy explained that it is unconstitutional viewpoint discrimination for a government agency to penalize speech that it deems to be “derogatory,” stating:

At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. . . . In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as “persons, living or dead, institutions, beliefs, or national symbols.” 15 U.S.C. § 1052(a). Within that category, an applicant may register a positive or benign mark but not a *derogatory* one. The law thus reflects the Government’s disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.

*Id.* at 1766 (citation omitted) (emphasis added).

At a minimum, remanding I.R.P.C. 8.4(g) for revision in light of the *Matal* decision would seem to be a prudential step for this Court to consider.

### Conclusion

Lawyers who live in a free society should rightly insist upon the freedom to speak without fear in their social activities, their workplaces, and the public square. Because proposed I.R.P.C. 8.4(g) would drastically curtail that freedom, this Court should reject it. At a minimum, as explained at pp. 19-21, remanding I.R.P.C. 8.4(g) for revision in light of the United States Supreme Court's *Matal* decision would be a prudential step for this Court to consider.

At a minimum, this Court 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 by its implementation in other states. There is no reason to make Idaho attorneys laboratory subjects in the ill-conceived experiment that proposed I.R.P.C. 8.4(g) represents. This is particularly true because sensible alternatives are readily available, such as waiting to see whether any other states adopt ABA Model Rule 8.4(g), and observing its impact on attorneys in those states. A decision to reject proposed I.R.P.C. 8.4(g) can always be revisited after other states have served as its testing ground.

We thank the Court for its consideration of these comments.

Respectfully submitted,

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**Appendix containing the texts of current Comment [3] and Proposed I.R.P.C. 8.4(g)**

Current Comment [3] repeats verbatim Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 to August 2016, when it was displaced by ABA Model Rule 8.4(g). Current Comment [3] reads as follows:

It is professional misconduct for a lawyer to:

\* \* \*

(d) engage in conduct that is prejudicial to the administration of justice.

\* \* \*

[3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Compare the narrow scope of current Comment [3] to the breadth of proposed I.R.P.C. 8.4(g), which would read as follows:

It is professional misconduct for a lawyer to:

\* \* \*

(g) engage in discrimination or harassment, defined as follows:

(1) in representing a client or operating or managing a law practice, engage in conduct that the lawyer knows or reasonably should know is unlawful discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. This subsection does not limit the ability of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules; and

(2) in conduct related to the practice of law, engage in conduct that the lawyer knows or reasonably should know is harassment. Harassment is derogatory or demeaning verbal, written, or physical conduct toward a person based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status. To constitute a violation of this subsection, the harassment must be severe or pervasive enough to create an environment that is intimidating or hostile to a reasonable person. This subsection does not limit the ability

of a lawyer to accept, decline, or withdraw from a representation as otherwise permitted in these Rules or preclude advice or advocacy consistent with these Rules.

*Commentary*

\* \* \*

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Harassment includes sexual harassment such as unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal, written, or physical conduct of a sexual nature. Factors to be considered to determine whether conduct rises to the level of harassment under paragraph (g)(2) of this Rule include: the frequency of the harassing conduct; its severity; whether it is threatening or humiliating, or a mere offensive utterance; whether it is harmful to another person; or whether it unreasonably interferes with conduct related to the practice of law. Petty slights, annoyances, and isolated incidents, unless extremely serious, will not rise to the level of harassment under paragraph (g)(2). The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes: representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business, or social activities in connection with the practice of law.

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