



## Why D.C. Should Not Adopt ABA Model Rule 8.4(g): D.C. Bar Rules Review Committee Taking Comments until April 5, 2019

The D.C. Bar Rules of Professional Responsibility Review Committee is holding a public comment period until **April 5, 2019**, on its proposal to amend D.C. Rule 9.1 to include ABA Model Rule 8.4(g).<sup>1</sup> ABA Model Rule 8.4(g) is the deeply flawed, highly criticized rule adopted by the American Bar Association in August 2016. Its flaws are explored in Christian Legal Society's recent comment letter.<sup>2</sup>

ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers, as Professor Eugene Volokh, a nationally recognized First Amendment expert, explains in a two-minute Federalist Society video at <https://www.youtube.com/watch?v=AfpdWmlOXbA>.<sup>3</sup>

Fortunately, ABA Model Rule 8.4(g) operates only in those states in which the highest court adopts it; and to date, only the Vermont Supreme Court has done so. After close scrutiny, many states have concluded that ABA Model Rule 8.4(g) is too flawed to impose on their bar members. They instead have chosen the prudent course of waiting to see whether other states adopt ABA Model Rule 8.4(g) in order to observe its real-life consequences for attorneys in those states.

At least eleven states have rejected or abandoned efforts to impose Model Rule 8.4(g), including:

- **Formal rejection:** The ABA itself lists nine states as having rejected the rule: *Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina, and Tennessee*.<sup>4</sup> CLS adds Texas and North Dakota to its list. Specifically, the state supreme courts of *Arizona, Idaho, South Carolina, and Tennessee* formally rejected ABA Model Rule 8.4(g) after holding comment periods.<sup>5</sup>
- **Petitions to adopt withdrawn:** Petitions to adopt ABA Model Rule 8.4(g) were withdrawn in *Nevada* (supreme court) and *Louisiana* (state bar committee) after comment periods.<sup>6</sup>
- **State legislature action:** The *Montana* Legislature adopted a joint resolution urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g). The Legislature was concerned about 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," as well as its effect on state legislators' speech when speaking about legislative matters, talking to constituents, or campaigning.<sup>7</sup>

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

<sup>2</sup> Christian Legal Society's Comment Letter is at <https://www.clsnet.org/document.doc?id=1190>.

<sup>3</sup> Prof. Volokh's Federalist Society debate is at <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>. See also, Prof. Ronald Rotunda, "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," The Heritage Foundation, Oct. 6, 2016, and his Federalist Society debate at <https://www.youtube.com/watch?v=V6rDPjqBcQg>; Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law,"* 30 Geo. J. Leg. Ethics 241 (2017); Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201 (2017).

<sup>4</sup> 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* (Sept. 19, 2018), at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chart\\_adapt\\_8\\_4\\_g\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adapt_8_4_g_authcheckdam.pdf).

<sup>5</sup> [https://www.tncourts.gov/sites/default/files/order\\_denying\\_8.4g\\_petition\\_.pdf](https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf) (Tennessee);

[https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf) (Arizona);

[https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/ISC%20Letter%20-%20201RPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20201RPC%208.4(g).pdf) (Idaho);

<http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (South Carolina).

<sup>6</sup> <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>;

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

<sup>7</sup> <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

- **Comment period without announced decision:** Comment periods have been held in *New Hampshire*, *New Mexico*, *Pennsylvania*, and *Utah*, but the supreme courts' decisions have not been announced.
- **State bar activity:** The *Illinois* Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule.”<sup>8</sup> The *North Dakota* Joint Committee on Attorney Standards recommended rejection; a *Colorado* subcommittee tabled consideration; and the *Louisiana* Rules of Professional Conduct Committee, after a year studying Model Rule 8.4(g), voted not to recommend. The *Texas* Attorney General issued an opinion stating the rule was likely unconstitutional.

D.C. Proposed Rule 9.1 would impose ABA Model Rule 8.4(g) on D.C. Bar members. It would make it professional misconduct for a lawyer to “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.”<sup>9</sup> The many problems with the rule include:

**1. Proposed D.C. Rule 9.1 would impose ABA Model Rule 8.4(g) on D.C. lawyers and regulate nearly everything a lawyer says or does, including:**

- speaking at public events or presenting CLE courses;
- participating in panel discussions on controversial political and social legal issues;
- publishing law review articles, blogposts, tweets, and op-eds;
- giving media interviews;
- teaching law school classes as faculty, adjunct faculty member, or guest lecturer;
- sitting on the boards of religious institutions, charities, or fraternities or sororities;
- belonging to organizations with membership or leadership requirements based on shared belief;
- volunteering at legal aid clinics;
- performing work for political or social action organizations, political parties, or campaigns;
- lobbying or testifying before legislative committees; or
- performing pro bono work for one’s congregation, religious college, or religious K-12 school.

**2. Proposed Rule 8.4(g) is unconstitutional under the analyses in two recent United States Supreme Court decisions.** In June 2018, the United States 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.<sup>10</sup> In June 2017, a unanimous United States Supreme Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is viewpoint discriminatory and, therefore, unconstitutional under the First Amendment.<sup>11</sup>

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

**4. Bar disciplinary counsel in some states question whether they should be the tribunal of first resort for complicated claims under ABA Model Rule 8.4(g).** They question whether their offices are adequately staffed and have the resources necessary to enforce such an overly broad rule.

**Take action before April 5, 2019:** Individuals may file comments with the D.C. Bar Rules Review Committee by email [ethics@dcbar.org](mailto:ethics@dcbar.org). **The written comment deadline is April 5, 2019.** Short email comments are just as useful as longer comment letters. For reasons why Model Rule 8.4(g) should be rejected, comments can draw upon material in the recent comment letter<sup>12</sup> from the Christian Legal Society and the law review articles listed above in note 3.

<sup>8</sup> <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

<sup>9</sup> [http://www.courts.maine.gov/rules\\_adminorders/rules/proposed/2018-5-22/mr\\_prof\\_conduct\\_proposed\\_amends\\_2018-5-22.pdf](http://www.courts.maine.gov/rules_adminorders/rules/proposed/2018-5-22/mr_prof_conduct_proposed_amends_2018-5-22.pdf).

<sup>10</sup> *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

<sup>11</sup> *Matal v. Tam*, 137 S. Ct. 1744 (2017). *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).

<sup>12</sup> Christian Legal Society’s comment letter is at <https://www.clsnet.org/document.doc?id=1190>.