CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

April 11, 2019

The Honorable Robert J. Lynn, Chief Justice
The Honorable Gary E. Hicks, Senior Associate Justice
The Honorable James P. Bassett, Associate Justice
The Honorable Anna Barbara Hantz Marconi, Associate Justice
The Honorable Patrick E. Donovan, Associate Justice
The Supreme Court of New Hampshire
One Charles Doe Drive
Concord, NH 03301
Attn: Eileen Fox, Clerk of Court
By email: rulescomment@courts.state.nh.us

Re: Christian Legal Society Comment Letter Opposing Addition of Rule of Professional Conduct 8.4(g)

Dear Chief Justice Lynn, Justice Hicks, Justice Bassett, Justice Hantz Marconi, and Justice Donovan:

This comment letter is filed pursuant to this Court's Order dated February 11, 2019, announcing a public comment period through the close of the public hearing on April 12, 2019.[1] The Advisory Committee on Rules has recommended the addition of a new Rule of Professional Conduct 8.4(g) patterned on the widely criticized ABA Model Rule 8.4(g). The Committee began its consideration of ABA Model Rule 8.4(g) two years ago in response to a letter dated September 29, 2016, from the ABA Center for Professional Responsibility Policy Implementation Committee to Chief Justice Dalianis urging adoption of ABA Model Rule 8.4(g).[2]

The Committee had a difficult job because ABA Model Rule 8.4(g) itself emerged from a rushed process in which the desire to produce an extremely expansive black letter rule trumped all other constitutional and practical considerations, including legitimate concerns for lawyers' First and Fourteenth Amendment rights.[3] Thus, the Committee began its work with an already defective rule. Unfortunately, despite the Committee members' best efforts, the new Rule of Professional Conduct 8.4(g) takes a bad rule and makes it worse by further expanding its scope and leaving key terms undefined.

This deeply flawed black letter rule should not be imposed on the members of the New Hampshire Bar. After over two years of deliberations in many states across the country, Vermont

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[1] Supreme Court of New Hampshire Order R-2019-0001 (Feb. 11, 2019), https://www.courts.state.nh.us/supreme/orders/2-11-19-order-2.pdf.

[2] The State of New Hampshire Advisory Committee on Rules, Report to Eileen Fox, Clerk of Court (Feb. 8, 2019) at 5, https://www.courts.state.nh.us/committees/adviscommrules/reports/February-8-2019-Report-to-the-Court.pdf.

[3] *See* 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) (a thorough examination of the problematic process by which the ABA adopted Model Rule 8.4(g)).

is the only state to have adopted ABA Model Rule 8.4(g). In contrast, at least eleven states have concluded, after careful study, that ABA Model Rule 8.4(g) is both unconstitutional and unworkable. These states have opted to take the prudent course of waiting to see whether other states choose to experiment with ABA Model Rule 8.4(g) and the practical effect of that experiment on the lawyers in those states. *See infra* at 9-13.

A number of scholars have accurately characterized ABA Model Rule 8.4(g) 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 serious impact on attorneys' speech in a short video for the Federalist Society.[4]

The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics, early warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.[5] Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, "[t]he ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment."[6]

Dean Michael S. McGinniss, who teaches professional responsibility, recently "examine[d] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."[7] 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."[8]

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[4] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA. Professor Volokh expanded on the many problems of ABA Model Rule 8.4(g) in a debate at the Federalist Society National Student Symposium. *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=b074xW5kvB8&t=50s.

[5] 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.

[6] Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017 [hereinafter "Rotunda & Dzienkowski"], "§ 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."

[7] Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173, 173 (2019).

[8] Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 241, 243 (2017).

In a thoughtful examination of the rule's legislative history, practitioners Andrew Halaby and Brianna Long concluded 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."[9] 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."[10] And 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."[11]

ABA Model Rule 8.4(g) is unconstitutional under two recent Supreme Court decisions: Since the ABA adopted Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued two major free speech decisions that demonstrate its unconstitutionality. First, under the Court's analysis in *National Institute of Family and Life Advocates ("NIFLA") v. Becerra*, 138 S. Ct. 2361 (2018), Model Rule 8.4(g) is an unconstitutional *content*-based restriction on lawyers' speech. The *NIFLA* Court held that state restrictions on "professional speech" are presumptively unconstitutional and subject to strict scrutiny. Second, under the Court's analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), ABA Model Rule 8.4(g) is an unconstitutional *viewpoint*-based restriction on lawyers' speech that cannot survive the strict scrutiny triggered by viewpoint discrimination. *See infra* at 16-19.

Last week, the ABA Section of Litigation published an article confirming that several section members see the Court's *NIFLA* decision as raising serious concerns about the overall constitutionality of ABA Model Rule 8.4(g)[12]:

> Model Rule 8.4(g) "is intended to combat discrimination and harassment and to ensure equal treatment under the law," notes Cassandra Burke Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section's Civil Rights Litigation Committee. While it serves important goals, "the biggest question about Rule 8.4(g) has been whether it unconstitutionally infringes on lawyers' speech rights—and after the Court's decision in *Becerra*, it increasingly looks like the answer is yes," Robertson concludes.

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[9] Halaby & Long, *supra* note 3, at 257.
[10] *Id.*
[11] *Id.* at 204.
[12] C. Thea Pitzen, *First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g) Constitutional?*, ABA Section of Litigation Top Story, Apr. 3, 2019, https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond/.

ABA Model Rule 8.4(g) will inevitably chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues: Because lawyers often are the spokespersons and leaders in political, social, and cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected because it constitutes a serious threat to maintaining 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, lawyers can ill-afford to wager their licenses on a rule that can be used to punish their speech. *See infra* at 23-29.

For example, ABA Model Rule 8.4(g) includes *any* conduct "related to the practice of law" that the lawyer "knows or reasonably should know is harassment or discrimination" on twelve separate bases. According to its Comment [3], the regulated conduct includes speech. That is, "discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others," and "[h]arassment includes . . . derogatory or demeaning *verbal* or physical conduct." (Emphasis supplied.) "Verbal conduct" is, of course, a euphemism for speech.

Furthermore, as its accompanying Comment [4] states, ABA Model Rule 8.4(g) would regulate *any* "[c]onduct with respect to the practice of law includ[ing] 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." (Emphasis supplied.) In plain English, regulated conduct "includes . . . interacting with . . . others . . . in connection with the practice of law."

Surprisingly, the scope of the new Rule of Professional Conduct 8.4(g) has been broadened even beyond that of ABA Model Rule 8.4(g). The proposed rule would cover all "conduct while acting as a lawyer *in any context*." This extreme breadth is intentional, as the Committee's Report explains:

> The language from the original proposal, 'engage in conduct related to the practice of law' has been replaced with 'engage in conduct while acting as a lawyer in any context.' [Senator Feltes] noted that comment 4 of the original proposal reads, 'see ABA Comment 4 related to the intended scope of the phrase, 'related to the practice of law.'" This language is not included in the Feltes-Herrick proposal. This is because he believes that *the model comment is too specific*.[13]

The compelling question becomes: What conduct is *not* reached? Virtually everything a lawyer does can be characterized as "conduct related to the practice of law" or "conduct while

[13] Comm. Rep., *supra* note 2, at 13.

acting as a lawyer in any context." Professor Rotunda and Professor Dzienkowski have noted that "[t]his Rule applies to lawyers chatting around the water cooler, participating on a CLE panel, or hiring a law firm messenger."[14]

ABA Model Rule 8.4(g) subjects a lawyer to disciplinary liability for a host of expressive activities:

- Is a lawyer subject to discipline for her discussion of hypotheticals while presenting a CLE course?[15]
- Is a lawyer subject to discipline when participating in legal panel discussions that touch on controversial political, religious, and social viewpoints?
- Is a law professor or adjunct faculty member subject to discipline for a law review article or a class discussion that explores controversial topics or expresses unpopular viewpoints?
- Must lawyers abstain from writing blogposts or op-eds because they risk a bar complaint by an offended reader?
- Must lawyers forgo media interviews on topics about which they have some particularly insightful comments because anyone hearing the interview could file a complaint?
- Can a lawyer lose his license to practice law for a sexist political tweet toward a public official?[16]
- Is a lawyer subject to discipline for employment decisions made by a religious or other charitable nonprofit if she sits on its board and ratifies its decisions or employment policies?[17]
- Is a lawyer subject to discipline if she testifies before the state legislature or a town meeting against amending nondiscrimination laws to add new protected classes if those classes are listed in the proposed rule?[18]

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[14] Rotunda & Dzienkowski, *supra* note 6, in "§ 8.4-2(j)-1. Introduction."

[15] *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 regarding sex discrimination and the applicability of the ethical rules during the 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-the-client-wants/.

[16] Debra Cassens Weiss, *BigLaw Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders*, ABA Journal, Oct. 1, 2018 (noting lawyer was honored by the ABA Journal in 2009 "for his innovative use of social media in his practice"), http://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

[17] *See* D.C. Bar Legal Ethics, Opinion 222 (1991) (punting the issue of whether a lawyer could be disciplined for arguably discriminatory employment decisions made by his church or a religious nonprofit while he was on its board), https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion222.cfm.

[18] The Tennessee Attorney General warned that "[e]ven statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently 'related to the practice of law' to fall within the

- Is a lawyer at risk if she testifies in favor of adding new protected classes but only if religious exemptions are also added?
- Is a lawyer subject to discipline for public comment letters to federal agencies that she writes as a lawyer expressing her personal views on proposed Title IX regulations, immigration issues, census questions, or re-districting proposals?
- Is a candidate for office subject to discipline if she proposes a new government financial assistance program to benefit only low-income students of a specific race?
- Is a lawyer subject to discipline for serving on the board of a social fraternity or sorority that discriminates based on sex?
- Is a lawyer at risk for advising political candidates who take controversial positions that some believe to be discriminatory?
- Is a lawyer subject to discipline for her opinions on current controversies expressed during conversations at a bar or firm dinner?[19]
- Is a lawyer at risk for any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues?

Proponents of ABA Model Rule 8.4(g) have candidly observed that they sought a new black letter rule precisely because they wanted to regulate nonlitigating lawyers, such as "[a]cademics, nonprofit lawyers, and some government lawyers," as well as "[t]ax lawyers, real

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scope of Proposed Rule 8.4(g)." Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 7 (hereinafter "Tenn. Att'y Gen. Letter"), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf. The Montana Legislature expressed its concern that ABA Model Rule 8.4(g)'s "expansive scope endeavors to control 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." *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), http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf.

[19] The Texas Attorney General observed that "[g]iven 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." *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) at 3, https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf. The Louisiana Attorney General agreed that "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."). *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) at 4, https://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384.

estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system."[20]

At least eleven states have rejected 8.4(g): Because of its expansive scope, several states have rejected or abandoned efforts to adopt ABA Model Rule 8.4(g). In the past two-and-a-half years, official entities in Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, North Dakota, South Carolina, Tennessee, and Texas have weighed ABA Model Rule 8.4(g) and found it wanting. *See infra* at 10-13. To date, the Vermont Supreme Court is the only high court to have adopted it.

New Hampshire attorneys should not be made the subjects of the novel experiment that ABA Model Rule 8.4(g) represents. This is particularly true when the Court has the prudent option of waiting to see what other jurisdictions decide to do and then observing the rule's real-world consequences for attorneys in those states.

The rest of this letter provides greater detail about several problems created by ABA Model Rule 8.4(g) and new Rule of Professional Conduct 8.4(g) in the following order:

- Part I explains why the ABA's original claim that 24 states have a rule similar to ABA Model Rule 8.4(g) is not accurate. Other than Vermont, no state has a rule that is as expansive as ABA Model Rule 8.4(g). *See infra* at 8-9.

- Part II summarizes why at least eleven states have publicly rejected or refrained from adopting ABA Model Rule 8.4(g). *See infra* at 10-13.

- Part III clarifies that ABA Model Rule 8.4(g) would make it professional misconduct for attorneys and law firms to engage in hiring practices that favor women or persons who belong to racial, ethnic, or sexual minorities. *See infra* 14-15.

- Part IV discusses why ABA Model Rule 8.4(g) is plainly unconstitutional under two Supreme Court decisions issued after its adoption, *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), and *Matal v. Tam*, 137 S. Ct. 1744 (2017). *See infra* at 16-19.

- Part V looks at the key ways that proposed Rule of Professional Conduct 8.4(g) would expand regulation of New Hampshire lawyers' lives. *See infra* at 19-23.

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[20] 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.

- Part VI details specific ways in which ABA Model Rule 8.4(g) could have a substantial chilling effect on New Hampshire attorneys' freedom of speech and free exercise of religion. *See infra* at 23-31.

- Part VII discusses the fact that the chilling effect on free speech is compounded by the Rule's imposition of a negligence standard rather than a knowledge requirement. *See infra* at 31-33.

- Part VIII examines whether the proposed rule would limit New Hampshire lawyers' ability to accept, decline, or withdraw from a representation. *See infra* at 33-34.

- Part IX considers the concerns expressed by some state bar disciplinary counsel, including the General Counsel at the New Hampshire Attorney Discipline Office, as to whether bar disciplinary offices have adequate financial and staff resources for adjudicating complex harassment and discrimination claims, including in the employment context. *See infra* at 35-37.

I. The ABA's Original Claim that Twenty-Four States Have a Rule Similar to ABA Model Rule 8.4(g) Is Not Accurate Because Only Vermont Has a Rule as Expansive as ABA Model Rule 8.4(g).

When the ABA adopted Model Rule 8.4(g) in 2016, it claimed that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."[21] But this claim has been shown to be factually incorrect. For that reason, no empirical evidence supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers. The reality is that ABA Model Rule 8.4(g) has not been adopted by any state supreme court except Vermont.

As even its proponents have had to concede, ABA Model Rule 8.4(g) does not replicate any prior black letter rule adopted by a state supreme court. Before 2016, twenty-four states and the District of Columbia had adopted some version of a black letter rule dealing with "bias" issues.[22] But each of these black letter rules was narrower than ABA Model Rule 8.4(g).

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[21] Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Linda Stewart Dalianis, Chief Justice, Supreme Court of New Hampshire, September 29, 2016, https://www.courts.state.nh.us/committees/adviscommrules/dockets/2016/2016-009/2016-009-Rule-of-Prof-Conduct%208-4-09-29-16-letter-from-ABA-Center-for-Professional-Responsiblity-Policy-Implementation-Committee.pdf.

[22] *Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative* (July 16, 2015), App. B, *Anti-Bias Provisions in State Rules of Professional Conduct*, at 11-32, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.

A proponent of ABA Model Rule 8.4(g), Professor Stephen Gillers, has written that "[a]lthough courts in twenty-five American jurisdictions (twenty-four states and Washington, D.C.) have adopted anti-bias rules in some form, these rules differ widely."[23] He then highlights primary differences between them and ABA Model Rule 8.4(g):

> Most contain the nexus "in the course of representing a client" or its equivalent. Most tie the forbidden conduct to a lawyer's work in connection with the "administration of justice" or, more specifically, to a matter before a tribunal. Six jurisdictions' rules require that forbidden conduct be done "knowingly," "intentionally," or "willfully." Four jurisdictions limit the scope of their rules to conduct that violates federal or state anti-discrimination laws and three of these require that a complainant first seek a remedy elsewhere instead of discipline if one is available. Only four jurisdictions use the word "harass" or variations in their rules.[24]

Key differences between ABA Model Rule 8.4(g) and the 25 jurisdictions' bias rules include:

- Several states' black letter rules apply only to *unlawful discrimination* and require that another tribunal first find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.

- Many states limit their rules to "conduct in the course of representing a client," in contrast to ABA Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law."

- Many states require that the misconduct be "prejudicial to the administration of justice."

Thirteen states have adopted a comment rather than a black letter rule to deal with bias issues. Fourteen states have adopted neither a black letter rule nor a comment.

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[23] Stephen Gillers, *A Rule to Forbid Bias and Harassment in law Practice: A Guide for State Courts Considering Model Rule 8.4(g),* 30 Geo. J. Legal Ethics 195, 208 (2017) (footnotes omitted). Professor Gillers notes that his spouse "was a member of the [ABA] Standing Committee on Ethics and Professional Responsibility, the sponsor of the amendment [of ABA Model Rule 8.4]." *Id.* at 197 n.2.

[24] *Id.* at 208.

II. Official Entities in Arizona, Idaho, Illinois, Montana, North Dakota, South Carolina, Tennessee, and Texas Have Rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada Have Abandoned Efforts to Impose It on Their Attorneys.

Federalism's great advantage is that one state can reap the benefit of other states' experience. Prudence counsels 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. This is particularly true when ABA Model Rule 8.4(g) has failed close scrutiny by official entities in many states.[25]

A. Several State Supreme Courts Have Rejected ABA Model Rule 8.4(g).

The Supreme Courts of **Arizona, Idaho, Tennessee, South Carolina,** and **Montana** have officially rejected adoption of ABA Model Rule 8.4(g). On August 30, 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).[26] A week later, on September 6, 2018, the Idaho Supreme Court rejected a resolution by the **Idaho** State Bar Association to adopt a modified version of ABA Model Rule 8.4(g).[27]

On April 23, 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).[28] The petition had been filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility. The Tennessee Attorney General filed a comment letter, explaining that a black letter rule based on ABA Model Rule 8.4(g) "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[29]

On October 26, 2016, the **Montana** Supreme Court announced a public comment period through December 9, 2016, to consider adoption of ABA Model Rule 8.4(g), but then announced

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[25] McGinniss, *supra* note 7, at 213-217.
[26] Arizona Supreme Court, Order re: No. R-17-0032 (Aug. 30, 2018), https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf.
[27] Idaho Supreme Court, Letter to Executive Director, Idaho State Bar (Sept. 6, 2018), https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf.
[28] The 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.
[29] Tenn. Att'y Gen. Letter, *supra* note 18, at 1.

an extension of the comment period until April 21, 2017.[30] In a memorandum dated March 1, 2019, the court noted that it "chose not to adopt the ABA's Model Rule 8.4(g)."[31]

On September 25, 2017, 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).[32] In a letter to the Court, dated September 6, 2017, 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."[33]

In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).[34] The Court acted after the state bar's House of Delegates, as well as the state attorney general, recommended against its adoption.[35]

On January 23, 2019, the ABA published a summary of the states' consideration of ABA Model Rule 8.4(g) to date. By the ABA's own count, nine states have declined to adopt Model Rule 8.4(g): **Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina,** and **Tennessee.** (We add **Texas** and **North Dakota** to that list.) The ABA lists **Vermont** as the only state to have adopted 8.4(g).[36]

B. State Attorneys General Have Identified Core Constitutional Issues with ABA Model Rule 8.4(g).

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[30] Montana Supreme Court, Order, *In re the Rules of Professional Conduct,* No. AF 09-0688 (Oct. 26, 2016), https://www.clsreligiousfreedom.org/sites/default/files/site_files/Montana%20Order%20Comment%20Period.pdf; Montana Supreme Court, Order, *In re the Rules of Professional Conduct,* No. AF 09-0688 (Dec. 7, 2016), https://www.clsreligiousfreedom.org/sites/default/files/site_files/Extension%20of%20Comment%20period.pdf.

[31] Montana Supreme Court, *In re Petition of the State Bar of Montana for Revision of the Montana Rules of Professional Conduct*, No. AF 09-0688, at 3 n.2 (Mar. 1, 2019), https://supremecourtdocket.mt.gov/APP/connector/6/1130/url/321Z337_0D2Q0RBHW00000V.pdf.

[32] The Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4*, Order (Sep. 25, 2017), https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf.

[33] Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), https://www.clsnet.org/document.doc?id=1124.

[34] The 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").

[35] South Carolina Op. Att'y Gen. (May 1, 2017), http://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf.

[36] 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* (Jan. 23, 2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.pdf.

On March 16, 2018, the Attorney General of **Tennessee** filed Opinion 18-11, *American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g)*, 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).[37] 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."[38]

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated 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."[39] The Attorney General declared that "[c]ontrary to . . . basic free 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."[40]

In September 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."[41] 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."[42]

Agreeing with the Texas Attorney General's assessment of the unconstitutionality of ABA Model Rule 8.4(g), the Attorney General of **South Carolina** 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."[43]

On May 21, 2018, 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

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[37] *American Bar Association's New Model Rule of Professional Conduct 8.4(g)*, 18 Tenn. Att'y Gen. Op. 11 (Mar. 16, 2018), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf.
[38] Tenn. Att'y Gen. Letter, *supra* note 18, at 1.
[39] Tex. Att'y Gen. Op., *supra* note 19, at 3.
[40] *Id.*
[41] La. Att'y Gen. Op. 0114, *supra* note 19, at 4.
[42] *Id.* at 6.
[43] South Carolina Att'y Gen. Op. (May 1, 2017) at 13, http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf.

concerns that ABA Model Rule 8.4(g) raises as to free speech, association, and expressive association.[44]

C. The Montana Legislature Recognized the Problems that ABA Model Rule 8.4(g) Might Create for Legislators, Witnesses, Staff, and Citizens.

On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).[45] 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.[46]

D. Several State Bar Associations Have Rejected ABA Model Rule 8.4(g).

On December 10, 2016, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois."[47] On October 30, 2017, 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."[48]

On September 15, 2017, 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."[49]

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[44] 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.
[45] Montana Legislature Resolution, *supra* note 18.
[46] *Id.* at 3. The Tennessee Attorney General similarly warned that "[e]ven statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra* note 18, at 8 n.8.
[47] Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals*, Illinois Lawyer Now, Dec. 15, 2016, https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals.
[48] 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 (last visited May 2, 2018).
[49] Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. n Att'y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (Dec. 14, 2017), at https://perma.cc/3FCP-B55J.

III. Proposed Rule of Professional Conduct 8.4(g) Would Make It Professional Misconduct for Attorneys and Their Firms to Engage in Hiring Practices that Favor Persons Because They are Women or Belong to Racial, Ethnic, or Sexual Minorities.

A well-respected presenter on professional ethics, Thomas Spahn, has explained that "ABA Model Rule 8.4(g)'s flat prohibition covers any discrimination on the basis of race, sex, or any of the other listed attributes" [50] and "extends to any lawyer conduct 'related to the practice of law,' including 'operating or managing a law firm or law practice.'"[51] He observes that ABA Model Rule 8.4(g) "thus prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc."[52]

Mr. Spahn further concludes that ABA Model Rule 8.4(g) would prohibit hiring practices that take into consideration an applicant's sex or racial, ethnic, or sexual identity, stating:[53]

> *[L]awyers will also have to comply with the new per se discrimination ban in their personal hiring decisions.* Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a "plus" when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms' head count on the basis of such attributes – but it is nevertheless discrimination. *In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.*

Mr. Spahn dismissed the idea that Comment [4] of ABA Model Rule 8.4(g) would allow these efforts to promote certain kinds of diversity to continue. Even though Comment [4] states that "[l]awyers may engage in conduct undertaken to promote diversity and inclusion . . . by . . . implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations," he explained, "[t]his sentence appears to

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[50] Thomas E. Spahn, *Professionalism for the Ethical Lawyer: Hypotheticals and Analyses*, May 31, 2018, at 14 https://media.mcguirewoods.com/publications/Ethics-Programs/29084419.pdf. Mr. Spahn made similar comments as a presenter for The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues* 5-6 (July 12, 2018) (quoting Comment [4] to ABA Model Rule 8.4(g)). The written materials used in the program are on file with Christian Legal Society and may be purchased from the D.C. Bar CLE program.
[51] *Id.* at 15.
[52] *Id.* at 15-16.
[53] *Id.* at 16 (emphasis supplied).

weaken the blanket anti-discrimination language in the black letter rule, but on a moment's reflection it does not – and could not – do that." [54]

Mr. Spahn gave three reasons for his conclusion that efforts to promote certain kinds of diversity would violate the rule:

1) The language in comments is only guidance, "[s]o the last sentence of Comment [4] is not binding – the black letter rule's per se discrimination ban is binding."[55]

2) The drafters of the rule "clearly knew how to include exceptions to the binding black letter anti-discrimination rule" because it contains two explicit exceptions, so "[i]f the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule."[56]

3) The comment "says nothing about discrimination" and "does not describe activities permitting discrimination on the basis of the listed attributes." The references could be to "political viewpoint diversity, geographic diversity, and law school diversity" which "would not involve discrimination prohibited in the black letter rule."[57]

Proposed Rule of Professional Conduct 8.4(g) is similarly ironclad in its prohibition of "harassment or discrimination" "in conduct while acting as a lawyer in any context." Its adoption will mean that many New Hampshire law firms' diversity efforts are now an ethical violation. The potential consequences for firms' efforts to promote diversity if proposed Rule of Professional Conduct 8.4(g) were adopted provide yet another reason to allow other jurisdictions to experiment with ABA Model Rule 8.4(g) in order to see the consequences that play out in those jurisdictions.

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[54] *Id.* at 14. *See also, id*. at 15 ("Perhaps that sentence was meant to equate 'diversity' with discrimination on the basis of race, sex, etc. But that would be futile – because it would fly in the face of the explicit authoritative prohibition in the black letter rule. It would also be remarkably cynical, by forbidding discrimination in plain language while attempting to surreptitiously allow it by using a code word.")
[55] *Id.* at 14.
[56] *Id.* at 15.
[57] *Id.* at 15.

IV. Under Two Recent United States Supreme Court Decisions, ABA Model Rule 8.4(g) Is an Unconstitutional Restriction on Lawyers' Speech.

A. ABA Model Rule 8.4(g) Is an Unconstitutional Content-Based Speech Restriction under the Supreme Court's Ruling in *National Institute of Family and Life Advocates v. Becerra.*

In *National Institute of Family and Life Advocates* (*NIFLA*) *v. Becerra*,[58] 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. A government regulation that targets speech must survive strict scrutiny, that is, a close examination of whether the regulation is narrowly tailored to achieve a compelling governmental interest.

Indeed, last week, an article published by the ABA Section of Litigation confirmed that several section members read the *NIFLA* decision as creating serious concerns about the constitutionality of ABA Model Rule 8.4(g). A committee member observed that, while ABA Model Rule 8.4(g) "serves important goals, 'the biggest question about Rule 8.4(g) has been whether it unconstitutionally infringes on lawyers' speech rights—*and after the Court's decision in Becerra, it increasingly looks like the answer is yes.*'"[59]

Under the *NIFLA* analysis, Proposed Rule 8.4(g) is a content-based speech restriction. As the Court explained, "[c]ontent-based regulations 'target speech based on its communicative content.'"[60] "[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.'"[61] 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.'"[62]

In *NIFLA*, the Court repudiated the idea that professional speech is less protected by the First Amendment than other speech. Three federal courts of appeals had recently ruled that "'professional speech' [w]as a separate category of speech that is subject to different rules" and, therefore, less protected by the First Amendment.[63] In abrogating those decisions, the Court stressed that "*this Court has not recognized 'professional speech' as a separate category of*

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[58] 138 S. Ct. 2361 (2018).
[59] Pitzen, *supra* note 12 (quoting member of ABA Section of Litigation) (emphasis supplied).
[60] 138 S. Ct. at 2371, quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[61] 138 S. Ct. at 2371.
[62] *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[63] 138 S.Ct. at 2371.

speech. Speech is not unprotected merely because it is uttered by 'professionals.'"[64] The Court resolutely rejected the idea that "professional speech" was an exception "from the rule that content-based regulations of speech are subject to strict scrutiny."[65]

The Court observed that there were "two circumstances" in which it "afforded less protection for professional speech" but "neither [circumstance] turned on the fact that professionals were speaking."[66] One circumstance in which it "applied more deferential review" involved "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'"[67] As the Court explained, professional speech is not commercial speech, except in the "advertising" context, in which the disclosure of "factual, noncontroversial information" may be required by the government.[68] Obviously, ABA Model Rule 8.4(g) is not primarily concerned with advertising. The second circumstance arises when States "regulate professional conduct, even though that conduct *incidentally* involves speech."[69] But again, ABA Model Rule 8.4(g) targets speech – "verbal conduct" – and is not aimed solely at conduct that incidentally involves speech. As in *NIFLA*, "neither line of precedents is implicated here."[70]

Instead, the Court reaffirmed that its "precedents have long protected the First Amendment rights of professionals" and have "applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers."[71] Indeed, in a landmark civil rights case involving lawyers' freedom of speech, the 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.[72]

Because it would censor or chill lawyers' protected speech, ABA Model Rule 8.4(g) fails strict scrutiny. ABA Model Rule 8.4(g), however, is not only an unconstitutional *content*-based speech restriction but also an unconstitutional *viewpoint*-based speech restriction.

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[64] *Id.* at 2371-72 (emphasis added).
[65] *Id.* at 2371.
[66] *Id.* at 2372.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 2372 (emphasis added).
[70] *Id.*
[71] *Id.* at 2374.
[72] *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438-39 (1963).

B. ABA Model Rule 8.4(g) Is an Unconstitutional Viewpoint-Based Speech Restriction under the Supreme Court's Ruling in *Matal v. Tam.*

In a second decision handed down after the ABA adopted Model Rule 8.4(g), *Matal v. Tam*, a *unanimous* Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech.[73] ABA Model Rule 8.4(g) would punish "derogatory or demeaning" speech. But the Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[74]

In *Matal*, all nine justices agreed that a provision of a longstanding federal law allowing government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons was unconstitutional because "[i]t offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[75] 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.'"[76]

In his concurrence, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, Justice Kennedy explained that the federal statute was viewpoint discriminatory because the government permitted "a positive or benign mark but not a derogatory one," which "reflects the Government's disapproval of a subset of messages it finds offensive," which is "the essence of viewpoint discrimination."[77] And it was viewpoint discriminatory even if it "applies in equal measure to any trademark that demeans or offends."[78]

Justice Kennedy took aim at a government agency having the power to penalize speech that it deemed to be "derogatory":

> At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as "persons,

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[73] 137 S. Ct. 1744 (2017).
[74] *Id.* at 1753-1754, 1765; *see also, id.* at 1766 (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan) (unconstitutional to suppress speech that "demeans or offends").
[75] *Id.* at 1751 (quotation marks and ellipses omitted).
[76] *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).
[77] *Id.* at 1766 (Kennedy, J., concurring).
[78] *Id.*

> living or dead, institutions, beliefs, or national symbols." Within that category, an applicant may register a positive or benign mark but not a *derogatory* one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.[79]

Writing for the liberal wing of the Court, 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."[80] He 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.[81]

V. Proposed Rule of Professional Conduct 8.4(g) Would Expand the Regulation of New Hampshire Lawyers' Lives.

A. The scope of regulated conduct under proposed Rule of Professional Conduct 8.4(g) is even broader than the scope of ABA Model Rule 8.4(g).

One primary criticism of ABA Model Rule 8.4(g) is that its expansive scope regulates all "conduct related to the practice of law." But proposed Rule of Professional Conduct 8.4(g) goes even further to reach all "conduct while acting as a lawyer *in any context*." In addition, unlike ABA Model Rule 8.4(g), the proposed Rule of Professional Conduct 8.4(g) does not even attempt to provide a description of what it means by "conduct while acting as a lawyer in any context."

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[79] *Id.* at 1766 (Kennedy, J. concurring) (citations omitted) (emphasis added). The Tennessee Attorney General similarly relied on *Matal* for the proposition that "'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" Tenn. Att'y Gen. Letter, *supra* note 18, at 6, *quoting Matal*, 137 S. Ct. at 1763; and *citing*, *Brown*, 564 U.S. at 791, 790 (noting that "disgust is not a valid basis for restricting expression"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting . . . ."); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991)("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").")

[80] *Id.* at 1767.

[81] *Id.* at 1769 (Kennedy, J., concurring).

This may be because ABA Model Rule 8.4(g) is accompanied by its highly problematic Comment [4], which makes clear how very broad its scope is. Comment [4] provides a nonexclusive list of examples of conduct that would be deemed "conduct related to the practice of law." Comment [4] is a *description* of examples of "conduct related to the practice of law" and not an actual *definition* of the regulated conduct.

But Proposed Rule of Professional Conduct 8.4(g) does not even attempt a description of the conduct it would regulate. For that reason, it is entirely foreseeable that when the bar disciplinary counsel office is required to interpret the scope of "conduct while acting as a lawyer in any context," it will fall back on ABA Model Rule 8.4(g)'s Comment [4] to determine that a lawyer's conduct, including his or her speech, is regulated by the proposed Rule.

Comment [4] defines "[c]onduct related to the practice of law" as "includ[ing]" not only "representing clients," but also "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." (Emphasis supplied.)

Thus, ABA Model Rule 8.4(g) would apply to nearly everything that a lawyer does, including certain "social activities in connection with the practice of law." It would apply to a lawyer's interactions with *anyone* ("and others") "while engaged in the practice of law." Of course, the operative word "includes" means that the list is nonexclusive and merely provides examples of the conduct on which ABA Model Rule 8.4(g) could be brought to bear.

Indeed, without the frills, the ABA Model Rule 8.4(g) definition in Comment [4] reads: "Conduct related to the practice of law includes . . . interacting with . . . others while engaged in the practice of law . . . and participating in . . . bar activities, business or social activities in connection with the practice of law." The rest of Comment [4] simply lists examples of covered conduct.

Besides not defining, or even attempting to describe, the scope of conduct that it reaches, proposed Professional Rule of Conduct 8.4(g) also fails to provide any definition, or even a description, of conduct that will be considered "harassment" or "discrimination." Again, this may be because ABA Model Rule 8.4(g) has been highly criticized for the descriptions of "harassment" and "discrimination" found in its accompanying Comment [3]. Like Comment [4], Comment [3] also provides *descriptions, not definitions,* of "harassment" and "discrimination." Those descriptions, however, have been enough to demonstrate that ABA Model Rule 8.4(g) is an unconstitutional restriction on lawyers' speech under the Supreme Court's decisions in *NIFLA* and *Matal. See supra* at 16-19.

But the fact that proposed Professional Rule of Conduct 8.4(g) does not include highly problematic Comment [3] or Comment [4] does not mean that it avoids being an unconstitutional restriction on lawyers' speech. If anything, the lack of the comments magnifies its unconstitutionality by exacerbating its unconstitutional vagueness. Disciplinary bar counsel are likely to draw upon Comment [3] and Comment [4] when applying the proposed Rule. The proposed Rule's assertion that it "does not infringe on any Constitutional right of a lawyer" fails to reassure. "Does" is not "shall." And given the times in which we live, and the fact that ABA Model Rule 8.4(g) is clearly aimed at lawyers' speech, this assertion is an inadequate response to the legitimate concerns created by ABA Model Rule [82]8.4(g) and its offspring.

New Hampshire lawyers deserve to know the scope of conduct covered by proposed Rule 8.4(g). They deserve to understand what speech and conduct constitutes "harassment" and "discrimination" that could subject them to discipline. The standard cannot be "trust that the rule will be applied fairly," or "a lawyer has nothing to fear if he or she says or does nothing wrong," or "few attorneys will be disciplined because the rule is intended to educate not punish." Professor Thomas Morgan, co-author with Professor Rotunda of *Professional Responsibility: Problems and Materials*, recently rejected such facile claims in discussing Professor Rotunda's denunciation of ABA Model Rule 8.4(g):

> There's a danger in even discussing [ABA Model Rule 8.4(g)] that one can sound churlish or petty because the reply is typically that bar officials will use common sense and do the right thing. But, of course, that's not necessarily true, particularly in a society where differences on policy can easily be asserted to describe moral failing. Ron Rotunda believed that clients and the public are better off when lawyers can make arguments that some members of the public understandably may resent. To the argument that most lawyers will have nothing to worry about because everyone knows they are reputable people, Ron made the correct response that even when a court does not enforce such rules, they will affect lawyers because good lawyers do not want to face any non-frivolous accusation that they're violating the rule, even winning a challenge to an asserted attack on a lawyer's ethical conduct can cast doubt on the lawyer's reputation that may last for years. So a lawyer's only protection will be to stay out of the public square.[83]

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[82] *See generally*, Halaby & Long, *supra* note 3.

[83] Thomas D. Morgan, *In Memoriam: Ronald Rotunda and Legal Ethics*, Federalist Society Teleforum, Mar. 20, 2019. The quote is taken from the teleforum transcript at https://fedsoc.org/events/in-memoriam-ronald-rotunda-and-legal-ethics.

B. ABA Model Rule 8.4(g) is not limited to conduct that is "prejudicial to the administration of justice."

The ABA intentionally drafted Model Rule 8.4(g) to be much broader than its former Comment [3], which was on the books from1996 until displaced in 2016. Comparing former Comment [3] with black-letter ABA Model Rule 8.4(g), the Rule's proponents explained:

> [Comment [3]] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. This limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms).[84]

Former Comment [3], which this Court previously chose not to adopt, required that a lawyer's actions be "prejudicial to the administration of justice" before professional misconduct could be found. Like ABA Model Rule 8.4(g), proposed Rule of Professional Conduct 8.4(g) abandons this key traditional limitation on a finding of professional misconduct, leaving a lawyer subject to disciplinary liability even though his or her conduct has not prejudiced the administration of justice.[85]

In an opinion finding ABA Model Rule 8.4(g) unconstitutional, a state attorney general relied in part on this elimination of the requirement that the administration of justice be prejudiced:

> Proposed Rule 8.4(g) is not limited to speech and conduct that pertains to a pending judicial proceeding or that actually prejudices the administration of justice; rather, it reaches all speech and conduct in any way "related to the practice of law" – speech that is entitled to full First Amendment protection.[86]

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[84] Letter from James J.S. Holmes, Chair, ABA Commission on Sexual Orientation and Gender Identity, et al., to Paula Frederick, Chair, ABA Standing Committee on Ethics & Professional Responsibility (May 7, 2014), *in* ABA Standing Committee on Ethics and Professional Responsibility, *Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative* (July 16, 2105), App. A, at 7-9, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf (last visited May 1, 2018).

[85] *See also,* Thomas Spahn, *supra* note 50, at 12 (noting the four ways that "[t]he new black letter rule provision expands the scope of the previous Comment").

[86] Tenn. Att'y Gen. Letter, *supra* note 18, at 7.

ABA Model Rule 8.4(g) goes far beyond its predecessor former Comment [3] in two other important aspects. First, former Comment [3] was limited to conduct "in the course of representing a client," which is much narrower than ABA Model Rule 8.4(g), which applies to all "conduct related to the practice of law." Second, former Comment [3] required that the lawyer "know" that she had engaged in "bias or prejudice." ABA Model Rule 8.4(g) and proposed Rule of Professional Conduct 8.4(g) substitute a negligence standard of "knows or should have known." *See infra* at 31-33.

VI. Proposed Rule of Professional Conduct 8.4(g) Would Chill New Hampshire Attorneys' Expression of Disfavored Political, Social, and Religious Viewpoints on a Multitude of Issues in the Public Square.

In adopting its new model rule, the ABA largely ignored over 480 comment letters,[87] most opposed to the rule change. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability, although the Committee dropped its opposition immediately prior to the House of Delegates' vote.[88]

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.[89] But little was done to address these concerns. In their scholarly examination 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."[90] In particular, 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."[91] Halaby and Long summarized the legislative history of the rule:

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[87] 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.

[88] Halaby & Long, *supra* note 3, at 220 & n.97 (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, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MABA MODEL RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

[89] Halaby & Long, *supra* note 3, 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).

[90] *Id.* at 203.

[91] *Id.*

> 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.[92]

A. ABA Model Rule 8.4(g) Would Operate as a Speech Code for Attorneys.

There are many areas of concern with the proposed rule. Perhaps the most troubling is the likelihood that it will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues in the workplace and in the public square. Because lawyers often are the spokespersons and leaders in political, social, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on such issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief.

Several scholars have voiced their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. *See supra* at 2-3. The late Professor Ronald Rotunda, author of a leading treatise on American constitutional law,[93] as well as *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, co-published by the ABA,[94] 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."[95] Writing about the problem ABA Model Rule 8.4(g) poses for lawyers' speech 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 the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.[96]

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[92] *Id.* at 233.
[93] *See, e.g.*, *American Constitutional Law: The Supreme Court in American History, Volumes I & II* (West Academic Publishing, St. Paul, MN. 2016); *Principles of Constitutional Law* (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).
[94] Rotunda & Dzienkowski, *supra* note 6.
[95] *Id.* at "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."
[96] 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, http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.

Professor Rotunda built on this critique in a memorandum for the Heritage Foundation entitled *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*.[97]

Prominent First Amendment scholar Professor Eugene Volokh has similarly warned that the new rule is a speech code for lawyers.[98] In a debate at the Federalist Society's 2017 National Student Symposium, Professor Volokh demonstrated the flaws of Model Rule 8.4(g), which the rule's proponent seemed unable to deflect.[99] His examples of potential violations of Model Rule 8.4(g) include:

> Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.
>
> Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."[100]

These and other scholars' red flags should not be ignored. The proposed rule would create a multitude of potential problems for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, grant media interviews, or otherwise engage in public discussions regarding current political, social, and religious questions. It is not good for the profession, or for a robust civil society, for lawyers to be potentially subject to disciplinary action every time they

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[97] Rotunda, *supra* note 5. At the Federalist Society's 2017 National Lawyers Convention, Professor Rotunda participated in a panel discussion on ABA Model Rule 8.4(g) with a former ABA President and a law professor. Federalist Society Debate (Nov. 20, 2017), *supra* note 5, https://www.youtube.com/watch?v=V6rDPjqBcQg.
[98] The Federalist Society video featuring Professor Volokh, *supra* note 4, https://www.youtube.com/watch?v=AfpdWmlOXbA.
[99] The Federalist Society Debate (Mar. 13, 2017), *supra* note 4, https://www.youtube.com/watch?v=b074xW5kvB8&t=50s.
[100] Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities*, The Washington Post, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

speak or write on a topic that may cause someone who disagrees to file a disciplinary complaint to silence them. *See supra* at 5-6.

1. By expanding its coverage to include all "conduct while acting as a lawyer in any context," proposed Rule of Professional Conduct 8.4(g) would encompass nearly everything a lawyer does, including conduct and speech protected by the First Amendment.

Proposed Rule of Professional Conduct 8.4(g) exposes every New Hampshire attorney to new claims of professional misconduct. Like ABA Model Rule 8.4(g), the proposed Rule uses the term "conduct." It will likely be interpreted through the prism of Comment [3] that accompanies ABA Model Rule 8.4(g) and clarifies that "conduct" includes "speech." That is, "discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others" and "[h]arassment includes . . . derogatory or demeaning *verbal* or physical conduct." (Emphasis supplied.) "Verbal conduct" is, of course, a euphemism for speech.

"Conduct" will likely also be interpreted through Comment [4] that accompanies ABA Model Rule 8.4(g): "Conduct related to the practice of law 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."

The real question becomes: What conduct do ABA Model Rule 8.4(g) and proposed Rule of Professional Conduct 8.4(g) not reach? Virtually everything a lawyer does is "conduct related to the practice of law" or "conduct while acting as a lawyer in any context."[101] Quite simply, much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues. Their commentary is sought by the media regarding controversial issues in their community and state. Of course, lawyers are asked to speak *because they are lawyers*. And a lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

At bottom, rules inspired by ABA Model Rule 8.4(g) have a "fundamental defect," which is that they "wrongly assume[] that the only attorney speech that is entitled to First Amendment

[101] *See, e.g.,* McGinniss, *supra* note 7; Blackman, *supra* note 8; Halaby & Long, *supra* note 3, at 226 ("The proposed comment of Version 3 expanded the ambit of 'conduct related to the practice of law' to include virtually anything a working lawyer might do.")

protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech."[102] Even if some public speaking falls outside the parameters of conduct "with respect to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline?

ABA Model Rule 8.4(g) and rules derived from it, like proposed Rule of Professional Conduct 8.4(g), create a cloud of doubt that inevitably will chill lawyers' public speech.[103] Even more troubling, in all likelihood, it will chill speech on one side of current political and social issues, while simultaneously creating little disincentive for lawyers who speak on the opposing side of these controversies.[104] If so, public discourse and civil society will suffer from the ideological straitjacket that these rules will impose on lawyers.

Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree.[105] At a time when freedom of speech needs more breathing space, not less, ABA Model Rule 8.4(g) threatens to suffocate attorneys' speech.

2. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their congregations, religious schools and colleges, or other nonprofit charities.

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious organizations. These organizations provide incalculable good to people in their local communities, as well as nationally and internationally. They also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.[106]

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[102] Tenn. Att'y Gen. Letter, *supra* note 18, at 2. *See id.* at 10 ("[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.)

[103] Tenn. Att'y Gen. Letter, *supra* note 18, 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.")

[104] McGinniss, *supra* note 7, 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").

[105] *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), http://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/ (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations simply because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

[106] Tex. Att'y Gen. Op., *supra* note 19, at 4 ("Model Rule 8.4(g) could also be applied to restrict an attorney's religious liberty and prohibit an attorney from zealously representing faith-based groups.")

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct while acting as a lawyer in any context." For example, a lawyer may be asked to help craft her congregation's policy regarding whether its clergy will perform marriages or whether it will host receptions for weddings that are contrary to its religious beliefs. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct while acting as a lawyer in any context," but surely a lawyer should not fear being disciplined for volunteer legal work she performs for her church, a charity, or her alma mater. [107]

3. Attorneys' membership in religious, social, or political organizations could expose lawyers to discipline.

ABA Model Rule 8.4(g) raises severe doubts about the ability of lawyers to participate in political, cultural, or religious organizations that promote traditional values regarding sexual conduct and marriage.[108] Would lawyers risk disciplinary action if they participate with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would lawyers risk disciplinary action by belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

ABA Model Rule 8.4(g) raises the too real scenario of a lawyer being disciplined for his or her religious beliefs. *See infra* at 34 (New York ethics opinion); *supra* at 27 (D.C. ethics opinion). Would an attorney be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds the religious belief that marriage is only between a man and a woman, or that limits its clergy to one sex?

Professor Rotunda and Professor Dzienkowski voiced concern that ABA Model Rule 8.4(g) would subject lawyers to discipline for attending events sponsored by the St. Thomas More Society, an organization of Catholic lawyers and judges who meet together to share their faith. Attending the Red Mass, an annual mass held by the Catholic Church for lawyers, judges, law professors, and law students, could be deemed conduct related to the practice of law that

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[107] For example, the clear implication of a 1991 District of Columbia ethics opinion was that a lawyer might be subject to discipline for the employment decisions of a religious organization's board on which he sat, although the Committee avoided actually deciding the issue. Ethics Op. 222 (Nov. 1991), *supra* note 17. *See also,* Tenn. Att'y Gen. Letter, *supra* note 18, at 8 n.8 ("statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization" "could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)").

[108] For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibited all California state judges from participating in Boy Scouts. Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, http://www.courts.ca.gov/documents/sc15-Jan_23.pdf .

runs afoul of ABA Model Rule 8.4(g) because of the Catholic Church's limitation of the priesthood to males, its opposition to abortion, or its teachings regarding marriage.[109]

State attorneys general have concurred.[110] They warn that "serving as a member of the board of a religious organization, participating in groups such as the Christian Legal Society, or even speaking about how one's religious beliefs influence one's work as an attorney" could "be deemed conduct 'related to the practice of law.'"[111]

B. ABA Model Rule 8.4(g) Would Institutionalize Viewpoint Discrimination Against Many Lawyers' Public Speech on Current Political, Social, Religious, and Cultural Issues.

1. On its face, ABA Model Rule 8.4(g) discriminates on the basis of viewpoint.

Comment [4] that accompanies ABA Model Rule 8.4(g) seems aimed at protecting some viewpoints over others by allowing lawyers to "engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations."[112] The proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not.

This is the very definition of viewpoint discrimination. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."[113] The government cannot have laws that allow lawyers to express one viewpoint on a particular subject but penalize lawyers for

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[109] Rotunda & Dzienkowski, *supra* note 6, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."
[110] Tex. Att'y Gen. Op., *supra* note 19, at 5 ("Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline."); La. Att'y Gen. Op., *supra* note 19, at 6 ("Proposed 8.4(h) could apply to many of the faith-based legal societies such as the Christian Legal Society, Jewish Legal Society, and Muslim Legal Society.")
[111] Tenn. Att'y Gen. Letter, *supra* note 18, at 10.
[112] Halaby and Long make the important point that "the terms 'diversity' and 'inclusion' themselves were left undefined" which creates a "quandary that the proponents of the model rule change left for those who might be asked to implement and enforce it in a real world lawyer discipline setting." Halaby & Long, *supra* note 3, at 240.
[113] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

expressing an opposing viewpoint on the same subject. Yet the proposed rule explicitly promotes one viewpoint over others.[114]

Of course, whether speech or conduct "promote[s] diversity and inclusion" depends on the beholder's subjective beliefs. Where one person sees inclusion, another sees exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of uniformity.

Because its enforcement would give government officials unbridled discretion to determine which speech is permissible and which is impermissible – which speech "promote[s] diversity and inclusion" and which does not – ABA Model Rule 8.4(g) clearly countenances viewpoint discrimination based on government officials' subjective biases, contrary to the United State Supreme Court's unanimous decision in *Matal*.[115] Giving any government official unbridled discretion to suppress citizens' free speech is unconstitutional viewpoint discrimination.[116] For that reason, the "most exacting level of scrutiny would apply to ABA Model Rule 8.4(g) because it regulates speech and expressive conduct that is entitled to full First Amendment protection based on viewpoint."[117]

2. ABA Model Rule 8.4(g)'s definition of "harassment" is also viewpoint discriminatory under the *Matal* analysis.

ABA Model Rule 8.4(g)'s Comment [3] explains that "harassment" includes "derogatory or demeaning verbal . . . conduct." This definition of "harassment" departs from the Supreme Court's much narrower definition of "harassment" as "harassment that is so *severe, pervasive, and objectively offensive* that it effectively bars the victim's access to an educational opportunity or benefit."[118] Therefore, ABA Model Rule 8.4(g) is unconstitutional under the First Amendment and is unconstitutionally vague under the Fourteenth Amendment.

The need for an objective definition of "harassment" is apparent in the courts' uniform rejection of university speech codes over the past two decades. The courts have found that speech codes violate freedom of speech because their "harassment" proscriptions are overbroad and unacceptably increase the risk of viewpoint discrimination. [119] For example, the Third Circuit

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[114] Rotunda & Dzienkowski, *supra* note 6, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (noting that lawyers who belong to a religious "organization that opposes gay marriage . . . can face problems. If they belong to one that favors gay marriage, then they are home free.").

[115] 137 S. Ct. at 1765 (Kennedy, J., concurring).

[116] *See, e.g., Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

[117] Tenn. Att'y Gen. Letter, *supra* note 18, at 5, citing *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011). *See also, Matal*, 137 S. Ct. at 1765 (Kennedy, J., concurring).

[118] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (emphasis added).

[119] *See, e.g.*, *McCauley v. Univ. of V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts*

struck down a campus speech policy "[b]ecause overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination." Quoting then-Judge Alito, the court wrote:

> "Harassing" or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "[i]f 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 offensive or disagreeable."[120]

Finally, ABA Model Rule 8.4(g) was drafted without the benefit of the Supreme Court's recent decision in *Matal*.[121] There the *unanimous* Court held that the long-established use of a prominent federal law to deny trademarks for terms that were "derogatory or offensive" was unconstitutional viewpoint discrimination.[122] *See supra* at 18-19.

VII. ABA Model Rule 8.4(g)'s Threat to Free Speech is Compounded by the Fact that It Imposes a Negligence Standard rather than a Knowledge Requirement.

The lack of a knowledge requirement is one of the Rule's most serious flaws: "[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 or discriminatory, simply because someone might construe it that way."[123]

Professor Dane Ciolino, an ethics law professor at Loyola University New Orleans College of Law, has explained:

> [ABA Model Rule 8.4(g)] 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. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the

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v. Haragan, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Blair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, 1998 WL 35867183 (E.D. Ky. 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989).

[120] *DeJohn v. Temple Univ.*, 537 F.3d 301, 313-314 (3d Cir. 2008), *quoting Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001), *quoting Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

[121] 137 U.S. 1744 (2017).

[122] *Id.* at 1754, 1765.

[123] Tenn. Att'y Gen. Letter, *supra* at note 18, at 5. *See* Halaby & Long, *supra* note 3, at 243-245; McGinniss, *supra* note 7, at 204-205.

> 'objectively reasonable lawyer' will be constructed for purposes of making this determination.[124]

This change in the knowledge requirement is particularly perilous in a time when the list of words and conduct that are deemed "discriminatory" or "harassing" is ever shifting in often unanticipated ways. Unfortunately, it is entirely foreseeable that the negligence standard could reach speech or conduct that demonstrates "implicit bias."[125] Nothing in proposed Rule of Professional Conduct 8.4(g) prevents punishing a lawyer for conduct based on implicit bias if someone thinks the lawyer "reasonably should have known" the speech or conduct was discriminatory.

The proponents of ABA Model Rule 8.4(g) frequently emphasize their concerns about "implicit bias," that is, speech or conduct that the lawyer is not consciously aware is, or could be interpreted to be, discriminatory.[126] On its webpages devoted to its "Implicit Bias Initiative," the ABA defines "implicit bias" and "explicit biases" as follows:[127]

> **Explicit biases:** Biases that are directly expressed or publicly stated or demonstrated, often measured by self-reporting, *e.g.*, "I believe homosexuality is wrong." A preference (positive or negative) for a group based on stereotype.
>
> **Implicit bias:** A preference (positive or negative) for a group based on a stereotype or attitude we hold that operates outside of human awareness and can be understood as a lens through which a person views the world that automatically filters how a person takes in and acts in regard to information. Implicit biases are usually measured indirectly, often using reaction times.

One can agree that implicit bias unfortunately exists and still believe that bias "outside of human awareness" should not be grounds for a lawyer's loss of licensure, suspension, censure, or

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[124] Prof. Dane S. Ciolino, *LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct*, Louisiana Legal Ethics (Aug. 6, 2017) (emphasis in original), https://lalegalethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/.

[125] At its mid-year meeting in February 2018, the ABA adopted Resolution 302, a model policy that "urges . . . all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity." ABA Res. 302 (Feb. 5, 2018), https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/302.pdf.

[126] *See* Halaby & Long, *supra* note 3, at 216-217, 243-245. Halaby and Long eventually conclude that implicit-bias conduct probably would not fall within the "reasonably should know" standard. *Id.* at 244-245. We are dubious.

[127] ABA Section on Litigation, *Implicit Bias Initiative, Toolbox, Glossary of Terms* (Jan. 23, 2012), https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox/glossary/#23

admonition.[128] Certainly nothing in ABA Model Rule 8.4(g) would prevent a charge of discrimination based on "implicit bias" from being brought against an attorney. Such charges are foreseeable given that the rule's "proponents repeatedly invoked that concept [of implicit bias] in arguing against any knowledge qualifier at all."[129]

VIII. Proposed Rule of Professional Conduct 8.4(g) Could Limit New Hampshire Lawyers' Ability to Accept, Decline, or Withdraw from a Representation.

The proponents of ABA Rule 8.4(g) generally claim that it will not affect a lawyer's ability to refuse to represent a client. They point to the language in the Rule that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16." But in the one state to have adopted ABA Model Rule 8.4(g), the Vermont Supreme Court explained in its accompanying Comment [4] that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." The Vermont Supreme Court further explained that, *under the mandatory withdrawal provision of Rule 1.16(a), "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g).*"[130]

Professional ethics experts agree that this is a genuine concern with ABA Model Rule 8.4(g) despite its inclusion of reassuring language. As Professor Rotunda and Professor Dzienkowski explain, Rule 1.16 actually "deals with when a lawyer must or may *reject* a client or *withdraw* from representation."[131] Rule 1.16 does not address *accepting* clients.[132] Moreover, as Professor Rotunda and Professor Dzienkowski have observed, Comment [5] to ABA Model Rule 8.4(g) would seem to limit any right to decline representation, if permitted at all, to "limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations."[133]

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[128] 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 7, at 204-205.

[129] 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).

[130] Vermont Supreme Court, *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, July 14, 2017, at 3, https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf (emphasis supplied).

[131] Rotunda & Dzienkowski, *supra* note 6, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis supplied by the authors).

[132] A state attorney general concurs that "[a]n attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra* note 18, at 11.

[133] *See* Rotunda & Dzienkowski, *supra* note 6.

Professor Michael McGinniss, who teaches professional responsibility, agrees that "[d]espite its ostensible nod of non-limitation, Model Rule 8.4(g) offers lawyers no actual protection against charges of 'discrimination' based on their *discretionary* decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer."[134] Because Model Rule 1.16 "addresses only when lawyers *must* decline representation, or when they may or must *withdraw* from representation" but not when they "are *permitted* to decline client representation," Model Rule 8.4(g) seems to only allow what was already required, not declinations that are discretionary. Professor McGinniss warns that "if state bar authorities consider a lawyer's declining representation . . . as 'manifest[ing] bias or prejudice,' they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g)."[135]

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that "[a] lawyer is under no obligation to accept every person who may wish to become a client *unless the refusal to accept a person amounts to unlawful discrimination*."[136] The facts before the Committee were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of "unlawful discrimination" for purposes of New York's Rule 8.4(g) a question of law beyond its jurisdiction, the Committee declined to "opine on whether a lawyer's refusal to represent a prospective client in a suit against the lawyer's own religious institution constitutes 'unlawful discrimination'" for purposes of New York's Rule 8.4(g).[137]

In *Stropnicky v. Nathanson*,[138] the Massachusetts Commission Against Discrimination found a law firm that specialized in representing women in divorce cases had violated state nondiscrimination law when it refused to represent a man.[139] As these examples demonstrate, reasonable doubt exists that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation.

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[134] McGinniss, *supra* note 7, at 207-209.
[135] *Id.* at 207-208 & n.146, citing Professor Stephen Gillers, *supra* note 23, at 231-32, as, in Professor McGinniss' words, "conceding that the United States Conference of Catholic Bishops' concerns about religious lawyers' loss of freedom in client selection under Model Rule 8.4(g) are well founded, though not a basis for objecting to the rule."
[136] N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).
[137] *Id.* New York's Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is significantly narrower.
[138] 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003).
[139] Rotunda & Dzienkowski, *supra* note 6, *in* "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

IX. Should State Bars Be Tribunals of First Resort for Employment and Other Discrimination and Harassment Claims Against Attorneys and Law Firms?

Concerns have been expressed by some state bar disciplinary counsel, including the New Hampshire Attorney Discipline Office, as to whether bar disciplinary offices have adequate financial and staff resources for adjudicating complex harassment and discrimination claims, particularly of employment discrimination claims. At the public hearing on June 1, 2018, the Attorney Discipline Office indicated that it did not support the adoption of a rule patterned on ABA Model Rule 8.4(g). The General Counsel at the Attorney Discipline Office, stated that the lawyers at the Attorney Discipline Office had concerns about their ability to enforce anti-discrimination and anti-harassment rules. [140] She noted that state and federal laws regarding harassment and discrimination are the subjects of "hugely complex litigation" with which courts struggle.[141] Enforcement of a challenging rule could require more resources than the Attorney Discipline Office currently has. Despite these legitimate concerns, "the working group [that developed the proposed Rule of Professional Conduct 8.4(g)] did not seek input from the Attorney Discipline Office about the proposal."[142]

The Montana Office of Disciplinary Counsel (ODC) voiced concerns about the breadth of ABA Model Rule 8.4(g).[143] The ODC quoted from a February 23, 2016 email from the National Organization of Bar Counsel to its members explaining that it had declined to take a position on then-proposed ABA Model Rule 8.4(g) because "there were a number of simple regulatory issues, not the least of which is the possibility of diverting already strained resources to investigate and prosecute these matters."[144]

The ODC thought that "any unhappy litigant" could claim that opposing counsel had discriminated on the basis of "one or more of the types of discrimination named in the rule."[145] The ODC also observed that ABA Model Rule 8.4(g) did not require "that a claim be first brought before an appropriate regulatory agency that deals with discrimination."[146] In that regard, the ODC recommended that the court consider "Illinois' rule [that] makes certain types of discrimination unethical and subject to discipline" because it required that "the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or

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[140] Comm. Rep., *supra* note 2, at 11.
[141] *Id.* By way of example, the recent closely-divided decision of the Court in *State v. Lilley*, 2019 WL 493721 (N.H. 2019), illustrates the complexities involved in adjudicating whether something is sex discrimination.
[142] *Id.* at 16-17.
[143] Office of Disciplinary Counsel, *In re the Model Rules of Professional Conduct: ODC's Comments re ABA Model Rule 8.4(g), filed in* Montana Supreme Court, No. AF 09-0688 (Apr. 10, 2017), at 3, https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Letter%20of%20Chief%20Disciplinary%20Counsel%20Opposing%208.4.pdf.
[144] *Id.* at 3-4.
[145] *Id.*
[146] *Id.* at 3.

administrative agency" and required that "the conduct must reflect adversely on the lawyer's fitness as a lawyer."[147]

In December 2016, the Disciplinary Board of the Supreme Court of Pennsylvania identified two defects of ABA Model Rule 8.4(g). The first was the rule's "potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers."[148] The second defect was that "after careful review and consideration … the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities."[149] The Board at that time concluded 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.[150]

Thus, Model Rule 8.4(g) generates several new concerns. Increased demand may drain the limited resources of the state bar if it becomes the tribunal of first resort for discrimination and harassment claims against lawyers. Serious questions arise about the evidentiary or preclusive effects that a state bar proceeding might have on other tribunals' proceedings. State bar tribunals have their own rules of procedure and rules of evidence that may be significantly different from state and federal court rules. Often, discovery is more limited in bar proceedings than in civil court. And, of course, there is no right to a jury trial in state bar proceedings.

Professor Rotunda and Professor Dzienkowski warn that Rule 8.4(g) "may discipline the lawyer who does not violate any statute or regulation [except Rule 8.4(g)] dealing with

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[147] *Id.* at 5.
[148] The Pennsylvania Bulletin, *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct*, 46 Pa. B. 7519 (Dec. 3, 2016) (hereinafter "The Pennsylvania Bulletin"), http://www.pabulletin.com/secure/data/vol46/46-49/2062.html. Nevertheless, ABA Model Rule 8.4(g) resurfaced in Pennsylvania in July 2018, when the Disciplinary Board sought comment on yet another iteration of the Rule. That version potentially subjects lawyers to disciplinary action for telling lawyer jokes. *See* Kim Colby, *Is Telling a "Lawyer Joke" Professional Misconduct? Pennsylvania Considers a Version of ABA Model Rule 8.4(g),* The Federalist Society Blog (July18, 2018), https://fedsoc.org/commentary/blog-posts/is-telling-a-lawyer-joke-professional-misconduct-pennsylvania-considers-a-version-of-aba-model-rule-8-4-g.
[149] *Id.*
[150] *Id.*

discrimination."[151] Nor is "an allegedly injured party [required] to first invoke the civil legal system" before a lawyer can be charged with discrimination or harassment.[152]

The threat of a complaint under Model Rule 8.4(g) could also be used as leverage in other civil disputes between a lawyer and a former client. Model Rule 8.4(g) even may be the basis of a private right of action against an attorney. As Professor Rotunda and Professor Dzienkowski note:

> If lawyers do not follow this proposed Rule, they risk discipline (e.g., disbarment, or suspension from the practice of law). In addition, Courts enforce the Rules in the course of litigation (e.g., sanctions, disqualification). Courts also routinely imply private rights of action from violation of the Rules – malpractice and tort suits by third parties (non-clients).[153]

Unsurprisingly, Professor Rotunda and Professor Dzienkowski disagree with the rule's proponents that lawyers "should rely on prosecutorial discretion because disciplinary boards do not have the resources to prosecute every violation." They warn that instead "[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas."[154]

A lawyer's loss of his or her license to practice law is a staggering penalty and demands a stringent process, one in which the standards for enforcement are clear and respectful of the attorneys' rights, as well as the rights of others.

Conclusion

This Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out if and when it is adopted in other states. There is no reason to make New Hampshire attorneys the subjects of the dubious experiment that ABA Model Rule 8.4(g) represents. This is particularly true given the sensible alternative of waiting to see whether states other than Vermont adopt ABA Model Rule 8.4(g), and then observing its impact on attorneys in those states. A decision to reject ABA Model Rule 8.4(g) can always be revisited, but the damage its premature adoption would do to New Hampshire attorneys cannot be undone.

Christian Legal Society thanks the Court for holding this public comment period and considering its comments.

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[151] Rotunda & Dzienkowski, *supra* note 6 (parenthetical in original).
[152] *Id.*
[153] *Id.*
[154] *Id.*

Respectfully submitted,

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