



## Why Iowa Should Not Adopt Proposed Rule 32:8.4(g): Iowa Supreme Court Public Comment Period Ends December 30, 2019

The Iowa Supreme Court is holding a public comment period until **4:30 p.m. on December 30, 2019**, on a number of proposed rule changes, including [Proposed Rule 32:8.4\(g\)](#), which would essentially add [ABA Model Rule 8.4\(g\)](#) to the Iowa Rules of Professional Conduct. ABA Model Rule 8.4(g) is the deeply-flawed and highly-criticized rule adopted by the American Bar Association in August 2016. It has been condemned by numerous scholars as a speech code for lawyers, as Professor Eugene Volokh, a nationally recognized First Amendment expert, explains in a [two-minute Federalist Society video](#).

**Take action before December 30, 2019:** Interested organizations, individuals, or agencies may express their view of Proposed Rule 32:8.4(g) by sending comments to the Iowa Supreme Court by email to [rules.comments@iowacourts.gov](mailto:rules.comments@iowacourts.gov), or by mail to the Clerk of the Iowa Supreme Court, 1111 East Court Avenue, Des Moines, Iowa, 50319. **Comments must** 1) state “Chapter 32 Amendments” in the subject line of the email; 2) refer to the specific rule number and line number (i.e., Rule 32:8.4(g), page 33, lines 44-46; page 34, lines 1-46; page 35, line 1)); and 3) be sent as an attachment to the email in Microsoft Word format. Short comments are as effective as lengthy ones. Comments may be posted on the Iowa Judicial Branch website by the Clerk of Court. (Note that the Court extended the original deadline of September 30 until December 30 [in an order dated September 27](#).)

Ideas for comments may be found in this [sample comment letter](#), Christian Legal Society’s own [comment letter](#), or several helpful legal articles.<sup>1</sup>

Fortunately, ABA Model Rule 8.4(g) operates only in those states in which the highest court adopts it. After three years, only two, Vermont and New Mexico, have adopted ABA Model Rule 8.4(g). After careful consideration, many states have concluded that ABA Model Rule 8.4(g) is too flawed and have instead chosen the prudent course of waiting to see whether other states adopt ABA Model Rule 8.4(g) and its real-life consequences for attorneys in those states. At least **eleven** states have rejected or abandoned efforts to impose ABA Model Rule 8.4(g), including:

- **Formal rejection:** The state supreme courts of *Arizona, Idaho, South Carolina, and Tennessee* formally rejected ABA Model Rule 8.4(g) after holding comment periods.<sup>2</sup> The ABA itself lists nine states as declining to adopt the rule: *Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina, and Tennessee*.<sup>3</sup> CLS includes *Texas* and *North Dakota* on its list.
- **Petitions to adopt withdrawn:** Petitions to adopt ABA Model Rule 8.4(g) were withdrawn in *Nevada, Louisiana, and Alaska* after comment periods.<sup>4</sup>

<sup>1</sup> See, e.g., Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol’y 173 (2019); Prof. Ronald Rotunda, “*The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*,” The Heritage Foundation, Oct. 6, 2016; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and “Conduct Related to the Practice of Law*,” 30 Geo. J. Leg. Ethics 241 (2017); Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201 (2017). See also, Prof. Volokh’s Federalist Society debate at <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s> (Mar. 2017), and Prof. Rotunda’s Federalist Society debate at <https://www.youtube.com/watch?v=V6rDPjqBcOg> (Nov. 2017).

<sup>2</sup> [https://www.tncourts.gov/sites/default/files/order\\_denying\\_8.4g\\_petition\\_.pdf](https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf) (Tennessee); [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf) (Arizona); [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ISC%20Letter%20-%2020IRPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%2020IRPC%208.4(g).pdf) (Idaho); <http://www.secourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (South Carolina).

<sup>3</sup> ABA Center for Prof. Resp. Policy Implementation Committee, *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (Oct. 18, 2019), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chart\\_adapt\\_8\\_4\\_g.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adapt_8_4_g.pdf).

<sup>4</sup> <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>;  
<https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

- **State legislature action:** The *Montana* Legislature adopted a joint resolution urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g). The Legislature was concerned about the impact of ABA Model Rule 8.4(g) on “the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation.”<sup>5</sup>
- **State bar activity:** The *Illinois* Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule.”<sup>6</sup> The *North Dakota* Joint Committee on Attorney Standards recommended rejection. The *Louisiana* Rules of Professional Conduct Committee voted not to recommend. Several state attorneys general, including *Texas*, *Tennessee*, and *Alaska* have issued opinions stating the rule was likely unconstitutional.<sup>7</sup>

Proposed Rule 32:8.4(g) would make it professional misconduct for a lawyer “to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law” which includes “interacting with . . . others while engaged in the practice of law” or “participating in . . . business or social activities in connection with the practice of law.”

**1. The proposed rule is so broad in scope that it would regulate nearly everything a lawyer says or does, including:**

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

**2. The proposed rule is unconstitutional under the analyses in two recent United States Supreme Court decisions.**<sup>8</sup> In June 2018, the United States Supreme Court held that government restrictions on professionals’ speech – including lawyers’ professional speech – are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, presumptively unconstitutional. In June 2017, a unanimous United States Supreme Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is viewpoint discriminatory and, therefore, unconstitutional under the First Amendment.

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

**4. Proposed Rule 32:8.4(g) could impair lawyers’ ability to accept, decline, or withdraw from representation.**

**5. Proposed Rule 32:8.4(g) is not needed because Iowa’s current Rule 32:8.4(g) already makes sexual harassment and unlawful discrimination grounds for discipline for professional misconduct.**

<sup>5</sup> <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

<sup>6</sup> <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

<sup>7</sup> Alaska Att’y Gen. Comment letter (August 9, 2019), <http://www.law.state.ak.us/press/releases/2019/080919-Rule8.html>; Tex. Att’y Gen. Op. KP0123 (Dec. 20, 2016), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>; Tenn. Att’y Gen. Op. 18-11, <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>.

<sup>8</sup> *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Matal v. Tam*, 137 S. Ct. 1744 (2017).