

## A CLA Clinic's Guide to Religious Freedom

### 1. How can you improve the legal defensibility of your clinic's religious rights:

#### 1.1 to intentionally employ Christians only?

This right is limited to religious (usually nonprofit) employers under Title VII. Sec. 702, Title VII, Civil Rights Act of 1964: “[t]his subchapter shall not apply to . . . a religious corporation, association, educational institution, or society . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities.” *Spencer v World Vision*, 633 F.3d 723 (9<sup>th</sup> Cir. 2010, amended 2011)(an entity is eligible for the section 2000e-1 exemption, at least, if it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts).

How would your CLA prove it is sincerely religious? Consider:

- Articles of Incorporation
- Bylaws
- Application to IRS for exempt status (Form 1023)
- Mission Statement
- Statement of Faith (for which employees?)
- Public job postings (e.g., Linked In)
- Job descriptions
- Employee handbook
- Spiritual character references
- Consistency of practice (exceptions to policy allowed?)

#### 1.2 to have and enforce standards of employee conduct, including sexual conduct?

Sec 701j of Title VII (42 USC 2000e-(j)): “(j) The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business;”

What evidence do you have that these standards are religiously based? Scriptural references?

Do you have written standards?

Board-reviewed and approved?

Are they shared with job applicants? Before job offer is made?

1.3 to decline to advise or represent in legal matters that go against our sincere religious beliefs or conscience?

Discrimination by “places of public accommodation” which can extend under state law to free legal services at CLA

Federal Religious Freedom Restoration Act (RFRA) (42 USC 2000bb-1 et seq.):

(a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

State RFRA<sup>1</sup>

States with judicial interpretation providing strict scrutiny

Cases Applying Compelling State Interest Test in States w/o RFRA Statute

*Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994)

*Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994)

*State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990)

*Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000)

*First Covenant Church v. City of Seattle*, 840 P.2d 174 (Wash. 1992) (en banc)

*State v. Miller*, 549 N.W.2d 235 (Wis. 1996)

2014 *Hobby Lobby* decision (*Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682)

Supreme Court of the US held that a for-profit, family-owned corporation is a “person” entitled to invoke the protection of RFRA

Bar Ethics Rules

In a state that has adopted ABA Model Rule 8.4(g) or a similar provision, it has been opined that such rule may be violated if a Christian legal aid ministry

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<sup>1</sup>Ala. Const. Art. I, §3.01 (1999); Ariz. Rev. Stat. §41-1493.01 (1999); Ark Code § 16-123-404 (2015 & 2023); Conn. Gen. Stat. §52-571b (1993); Fla. Stat. §761.01, *et seq.* (1998); Idaho Code §73-402 (2001); Ill. Rev. Stat. Ch. 775, §35/1, *et seq.* (1998); IN Code § 34-13-9 (2015); IA SF 2095 Iowa Code Chapter 675, *et seq.* (2024); Kan. Stat. §60-5301, *et seq.* (2013); Ky. Rev. Stat. §446.350 (2013); La. Rev. Stat. §13:5231, *et seq.* (2010); Miss. Code §11-61-1 (2014); Mo. Rev. Stat. §1.302 *et seq.* (2003); MT Code § 27-33-101, *et seq.* (2021); Nebraska LB 43 (awaiting codification) (2024); ND Century Code 14-02.4-08.1 (2023); N.M. Stat. §28-22-1, *et seq.* (2000); Okla. Stat. tit. 51, §251, *et seq.* (2000); Pa. Stat. tit. 71, §2403 (2002); R.I. Gen. Laws §42-80.1-1, *et seq.* (1993); S.C. Code §1-32-10, *et seq.* (1999); SD Codified Laws § 1-1A-4 (2021); Tenn. Code §4-1-407 (2009); Tex. Civ. Prac. & Remedies Code §110.001, *et seq.* (1999); UT Senate Bill 150 Amends Utah Code 63G-31-101, *et seq.* (2024); Va. Code §57-2.02 (1986); WV Code §35-1A-1 (2023).

declines on the basis of sincerely held religious conscience to represent a cause or party (e.g., an abortion provider).

- The Vermont Supreme Court has said 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.”<sup>2</sup>
- Dean McGinniss, who teaches professional responsibility, says 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>3</sup>

## 2. What should a CLA consider before applying for a federal grant or contract?

### 2.1 General Considerations

Grant can scale up your client services and resources, so can be used for great good.

Make sure your operations can still run on regular gas, without government funds (i.e, nongovernment donations, foundation grants, other private resources)

Need a second opinion and plumbline, perspective; so helpful to have trusted advisors to exert close accountability.

### 2.2 What are the legal risks for a religious organization’s participating in government funding opportunities?

Buying your silence. The more your budget depends on Uncle Sam or state grants, the more reticent you may feel to zealously represent clients against the government

Temptation to cover up. Federal grants require that all expenditures be within allowed categories; if a grantee discovers a disallowed cost, there can be the temptation to not immediately disclose to the grantor agency; but that is a quick way to be suspended or even debarred from future grants. See 2 Code of Federal Regulations Part 200.C.

Must separate your religious content from funded program. The programming must separate inherently religious activities (testimonials, prayer, scriptural counsel) by time or by site (have the God-talk at a different time than the grant-funded service or else at the same time but in a different part of the building).

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<sup>2</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).

<sup>3</sup> McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol’y 173, 207-209 (2019).

Exception: If beneficiaries are given a voucher where they can obtain free legal aid from either a secular or a faith-based provider.

The government may threaten to revoke tax exemption eventually. In *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), the U.S. Supreme Court held that nonprofit private universities that prescribe and enforce racially discriminatory admission standards on the basis of religious doctrine do not qualify as tax-exempt organizations under Section 501(c)(3) of the U.S. Internal Revenue Service.

Federal contracts are far more onerous, as they are governed by the Federal Acquisition Rules of procurement. Government micromanages, deliverables are exact not aspirational, more recordkeeping.

### 2.3 What are the key legal protections for religious organizations as they engage?

You have right to hire only fellow believers for any job (Section 702, Title VII of the Civil Rights Act of 1964; see Part 1.1, *supra*).

You may have right to enforce standards of Christian conduct. It is not settled law.

You have equal right to apply and compete for grants. Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities, 85 FR 82037 (published 12/17/2020).

You need not remove religious messages or art from your facilities.

You can seek to force an exemption invoking RFRA and state RFRAs, state constitutions, and the First Amendment to U.S. Constitution. See Part 1.3 *supra*.

If a program provides vouchers to beneficiaries, you can blend the religion with the government-funded service.

### 2.4 Legal and practical do's and don'ts for religious organizations considering government funding and then engaging in compliance under that funding.

Know what you believe. Identify the red lines where you must forgo a grant award in the interest of mission, sincerely held religious tenets.

Have written, board-approved policy. To validate the sincerity of the belief, the board should have reviewed and approved it, with documentation.

Publicize the beliefs and conduct standards (1) among personnel (a secret policy or standard is hard to enforce fairly and looks less sincere or genuine) and (2) to job applicants early in the hiring process, not when applicant is finalist.

Limit percentage of revenue from government; avoids dependence and excessive government influence.

Beware of thinking you won't ever be tempted to compromise mission or coverup disapproved costs or embezzlement.

CEO needs a council of spiritual advisors. It can be lonely at the top. Need wise peers who can speak truth to power.

Limit the number of board vacancy nominees from CEO. CEO should not load her board with friends and those who look and think like he does. No echo chamber in board meetings.

Define what a "good" board meeting looks like. "No surprises, and everything on agenda was approved" is NOT necessarily a successful meeting. Ask "What value?" did the independent board bring to management.

Measure fidelity at least as much as growth. You get what you measure. Success should NOT be defined **solely** as growing budget, growing staff, growing number of beneficiaries. Also fidelity to mission. No "mission drift."

### **3. How do your clinic attorneys maintain their bar licenses if your state bar adopts ABA Model Rule 8.4g or a similar provision?**

3.1 Testify before the bar board of governors or similar governing bar body: tell them of what you do, for what clientele, and why; explain how the rule could disbar you and your staff.

3.2 Brief overview of the legal arguments against the rule

A number of scholars have characterized ABA Model Rule 8.4(g) as a speech code for lawyers.<sup>4</sup> The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics and the former Albert E. Jenner, Jr. Professor of Law at the University of Illinois., warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.<sup>5</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>6</sup> Professor Michael McGinniss, Dean of the University of North Dakota School of Law, raised similar concerns in a recent article.<sup>7</sup>

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<sup>4</sup> Eugene Volokh, A Nationwide Speech Code for Lawyers?, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

<sup>5</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>6</sup> Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017, "§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech" & "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" in "§ 8.4-2 Categories of Disciplinary Conduct."

<sup>7</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, 173 (2019).

Two Arizona practitioners thoroughly examined ABA Model Rule 8.4(g) and concluded that it “is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities.”<sup>8</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.” 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>9</sup>

Since the ABA adopted Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued three free speech decisions that demonstrate it is unconstitutional. Under the Court’s analysis in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), ABA Model Rule 8.4(g) is an unconstitutional content-based restriction on lawyers’ speech. In *Becerra*, the Supreme Court held that state restrictions on “professional speech” are presumptively unconstitutional and subject to strict scrutiny. Under the Court’s unanimous analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), ABA Model Rule 8.4(g) is an unconstitutional viewpoint-based restriction on lawyers’ speech.

3.3 Consult the CLS Center for extensive briefing on how such a rule would violate the U.S. Constitution.

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<sup>8</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>9</sup> *Id.* at 204.