



# CHRISTIAN LEGAL SOCIETY

*Seeking Justice with the Love of God*

June 30, 2025

Chief Justice Megan K. Cavanagh  
Justice Brian K. Zahra  
Justice Richard Bernstein  
Justice Elizabeth M. Welch  
Justice Kyra H. Bolden  
Justice Kimberly A. Thomas  
Justice Noah P. Hood  
Michigan Supreme Court  
925 W. Ottawa St.  
Lansing, Michigan 48915

**Re: ADM File No. 2023-35 Proposed Amendment of Rule 6.5 of the Michigan Rules of Professional Conduct**

Dear Chief Justice Cavanagh, Justice Zahra, Justice Bernstein, Justice Welch, Justice Bolden, Justice Thomas, and Justice Hood:

Christian Legal Society (“CLS”) respectfully submits this comment letter to express opposition to the proposal to amend Rule 6.5 of the Michigan Rules of Professional Conduct. Specifically, Proposed Rule 6.5 would prohibit attorneys from

by words or conduct manifest[ing] bias or prejudice for or against any person involved in the legal process, or engag[ing] in harassment against any person involved in the legal process, based upon race, color, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, height, weight, sexual orientation, marital status, familial status, socioeconomic status, or political affiliation.

Although CLS lauds the effort to prevent bias, prejudice, and harassment in the legal profession, approving a vague and overbroad rule like Proposed Rule 6.5—one that would inevitably chill the First Amendment rights of Michigan attorneys—is not the tool to accomplish this, especially when the existing rules are more than sufficient. The proposed rule should not be adopted because it is unconstitutional under U.S. Supreme Court precedent and would act as a speech code for the Michigan legal community.

## **I. Michigan’s Proposed Rule 6.5 Bears a Strong Resemblance to ABA Model Rule 8.4(g), Which Is Unconstitutional and Has Been Aptly Labeled a “Speech Code for Lawyers.”**

Because Proposed Rule 6.5 appears to draw on ABA Model Rule 8.4(g), it is subject to the same critiques and First Amendment concerns as the ABA model rule.<sup>1</sup> ABA Model Rule 8.4(g) is a deeply flawed and highly criticized model rule adopted at the annual American Bar Association meeting in August 2016. As detailed in Part IV, after careful consideration, a majority of states that have considered it have concluded that ABA Model Rule 8.4(g) is unconstitutional, unworkable, and/or too flawed to adopt.

### **A. ABA Model Rule 8.4(g) is deeply flawed and highly criticized by leading legal scholars.**

When the American Bar Association adopted ABA Model Rule 8.4(g) at its annual meeting in August 2016, the ABA largely ignored over 480 comment letters,<sup>2</sup> most opposed to the new rule. Even the ABA’s own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule and raising concerns about its enforceability, although the committee, without explanation, dropped its opposition immediately prior to the House of Delegates’ vote.<sup>3</sup>

Since its adoption, scholars have explained in detail the constitutional issues with ABA Model Rule 8.4(g) and have also accurately characterized it as a “speech code for lawyers.” For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has summarized his view that ABA Model Rule 8.4(g) is a speech code that will have a

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<sup>1</sup> The relevant language of ABA Model Rule 8.4(g) is as follows: “It is 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. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.”

<sup>2</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>3</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, 220 & n.97 (2017) (listing the Committee’s concerns as including: lack of empirical evidence of need for Rule; vagueness of key terms; enforceability; constitutionality; coverage of employment discrimination complaints; mens rea requirement; and potential limitation on ability to decline representation), *citing* Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016.

serious impact on attorneys' speech.<sup>4</sup> Professor Volokh also explored its many flaws in a debate with a proponent of the model rule.<sup>5</sup>

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that “[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers’ First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants.”<sup>6</sup> She insists that “lawyer speech, association, and petitioning” are “rights [that] must be protected” because they “play a major role in checking the use of governmental and non-governmental power in the United States.”<sup>7</sup>

The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens attorneys’ First Amendment rights.<sup>8</sup> Regarding the 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>9</sup> They observed that “[t]he language the ABA has adopted in Rule 8.4(g) and its associated Comments are similar to laws that the Supreme Court has invalidated on free speech grounds.”<sup>10</sup> In a *Wall Street Journal* commentary entitled *The ABA Overrules the First Amendment*, Professor Rotunda explained:

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

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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&t=3s>.

<sup>5</sup> *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>.

<sup>6</sup> Margaret Tarkington, *Throwing Out the Baby: The ABA’s Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).

<sup>7</sup> *Id.*

<sup>8</sup> Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>. Professor Rotunda and Texas Attorney General Ken Paxton debated two proponents of Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention. *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, The Federalist Society (Nov. 20, 2017), <https://www.youtube.com/watch?v=V6rDPjqBcQg>.

<sup>9</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 Disciplinable Conduct.”

<sup>10</sup> *Id.* at “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

the idle rich. We should raise capital gains taxes.” The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.<sup>11</sup>

Professor Josh Blackman has explained that “Rule 8.4(g) is unprecedented, as it extends a disciplinary committee’s jurisdiction to conduct merely ‘related to the practice of law,’ with only the most tenuous connection to representation of clients, a lawyer’s fitness, or the administration of justice.”<sup>12</sup>

Professor Michael S. McGinniss, former dean of the University of North Dakota School of Law who currently teaches professional responsibility at the law school, warns against “the widespread ideological myopia about what it truly means to have a diverse and inclusive profession” that seems to be an impetus for ABA Model Rule 8.4(g).<sup>13</sup> He explains that a genuinely “diverse and inclusive profession . . . does not mean silencing or chilling diverse viewpoints on controversial moral issues on the basis that such expression manifests ‘bias or prejudice,’ is ‘demeaning’ or ‘derogatory’ because disagreement is deemed offensive, or is considered intrinsically ‘harmful’ or as reflecting adversely on the ‘fitness’ of the speaker.”<sup>14</sup>

In a thorough examination of the rule’s legislative history, practitioners Andrew Halaby and Brianna Long determined that ABA Model Rule 8.4(g) “is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities.”<sup>15</sup> They recommend that “jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all.”<sup>16</sup> 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>17</sup>

A recurrent concern in many of the comments submitted during the comment period was the threat that ABA Model Rule 8.4(g) poses to attorneys’ First Amendment rights.<sup>18</sup> But little was

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<sup>11</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, <https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418>.

<sup>12</sup> Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 *Geo. J. Legal Ethics* 241, 243 (2017). See also, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 *Notre Dame J.L. Ethics & Pub. Pol’y* 135 (2018).

<sup>13</sup> Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 *Harv. J.L. & Pub. Pol’y* 173, 249 (2019), [https://law.und.edu/\\_files/docs/features/mcginnissexpressingconsciencewithcandor-harvardjlp-2019.pdf](https://law.und.edu/_files/docs/features/mcginnissexpressingconsciencewithcandor-harvardjlp-2019.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> Halaby & Long, *supra* note 3, at 257.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 204.

<sup>18</sup> *Id.* at 216-223 (summarizing concerns expressed at the only public hearing on an early version of ABA Model Rule 8.4(g), as well as the main concerns expressed in the comment letters).

done to address these concerns. In their meticulous explication of the legislative history of ABA Model Rule 8.4(g), Halaby and Long conclude that “the new model rule’s afflictions derive in part from indifference on the part of rule change proponents, and in part from the hasty manner in which the rule change proposal was pushed through to passage.”<sup>19</sup> Specifically, the rule went through five versions, of which three versions evolved “in the two weeks before passage, none of these was subjected to review and comment by the ABA’s broader membership, the bar at large, or the public.”<sup>20</sup> Halaby and Long summarized the legislative history of the rule:

Model Rule 8.4(g) and its associated comments evolved rapidly between the initial letter from the Goal III entities in July 2014, through initial circulation of Version 1 in July 2015, to final adoption of Version 5 the following August. There was solicitation of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.<sup>21</sup>

Professor Bruce Green directs the Louis Stein Center for Law and Ethics at Fordham Law School, and Professor Rebecca Roiphe is a professor of law at New York Law School who studies legal ethics and the history of the legal profession. Together they recently published an article examining ABA Model Rule 8.4(g) in which they explain that “[a] restriction on lawyers’ speech in a given case would have to closely serve a compelling government interest.”<sup>22</sup> As authority, they cite the U.S. Supreme Court’s decision in *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018), in which the Court held that restrictions on professional speech are subject to strict scrutiny. They conclude that “many realistic applications of [ABA Model] Rule 8.4(g) would fail this test.”<sup>23</sup>

Professors Green and Roiphe examine the various government interests put forth to justify the speech infringements that ABA Model Rule 8.4(g) and its progeny would create and conclude that many applications of the rules fail to satisfy strict scrutiny.<sup>24</sup> The interests examined and found lacking in many circumstances include protecting the attorney-client relationship; protecting the administration of justice; protecting the targets of demeaning, derogatory, and hurtful speech; promoting public confidence in the legal profession and the legal system; and identifying attorneys with bad character or bad views.

In a detailed discussion of the First Amendment standard to be applied, the professors conclude that ABA Model Rule 8.4(g) “is presumptively invalid and subject to this rigorous [strict scrutiny] standard both because . . . it constitutes impermissible viewpoint discrimination, and . . . it

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<sup>19</sup> *Id.* at 203.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 233.

<sup>22</sup> Bruce A. Green and Rebecca Roiphe, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, 50 Hofstra L. Rev. 543, 549 (2022) [hereinafter “Green and Roiphe”].

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 558-578.

constitutes a content-based restriction.”<sup>25</sup> As Professors Green and Roiphe elucidate, the Court’s analysis in *Matal v. Tam*, 582 U.S. 218 (2017), shows that ABA Model Rule 8.4(g) creates impermissible viewpoint discrimination because “[g]iving offense is a viewpoint.” The federal trademark law prohibited issuance of “any mark that disparaged members of a racial or ethnic group.”<sup>26</sup> The Court rejected the claim that the restriction was constitutional because it “protect[ed] members of minority groups ‘from being ‘bombarded with demeaning messages in commercial advertising.’”<sup>27</sup> The Court rejected that “idea” as “striking at the heart of the First Amendment.”<sup>28</sup> Instead, “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”<sup>29</sup>

Professors Green and Roiphe “argue that, regardless of whether the rule targets a substantial amount of protected expression or a tolerable amount for constitutional purposes, state courts should not adopt it.”<sup>30</sup> The professors are concerned that even if ABA Model Rule 8.4(g) and its imitators capture “bad conduct that may and should be proscribed,” they also “deliberately and unnecessarily target constitutional protected speech, however objectionable.”<sup>31</sup> They conclude:

[P]urging the profession of biased, hateful speech is a noble cause. But like other such worthy causes, it should, as a general matter, be pursued by means other than banning speech. Rule 8.4(g) will chill valuable speech, and its broad language leaves a dangerous amount of discretion to regulators to pick and choose which violations to pursue.<sup>32</sup>

These scholars’ red flags should not be ignored. Like ABA Model Rule 8.4(g), Proposed Rule 6.5 would dramatically shift the disciplinary landscape for Michigan attorneys. The proposed rule has many of the same defects as the model rule and, as such, is also unconstitutional and will act as a speech code for Michigan attorneys.

### **B. Proposed Rule 6.5 is even more problematic than ABA Model Rule 8.4(g).**

Unlike ABA Model Rule 8.4(g), Proposed Rule 6.5 includes “political affiliation” in its lengthy list of protected classes. If adopted, Proposed Rule 6.5 would make it an ethical violation for attorneys serving as state legislators or officers in the executive branch to hire or promote staff based on any individual’s political affiliation. Governor Whitmer would be in violation of

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<sup>25</sup> *Id.* at 550. See generally, Green and Roiphe, pp. 550-557 (applying Supreme Court precedent to show that ABA Model Rule 8.4(g) discriminates on the bases of both viewpoint and content).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*, citing *Matal*, 137 S. Ct. at 1764-65.

<sup>28</sup> *Id.*, citing *Matal*, 137 S. Ct. at 1764.

<sup>29</sup> *Id.* at 551, quoting *Matal*, 137 S. Ct. at 1764.

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 571.

Proposed Rule 6.5 if she made appointments to her staff, executive and judicial officers, and state commissions based on political affiliation.

State legislators who belong to the legal profession likewise would violate Proposed Rule 6.5 by hiring staff based on political affiliation. Indeed, one state legislature passed a resolution opposing ABA Model Rule 8.4(g), which does not include “political affiliation” as a protected class, because it was concerned about the impact ABA Model Rule 8.4(g) could have 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>33</sup>

Proposed Rule 6.5 goes even further. It prohibits all attorneys, including those serving in government, from making decisions based on political affiliation. Of course, this would also make it unethical for attorneys working for the state Democratic Party or state Republican Party to hire staff based on political affiliation. Such a prohibition is clearly an unconstitutional prohibition of protected political speech and illustrates that Proposed Rule 6.5’s ramifications have not been adequately thought through.

For that reason alone, the Court should not adopt Proposed Rule 6.5. But even if political affiliation were not included in Proposed Rule 6.5’s list of protected classes, it would still violate the free speech rights of Michigan attorneys under recent U.S. Supreme Court cases.

## **II. Proposed Rule 6.5 Does Not Comport with U.S. Supreme Court Precedent.**

“If 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 itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The U.S. Supreme Court has issued three free speech decisions making it clear that rules such as Proposed Rule 6.5 are unconstitutional and will chill attorneys’ speech: *Iancu v. Brunetti*, 588 U.S. 388 (2019); *National Institute of Family and Life Advocates (“NIFLA”) v. Becerra*, 585 U.S. 755 (2018); and *Matal v. Tam*, 582 U.S. 218 (2017). The *NIFLA* decision clarified that the First Amendment protects “professional speech” just as fully as other speech. That is, there is no free speech carve-out that countenances content-based restrictions on professional speech. The *Matal* and *Iancu* decisions affirm that Proposed Rule 6.5 creates unconstitutional viewpoint discrimination.

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<sup>33</sup> *A Joint Resolution of the Senate and the House of Representatives of the State of Montana Making the Determination that it would be an Unconstitutional Act of Legislation, in Violation of the Constitution of the State of Montana, and would Violate the First Amendment Rights of the Citizens of Montana, Should the Supreme Court of the State of Montana Enact Proposed Model Rule of Professional Conduct 8.4(G)*, SJ 0015, 65th Legislature (Mont. Apr. 25, 2017) (hereinafter “Joint Resolution”), <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

**A. *NIFLA* protects attorney speech from content-based restrictions.**

The Court’s analysis in *NIFLA* makes clear that rules like Proposed Rule 6.5 are an unconstitutional *content*-based restriction on attorneys’ speech. There the Court held that government restrictions on professionals’ speech—including attorneys’ professional speech—are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, *presumptively unconstitutional*. That is, a government regulation that targets speech must survive strict scrutiny—a close examination of whether the regulation is narrowly tailored to achieve a compelling government interest.

The Court explained that “[c]ontent-based regulations ‘target speech based on its communicative content.’”<sup>34</sup> “[S]uch laws ‘are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.’”<sup>35</sup> As the Court observed, “[t]his stringent standard reflects the fundamental principle that governments have ‘no power to restrict expression because of its message, its ideas, its subject matter, or its content.’”<sup>36</sup>

The Court rejected the idea that “professional speech” was an exception “from the rule that content-based regulations of speech are subject to strict scrutiny.”<sup>37</sup> The Court stressed that “*this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’*”<sup>38</sup>

The operative assumption underlying Proposed Rule 6.5 is that professional speech is less protected by the First Amendment than other speech, but the Supreme Court rejected that basic premise. Instead, the Court was clear that a state’s regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its “precedents have long protected the First Amendment rights of professionals” and “has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers.”<sup>39</sup> Indeed, the speech that Proposed Rule 6.5 regulates is entitled to the full protection of the First Amendment.

**B. *Matal* and *Iancu* protect attorney speech from viewpoint-discrimination restrictions.**

Under the Court’s analysis in *Matal* and *Iancu*, Proposed Rule 6.5 is an unconstitutional *viewpoint*-based restriction on attorneys’ speech. In *Matal*, a unanimous Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize

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<sup>34</sup> *NIFLA*, 585 U.S. at 766 (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)).

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

<sup>36</sup> *Id.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

<sup>37</sup> *Id.* at 766-767.

<sup>38</sup> *Id.* at 767 (emphasis added).

<sup>39</sup> *Id.* 771 (citations omitted).

“disparaging” speech. In his concurrence, Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, observed that it is unconstitutional to suppress speech that “demeans or offends.”<sup>40</sup> The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.

All justices agreed that a provision of a longstanding federal law, the Lanham Act, was unconstitutional because it allowed government officials to deny trademarks for terms that may “disparage or bring into contempt or disrepute” living or dead persons. Allowing government officials to determine what words do and do not “disparage” a person “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”<sup>41</sup> Justice Alito, writing for a plurality of the Court, noted that “[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”<sup>42</sup>

In his concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy stressed that “[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate,” particularly “if the ideas or perspectives are ones a particular audience might think offensive.”<sup>43</sup> Justice Kennedy closed with a sober warning:

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.<sup>44</sup>

Justice Kennedy explained that the federal statute was unconstitutional viewpoint discrimination because the statute “reflects the Government’s disapproval of a subset of messages it finds offensive,” which is “the essence of viewpoint discrimination.”<sup>45</sup>

In 2019, the Supreme Court reaffirmed its rigorous rejection of viewpoint discrimination. The challenged terms in *Iancu* were “immoral” and “slandorous” and, once again, the Court found the

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<sup>40</sup> *Matal*, 582 U.S. at 249 (Kennedy, J., concurring) (emphasis supplied).

<sup>41</sup> *Id.* at 233 (quotation marks and ellipses omitted).

<sup>42</sup> *Id.* at 246 (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)) (emphasis supplied).

<sup>43</sup> *Id.* at 250 (Kennedy, J., concurring).

<sup>44</sup> *Id.* at 254 (Kennedy, J., concurring).

<sup>45</sup> *Id.* at 249 (Kennedy, J., concurring) (emphasis supplied).

terms were viewpoint discriminatory because they allowed government officials to pick and choose which speech to allow.

Proposed Rule 6.5 cannot withstand viewpoint-discrimination analysis under the *Matal* and *Inacu* decisions. Proposed Rule 6.5 prohibits an attorney from “by words . . . manifest[ing] bias or prejudice.” But a rule that permits government officials to punish attorneys for something that the government determines to be “bias or prejudice” is the epitome of an unconstitutional rule.

Thus, under Supreme Court precedent, the First Amendment fully protects speech that manifests bias and prejudice. Any state effort to single out such speech for sanction is a viewpoint-based speech restriction and is subject to the strictest First Amendment scrutiny.<sup>46</sup> Such a speech restriction survives First Amendment scrutiny only if the government demonstrates the restriction serves a compelling state interest that cannot be achieved in a more narrowly tailored manner. Additionally, the First Amendment analysis does not change simply because the speech restriction is imposed on an attorney. Speech that manifests bias or prejudice is not subject to decreased constitutional protection simply because it is spoken by an attorney to “anyone involved in the legal process.” The First Amendment protects “professional speech” as fully as it does speech by nonprofessionals.<sup>47</sup>

### **III. Other Issues Surrounding Proposed Rule 6.5.**

#### **A. Proposed Rule 6.5 is Void for Vagueness.**

Besides creating unconstitutional content-based restrictions and viewpoint discrimination, the vagueness of the terms “bias,” “prejudice,” “harassment,” and “involved in the legal process” in Proposed Rule 6.5 necessarily raises additional constitutional issues. Proposed Rule 6.5 completely fails to define what is meant by “bias,” “prejudice,” “harassment,” and “involved in the legal process.” This failure to provide clear definitions of key terms means Proposed Rule 6.5 does not give Michigan attorneys fair notice of what speech might result in violations of the professional conduct rules. The lack of well-defined terms means a Michigan attorney can violate the rules of professional conduct without intending to do so or even being aware of having done so. The language is dangerously vague and infringes upon the rights of every attorney and law firm in Michigan. As such, Proposed Rule 6.5 does not provide the clear enforcement standards that are necessary when the loss of one’s livelihood is at stake. These uncertainties as to the meaning of key terms in Proposed Rule 6.5 raise severe issues for the constitutionality of Proposed Rule 6.5.

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<sup>46</sup> *Iancu*, 588 U.S. 388; *Matal*, 582 U.S. 218.

<sup>47</sup> *NIFLA*, 585 U.S. at 766-767.

**B. Proposed Rule 6.5 Is Overbroad and Would Regulate Much of What a Michigan Attorney Says or Does.**

Proposed Rule 6.5 would greatly expand the reach of the Michigan Rules of Professional Conduct. It is particularly important to understand just how broad in scope Proposed Rule 6.5 is. This rule, if adopted, would regulate attorneys' interactions with "*any person* involved in the legal process." Yet nowhere is it defined precisely what is meant by "involved in the legal process." Virtually everything an attorney does can be characterized as being "involved in the legal process." Even an attorney's social life, much of which can be viewed as business development and opportunities to cultivate relationships with current clients or potential future clients, would be regulated by Proposed Rule 6.5.

Proposed Rule 6.5's scope is even broader than ABA Model Rule 8.4(g)'s broad scope of regulating "conduct related to the practice of law."<sup>48</sup> Proponents of ABA Model Rule 8.4(g) candidly observed that they sought a new black letter rule precisely because they wanted to regulate *nonlitigating attorneys*, such as "[a]cademics, nonprofit lawyers, and some government lawyers," as well as "[t]ax lawyers, real estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system."<sup>49</sup>

Proposed Rule 6.5's application is limitless. Various routine expressive activities would run afoul of the rule. The compelling question becomes: What conduct would Proposed Rule 6.5 *not* reach?

- Can an attorney speak at public events or participate in panel discussions touching on controversial political, religious, and social viewpoints without violating Proposed Rule 6.5?<sup>50</sup>

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<sup>48</sup> "Conduct related to the practice of law," according to Comment [4] of ABA Model Rule 8.4(g), "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."

<sup>49</sup> ABA Commission on Sexual Orientation and Gender Identity, *Memorandum to Standing Committee on Ethics and Professional Responsibility: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4*, at 5, 7 (Oct. 22, 2015), <https://www.clsnet.org/document.doc?id=1125>.

<sup>50</sup> Eugene Volokh, *Professor Stephen Gillers (NYU) Unwittingly Demonstrates Why ABA Model Rule 8.4(g) Chills Protected Speech*, *The Volokh Conspiracy* (June 17, 2019), <https://reason.com/2019/06/17/professor-stephengillers-nyu-unwittingly-demonstrates-why-aba-model-rule-8-4g-chills-protected-speech/>. The article explains that in a media interview regarding ABA Model Rule 8.4(g), a proponent of the Rule (wrongly) stereotyped opponents of the Rule by race and gender and suggests that the same comment made in the context of a bar association debate might be grounds for discipline under ABA Model Rule 8.4(g).

- Is a law professor, adjunct faculty member, or an attorney speaking as a guest lecturer subject to discipline for a law review article or a class discussion that explores controversial topics or expresses unpopular viewpoints?<sup>51</sup>
- Must attorneys abstain from writing law review articles, blogposts, social media threads, or op-eds because they run the risk of a bar complaint by an offended reader?
- Must attorneys forgo media interviews regarding cases they are handling on topics about which they have some particularly insightful comments because anyone hearing the interview could file a complaint?<sup>52</sup>
- Can an attorney lose his license to practice law for tweeting, re-tweeting, or liking something with which someone disagrees? What about for a tweet calling a female judicial official or attorney a sexist term?<sup>53</sup>
- Does an attorney violate the rule for providing legislative testimony in favor of adding new protected classes to state or local civil rights laws but only on the condition that religious exemptions (which some consider “a license to discriminate”) are also added?<sup>54</sup>
- Must attorneys abstain from submitting comment letters expressing personal views regarding proposed Title IX regulations, immigration issues, census questions, re-districting proposals, capital gains tax proposals, or even state bar rules?
- Is an attorney subject to discipline for serving on the board of, or providing pro bono counsel to, an organization that discriminates based on sex, such as a social fraternity or sorority?
- Can an attorney provide pro bono counsel to religious congregations, colleges, or schools or sit on their boards without fear of violating Proposed Rule 6.5?

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<sup>51</sup> *Whether adoption of the American Bar Association’s Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney’s statutory or constitutional rights (RQ-0128-KP)*, Tex. Att’y Gen. Op. KP-0123 (Dec. 20, 2016) (hereinafter “Tx. Att’y Gen. Op.”), at 3 (“Given the broad nature of this rule, a court could apply it to an attorney’s participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.”),

<https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>; *ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution*, 17 La. Att’y Gen. Op. 0114 (Sept. 8, 2017) (hereinafter “La. Att’y Gen. Op.”), at 6 (“[A] lawyer who is asked his opinions, thoughts, or impressions on legal matters taking place in the news at a social function could also be found to be engaged in conduct related to the practice of law.”); <https://lalegaethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf>.

<sup>52</sup> In *Basler v. Downtown Hope Center*, Case No. 18-167, Anchorage Equal Rights Com’n. (May 15, 2018), a discrimination complaint was lodged against an attorney for his accurate comments in a media interview that he gave on behalf of his client.

<sup>53</sup> Debra Cassens Weiss, *BigLaw Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders*, ABA Journal (Oct. 1, 2018) (noting that the lawyer had been honored in 2009 by the ABA Journal “for his innovative use of social media in his practice”),

[https://www.abajournal.com/news/article/biglaw\\_partner\\_deletes\\_twitter\\_account\\_after\\_profane\\_insult\\_toward\\_sarah\\_hu](https://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu).

<sup>54</sup> The Montana Legislature passed a resolution expressing its concerns about the impact of ABA Model Rule 8.4(g) on “the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees.” See Joint Resolution, *supra* note 33.

- Is an attorney subject to discipline for her discussion of hypotheticals while presenting a CLE course?<sup>55</sup>
- Is an attorney at risk for any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political positions?

The First Amendment provides robust protection for attorney speech.<sup>56</sup> Proposed Rule 6.5 is overbroad, creates doubt as to whether a wide range of attorneys' speech is permissible and, therefore, will inevitably chill attorneys' speech.<sup>57</sup>

### **C. Proposed Rule 6.5 would become yet another means of silencing speech on which political and ideological opponents disagree.**

Sadly, we live at a time when many people, including attorneys, are increasingly willing to suppress the free speech of those with whom they disagree. Some attorneys purportedly have filed bar complaints to harass officeholders whose political views they dislike.<sup>58</sup> Yale law students have described significant harassment by fellow law students simply because they hold religious or conservative ideas.<sup>59</sup>

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<sup>55</sup> See, e.g., Kathryn Rubino, *Did D.C. Bar Course Tell Attorneys That It's Totally Cool to Discriminate If that's What the Client Wants?*, Above the Law (Dec. 12, 2018) (reporting on attendees' complaints regarding an instructor's discussion of a hypothetical about sex discrimination and the applicability of the ethical rules during a mandatory D.C. Bar Professional Ethics course for newly admitted D.C. attorneys), <https://abovethelaw.com/2018/12/did-d-c-bar-course-tell-attorneys-its-totally-cool-to-discriminate-if-thats-what-theclient-wants/>.

<sup>56</sup> Tenn. Att'y Gen. Letter, Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018), at 7. The letter is incorporated into Tennessee Attorney General Opinion 18-11, *American Bar Association's New Model Rule of Professional Conduct 8.4(g)*, 18 Tenn. Att'y Gen. Op. 11 (Mar. 16, 2018) (hereinafter "Tenn. Att'y Gen. Op."), ("[T]he goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.") (Emphasis in original.), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf>. For purposes of quoting the letter, citations are to the page numbers of the letter rather than the opinion.

<sup>57</sup> *Id.* at 8 ("Even if the [Board of Professional Responsibility] may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place.").

<sup>58</sup> See Brian Sheppard, *The Ethics Resistance*, 32 *Geo. J. Legal Ethics* 235, 238 (2018): "Ordinary ethics complaints have the capacity to ruin individual law careers and serve as cautionary examples to other lawyers. Ethics Resistance complaints have the additional capacity to prompt official action, alter staffing decisions at the highest levels of government, influence high-ranking lawyers' willingness to comply with investigations, and terminate or preempt relationships between lawyers and the politically powerful. Most importantly, they can change public perception regarding the moral integrity of an administration. And they can do this even if they do not result in a sanction."

<sup>59</sup> See, e.g., Aaron Haviland, *I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong*, *The Federalist* (Mar. 4, 2019) (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers), <https://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/>.

Merely expressing support for freedom of speech has itself become controversial. In July 2020, several well-known liberal signatories to a public letter in support of freedom of speech were publicly pressured to recant their support for free speech and its concomitant corollary of tolerance for others who hold different beliefs.<sup>60</sup>

Because attorneys frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline an attorney for his or her speech on controversial issues should be rejected because it constitutes a serious threat to a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, attorneys can ill-afford to wager their licenses on a rule that may be utilized to target their speech. Our democracy depends on attorneys' ability to speak freely.<sup>61</sup>

In all likelihood, Proposed Rule 6.5 will chill speech on one side of current political and social issues, while simultaneously creating little disincentive for attorneys who speak on the opposing side of these controversies.<sup>62</sup> Public discourse and civil society will suffer from the ideological straitjacket that Proposed Rule 6.5 will impose on Michigan attorneys.

**D. Proposed Rule 6.5's potential for chilling Michigan attorneys' speech is compounded by its lack of an intent requirement.**

Proposed Rule 6.5's threat to free speech is increased by the fact that it is not restricted to a knowledge standard nor even to a negligence standard. Indeed, Proposed Rule 6.5 fails to include any intent requirement whatsoever, simply providing that "[a] lawyer shall not . . . manifest bias or prejudice . . . or engage in harassment." The lack of a knowledge standard—actually, any standard at all—is a serious flaw. It means an attorney can violate Proposed Rule 6.5 without intending to do so or even being aware of having done so: "[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing . . . simply because someone might construe it that way."<sup>63</sup>

This is particularly troubling if implicit bias is considered to fall within the undefined terms in Proposed Rule 6.5. This lack of an intent requirement makes it entirely foreseeable that Proposed

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<sup>60</sup> "J.K. Rowling Joins 150 Public Figures Warning Over Free Speech," BBC (July 8, 2020), <https://www.bbc.com/news/world-us-canada-53330105>.

<sup>61</sup> William Shakespeare, *Henry VI, Part II*, Act IV, Scene II ("The first thing we do is, let's kill all the lawyers."). See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 371 (1985) (Stevens, J., dissenting) ("As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.").

<sup>62</sup> McGinniss, *supra* note 13, at 217-249 (explaining the "justified distrust of speech restrictions" such as Model Rule 8.4(g), in light of its proponents' stated desire "for a cultural shift . . . to be captured in the rules of professional conduct").

<sup>63</sup> Tenn. Att'y Gen. Op., *supra* note 56, at 5. See also Halaby & Long, *supra* note 3, at 243-245.

Rule 6.5 could reach communication or conduct that demonstrates implicit bias, that is, conduct or speech that the attorney is not consciously aware may be biased or prejudicial.

One can agree that implicit bias exists and still believe that bias “outside of human awareness” should not be grounds for an attorney’s loss of licensure or suspension, censure, or admonition.<sup>64</sup> But nothing would prevent a charge of discrimination based on “implicit bias” from being brought against an attorney under Proposed Rule 6.5 if someone thinks the attorney “reasonably should have known” his or her communication manifested implicit bias.<sup>65</sup> Such charges are foreseeable given that ABA Model Rule 8.4(g)’s “proponents repeatedly invoked that concept [of implicit bias] in arguing against any knowledge qualifier at all.”<sup>66</sup>

In the landmark case, *National Association for the Advancement of Colored People v. Button*,<sup>67</sup> which involved a First Amendment challenge to a state statute regulating attorneys’ speech, the Supreme Court ruled that “a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights,” explaining:

If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.<sup>68</sup>

Proposed Rule 6.5 fails to protect an attorney from complaints being filed against her based on her speech. It fails to protect an attorney from an investigation into whether her speech “manifests bias or prejudice” or “engages in harassment” based on one or more of the seventeen protected categories. The provision fails to protect an attorney from the expense of protracted litigation to defend her speech and her license. Such litigation extracts significant expense and a substantial emotional toll. Even if the investigation or litigation eventually concludes that the attorney’s speech was protected by the First Amendment, the attorney has had to inform courts that a complaint has been brought and that she is under investigation whenever she applies for admission

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<sup>64</sup> Halaby & Long, *supra* note 3, at 245 (“Even crediting the existence of implicit bias as well as corresponding concerns over its impact on the administration of justice, one recoils at the dystopian prospect of punishing a lawyer over unconscious behavior.”). *See also*, McGinnis, *supra* note 13, at 204-205; Dent, *supra* note 12, at 144.

<sup>65</sup> *See, e.g.*, Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 Calif. L. Rev. 965, 975 (2020) (ABA Model Rule 8.4(g) “addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias.”); *id.* at 978 n.70 (“[T]he rule’s use of ‘knows or reasonably should know’ arguably includes an understanding and reflection of unconscious bias and its effects.”).

<sup>66</sup> Halaby & Long, *supra* note 3, at 244 (“When a new anti-bias rule proved unsaleable without a knowledge qualifier, one was added, but only with the alternative ‘reasonably should know’ qualifier alongside. That addition was not subjected to comment by the public or by the bar or the ABA’s broader membership.”) (footnote omitted).

<sup>67</sup> *NAACP v. Button*, 371 U.S. 415 (1963).

<sup>68</sup> *Id.* at 438-39.

to another bar or seeks to appear pro hac vice in a case. In the meantime, her personal reputation may suffer damage through media reports.

The process is the punishment. Rather than risk a prolonged investigation with an uncertain outcome, and then lengthy litigation, a rational, risk-adverse attorney will self-censor. Because an attorney's loss of license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one's own speech than to risk a grievance complaint under proposed Rule 8.4(h). As a federal judge observed in *Greenberg v. Haggerty*:<sup>69</sup>

Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the [lawyer's] words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause . . . any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities.

#### **E. There is no need for Proposed Rule 6.5.**

Existing Michigan Rules of Professional Conduct Rules 6.5 and 8.4(d) are sufficient to tackle whatever problem Proposed Rule 6.5 is trying to solve. The current version of Rule 6.5 adequately protects the public by mandating a broad requirement that every person should be treated with fairness, courtesy, and respect. Similarly, existing Rule 8.4(d) adequately addresses prejudicial conduct. The current versions of Rule 6.5 and 8.4(d) are both written to fairly balance the interests of both attorneys and the public. There simply is no demonstrated need for Proposed Rule 6.5.

#### **VI. Michigan Should Follow the Example of Other States that Have Opted not to Adopt ABA Model Rule 8.4(g) or a Similar Rule.**

Fortunately, ABA Model Rule 8.4(g) operates only in those states in which the highest court adopts it. After nine years, only two states have adopted ABA Model Rule 8.4(g), and seven states have adopted a modified version of ABA Model Rule 8.4(g), most of them only after declining to adopt the model rule itself.

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<sup>69</sup> 491 F.Supp. 3d 12, 25 (E.D. Pa. 2020), *summary judgment granted plaintiff sub nom, Greenberg v. Goodrich*, 593 F.Supp. 3d 174 (E.D. Pa. 2022), *rev'd for lack of standing sub nom Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. 2023), *cert. denied*, 144 S. Ct. 1393 (2024).

At least **seventeen** states have rejected or abandoned efforts to impose ABA Model Rule 8.4(g) or a version thereof. Numerous state supreme courts around the nation have officially rejected adoption of ABA Model Rule 8.4(g), or a rule based on ABA Model Rule 8.4(g).

- In August 2018, after a public comment period, the *Arizona* Supreme Court rejected a petition from the Central Arizona Chapter of the National Lawyer Guild urging adoption of ABA Model Rule 8.4(g).<sup>70</sup>
- In October 2021, the *Hawaii* Supreme Court amended its Rule 8.4 by adopting new subsection (h) that specifically addresses sexual harassment by an attorney in his or her professional capacity.<sup>71</sup> In doing so, the Hawaii Supreme Court rejected the originally proposed rule that closely resembled ABA Model Rule 8.4(g).
- The *Idaho* Supreme Court not once but twice—in 2018<sup>72</sup> and 2023<sup>73</sup>—rejected a resolution by the Idaho State Bar Association to adopt a modified version of ABA Model Rule 8.4(g).
- In August 2020, the *Iowa* Supreme Court, after soliciting public comments on amendments to its professional conduct rules, adopted some but not all of the proposed amendments. One of those not adopted was the amendment to its misconduct rule.
- A report from the ABA itself indicates that the *Minnesota* Supreme Court rejected the rule.<sup>74</sup>
- In March 2019, when the State Bar of *Montana* petitioned the state supreme court to revise 18 rules of the Montana Rules of Professional Conduct, that bar mentioned in a footnote that Montana Rule of Professional Conduct Rule 8.4(g) was not included in the review as it had “earlier been the subject of Court attention ... and the Supreme Court chose not to adopt the ABA’s Model Rule 8.4(g).”<sup>75</sup>

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<sup>70</sup> Arizona Supreme Court Order re: No. R-17-0032 (Aug. 30, 2018), <https://www.christianlegalsociety.org/wp-content/uploads/2023/04/Rules-Agenda-Denial-of-Amending-8.4.pdf>.

<sup>71</sup> Hawaii Supreme Court Order SCRU-11-0001047 (October 26, 2021), <https://www.christianlegalsociety.org/wp-content/uploads/2023/07/HI-8.4-amendment-order.pdf>.

<sup>72</sup> Idaho Supreme Court, Letter to Executive Director, Idaho State Bar (September 6, 2018), <https://www.christianlegalsociety.org/wp-content/uploads/2023/04/ISC-Letter-IRPC-8.4g.pdf>.

<sup>73</sup> Idaho Supreme Court Order *In re* Idaho State Bar Resolution 21-01 (January 20, 2023), <https://www.christianlegalsociety.org/wp-content/uploads/2023/02/2023-Idaho-Published-Opinion.pdf>.

<sup>74</sup> American Bar Association Center for Professional Responsibility Policy Implementation Committee, *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (Sept. 19, 2018), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chart\\_adopt\\_8\\_4\\_g.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.authcheckdam.pdf).

<sup>75</sup> Petition in Support of Revision of the Montana Rules of Professional Conduct, page 3, n.2, <https://www.christianlegalsociety.org/wp-content/uploads/2023/04/MT-Petition-and-Memo.pdf>.

- In June 2017, the Supreme Court of *South Carolina* rejected adoption of ABA Model Rule 8.4(g).<sup>76</sup>
- In March 2020, the Supreme Court of *South Dakota* unanimously decided to deny the proposed amendment to Rule 8.4 because the court was “not convinced that proposed Rule 8.4(g) is necessary or remedies an identified problem.”<sup>77</sup>
- In April 2018, after a public comment period, the Supreme Court of *Tennessee* denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).<sup>78</sup>
- In July 2023, *Wisconsin*, denied a petition from the State Bar Standing Committee on Professional Ethics asking the court to replace existing Supreme Court Rule 20:8.4(i) with ABA Model Rule 8.4(g).<sup>79</sup>

State bars themselves have weighed in against the model rule or a variation thereof. Some state bars have responded to a state supreme court’s comment request. Others decided on their own that ABA Model Rule 8.4(g) and similar rules should not be adopted and chose not to move proposals forward to their respective supreme courts.

- In 2019, the *Alaska* Bar Association’s Rules of Professional Conduct Committee recommended that the Board not advance the proposed rule to the Alaska Supreme Court but instead remand it to the committee for additional revisions, noting that “[t]he amount of comments was unprecedented.”<sup>80</sup> The Committee’s concerns included vagueness, the need for an appropriate mental state, undefined terms, and the broad scope of activities covered.<sup>81</sup>

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<sup>76</sup> Supreme Court of South Carolina, *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct Appellate Case No. 2017-000498*, Order (June 20, 2017), <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (if arrive at South Carolina Judicial Department homepage, select “2017” as year and then scroll down to “2017-06-20-01”).

<sup>77</sup> Letter from Chief Justice Gilbertson to the South Dakota State Bar (March 9, 2020), [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ABA%208.4\(g\)/Proposed\\_8.4\\_Rule\\_Letter\\_3\\_9\\_2\\_0.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_2_0.pdf).

<sup>78</sup> Supreme Court of Tennessee, *In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, Order No. ADM2017-02244 (Apr. 23, 2018), [https://www.tncourts.gov/sites/default/files/order\\_denying\\_8.4g\\_petition\\_.pdf](https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf).

<sup>79</sup> Supreme Court of Wisconsin, Order No. 22-02 (July 11, 2023), <https://www.christianlegalsociety.org/wp-content/uploads/2023/07/Wisconsin-22-02-Final-Order.pdf>.

<sup>80</sup> Letter from Chairman Murtagh, Chair of the Alaska Rules of Professional Conduct Committee, to President of the Alaska Bar Association (Aug. 30, 2019), [https://www.christianlegalsociety.org/wp-content/uploads/2022/10/Report.ARPCmte.on8\\_4f\\_CLS\\_Center\\_for\\_Law\\_and\\_Religious\\_Freedom.pdf](https://www.christianlegalsociety.org/wp-content/uploads/2022/10/Report.ARPCmte.on8_4f_CLS_Center_for_Law_and_Religious_Freedom.pdf).

<sup>81</sup> “Board Proposes Alaska Rule of Professional Conduct 8.4(f)-(g),” *Alaska Bar Rag*, June 2020, pp. 6-8, <https://www.christianlegalsociety.org/wp-content/uploads/2024/12/Alaska-Bar-Rag.pdf>. In 2021, the Alaska Supreme Court adopted Rule 8.4(f), which is much narrower than ABA Model Rule 8.4(g) and requires knowledge, specifically defines “harassment” and “discrimination,” and limits the scope of activities covered.

- 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>82</sup>
- The *North Dakota* Joint Committee on Attorney Standards voted not to recommend adoption of ABA Model Rule 8.4(g), expressing concerns that it was “overbroad, vague, and imposes viewpoint discrimination” and that it might “have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views.”<sup>83</sup>
- 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>84</sup> In a letter to the court, the state bar president explained that “the language used in other jurisdictions was inconsistent and changing,” and, therefore, “the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions.”<sup>85</sup>
- A state bar association committee in *Oregon* voted not to recommend it after considering it at the committee level.

Several state attorneys general have issued opinions critical of ABA Model Rule 8.4(g), advising against its adoption and calling into question its constitutionality.

- In August 2019, the *Alaska* attorney general identified numerous constitutional concerns with ABA Model Rule 8.4(g).<sup>86</sup>
- A year earlier, the *Arizona* attorney general filed a comment letter urging the Arizona Supreme Court to heed the opposition of other states, state attorneys general, and state bar associations to adoption of ABA Model Rule 8.4(g). He also noted the constitutional concerns that ABA Model Rule 8.4(g) raises as to free speech, association, and expressive association.<sup>87</sup>

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<sup>82</sup> Louisiana State Bar Association, *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, Oct. 30, 2017, <https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

<sup>83</sup> Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. on Att’y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (December 14, 2017), <https://perma.cc/3FCP-B55J>.

<sup>84</sup> Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4*, Order (September 25, 2017), <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>.

<sup>85</sup> Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), <https://www.christianlegalsociety.org/wp-content/uploads/2023/04/Bar-Letter-Retracting-Petition-17-32067.pdf>.

<sup>86</sup> Letter from Alaska Attorney General to Alaska Bar Association Board of Governors (August 9, 2019), <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>.

<sup>87</sup> Attorney General Mark Brnovich, *Attorney General’s Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court* (May 21, 2017), <https://www.clsnet.org/document.doc?id=1145>.

- Also in 2017, the *Louisiana* attorney general concluded that “[t]he regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid.”<sup>88</sup> Because of the “expansive definition of ‘conduct related to the practice of law’” and its “countless implications for a lawyer’s personal life,” the attorney general found the rule to be “unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct.”<sup>89</sup>
- In May 2022, the *Nebraska* attorney general recommended that the Nebraska Supreme Court not adopt a proposed ABA Model Rule 8.4(g)-like amendment, calling the proposed amendment “unconstitutional” and opining that the “sweeping scope and vague language [of the proposed rule] will chill attorneys’ constitutionally protected speech throughout Nebraska.”<sup>90</sup>
- The attorney general of *South Carolina*, in 2017, determined that “a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of Religion and is void for vagueness.”<sup>91</sup>
- In March 2018, the attorney general of *Tennessee* filed Opinion 18-11, attaching his office’s comment letter to the Supreme Court of Tennessee, opposing adoption of a proposed rule closely modeled on ABA Model Rule 8.4(g). He wrote that “the goal of the proposed rule is to subject to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.”<sup>92</sup> After a thorough analysis, the attorney general concluded that the proposed rule “would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct.”<sup>93</sup>
- In December 2016, the *Texas* attorney general opined 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>94</sup> The opinion declared that “[c]ontrary to . . . basic free

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<sup>88</sup> La. Att’y Gen. Op., *supra* note 51, at 4.

<sup>89</sup> *Id.* at 6.

<sup>90</sup> Neb. Att’y Gen. Letter (May 2, 2022), <https://www.christianlegalsociety.org/wp-content/uploads/2023/04/NE-General-Attorney-Commnet-Letter.pdf>.

<sup>91</sup> South Carolina Att’y Gen. Op. (May 1, 2017) at 13, <https://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf>.

<sup>92</sup> Tenn. Att’y Gen. Op., *supra* note 56, at 10.

<sup>93</sup> *Id.* at 12.

<sup>94</sup> Tx. Att’y Gen. Op., *supra* note 51, at 3.

speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues."<sup>95</sup>

Finally, even one state legislature has acted on ABA Model Rule 8.4(g). The *Montana* State Legislature adopted a joint resolution urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g) because of the impact ABA Model Rule 8.4(g) could have 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>96</sup>

### Conclusion

There is no reason to subject Michigan attorneys to the experiment represented by Proposed Rule 6.5, as an extension of ABA Model Rule 8.4(g). Federalism's great advantage is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see the effects on attorneys—in the handful of states that have adopted ABA Model Rule 8.4(g) or similar rule—of the real-life implementation of the rule. This is particularly true when ABA Model Rule 8.4(g) and its progeny have failed to survive close scrutiny by official entities in so many states.

Attorneys 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 the proposed amendment to the Michigan Rules of Professional Conduct Rule would drastically curtail that freedom, this Court should reject it. Proposed Rule 6.5 will irreparably harm the First Amendment rights of Michigan attorneys and, if adopted, would operate as a speech code for Michigan attorneys. The rule could also be misused to target disfavored speech from all sides of the political spectrum. The damage that premature adoption of Proposed Rule 6.5 may do to Michigan attorneys can never be undone, while a decision to not adopt Proposed Rule 6.5 can always be revisited.

The proposed rule creates several other serious concerns, but the concerns already discussed adequately illustrate why this Court should reject Proposed Rule 6.5. Rejecting the proposed rule would seem a prudent and constitutionally wise course for the Michigan Supreme Court to choose.

Thank you for your consideration of these comments.

Respectfully submitted,

/s/ David Nammo  
David Nammo  
CEO & Executive Director  
Christian Legal Society

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<sup>95</sup> *Id.*

<sup>96</sup> Joint Resolution, *supra* note 33.

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