

Talking Points for South Dakota Proposed Rule 8.4(g)

1. Proposed Rule 8.4(g) would make it professional misconduct for a lawyer to “engage in harassing or discriminatory conduct by the known use of words or actions based upon race, sex, religion, national origin, disability, age, or sexual orientation when that conduct is directed to . . . others and that conduct is prejudicial to the administration of justice.”

2. Proposed Rule 8.4(g) is redundant with existing South Dakota Rules of Professional Conduct Rule 8.4(d) and existing Comment 3.

a. Proposed Rule 8.4(g) is rightly limited to conduct that “is prejudicial to the administration of justice.” Yet that makes Proposed Rule 8.4(g) redundant because existing Rule 8.4(d) already makes it professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.”

b. Existing Comment [3] adds to Proposed Rule 8.4(g)’s redundancy, as the comment already makes it misconduct for a lawyer to manifest “bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status” when “representing a client” and “such actions are prejudicial to the administration of justice.” Current Rule 8.4(d) and Comment [3], therefore, already provide an adequate basis for disciplining attorneys for bias or prejudice.

3. Proposed Rule 8.4(g), like ABA Model Rule 8.4(g), applies to “words” and, therefore, creates a speech code that will chill lawyers’ speech, particularly socially conservative or religious viewpoints. For this exact reason, several constitutional scholars have criticized the model rule.

a. First Amendment expert, Professor Eugene Volokh of the UCLA School of Law, explains this in a two-minute video at <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

b. Dean of North Dakota University School of Law, Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol’y 173 (2019), <http://www.harvard-jlpp.com/wp-content/uploads/sites/21/2019/02/McGinniss-final.pdf>.

c. 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).

4. Proposed Rule 8.4(g) is ambiguous.

a. It is unclear as to “when” it applies to an attorney’s speech. Proposed Rule 8.4(g) is not limited to lawyer’s conduct “in the course of representing a client,” as is current Comment [3]. Instead, by its terms, the language applies to all of a lawyer’s speech to “others” but not to “legitimate advocacy. . . in any legal proceeding, action or forum where said counsel provides advice.” This indicates its broad applicability, but it is not clear what constitutes a “forum where said counsel provides advice.”

b. Proposed Rule 8.4(g) is also ambiguous because it fails to provide definitions for “harassing” conduct, “discriminatory” conduct, and “legitimate advocacy.”

c. Proposed Rule 8.4(g)’s mens rea standard is also ambiguous. It refers to “the *known* use of words,” which fails to identify a particular level of intent. “Known” means “recognized” or “familiar,” which is not the same as “knowingly,” which means “deliberately.” The phrase “known use of words” seems to mean that the attorney is known to have used the words at issue, but it does not require that she used them deliberately or intentionally.

5. When the ABA adopted Model Rule 8.4(g) in August 2016, it sent letters to the chief justices of all 50 state supreme courts, asking them to adopt ABA Model Rule 8.4(g).

a. After more than three years, only two states, Vermont and New Mexico, have adopted ABA Model Rule 8.4(g), while 11 states have rejected it. This shows that ABA Model Rule 8.4(g) is seriously flawed.

b. The ABA itself lists nine states as having declined to adopt ABA Model Rule 8.4(g): Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina, and Tennessee.¹ North Carolina and Texas have for all practical purposes also declined to adopt it.

6. When the ABA adopted Model Rule 8.4(g) in August 2016, it made the false claim that 24 states already had a rule similar to the new model rule. Now, three and a half years later, even the ABA has abandoned that claim. In reality, in August 2016, 24 states had some rule that referred to “bias, prejudice, harassment, or discrimination,” but all of those rules were narrower than ABA Model Rule 8.4(g), which is an extremely expansive rule.

7. After the ABA adopted Model Rule 8.4(g), the United States Supreme Court issued two free speech decisions that demonstrate that ABA Model Rule 8.4(g) is unconstitutional. Some ABA section leaders have admitted this is so.

a. *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), rejected the idea that professional speech is less protected by the First Amendment than other types of speech, specifically using lawyers’ speech as an example; regulations regarding professional speech, including lawyers’ speech, are subject to strict scrutiny, meaning that the government must show a compelling interest to justify the regulation that the government cannot achieve by a more narrowly tailored alternative.

b. *Matal v. Tam*, 137 S. Ct. 1744 (2017), held that a law that prohibits disparaging or demeaning speech is not viewpoint neutral and, therefore, violates the First Amendment.

8. ABA Model Rule 8.4(g) is so broad that it would apply to nearly everything that a lawyer does or says.

¹ The ABA’s most recent chart, dated October 18, 2019, shows Vermont and New Mexico as the only states to have adopted ABA Model Rule 8.4(g), along with nine states that have declined to adopt it. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adapt_8_4_g.pdf.

a. The proponents of ABA Model Rule 8.4(g) particularly wanted to regulate lawyers' speech.

b. If adopted, ABA Model Rule 8.4(g) would chill lawyers' speech on political, social, and religious matters.

1. As Dean McGinniss has noted, it is particularly likely to chill conservative speech while leaving liberal speech untouched.

2. The legal profession is the last profession in which speech should be chilled.

3. Proponents of ABA Model Rule 8.4(g) often claim that the rule simply imposes the same types of restrictions on lawyers' speech as on judges' speech, but that claim misses the essential point that there is a fundamental difference between the judges' duty to maintain the appearance of impartiality and the lawyers' duty to be a zealous advocate of even controversial ideas.

c. ABA Model Rule 8.4(g) also threatens lawyers' free exercise of religion.

1. It could be used to deter a lawyer from sitting on the board of a religious congregation or school because some of their policies might be deemed discriminatory by those who do not understand religious freedom.

2. It calls into question their ability to belong to religious organizations formed around one particular faith.

d. Similarly, ABA Model Rule 8.4(g) calls into question a lawyer's involvement in single-sex organizations, such as fraternity and sororities, or groups dedicated to advancing women's interests in the profession.

9. If ABA Model Rule 8.4(g) is adopted, law firms will no longer be able to engage in affirmative action in their recruitment and hiring programs. While a comment purports to protect such programs, lawyers making decisions based on protected classes have nonetheless violated the black letter rule and risk a complaint of professional misconduct.