



**Why Utah Should Not Adopt Proposed Rules 8.4(g) & 8.4(h) or
Changes to the Standards of Professionalism and Civility
Utah Supreme Court Public Comment Period Ends August 1, 2020**

The Utah Supreme Court is holding a public comment period through **August 1, 2020**, on a number of proposed rule changes, including adding [Proposed Rule 8.4\(g\) and Rule 8.4\(h\) with several Comments](#). Even more troublingly, the proposed changes would transform the [Standards of Professionalism and Civility](#) into black letter rules, rather than guidance, especially Proposed Standard 3. The Proposed Rules are so [complicated and confusing](#) that their inevitable effect will be to chill the speech of Utah lawyers.

The Proposed Rules would add elements of [ABA Model Rule 8.4\(g\)](#) to the Utah Rules of Professional Conduct. ABA Model Rule 8.4(g) is the deeply flawed and highly criticized rule adopted by the ABA 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 August 1, 2020: Interested organizations, individuals, or agencies may express their view of the Proposed Rules by submitting comments to the [public website](#) of the Utah Supreme Court. Concise comments are equally effective as detailed ones.

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

Fortunately, ABA Model Rule 8.4(g) operates only in those states in which the highest court adopts it. After four 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 what its real-life consequences are for attorneys in those states. At least **twelve** states have rejected or abandoned efforts to impose rules derived from ABA Model Rule 8.4(g), including:

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

¹ 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=V6rDPjqBcQg> (Nov. 2017).

² 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 (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); https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Petition%20and%20Memo.pdf (Montana); <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (South Carolina); [https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4\(g\)/Proposed_8.4_Rule_Letter_3_9_20.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_20.pdf) (South Dakota).

- **Petitions to adopt withdrawn:** Petitions to adopt ABA Model Rule 8.4(g) were withdrawn in *Nevada, Louisiana, and Alaska* after comment periods.³
- **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 its impact 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.”⁴
- **State bar activity:** The *Illinois* Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule.”⁵ 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 *Alaska, Texas, Tennessee, Louisiana, Arizona, and South Carolina* have issued excellent opinions questioning the rule’s constitutionality.⁶

1. The Proposed Rules are a complicated and confusing combination of vague black letter rules that transform the broad, aspirational Standards of Professionalism and Civility into black letter rules. By explicitly incorporating the Standards of Professionalism and Civility as a black letter rule, the Standards’ long list of aspirational guidelines will be transformed into a fertile source of professional misconduct claims.

2. The Proposed Rules are not needed because Utah already has Rule 8.4(d) and its accompanying Comment [3], which provide that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.”

3. The Proposed Rules are so broad in scope (covering “law-related activities”) that it could be used to regulate much of what a lawyer says or does, including:

- presenting CLE courses or participating in bar panel discussions on controversial legal issues;
- performing pro bono work for one’s congregation, religious college, or religious K-12 school;
- 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; or
- testifying before legislative committees or other legislative work.

4. The Proposed Rules are likely unconstitutional under the analyses in two recent United States Supreme Court decisions.⁷ 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.

5. The Proposed Rules could impair lawyers’ ability to accept, decline, or withdraw from representation. The Proposed Rules seemingly protect lawyers when they *must* decline or withdraw from representation, but not *discretionary* decisions to decline or withdraw from representation.

³ <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>.

⁴ <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

⁵ <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

⁶ 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>.

⁷ *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Matal v. Tam*, 137 S. Ct. 1744 (2017).