



Seeking Justice with the Love of God

March 11, 2019

Rules Review Committee
District of Columbia Bar
901 4th Street, N.W.
Washington, DC 20001
Attn: Hope C. Todd, D.C. Bar Legal Ethics Counsel

By email: ethics@dcbar.org

Re: Christian Legal Society Comment Letter Opposing the Amendment of D.C. Rule 9.1 to Include ABA Model Rule 8.4(g)

Dear Members of the D.C. Bar Rules of Professional Conduct Review Committee:

This comment letter is filed pursuant to this Committee's announcement dated February 4, 2019, soliciting public comment from Bar members and others on its final draft report and recommendations to amend D.C. Rules of Professional Conduct 9.1 and 8.4. Specifically, the Committee "recommends amendments to D.C. Rule 9.1 based on [ABA] Model Rule 8.4(g), with some minor differences," as well as "an amendment to Comment [3] to Rule 8.4 that would cross reference Rule 9.1."¹

In essence, the Committee is recommending that a deeply flawed, widely criticized black letter rule, ABA Model Rule 8.4(g), be imposed on the members of the District of Columbia Bar. But after two years of deliberations in many states across the country, Vermont is the only state to have adopted this defective rule. 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.

As scholars have explained, ABA Model Rule 8.4(g) is a speech code for lawyers: 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 two-minute video for the Federalist Society.²

¹ District of Columbia Bar Rules of Professional Conduct Review Committee, *Proposed Amendments to Selected Rules of the D.C. Rules of Professional Conduct* (February 2019), at 10, 29-32, 80-89 [hereinafter "Committee Report"], at <http://www.dcbar.org/bar-resources/legal-ethics/upload/Rules-Review-Committee-Report-for-Public-Comment-2019.pdf>.

² 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>.

The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.³ 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."⁴

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."⁵ Professor 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."⁶

In a thoughtful examination of the rule's legislative history, practitioners Andrew Halaby and Brianna Long conclude 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."⁷ 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."⁸ 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."⁹

³ 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>.

⁴ 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."

⁵ Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 241, 243 (2017).

⁶ 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). See also, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 Notre Dame J.L. Ethics & Pub. Pol'y 135 (2018).

⁷ 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, 257 (2017).

⁸ *Id.*

⁹ *Id.* at 204.

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 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 22-25.

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, religious, or 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 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 overtly targets their speech.

For example, if amended, the scope of Proposed Rule 9.1 would include *any* conduct “with respect to the practice of law” that the lawyer “knows or reasonably should know is harassment or discrimination” on twelve separate bases.¹⁰ According to its accompanying new Comment [1], 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, speech.

Furthermore, as its accompanying new Comment [2] states, Proposed Rule 9.1 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 or business activities (for example, *social functions* sponsored by the firm or employer as well as travel for the firm or employer).” (Emphasis supplied.) In plain English, regulated conduct “includes . . . interacting with . . . others while engaged in the practice of law.”

The compelling question becomes: What conduct does ABA Model Rule 8.4(g) *not* reach? Virtually everything a lawyer does can be characterized as “conduct with respect to the practice of law.” Professor Rotunda and Professor Dzienkowski have noted that “[t]his Rule

¹⁰ Proposed D.C. Rule 9.1 and its seven proposed comments are set out *infra* at 6-10.

applies to lawyers chatting around the water cooler, participating on a CLE panel, or hiring a law firm messenger.”¹¹

Activities that may fall within Proposed D.C. Rule 9.1’s broad scope include:

- presenting CLE courses;¹²
- participating in panel discussions that touch on controversial political, religious, and social viewpoints;
- teaching law school classes as faculty, adjunct faculty, or guest lecturers;
- writing law review articles, op-eds, blogposts, or tweets;
- giving media interviews;
- serving on the boards of religious or other charitable institutions, including one’s religious congregation or religious school or college;¹³
- providing *pro bono* legal advice to nonprofits;
- serving at legal aid clinics;
- lobbying on various legal issues;
- testifying before a legislative body;
- writing to a government representative;
- providing *pro bono* legal advice to religious ministries that assist prisoners, the underprivileged, the homeless, the abused, and other vulnerable populations;
- sitting on the board of a fraternity or sorority;
- volunteering for political parties; and
- advocating through social justice organizations.

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 estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system.”¹⁴

¹¹ Rotunda & Dzienkowski, *supra* note 4, in “§ 8.4-2(j)-1. Introduction.”

¹² 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 about an instructor’s discussion of a hypothetical regarding sex discrimination and the applicability of current 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/>.

¹³ 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>.

¹⁴ 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>.

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 18-21. To date, only the Vermont Supreme Court has adopted it.

D.C. 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 Committee 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. There is no need for haste because current Rule 9.1 already makes it professional misconduct for lawyers to discriminate in employment, and current Comment [3] to Rule 8.4 already deems bias and prejudice in the course of representing a client to be professional misconduct if the conduct is prejudicial to the administration of justice.

The rest of this letter provides greater detail about the flaws of Proposed Rule 9.1, as follows:

- Part I compares the actual language of Current Rule 9.1 and Current Comment [3] to Rule 8.4 with ABA Model Rule 8.4(g). *See infra* at 6-10.
- Part II introduces five key concerns that the proposed rule amendments would create. *See infra* at 10-16.
- Part III 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 16-18.
- Part IV summarizes why at least eleven states have publicly rejected or refrained from adopting ABA Model Rule 8.4(g). *See infra* at 18-21.
- Part V explains 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 22-25.
- Part VI details specific ways in which ABA Model Rule 8.4(g) will have a substantial chilling effect on D.C. attorneys' freedom of speech and free exercise of religion. *See infra* at 25-37.
- Part VII discusses the fact that Proposed Rule 9.1's threat to free speech is compounded by its adoption of a negligence standard rather than a knowledge requirement. *See infra* at 37-38.

- Part VIII queries whether 1) bar disciplinary processes provide adequate due process protections for lawyers and 2) bar disciplinary offices have adequate financial and staff resources for adjudicating an increased volume of discrimination claims. *See infra* at 38-40.

I. By Incorporating ABA Model Rule 8.4(g), Proposed Rule 9.1 Would Impose a Substantially Heavier Burden on D.C. Attorneys than Current Rule 9.1 and Current Comment [3] to Rule 8.4 Impose.

A. Current D.C. Rule 9.1

In 1991, Current Rule 9.1 made it professional misconduct for a lawyer to discriminate in employment based on several characteristics, as follows:

A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.¹⁵

Comment [1] to Current Rule 9.1 has an important limitation on the rule's scope when it states that "[t]he Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law." This limitation would be deleted if Proposed Rule 9.1 and its proposed comments are adopted.¹⁶

B. Current Comment [3] to Rule 8.4

Current Comment [3] to Rule 8.4 was added in 2007 and seems based on former Comment [3] that accompanied ABA Model Rule 8.4 from 1998 to August 2016. Current D.C. Comment [3] to D.C. Rule 8.4 reads as follows:

[3] A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.¹⁷

C. The Proposed Amendments to Rule 9.1 and Its Seven Proposed Comments

1. Proposed Rule 9.1 Would Incorporate ABA Model Rule 8.4(g) as a Black Letter Rule.

¹⁵ D.C. Rule 9.1.

¹⁶ This letter's appendix attaches the Committee Report's redline version of the Proposed Revisions to Rule 9.1.

¹⁷ D.C. Rule 8.4, cmt. 3.

As the Committee Report itself notes, “[i]n recommending that D.C. Rule 9.1 be amended to closely align with ABA Model Rule 8.4(g), the Bar expands the scope of prohibited behavior under the D.C. Rule.”¹⁸ Proposed Rule 9.1 would read:

New Black Letter Rule 9.1: It is professional misconduct for a lawyer, with respect to the practice of law, to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status. This Rule does not limit the ability of a lawyer to accept, decline or, in accordance with Rule 1.16, withdraw from a representation. This Rule does not preclude providing legitimate advice or engaging in legitimate advocacy consistent with these Rules.

2. The Proposed Amendments to Rule 9.1 Would Add ABA Model Rule 8.4(g)’s Three Comments.

With but a few minor differences, Comments [3]–[5] to ABA Model Rule 8.4(g) would become Proposed Comments [1]–[3] to Proposed Rule 9.1.

a. Proposed Comment [1] claims to define “discrimination” and “harassment,” but it succeeds only in making clear that Proposed Rule 9.1 is an unconstitutional content-based restriction on attorneys’ free speech, as well as a viewpoint-discriminatory restriction. The purported definitions are open-ended (*i.e.*, “discrimination *includes*” and “[h]arassment *includes*”). “[H]armful” speech is prohibited, but “harmful” is not defined. “Harassment includes . . . derogatory or demeaning” speech, a standard that plainly violates freedom of speech under the Supreme Court’s 2017 decision in *Matal v. Tam*,¹⁹ which ruled that government officials cannot constitutionally determine whether speech is “derogatory or demeaning.” See *infra* at 22-25, 35-36.

Proposed Comment [1] -- Discrimination and harassment by lawyers in violation of the Rule undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and antiharassment may guide application of the Rule.

¹⁸ Committee Report, *supra* note 1, at 30.

¹⁹ 137 S. Ct. 1744 (2017).

b. Proposed Comment [2] describes conduct “with respect to the practice of law” so broadly that much of a lawyer’s speech and conduct falls within its extremely expansive scope. Essentially, the scope of Proposed Rule 9.1 would include all “[c]onduct with respect to the practice of law [that] includes . . . interacting with . . . others while engaged in the practice of law . . . and participating in . . . bar activities or business activities (for example, social functions sponsored by the firm) . . . in connection with the practice of law.” See *supra* at 3-4; *infra* at 10-16, 25-37.

Proposed Comment [2] -- Conduct with respect 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 or business activities (for example, *social functions* sponsored by the firm or employer as well as travel for the firm or employer) in connection with the practice of law. Lawyers may 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. (Emphasis supplied.)

c. Proposed Comment [3] is an attempt to address several issues that would be created if Proposed Rule 9.1 were adopted, including issues triggered by inclusion of “socioeconomic status” as a protected class. The question of whether a lawyer’s use of peremptory challenges could violate Proposed Rule 9.1 is an important one to which the Comment fails to give a satisfactory response because it merely makes a factually accurate statement that peremptory challenges are addressed by Rule 3.4(g), but that rule merely states that “[a] lawyer shall not . . . [p]reemptorily strike jurors for any reason prohibited by law.” That reference fails to foreclose the possibility that peremptory challenges not prohibited by law might nonetheless violate Proposed Rule 9.1.

Proposed Comment [3] -- A lawyer’s use of peremptory challenges is addressed by Rule 3.4(g). A lawyer does not violate Rule 9.1 by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer’s representation of a

client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

3. The Other Four Proposed Amendments to Rule 9.1 Would Delete a Critical Sentence from Current Comment [1] and add a new Comment [7].

a. Proposed Comment [4] would remove the existing limitation on the scope of Rule 9.1 placed by current Comment [1], which states “[t]he Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.”

Proposed Comment [4] -- The D.C. Human Rights Act, D.C. Code § 2-14-2.11 (2001), and federal law also contain certain prohibitions on discrimination in employment. [Contrast the proposed change with Current Comment [1] which states: “This provision is modeled after the D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), though in some respects is more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.”]

b. Proposed Comment [5] would remove the second sentence of current Comment [2], which reads “[s]uch experience may involve, among other things, methods of analysis of statistical data regarding discrimination claims.”

Proposed Comment [5] -- The investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission. These agencies have, in appropriate circumstances, the power to award remedies to the victims of discrimination, such as reinstatement or back pay, which extend beyond the remedies that are available through the disciplinary process. Remedies available through the disciplinary process include such sanctions as disbarment, suspension, censure, and admonition, but do not extend to monetary awards or other remedies that could alter the employment status to take into account the impact of prior acts of discrimination.

c. Proposed Comment [6] is unchanged from current Comment [3].

Proposed Comment [6] -- If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Disciplinary Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Disciplinary Counsel and material allegations involved in other proceedings. See §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.

d. Proposed Comment [7] is new:

Proposed Comment [7] -- The prior version of Rule 9.1 included “physical handicap” among the disallowed bases for harassment and discrimination. That basis now is subsumed within the new category of “disability.”

D. The Proposed Change to Current Comment [3] to Rule 8.4

Current Rule 8.4, Comment [3] would be revised to entirely delete the current text and replace it with the following:

Proposed Comment [3] -- See Rule 9.1 for guidance on prohibited harassment and discrimination. Conduct that violates Rule 9.1 *and* seriously interferes with the administration of justice also violates paragraph (d) of this Rule. (Emphasis supplied.)

II. Proposed Rule 9.1 Would Greatly Expand the Reach of the Professional Rules of Conduct into D.C. Lawyers’ Lives.

A. Proposed Rule 9.1 is substantially broader than Current Rule 9.1 as to conduct regulated.

Current Rule 9.1 prohibits a lawyer from discriminating in the context of employment. Proposed Rule 9.1 goes far beyond employment to reach all conduct “with respect to the practice of law.” This is essentially the same scope as ABA Model Rule 8.4(g)’s “conduct related to the practice of law.”

Proposed Comment [2] then provides examples of “[c]onduct with respect to the practice of law” which “includes” 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 or business activities

(for example, *social functions* sponsored by the firm or employer as well as travel for the firm or employer) in connection with the practice of law.” (Emphasis supplied.)

As detailed *infra* at 25-36, Proposed Rule 9.1 would apply to nearly everything that a lawyer does, including certain “social functions . . . 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.” And, of course, because the operative word is “includes,” the list is nonexclusive, merely providing examples of the conduct on which Proposed Rule 9.1 could be brought to bear.

Indeed, without the frills, Proposed Comment [2]’s definition reads: “Conduct with respect to the practice of law includes . . . interacting with . . . others while engaged in the practice of law . . . and participating in . . . bar activities or business activities (for example, social functions sponsored by the firm) . . . in connection with the practice of law.” The rest of Proposed Comment [2] simply lists examples of covered conduct.

B. Proposed Rule 9.1 is not limited to conduct that is “prejudicial to the administration of justice.”

Current Comment [3] to Rule 8.4 requires that a lawyer’s conduct “seriously interfere[] with the administration of justice” to qualify as professional misconduct. But like ABA Model Rule 8.4(g), Proposed Rule 9.1 abandons this important limitation. Deleting current Comment [3], Proposed Comment [3] states that “[c]onduct that violates Rule 9.1 *and* seriously interferes with the administration of justice also violates” Rule 8.4(d)’s prohibition on “conduct that seriously interferes with the administration of justice.”

As a result, a D.C. attorney would be subject to disciplinary liability even though his or her conduct had not prejudiced the administration of justice. 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.²⁰

²⁰ 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 letter is incorporated into Tennessee Attorney General Opinion 18-11; however, for purposes of quoting the letter, we cite to the page numbers of the letter rather than the opinion.

C. Proposed Rule 9.1 does not preclude a finding of professional misconduct based on a lawyer’s “implicit bias.”

Like ABA Model Rule 8.4(g), Proposed Rule 9.1 relies on a negligence standard that makes a lawyer liable for conduct that she “knows *or* reasonably should know” is “harassment or discrimination.” A D.C. attorney, therefore, could violate Model Rule 8.4(g) without actually realizing he or she had done so.

This change in the knowledge requirement is particularly perilous because 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.”²¹ Nothing in Proposed Rule 9.1 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, discriminatory conduct that the lawyer is not consciously aware is discriminatory.²² On its webpages devoted to its “Implicit Bias Initiative,” the ABA defines “implicit bias” and “explicit biases” as follows:²³

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.

²¹ 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>.

²² See Halaby & Long, *supra* note 7, at 216-217, 243-245. Halaby & Long eventually conclude that implicit-bias conduct probably would not fall within the “reasonably should know” standard. *Id.* at 244-245. We are not so certain.

²³ 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>

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 admonition.²⁴ 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.”²⁵

A recent D.C. Bar CLE program adds to the concern that Proposed Rule 9.1 might be interpreted to allow complaints of implicit bias. The December 2018 CLE program began a program on implicit bias with a discussion of ABA Model Rule 8.4(g). The presenters included a D.C. Bar Ethics Legal Counsel, a current member of the D.C. Bar Rules of Professional Conduct Review Committee, and a past member of the Committee.²⁶

D. Proposed Rule 9.1 would make it professional misconduct for attorneys to engage in hiring practices that favor persons because they are women, belong to racial, ethnic, or sexual minorities, or represent a particular socioeconomic status.

In the written materials for a different CLE program for the D.C. Bar, the presenter, Thomas Spahn, a highly respected professional ethics expert, 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” and “extends to any lawyer conduct ‘related to the practice of law,’ including ‘operating or managing a law firm or law practice.’”²⁷ Proposed Rule 9.1 and its Proposed Comment [2] essentially duplicate ABA Model Rule 8.4(g) and its Comment [4].

The presenter concluded 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.”²⁸ He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:²⁹

²⁴ Halaby & Long, *supra* note 7, 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 6, at 204-205.

²⁵ Halaby & Long, *supra* note 7, at 244 (“When a new anti-bias rule proved unworkable 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).

²⁶ The District of Columbia Bar, Continuing Legal Education Program, *Implicit Bias and Your Ethical Duties as a Lawyer* (Dec. 12, 2018). 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.

²⁷ 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.

²⁸ *Id.* at 6.

²⁹ *Id.* at 7 (emphasis supplied).

[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.

The presenter dismissed the idea that Comment [4] of ABA Model Rule 8.4(g) (which is tracked by Proposed Comment [2] to Proposed Rule 9.1) 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,” as the ethics expert explained, “[t]his sentence appears to 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.”³⁰

The presenter gave three reasons for his conclusion that efforts to promote certain kinds of diversity would violate the rule and, therefore, would need to cease:

- 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.”³¹
- 2) The drafters of the rule “clearly knew how to include exceptions to the binding black letter anti-discrimination rule” because two exceptions actually are contained in the black letter rule itself, 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.”³²

³⁰ *Id.* at 5. *See also, id.* at 5-6 (“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.”)

³¹ *Id.* at 5.

³² *Id.* at 6.

- 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.”³³

The potential consequences for firms’ efforts to promote diversity if Proposed Rule 9.1 were adopted provides 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.

E. Proposed Rule 9.1 Could Limit D.C. 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).”³⁴

Professional ethics experts agree. 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.”³⁵ Rule 1.16 does not address *accepting* clients.³⁶ Moreover, as Professor Rotunda and Professor Dzienkowski have observed, Comment [5] to ABA Model Rule 8.4(g) (which is Proposed Comment [3] to Proposed D.C. Rule 9.1), 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.”³⁷

³³ *Id.* at 6.

³⁴ 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/PROMULGATEDVRPr8.4\(g\).pdf](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPr8.4(g).pdf) (emphasis supplied).

³⁵ Rotunda & Dzienkowski, *supra* note 4, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise” (emphasis supplied by the authors).

³⁶ 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 20, at 11.

³⁷ See Rotunda & Dzienkowski, *supra* note 4.

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.”³⁸ 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).”³⁹

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*.”⁴⁰ 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).⁴¹

In *Stropnick v. Nathanson*,⁴² 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.⁴³ 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.

III. 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).

³⁸ McGinniss, *supra* note 6, at 207-209.

³⁹ *Id.* at 207-208 & n.146, citing 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, 231-32 (2017), 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.”

⁴⁰ N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied).

⁴¹ *Id.* New York’s Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is narrower.

⁴² 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).

⁴³ Rotunda & Dzienkowski, *supra* note 4, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

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.”⁴⁴ 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 in 2017.

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.⁴⁵ But each of these black letter rules was narrower than ABA Model Rule 8.4(g). As we have already seen, Current D.C. Rule 9.1 is significantly narrower in its scope.

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.”⁴⁶ 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.⁴⁷

⁴⁴ See, e.g., Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, https://www.scbarr.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf, at 56-57.

⁴⁵ *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.

⁴⁶ Gillers, *supra* note 39, at 208 (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.

⁴⁷ *Id.* at 208.

In summary, several key differences exist between ABA Model Rule 8.4(g) and the 25 jurisdictions' bias rules, including:

- 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."
- No black letter rule utilizes ABA Model Rule 8.4(g)'s circular "protection" for "legitimate advocacy . . . consistent with these rules."

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.

IV. 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 states (besides Vermont) 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.⁴⁸

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

The Supreme Courts of **Arizona, Idaho, Tennessee, and South Carolina** 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).⁴⁹ A week later, on

⁴⁸ McGinniss, *supra* note 6, at 213-217.

⁴⁹ 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.

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).⁵⁰

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).⁵¹ 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.”⁵²

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).⁵³ 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.”⁵⁴

In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).⁵⁵ The Court acted after the state bar’s House of Delegates, as well as the state attorney general, recommended against its adoption.⁵⁶

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

⁵⁰ 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](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf).

⁵¹ 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.

⁵² Tenn. Att’y Gen. Letter, *supra* note 20, at 1.

⁵³ 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>.

⁵⁴ 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>.

⁵⁵ 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”).

⁵⁶ 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>.

Rule 8.4(g): **Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina, and Tennessee.** The ABA lists **Vermont** as the only state to have adopted 8.4(g).⁵⁷

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

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).⁵⁸ 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.”⁵⁹

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.”⁶⁰ 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.”⁶¹

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.”⁶² 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.”⁶³

⁵⁷ 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_adapt_8_4_g.pdf.

⁵⁸ *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>.

⁵⁹ Tenn. Att’y Gen. Letter, *supra* note 20, at 1.

⁶⁰ *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>.

⁶¹ *Id.*

⁶² *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://lalegaethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384>.

⁶³ *Id.* at 6.

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.”⁶⁴

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 concerns that ABA Model Rule 8.4(g) raises as to free speech, association, and expressive association.⁶⁵

C. A State 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).⁶⁶ 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.⁶⁷

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.”⁶⁸ 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

⁶⁴ 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>.

⁶⁵ 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>.

⁶⁶ *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>.

⁶⁷ *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 20, at 8 n.8.

⁶⁸ 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>.

discrimination” and that it might “have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views.”⁶⁹ 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.”⁷⁰

V. Under Two Recent United States Supreme Court Decisions, Proposed Rule 9.1 Would Be an Unconstitutional Restriction on Lawyers’ Speech.

A. Proposed Rule 9.1 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*,⁷¹ 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, a close examination of whether the regulation is narrowly tailored to achieve a compelling governmental interest.

Under this 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.’”⁷² “[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.’”⁷³ 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.’”⁷⁴

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.⁷⁵ In abrogating those decisions, the Court

⁶⁹ 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>.

⁷⁰ 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).

⁷¹ 138 S. Ct. 2361 (2018).

⁷² *Id.* at 2371, quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

⁷³ *Id.* at 2371.

⁷⁴ *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

⁷⁵ *Id.* at 2371.

stressed that “*this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’*”⁷⁶ 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.”⁷⁷

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.”⁷⁸ One circumstance in which it “applied more deferential review” involved “laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’”⁷⁹ 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.⁸⁰ 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.”⁸¹ 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.”⁸²

Instead, the Court reaffirmed that its “precedents have long protected the First Amendment rights of professionals” and “has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers.”⁸³ Indeed, in a landmark case, 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.⁸⁴

Because it would censor or chill lawyers’ protected speech, Proposed Rule 9.1 fails strict scrutiny. Proposed Rule 9.1 is not only an unconstitutional *content*-based speech restriction but also an unconstitutional *viewpoint*-based speech restriction.

⁷⁶ *Id.* at 2371-72 (emphasis added).

⁷⁷ *Id.* at 2371.

⁷⁸ *Id.* at 2372.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 2372 (emphasis added).

⁸² *Id.*

⁸³ *Id.* at 2374.

⁸⁴ *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 438-39 (1963).

B. Proposed Rule 9.1 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.⁸⁵ Proposed Rule 9.1 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.⁸⁶

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.”⁸⁷ 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.’”⁸⁸

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.”⁸⁹ And it was viewpoint discriminatory even if it “applies in equal measure to any trademark that demeans or offends.”⁹⁰

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.”⁹¹ Justice Kennedy closed with a sober warning:

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not

⁸⁵ 137 S. Ct. 1744 (2017).

⁸⁶ *Id.* at 1753-1754, 1765; *see also, id.* at 1766 (unconstitutional to suppress speech that “demeans or offends”) (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).

⁸⁷ *Id.* at 1751 (quotation marks and ellipses omitted).

⁸⁸ *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

⁸⁹ *Id.* at 1766 (Kennedy, J., concurring).

⁹⁰ *Id.*

⁹¹ *Id.* at 1767.

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.⁹²

In his concurrence, which was joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, Justice Kennedy explained that it was unconstitutional viewpoint discrimination for a government agency 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, 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.⁹³

Proposed D.C. Rule 9.1 punishes lawyers' speech on the basis of its viewpoint and content. It is, therefore, unconstitutional under the Supreme Court's analyses in *Matal* and *NIFLA*.

VI. Proposed Rule 9.1 Would Chill Lawyers' 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,⁹⁴ 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

⁹² *Id.* at 1769 (Kennedy, J., concurring).

⁹³ *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 20, 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." (internal quotation marks omitted)).

⁹⁴ 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.

change and raising concerns about its enforceability, although the Committee dropped its opposition immediately prior to the House of Delegates' vote.⁹⁵

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.⁹⁶ 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."⁹⁷ 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."⁹⁸ Halaby and Long summarized the legislative history of the rule:

Model Rule 8.4(g) and its associated comments evolved rapidly between the initial letter from the Goal III entities in July 2014, through initial circulation of Version 1 in July 2015, to final adoption of Version 5 the following August. There was solicitation of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.⁹⁹

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.

⁹⁵ Halaby & Long, *supra* note 7, 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%20MODEL%20RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

⁹⁶ Halaby & Long, *supra* note 7, 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).

⁹⁷ Halaby & Long, *supra* note 7, at 203.

⁹⁸ *Id.*

⁹⁹ *Id.* at 233.

Several scholars have outlined their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. *See supra* at 1-3. The late Professor Ronald Rotunda wrote a leading treatise on American constitutional law,¹⁰⁰ as well as co-authoring *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, co-published by the ABA.¹⁰¹ In the 2017-2018 edition of the *Deskbook*, Professor Rotunda and Professor Dzienkowski 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."¹⁰²

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.¹⁰³

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*.¹⁰⁴

Prominent First Amendment scholar Professor Volokh has similarly warned that the new rule is a speech code for lawyers.¹⁰⁵ 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

¹⁰⁰ *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).

¹⁰¹ Rotunda & Dzienkowski, *supra* note 4.

¹⁰² *Id.* at "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

¹⁰³ 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>.

¹⁰⁴ Rotunda, *supra* note 3. 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 3, <https://www.youtube.com/watch?v=V6rDPjqBcQg>.

¹⁰⁵ The Federalist Society video featuring Professor Volokh, *supra* note 2, <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

proponent seemed unable to deflect.¹⁰⁶ 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."¹⁰⁷

These 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.

1. By expanding its coverage to include all conduct "with respect to the practice of law," Proposed Rule 9.1 would encompass nearly everything a lawyer does, including conduct and speech protected by the First Amendment.

Because it expressly applies to all conduct "with respect to the practice of law," Proposed D.C. Rule 9.1 raises troubling new concerns for every D.C. attorney. Proposed Comment [1] makes clear that "conduct" includes "speech": "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.)

Proposed Comment [2] confirms its extensive overreach: "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

¹⁰⁶ The Federalist Society Debate (Mar. 13, 2017), *supra* note 2, <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>.

¹⁰⁷ 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.

law practice; and participating in bar association or business activities (for example, social functions sponsored by the firm or employer . . .) in connection with the practice of law.” See *supra* at 6-16.

The real question becomes: What conduct does proposed ABA Model Rule 8.4(g) not reach? Virtually everything a lawyer does is conduct “with respect to the practice of law.”¹⁰⁸ 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. For example, would Proposed D.C. Rule 9.1 be violated by a law firm outing for clients or summer associates to a Redskins football game?¹⁰⁹ (And would a lawyer’s use of the name of the local NFL franchise football team, knowing it is heard by many persons as derogatory and demeaning, in a comment letter regarding a D.C. Bar proposed rule violate Proposed Rule 9.1?)

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, state, and nation. 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.

Proposed Rule 9.1 would make a lawyer subject 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?¹¹⁰
- 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?

¹⁰⁸ See Halaby & Long, *supra* note 7, 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.”)

¹⁰⁹ See *Pro-Football, Inc., v. Blackhorse*, 112 F.3d 439 (E.D. Va. 2015) (challenge to Redskins’ trademark as racially disparaging), *vacated and remanded in light of Matal v. Tam*, 709 Fed. Appx. 182 (4th Cir. 2018).

¹¹⁰ 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/>.

- 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 tweet calling a female public official a derogatory sexist term?¹¹¹
- Is a lawyer subject to discipline for employment decisions made by religious or other charitable nonprofits if she sits on its board and ratifies its decisions or employment policies?¹¹²
- May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various groups as protected classes in a nondiscrimination law being debated in the state legislature?
- Is a lawyer subject to discipline if she testifies before Congress against amending the Civil Rights Act of 1964 to add new protected classes if they are listed in Proposed Rule 9.1?
- 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 comment letters she writes as a lawyer expressing her personal views on proposed Title IX regulations, immigration issues, census questions, re-districting proposals, or capital gains tax proposals?
- Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government financial assistance programs?
- Is a lawyer subject to discipline for serving on the board of an organization that discriminates based on sex, such as a social fraternity or sorority?
- Is a lawyer at risk for volunteer legal work for political candidates who take controversial positions?
- Is a lawyer at risk for any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues?¹¹³

¹¹¹ Debra Cassens Weiss, *BigLaw Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders*, ABA Journal, Oct. 1, 2018 (noting that the lawyer had been honored in 2009 by the ABA Journal “for his innovative use of social media in his practice”), at http://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

¹¹² 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>.

¹¹³ Tex. Att’y Gen. Op., *supra* note 60, at 3 (“Given the broad nature of this rule, a court could apply it to an attorney’s participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.”); La. Att’y Gen. Op., *supra* note 62, at 6 (“[A] lawyer who is asked his opinions, thoughts, or impressions on legal matters taking place in the news at a social function could also be found to be engaged in conduct related to the practice of law.”).

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 protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech.”¹¹⁴ 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?

Proposed Rule 9.1 would create a cloud of doubt that will inevitably chill lawyers’ public speech.¹¹⁵ 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.¹¹⁶ If so, public discourse and civil society will suffer from the ideological straitjacket that Proposed Rule 9.1 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.¹¹⁷ At a time when freedom of speech needs more breathing space, not less, Proposed D.C. Rule 9.1 threatens to suffocate attorneys’ speech in the Nation’s Capital.

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 ministries. These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. These ministries also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.¹¹⁸

¹¹⁴ Tenn. Att’y Gen. Letter, *supra* note 20, 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.)

¹¹⁵ Tenn. Att’y Gen. Letter, *supra* note 20, 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.”)

¹¹⁶ McGinniss, *supra* note 6, 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”).

¹¹⁷ *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 because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

¹¹⁸ Tex. Att’y Gen. Op., *supra* note 60, 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 "with respect to the practice of law." For example, a lawyer may be asked to help craft her church'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 "with respect to the practice of law," but surely a lawyer should not fear being disciplined for volunteer legal work she performs for her church or her alma mater.

In 1991, a D.C. ethics opinion addressed the question of a member of the D.C. bar who was a member of his church's board of elders and sat on the board of directors for an international religious human rights organization. The church was located in Virginia, and the human rights organization in Maryland. Both religious institutions understood homosexual conduct to violate their religious beliefs.¹¹⁹ The lawyer stated that he did not provide legal counsel or services to either organization. But he wanted reassurance that his concurrence in hiring decisions while serving on these boards would not violate Rule 9.1. In its ethics opinion, the Committee determined that because Comment [1] "states that '[t]he rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law,'" the lawyer was not subject to discipline because, unlike the District of Columbia, "neither Virginia nor Maryland, nor the Federal law, outlaw acts of discrimination in employment based on 'sexual orientation.'" But the Committee noted "that if Maryland or Virginia law, or the Federal law, should be changed to include 'sexual orientation' as a forbidden ground for employment discrimination, Rule 9.1 would then apply to such acts of discrimination by a member of the D.C. bar in those states, as well as in the District of Columbia." Because Maryland and Virginia state law did not prohibit discrimination on the basis of sexual orientation at that time, the Committee found it "unnecessary" to reach the question of "whether Rule 9.1 applies to employment decisions made by a member of the D.C. Bar . . . in connection with church-related or other non-legal organizations in which the lawyer is involved."¹²⁰

The clear implication of the Committee's opinion in 1991 was that the lawyer might be subject to discipline if the church or religious international organization were located in the District. The Committee sidestepped that question.

Also recall that Proposed Rule 9.1 would delete from Comment [1] the sentence that protected the attorney in 1991 for activity in jurisdictions with differing laws. See *supra* at 9. If adopted, Proposed Rule 9.1 could now "exceed those [ethical obligations] imposed on a lawyer by applicable law" in any jurisdiction.

¹¹⁹ Ethics Op. 222 (Nov. 1991), *supra* note 112.

¹²⁰ *Id.* See also, Tenn. Att'y Gen. Letter, *supra* note 20, 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)").

A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of “conduct with respect to the practice of law.” Yet the proposed rule creates legitimate concerns. Because Proposed Rule 9.1 seems poised to prohibit lawyers from providing counsel in these contexts, the rule will have a chilling effect on lawyers’ free speech and free exercise of religion when serving their congregations and religious institutions. By making D.C. attorneys hesitant to serve on their boards, Proposed Rule 9.1 would do real harm to religious and charitable institutions and hinder their good works in their communities.

3. Attorneys’ membership in religious, social, or political organizations would be subject to discipline.

Proposed Rule 9.1 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.¹²¹ Would Proposed Rule 9.1 subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

Proposed Rule 9.1 raises the too real scenario of a lawyer being disciplined for his or her religious beliefs. See *supra* at 16 (New York ethics opinion), 32 (D.C. ethics opinion). May 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 have expressed 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 runs afoul of Proposed Rule 9.1 because of the Catholic Church’s limitation of the priesthood to males, its opposition to abortion, or its teachings regarding marriage.¹²²

State attorneys general have voiced similar concerns.¹²³ Several attorneys general have warned that “serving as a member of the board of a religious organization, participating in

¹²¹ 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 .

¹²² Rotunda & Dzienkowski, *supra* note 4, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

¹²³ Tex. Att’y Gen. Op., *supra* note 60, 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

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.’”¹²⁴

Finally, note that Proposed Rule 9.1 “is far broader than Rule 3.6 of the Code of Judicial Conduct” because Rule 3.6’s Comment [4] clarifies that a judge’s membership in a religious organization does not violate the rule.¹²⁵ The District of Columbia Code of Judicial Conduct similarly exempts judges’ membership in a religious organization.¹²⁶ By contrast, Proposed Rule 9.1 contains no exception for membership in a religious organization.

B. Proposed Rule 9.1 Would Institutionalize Viewpoint Discrimination Against Many Lawyers’ Public Speech on Current Political, Social, Religious, and Cultural Issues.

1. On its face, Proposed Rule 9.1 discriminates on the basis of viewpoint.

Proposed Comment [2] to Proposed Rule 9.1 explicitly protects 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.”¹²⁷ The proposed rule would impermissibly favor speech that “promote[s] diversity and inclusion” over speech that does not.

That 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.”¹²⁸ The government cannot have laws that allow lawyers to express one viewpoint on a particular subject but penalize lawyers for

such participation for fear of discipline.”); La. Att’y Gen. Op., *supra* note 62, 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.”)

¹²⁴ Tenn. Att’y Gen. Letter, *supra* note 20, at 10.

¹²⁵ *Id.* at 9.

¹²⁶ District of Columbia Code of Judicial Conduct, Rule 3.6, cmt. [4], at 29-30 (ed. 2018) (“A judge’s membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.”), https://www.dccourts.gov/sites/default/files/divisionspdfs/Code-of-Judicial-Conduct_2018.pdf.

¹²⁷ 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 7, at 240.

¹²⁸ *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.¹²⁹

And even more to the point, 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 – Proposed Rule 9.1 clearly countenances viewpoint discrimination based on government officials’ subjective biases. As a unanimous Supreme Court held in *Matal*, viewpoint discrimination is unconstitutional.¹³⁰ Giving any government official unbridled discretion to suppress citizens’ free speech is unconstitutional viewpoint discrimination.¹³¹ 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.”¹³²

2. Proposed Rule 9.1’s definition of “harassment” is viewpoint discriminatory, as explained most recently by the Supreme Court in *Matal v. Tam*.

In Proposed Comment [1], Proposed Rule 9.1 defines “harassment” to include “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.”¹³³ Proposed Rule 9.1 is unconstitutional on its face and as applied 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.¹³⁴ For example, the Third Circuit

¹²⁹ Rotunda & Dzienkowski, *supra* note 4, 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.”).

¹³⁰ 137 S. Ct. at 1765 (Kennedy, J., concurring).

¹³¹ 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).

¹³² Tenn. Att’y Gen. Letter, *supra* note 20, 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).

¹³³ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (emphasis added).

¹³⁴ 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 v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Blair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71

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.”¹³⁵

Finally, ABA Model Rule 8.4(g) was drafted without the benefit of the Supreme Court’s recent decision in *Matal v. Tam*.¹³⁶ 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.¹³⁷ See *supra* at 24-25.

C. Who determines whether advocacy is “legitimate” or “illegitimate” under proposed ABA Model Rule 8.4(g)?

ABA Model Rule 8.4(g) cursorily states that it “does not preclude *legitimate* advice or advocacy *consistent with these rules*.” But the qualifying phrase “consistent with these rules” makes ABA Model Rule 8.4(g) utterly circular. Like the proverbial dog chasing its tail, ABA Model Rule 8.4(g) protects “legitimate advice or advocacy” only if it is “consistent with” ABA Model Rule 8.4(g).¹³⁸ That is, speech is permitted by ABA Model Rule 8.4(g) if it is permitted by ABA Model Rule 8.4(g).

The epitome of an unconstitutionally vague rule, ABA Model Rule 8.4(g) violates the Fourteenth Amendment, as well as the First Amendment. Again, who decides which speech is “legitimate” and which speech is “illegitimate”? By what standards? By whose standards?

“In fact, the proposed rule would effectively require enforcement authorities to be guided by their ‘personal predilections’ because whether a statement is ‘harmful’ or ‘derogatory or

(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).

¹³⁵ *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)).

¹³⁶ 137 U.S. 1744 (2017).

¹³⁷ *Id.* at 1754, 1765.

¹³⁸ McGinniss, *supra* note 6, at 209-211.

demeaning’ depends on the subjective reaction of the listener. Especially in today’s climate, those subjective reactions can vary widely.”¹³⁹

As Halaby and Long note in their survey of the Rule’s many problems, “the word ‘legitimate’ cries for definition.”¹⁴⁰ Indeed, “one difficulty with the ‘legitimate’ qualifier” is that “lawyers need to make the arguments in order to change the law, yet the new model rule obstructs novel legal arguments.”¹⁴¹ This is particularly true when “the subject matter is socially, culturally, and politically sensitive.”¹⁴²

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 speak or write on a topic that may cause someone who disagrees to file a disciplinary complaint to silence them.

VII. ABA Model Rule 8.4(g)’s Threat to Free Speech is Compounded by the Fact that It Adopts 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.”¹⁴³

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

¹³⁹ Tenn. Att’y Gen. Letter, *supra* at note 20, at 9 (citation and explanatory parenthetical omitted). *See id.* (“The lack of clarity in Proposed Rule 8.4(g)’s terms creates a substantial risk that determinations about whether expression is prohibited will be guided by the ‘personal predilections’ of enforcement authorities rather than the text of the rule. *Kolender v. Lawson*, 461 U.S. 352, 356 (1983) (internal quotation marks omitted).”) *See also, id.* at 10 (“[T]he [Board of Professional Responsibility] would presumably get to draw the line between legitimate and illegitimate advocacy, creating a further risk that advocacy of controversial or politically incorrect positions would be deemed harassment or discrimination that constitutes professional misconduct.”)

¹⁴⁰ Halaby & Long, *supra* note 7, at 237.

¹⁴¹ *Id.* at 238.

¹⁴² *Id.*

¹⁴³ Tenn. Att’y Gen. Letter, *supra* at note 20, at 5. *See* Halaby & Long, *supra* note 7, at 243-245.

‘objectively reasonable lawyer’ will be constructed for purposes of making this determination.¹⁴⁴

3. “[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.”¹⁴⁵

Similarly, the Disciplinary Board of the Supreme Court of Pennsylvania initially criticized ABA Model Rule 8.4(g) because:

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.¹⁴⁶

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

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.”¹⁴⁷ 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.”¹⁴⁸ 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

¹⁴⁴ 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://lalegaethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/>.

¹⁴⁵ *Id.* at 5.

¹⁴⁶ 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 seemed to make lawyers potentially subject 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 (July 18, 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>.

¹⁴⁷ The Pennsylvania Bulletin, *supra* note 147.

¹⁴⁸ *Id.*

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.¹⁴⁹

Model Rule 8.4(g) generates many 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 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.

An attorney may be disciplined regardless of whether her conduct is a violation of any other law. 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 discrimination.”¹⁵⁰ Nor is “an allegedly injured party [required] to first invoke the civil legal system” before a lawyer can be charged with discrimination or harassment.¹⁵¹

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. Professor Rotunda and Professor Dzienkowski note this risk:

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).¹⁵²

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 “[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas.”¹⁵³

¹⁴⁹ *Id.*

¹⁵⁰ Rotunda & Dzienkowski, *supra* note 4 (parenthetical in original).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

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. Current Rule 9.1 and current Comment [3] to Rule 8.4 already provide a carefully crafted balance that has worked.

Conclusion

Lawyers who live in a free society should not willingly surrender their freedom to speak their thoughts in the public square. Because Proposed Rule 9.1 would drastically chill lawyers' freedom to express their viewpoints on political, social, religious, and cultural issues, this Committee should either reject or withdraw its proposed rule amendments.

At a minimum, this Committee 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 D.C. attorneys laboratory subjects in the ill-conceived experiment that ABA Model Rule 8.4(g) represents. This is particularly true given the sensible alternatives that are readily available, such as waiting to see whether any 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 D.C. attorneys cannot be undone.

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

Respectfully submitted,

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District of Columbia Rules of Professional Conduct

Rule 9.1 (Discrimination in Employment): Proposed Revisions Showing Mark-up

[Unmarked text is the current D.C. Rule/Comment; proposed additions: **bold and underscored**; proposed deletions: strike-through, as in ~~deleted~~]

D.C. Rule 9.1 (**Nondiscrimination and Antiharassment**) ~~Discrimination in Employment~~

A lawyer shall not discriminate against any individual in conditions of employment ~~because~~ **It is professional misconduct for a lawyer, with respect to the practice of law, to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis** of the individual's race, ~~sex~~ color, religion, national origin, ~~ethnicity~~ sex, disability, age, ~~marital status~~, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status ~~physical handicap~~. **This Rule does not limit the ability of a lawyer to accept, decline or, in accordance with Rule 1.16, withdraw from a representation. This Rule does not preclude providing legitimate advice or engaging in legitimate advocacy consistent with these Rules.**

Comment

[1] **Discrimination and harassment by lawyers in violation of the Rule undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and antiharassment may guide application of the Rule.**

[2] **Conduct with respect 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 or business activities (for example, social functions sponsored by the firm or employer as well as travel for the firm or employer) in connection with the practice of law. Lawyers may 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.**

[3] **A lawyer's use of peremptory challenges is addressed by Rule 3.4(g). A lawyer does not violate Rule 9.1 by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause.**

See Rule 6.2(a), (b), and (c). A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. See Rule 1.2(b).

[14] This provision is modeled after the The D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), though in some respects is more limited in scope. There are also provisions of **and** federal law that **also** contain certain prohibitions on discrimination in employment. ~~The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.~~

[25] The investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission. ~~Such experience may involve, among other things, methods of analysis of statistical data regarding discrimination claims.~~ These agencies also have, in appropriate circumstances, the power to award remedies to the victims of discrimination, such as reinstatement or back pay, which extend beyond the remedies that are available through the disciplinary process. Remedies available through the disciplinary process include such sanctions as disbarment, suspension, censure, and admonition, but do not extend to monetary awards or other remedies that could alter the employment status to take into account the impact of prior acts of discrimination.

[36] If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Disciplinary Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Disciplinary Counsel and material allegations involved in such other proceedings. *See* §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.

[7] The prior version of Rule 9.1 included “physical handicap” among the disallowed bases for harassment and discrimination. That basis now is subsumed within the new category of “disability.”

District of Columbia Rules of Professional Conduct

Rule 8.4 (Misconduct): Proposed Revisions Showing Mark-up

[Unmarked text is the current D.C. Rule/Comment; proposed additions: **bold and underscored**; proposed deletions: strike-through, as in ~~deleted~~]

D.C. Rule 8.4 (Misconduct)

It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) Engage in conduct that seriously interferes with the administration of justice;
- (e) State or imply an ability to influence improperly a government agency or official;
- (f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) Seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter.

Comment

[1] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are

in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2] Paragraph (d)'s prohibition of conduct that "seriously interferes with the administration of justice" includes conduct proscribed by the previous Code of Professional Responsibility under DR 1-102(A)(5) as "prejudicial to the administration of justice." The cases under paragraph (d) include acts by a lawyer such as: failure to cooperate with Disciplinary Counsel; failure to respond to Disciplinary Counsel's inquiries or subpoenas; failure to abide by agreements made with Disciplinary Counsel; failure to appear in court for a scheduled hearing; failure to obey court orders; failure to turn over the assets of a conservatorship to the court or to the successor conservator; failure to keep the Bar advised of respondent's changes of address, after being warned to do so; and tendering a check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client. Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples.

[3] ~~A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct~~**See Rule 9.1 for guidance on prohibited harassment and discrimination. Conduct that violates Rule 9.1 and** seriously interferes with the administration of justice **also violates paragraph (d) of this Rule.** ~~Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.~~