



**Why Wisconsin Should Not Adopt ABA Model Rule 8.4(g):  
Wisconsin Lawyers' Comment Deadline March 12, 2021**

The Wisconsin Bar's Standing Committee on Professional Ethics is seeking input on whether to adopt ABA Model Rule 8.4(g) as a modification of current Wisconsin Supreme Court Rule 20:8.4(i). Comments opposing adoption of ABA Model Rule 8.4(g) should be sent to the Standing Committee by **March 12, 2021**. Comments should be sent by email to Ethics Committee Chair Ben Kempinen at [kempinen@wisc.edu](mailto:kempinen@wisc.edu) and Ethics Counsel Tim Pierce at [tpierce@wisbar.org](mailto:tpierce@wisbar.org).

[ABA Model Rule 8.4\(g\)](#) is the deeply-flawed, highly-criticized rule adopted by the American Bar Association in August 2016. ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers, as UCLA Professor Eugene Volokh, a nationally recognized First Amendment expert, explains in a [two-minute Federalist Society video](#). CLS has outlined [ten key problems with ABA Model Rule 8.4\(g\)](#) and reasons why it should not be adopted.

**Please take action before March 12, 2021:** Send a short email (or longer comments) to Chair Ben Kempinen at [kempinen@wisc.edu](mailto:kempinen@wisc.edu) and Ethics Counsel Tim Pierce at [tpierce@wisbar.org](mailto:tpierce@wisbar.org), urging the Committee to reject ABA Model Rule 8.4(g). A sample comment could say: **"I oppose adoption of ABA Model Rule 8.4(g) because it threatens Wisconsin lawyers' First Amendment rights. Existing Supreme Court Rule 20:8.4(i) already adequately addresses harassment 'on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities.' I respectfully request the Committee reject ABA Model Rule 8.4(g)."**

Other options include signing a [sample comment letter](#) and emailing it to the above email addresses, or submitting a comment letter based on some of the legal concerns highlighted in the [Christian Legal Society comment memorandum](#) to the Committee.

**Key problems with ABA Model Rule 8.4(g):** A federal district court has ruled that ABA Model Rule 8.4(g) is unconstitutional.<sup>1</sup> Respected scholars have criticized ABA Model Rule 8.4(g) as a speech code for lawyers.<sup>2</sup> Fortunately, ABA Model Rule 8.4(g) operates only in those states in which the highest court adopts it. After four years, only two states, Vermont and New Mexico, have adopted ABA Model Rule 8.4(g). Pennsylvania and Maine adopted modified versions, but Pennsylvania's was held unconstitutional by a federal district court in the *Greenberg* decision.

After careful consideration, many states have concluded that ABA Model Rule 8.4(g) is too flawed to adopt and have instead chosen the prudent course of waiting to see whether other states adopt ABA Model Rule 8.4(g) and its impact on attorneys in those states. At least **fourteen** states have rejected or abandoned efforts to impose ABA Model Rule 8.4(g), including:

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<sup>1</sup> *Greenberg v. Haggerty*, --- F. Supp.3d ---, 2020 WL 2772251 (E.D. Pa. 2020), appeal docketed, No. 20-3602 (3d Cir. Dec. 24, 2020).

<sup>2</sup> See, e.g., Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019); Prof. Ronald Rotunda, "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," The Heritage Foundation, Oct. 6, 2016; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law,"* 30 Geo. J. Leg. Ethics 241 (2017); Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201 (2017). See also, Prof. Volokh's Federalist Society debate at <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s> (Mar. 2017), and Prof. Rotunda's Federalist Society debate at <https://www.youtube.com/watch?v=V6rDPjqBcQg> (Nov. 2017).

- **Formal rejection:** The state supreme courts of *Arizona, Idaho, Montana, New Hampshire, South Carolina, South Dakota, and Tennessee* formally rejected ABA Model Rule 8.4(g) after holding comment periods.<sup>3</sup> ABA Model Rule 8.4(g) has also been rejected in Illinois, Louisiana, Minnesota, Nevada, North Dakota, and Texas.
- **State legislature action:** The *Montana* 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>4</sup>
- **State bar activity:** The *Illinois* Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule.”<sup>5</sup> The *North Dakota* Joint Committee on Attorney Standards recommended rejection. The *Louisiana* Rules of Professional Conduct Committee voted not to recommend its adoption.
- **State Attorneys General:** Some attorneys general concluded it likely is unconstitutional.<sup>6</sup>

#### 1. ABA Model Rule 8.4(g) would regulate nearly everything a lawyer says or does, including:

- speaking at public events, presenting CLE courses, or participating in panel discussions on controversial legal issues;
- tweeting or re-tweeting something someone disagrees with;
- writing 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 board of a single-sex fraternity or sorority;
- belonging to organizations with belief-based membership or leadership requirements;
- performing work for political or social action organizations, political parties, or campaigns;
- lobbying or testifying before legislative committees; and
- providing pro bono counsel to religious congregations, colleges, or schools.

**2. ABA Model Rule 8.4(g) likely is unconstitutional under the analyses in three recent United States Supreme Court decisions.**<sup>7</sup> In 2018, the 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 2017 and again in 2019, a unanimous Supreme Court made clear that a government prohibition on disparaging, derogatory, demeaning, offensive, immoral, or scandalous speech is viewpoint discriminatory and, therefore, unconstitutional under the First Amendment.

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

**4. ABA Model Rule 8.4(g) would make it professional misconduct for lawyers and law firms to engage in many current initiatives aimed at promoting diversity in their employment practices.**

<sup>3</sup> [https://www.tncourts.gov/sites/default/files/order\\_denying\\_8.4g\\_petition\\_.pdf](https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf) (Tennessee); [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf) (Arizona); [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ISC%20Letter%20-%2020IRPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%2020IRPC%208.4(g).pdf) (Idaho); <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (South Carolina).

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

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

<sup>6</sup> Alaska Att’y Gen. Comment letter (August 9, 2019), <http://www.law.state.ak.us/press/releases/2019/080919-Rule8.html>; Tex. Att’y Gen. Op. KP0123 (Dec. 20, 2016), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>; Tenn. Att’y Gen. Op. 18-11, <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>.

<sup>7</sup> *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).