



*Seeking Justice with the Love of God*

July 17, 2018

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The Disciplinary Board of the  
Supreme Court of Pennsylvania  
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**Re: The Unconstitutionality of the Proposed Amendment to the Pennsylvania Rules of Professional Conduct Regarding Misconduct (Proposed Rule 8.4(g))**

Dear Board Members:

The Christian Legal Society filed a comment letter with the Board on February 3, 2017, regarding proposed changes to the Pennsylvania Rules of Professional Conduct that would have adopted a modified version of ABA Model Rule 8.4(g).<sup>1</sup> After review, the Board astutely “determined not to move forward” with that proposal.<sup>2</sup> But, unfortunately, the Board now has before it another version of ABA Model Rule 8.4(g) that would impose on Pennsylvania attorneys a speech code just as unconstitutional and unwise as the deeply flawed and highly criticized ABA Model Rule 8.4(g).

**Summary:** This letter explains why the current proposal is unconstitutional in light of the United States Supreme Court’s decision last month in *National Institute of Family and Life Advocates v. Becerra*,<sup>3</sup> which 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. The proposed language is also unconstitutional under the 2017 United States Supreme Court decision in *Matal v. Tam*.<sup>4</sup> There a unanimous Court held that a section of a preeminent federal statute was facially unconstitutional because it allowed government officials to restrict “derogatory” speech.<sup>5</sup>

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<sup>1</sup> Letter to Julia Frankston-Morris from David Nammo, Executive Director of Christian Legal Society, Feb. 3, 2017, <https://www.clsnet.org/document.doc?id=1003> (last visited July 14, 2018).

<sup>2</sup> The Pennsylvania Bulletin, *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Regarding Misconduct*, 45 Pa. B. 2936 (May 19, 2018) (“Following extensive review and discussion of the numerous comments and suggestions received in response to the published proposal, the Board determined not to move forward with the proposed amendments, and renewed its study of the issue.”), <https://www.pabulletin.com/secure/data/vol48/48-20/773.html> (last visited July 14, 2018).

<sup>3</sup> *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2018 WL 3116336 (U.S. June 26, 2018) (“*NIFLA*”).

<sup>4</sup> *Matal v. Tam*, 137 S. Ct. 1744 (2017).

<sup>5</sup> *Id.* at 1747; *see also, id.* at 1766 (unconstitutional to suppress speech that “demeans or offends”) (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).

In addition to being unconstitutional, the current proposal is unwise. Pennsylvania attorneys should not be made the subjects of the novel experiment that Proposed Rule 8.4(g) represents. This Board has the prudent option of waiting to see what other states decide to do. Several states already have rejected, or abandoned efforts to adopt, ABA Model Rule 8.4(g). Over the past 18 months, official entities in Nevada, Tennessee, Illinois, Montana, North Dakota, Texas, South Carolina, and Louisiana have weighed ABA Model Rule 8.4(g) and found it seriously wanting. *See infra* pp. 13-18. Only the Vermont Supreme Court has adopted it, and no empirical evidence yet exists as to its practical ramifications for Vermont attorneys. This Board should wait to see whether other states adopt ABA Model Rule 8.4(g), and then observe the rule's practical consequences for attorneys in those states.

A number of scholars have correctly 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 concerns about Model Rule 8.4(g) and its impact on attorneys' speech in a two-minute video released by the Federalist Society.<sup>6</sup>

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.<sup>7</sup> 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."<sup>8</sup> Professor Josh Blackman has written a respected scholarly response to the primary arguments made by the rule's proponents.<sup>9</sup>

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;

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<sup>6</sup> Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA> (last visited May 1, 2018). Professor Volokh expanded on the many problems of ABA Model Rule 8.4(g) in a debate with a proponent of Model Rule 8.4(g) at the Federalist Society National Student Symposium in March 2017. *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s> (last visited May 1, 2018).

<sup>7</sup> 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> (last visited May 1, 2018). Professor Rotunda and Texas Attorney General Ken Paxton debated two leading proponents of Model Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention in a panel on *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> (last visited May 1, 2018).

<sup>8</sup> 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."

<sup>9</sup> 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 *Georgetown Journal of Legal Ethics* 241 (2017).

as well as due process and First Amendment free expression infirmities.”<sup>10</sup> 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.”<sup>11</sup> In their view, “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.”<sup>12</sup>

While there are many areas of concern with the proposed rule, 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. 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 such issues should be rejected because it constitutes a serious threat to freedom of speech, free exercise of religion, and freedom of political belief.

Quite simply, Proposed Rule 8.4(g) would have been denounced by the lawyers who gathered in Philadelphia from 1775 to 1787 to write the Declaration of Independence and the Constitution. Those lawyers valued their freedom to speak disfavored political views above their “lives, fortunes, and sacred honor.” A speech code, like Proposed Rule 8.4(g), breaks faith with those bold lawyers. We respectfully urge this Board “to preserve and teach the necessity of freedom of speech for the generations to come”<sup>13</sup> and reject Proposed Rule 8.4(g).

**1. Proposed Rule 8.4(g) is facially unconstitutional under the United States Supreme Court’s Recent Ruling in *National Institute of Family and Life Advocates v. Becerra*.**

The ink has not yet dried on the United States Supreme Court’s ruling on June 26, 2018, in *National Institute of Family and Life Advocates v. Becerra* (“*NIFLA*”).<sup>14</sup> For that reason alone, the Board should pause to consider a new, directly applicable Supreme Court decision that was handed down *after* the Board announced Proposed Rule 8.4(g). The *NIFLA* decision makes clear that both Proposed Rule 8.4(g) and ABA Model Rule 8.4(g) are facially unconstitutional.

**a. Proposed Rule 8.4(g) threatens to punish broad swaths of speech:** Proposed Rule 8.4(g) expressly regulates lawyers’ speech. It is rare for a regulation to so forthrightly proclaim that it is regulating speech, and even rarer for such a regulation or law to survive the strict scrutiny that is triggered by explicit state regulation of “speech.” Proposed Rule 8.4(g) specifically targets speech, expressly punishing lawyers for what they say. Its broad scope will expose lawyers to possible discipline for telling lawyer jokes (“attempted humor based upon

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<sup>10</sup> 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) (hereinafter “Halaby & Long”).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 204.

<sup>13</sup> *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).

<sup>14</sup> 138 S. Ct. 2361, 2018 WL 3116336 (U.S. June 26, 2018).

stereotypes”) and for political speech (manifesting bias based on “political affiliation”). *See infra* at pp. 10-11.

As the Supreme Court reaffirmed in *NIFLA*, a government regulation that targets speech must survive strict scrutiny, which closely examines whether the regulation is narrowly tailored to achieve a compelling government interest. Because it would censor or chill huge swaths of protected speech, Proposed Rule 8.4(g) fails strict scrutiny.

Proposed Rule 8.4(g) punishes “words” that “manifest bias or prejudice . . . including *but not limited to*” thirteen characteristics. In other words, the list of thirteen characteristics is only the beginning, not the end, of the list of lawyers’ speech that can trigger disciplinary action. Indeed, the Board itself has explained that “[p]roposed comments (3), (4), and (5) provide guidance to attorneys on the types of behavior covered by proposed paragraph 8.4(g), while explicitly stating that *the examples provided are not limited to that list of behaviors.*”<sup>15</sup>

Comment (3) exacerbates the proposed rule’s unconstitutional overbreadth by giving a list of “[e]xamples of manifestations of bias or prejudice” that is likewise unlimited. Again, the examples “include but are not limited to” the examples listed. That is, the list is the beginning, not the end, of the proposed rule’s overreach. And, as explained below, even if the list actually did enumerate all the speech covered by the proposed rule, it would still be unconstitutionally overbroad and viewpoint discriminatory under the United States Supreme Court’s 2017 decision in *Matal v. Tam*.

Nearly every example listed in Comment (3) is an example of speech that the First Amendment protects *because it protects speech that offends*: “epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; . . . suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.”

Comment (4)’s definition of “harassment” is also unconstitutionally overbroad when it restricts speech “that denigrates or shows hostility or aversion toward a person on bases *such as*” and then lists twelve characteristics. Again, the phrase “such as” shows that this list is the beginning, not the end, of the characteristics that might trigger disciplinary action.

Simply reading Comment (3) and Comment (4) drives home the impossibility of enforcing the proposed rule in any constitutional manner. Will the Disciplinary Board publish a list of taboo words? Will there be a comprehensive list of banned “epithets,” “slurs,” and “demeaning nicknames”? Will the Board define the difference between impermissible “negative stereotyping” and permissible “positive stereotyping”? (Such a definition will itself be *per se* viewpoint discriminatory and, therefore, unconstitutional.) May a lawyer not refer in briefs,

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<sup>15</sup> *The Pennsylvania Bulletin*, *supra*, note 2 (emphasis added).

legislative testimony, or law review articles to studies that include statistics regarding the “race, ethnicity, or nationality” of victims of police brutality (which is a crime) or victims of hate crimes (which is by definition based on race, ethnicity, or nationality)? Is the Department of Justice lawyer who publishes such statistics as part of her job engaged in professional misconduct?

Proposed Rule 8.4(g) is an enforcement nightmare. In a landmark case, the United States Supreme Court ruled that “a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights,”<sup>16</sup> 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.<sup>17</sup>

**b. The Supreme Court’s analysis in *NIFLA* makes plain that Proposed Rule 8.4(g) is a content-based speech restriction that violates the First Amendment.** As the Supreme Court explained just a few weeks ago, “[c]ontent-based regulations ‘target speech based on its communicative content.’”<sup>18</sup> “[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.’”<sup>19</sup> As the Supreme Court explained, “[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.’”<sup>20</sup>

As we have seen, Proposed Rule 8.4(g) is specifically targeted at speech because of its content. The proposed rule and its comments repeatedly prohibit speech based on its content. Therefore, it is “presumptively unconstitutional” unless it is narrowly tailored to serve a compelling state interest. But Proposed Rule 8.4(g) is light-years from being “narrowly tailored.” First, the three lists of expressly-regulated speech (as found in the main paragraph, as well as Comment (3) and Comment (4)) are very broad in scope and prohibit vast amounts of protected speech. Second, these lists by their terms are not comprehensive. Instead, they explicitly speak in terms of “including, but not limited to” the twelve listed categories. No speech is safe from the

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<sup>16</sup> *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 439 (1963).

<sup>17</sup> *Id.* at 438.

<sup>18</sup> *NIFLA*, 138 S. Ct. at 2371, quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

<sup>19</sup> *Ibid.*

<sup>20</sup> *NIFLA*, 138 S. Ct. at 2371, quoting *Reed*, 135 S. Ct. at 2226, quoting *Police Dept. of Chicago v. Mosley*, 208 U.S. 92, 92 (1972).

reach of Proposed Rule 8.4(g). Therefore, it is an unconstitutional content-based speech restriction.

**c. In *NIFLA*, the Supreme Court rejected the notion that professional speech is less protected by the First Amendment than other speech.** Three circuits, including the Third Circuit, recently ruled that “‘professional speech’ [w]as a separate category of speech that is subject to different rules” and less protection under the First Amendment.<sup>21</sup> In *NIFLA*, the Supreme Court resoundingly rejected the idea that “professional speech” was an exception “from the rule that content-based regulations of speech are subject to strict scrutiny,” explicitly abrogating a Third Circuit decision that had so held.<sup>22</sup>

The Supreme Court reiterated the lesson of numerous earlier cases that “[s]peech is not unprotected merely because it is uttered by ‘professionals.’”<sup>23</sup> 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.”<sup>24</sup> One circumstance in which it “applied more deferential review” were “laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’”<sup>25</sup> As the Court continued to explain, professional speech is not commercial speech except in the “advertising” context, in which the disclosure of “factual, noncontroversial information” may be required. Obviously, Proposed Rule 8.4(g) is not primarily concerned with advertising. The other circumstance is when States “regulate professional conduct, even though that conduct *incidentally* involves speech.”<sup>26</sup> But again, Proposed Rule 8.4(g) targets speech and is not aimed solely at conduct that incidentally involves speech. As the Court observed in *NIFLA*, “neither line of precedents is implicated here.”<sup>27</sup>

In *NIFLA*, the Court was clear that a State’s regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that it “has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers.”<sup>28</sup>

A regulation that targets speech and prohibits broad swaths of protected speech, as Proposed Rule 8.4(g) does, cannot survive strict scrutiny. A regulation that discriminates on the basis of viewpoint, as Proposed Rule 8.4(g) does, cannot survive strict scrutiny, as the Court held in 2017 in *Matal v. Tam*.

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<sup>21</sup> *NIFLA*, 138 S. Ct. at 2371.

<sup>22</sup> *Id.*, abrogating *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3<sup>rd</sup> Cir. 2014).

<sup>23</sup> *NIFLA*, 138 S. Ct. at 2371-2372.

<sup>24</sup> *Id.* at 2372.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 2373 (emphasis added).

<sup>27</sup> *Id.* at 2372.

<sup>28</sup> *Id.* at 2374.

**2. Proposed Rule 8.4(g) is facially unconstitutional under the United States Supreme Court’s Unanimous Ruling in *Matal v. Tam*.**

ABA Model Rule 8.4(g) was drafted before the Court’s decision in *Matal*, and for that reason alone, is a poor paradigm upon which to pattern any rule that aspires to constitutionality. In *Matal v. Tam*,<sup>29</sup> a unanimous Supreme Court made clear that a government prohibition on derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.<sup>30</sup>

All Justices agreed that provisions of a prominent federal law that denied trademarks for terms that “may disparage or bring into contempt or disrepute”<sup>31</sup> living or dead persons, even on racial or ethnic grounds, 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.”<sup>32</sup> 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.’”<sup>33</sup>

In his concurrence, which was joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, Justice Kennedy explained that the provision was unconstitutional as viewpoint discrimination 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” – “the essence of viewpoint discrimination.”<sup>34</sup> And it was viewpoint discriminatory even if it “applies in equal measure to any trademark that demeans or offends.”<sup>35</sup>

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.”<sup>36</sup> 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 entrust that power to the government’s benevolence. Instead, our

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<sup>29</sup> 137 S. Ct. 1744 (2017).

<sup>30</sup> *Id.* at 1754, 1765; *see also, id.* at 1766 (Kennedy, J., concurring).

<sup>31</sup> *Id.* at 1751 (quotation marks and ellipses omitted).

<sup>32</sup> *Id.* at 1754, 1765.

<sup>33</sup> *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

<sup>34</sup> *Id.* at 1766 (Kennedy, J., concurring).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1767.

reliance must be on the substantial safeguards of free and open discussion in a democratic society.<sup>37</sup>

Under the Supreme Court's analysis in *Matal*, Proposed Rule 8.4(g) is unconstitutionally viewpoint discriminatory on three separate grounds. **First**, nearly every example listed in Comment (3) is an example of speech that requires the Board to engage in viewpoint discrimination in order to determine whether the speech is impermissible as "epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; . . . suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics." Because enforcement of Proposed Rule 8.4(g) gives government officials unbridled discretion to determine which speech is permissible and which is impermissible, the Proposed Rule clearly countenances viewpoint discrimination based on government officials' subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens' free speech is itself unconstitutional viewpoint discrimination.<sup>38</sup>

**Second**, Comment (4)'s definition of "harassment" is also unconstitutionally viewpoint discriminatory because it prohibits speech "that denigrates or shows hostility or aversion toward a person." Similarly, in its Comment [3], ABA Model Rule 8.4(g) defines "harassment" to include "derogatory or demeaning verbal . . . conduct." Both definitions of "harassment" depart 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."<sup>39</sup>

Of course, the consequences of disciplinary action against an attorney are too great to leave the definition of "harass" so open-ended and subjective. "Harassment" should not reside "in the eye of the beholder," but instead should be determined by an objective standard, as provided by the United States Supreme Court.

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.<sup>40</sup> For example, the Third Circuit

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<sup>37</sup> *Id.* at 1769 (Kennedy, J., concurring).

<sup>38</sup> See, e.g., *Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4<sup>th</sup> Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7<sup>th</sup> Cir. 2001).

<sup>39</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (emphasis added).

<sup>40</sup> 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 (6<sup>th</sup> 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 (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).



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.”<sup>41</sup>

**Third**, Proposed Rule 8.4(g) and ABA Model Rule 8.4(g) are viewpoint discriminatory because they state that they “do[] not preclude *legitimate* advice or advocacy consistent with these Rules.” (Emphasis added.) 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 demeaning’ depends on the subjective reaction of the listener. Especially in today’s climate, those subjective reactions can vary widely.”<sup>42</sup>

As Halaby and Long note in their survey of the many problems created by ABA Model Rule 8.4(g), “the word ‘legitimate’ cries for definition.”<sup>43</sup> 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.”<sup>44</sup> This is particularly true when “the subject matter is socially, culturally, and politically sensitive.”<sup>45</sup>

Quite simply, 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.

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<sup>41</sup> *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).

<sup>42</sup> Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 9 (hereinafter “Tenn. Att’y Gen. Letter”), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf> (last visited May 1, 2018). 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.”)

<sup>43</sup> Halaby & Long, *supra*, note 10, at 237.

<sup>44</sup> *Id.* at 238.

<sup>45</sup> *Id.*

**3. If Proposed Rule 8.4(g) is adopted, Pennsylvania lawyers will be subject to discipline for telling lawyer jokes.**

Proposed Rule 8.4(g) is so broad that, if it were adopted, it literally would make lawyer jokes punishable as professional misconduct. The proposed rule would punish a lawyer's "words" that "knowingly manifest . . . bias or prejudice . . . including *but not limited to* bias, prejudice, or harassment based upon [thirteen listed characteristics]." But note this critical fact: the list of thirteen characteristics is not a limited or exclusive list.

Proposed Comment (3) offers "[e]xamples of manifestations of bias or prejudice," including "attempted humor based upon stereotypes." Lawyer jokes, of course, are the epitome of "attempted humor based upon stereotypes." Thus, on its face, Proposed Rule 8.4(g) would punish lawyers for telling lawyer jokes.

Indeed, any "attempted humor based upon stereotypes" of any kind would be punishable. No more jokes about mothers-in-law, doctors, accountants, or government bureaucrats would be allowed. And jokes about President Trump, Senator Bernie Sanders, or any other politicians would be taboo as either "attempted humor" based on "a stereotype" or "political affiliation."<sup>46</sup>

**4. If Proposed Rule 8.4(g) is adopted, Pennsylvania lawyers will be subject to discipline for political speech that is at the core of the First Amendment's protections.**

Even if the "impermissible speech" were actually confined to the list of thirteen characteristics, Proposed Rule 8.4(g) would still be overbroad because it punishes political speech, which is at the core of the First Amendment's protections. The proposed rule will punish a lawyer for speech that "knowingly manifest[s] bias or prejudice" based on "political affiliation," which means that any lawyer's political speech is now subject to disciplinary action if it is arguably "in the practice of law." Lawyers who serve in the legislature, work on legislative staffs, testify at legislative hearings, lobby for or against particular legislation or regulations, advise political campaigns, or serve on administrative boards will now have to carefully choose their words to avoid "manifest[ing] bias or prejudice" based on "political affiliations" or "stereotypes." As the Supreme Court noted in an early case upholding lawyers' First Amendment rights against a state law regulating attorney conduct: "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."<sup>47</sup>

Proposed Rule 8.4(g) falls into the trap of trying to regulate "words" that "manifest bias or prejudice" based on "political affiliation" because "[t]he Board modeled its proposed rule

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<sup>46</sup> Cf. *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring) ("The logic of the Government's rule is that a law could be viewpoint neutral even if it provided that public officials could be praised but not condemned.")

<sup>47</sup> *NAACP v. Button*, 371 U.S. at 433; *id.* at 435 ("It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes.").

language on the Pennsylvania Code of Judicial Conduct” because it wanted “a lawyer’s ethical obligations under the RPC” to “correspond to the conduct prohibited in the Code of Judicial Conduct.” But this premise is a mistake of the first magnitude. Lawyers and judges serve two very different functions in our legal system. A judge’s foremost duty is to be impartial in administering justice. A lawyer’s foremost duty is *not to be impartial* but to zealously represent the interests of her client. For that reason, a regulation suitable for judges (which are nonetheless subject to strict scrutiny under the First Amendment) does not easily translate into a regulation suitable for lawyers.

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

When the ABA adopted Model Rule 8.4(g) in 2016, it claimed that “as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.”<sup>48</sup> But this claim has been shown to be factually incorrect. The reality is that ABA Model Rule 8.4(g) has not been adopted by any state supreme court, except Vermont, and that was only a year ago.

For that reason, no empirical evidence supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers. 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.<sup>49</sup> But each of these black-letter rules was narrower than ABA Model Rule 8.4(g).

For example, 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.”<sup>50</sup> He then highlights primary differences:

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<sup>48</sup> 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.scbar.org/media/filer\\_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod\\_materials\\_january\\_2017.pdf](https://www.scbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf), at 56-57.

<sup>49</sup> Letter from James J.S. Holmes, Chair, ABA Commission on Sexual Orientation and Gender Identity, et al., to Paula Frederick, Chair, ABA Standing Committee on Ethics & Professional Responsibility (May 7, 2014), in ABA Standing Committee on Ethics and Professional Responsibility, *Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative* (July 16, 2105), App. A, at 10-36, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/language\\_choice\\_narrative\\_with\\_appendices\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf) (last visited May 1, 2018).

<sup>50</sup> Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 195, 208 (2017) (footnotes omitted). Professor Gillers notes that his wife

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.<sup>51</sup>

Basic differences exist between state black-letter rules and ABA Model Rule 8.4(g):

- 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.”
- Almost no state black-letter rule enumerates all eleven of the ABA Model Rule 8.4(g)’s protected characteristics.
- No black-letter rule utilizes ABA Model Rule 8.4(g)’s “circular non-protection” for “legitimate advocacy . . . consistent with these rules.”

Thirteen states have adopted a comment, rather than a black-letter rule, dealing with “bias” issues. Fourteen states have adopted neither a black-letter rule nor a comment addressing “bias” issues.

Finally, it should be noted that if Proposed Rule 8.4(g) is adopted, Pennsylvania will have a rule that is broader than any other state. For that reason alone, the Board should not adopt the proposed rule.

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“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.

<sup>51</sup> *Id.*

**6. Official Entities in Illinois, Montana, Texas, South Carolina, North Dakota, and Tennessee Have Rejected ABA Model Rule 8.4(g), and Nevada and Louisiana 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 several official entities in other states.

**a. State Supreme Courts:** The Supreme Courts of **Tennessee** and **South Carolina** have officially rejected adoption of ABA Model Rule 8.4(g). On April 23, 2018, the Supreme Court of **Tennessee** denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).<sup>52</sup> 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.”<sup>53</sup>

In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).<sup>54</sup> The Court acted after the state bar’s House of Delegates, as well as the state attorney general, recommended against its adoption.<sup>55</sup>

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).<sup>56</sup> 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

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<sup>52</sup> 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](https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf) (last visited May 2, 2018).

<sup>53</sup> Tenn. Att’y Gen. Letter, *supra*, note 42, at 1.

<sup>54</sup> 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”) (last visited May 2, 2018).

<sup>55</sup> 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> (last visited May 2, 2018).

<sup>56</sup> 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> (last visited May 2, 2018).

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.”<sup>57</sup>

On March 20, 2018, the ABA published a summary of the states’ consideration of ABA Model Rule 8.4(g) to date. By the ABA’s own count, five states have declined to adopt Model Rule 8.4(g): **Illinois, Minnesota, Montana, Nevada, and South Carolina**. With **Tennessee** subsequently declining to adopt 8.4(g), the ABA’s own count would then stand at six states having declined to adopt 8.4(g). The ABA lists **Vermont** as the only state to have adopted 8.4(g).<sup>58</sup>

**b. State Attorney General Opinions:** 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).<sup>59</sup> 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.”<sup>60</sup>

The opinion began by noting that the ABA Model Rule 8.4(g) “has been widely and justifiably criticized as creating a ‘speech code for lawyers’ that would constitute an ‘unprecedented violation of the First Amendment’ and encourage, rather than prevent, discrimination by suppressing particular viewpoints on controversial issues.”<sup>61</sup> Noting the rule’s application to “‘verbal . . . conduct’ – better known as speech,”<sup>62</sup> the opinion concluded that “any speech or conduct that could be considered ‘harmful’ or ‘derogatory or demeaning’ would constitute professional misconduct within the meaning of the proposed rule.”<sup>63</sup>

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.”<sup>64</sup> The

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<sup>57</sup> 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> (last visited May 2, 2018).

<sup>58</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* (Mar. 20, 2018), [https://www.dropbox.com/s/6seu8x1i0m41116/Model%20Rules%208\\_4%20Presentation\\_Final.wmv?dl=0](https://www.dropbox.com/s/6seu8x1i0m41116/Model%20Rules%208_4%20Presentation_Final.wmv?dl=0).

<sup>59</sup> *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> (last visited May 2, 2018).

<sup>60</sup> Tenn. Att’y Gen. Letter, *supra*, note 42, at 1.

<sup>61</sup> *Id.* at 1-2.

<sup>62</sup> *Id.* at 3.

<sup>63</sup> *Id.* at 4.

<sup>64</sup> *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,

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.”<sup>65</sup>

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.”<sup>66</sup> 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.”<sup>67</sup>

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.”<sup>68</sup>

On May 21, 2018, the Arizona Attorney General filed a comment letter urging the Arizona Supreme Court to heed the opposition in 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.<sup>69</sup>

**c. State Legislature:** 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).<sup>70</sup> The impact of Model Rule 8.4(g) on “the speech of legislative

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2016) at 3, <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf> (last visited May 2, 2018).

<sup>65</sup> *Id.*

<sup>66</sup> *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> (last visited May 2, 2018).

<sup>67</sup> *Id.* at 6.

<sup>68</sup> 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> (last visited May 2, 2018).

<sup>69</sup> 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>.

<sup>70</sup> *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, 65<sup>th</sup> Legislature (Mont. Apr. 25, 2017), <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf> (last visited May 2, 2018).

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.<sup>71</sup>

**d. State Bar Associations:** On December 10, 2016, the **Illinois** State Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule in Illinois.”<sup>72</sup> On September 15, 2017, the **North Dakota** Joint Committee on Attorney Standards voted to recommend rejection of ABA Model Rule 8.4(g). 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.”<sup>73</sup>

These actions in other states all vindicate the position taken on December 2, 2016, by this Board when it explained that ABA Model Rule 8.4(g) was too broad:

It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment. A lawyer who did not know that a comment was offensive will be disciplined if the lawyer should have known that it was.<sup>74</sup>

## **7. The Vermont Supreme Court has Interpreted ABA Model Rule 8.4(g) as Limiting a Lawyer’s Ability to Accept, Decline, or Withdraw from a Representation in Accordance with Rule 1.16.**

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 its language, repeated in Proposed Rule 8.4(g), that it “does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.”

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<sup>71</sup> *Id.* at 3. The Tennessee Attorney General likewise 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 42, at 8 n.8.

<sup>72</sup> 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> (last visited May 2, 2018).

<sup>73</sup> 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).

<sup>74</sup> The Pennsylvania Bulletin, *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct*, 46 Pa. B. 7519 (Dec. 3, 2016), <http://www.pabulletin.com/secure/data/vol46/46-49/2062.html>.



But 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.”<sup>75</sup> Rule 1.16 does not address *accepting* clients. The Tennessee Attorney General similarly suggests 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).”<sup>76</sup>

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.” It 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).”<sup>77</sup>

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.*”<sup>78</sup> 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).<sup>79</sup>

In *Stropnick v. Nathanson*,<sup>80</sup> 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.<sup>81</sup> 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.

Proposed Rule 8.4(g) has several additional problems that this letter will not explore. For example, Proposed Rule 8.4(g) applies broadly to all conduct that is “the practice of law.” But, as

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<sup>75</sup> Rotunda & Dzienkowski, *supra*, note 8, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise” (emphasis supplied by the authors).

<sup>76</sup> Tenn. Att’y Gen. Letter, *supra*, note 42, at 11.

<sup>77</sup> 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/PROMULGATEDVPr8.4\(g\).pdf](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVPr8.4(g).pdf).

<sup>78</sup> NY Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).

<sup>79</sup> *Id.* New York’s Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is significantly narrower.

<sup>80</sup> 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).

<sup>81</sup> Rotunda & Dzienkowski, *supra*, note 8, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

the Board's memorandum admits, "[t]he Pennsylvania RPC and the Pennsylvania Rules of Disciplinary Enforcement do not define what constitutes the practice of law."<sup>82</sup> Another example is that Proposed Rule 8.4(g) does not apply to employment discrimination claims, but the actual language on this point<sup>83</sup> is incomprehensible, and, therefore, unconstitutionally vague.

### Conclusion

Lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts without fear of losing their license to practice law. Because it would drastically curtail lawyers' freedom to express their viewpoints on political, social, religious, and cultural issues, this Board should again "determine[] not to move forward with the proposed amendments, and renew[] its study of the issue."<sup>84</sup> This is particularly true given the United States Supreme Court's decision three weeks ago in *NIFLA v. Becerra*, and last year in *Matal v. Tam*.

For the reasons discussed, there is no reason to make Pennsylvania attorneys laboratory subjects in the ill-conceived experiment that Proposed Rule 8.4(g) represents. This is particularly true when sensible alternatives are readily available, such as waiting to see whether any other states join Vermont in adopting Model Rule 8.4(g).

A decision to wait can always be revisited after other states have served as the testing ground for Model Rule 8.4(g). A judicious pause will allow the Board to examine *NIFLA* and *Matal*. A pause will also allow the Board to see whether the widespread prediction that Model Rule 8.4(g) will operate as a speech code for attorneys is borne out in other states before imposing it on Pennsylvania lawyers.

Christian Legal Society thanks the Board for considering these comments.

Respectfully submitted,

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<sup>82</sup> *The Pennsylvania Bulletin*, *supra*, note 2.

<sup>83</sup> The language is "(except employment discrimination unless resulting in a final agency or judicial determination)."

<sup>84</sup> *The Pennsylvania Bulletin*, *supra*, note 2.