



Why New Hampshire Should Reject ABA Model Rule 8.4(g)
New Hampshire Supreme Court Advisory Committee on Rules' Comment Period Ends May 31, 2018
Public Hearing June 1, 2018

ABA Model Rule 8.4(g) is a deeply flawed rule adopted by the American Bar Association at its annual meeting in San Francisco, California, in August 2016. *Fortunately, it can only operate in those states in which the highest court adopts it; and to date, only the Vermont Supreme Court has done so.*¹

The New Hampshire Supreme Court Advisory Committee on Rules is weighing whether to adopt ABA Model Rule 8.4(g).² But after examining ABA Model Rule 8.4(g), official bodies in other states have concluded that it is too flawed to impose on bar members. Federalism's great advantage is that one state can reap the benefit of other states' trial and error. Prudence counsels a course of waiting to see whether other states adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states.

ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers, as Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, explains in a **two-minute Federalist Society video** at <https://www.youtube.com/watch?v=AfpdWmlOXbA>. His Federalist Society debate demonstrates the rule's flaws at <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>. The late Professor Ronald Rotunda, a highly respected constitutional scholar and ethics expert, described the rule's grave threat to lawyers' speech in "*The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*," The Heritage Foundation, Oct. 6, 2016.³ His Federalist Society debate is at <https://www.youtube.com/watch?v=V6rDPjqBcOg>.

ABA Model Rule 8.4(g) would operate as a speech code because it applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." Furthermore, the proposed rule makes clear that "conduct" includes "verbal conduct," which is, of course, speech. The real question is what conduct does ABA Model Rule 8.4(g) *not* reach? Activities within its scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as faculty, adjunct faculty member, or guest lecturer
- publishing law review articles, blogposts, and op-eds
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social issues
- serving on the boards of various religious or other charitable institutions
- serving at legal aid clinics
- serving political or social action organizations
- lobbying or testifying before legislative committees
- serving one's congregation
- serving one's alma mater if it is a religious institution of higher education
- serving religious ministries that assist vulnerable populations
- serving on the board of a fraternity or sorority
- volunteering with or working for political parties

Numerous states have either rejected ABA 8.4(g) or abandoned attempts to adopt it, including:

¹ For further information, contact Kim Colby at kscolby@clsnet.org or find resources at <https://www.christianlegalsociety.org/aba-model-rule-new-hampshire> and <https://www.clsreligiousfreedom.org/resources/aba-model-rule-84g-and-states>.

² <https://www.clsnet.org/document.doc?id=1135>.

³ <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>.

- **Formal rejection:** The Supreme Courts of *Tennessee* and *South Carolina* have expressly rejected ABA Model Rule 8.4(g).⁴
- **Petitions to adopt withdrawn:** Petitions to adopt ABA Model Rule 8.4(g) were withdrawn in *Nevada* (at the supreme court level) and *Louisiana* (at the professional rules committee level) after comment periods.⁵
- **Comment period without announced decision:** No state supreme court decision has yet been announced after a comment period was held on adoption of some version of ABA Model Rule 8.4(g) in *Illinois*, *Idaho*, *Arizona*, *Montana*, *Pennsylvania*, and *Utah*. The *Maine* Supreme Judicial Court has a comment period open until June 5, 2018.
- **State bar activity:**
 - The *Illinois* State Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule in Illinois.”⁶
 - The *North Dakota* Joint Committee on Attorney Standards recommended rejection of ABA Model Rule 8.4(g).
 - The *Louisiana* Rules of Professional Conduct Committee, which had spent a year studying 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.”⁷
 - The Disciplinary Board of the Supreme Court of *Pennsylvania* explained that ABA Model Rule 8.4(g) was too broad:
 - It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.⁸
- **State legislature action:** The *Montana* Legislature adopted a joint resolution urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g). The impact of 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” greatly concerned the Montana Legislature.⁹ It was also concerned about its effect on state legislators’ speech “on legislative matters, speaking to constituents about their positions on legislation, or campaigning for office.”
- **State attorneys general:** The Attorneys General of *Arizona*, *Tennessee*, *Texas*, *Louisiana*, and *South Carolina* have issued opinions finding ABA Model Rule 8.4(g) has significant constitutional problems.¹⁰

Take action: For additional reasons why Model Rule 8.4(g) should be rejected, read Christian Legal Society’s comment letter¹¹ or this law review article.¹² Individuals may file comments, long or short, with the Advisory Committee on Rules by email at rulescomment@courts.state.nh.us. **The written comment deadline is May 31. A public hearing is scheduled for 12:30 p.m. on June 1 at the Supreme Court Building in Concord.**

⁴ https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf ; <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01>.

⁵ <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>; <https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

⁶ <https://iln.lsba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

⁷ <https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

⁸ <http://www.pabulletin.com/secure/data/vol46/46-49/2062.html>.

⁹ <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

¹⁰ <https://www.clsnet.org/document.doc?id=1142>; <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>; <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>; <http://www.scag.gov/archives/31861>; <https://lalegaethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384> .

¹¹ <https://www.clsnet.org/document.doc?id=1136>.

¹² https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946375.