ADM2017-02244

320 McCallie Avenue
Chattanooga, Tennessee 37402

February 9, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

IN RE: PETITION FOR THE ADOPTION OF A NEW TENN. SUP. CT. R. 8, RPC 8.4(g)

No. ADM2017-02244, In the Supreme Court of Tennessee

To the Honorable Justices of the Supreme Court:

I write to express my opposition to the referenced petition, jointly filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility on November 15, 2017. In doing so, I hereby adopt the substantive reasoning set forth in the letter dated January 31, 2018 from Mr. David Nammo of the Christian Legal Society. However, with the Court's indulgence, I will add some personal thoughts to Mr. Nammo's comments.

In my view, there is no demonstrated need for this change. To my knowledge, there have been no incidents of "harassment" of such an egregious nature within the Tennessee bar that would require disciplinary action, at least none that could not be adequately addressed by the existing Rule 8(g).

The Petition claims that the proposed rule has taken into account the objections raised, primarily on First Amendment grounds, to the ABA rule. Yet, it adopts the ABA's language, and claims to avoid the ABA version's draconian effect on free speech by means of the comments to the rule. This approach ignores Paragraph 23 of the Preamble to the Tennessee Rules of Professional Conduct which provides that while "[c]omments are intended as guides to interpretation, [] the text of each Rule is authoritative."

The proposed rule protects characteristics that as a matter of public policy have not been recognized by the Tennessee General Assembly, or, indeed, this Court. Ironically, every

species of what is deemed to be diversity seems to be protected by the rule, ***except*** diversity of thought.

Most alarmingly, the concept of "conduct related to the practice of law" is impermissibly overbroad. As a former officer of the TBA, I might find myself in a hospitality room at the association's annual meeting, thereby interacting with lawyers and engaging what would be deemed a social event in connection with the practice of law. In the course of that time, it is possible that I might express some of the thoughts set forth below which are, I believe, still more or less in the mainstream in Tennessee.

That marriage is only appropriate for male/female relationships (essentially the same stance Barak Obama took in 2008). Is that sexual orientation harassment?

That the First Amendment should protect the rights of those with deeply held religious beliefs not to bake a cake celebrating a gay marriage. Sexual orientation? Marital status?

That transgenderism is a mental disorder (gender dysphoria is listed in the DSM-5). Gender identity?

That I prefer not to have a genetic male who identifies himself as a woman in the same public restroom with my daughters. Sexual orientation? Gender identity?

Or I could simply voice approval of an article that appeared in the *Philadelphia Inquirer* on August 9, 2017, in which two law professors argue that many of the ills of today's society are curable by returning to the "bourgeois culture" of the mid-20th century.

> That culture laid out the script we all were supposed to follow: Get married before you have children and strive to stay married for their sake. Get the education you need for gainful employment, work hard, and avoid idleness. Go the extra mile for your employer or client. Be a patriot, ready to serve the country. Be neighborly, civic-minded, and charitable. Avoid coarse language in public. Be respectful of authority. Eschew substance abuse and crime.[1]

In advocating these concepts around other lawyers, am I guilty of harassment on the basis of socioeconomic status? Sex? Race? Marital status? Religion? Illustrating the danger of publically approving what in many circles are (hopefully) still considered virtues, Professor Wax's law school's chapter of the National Lawyers Guild "condemned" the statement of her views, claiming: "Professor Wax's statements amount to an explicit and implicit endorsement of white supremacy. Silence in the face of such dangerous ideas is unacceptable–particularly when they come from someone with Professor Wax's academic credentials." Eighteen law professors

[1]Amy Wax and Larry Alexander, "Paying the price for breakdown of the country's bourgeois culture," *Philadelphia Inquirer*, August 9, 2017.

published an article that stated they were all for "academic freedom," but nonetheless condemned the article that extolled these simple values as "racist and classist."[2]

The danger of a lawyer with political beliefs similar to those of the National Lawyers Guild or the eighteen professors overhearing statements of this nature and concluding they were "harassed" by the expression of these views, which, even at this late date, are simply not out of the ordinary among a great many of the members of the bar of this Court, is too great. No Tennessee lawyer should be afraid to articulate his views on political, cultural or religious matters when among other lawyers.

And once a Tennessee lawyer can be disciplined or even lose his or her law license over what amounts to diversity of thought, the danger of this rule being weaponized by a zealous "activist" of a different political stripe cannot be discounted. The courts have long recognized that charges of disciplinary rule violations can improperly be used as a litigation tactic. See ***Manning v. Waring, Cox, James, Sklar & Allen***, 849 F.2d 222, 224 (6th Cir. 1988).

The proposed rule "leaves," as stated in the petition, a "sphere of private thought" for Tennessee lawyers. That facially inoffensive statement is a chilling and outrageous corruption of fundamental precept of liberty that "[t]he free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Article I, Section 19, Tennessee Constitution. This Court is the ultimate arbiter of the wide range of freedom of speech Article I, Section 19 confers, and on that basis, if no other, should firmly reject the proposed amendment.

I am authorized to state that former Chief Justice William M. Barker joins in this comment.

Respectfully,

Sam D. Elliott
TBA President, 2010-2011
BPR# 9431

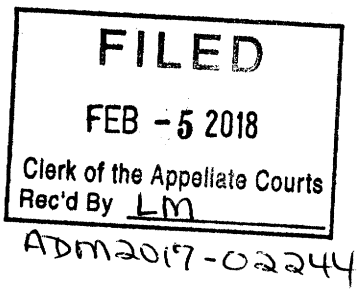
cc: Hon. William M. Barker

[2]"Law professors argue colleagues' 'bourgeois' ideal is racist and classist," *Philly Voice*, August 24, 2018 http://www.phillyvoice.com/law-professors-argue-colleagues-bourgeois-ideal-is-racist-and-classist/

appellatecourtclerk - No. ADM2017-02244 – Comment Letter Opposing Amending Rule of Professional Conduct 8.4(g)

From: John Kea <jkea@southernbaptistfoundation.org>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 2/5/2018 11:57 AM
Subject: No. ADM2017-02244 – Comment Letter Opposing Amending Rule of Professional Conduct 8.4(g)

February 5, 2018



The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2017-02244 – Comment Letter Opposing Amending Rule of Professional Conduct 8.4

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This comment is filed pursuant to the Order of the Supreme Court of Tennessee, dated November 21, 2017, which solicits written comments on whether to adopt proposed Rule of Professional Conduct 8.4(g). I oppose adoption of the proposed rule.

The legal basis of my opposition is set forth in substance in the comment letters submitted by the Christian Legal Society and Alliance Defending Freedom. Without needless repetition, I affirm these detailed opposition letters and believe the concerns they raise regarding the deficiencies of the proposed rule are manifest. Though current Rule 8.4(g) may indeed need revision and expansion to address specific concerns, the proposed amendment is not a legally viable or ethically prudent option.

From a personal professional perspective, I serve as General Counsel of the national foundation of the largest evangelical denomination in the United States, and as a national and local board member of the Christian Legal Society. In these roles, I frequently speak at conferences, seminars and meetings sponsored by religious organizations and provide legal guidance from a Biblical perspective to the institutions and individuals regarding a variety of legal and cultural issues. As such, each day I must integrate Christian beliefs, legal standards and ethical mandates. I earnestly

endeavor to be respectful, caring and fair to all people—legally, ethically, morally and spiritually—and believe it is possible to champion equal protection for all while simultaneously maintaining freedom of expression and religious free exercise for diverse viewpoints. One side of this balance, for me and I suspect numerous other Tennessee attorneys, will be outright constrained, or at a minimum significantly "chilled," if the proposed RPC 8.4(g) is adopted.

I thank the Court for ordering this public comment period and for considering my opposition to the proposed rule.

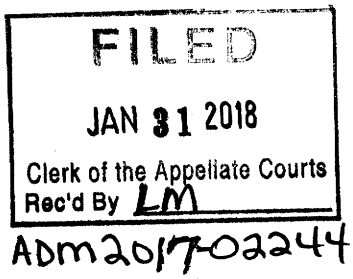
Respectfully submitted,

John L. Kea, II, BPR No. 016770
Executive Vice President & General Counsel
The Southern Baptist Foundation
901 Commerce Street, Suite 600
Nashville, TN 37203
(615) 254-8823
(615) 255-1832 fax
www.southernbaptistfoundation.org
www.mylegacyoffaith.org

NOTE: My email has changed to jkea@southernbaptistfoundation.org. Please note this change in your records.

Lisa Marsh - Fwd: TN Courts: Submit Comment on Proposed Rules

From: Jim Hivner <jim.hivner@tncourts.gov>
To: <Lisa.Marsh@tncourts.gov>
Date: 1/31/2018 3:16 PM
Subject: Fwd: TN Courts: Submit Comment on Proposed Rules



Sent from my iPhone

Begin forwarded message:

From: "Cheryl Rumage Estes" <cestes@lewisthomason.com>
Date: January 31, 2018 at 2:56:15 PM CST
To: "Jim Hivner" <Jim.Hivner@tncourts.gov>
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Wednesday, January 31, 2018 - 3:56pm
Submitted by anonymous user: [99.44.45.125]
Submitted values are:

Your Name: Cheryl Rumage Estes
Your Address: 5061 Barry Road
Your email address: cestes@lewisthomason.com
Your Position or Organization: Attorney
Rule Change: Rule 8: Rules of Professional Conduct
Docket number: ADMIN 2017-02244
Your public comments: I think this rule places unconstitutional restrictions on members, is an attempt to expand judicially the definition of protected class in order to circumvent the Tennessee legislature, is a threat to an attorney's First Amendment rights, and threatens an attorney's membership in religious and political organizations.

The results of this submission may be viewed at:
http://www.tncourts.gov/node/602760/submission/21884

appellatecourtclerk - RE: Docket No. ADM2017-02244; Comment Letter Opposing Adoption of ABA Model Rule 8.4(g) as New Tenn. Sup. Ct. R. 8, RPC 8.4(g)

From: "Sandra I. Schefcik" <micah6.8@estillnaz.org>
To: <appellatecourtclerk@tncourts.gov>
Date: 1/31/2018 5:27 PM
Subject: RE: Docket No. ADM2017-02244; Comment Letter Opposing Adoption of ABA Model Rule 8.4(g) as New Tenn. Sup. Ct. R. 8, RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee and Justice Page:

Please consider this email as my opposition to the proposed adoption of ABA Model Rule 8.4 (g). This comment email is filed pursuant to the Order of the Supreme Court of Tennessee, dated November 21, 2017, which "solicits written comments from the bench, the bar, and the public." For many reasons, as discussed below, I oppose adoption of ABA Model Rule 8.4(g) because of the damage it will do to attorneys' First Amendment rights. As a licensed attorney in Tennessee, please consider the following:

1. This **proposed Rule is too broad in scope and so vague in meaning** that its proponents feel necessary to defend it by a statement that it will not interfere with "private thought and private activity". I beg to differ.
2. **Free speech is at issue.** Should I disagree with an issue involving sex, religion, sexual orientation, or gender identity, I may be censored by the Board of Professional Responsibility, publicly, privately, suspension of my law license or even disbarment. The issues that I enumerate above are issues that I have strong convictions. Should I voice those convictions at a Bar function, refuse to take a client, or speak up at a law conference, I would hope that I would not be silenced. Yet, I may be silenced by implementation of this proposed rule.
3. **Freedom of religion is at issue**. As a Christian, my Biblical view and world view do not agree with same-sex marriage, homosexuality or transgender identity. This is my religious right. Yet, implementation of the proposed rule recognizes these "classes" as somehow protected classes.
4. **Several states have refused to adopt the proposed rule** and several other states have issued opinions through their Supreme Courts or their Attorney Generals that oppose or question the constitutionality of the restrictions such a rule would place on their Bar members.

Therefore, I respectively request that the proposed ABA Model Rule 8.4 (g) not be adopted for those reasons as set out hereinabove.

Respectively Submitted,

Sandra I. Schefcik
Attorney at Law
105 Flower Lane Drive
Estill Springs, Tennessee 37330

931-649-3867
931-649-3410 Fax
micah6.8@estillnaz.org
www.estillnaz.org

appellatecourtclerk - No. ADM2017-02244 -- Christian Legal Society Comment Letter Opposing Adoption of New RPC 8.4(g)

From: Kim Colby <kcolby@clsnet.org>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 1/31/2018 9:01 PM
Subject: No. ADM2017-02244 -- Christian Legal Society Comment Letter Opposing Adoption of New RPC 8.4(g)
Cc: David Nammo <dnammo@clsnet.org>
Attachments: Christian Legal Society Comment Letter ADM2017-02244 Filed.pdf

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Dear Mr. Hivner:

On behalf of David Nammo, Executive Director and CEO of the Christian Legal Society, I am submitting the attached comment letter of the Christian Legal Society opposing amending Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by adopting a new RPC 8.4(g). Please provide copies of the letter to the justices of the Supreme Court of Tennessee and otherwise make it publicly available in the same manner other comment letters submitted on this matter are made public.

Thank you for your assistance in this matter.

Best,

Kim Colby
Director, Center for Law & Religious Freedom
Christian Legal Society
(703) 894-1087
kcolby@clsnet.org

CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

January 31, 2018

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

FILED
JAN 31 2018
Clerk of the Appellate Courts
Rec'd By _____

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: No. ADM2017-02244 – Comment Letter of Christian Legal Society Opposing Amending Rule 8, RPC 8.4 of the Rules of the Tennessee Supreme Court by Adopting a New RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

This comment letter is filed pursuant to the Order of the Supreme Court of Tennessee, dated November 21, 2017, which solicits written comments on whether to adopt proposed RPC 8.4(g). Because RPC 8.4(g) would operate as a speech code for Tennessee attorneys, Christian Legal Society opposes its adoption.

Proposed RPC 8.4(g) essentially replicates the highly criticized and deeply flawed ABA Model Rule 8.4(g), as adopted by the American Bar Association at its annual meeting in San Francisco, California, in August 2016. The proponents of proposed RPC 8.4(g) acknowledge in their Petition to this Court that proposed RPC 8.4(g) "is patterned after" ABA Model Rule 8.4(g).[1]

ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers.[2] Fortunately, it can only operate in those states in which the highest court adopts it, and

[1] Joint Petition of Board of Professional Responsibility of the Supreme Court of Tennessee and Tennessee Bar Association for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g) [hereinafter "Pet."] at 1, http://www.tba.org/sites/default/files/filed_tsc_rule_8_rpc_8.4_g.pdf.

[2] For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, discusses why ABA Model Rule 8.4(g) would impose a speech code on lawyers in a Federalist Society video at https://www.youtube.com/watch?v=AfpdWmlOXbA. Professor Volokh debated a proponent of ABA Model Rule 8.4(g) at the Federalist Society National Student Symposium in March 2017. https://www.youtube.com/watch?v=b074xW5kvB8&t=50s. Highly respected constitutional scholar and ethics expert, Professor Ronald Rotunda, and Texas Attorney General Ken Paxton debated two leading proponents of Model Rule 8.4(g) at the Federalist Society National Lawyers Convention in November 2017. https://www.youtube.com/watch?v=V6rDPjqBcQg. Professor Rotunda also has written a lengthy memorandum about the Rule's threat to lawyers' First Amendment rights. Ronald D. Rotunda, "*The ABA Decision to Control*

to date, only the Vermont Supreme Court has adopted it. Because the rule took effect in Vermont less than five months ago, no empirical evidence yet exists as to the effect its implementation will have on attorneys.

This Court should reject proposed RPC 8.4(g) because its extremely broad scope will irreparably harm Tennessee attorneys' First Amendment rights. But at a minimum, this Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out by what happens in another state. Otherwise Tennessee attorneys will be the laboratory subjects for the ill-conceived experiment that ABA Model Rule 8.4(g) represents. There is no reason to impose on Tennessee attorneys a rule rife with risk, when a wise and readily available option for this Court is to wait to see whether other states adopt ABA Model Rule 8.4(g), and then to observe its impact on attorneys in those states.

Proposed RPC 8.4(g) is so deeply flawed that its proponents, in their Petition to this Court urging its adoption, find it necessary to state that "proposed Rule 8.4(g) leaves *a sphere of private thought and private activity* for which lawyers will remain free from regulatory scrutiny."[3] A "sphere of private thought" may be the best that lawyers living under a totalitarian regime can hope for; but lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts publicly and without fear in their social activities, their workplaces, and the public square. Proposed RPC 8.4(g) would drastically curtail that freedom.

A rule that is so broad in scope and so vague in meaning that its proponents feel the need to reassure the lawyers who will be regulated by it that they will be left "a sphere of private thought and private activity . . . free from regulatory scrutiny" is a rule that this Court should reject. A lawyer's license to practice law should not depend on whether he or she – either unwittingly or intentionally -- steps outside of a nebulous, undefined "sphere of private thought and private activity."

Nor is there need for haste because current Comment [3], which already accompanies RPC 8.4(d), adequately meets any need. There is no pressing reason to revisit this Court's recent decision in 2013 to retain current Comment [3] rather than adopt a black-letter rule. Current Comment [3] satisfactorily meets any need without creating new threats to attorneys' freedom of speech.

In 2013, in contrast to its current posture, the Tennessee Bar Association opposed adoption of a black-letter rule. Its reasons for opposition to a black-letter rule remain as valid today as they were a scant five years ago. In its comment letter to this Court, dated March 27, 2013, the TBA "explain[ed] how it is possible to be staunchly opposed to invidious discriminatory conduct of any sort and yet steadfastly opposed" to adding a new black-letter rule

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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.

[3] Pet. at 6.

to RPC 8.4.[4] Specifically, "[t]he TBA believe[d] that when this Court originally adopted Comment [3] more than a decade ago it made the right decision."[5]

The TBA 2013 Comment Letter focused on three flaws that, five years later, are embedded in proposed RPC 8.4(g):

1. Disciplinary liability for speech: The TBA in 2013 was opposed to "replac[ing] the language 'in the course of representing a client' [the scope of current Comment [3]] with the more expansive 'in a professional capacity.'"[6] But this is precisely what proposed RPC 8.4(g) would do if adopted. Proposed RPC 8.4(g) would supplant current Comment [3] and its limited scope of "in the course of representing a client" with the much broader scope of "in conduct related to the practice of law." As the TBA 2013 Comment Letter explained, the expansive scope of "in a professional capacity" "would appear to subject a lawyer to potential disciplinary liability" on several new fronts, including: "(1) service in the General Assembly; (2) speaking in public, including at CLEs; (3) advertising their legal services; and (4) authoring and publishing books/treatises, articles, or opinion columns."[7]

In 2013, the TBA recognized that, if adopted, the expansive scope of "in a professional capacity" "could result, for example, in any number of constitutional challenges regarding the First Amendment rights of lawyers."[8] The TBA asked whether "a lawyer-legislator [could] be subjected to discipline under [the proposed 2013 rule] for introducing a bill to prohibit (or permit) the display of religious symbols on public property?"[9] The TBA asked whether "a divorce lawyer [could] be subjected to discipline for broadcasting advertisements indicating that they only represent one gender in divorce proceedings?"[10] Five years later, these same threats to Tennessee attorneys' freedom of speech would materialize if proposed RPC 8.4(g) were adopted because, as Comment [4] accompanying proposed RPC 8.4(g) explicitly states, "conduct related to the practice of law" includes "bar association, business *or social activities* in connection with the practice of law." See pp. 10-16, *infra*, for a more detailed discussion.

2. Disciplinary liability for employment decisions: The TBA in 2013 recognized that "a lawyer who makes a decision whether to hire (or not hire) someone also would likely qualify as engaging in conduct in their professional capacity."[11] As a result, a lawyer could be subject "to potential disciplinary liability for a decision not to hire a job applicant and could do so even

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[4] Comment of the Tennessee Bar Association in re: Proposed Amendment to Tennessee Rule of Professional Conduct 8.4, No. M2013-00379-SC-RL1-RL, Mar. 27, 2013, [hereinafter "TBA 2013 Comment Letter"] at 1, http://www.tba.org/sites/default/files/Rule%208%204%20Comment%203-28-13.pdf.
[5] *Id.* at 2.
[6] *Id.*
[7] *Id.* at 3.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

in instances where federal laws addressing bias or prejudice in making employment decisions would not otherwise apply."[12] Again, proposed RPC 8.4(g)'s Comment [4] confirms the TBA's concern because it explicitly states that "conduct related to the practice of law includes . . . operating or managing a law firm or practice."

3. Negligence standard for disciplinary liability: The TBA in 2013 opposed language that would punish "conduct that, unknown to the lawyer, manifests bias or prejudice."[13] But proposed RPC 8.4(g) would punish a lawyer for conduct that he or she does not realize is discrimination or harassment.[14] Proposed RPC 8.4(g) implements a negligence standard that hangs like the sword of Damocles over the head of every Tennessee attorney.

At bottom, current Comment [3] strikes the appropriate balance between the public interest and Tennessee attorneys' First Amendment rights. In contrast, proposed RPC 8.4(g) threatens Tennessee attorneys' First Amendment rights. The reasons for the TBA's opposition in 2013 remain equally valid today.

Tennessee should not become the second state, in company only with Vermont, to adopt the newly minted, deeply flawed ABA Model Rule 8.4(g). Instead, it should wait to see if other states choose to roll the dice with ABA Model Rule 8.4(g) and learn from other states' experience before adopting a new black-letter rule that will chill Tennessee attorneys' speech.

I. This Court Should Retain Current Comment [3] Rather than Adopt the Deeply Flawed Proposed RPC 8.4(g).

A. A comparison of the texts of current Comment [3] and proposed RPC 8.4(g) leaves no doubt that proposed RPC 8.4(g) should be rejected.

A mere five years ago, in 2013, this Court considered whether to adopt a black-letter rule that was significantly narrower than the proposed RPC 8.4(g) before the Court today. After deliberation, this Court wisely chose to retain current Comment [3] rather than impose a black-letter rule on Tennessee attorneys. Current Comment [3] largely tracked the Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 to August 2016. Current Comment [3] reads as follows:

> [3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socio economic status, violates paragraph (d) when such actions are prejudicial

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[12] *Id.*
[13] *Id.* at 2.
[14] In a puzzling reversal, the Tennessee Bar Association in its Petition now criticizes current Comment [3] because it "seems to only bar discriminatory conduct 'knowingly' performed." Pet. at 3.

> to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

Compare the narrow scope of current Comment [3] to the breadth of proposed RPC 8.4(g) and its accompanying comments, which read as follows:

> "It is professional misconduct for a lawyer to:
>
> ***
>
> "(g) 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, or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with RPC 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.
>
> "Comment:
>
> ***
>
> "[3] Discrimination and harassment by lawyers in violation of paragraph (g) 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 anti-harassment statutes and case law may guide application of paragraph (g).
>
> "[4] 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 practice; and participating in bar association, business or social activities 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. Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation.
>
> "[4a] Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.
>
> "[5a] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g).
>
> "[5b] A lawyer does not violate paragraph (g) 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.
>
> "[5c] Lawyers should be mindful of their professional obligations under RPC 6.1 to provide legal services to those who are unable to pay, and their obligation under RPC 6.2 not to avoid appointments from a tribunal except for good cause. Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socioeconomic status merely by charging and collecting reasonable fees and expenses for a representation.
>
> "[5d] A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See RPC 1.2(b)."

B. Proposed RPC 8.4(g) would impose a significantly heavier burden on Tennessee attorneys than does current Comment [3].

The scope of RPC 8.4(g) is significantly broader than current Comment [3] in several critical aspects, including:

1. Proposed RPC 8.4(g) is substantially broader in the conduct it regulates: Current Comment [3] is limited to when a lawyer is acting "in the course of representing a client,"

whereas proposed RPC 8.4(g) applies when a lawyer is acting "in conduct related to the practice of law," which is defined as broadly as possible to include not only "representing clients," but also "interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business *or social activities* in connection with the practice of law." (Emphasis supplied.) As detailed below at pp. 10-16, proposed RPC 8.4(g) would apply to *almost everything that a lawyer does, including his or her social activities* that are arguably related to the practice of law. It would also apply to *anyone* that a lawyer interacts with during any conduct arguably related to the practice of law.

2. Proposed RPC 8.4(g) is not limited to conduct that is "prejudicial to the administration of justice": Current Comment [3] requires that a lawyer's actions be "prejudicial to the administration of justice" before professional misconduct can be found. Proposed RPC 8.4(g) abandons this traditional limitation on a finding of professional misconduct, leaving a lawyer subject to disciplinary liability even though his or her conduct has not prejudiced the administration of justice, which greatly expands the regulatory reach of the proposed rule.

3. Proposed RPC 8.4(g) dispenses with the mens rea requirement of current Comment [3]: Current comment [3] requires that a lawyer "knowingly" manifest bias or prejudice, whereas proposed RPC 8.4(g) adopts a negligence standard by including "reasonably should know." A lawyer could violate proposed RPC 8.4(g) without even realizing he or she has done so. This change is particularly perilous because the list of words and conduct that are deemed "discriminatory" or "harassing" is ever expanding in novel and unanticipated ways.

4. Proposed RPC 8.4(g) adds three new protected categories: Current Comment [3] already protects "race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status." Proposed RPC 8.4(g) would add gender identity, marital status, and ethnicity to protect eleven different characteristics of individuals.

II. Only the Vermont Supreme Court has adopted 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."[15] *But this claim is factually incorrect because ABA Model Rule 8.4(g) has not been adopted by any state bar, except Vermont.* Vermont's implementation of ABA Model Rule 8.4(g) began less than five months ago, on September 18, 2017.

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[15] *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, *available at* https://www.scbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf, at 56-57.

As a result, no empirical evidence exists to support the claim that ABA Model Rule 8.4(g) "will not impose an undue burden on lawyers." Tennessee should not become the testing ground for this deeply flawed rule.

Despite the ABA's claim to the contrary, 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.[16] *But each of these black-letter rules is narrower than ABA Model Rule 8.4(g).*

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

- Many 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, including Tennessee, 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.

Because no state, except Vermont five months ago, has adopted ABA Model Rule 8.4(g), it has no track record in any state. Empirical evidence demonstrating a need in Tennessee for the adoption of the proposed rule has not been provided. Current Comment [3] already adequately addresses any need.

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[16] Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Prof. Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf .

III. Official Bodies in Illinois, Maine, Montana, Pennsylvania, Texas, and South Carolina Have Rejected Model Rule 8.4(g), and Nevada and Louisiana Have Abandoned Efforts to Impose It on Their Attorneys.

In several states, the state supreme court, state legislature, state attorney general, state bar association, professional ethics committee, or supreme court disciplinary counsel has already officially opposed adoption of ABA Model Rule 8.4(g).

Two state supreme courts have officially rejected adoption of ABA Model Rule 8.4(g). In June 2017, the Supreme Court of **South Carolina** became the first state supreme court to take official action regarding ABA Model Rule 8.4(g) when it rejected adoption of the rule.[17] The Court acted after the House of Delegates of the South Carolina Bar, as well as the South Carolina Attorney General, recommended against its adoption.[18] On November 30, 2017, the Supreme Court of **Maine** announced it had "considered, but not adopted, the ABA Model Rule 8.4(g)."[19]

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).[20] 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."

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."[21]

On December 2, 2016, the Disciplinary Board of the Supreme Court of **Pennsylvania** explained that ABA Model Rule 8.4(g) was too broad:

> It is our opinion, after careful review and consideration, that the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities. The Model Rule . . . subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a

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[17] http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01.

[18] http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna-cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf.

[19] http://www.courts.maine.gov/rules_adminorders/rules/proposed/mr_prof_conduct_proposed_amend_2017-11-30.pdf at 2 (announcing comment period on alternative language).

[20] https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf.

[21] https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

> 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.[22]

On December 10, 2016, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois."[23]

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).[24] 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.[25]

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."[26]

It is instructive that, after examining more closely ABA Model Rule 8.4(g), official bodies in numerous states have concluded that it is too flawed to impose on attorneys. The great advantage of a federalist system is that one state can reap the benefit of other states' trial-and-error. Prudence counsels a course of 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.

IV. Proposed RPC 8.4(g)'s Expansive Scope Threatens All Attorneys' First Amendment Rights.

In August 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, ABA Model Rule 8.4(g), making it professional misconduct for a lawyer to engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.[27] Unfortunately, in adopting the new model rule, the ABA

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[22] http://www.pabulletin.com/secure/data/vol46/46-49/2062.html.

[23] https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals.

[24] http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf.

[25] *Id.* at 3.

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

[27] The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission,

largely ignored over 450 comment letters,[28] most opposed to the rule change. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).[29]

ABA Model Rule 8.4(g) poses a serious threat to attorneys' First Amendment rights; therefore, its clone, proposed RPC 8.4(g), should be rejected. If adopted, proposed RPC 8.4(g) would have a chilling effect on Tennessee attorneys' free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square.[30]

A. Proposed RPC 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. 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.

Two highly respected constitutional scholars have written about their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. Professor Ronald Rotunda has written a treatise on American constitutional law,[31] as well as the ABA's treatise on

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Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

[28] 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.

[29] Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the 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%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

[30] The Attorney General of Texas issued an opinion 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." Texas A.G. Op. No. KP-0123, 2016 WL 7433186 (Dec. 20, 2017), https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

[31] See, *e.g.*, AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME I – INSTITUTIONAL POWERS (West Academic Publishing, St. Paul, MN. 2016); AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME II – LIBERTIES (West Academic Publishing, St. Paul, MN. 2016); Principles of Constitutional Law (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).

legal ethics.[32] He initially wrote about the problem ABA Model Rule 8.4(g) poses for lawyers' speech in a *Wall Street Journal* article entitled "The ABA Overrules the First Amendment,"[33] where he explained that:

> 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.

Professor Rotunda also wrote a lengthy critique of ABA Model Rule 8.4(g) for the Heritage Foundation, entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought."[34] His analysis is essential to understanding the threat that the new rule poses to attorneys' freedom of speech.

At the Federalist Society's 2017 National Lawyers Convention, Professor Rotunda and Texas Attorney General Ken Paxton participated in a panel discussion with former ABA President Paulette Brown and Professor Stephen Gillers on ABA Model Rule 8.4(g).[35] In the opinion of many, the proponents of the rule failed to provide adequate responses to the free speech concerns it creates.

Influential First Amendment scholar and editor of the daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has similarly warned that the new rule is a speech code for lawyers in a two-minute video released by the Federalist Society.[36] In a debate at the Federalist Society's 2017 National Student Symposium, Professor Volokh demonstrated the flaws of Model Rule 8.4(g), despite the rule's proponent's unsuccessful attempts to gloss over its flaws.[37]

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[32] *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016). In their April 2017 update to the *Deskbook*, Professor Rotunda and Professor John S. Dzienkowski provide extensive criticism of ABA Model Rule 8.4(g). *Legal Ethics, Law. Deskbk. Prof. Resp.* (2017-2018 ed.), §§8.4-2(j)-1 – 8.4-2(j)-6.

[33] 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.

[34] 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.

[35] https://www.youtube.com/watch?v=V6rDPjqBcQg.

[36] https://www.youtube.com/watch?v=AfpdWmlOXbA.

[37] https://www.youtube.com/watch?v=cOivGxOUx4g.

Professor Volokh has also given examples of potential violations of Model Rule 8.4(g):

> 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."[38]

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, or otherwise engage in public discussions regarding current political, social, and religious questions.[39]

1. **By expanding its coverage to include all "conduct related to the practice of law," proposed RPC 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.**

Proposed RPC 8.4(g) raises troubling new concerns for every Tennessee attorney because it explicitly applies to all "conduct related to the practice of law." Its accompanying Comment [3] makes clear that "conduct" encompasses "speech," when it states that "discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others" and that "[h]arassment includes . . . derogatory or demeaning *verbal* or physical conduct." (Emphasis supplied.)

Accompanying Comment [4] explicitly delineates the extensive reach of proposed RPC 8.4(g): "Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law,

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[38] 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.

[39] *See also,* TBA 2013 Comment Letter at 3.

operating or managing a law firm or law practice; and participating in bar association, business *or social activities* in connection with the practice of law." (Emphasis supplied.)

As already discussed at pp. 4-7, *supra*, proposed RPC 8.4(g) greatly expands upon current Comment [3]. Proposed RPC 8.4(g) is much broader in scope than current Comment [3], which applies only to conduct "in the course of representing a client." Instead, proposed RPC 8.4(g) applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." This is a breathtaking expansion of the scope of current Comment [3]. Furthermore, current Comment [3] speaks in terms of "actions when prejudicial to the administration of justice." By deleting that qualifying phrase, proposed RPC 8.4(g) also greatly expands the reach of the rule into attorneys' lives.

Indeed the substantive question becomes, what conduct does proposed RPC 8.4(g) *not* reach? Virtually everything a lawyer does is "conduct related to the practice of law." Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Arguably, the rule includes all of a lawyer's "business or social activities" because there is no real way to delineate between those "business or social activities" that are related to the practice of law and those that are not. 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.

Activities likely to fall within the proposed RPC 8.4(g)'s scope include:

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

- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues

Recall that in its 2013 Comment Letter the TBA observed that the expansive scope of "in a professional capacity" "would appear to subject a lawyer to potential disciplinary liability" on several new fronts, including: "(1) service in the General Assembly; (2) speaking in public, including at CLEs; (3) advertising their legal services; and (4) authoring and publishing books/treatises, articles, or opinion columns."[40] Proposed RPC 8.4(g) would make a lawyer subject to disciplinary liability for a host of expressive activities.

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 religious ministries.

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit 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.

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related 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 related 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.

By chilling attorneys' speech, the rule is likely to do real harm to religious institutions and their good works in their communities. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law," yet proposed RPC 8.4(g) creates such concerns. Because proposed RPC 8.4(g) seems to prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyers' free speech and free exercise of religion when serving their congregations and religious institutions.

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[40] TBA 2013 Comment Letter at 3. *See also*, the Joint Resolution of the Montana Legislature, http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf.

3. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline.

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. Of course, lawyers are asked to speak *because they are lawyers*. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Writing -- "Verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar? If so, public discourse and civil society will suffer from the ideological paralysis that proposed RPC 8.4(g) will impose on lawyers.

Speaking -- It would seem that all public speaking by lawyers on legal issues falls within proposed RPC 8.4(g)'s prohibition. But even if some public speaking were to fall outside the parameters of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various protected characteristics in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in proposed RPC 8.4(g)? 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 tuition assistance programs?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, proposed RPC 8.4(g) chills attorneys' speech.

4. Attorneys' membership in religious, social, or political organizations would be subject to discipline.

Proposed RPC 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a

disciplinary rule that prohibits all California state judges from participating in Boy Scouts because of the organization's teaching regarding sexual conduct.[41]

Would proposed RPC 8.4(g) 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 RPC 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or numerous other religious beliefs implicated by proposed RPC 8.4(g).[42] Some have gone so far as to claim that the right of a religious group to choose its leaders according to its religious beliefs is "discrimination."

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

As seen in Comment [4] that accompanies proposed RPC 8.4(g), the rule would explicitly protect 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." Because "conduct" includes "verbal conduct," 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. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. 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."[43] Yet proposed RPC 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, whether speech or action does or does not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees

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[41] 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.

[42] https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

[43] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of uniformity.

Because enforcement of proposed RPC 8.4(g) gives governmental officials unbridled discretion to determine which speech is permissible and which is impermissible, which speech "promote[s] diversity and inclusion" and which does not, the rule clearly countenances viewpoint discrimination based on governmental officials' subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens' free speech is unconstitutional viewpoint discrimination.[44]

C. Who determines whether advocacy is "legitimate" or "illegitimate" under proposed RPC 8.4(g)?

Proposed RPC 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 proposed RPC 8.4(g) utterly circular. Like the proverbial dog chasing its tail, proposed RPC 8.4(g) protects "legitimate advice or advocacy" only if it is "consistent with" proposed RPC 8.4(g). That is, speech is permitted by proposed RPC 8.4(g) if it is permitted by proposed RPC 8.4(g).

The epitome of an unconstitutionally vague rule, proposed RPC 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? 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.

D. Proposed RPC 8.4(g)'s threat to free speech is compounded by the fact that it utilizes a negligence standard rather than a knowledge requirement.

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

> [ABA Model Rule 8.4(g)] subjects to discipline not only a lawyer who *knowingly* engages in harassment or discrimination, but also a lawyer who *negligently* utters a derogatory or demeaning comment. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the

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[44] *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).

> 'objectively reasonable lawyer' will be constructed for purposes of making this determination.[45]

E. The Two Sentences Added to Ameliorate Proposed RPC 8.4(g)'s Damage to Attorneys' Free Speech Are Meaningless.

Proposed RPC 8.4(g) is a speech code for Tennessee lawyers. In its Petition urging adoption of proposed RPC 8.4(g), the Tennessee Bar Association claims that it has added two sentences which will adequately protect Tennessee attorneys' First Amendment rights. But a cursory reading of the added sentences demonstrates that claim to be false.

Sentence #1: Comment [4a] to proposed RPC 8.4(g) would add this sentence: "Section (g) does not restrict any speech or conduct *not* related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct *unrelated* to the practice of law cannot violate this Section." (Emphasis supplied.)

This sentence plainly provides no protection for attorneys' speech because, by its very terms, proposed RPC 8.4(g) applies to "conduct related to the practice of law." By contrast, Comment [4a] speaks only of "speech or conduct *not* related to the practice of law." (Emphasis supplied.) Therefore, Comment [4a] is meaningless.

Sentence #2: Proposed Comment [4] would add this sentence: "*Legitimate* advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation." (Emphasis supplied.)

Yet again, this is an empty sentence that provides no protection for attorneys' free speech. It begs the question of what is "*legitimate* advocacy" and, equally importantly, who decides whether a lawyer's words are protected "*legitimate* advocacy" or unprotected "*illegitimate* advocacy." A rule that gives government officials unbridled discretion to determine which speech is "legitimate advocacy" and which speech is "illegitimate advocacy," which speech is "permissible" and which is "impermissible," is unconstitutional viewpoint discrimination.[46]

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[45] Prof. Dane S. Ciolino, "LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct," *Louisiana Legal Ethics*, Aug. 6, 2017, https://lalegalethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/ (original emphasis). *See also,* TBA 2013 Comment Letter at 2.

[46] *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).

V. 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.

The Vermont Supreme Court adopted ABA Model Rule 8.4(g), including its provision 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 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)."[47] The Vermont Supreme Court's Comment [4] creates reasonable doubt that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation.

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.*"[48] (Emphasis supplied.) 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).[49]

VI. Bar Officials in California and Pennsylvania Have Expressed Grave Reservations About Whether State Bars Have the Resources to Act as Tribunals of First Resort for Employment Claims Against Attorneys and Law Firms.

In 2013, the Tennessee Bar Association was concerned that a black-letter rule could subject a lawyer "to potential disciplinary liability for a decision not to hire a job applicant and could do so even in instances where federal laws addressing bias or prejudice in making employment decisions would not otherwise apply."[50] For that reason, in addition to others, the TBA opposed supplanting current Comment [3] with a black-letter rule.

Similarly, a recent memorandum outlining Pennsylvania's proposed Rule 8.4(g) correctly identified two defects of ABA Model Rule 8.4(g). The memorandum identified the first defect to

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[47] https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf.
[48] NY Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017).
[49] *Id.*
[50] TBA 2013 Comment Letter at 3.

be 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."[51] 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."[52]

Likewise, California State Bar authorities have voiced serious concern when considering whether to modify their disciplinary rule to something more akin to the ABA Model Rule 8.4(g). California's current Rule 2-400 requires that a separate judicial or administrative tribunal first have found that a lawyer committed unlawful discrimination before disciplinary charges can be brought. According to Justice Lee Smalley Edmon, the presiding justice of the Second District, Division Three of the California Courts of Appeals and the Chair of the State Bar's Second Commission for the revision of the Rules of Professional Conduct, "[t]he proposed elimination of current Rule 2-400(C)'s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings."[53] For that reason, she explained, an alternative was being offered to leave in place Rule 2-400(C)'s requirement that an attorney cannot be disciplined for unlawful discrimination unless a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law and any appeal is final and leaves the finding of unlawful discrimination standing.

An official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court's adjudicatory process and the state civil courts' adjudicatory processes.[54] In the words of the State Bar Court official, "the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings."[55] First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different. "State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases."[56] Any relevant evidence must be admitted, and hearsay evidence may be used. Third, "[i]n disciplinary proceedings, attorneys are not entitled to a jury trial."[57]

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[51] "Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct," 46 Pa.B. 7519 (Dec. 3, 2016), https://www.pabulletin.com/secure/data/vol46/46-49/2062.html.
[52] *Id.*
[53] Justice Lee Smalley Edmon, "*Wanted: Input on Proposed Changes to the Rules of Professional Conduct*," California Bar Journal, August 2016, http://calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx.
[54] Commission Provisional Report and Recommendation: Rule 8.4.1 [2-400], at 9, http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20[2-400]%20-%20Rule%20-%20DFT5%20(02-19-16)%20w-ES-PR.pdf.
[55] *Id.*
[56] *Id.*
[57] *Id.*

The California Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement. It described the problems with the requirement's deletion as follows:

> Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, . . . lack of [the State Bar's Office of Chief Trial Counsel] resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.[58]

A lawyer's loss of his or her license to practice law is a heavy penalty and demands a stringent process, one in which the standards for enforcement are rigorous and respectful of the attorneys' rights, as well as the rights of others. Comment [3] that accompanies RPC 8.4(d) already provides a carefully crafted balance and should be retained.

Conclusion

Proposed RPC 8.4(g) is so deeply flawed that its proponents, in their Petition to this Court urging its adoption, find it necessary to state that "proposed Rule 8.4(g) leaves *a sphere of private thought and private activity* for which lawyers will remain free from regulatory scrutiny."[59] A "sphere of private thought" may be the best that lawyers living under a totalitarian regime can hope for; but lawyers who live in a free society should rightly insist upon the freedom to speak their thoughts publicly and without fear in their social activities, their workplaces, and the public square. Because proposed RPC 8.4(g) would drastically curtail that freedom, this Court should reject it.

At a minimum, this Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out by its implementation in other states. There is no reason to make Tennessee attorneys laboratory subjects in the ill-conceived experiment that proposed RPC 8.4(g) represents. This is particularly true because sensible alternatives are readily available, such as waiting to see whether any other states adopt ABA Model Rule 8.4(g) and observing its impact on attorneys in those states. A decision to reject proposed 8.4(g) can always be revisited after other states have served as its testing ground.

Christian Legal Society thanks the Court for ordering this public comment period and considering these comments.

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[58] *Id.* at 13.
[59] Pet. at 6.

Respectfully submitted,
/s/ David Nammo
David Nammo
CEO & Executive Director
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, Virginia 22151
(703) 642-1070
dnammo@clsnet.org

appellatecourtclerk - Proposed Amendment to Rule 8, RPC 8.4

ADM2017-02244

From: James Bingham <binglaw@comcast.net>
To: <appellatecourtclerk@tncourts.gov>
Date: 1/26/2018 11:35 AM
Subject: Proposed Amendment to Rule 8, RPC 8.4

Definitely not. This will give opposing counsel a weapon to use which is outside the facts and the law of the case. Many frivolous and false allegations will be made to attempt to slant the case against a lawyer. This kind of stuff is academic malarkey.

James E. Bingham
Attorney at Law
707 Adams Ave.
Memphis, TN 38105
901.525.8601
fax 901.525.3084
binglaw@comcast.net

ADM2017-02244

FILED
JAN 19 2018
Clerk of the Appellate Courts
Rec'd By _____

House of Representatives
State of Tennessee

Mr. William Lamberth
State Representative
44TH Legislative District

COUNTIES REPRESENTED
Sumner County

NASHVILLE

Committees:
Criminal Justice Chairman
Criminal Justice Sub-Committee
State Government
Calendar & Rules

Cordell Hull Building
425 5th Ave. North, Suite 636
Nashville, TN 37243
Phone (615) 741-1980
rep.william.lamberth@capitol.tn.gov

January 18, 2018

To Whom It May Concern,

As a Tennessee lawmaker and a Tennessee attorney, I do not support the 8.4(g) revision proposed by both the Tennessee Bar Association (TBA) and the Tennessee Board of Professional Responsibility (TBPR).

The wording of the proposed 8.4(g) rule would create a "carve out" provision applying to attorneys, which would limit the attorney's freedom of speech as it relates to historically held fundamental Judeo-Christian beliefs regarding sexual orientation and gender identity. If an attorney held fundamental Jewish, Christian or Muslim beliefs, that attorney could not speak or act on those beliefs if someone deemed that belief and relating action to be harassment. Hence, the attorney would have less protection than the average citizen due to their profession. I do not believe that this state has ever intended to bind someone to a situation which violates their religious beliefs or speech. Tennessee has never restricted a person's religious beliefs to the confines of their place of worship, but that is exactly what this proposed provision does.

Furthermore, the State Legislature has been proactive in protecting the above-mentioned rights for counselors and college students. This proposed rule is also contrary to the will of the people of Tennessee who have long held free market principles to be sacrosanct. Therefore, the proposed revision is simply inconsistent with the laws and direction of Tennessee when it comes to protecting Freedom of Religion and Freedom of Speech. No attorney should ever discriminate against another person for any reason, but current ethical rules and criminal laws provide ample protections against behavior that we would all find repugnant. This proposed rule is a solution in search of a problem and I respectfully request that the Court decline to implement the proposed rule change.

William Lamberth
Tennessee State Representative

ZALE DOWLEN

Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

January 17, 2018

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407
appellatecourtclerk@tncourts.gov

Sent via US Mail and Email

RE: Case: ADM2017-02244
Issue: Rule 8.4(g) revision

Dear Supreme Court:

The following is my response to the proposal by the Tennessee Bar Association (TBA) and the Tennessee Board of Professional Responsibility (BPR):

SHORT RESPONSE

This initiative has nothing to do with ethics. This is viewpoint discrimination. This is a politically motivated effort on the part of the LGBTQI initiative. This proposal is about coercing LGBTQI accepted speech as deemed appropriate by the ABA Model Rules Committee. No form of the ABA 8.4(g) model rule or it's progeny can overcome the Tennessee Constitution's and Legislation's mandates as to freedom of speech.

What is particularly disturbing about this initiative at hand is that the Board of Professional Responsibility is a co-petitioner. I do not believe the Board of Professional Responsibility should be involved in political activism.

The proposal should be respectfully and summarily DENIED.

"Learn to do good. Seek justice. Help the oppressed. Defend the cause of orphans. Fight for the rights of widows."
Isaiah 1:17 NLT

ZALE DOWLEN

Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

INDEPTH RESPONSE

INTRODUCTION

Jesus Christ and the life lessons espoused in the teachings of the Bible are the basis for how I live my life and conduct my law practice. Many other attorneys can echo the same life perspective. Our faith is not simply something confined to our private lives, nor is our practice as an attorney confined to Monday through Friday, 9:00 to 5:00.

I recommend the Biblical teachings and principles to all I come into contact with. I am happy to share story after story of how Jesus has set me free from sin issues in my own life. I will be happy to share with anyone how He has healed me from childhood trauma. I will be happy to share the Good News of how He continues to work in and through my marriage, my parenting, my law practice and my life. These are stories I am currently able to share with my clients, when the conversation or circumstances warrant the discussion.

My law practice and my faith are inseparable. I do not leave my faith in church on Sunday morning or at home when I leave for the office or court each morning. Likewise, I do not leave the practice of law in my office at the end of the day, or in the courtroom at the end of a trial. I am an Attorney and Counselor at Law. One cannot separate my religious beliefs from my practice of law. The general public sees me as an attorney. Everything I say is considered by the general public to be within the course and scope of my being an attorney.

When I quote various scripture, I am at risk, under this proposal, of losing my law license. Examples of these scriptures are as follows:

> Scripture on our general purpose on this earth:
> Jesus replied: "'**Love the Lord your God** with all your heart and with all your soul and with all your mind.' This is the first and greatest commandment. And the second is like

ZALE DOWLEN
Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

it: '**Love your neighbor as yourself**.' All the Law and the Prophets hang on these two commandments."
Matthew 22: 37-40 New International Version (NIV) **[emphasis added]**

Scripture regarding what marriage is:
"Haven't you read," he replied, "that at the beginning the Creator '**made them male and female**,' and said, 'For this reason a **man will leave his father and mother and be united to his wife**, and the two will become one flesh' So they are no longer two, but one flesh. Therefore what God has joined together, let no one separate."
Matthew 19: 4-6 NIV **[emphasis added]**

Scripture regarding the place of sin, including sexuality, in our culture:
"Instead, you yourselves cheat and do wrong, and you do this to your brothers and sisters. Or do you not know that wrongdoers will not inherit the kingdom of God? Do not be deceived: Neither the **sexually immoral nor idolaters nor adulterers nor men who have sex with men, nor thieves nor the greedy nor drunkards nor slanderers nor swindlers will inherit the kingdom of God**. And that is what some of you were. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God. "
I Corinthians 6: 8-11 NIV **[emphasis added]**

Scripture regarding how I should deal with individuals I encounter on a daily basis:
"Then we will no longer be infants, tossed back and forth by the waves, and blown here and there by every wind of teaching and by the cunning and craftiness of people in their deceitful scheming. Instead, **speaking the truth in love**, we will grow to become in every respect the mature body of him who is the head, that is, Christ. From him the whole body, joined and held together by every supporting ligament, grows and builds itself up in love, as each part does its work.

ZALE DOWLEN
Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

So I tell you this, and insist on it in the Lord, that you must **no longer live as the Gentiles do, in the futility of their thinking**. They are **darkened in their understanding and separated from the life of God because of the ignorance that is in them due to the hardening of their hearts. Having lost all sensitivity, they have given themselves over to sensuality so as to indulge in every kind of impurity, and they are full of greed. "** Ephesians 4:14-19 NIV **[emphasis added]**

Until this proposal, the above have been constitutionally protected statements. The push to change the Tennessee Rule of Ethics 8.4 would make several of these verse unethical for me to utter as an attorney in most every situation I find myself. This provision by the TBA and the BPR is an effort to coerce and suppress speech that they do not like. Speech that has been historically constitutionally protected speech. This initiative is viewpoint discrimination.

APPLICATION

The proposed rule states, in part (**emphasis added**):

"It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is **harassment or discrimination** on the basis of ... **sexual orientation, gender identity, marital status**... in **conduct related to the practice of law**..."

Comment:

[3] "...Such discrimination includes **harmful** verbal ... conduct that **manifests bias or prejudice** towards others. **Harassment** includes sexual harassment and **derogatory or demeaning verbal ... conduct**. .... The substantive law of **antidiscrimination** and anti-harassment statutes and case law may guide application of paragraph (g)."

[4] "Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others **while engaged in the**

ZALE DOWLEN
Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law..."

[4a] "Section (g) **does not restrict any speech or conduct not related to the practice of law**, including speech or conduct protected by the First Amendment. Thus, a lawyer's speec (sp) or conduct unrelated to the practice of law cannot violate this Section."

[5d] "A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See RPC 1.2(b)."

With regard to the rule (g) itself:

1. The words "Harassment or discrimination" are similar to the word "beauty." It's often defined by the one perceiving "harassment or discrimination." In our modern time of "safe spaces" and "micro aggressions", this is overly broad.

2. "Sexual orientation, gender identity, marital status" are also quite troubling. The concepts of "Sexual Orientation" and "Gender Identity" for some individuals are extremely fluid and can change during the course of the day. There is no objective standard for this. Hence, it is an overly broad slippery slope.

3. "Marital status" is troubling. This is not just problematic in the wake of *Obergefell*, but also as we face this ever-changing landscape of those who continue to attack the traditional institution of marriage with polymorphous marriage, polygamy and the like.

4. Finally, "conduct related to the practice of law" is also troubling. My bar card does not have hours and days of operation. All those around me always see me as an attorney. Even writing this response is "conduct related to the practice of law".

ZALE DOWLEN

Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

With regard to the comments:

[3] How do you determine "harmful"? Criminal conviction? Civil conviction? Or merely hurt feelings?

Life is composed of "bias or prejudice". This whole initiative is biased toward the LGBTQI initiative and prejudiced against traditional "Faith Community" values, which is not limited to Christians.

"Derogatory or demeaning verbal ... conduct .." is constitutionally protected speech. Neither the 1st Amendment nor the Tennessee Constitution says that it only protects speech everyone likes. Isn't that a simple law school constitutional law *Cohen* analysis?

[4] "While engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities..." – based on this, there simply is no time that an attorney could speak of the Biblical truths that the LGBTQI community find offensive. This weaves into every element of an attorney's life.

[4a] "Unrelated to the practice of law..." it is a complete fiction to propose that anything in an attorney's life is "unrelated to the practice of law". The general public always sees us as an attorney.

[5d] "A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See RPC 1.2(b)." To properly advocate for a client, an attorney has to believe in the "cause". Conversely, no attorney can properly advocate for a cause that they completely disagree with. Make all the rules you want, people cannot properly advocate for initiatives they disagree with. Hence, our cases are also our speech and deserve the appropriate freedoms. We are not actors. We are counselor at law. Hence, everything within us reflects our professional representation.

ZALE DOWLEN
Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

VIOLATIONS BY THIS PROVISION

The effort at hand, which is to "Tennesseeize" the ABA Model Rule 8.4 (g), violates both the 1st Amendment and the Tennessee Constitution's privileges of traditional Christian, Jewish and Muslim attorneys.

I. 1st Amendment

I anticipate many of the responses in opposition to this proposal will address the 1st Amendment issues. I also anticipate those 1st Amendment responses will be authored by individuals much more skilled than I am at addressing how this proposal violates the 1st Amendment. I agree with those who opine that this provision violates the 1st Amendment. I defer to their scholarly wisdom and writing on that topic. I will focus on the Tennessee Constitution, statute and caselaw.

II. Tennessee Constitution and Caselaw

The Tennessee Constitution Article I, Section 3 states:

"That all men have a **natural and indefeasible right to worship Almighty God according to the dictates of their own conscience**; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; **that no human authority can, in any case whatever, control or interfere with the rights of conscience**; and that **no preference shall ever be given, by law**, to any religious establishment or mode of worship." **Emphasis added**.

The Tennessee Constitution Article I, Section 4 states:

"That **no political or religious test**, other than an oath to support the Constitution of the United States and of this state, **shall ever be required as a qualification to any office or public trust** under this state." **Emphasis added.**

This proposal violates both provisions. It violates Section 3 in essentially the same manner as it violates the 1st Amendment. I have a right to express my faith and its tenants through my day-to-day

ZALE DOWLEN
Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

practice of law. Here in Tennessee, that appears to be valued. Specifically, we have the Tennessee Faith and Justice Alliance. How is it possible that we can tie the vocal chords of the faith-ased attorneys on key issues of their faith and expect them to be able to assist clients in matters relating to those religious tenants? To quote Justice Clark:

> "**Faith communities are a natural fit with our efforts to help those in need find access to legal advice**," said Tennessee Supreme Court Justice Cornelia A. Clark. "And with our goal of helping more lawyers find more occasions to provide pro bono services, this is the **ideal opportunity for attorneys to put faith in action in their own worship communities.**"
> http://www.tncourts.gov/press/2013/02/05/faith-based-initiative-seeks-align-pro-bono-attorneys-their-worship-communities **Emphasis Added**

It simply makes no sense to ask and motivate faith-based initiatives to work within both their professional and spiritual calling and then to tell them that they cannot speak of <u>all</u> their doctrinal truths.

Planned Parenthood of Middle Tenn. v. Sundquist tells us that there is a long tradition of the Tennessee Constitution providing greater protection for freedoms, specifically religious, than the US Constitution.

> "In contrast, the guarantee of worship under the Tennessee Constitution exists in its own paragraph constituting eighty-one words. It characterizes mankind's right to worship as "a natural and indefeasible right" and declares "that no human authority can, in any case whatever, control or interfere with the rights of conscience." Tenn. Const. art I, § 3. **This Court has said that the language of this section, when compared to the guarantee of religious freedom contained in the federal constitution, is a stronger guarantee of religious freedom.**" *Planned Parenthood of Middle Tenn. v. Sundquist,* 38 S.W. 3d 1, 13 (2000) citing *Carden v. Bland,* 199 Tenn. 665, 288 S.W.2d 718, 721 (1956). **[emphasis added]**

ZALE DOWLEN
Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

Furthermore, *Ramsey v. BD. OF PRO. RESP.*, 771 SW 2d 116 (Tenn 1989) tells us "...**we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights.**" at 121 **[emphasis added].** However, this is exactly the result of the proposed rule change.

Hence, shouldn't we be mindful of the Tennessee Constitution as well as the 1st Amendment? Based on the case above, our inquiry into the legality of this provision should both start and stop with the Tennessee Constitution.

This proposal also violates Section 4 of Article I of the Tennessee Constitution in that it essentially establishes a test for those who wish to practice law in Tennessee. If you don't alter your speech to fit the LGBTQI politically correct agenda, then you have committed a per se ethical violation. Is this any different than how the cake bakers, florists and photographers have been prosecuted for their beliefs throughout the country?

III. Tenn. Code Ann. § 16-3-403

Tenn. Code Ann. § 16-3-403 states:

"The rules prescribed by the supreme court pursuant to § 16-3-402 shall not abridge, enlarge or modify any substantive right, and shall be consistent with the constitutions of the United States and Tennessee."

This proposal abridges and modifies the substantive right of an attorney's freedom of speech. This proposal is not consistent with the constitution of either Tennessee or the United States.

IV. The Preamble to Rule 8: Rule of Professional Conduct

The Preamble to the Rules of Professional Conduct as prescribed by this court states:

"[8] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is

ZALE DOWLEN
Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

also guided by **personal conscience** and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service." **Emphasis Added.**

This Honorable Court encourages attorneys to be guided by their "personal conscience" in the furtherance of the profession of law. The new proposed rule attempts to dictate the boundaries of "personal conscience" to fit within the LGBTQI's proscribed politically correct boundaries. It seems to be inconsistent to instruct an attorney to follow "personal conscience" and then dictate their speech. Hence, this provision is inconsistent with Tennessee case law, statute and Constitution. This provision does not survive a Tennessee analysis in order to get to a federal analysis. It fails based solely on Tennessee Constitutional, case law and statutory analysis.

FREEDOM OF SPEECH IN GENERAL

When one removes an attorney's freedom of speech, haven't you really removed it from everyone? Isn't this effort akin to removing weapons of war from the military? Freedom of speech for those who would litigate the freedom of speech for the general public should be of tantamount concern for a free society. A great quote on the subject is:

"Freedom is a fragile thing and is never more than one generation away from extinction. It is not ours by inheritance; it must be fought for and defended constantly by each generation, for it comes only once to a people."

RONALD REAGAN (Inaugural Address as Governor of California, January 5, 1967)

CONCERNS AS TO BOARD OF PROFESSIONAL RESPONSIBILITY INVOLVEMENT

The Board's Mission Statement is:

"To assist the Court in protecting the public from harm from unethical lawyers by administering the disciplinary process; to assist the public by providing information

ZALE DOWLEN
Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

about the judicial system and the disciplinary system for lawyers; and, to assist lawyers by interpreting and applying the Court's disciplinary rules."
http://www.tbpr.org/about-the-board/mission-statement

The statement includes "assist", "protecting", "administering", "interpreting" and "applying". At no point does the Mission Statement include "advocating" or "politics". However, in the petition at hand, the Board of Professional Responsibility is advocating for an extreme political agenda. The Board is also pitting itself against freedom of speech, specifically of faith-oriented attorneys.

I am involved with the Board. I like the Board. However, I find this extreme move to be gravely concerning. This appears to be far beyond the Board's role in the legal community. The Board is effectively the arbiter of attorney ethics. In this situation, it is picking sides in an extremist political agenda.

CONCLUSION

This situation is similar to the one dicussed in Acts 5. The scriptures state:
"The apostles were brought in and made to appear before the Sanhedrin to be questioned by the high priest. "We gave you strict orders not to teach in this name," he said. "Yet you have filled Jerusalem with your teaching and are determined to make us guilty of this man's blood."
Peter and the other apostles replied: **"We must obey God rather than human beings!** The God of our ancestors raised Jesus from the dead—whom you killed by hanging him on a cross. God exalted him to his own right hand as Prince and Savior that he might bring Israel to repentance and forgive their sins. We are witnesses of these things, and so is the Holy Spirit, whom God has given to those who obey him." Acts 5:27-32 NIV **[emphasis added]**

ZALE DOWLEN

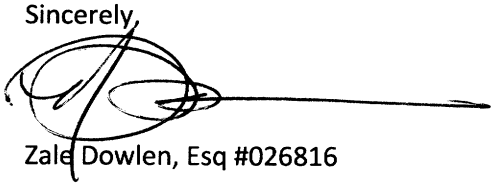
Attorney, MBA
PO Box 335
Goodlettsville, Tennessee 37070-0335
Phone: (615) 497-0763
Fax: (888) 840-4269
Email: zale@dowlenlaw.com
www.DowlenLaw.com

I must obey God. Only one (1) other state has adopted the new 8.4(g) while many states have declined accepting it, including Illinois. If Tennessee decides to adopt this provision, it will be number two (2). As in Ephesians 4:14-19 NIV, listed above, I will continue to speak the truth in love even if Tennessee becomes number two (2).

When you silence an attorney of faith, aren't you also silencing every person, organization and group of faith that attorney has or would represent? Is Tennessee really considering silencing our faith based community? How does that line up with any of the above statutory, constitiuonal or case law precident above? It doesn't. If the Honorable Court decides to adopt this proposal, it will be in stark contrast to the overall direction of Tennessee.

This provision violates both the Federal and the Tennessee Constitutions. This provision also violates Tenn. Code Ann. § 16-3-403 and caselaw. This provision is clearly government coerced and suppressed speech. This proposed provision should be DENIED.

Sincerely,



Zale Dowlen, Esq #026816

"Learn to do good. Seek justice. Help the oppressed. Defend the cause of orphans. Fight for the rights of widows."
Isaiah 1:17 NLT

appellatecourtclerk - Comment on Proposed Rule 8.4(g)

From: "Garry J. Rhoden" <GRhoden@thefloridafirm.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 1/16/2018 2:16 PM
Subject: Comment on Proposed Rule 8.4(g)

ADM2017-02244

My name is Garry Rhoden.

My BPR number is 024815.

Please accept this as my opposition to Proposed New Rule 8.4(g) and Comments.

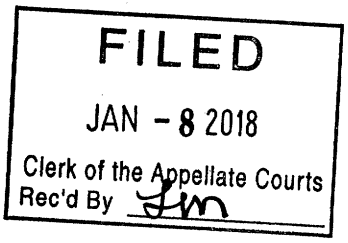
Best wishes.

Garry J. Rhoden
Colling Gilbert Wright & Carter LLC
801 North Orange Avenue, Suite 830
Orlando, Florida 32801
407.712.7300 (t)
407.712.7301 (f)
866.FLA.FIRM (Toll Free @ 866.352.3476)
grhoden@thefloridafirm.com
www.TheFloridaFirm.com
Rated AV Preeminent® by Martindale-Hubbell®
Licensed in FL, MS, TN, KY, AR, NC, & the District of Columbia

appellatecourtclerk - Comment on Docket No. ADM2017-02244

From: "D.E. Barker" <diezba@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 1/8/2018 12:38 PM
Subject: Comment on Docket No. ADM2017-02244
Attachments: 2018-01-08 Supreme Court of Tennessee -- In re Comment Letter against ABA Model Rule adoption.pdf

January 8, 2017



James M. Hivner, Clerk

Re: Tenn. Sup. Ct. R. 9, section 32

Tennessee Appellate Courts

100 Supreme Court Building

401 7th Avenue North

Nashville, TN 37219-1407

Dear Mr. Hivner:—

Attached, please find a PDF file containing a Comment Letter on ABA Model Rule 8.4(g), Docket No. ADM2017-02244.

If there is an error in transmission, please notify me via my contact information, below.

Respectfully submitted,

The Rev. Mr. D. E. Barker, Esq.

Tenn. Bar no. 027083

188 Thompson Lane

Nashville, TN 37211

423-754-3244

dillon.e.barker@gmail.com

In residence
Saint Edward Parish
188 Thompson Lane
Nashville, Tennessee 37211

– • –

Tennessee Bar No.
027083

The Reverend Deacon
DILLON EZEKIEL BARKER
Attorney at Law

Office
615-833-5520

Mobile
423-754-3244

Email
dillon.e.barker@gmail.com

January 8, 2018

VIA ELECTRONIC MAIL*
The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Associate Justice
The Honorable Holly Kirby, Associate Justice
The Honorable Sharon G. Lee, Associate Justice
The Honorable Roger A. Page, Associate Justice

Attn: James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 9, section 32 Tennessee Appellate Courts
100 Supreme Court Building
401 Seventh Avenue North
Nashville, Tennessee 37219-1407

In re: No. ADM2017-02244 – Comment Letter Opposing Adoption of ABA Model Rule 8.4(g) as New Tenn. Sup. Ct. R. 8, RPC 8.4(g)

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:—

This comment letter is filed pursuant to the Order of the Supreme Court of Tennessee, dated November 21, 2017, which "solicits written comments from the bench, the bar, and the public." For many reasons, as both a member of the Tennessee Bar and a Roman Catholic minister, I deeply oppose adoption of ABA Model Rule 8.4(g) because of the damage it will do to Tennessean attorneys' First Amendment rights.**

At the outset, I would note that the proposed Model Rule 8.4(g) is so deeply flawed that its proponents, in their Petition to this Court urging its adoption, find it necessary to state that "proposed Rule 8.4(g) leaves a sphere of private thought and private activity for which lawyers will remain free from regulatory scrutiny." (Pet. at 6). When a rule is so broad in scope and so vague in meaning that its proponents feel such a

* Sent to appellatecourtclerk@tncourts.gov on January 8, 2018.

** With few exceptions, the substantive content of this Comment Letter is taken from a Draft Comment Letter written by the Christian Legal Society, of which I have been a member. My submission of their letter is by way of endorsement of their analysis.

statement is necessary to its defense, that rule is a bad rule. Such a rule should not be imposed on Tennessee attorneys whose ability to practice law depends on not unwittingly stepping out of the vague, undefined "sphere of private thought and private activity" that the proposed Rule 8.4(g) does not subject to "regulatory scrutiny." As the Petition itself illustrates, proposed Rule 8.4(g) is truly a speech code for lawyers and should be rejected by this Court.

My background. I was admitted to the Bar of this State in 2008, and I have remained a member since that time. Beginning in 2011, I left the active practice of law in order to pursue a calling to the Roman Catholic priesthood. Since then, I have been pursuing the course of formation and education required by the Catholic Church for those who aspire to receive the Sacrament of Holy Orders in the presbyteral rank. Though I am writing in a personal capacity, and in no way represent my parish, the Diocese of Nashville, or the Holy See, my views and opinions are guided and formed by not only my deeply-held religious faith, but also by my training and experience as a Tennessee attorney.

I. This Court Should Not Adopt the Deeply Flawed ABA Model Rule 8.4(g) but Instead Should Keep the Current Comment [3] Accompanying Rule 8, RPC 8.4(d).

As recently as 2013, this Court considered whether to adopt a black-letter rule significantly narrower than the Model Rule 8.4(g) currently under consideration. At the end of its deliberations, this Court wisely chose to adopt current Comment [3] to RPC 8.4 rather than a black-letter rule. In adopting Comment [3], this Court took, with only minor modifications, the ABA's Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 to August 2016.

The current Comment [3] to RPC 8.4 prohibits bias and prejudice that are prejudicial to the administration of justice by an attorney in the course of representing a client and reads as follows:

> [3] A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

Given the Court's recent adoption of Comment [3], as well as the fact that there has been no empirical showing of a need for revisiting the recent decision to adopt Comment[3] rather than a black-letter rule, Tennessee should not become only the second state to adopt the new, deeply flawed ABA Model Rule 8.4(g). Current Comment [3] strikes the appropriate balance between the public interest and Tennessee attorneys' First Amendment rights. In contrast, Model Rule 8.4(g) threatens attorneys' First Amendment rights.

II. This Court Should Not Subject Tennessee Attorneys to a Rule that Has No Track Record in Any State.

The ABA claims that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."[1] But this claim is factually incorrect: ABA Model Rule 8.4(g) has not been adopted by any state bar, excepting Vermont, which only began its implementation on September 18, 2017. Therefore, no empirical evidence exists to support the ABA's claim that Model Rule 8.4(g) "will not impose an undue burden on lawyers." This Court should not make Tennessee the testing ground for the deeply flawed Model Rule 8.4(g).

Furthermore, despite the ABA's claim to the contrary, ABA Model Rule 8.4(g) is not a duplicate of any prior rule of professional conduct adopted by a state bar or state supreme court. Twenty-four states and the District of Columbia have adopted black-letter rules dealing with "bias" issues.[2] But each of these black-letter rules differs from ABA Model Rule 8.4(g), being in some significant way narrower than that rule.

Examples of the differences between state black-letter rules and Model Rule 8.4(g)'s expansive scope include:

- Many states' black-letter rules apply only to unlawful discrimination and require that another tribunal 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 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 Model Rule 8.4(g)'s protected characteristics.

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

Thirteen states, including Tennessee, have adopted a comment dealing with "bias" issues, but not a black-letter rule. Fourteen states have neither adopted a rule nor a comment addressing "bias" issues.

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1 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, at 1.

2 Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.

Because no state, except Vermont as of September 2017, has adopted ABA Model Rule 8.4(g), the proposed rule has no track record whatsoever. Nor is there empirical evidence demonstrating a need in Tennessee for the adoption of the proposed rule. Nor does the proposed rule solve a problem that is not already adequately addressed by application of the current Comment [3] that accompanies RPC 8.4.

III. This Court should not adopt Model Rule 8.4(g) because official bodies in Illinois, Maine, Montana, Pennsylvania, Texas, and South Carolina have urged rejection of Model Rule 8.4(g), while Nevada and Louisiana recently abandoned efforts to adopt it.

In June 2017, the Supreme Court of **South Carolina** became the first state supreme court to take official action regarding Model Rule 8.4(g) when it rejected adoption of the rule. http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01. The Court acted on the recommendation of the House of Delegates of the South Carolina Bar, as well as the South Carolina Attorney General. http://2hsvz0l74ah31vgcm16peuy12tz.wpengine.netdna- cdn.com/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf.

On November 30, 2017, the Supreme Court of **Maine** announced that it had not adopted ABA Model Rule 8.4(g), when it announced a comment period on a entirely different version. http://www.courts.maine.gov/rules_adminorders/rules/proposed/mr_prof_conduct_proposed_am end_2017-11-30.pdf ("Maine has considered, but not adopted, the ABA Model Rule 8.4(g).")

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General opined 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." https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

On December 2, 2017, the Disciplinary Board of the Supreme Court of **Pennsylvania** explained that 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.

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

On December 10, 2017, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois." https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and- collaborative-law-proposals.

On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that Model Rule 8.4(g) would unconstitutionally infringe on the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt Model Rule 8.4(g). http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf. 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. Mont. Legis. Jt. Res. 3.

On September 25, 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). https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf. 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," 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."

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

IV. This Court Should Not Adopt Model Rule 8.4(g) Because its Expansive Scope Threatens All Attorneys' First Amendment Rights.

In August 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, Model Rule 8.4(g), making it professional misconduct for a lawyer to engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.[3] Unfortunately, in adopting the new model rule, the ABA largely ignored over 450 comment letters,[4] most opposed to the rule change. The ABA's own Standing Committee on Professional Discipline filed a comment letter[5]

3 The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_an d_report_109.authcheckdam.pdf.

4 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.

5 Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016,

questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).

The ABA's new Model Rule 8.4(g) poses a serious threat to attorneys' First Amendment rights and should be rejected. If adopted, the proposed rule would have a chilling effect on attorneys' ability to engage in free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square.[6]

A. Model Rule 8.4(g) Operates 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. 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.

Two renowned constitutional scholars have written about their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. Professor Ronald Rotunda has written a treatise on American constitutional law,[7] as well as the ABA's treatise on legal ethics.[8] He demonstrated the problem Model Rule 8.4(g) poses for lawyers' speech in a Wall Street Journal article entitled "The ABA Overrules the First Amendment."[9] He explained that:

> 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.

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http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208- 4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

6 The Attorney General of Texas recently issued an opinion 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." Texas A.G. Op. No. KP-0123, 2016 WL 7433186 (Dec. 20, 2017), https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

7 See, *e.g.*, AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME I – INSTITUTIONAL POWERS (West Academic Publishing, St. Paul, MN. 2016); AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME II – LIBERTIES (West Academic Publishing, St. Paul, MN. 2016); Principles of Constitutional Law (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).

8 *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016).

9 Ron Rotunda, "The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech," *The Wall Street Journal*, Aug. 16, 2016, http://www.wsj.com/articles/the-aba-overrules-the-first- amendment-1471388418.

Professor Rotunda also recently published an extensive critique of Model Rule 8.4(g), entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought."[10] His analysis is essential to understanding the threat that the new rule poses to attorneys' freedom of speech.

On November 20, 2017, at the Federalist Society's National Convention, Professor Rotunda participated in a panel with former ABA President Paulette Brown and Professor Stephen Gillers on Model Rule 8.4(g). htpps://www.youtube.com/watch?v=V6rDPjqBcQg.

Influential First Amendment scholar and editor of the daily legal blog, The Volokh Conspiracy, UCLA Professor Eugene Volokh has similarly described the new rule as a speech code for lawyers, explaining:[11]

> 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."

In a two-minute video released by the Federalist Society, Professor Volokh explains why Model Rule 8.4(g) is a speech code. In a debate at the Federalist Society's National Student Symposium in March 2017, Professor Volokh demonstrated the flaws of Model Rule 8.4(g) despite his opponent's attempts to gloss over them. https://www.youtube.com/watch?v=cOivGxOUx4g.

These significant red flags raised by leading First Amendment scholars 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, or otherwise engage in public discussions regarding current political, social, and religious questions.

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10 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.

11 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.

1. **By expanding its coverage to include all "conduct related to the practice of law," the proposed Rule 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.**

Proposed Rule 8.4(g) raises troubling new concerns for every attorney because it explicitly applies to all "conduct related to the practice of law." Comment [4] to ABA Model Rule 8.4(g) explicitly delineates Model Rule 8.4(g)'s extensive reach: "Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law, operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law." (Emphasis supplied.)

Note that Model Rule 8.4(g) greatly expands upon its predecessor Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 through July 2016, which is the current Comment [3] to Tennessee RPC 8.4. First, the proposed Model Rule 8.4(g) has an accompanying comment that makes clear that "conduct" encompasses "speech," when it states that "discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others." (Emphasis supplied.) Second, Model Rule 8.4(g) is much broader in scope than its predecessor Comment [3], which applied only to conduct "in the course of representing a client." Instead, the ABA's Model Rule 8.4(g) applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." As discussed below, this is a breathtaking expansion of the scope of former ABA Comment [3], which is the current Comment [3] that accompanies RPC 8.4 in this Court's Rules of Professional Conduct. Third, the predecessor ABA Comment [3] speaks in terms of "actions when prejudicial to the administration of justice." By deleting that qualifying phrase, the new Rule 8.4(g) also greatly expands the reach of the rule into attorneys' lives.

Indeed, the substantive question becomes, what conduct does Rule 8.4(g) not reach? Virtually everything a lawyer does is "conduct related to the practice of law." Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Most likely, the rule includes all "business or social activities in connection with the practice of law" because there is no real way to delineate between the two. 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, activities likely to fall within the proposed Rule 8.4(g)'s scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds
- giving guest lectures at law school classes
- speaking at public events
- participating in panel discussions that touch on controversial political,

religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to nonprofits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one's congregation
- serving one's alma mater if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving on the boards of fraternities or sororities
- volunteering with or working for political parties
- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues

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 religious ministries.

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit 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.

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related 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 related 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.

By chilling attorneys' speech, the rule is likely to do real harm to religious institutions and their good works in their communities. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law," yet ABA Model Rule 8.4(g) creates such concerns. Because ABA Model Rule 8.4(g) seems to prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyers' free speech and free exercise of religion when serving their congregations and religious institutions.

3. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline.

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. Of course, lawyers are asked to speak because they are lawyers. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Writing -- "Verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar? If so, public discourse and civil society will suffer from the ideological paralysis that Model Rule 8.4(g) will impose on lawyers.

Speaking -- It would seem that all public speaking by lawyers on legal issues falls within Model Rule 8.4(g)'s prohibition. But even if some public speaking were to fall outside the parameters of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various protected categories in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in Model Rule 8.4(g)? 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 tuition assistance programs?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, Model Rule 8.4(g) chills attorneys' speech.

4. Attorneys' membership in religious, social, or political organizations may be subject to discipline.

Model Rule 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibits all California state judges from participating in Boy Scouts because of the organization's teaching regarding sexual conduct.[12]

12 Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, *available at*

Would ABA Model Rule 8.4(g) 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?

ABA Model Rule 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs or that holds to the religious belief that marriage is only between a man and a woman or numerous other religious beliefs implicated by the rule's strictures. See Texas A.G. Op., https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf. Bear in mind that some government officials claim that the right of a religious group to choose its leaders according to its religious beliefs is "religious discrimination."

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

As seen in the ABA's Comment [4], ABA Model Rule 8.4(g) 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." Because "conduct" includes "verbal conduct," 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. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. 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." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Yet Model Rule 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, what speech or action does or does not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of uniformity.

Because enforcement of Model Rule 8.4(g) gives governmental actors unbridled discretion to determine which speech is permissible and which is impermissible, which speech "promote[s] diversity and inclusion" and which does not, the rule clearly countenances viewpoint discrimination based on governmental actors' subjective biases. Courts have recognized that giving any government official such unbridled discretion to

http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

suppress citizens' free speech is unconstitutional. *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).

C. A Troubling Gap Exists Between Protected and Unprotected Speech Under ABA Model Rule 8.4(g).

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 Rule 8.4(g) utterly circular. Like the proverbial dog chasing its tail, Rule 8.4(g) protects "legitimate advice or advocacy" only if it is "consistent with" Rule 8.4(g). That is, speech is permitted by Rule 8.4(g) if it is permitted by Rule 8.4(g).

This circularity itself compounds the threat that Model Rule 8.4(g) poses to attorneys' freedom of speech. The epitome of an unconstitutionally vague rule, Rule 8.4 violates the Fourteenth Amendment as well as the First Amendment. Again, who decides what speech is legitimate? By what standards? 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 the attorney.

D. Model Rule 8.4(g)'s threat to free speech is compounded by the fact that it utilizes a negligence standard rather than a knowledge/intent requirement.

As 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 'objectively reasonable lawyer' will be constructed for purposes of making this determination.

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

V. This Court Should Not Adopt Model Rule 8.4(g) Because the Two Sentences Added by the Tennessee Bar Association as Attempts to Remedy Model Rule 8.4(g)'s Damage to Attorneys' Speech Rights Provide No Additional Protection.

Model Rule 8.4(g) is a speech code for lawyers, threatening their First Amendment rights in myriad ways. In its Petition urging adoption of Model Rule 8.4(g), the Tennessee Bar Association claims that two sentences which it added will adequately protect Tennessee attorneys' First Amendment rights. But even the most cursory reading of these two sentences proves that claim to be false.

Sentence #1: Proposed Comment [4a] would add to proposed Model Rule 8.4(g) this sentence: "Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section." (Pet., Ex. A at 3).

This sentence obviously provides no added protection because Model Rule 8.4(g) applies to "conduct related to the practice of law." Its text does not claim to apply to "conduct not related to the practice of law. Therefore, a sentence to protect "speech or conduct not related to the practice of law" does nothing to cabin the damage done by Model Rule 8.4(g) because of the broad scope of "conduct related to the practice of law." The sentence is meaningless.

Sentence #2: Proposed Comment [4] would add this sentence: "Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation." (Pet., Ex. A at 2). Again, this is an empty sentence. It begs the question of what is "legitimate advocacy" and who decides whether a lawyer's words are protected "legitimate advocacy" or unprotected "illegitimate advocacy."

VI. Model Rule 8.4(g) has been interpreted in at least one state to override a lawyer's ability to accept, decline, or withdraw from a representation in accordance with Rule 1.16.

The only state to have adopted Model Rule 8.4(g), Vermont, included its assurance that the rule "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." But 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 also 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)." https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP 8.4(g). pdf. The Vermont Supreme Court's interpretation of that language in its Comment

4 creates reasonable doubt that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation.

VII. Bar Officials in California and Pennsylvania Have Expressed Grave Reservations About Whether State Bars Have the Resources to Become the Tribunal of First Resort for Employment Claims Against Attorneys and Law Firms.

California State Bar authorities voiced serious concern last year when considering whether to modify their disciplinary rule to something more akin to the ABA Model Rule 8.4(g). California's current Rule 2-400 requires that a separate judicial or administrative tribunal have found that a lawyer committed unlawful discrimination before disciplinary charges can be brought. According to Justice Lee Smalley Edmon, the presiding justice of the Second District, Division Three of the California Courts of Appeals and the Chair of the State Bar's Second Commission for the revision of the Rules of Professional Conduct, "[t]he proposed elimination of current Rule 2-400(C)'s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings."[13] For that reason, she explained, an alternative was being offered to leave in place Rule 2-400(C)'s requirement that an attorney cannot be disciplined for unlawful discrimination unless a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law and any appeal is final and leaves the finding of unlawful discrimination standing.

Similarly, an official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court's adjudicatory process and the state civil courts' adjudicatory processes.[14] In the words of the State Bar Court official, "the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings."[15] First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different. "State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases."[16] Any relevant evidence must be admitted, and hearsay evidence may be used. Third, "[i]n disciplinary proceedings, attorneys are not entitled to a jury trial."[17]

The California Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement. It described the problems with the requirement's deletion as follows:

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13 Justice Lee Smalley Edmon, "Wanted: Input on Proposed Changes to the Rules of Professional Conduct," *California Bar Journal*, Aug. 2016, http://calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx.

14 Comm'n Provisional Report & Recommendation: Rule 8.4.1 [2-400], at 9, http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20[2-400]%20-%20Rule%20-%20DFT5%20(02-19-16)%20w-ES-PR.pdf.

15 *Id.*

16 *Id.*

17 *Id.*

> Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, . . . lack of [the State Bar's Office of Chief Trial Counsel] resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.[18]

Similarly, a recent memorandum outlining Pennsylvania's Proposed Rule 8.4(g) correctly identified two defects of ABA Model Rule 8.4(g) that Pennsylvania's Proposed Rule 8.4(g) would avoid.[19] Pennsylvania's proposed rule would adopt a rule like several states have, including Illinois, Iowa, and California, that requires that a judicial or administrative tribunal, other than a state bar tribunal, find that an attorney committed unlawful discrimination before the state bar may entertain a disciplinary complaint against the attorney. The memorandum identifies the first defect of ABA Model Rule 8.4(g) to be its "potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers." Mem. at 2. Second, as the Memorandum concluded, "after careful review and consideration ... the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities."[20]

Conclusion

The threat of losing one's license to practice law is a heavy penalty and demands a stringent process, one in which the standards for enforcement are rigorous and respectful of the attorneys' rights, as well as the rights of others. Comment [3] of the Tennessee Rules of Professional Conduct already provides a carefully crafted balance between the need to prevent discrimination and the need to respect attorneys' due process and First Amendment rights.

Because adoption of the ABA Proposed Model Rule 8.4(g) would have a chilling effect on attorneys' First Amendment rights, it should not be adopted. Attorneys must remain free to engage in speech, religious exercise, assembly, and expressive association in their workplaces and the public square.

Because no state, except Vermont in September 2017, has adopted ABA Model Rule 8.4(g), it has no track record. Nor is there any empirical evidence showing a need to adopt the excessively broad ABA Model Rule 8.4(g).

For all of these reasons, I uge that the ABA Model Rule 8.4(g) not be adopted. Thank you for your consideration of these comments.

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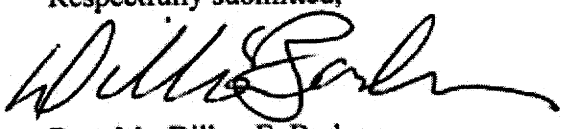
18 Comm'n Report at 13.

19 "Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct," 46 Pa.B. 7519 (Dec. 3, 2016) ["Memorandum"].

20 *Id.*

Respectfully submitted,



Rev. Mr. Dillon E. Barker

Tenn. Bar no. 027083
Deacon in Residence*
St. Edward Parish
188 Thompson Lane
Nashville, Tennessee 37211
(423) 754-3244
dillon.e.barker@gmail.com

* The foregoing comment letter is submitted in the writer's personal capacity as a Tennessee attorney and does not necessarily reflect the views, opinions, or positions of St. Edward Parish, the Diocese of Nashville, or the Holy See.

appellatecourtclerk - No. ADM2017-02244

From: Joshua McCaig <JMcCaig@Polsinelli.com>
To: "'appellatecourtclerk@tncourts.gov'" <appellatecourtclerk@tncourts.gov>
Date: 1/2/2018 12:01 PM
Subject: No. ADM2017-02244
Attachments: NLA Model Rule 8.4g Statement-c.pdf

Dear Mr. James M. Hivner,

In response to the Supreme Court of Tennessee's order of November 21, 2017 regarding the petition for adoption of RPC 8.4(g), the National Lawyers Association submits the attached written comment against adoption of this model rule for your consideration. If you could please provide a response that this comment was received I would greatly appreciate it. Thank you.

Best regards,

Joshua McCaig
NLA President

Joshua McCaig
Attorney at Law

jmccaig@polsinelli.com
816.395.0651
900 W. 48th Place, Suite 900
Kansas City, MO 64112
polsinelli.com

POLSINELLI

Polsinelli PC, Polsinelli LLP in California

NATIONAL LAWYERS ASSOCIATION

COMMISSION FOR THE PROTECTION OF CONSTITUTIONAL RIGHTS

STATEMENT ON ABA MODEL RULE 8.4(g)

The National Lawyers Association

The National Lawyers Association ("NLA") is a 501(c)(6) non-profit, non-partisan professional membership association founded in 1993 comprised of lawyers, legal scholars, professors, law students and other legal and policy professionals committed to expanding liberty, increasing individual freedom, promoting justice, and strengthening the rule of law in America. Since its founding, the NLA's membership has included thousands of attorneys in all 50 states.

On behalf of its members, the NLA's Commission for the Protection of Constitutional Rights established a special Task Force to closely examine the language of new Model Rule 8.4(g), the findings of which are summarized below. Based on this review, the NLA finds that Model Rule 8.4(g), if adopted by any state and enforced against any attorney, would violate the free speech, free association, and free exercise rights of that state's attorneys under the First Amendment to the Constitution of the United States.

The New ABA Model Rule 8.4(g)

The American Bar Association's House of Delegates adopted the ABA Model Rules of Professional Conduct, formerly known as the Model Rules of Professional Responsibility, in 1983. The Rules serve as models for the ethics rules of most states. In fact, the Model Rules have been adopted, in some form or another, by every state except California, as well as by the District of Columbia. Periodically, the ABA amends the Rules and encourages states to adopt the amended language as part of the states' Rules of Professional Conduct.

Given the fact that an attorney's violation of a state's ethics Rules has real consequences, which vary from state to state, but which can range from a reprimand to disbarment, it is critical that the constitutionality of any proposed amendment of the Rules be closely evaluated prior to state adoption - for once adopted by a state, the Rules have the force and effect of law.

On August 8, 2016, the American Bar Association's House of Delegates amended Model Rule 8.4 – the Attorney Misconduct Rule – of the Model Rules of Professional Conduct by adding a subsection (g) to the Rule.

The language of Model Rule 8.4(g) reads:

It is professional misconduct for a lawyer to: . . . (g) 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 or socioeconomic status related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The ABA also adopted three new Model Comments to the new Rule 8.4(g).

Model Comment [3] attempts to clarify what the new Model Rule means by prohibiting "discrimination" and "harassment." According to Comment [3], discrimination includes "harmful verbal...conduct that manifest bias or prejudice toward others." "Harassment includes...derogatory or demeaning verbal....conduct."

Model Comment [4] provides examples of the type of attorney speech and conduct which is "related to the practice of law." According to the Comment, such conduct includes, but is not limited to, "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law," "operating or managing a law firm or law practice," and "participating in bar association, business or social activities in connection with the practice of law."

FINDINGS OF THE NLA TASK FORCE ON MODEL RULE 8.4(g)

In accordance with its mandate, the NLA Task Force on Model Rule 8.4(g) focused only on the potential constitutional violations of the new Rule. The Task Force's findings are limited specifically to constitutional analysis. Other problems with the Rule, including that it, for the first time, expands attorney regulation and discipline into areas unconnected with prejudice to the administration of justice or conduct that renders an attorney unfit, and that it infringes upon attorneys' professional autonomy, are not addressed, only because such issues are outside the Task Force's mandate.

A. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of speech

Lawyers do not surrender their constitutional rights when they enter the legal profession. *In re Primus*, 436 U.S. 412, 432-33 (1978). See also *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1054 (1991)(disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 469 (1988) (the First Amendment applies to state bar disciplinary actions through the Fourteenth Amendment).

Although decisions of the United States Supreme Court have held that an attorney's free speech rights may be circumscribed to some extent in the courtroom during a judicial proceeding, as well as outside the courtroom when speaking about a pending case, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991), Model Rule 8.4(g) extends far beyond the context of a judicial proceeding. It purports to restrict all speech that constitutes

"discrimination" or "harassment" whenever such speech is – however attenuated – "related to the practice of law." Model Comment [3] makes clear that this includes any so-called "harmful," "derogatory," or "demeaning" speech.

But speech is not unprotected merely because it is unpopular, harmful, derogatory or demeaning. In fact, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). See also, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If 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 itself offensive or disagreeable"). Therefore, if an attorney engages in speech - although unpopular, derogatory, demeaning, or offensive – but the speech does not prejudice the administration of justice or render the attorney unfit, such speech is constitutionally protected.

"All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - fall within the full protection of the First Amendment." *Roth v. United States*, 354 U.S. 476, 484 (1957). Contrary to these 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.

Furthermore, by only proscribing speech that is unpopular, derogatory, demeaning, or harmful *toward members of certain designated classes*, the new Model Rule constitutes an unconstitutional content-based speech restriction. *American Freedom Defense Initiative v. Metropolitan Transp. Authority*, 880 F.Supp.2d 456 (S.D.N.Y. 2012) (ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

For example, under the new Rule a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that manifests discrimination on the basis of sexual orientation, while a lawyer who speaks in favor of same-sex marriage would certainly not be in violation of the Rule. That is a classic example of an unconstitutional content-based speech restriction.

"Viewpoint discrimination is thus an egregious form of content discrimination. The 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." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provides a concrete example of how the new Model Rule may constitute an unconstitutional content-based speech restriction. He explains: "*At a . . .bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.'*

Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally, another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline." *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016.

In other words, whether a lawyer has or has not violated the new Model Rule will be determined solely by reference to the content of the speaker's speech. Although attorneys may be speaking on the same subject matter, whether their speech violates the Rule will depend entirely upon the content of their speech. Some of the attorneys will be immune, based solely upon the content of their speech. Others could be prosecuted, based solely upon the content of their speech.

Indeed, in the few states that have already modified their respective Rule 8.4 in similar ways, such Rules are being enforced as clearly unconstitutional free-standing speech codes. See, for example, *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Indiana Supreme Court 2010), in which an Indiana attorney was professionally disciplined for asking someone if they were "gay," and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Indiana 2010) in which an attorney had his license suspended for applying a racially derogatory term to himself.

B. Model Rule 8.4(g) violates attorneys' First Amendment right to free exercise of religion

Model Rule 8.4(g) would also infringe upon an attorney's First Amendment right to free exercise of religion. For example, in the same-sex marriage context, the U.S. Supreme Court has emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." *Obergefell v. Hodges*, 135 S. Ct. 25 84, 2607 (2015).

The new Model Rule, however, would discipline attorneys for expressing their religiously based opinions concerning same-sex marriage.

Professor Rotunda posits the example of Catholic attorneys who are members of an organization of Catholic lawyers and judges, like the Catholic Bar Association. If the Catholic Bar Association should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. Indeed – he points out – attorneys might be in violation of the new Rule merely for being members of such an organization. *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage

Foundation, October 6, 2016, pp. 4-5. And yet, such speech and the right to belong to the Catholic Bar Association would both be constitutionally protected.

By prohibiting both, the new Rule would constitute an unconstitutional infringement on not only the free speech and free association rights of attorneys, but their free exercise rights as well.

C. Model Rule 8.4(g) violates attorneys' First Amendment right to freedom of association

"[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S.. Jaycees*, 468 U.S. 609, 622 (1984). "This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000). The First Amendment protects rights of association and assembly.

The new Model Rule 8.4(g), however, would violate attorneys' constitutionally protected rights to associate freely.

Under the new Rule an attorney could not belong to a legal organization, such as the Christian Legal Society, that requires its attorney members to acknowledge and agree with a Christian Statement of Faith, because belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion. https://clsnet.org/page.aspx?pid=367. The Christian Legal Society also has a Community Life Statement in which members "renounce unbiblical behaviors, including . . . immoral conduct such as . . . engaging in sexual relations other than within a marriage between one man and one woman." https://clsnet.org/page.aspx?pid=494. An attorney belonging to such an organization would violate the new Model Rule because, again, such would constitute conduct related to the practice of law, and would "discriminate" on the basis of marital status and, some may argue, sexual orientation.

Nor would the new Model Rule allow attorneys to be members of the Catholic Bar Association, which requires its attorney members to be practicing Catholics because, again, belonging to such an organization would constitute conduct related to the practice of law and that "discriminates" against attorneys based on their religion.

Clearly, however, attorneys have a constitutional right to freely associate with other attorneys in pursuit of a wide variety of ends – including religious ends. The new Model Rule would clearly violate that right.

D. Model Rule 8.4(g) is unconstitutionally vague

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Grayned*, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned*, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned*, supra, at 109.

The language of Rule 8.4(g) violates all these principles.

(a) The term "harassment" is unconstitutionally vague. The new Model Rule prohibits attorneys from engaging in harassment of anyone on the basis of one of the protected classes. But the term "harassment" is not defined in the Rule, is subject to varied interpretations, and no standard is provided to determine whether conduct is or is not harassing.

Does expressing disagreement with someone's religious beliefs constitute harassment based on religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment?

Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996) (holding that the term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague). *See also Are Stalking Laws Unconstitutionally Vague Or Overbroad*, 88 Nw. U. L. Rev. 769, 782 (1994) (the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass.").

Because the term "harass" is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to

enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid inadvertently violating the Rule.

The new Comments to the Rule attempt to define the term "harassment," but in doing so actually raise additional concerns. For example, Comment [3] to the new Rule provides that harassment includes *derogatory or demeaning verbal or physical conduct.* Unfortunately, rather than clarifying (let alone limiting) the meaning of the term "harassment," the terms "derogatory" and "demeaning" present the same vagueness issues as the term they are intended to define. Indeed, because it is not clear what speech is encompassed by the words "derogatory" and "demeaning," courts have found those terms to be unconstitutionally vague. *Hinton v. Devine*, 633 F.Supp. 1023 (E.D. Pennsylvania 1986) (the term "derogatory" without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal.App.4th 669 (Cal.App. 2012) (statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

(b) The term "discrimination" is unconstitutionally vague. It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it's also true that such statutes and ordinances do not – as does the new Model Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

For example, Title VII does not merely provide that it shall be an unlawful employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that "It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2.

Likewise, the federal Fair Housing Act does not simply provide that one may not discriminate in housing based on race, color, religion, familial status, or national origin. It provides a description of what, specifically, is being prohibited: "[I]t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce

or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604. And the Act provides precise definitions of important terms used in the Act, such as "dwelling," "person," "to rent," and "familial status." 42 U.S.C. § 3602.

Unlike other non-discrimination enactments, however, the new Model Rule simply states that "It is professional misconduct for a lawyer to: . . . (g) knowingly . . . discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law" – leaving to the attorney's imagination what sorts of speech and behavior might be encompassed in that proscription.

Making matters worse, Model Comments [3] to Model Rule 8.4(g) states that the term "discrimination" includes "harmful verbal or physical conduct that manifests bias or prejudice towards others." The term "harmful" – in the context of attorney speech and conduct – is unconstitutionally vague because attorneys cannot with any degree of reasonable certainty determine what speech and conduct may be prohibited and what may be allowed.

(c) The phrase "conduct related to the practice of law" is unconstitutionally vague. Whereas the previous Model Rule applied only to attorney conduct while the attorney is acting in the course of representing a client – a relatively narrow and reasonably determinable aspect of a lawyer's activities – the new Rule applies to any conduct of an attorney that is in any way "*related to the practice of law.*" What conduct is related to the practice of law and what conduct is unrelated to the practice of law, however, is vague and not readily determinable.

The new Comment [4] attempts to provide guidance as to what the phrase "related to the practice of law" means. But not only is the Comment's definition nearly limitless – including within it *representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law* – but its list of activities related to the practice of law is an expressly non-exclusive list. Activities other than those expressly included in the Comment could also qualify as being in connection with the practice of law. But what those activities may be is difficult to determine. For example, does the phrase include comments made by an attorney while attending a birthday celebration for a law firm co-worker; or a statement made by an attorney at a cocktail party that the attorney is attending – at least in part – in order to make connections that will hopefully result in future legal work; or comments an attorney makes while serving on the governing board of the attorney's church and to whom the board periodically looks for church-related legal advice?

Because no attorney, with any reasonable degree of certainty, can determine what speech

or conduct is or is not "related to the practice of law," the new Rule is unconstitutionally vague.

E. Model Rule 8.4(g) is unconstitutionally overbroad

Even if an enactment is otherwise clear and precise in what conduct it proscribes, the law may nevertheless still be unconstitutionally overbroad if its reach prohibits constitutionally protected conduct. *Grayned*, supra, at 114.

It is clear that the new Model Rule is not only unconstitutionally vague, it is also unconstitutionally overbroad because, although it may apply to attorney conduct that might be unprotected – such as conduct that actually and significantly prejudices the administration of justice or that would clearly render an attorney unfit to practice law – Model Rule 8.4(g) would also sweep within its orbit lawyer speech that is clearly protected by the First Amendment, such as speech that might be unpopular, offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit.

The terms "harmful verbal conduct" and "derogatory or demeaning verbal conduct" sweep into their ambit much speech that is clearly constitutionally protected. As noted above, speech is not unprotected merely because it is harmful, derogatory or demeaning. *Snyder v. Phelps*, supra at 458. In fact, that is precisely the sort of speech that is constitutionally protected. Speech that no one finds offensive needs no protection.

Courts have found terms such as "derogatory" and "demeaning" unconstitutionally overbroad. *Hinton v. Devine*, *supra* (the term "derogatory information" is unconstitutionally overbroad); *Summit Bank v. Rogers*, *supra* (statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech). *See also Saxe v. State College Area School Dist.*, 240 F.3d 200, 215 (3rd Cir. 2001) (school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional).

And it is irrelevant whether such speech would ever actually be prosecuted by disciplinary authorities under the new Rule. The fact that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – the very danger the overbreadth doctrine is designed to prevent.

CONCLUSION

After carefully reviewing the new ABA Model Rule 8.4(g) and its Comments, the National Lawyers Association finds that the new ABA Model Rule 8.4(g), if adopted by any state and enforced against any attorney, would violate an attorneys' free speech, free association, and free exercise rights under the First Amendment to the Constitution of the United States. Therefore, the National Lawyers Association recommends that no state adopt Model Rule 8.4(g), and that any state that might have adopted Model Rule 8.4(g) take all steps necessary to repeal and remove subsection (g) from its Rules of Professional Conduct.

Dated: March 7, 2017

NLA CPCR Task Force Members:

Rebecca Messall

Joshua McCaig

Bradley Abramson

Joe Miller

Gualberto Garcia Jones

Andrew Bath

Marsha I. Stiles

Joseph Meissner

appellatecourtclerk - Comment Regarding proposed Amendment to RPC 8.4(g)

ADM2017-02244

FILED

DEC 29 2017

Clerk of the Courts

Rec'd By _____

From: Alex Clark <alex.clark@atwoodandmoore.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 12/29/2017 4:15 PM
Subject: Comment Regarding proposed Amendment to RPC 8.4(g)

To whom it may concern,

The duty held by those who have chosen to practice law is a solemn one. A duty in which there is no place for discrimination of any kind. That the RPC currently utilizes mere comment to directly address the many forms of discrimination cannot be allowed to continue. The proposed rule addresses in clear language to whom and under what conditions discrimination occurs. At the same time it protects free speech rights of attorneys speaking outside conduct related to the practice of law. I humbly ask the Court to approve the proposed language.

Yours truly,

Alexander W. Clark
Atwood & Moore - Attorneys at Law
144 Uptown Square
Murfreesboro, TN 37129
615.895.2421

appellatecourtclerk - Model Rule 8.4(g) ADM2017-02244

From: <james@heartfieldlaw.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 12/26/2017 1:30 PM
Subject: Model Rule 8.4(g)

Dear Mr. Hivner,

I am writing to provide my strong objection to the proposed adoption of Model Rule 8.4(g). In my humble, as a practicing Tennessee attorney for the past 28 years, I believe this proposed Rule will unduly and improperly infringe upon my First Amendment rights of free speech and cannot envision how or why the Court would seriously entertain adopting this Rule. As such, my official public comment is that this Rule should not be adopted in Tennessee, and I appreciate your recording the same and passing along to the Court.

Thank you and best wishes for a fulfilling 2018.

James Heartfield
TN Bar 013824

Law Office of James C. Heartfield, Esq.
2288 Gunbarrel Road
Suite 154 - 249
Chattanooga, TN 37421
Tel: 423.580-3226
Email: James@HeartfieldLaw.com

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appellatecourtclerk - Docket No. ADM2017-02244

From: Robert Pautienus <robert@fidelislawfirm.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 12/27/2017 5:10 PM
Subject: Docket No. ADM2017-02244

December 27, 2017

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Associate Justice
The Honorable Holly Kirby, Associate Justice
The Honorable Sharon G. Lee, Associate Justice
The Honorable Roger A. Page, Associate Justice

Attn: James M. Hivner, Clerk:
I am opposed to the adoption of ABA Model Rule 8.4(g) as the new Tenn. Sup. Ct. R. 8, RPC 8.4(g). Based on my review of the proposed language and possible application of it, I see a myriad of situations in my practice where I would be placed in an ethical dilemma of possibly committing professional misconduct, simply by representing clients and offering professional advice and counsel that could be perceived as discrimination by one of the numerous classifications listed. The last two sentences of the proposed rule, particularly the last sentence, provide less clarity and more ambiguity. I urge you to leave the current standard in place without any amendments.

Robert M. Pautienus III, Esq.
Fidelis Law, PLLC
216 Centerview Drive, Suite 317
Brentwood, Tennessee 37027
615.370.3010 / 615.371.8769 Fax
www.fidelislawfirm.com

under federal law or (B) promoting, marketing, or recommending to another party any transaction or matter addressed in this communication (or any attachment).

Lisa Marsh - Re: Tenn. Sup. Ct. R. 9, section 32 Tennessee Appellate Courts

ADM2017-02244

From: Josh Blackman <jblackman@stcl.edu>
To: <appellatecourtclerk@tncourts.gov>
Date: 12/11/2017 6:25 PM
Subject: Re: Tenn. Sup. Ct. R. ~~9, section 32~~ Tennessee Appellate Courts
Attachments: Tennessee-Letter.pdf; Blackman_Final.PDF

Dear Mr. Hivner:

I write in response to the Supreme Court of Tennessee's request for public comments concerning the proposal to adopt a new RPC 8.4(g). I recently published an article about Model Rule 8.4(g), titled *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law,"* in Volume 30 of the Georgetown Journal of Legal Ethics. For your convenience, I have attached a copy of the article, which can also be downloaded at https://ssrn.com/abstract=2888204.

Sincerely,

Josh Blackman

ADM2017-02244

SOUTH TEXAS
COLLEGE OF LAW

Josh Blackman
Associate Professor
South Texas College of Law Houston
1303 San Jacinto Street
Houston, TX 77002
JBlackman@stcl.edu

James M. Hivner, Clerk
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407
appellatecourtclerk@tncourts.gov

Re: Tenn. Sup. Ct. R. 9, section 32 Tennessee Appellate Courts

December 11, 2017

Dear Mr. Hivner:

I write in response to the Supreme Court of Tennessee's request for public comments concerning the proposal to adopt a new RPC 8.4(g). I recently published an article about Model Rule 8.4(g), titled *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law,"* in Volume 30 of the GEORGETOWN JOURNAL OF LEGAL ETHICS. For your convenience, I have attached a copy of the article, which can also be downloaded at https://ssrn.com/abstract=2888204. This letter provides four recommendations of how the proposed rule can be modified to avoid chilling speech under the First Amendment.

The proposed RPC 8.4(g) adopts ABA Model Rule 8.4(g) and comment [3] in their entirety. There are three additions, which I applaud.

First, the proposed comment [4] offers a definition of the phrase "legitimate advocacy" for the proposed RPC 8.4(g):

> Legitimate advocacy protected by Section (g) includes advocacy in any conduct related to the practice of the law, including circumstances where a lawyer is not representing a client and outside traditional settings where a lawyer acts as an advocate, such as litigation.

This comment could be improved by providing some context of what those non-traditional settings are. This sentence, which I suggest in my article, would suffice: "For example, this Rule does not apply to speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.'" This addition would clarify that an attorney's speech in the context of a lecture, debate, or CLE class, on a matter of public concern, would not amount to disciplinable conduct.

Second, proposed comment [4a] includes additional protections for free speech. It provides:

> [4a] Section (g) does not restrict any speech or conduct not related to the practice of law, including speech or conduct protected by the First Amendment. Thus, a lawyer's speech or conduct unrelated to the practice of law cannot violate this Section.

I also applaud this addition. It could be improved even further by replacing the first sentence with one used in an earlier draft of ABA Model Rule 8.4(g) from 2015, but was ultimately removed (see pp. 248-49 of my article). The comment provides: "This Rule does not apply to conduct protected by the First Amendment, as a lawyer does retain a 'private sphere'

where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to this rule." Making this change would clarify that not only are values of free speech protected, but also those of freedom of association, as well as freedom of exercise.

Third, proposed comment [5b] excludes a provision that was included in ABA Model Rule 8.4(g):

> A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a).

Rather, comment [5d] expands on this sentiment by clarifying that charging fees does not amount to discrimination on the basis of socioeconomic status:

> Nevertheless, a lawyer does not engage in conduct that harasses or discriminates based on socioeconomic status merely by charging and collecting reasonable fees and expenses for a representation.

I applaud this addition, which retains the right of an attorney to set "reasonable fees," without fear of a bar complaint.

Beyond these three revisions, this letter offers a **fourth** recommendation: the proposed comment [3] should be amended to clarify that for discrimination or harassment to fall within Rule 8.4(g), it must be "severe or pervasive." Along these same lines, the rule should stress that the law of antidiscrimination and anti-harassment statutes "will," and not "may" guide application of the paragraph. There is a well-established body of federal caselaw that disciplinary committees should rely on when determining if there has been discrimination or harassment. This tweak would also put all parties on notice of the relative burdens of proof. Here is a proposed redline of the revised comment [3]:

> *"Severe or pervasive"* discrimination and harassment by lawyers in violation of paragraph (g) undermines 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 *federal* antidiscrimination and anti-harassment statutes and case law ~~may~~ *will* guide application of paragraph (g).

Making the revisions suggested in this letter will allow the Tennessee Supreme Court to pursue the important purpose behind Rule 8.4(g), but do so consistently with the First Amendment.

It would be my pleasure to provide any further insights to inform your deliberations.

Sincerely,

Josh Blackman
Associate Professor
South Texas College of Law Houston

Reply: A Pause for State Courts Considering Model Rule 8.4(g)

The First Amendment and "Conduct Related to the Practice of Law"

JOSH BLACKMAN*

ABSTRACT

In August 2016, the American Bar Association approved Model Rule of Professional Conduct 8.4(g). Under the amendment, it is misconduct for an attorney 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 or socioeconomic status in conduct related to the practice of law." Comment [4] explains that "conduct related to the practice of law . . . includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law." The Model Rule is just that—a model, which does not apply in any jurisdiction. Now the project goes to the states, as state courts consider whether to adopt Rule 8.4(g).

Professor Stephen Gillers analyzes the new provision in this Issue with A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g). *This reply urges state courts to pause before adopting Rule 8.4(g) in light of its First Amendment implications.*

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* Associate Professor, South Texas College of Law, Houston. I am grateful to Scott H. Greenfield, Michael K. Krauss, and Ronald D. Rotunda, for their assistance with this Article.

INTRODUCTION

In August 2016, the American Bar Association (ABA) approved Model Rule of Professional Conduct 8.4(g). Under the amendment, it is misconduct for an attorney 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 or socioeconomic status in conduct related to the practice of law."[1] Comment [4] explains that:

> Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.[2]

The model rule is just that—a model that does not apply in any jurisdiction. Now the project goes to the states, as state courts consider whether to adopt Rule 8.4(g).

Professor Stephen Gillers analyzes the new provision in this Issue with *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts*

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1. STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY ET AL., REPORT TO THE HOUSE OF DELEGATES 1 (Aug. 8, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [https://perma.cc/K2XB-T76E] [hereinafter 2016 ABA REPORT].

2. *Id.* at 2.

Considering Model Rule 8.4(g).[3] This reply urges state courts to pause before adopting Rule 8.4(g) in light of its First Amendment implications. (Professor Gillers was given an opportunity to reply to my Article, but declined to do so.)[4]

Part I focuses on how Rule 8.4(g) extends a disciplinary committee's jurisdiction to "conduct related to the practice of law" for speech that can be deemed "harassment." Lectures given at CLE events, or dinner-time conversation at a bar association function, would now be subject to discipline if the speaker reasonably should know someone would find it "derogatory." The threat of sanction will inevitably chill speech on matters of public concern. Neither the rule nor its comments express any awareness of this novel intrusion into the private spheres of an attorney's professional life.

Part II compares the operation of Rule 8.4(g) with previous ABA model rules, as well as state-adopted anti-bias regimes. 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.

Part III discusses Rule 8.4(g)'s chilling effects. Though courts have generally upheld the regulation of attorney speech in the context of the practice of law, as the expression becomes more attenuated from the bar association's traditional purposes, the state interest becomes far less compelling. In this sense, past precedents upholding disciplinary actions for attorney speech are largely unhelpful. Rule 8.4(g) sweeps in a vast amount of speech on matters of public concern, and imposes an unlawful form of viewpoint discrimination. At bottom, the defenders of the model rule can only urge us to trust the disciplinary committees. The First Amendment demands more. This Article concludes by offering three simple tweaks to the comments accompanying Rule 8.4(g) that would still serve the drafters' purposes, but provide stronger protection for free speech.

I. MODEL RULE 8.4(G)

Rule 8.4(g)'s overarching purpose was to eliminate discrimination and harassment in "conduct related to the practice of law." Part I analyzes how the rule's design to eradicate "verbal" harassment sweeps in vast amounts of speech protected by the First Amendment.

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3. Professor Gillers notes his personal connection with the promulgation of the rule. 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, 197 n.2 (2017) ("My wife, Barbara S. Gillers, was a member of the Standing Committee on Ethics and Professional Responsibility, the sponsor of the amendment. I say this in the spirit of full disclosure.").

4. *See id.* at 195 n.*.

A. "CONDUCT RELATED TO THE PRACTICE OF LAW"

Rule 8.4(g)'s drafters were well intentioned. During a two-hour hearing held in February 2016, several witnesses expressed their concerns about sexual harassment that occurs during the practice of law, and in particular at after-hours social functions.[5] Attorney Wendi Lazar of New York, for example, acknowledged that "no one wants to engage in the . . . private aspects of a lawyer['s]," life, but stressed that she was "concerned that so much sexual harassment and bullying against women actually takes place on the way home from an event or in a limo traveling on the way back from a long day of litigation."[6] Ms. Lazar explained "that to say that these events are *social events* as opposed to professional events is" not accurate, as a more narrow definition would allow misconduct to go unpunished.[7]

Laurel Bellows, a past president of the ABA, offered anecdotes of sexual harassment occurring at a "Christmas party," or when a male partner asks a female associate to "dinner after the deposition is over," followed by a "social invitation" to "come to my room."[8] Ms. Bellows asked, rhetorically, "[i]s that in relation to the practice of law?" She suggested that the rule should govern conduct that is more than "simply related to the *technical* practice of law." The ABA's report, justifying the final version of Rule 8.4(g), cited the "substantial anecdotal information" provided to the Standing Committee of "sexual harassment" at "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law."[9] Read against this history, Rule 8.4(g) and comment [4] were crafted to allow disciplinary boards to punish lawyers who engage in sexual harassment at social activities that are not strictly connected with the attorney-client relationship or the operation of a law practice.

B. "HARASSMENT"

Rule 8.4(g) and comment [4], however, accomplish far, far more than punishing sexual harassment.[10] As a threshold matter, the rule does not proscribe only sexual harassment, but it also extends to the far broader category of

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5. *See* ABA House of Delegates, Tr. of Proceedings, Feb. 7, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.pdf [https://perma.cc/WNZ3-BA4Y] [hereinafter 2016 ABA HOD Proceedings].

6. *Id.* at 39.

7. *Id.* at 42.

8. *Id.* at 62.

9. 2016 ABA REPORT, *supra* note 1, at 11.

10. Joseph J. Martins, a law professor at Liberty University, submitted a comment addressing the likely unintended consequences of this rule. "The overbreadth and vagueness of the draft language imperils First Amendment liberties and the right to practice law itself. I cannot imagine this was the intent of the Committee, but the language of the proposed amendments leads me to this conclusion nonetheless." Joseph J. Martins, *Re: Proposed ABA Model Rule of Professional Conduct 8.4(g) and Comment [3]* (Mar. 11, 2016), http://www.

"harassment," which comment [3] defines to include "derogatory or demeaning verbal . . . conduct." Black's Law Dictionary defines "demeaning" as "[e]xhibiting less respect for a person or a group of people than they deserve, or causing them to feel embarrassed, ashamed, or scorned."[11] "Derogatory," not included in Black's, is defined by the Oxford Living Dictionary as "[s]howing a critical or disrespectful attitude."[12] Random House defines "derogatory" as "tending to lessen the merit or reputation of a person or thing; disparaging; depreciatory."[13] In the abstract, speech that satisfies *any* of these definitions is entirely protected by the First Amendment, and does not fall into any of the special exceptions to free speech, such a "fighting words" or "incitement."[14] As then-Judge Alito observed, there is no "categorical harassment exception" to the First Amendment.[15]

The courts have generally permitted the imposition of damages for verbal—that is, non-physical—sexual harassment in the employment context so long as the speech was so "severe or pervasive" that it created an "offensive work environment."[16] While comment [3] to Model Rule 8.4(g) explains that the "substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g),"[17] it does not impose a requirement of severity or pervasiveness. A single "harassing" comment could result in

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americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/martins_3_11_16.authcheckdam.pdf [https://perma.cc/SW9N-YPLW].

11. *Demeaning*, BLACK'S LAW DICTIONARY (10th ed. 2014).

12. *Derogatory*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/derogatory [https://perma.cc/U28W-PXB8] (last visited Apr. 20, 2017).

13. *Derogatory*, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1998).

14. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 791 (2011) ("These limited areas—such as obscenity, incitement, and fighting words—represent 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'") (citations omitted).

15. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001). It is worth noting that there is much uncertainty in the law concerning how the First Amendment limits hostile environment law; these laws may not be constitutional in the first instance. *See* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596–97 (5th Cir. 1995) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment . . . . Whether such applications of Title VII are necessarily unconstitutional has not yet been fully explored. The Supreme Court's offhand pronouncements are unilluminating.") (citations omitted). For purposes of this analysis of Rule 8.4(g), I will assume such a regime that polices verbal harassment, as distinguished from sexual harassment or discrimination, is constitutional. If it is not, then no tweaks will save the model rule from facial invalidation.

16. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 787–88 (1998) ("[I]n order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. We directed courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' Most recently, we explained that Title VII does not prohibit 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.' A recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'") (citations omitted).

17. 2016 ABA REPORT, *supra* note 1, at 2.

discipline. Further, the rule expressly extends beyond the work environment. Rule 8.4(g) and comment [4] provide a near-infinite number of fora where speech can be give rise to discipline.

Lectures and debates hosted by bar associations that offer Continuing Legal Education (CLE) credits are necessarily held "in connection with the practice of law." Lawyers are required to attend such classes to maintain their law licenses. It is not difficult to imagine how certain topics could reasonably be found by attendees to be "derogatory or demeaning" on the basis of one of the eleven protected classes in Rule 8.4(g). Consider several examples:

- *Race*—A speaker discusses "mismatch theory," and contends that race-based affirmative action should be banned because it hurts minority students by placing them in education settings where they have a lower chance of success.
- *Gender*—A speaker argues that women should not be eligible for combat duty in the military, and should continue to be excluded from the selective service requirements.
- *Religion*—A speaker states that the owners of a for-profit corporation who request a religious exemption from the contraceptive mandate are bigoted and misogynistic.
- *National Origin*—A speaker contends that the plenary power doctrine permits the government to exclude aliens from certain countries that are deemed dangerous.
- *Ethnicity*—A speaker states that *Korematsu v. United States* was correctly decided, and that during times of war, the President should be able to exclude individuals based on their ethnicity.
- *Disability*—A speaker explains that people with mental handicaps should be eligible for the death penalty.
- *Age*—A speaker argues that minors convicted of murder can constitutionally be sentenced to life without parole.
- *Sexual Orientation*—A speaker contends that *Obergefell v. Hodges* was incorrectly decided, and that the Fourteenth Amendment does not prohibit classifications on the basis of sexual orientation.
- *Gender Identity*—A speaker states that Title IX cannot be read to prohibit discrimination on the basis of gender identity, and that students should be assigned to bathrooms based on their biological sex.
- *Marital Status*—A speaker remarks over dinner that unmarried attorneys are better candidates for law firms because they will be able to dedicate more time to the practice.
- *Socioeconomic Status*—A speaker posits that low-income individuals who receive public assistance should be subject to mandatory drug testing.

For each topic—chosen for its deliberate provocativeness—a speaker "reasonably should know" that someone at the event could find the remarks disparaging

towards one of the eleven protected groups. A person whose marriage was legalized by *Obergefell*, or who gained access to a bathroom of choice under an interpretation of Title IX, or who immigrated from a country subject to an immigration ban, or who was admitted to college under an affirmative action plan, could plausibly feel demeaned by such arguments. Lest you think these charges are implausible, consider the tempestuous reaction to Justice Scalia's discussion of mismatch theory during oral arguments in *Fisher v. University of Texas at Austin*.[18] CLE lectures on any of these eleven topics would each be entirely protected by the First Amendment, yet could still give rise to liability under Rule 8.4(g). These eleven examples should reveal another fairly obvious result: speech on the right side of the political spectrum would disproportionately give rise to liability.[19] We will return to this unconstitutional form of viewpoint discrimination in Part III.

Further, comment [4] provides an even greater number of fora that could be deemed "connected to the practice of law." For example, dinners hosted by bar associations or similar legal groups, such as the Federalist Society or the NAACP, are "social activities" with a connection to the practice of law. If any of these eleven topics were discussed at the dinner table of such events, an attendee who felt demeaned could file a bar complaint.[20]

Additionally, teaching a law school class could be deemed "conduct related to the practice of law," as in virtually all states, attending an accredited law school is a prerequisite to becoming an attorney. The report accompanying the final

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18. *See, e.g.*, Stephen Dinan, *Scalia Accused of Embracing 'Racist' Ideas for Suggesting 'Lesser' Schools for Blacks*, WASH. TIMES (Dec. 10, 2015), http://www.washingtontimes.com/news/2015/dec/10/antonin-scalia-accused-of-embracing-racist-ideas-f/ [https://perma.cc/V6CX-DWHY]; Lauren French, *Pelosi: Scalia Should Recuse Himself from Discrimination Cases*, POLITICO (Dec. 11, 2015, 12:56 PM), http://www.politico.com/story/2015/12/nancy-pelosi-antonin-scalia-216680 [https://perma.cc/BCL5-VGWY]; Joe Patrice, *Scientists Agree: Justice Scalia Is a Racist Idiot*, ABOVE THE LAW (Dec. 14, 2015, 9:58 AM), http://abovethelaw.com/2015/12/scientists-agree-justice-scalia-is-a-racist-idiot/ [https://perma.cc/9GA8-2NGT]; David Savage, *Justice Scalia Under Fire for Race Comments During Affirmative Action Argument*, L.A. TIMES (Dec. 10, 2015, 2:40 PM), http://www.latimes.com/nation/la-na-scalia-race-20151210-story.html [https://perma.cc/U3T2-CBAE]; Debra Cassens Weiss, *Was Scalia's Comment Racist?*, A.B.A. J. (Dec. 10, 2015, 7:32 AM), http://www.abajournal.com/news/article/was_scalias_comment_racist_some_contend_blacks_may_do_better_at_slower_trac/ [https://perma.cc/G7DH-U5H3].

19. *See* Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities*, WASH. 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 [https://perma.cc/HEJ7-CLBH] ("And, of course, the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you're fine; if you express the contrary viewpoints, you're risking disciplinary action.").

20. *See id.* ("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.").

resolution also discusses how "lawyers engage in mentoring."[21] In many cases, teaching embraces forms of "mentoring" that are connected to bar exam preparation. Admittedly, this reading of the rule is somewhat tenuous. However, speaking from personal experience, students in my classes from various walks of life have found offensive lectures on a host of these topics.[22] The prospect of a bar complaint, where the Associate Dean's response does not provide enough solace, could be appealing to aggrieved students. The important question is not whether a student's reaction is "reasonable," but whether a professor should "reasonably" know a student will be triggered by disrespectful speech.

The rule could even apply to an attorney speaking at career day at his child's Catholic school about the role of faith in the practice of law.[23] Whether or not such complaints lead to any disciplinary action, the threat of liability would chill speech during a CLE debate, over dinner, and in the classroom.

C. "PROTECTED BY THE FIRST AMENDMENT"

The most striking aspect of the adoption of Model Rule 8.4(g) is how little awareness the ABA expressed about the boundless scope of prohibited speech.[24] Neither the rule nor the comments even reference the First Amendment. Charitably, such concerns simply may not have been on the drafters' minds, as they focused primarily on "substantial anecdotal information" provided to the Standing Committee about sexual harassment at after-hours events. Addressing such misconduct, which would also violate well-established employment law, was their primary target. But there is reason to suspect that there was a deliberate effort to include otherwise-protected speech as well.

An earlier draft of comment [3] from December 2015 stressed that the rule "does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment."[25] The accompanying report "ma[d]e clear that a lawyer does retain a 'private sphere' where personal opinion, freedom of association, religious expression, and political speech is protected by the First

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21. 2016 ABA REPORT, *supra* note 1, at 10.

22. Josh Blackman, *My (Rejected) Proposal for the AALS President's Program on Diversity*, JOSH BLACKMAN'S BLOG (Nov. 15, 2016), http://joshblackman.com/blog/2016/11/15/my-rejected-proposal-for-the-aals-presidents-program-on-diversity-the-effect-of-model-rule-of-professional-conduct-8-4g-and-law-school-pedagogy-and-academic-freedom/ [https://perma.cc/ZSL3-8TQ3].

23. Lindsey Keiser, Note, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629, 637–38 (2015).

24. Gillers devotes two sentences, all descriptive, to the scope of the new 8.4(g). Gillers, *supra* note 3, at 219 ("Not only would this language apply to client matters that are not before a tribunal, such as negotiation or counseling, it would also apply to a lawyer's words or conduct toward others in his or her law office and at professional meetings or on bar committees. It would cover a lawyer who made unwelcome sexual overtures to a subordinate lawyer or a legal assistant.").

25. STANDING COMM. ON ETHICS & PROF'L RESPONSIBILITY, AM. BAR ASS'N, NOTICE OF PUBLIC HEARING 14 (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.pdf [https://perma.cc/US3Z-F9BJ].

Amendment and not subject to the Rule."[26] The Standing Committee stressed that this provision "is a useful clarification," and "would appropriately address" some of the "possible First Amendment challenges" that may arise when "state court[s] adopted similar black letter provisions."[27] I wholeheartedly endorsed this analysis as I read through the rule's record chronologically.

Several comments that were supportive of Model Rule 8.4(g) praised the inclusion of this First Amendment proviso, as it assuaged concerns about possible constitutional infirmities. Myles Lynk, a member of the Standing Committee on Ethics and Professional Responsibility, endorsed comment [3]'s explicit reference to the First Amendment as "a useful clarification" that "avoid[s] other possible ambiguities."[28] The ABA's Standing Committee on Professional Discipline worried that even with this provision, the language was "overbroad," and questioned whether it "would withstand constitutional scrutiny" as it may "result in infringement upon lawyers' exercise of their First Amendment rights."[29] Other groups that opposed Rule 8.4(g), such as the Christian Legal Society, took little solace in this proviso, but appreciated its inclusion.

During the February 2016 hearing, however, Laurel Bellows, a past president of the ABA, took the opposite position. Including that provision, Bellows contended, would make it unduly difficult to mete out punishment because it "take[s] away" from the purpose of the rule.[30] She explained, "We know that the constitution governs," and the New York rule[31] "does not have any exception for conduct that might be protected by the First Amendment."[32] As a result, Bellows urged the Standing Committee to excise that provision.

Her argument is something of a non sequitur. New York Rule of Professional Conduct 8.4(g) applies only to the "practice of law," not "conduct related to the practice of law," and is limited to "discrimination," and not the more nebulous speech acts embraced by "harassment."[33] Attorneys, when engaged in the

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26. *Id.* at 5.

27. *Id.*

28. STANDING COMM. ON SEXUAL ORIENTATION & GENDER IDENTITY, AM. BAR ASS'N, PROPOSED AMENDMENT TO ABA MODEL RULE OF PROFESSIONAL CONDUCT 8.4, app. c (Feb. 7, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/sogi_comments_2_7_16.authcheckdam.pdf [https://perma.cc/Z76E-TNRC].

29. Letter from Arnold R. Rosenfeld, Chair, Am. Bar Ass'n Standing Comm. on Prof'l Discipline, to Myles V. Lynk, Chair, Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, at 4 (Oct. 8, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf [https://perma.cc/4UW4-RKB2].

30. *See* 2016 ABA HOD Proceedings, *supra* note 5, at 63.

31. N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) (2017) ("A lawyer or law firm shall not . . . unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation.").

32. 2016 ABA HOD Proceedings, *supra* note 5, at 63–64.

33. *Id.* at 39–40.

"practice of law," admittedly have severely constrained First Amendment rights. Ultimately, Bellows' position prevailed, and the proviso was *removed* in the second draft. Neither the final rule, nor the comments, nor the ratified report, makes any reference to the First Amendment.[34] This regrettable omission was deliberate.

II. ANTI-BIAS PROVISIONS BEFORE MODEL RULE 8.4(G)

The scope of Rule 8.4(g) is unprecedented in how far it goes beyond regulating conduct related to the practice of law, conduct related to a lawyer's fitness to practice, or conduct prejudicial to the administration of justice. Part II will analyze how Model Rules 8.4(a)–(f) operated before the amendment, and document how the states have narrowly tailored their anti-bias disciplinary provisions.

A. MISCONDUCT PROHIBITED BY THE MODEL RULES

The first seven sections of the *Model Rules of Professional Conduct* govern the responsibilities, duties, and restrictions on attorneys when they are practicing law or representing clients. Rules 1.0–1.18 define the various attributes of the client-lawyer relationship, including conflicts of interest and duties owed to clients. Rules 2.1–2.4 discuss the attorney's role as a counselor. Rules 3.1–3.9 prescribe an attorney's responsibilities as an advocate before tribunals and other fora. Rules 4.1–4.4 establish how an attorney must transact with people other than clients. Rules 5.1–5.7 govern an attorney's responsibilities as part of a law firm or association. Rules 6.1–6.5 center around an attorney's commitment to public service, including pro bono work. Rules 7.1–7.6 focus on how an attorney can convey information about legal services, such as through advertising to, and solicitation of, clients. If an attorney violates any of these rules, he or she is in violation of Rule 8.4(a).[35]

The remainder of Rule 8.4, however, governs conduct that is increasingly more attenuated from the actual practice of law. Rule 8.4(b) states that it is misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Not *all* criminal acts are misconduct—only those that "reflect[] adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." In a sense, white-collar crimes, more so than violent crimes, warrant this disapprobation. Rule 8.4(c)

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34. Gillers writes that an attorney "remains free to argue that as applied to his or her conduct the rule is unconstitutional . . . whether or not the rule says, for example, 'subject to the First Amendment.'" Gillers, *supra* note 3, at 231.

35. MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2016) ("It is professional misconduct for a lawyer to . . . 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.").

provides that it is misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Thus, even if an action is not criminal, so long as it "involv[es] dishonesty, fraud, deceit, or misrepresentation," it warrants disciplinary action. Indeed, Rule 8.4(c) swallows up virtually all of the conduct that satisfies 8.4(b), and then some. These two provisions articulate a standard that a lawyer's actions, even when unconnected with the practice of law, must at all times promote honesty and trustworthiness, so there is no doubt about his or her fitness to practice law.

Rule 8.4(d) states that lawyers cannot "engage in conduct that is prejudicial to the administration of justice." For example, the ABA's May 2016 report on the proposed Model Rule 8.4(g) cited *Neal v. Clinton*.[36] In this Arkansas case, former-President Clinton was suspended from the practice of law for five years because "he gave knowingly evasive and misleading discovery responses concerning his relationship with Ms. Lewinsky." This conduct, the court found, was "prejudicial to the administration of justice," even though Mr. Clinton was not even engaged in the practice of law.[37] More pressingly, Clinton lied under oath, which would arguably also run afoul of Model Rule 8.4(c).

Rule 8.4(e) prohibits lawyers from "stat[ing] or imply[ing] an ability to influence improperly a government agency or official." Finally, Rule 8.4(f) prohibits "knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct." Rules 8.4(e) and 8.4(f) are in large respects duplicative of 8.4(d). Each concern conduct—including speech—that undermines the neutrality and fairness of our legal system, even if not engaged in during the course of a representation.

Prior to amending Rule 8.4 in August 2016, the *Model Rules* generally prohibited three heads of conduct: (1) conduct during the practice of law or representing a client; (2) conduct that reflects on a lawyer's fitness to practice law; and (3) conduct prejudicing the administration of justice.[38] Model Rule 8.4(g), which covers "conduct related to the practice of law," including speech at "bar association[s]" and "social activities," represents an unprecedented expansion of the disciplinary committee's jurisdiction over the private lives and speech of attorneys.

During the February 2016 hearing over Model Rule 8.4(g), Ben Strauss, a past-president of the Delaware State Bar Association, warned that "[w]e need to be a little bit careful in terms of how we get involved in the life of people that are *not related to the delivery of legal services* which is ultimately what we're all

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36. 2016 ABA REPORT, *supra* note 1, at 9 n.19 (citing Neal v. Clinton, No. CIV 2000-5677, 2001 WL 34355768 (Ark. Cir. Ct. Jan. 19, 2001)).

37. *Clinton*, 2001 WL 3435576, at *2.

38. *See generally* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4-2 (2016–17 ed.).

about."[39] Myles Lynk, the Chairman of the Standing Committee, promptly replied, "I know you're familiar with [Model Rule] 8.4(c)," which provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Lynk continued, "so the rules do contemplate that some conduct which is unrelated to the practice of law can constitute professional misconduct." The ABA included a virtually identical argument in its written report, stating "[s]uch conduct need not be related to the lawyer's practice of law, but may reflect adversely on the lawyer's fitness to practice law or involve moral turpitude."[40]

This position, however, disregards the three categories that were traditionally limited by the *Model Rules*. Rule 8.4(g) opens up for liability an entirely new realm of conduct unrelated to the actual practice of law or a lawyer's fitness to practice, and not connected with the administration of justice. Along these lines, Mr. Strauss concisely responded that "the behavior which constitutes misconduct is one that goes to the character that impacts on the person's ability to deliver legal services," while this rule regulated mere "social behavior."[41] He added that "the purposes of the new rule might be different."[42] Indeed it was different. The Delawarean cautioned that "there is a certain risk" when we "go[] overboard to the point where the vast majority of our membership may think we've gone too far."[43]

The ABA acknowledged that the new Rule 8.4(g) is indeed "broader than the current provision,"[44] but insisted that the "change is necessary."[45] The final resolution concluded, "ethics rules should make clear that the profession will not tolerate harassment and discrimination in any conduct related to the practice of law." Beyond serving as "officers of the court" and "managers of their law practices," the ABA resolved, lawyers are "public citizens" with a "special responsibility for the administration of justice." This notion of an attorney as a *public citizen* is derived from Preamble [6] to the *Model Rules*. Critically, by its own terms, the Preamble still treats as private almost the entirety of an attorney's interactions. Preamble [6] speaks of the attorney's duty as a public citizen to include seeking "improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession." It does not, and cannot, reach constitutionally protected speech that demeans others at bar-related functions.

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39. 2016 ABA HOD Proceedings, *supra* note 5, at 72–73 (emphasis added).

40. 2016 ABA REPORT, *supra* note 1, at 9–10.

41. *See* 2016 ABA HOD Proceedings, *supra* note 5, at 73.

42. *Id.*

43. *Id.* at 34.

44. 2016 ABA REPORT, *supra* note 1, at 10. Professor Gillers agrees that no state has a rule "as broad as the new ABA rule." Gillers, *supra* note 3, at 198.

45. 2016 ABA REPORT, *supra* note 1, at 10.

The strongest textual hook for the ABA in Preamble [6] is an attorney's duty to "further the public's . . . confidence in the rule of law." The report, and several instances of the model rule's legislative history, suggest that the drafters were concerned about what message the bar sends to the public when attorneys misbehave. For example, the conclusion of the resolution states, "As the premier association of attorneys in the world, the ABA should lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but *wherever it occurs* in conduct by lawyers related to the practice of law. *The public expects no less of us*."[46] This may be a laudable goal, but it is important to recognize how far afield such concerns are from Rule 8.4(a)–(f), and what the states have traditionally adopted. State courts that consider this rule should be very careful about relying on public perception of attorney behavior as an impetus for the overregulation of what has *long* been considered private speech.

B. STATE ANTI-BIAS PROVISIONS

Over the past two decades, nearly three dozen jurisdictions have amended their local version of Rule 8.4 to prohibit discrimination, harassment, or other forms of bias against specifically defined groups.[47] With few exceptions, these rules *only* govern conduct within the three heads of conduct reached by Model Rule 8.4(a)–(f). First, the narrowest category regulated bias *during the representation of a client* or *in the practice of law*. This standard is set by fifteen states in their rules,[48] and ten states in their comments.[49] Second, a far broader standard

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46. *Id.* at 15 (emphasis added). Gillers makes a similar point. Gillers, *supra* note 3, at 200. ("Second, adoption of Rule 8.4(g) tells the public that the legal profession will not tolerate this conduct, not solely when aimed at other lawyers, but at anyone. The rule tells the public who we are.").

47. *See* 2016 ABA REPORT, *supra* note 1, at 5.

48. CAL. RULES OF PROF'L CONDUCT R. 2-400(B) (2015) ("In the management or operation of a law practice"); COLO. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("engage in conduct, in the representation of a client"); D.C. RULES OF PROF'L CONDUCT R. 9.1 (2007) ("in conditions of employment"); FLA. RULES OF PROF'L CONDUCT R. 4-8.4(d) (2017) ("engage in conduct in connection with the practice of law"); IDAHO RULES OF PROF'L CONDUCT R. 4.4(a) (2014) ("[i]n representing a client"); IOWA RULES OF PROF'L CONDUCT R. 32:8.4(g) (2015) ("in the practice of law"); MASS. RULES OF PROF'L CONDUCT R. 3.4(i) (2013) ("in appearing in a professional capacity before a tribunal"); MICH. RULES OF PROF'L CONDUCT R. 6.5(a) (2015) ("involved in the legal process"); N.J. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("engage, in a professional capacity"); N.M. RULES OF PROF'L CONDUCT R. 16-300 (2009) ("In the course of any judicial or quasi-judicial proceeding before a tribunal"); N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) (2017) ("in the practice of law"); OHIO RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("in a professional capacity"); OR. RULES OF PROF'L CONDUCT R. 8.4(a)(7) (2015) ("in the course of representing a client"); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 5.08 (2016) ("in connection with an adjudicatory proceeding"); VT. RULES OF PROF'L CONDUCT R. 8.4(g) (2009) ("in hiring, promoting or otherwise determining the conditions of employment of that individual").

49. DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013) ("in the course of representing a client"); IDAHO RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) ("in the course of representing a client"); ME. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) ("a lawyer who, in the course of representing a client"); N.C. RULES OF PROF'L CONDUCT R. 8.4 cmt. 5 (2015) ("anyone associated with the judicial process"); S.C. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2015) ("in the course of representing a client"); S.D. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2004) ("in the course of representing a client"); TENN. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2016)

regulates bias that implicates a *lawyer's fitness to practice law*, whether or not it occurs in the practice of law. Only two states impose this standard in their rules.[50] (Such a provision would be largely duplicative of Model Rules 8.4(b) and 8.4(c).) Third, the broadest, most nebulous standard at issue prohibits bias that would *prejudice the administration of justice*. This standard, which can reach conduct entirely outside the client-lawyer relationship or the practice of law, is imposed by seven states.[51] None of these jurisdictions provide a precedent for the new Model Rule 8.4(g).

Three jurisdictions have adopted far broader scopes to their anti-bias provisions. First, Indiana regulates such misconduct when "engage[d] . . . in a *professional capacity*."[52] Second and third, Washington state and Wisconsin both regulate such misconduct that is committed "in connection with the *lawyer's professional activities*."[53] None of these rules define "professional capacity" or "professional activities." A note in the *Georgetown Journal of Legal Ethics* explained that the rule from Wisconsin—and by extension, the other two—is "extraordinarily broad and loses its main justification of why attorney speech needs to be restricted at all," which is "[p]reserving the administration of justice."[54] Yet, these three provisions still have a concrete nexus to delivering legal services,[55] and do not purport to reach "social activities," such as bar-sponsored dinners that are merely "connected with the practice of law." Model Rule 8.4(g) is unprecedented in its scope. Efforts to cite precedents from these states as evidence that Model Rule 8.4(g) would not censor protected speech are unavailing.

("in the course of representing a client"); UTAH RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013) ("in the course of representing a client"); W. VA. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2015) ("in the course of representing a client"); WYO. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) ("in the course of representing a client").

50. ILL. RULES OF PROF'L CONDUCT R. 8.4(j) (2016) ("conduct that reflects adversely on the lawyer's fitness as a lawyer"); MINN. RULES OF PROF'L CONDUCT R. 8.4(h) (2015) ("reflects adversely on the lawyer's fitness as a lawyer").

51. ARIZ. RULES OF PROF'L CONDUCT R. 8.4(d) (2004) ("prejudicial to the administration of justice"); ARK. RULES OF PROF'L CONDUCT R. 8.4(d) (2016) ("conduct that is prejudicial to the administration of justice"); CONN. RULES OF PROF'L CONDUCT R. 8.4(4) (2006) ("conduct that is prejudicial to the administration of justice"); MD. ATTORNEY'S RULES OF PROF'L CONDUCT R. 19-308.4(e) (2016) ("when acting in a professional capacity . . . when such action is prejudicial to the administration of justice"); NEB. RULES OF PROF'L CONDUCT R. 8.4(d) (2016) ("engage in conduct that is prejudicial to the administration of justice . . . [when] employed in a professional capacity"); N.D. RULES OF PROF'L CONDUCT R. 8.4(f) (2006) ("engage in conduct that is prejudicial to the administration of justice"); R.I. RULES OF PROF'L CONDUCT R. 8.4(d) (2007) ("engage in conduct that is prejudicial to the administration of justice").

52. IND. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) (emphasis added).

53. WASH. RULES OF PROF'L CONDUCT R. 8.4(g) (2015) (emphasis added); WISC. RULES OF PROF'L CONDUCT 8.4(i) (2017) (emphasis added).

54. Keiser, Note, *supra* note 23, at 636.

55. *See* Gillers, *supra* note 3, at 199–200 n.18 (citing cases from Indiana, Washington, and Wisconsin).

III. RULE 8.4(G) AND THE FIRST AMENDMENT

The ABA's report accompanying Rule 8.4(g) provides only the most cursory First Amendment analysis. As discussed in Part II, without any explanation, the final report deleted both comments and analysis from an earlier draft that explicitly protected the freedom of speech. In his article, Professor Gillers provides what he admits is a "brief" analysis of the First Amendment issues implicated by the new Model Rule 8.4(g). Due to the new rule's intrusion into the private spheres of attorneys' speech and conduct, a "brief" discourse does not suffice.

Gillers' First Amendment analysis centers around whether Rule 8.4(g) would survive a facial challenge. "An overbreadth claim is likely to fail," we are told, in light of the Supreme Court's difficult-to-satisfy test for invalidating overbroad statutes.[56] A void-for-vagueness challenge will fail, Gillers writes, "[s]o long as the rule is drafted in a way that seeks to define only the conduct or speech that will and constitutionally can be the basis of discipline."[57] These analyses are premature in an article titled *A Guide for State Courts Considering Model Rule 8.4(g)*. The far more important question presented to state courts is whether they are willing to adopt a new model rule designed to root out harassment and discrimination, which also prohibits speech outside the delivery of legal services. This is a profound policy question that the ABA elided and that Professor Gillers considers a mere afterthought.[58]

Part III will analyze this vague standard's chilling effects on speech, how the rule sweeps in a range of constitutionally protected speech, and how the comments establish an invalid form of viewpoint discrimination. Next, three tweaks to Rule 8.4(g) are offered that would still maintain the drafters' intent, while providing protection for free expression. This Article will close with an admonition that state courts should not be content to simply trust disciplinary committees to exercise discretion.

A. THE CHILLING EFFECT OF RULE 8.4(G)

Professor Gillers accurately notes that courts have upheld numerous efforts by state bar associations to discipline various forms of attorney speech. He writes that provisions of the *Model Rules* "subordinate[] the right to speak in order to protect the fairness of and public confidence in the legal system . . . ."[59] When confronted with language "even more general" than *harassment* "that offers even less notice of the forbidden conduct," Gillers observes, void-for-vagueness

56. *Id.* at 235 (quoting Virginia v. Hicks, 539 U.S. 113, 119–20 (2003) (emphasis in original)).

57. *Id.* at 236 (citing United States v. Wunsch, 84 F.3d 1110, 1116 (9th Cir. 1996)).

58. *Id.* at 230–31 ("Any lawyer charged with violating Rule 8.4(g) remains free to argue that as applied to his or her conduct the rule is unconstitutional.").

59. *Id.* at 235.

challenges have failed.[60] For example, a New York court censured a lawyer who, during a deposition, "called the opposing female lawyer a 'bitch,' described her with anatomical references ('c___' and 'a_____'), and told her to 'go home and have babies.'"[61] On appeal, the court concluded that such speech uttered in a legal proceeding was "conduct that adversely reflects on the lawyer's fitness as a lawyer."[62] Indeed, as Gillers points out, the concept of conduct that "adversely reflects" a lawyer's fitness is quite capacious, though it too has been upheld in the face of constitutional challenges.[63] The court stressed that "'[b]road standards governing professional conduct are permissible and indeed often necessary' where it is almost impossible to enumerate every offense for which an attorney ought to be removed or disciplined."[64]

These precedents, however, do not resolve the question at hand, as they considered challenges in the context of disciplinary actions that related to the representation of a client, a lawyer's fitness for practice, or the administration of justice—all conduct within the state bar's competencies.

Constitutional scrutiny amounts to a balance of the means and the ends.[65] As the government's interest becomes more compelling, the rule's tailoring need not be as narrow. Conversely, when the government's interest becomes less compelling, narrow tailoring becomes essential. "Governing professional conduct" is a compelling interest within a bar association's core jurisdiction.[66] Here, the government's authority is at its apex, and narrow tailoring is not as critical. "Broad standards," to use the phrasing of the New York court, suffice.

However, when conduct is merely "related to the practice of law," which includes speech at social events, the government's interest becomes far less compelling, as it is outside the traditional regulatory functions of bar associations. In other words, when the nexus between the legal practice and the speech at issue becomes more attenuated, the disciplinary committee's authority to regulate an attorney's expressions becomes weaker.[67] As a result, narrow tailoring becomes critical to salvage the sanction's constitutionality. Stated differently, the same capacious standard of "harassment" could constitutionally support a

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60. *Id.* at 236.

61. *Id.* at 237–38 (citing *In re* Schiff, No. HP 22/92 (Departmental Disc. Comm. N.Y. Sup. Ct. Feb. 2, 1993)).

62. *Id.* at 216 n.80 (citing *In re* Schiff, 599 N.Y.S.2d 242 (1993)).

63. *See id.* (citing *In re* Holley, 729 N.Y.S.2d 128, 132 (N.Y. App. Div. 2001)).

64. *Id.*

65. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 (1984) ("In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.").

66. *In re Holley*, 729 N.Y.S.2d at 220.

67. In its report, the ABA cited only "substantial *anecdotal* information" about "sexual harassment" at "activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law" (emphasis added). That conjectural standard does not satisfy the lofty standard needed to establish a *compelling* state interest. 2016 ABA REPORT, *supra* note 1, at 11.

punishment for an incident during a deposition, but *not* during a bar association dinner or CLE lecture. Context matters for the First Amendment.

Because no jurisdiction has ever attempted to enforce a speech code over social activities merely "connected with the practice of law," there are no precedents to turn to in order to assess such a regime's constitutionality. (Professor Gillers fails to acknowledge this gap in his otherwise thorough analysis.) While discrimination and sexual harassment do have established bodies of case law that can be referred to,[68] longstanding ethics rules do not penalize harassment by itself in the context of private speech at various social functions. In such fora, the government's interest is at its nadir, and tailoring must be extremely narrow to survive judicial scrutiny. Even before Rule 8.4(g) was adopted, attorneys often found themselves "in the midst of that recurring inquiry into when lawyer conduct has a sufficient nexus with fitness to practice law that it ought to be a basis for lawyer discipline, even when it is marginal to the direct representation of clients."[69] Now discipline can be imposed for conduct merely related to the practice of law, and totally unrelated to the direct representation of any clients.

It is against this backdrop that the chilling effects of Rule 8.4(g) must be assessed. As drafted, the rule could discipline a wide range of speech on matters of public concern at events with only the most dubious connection with the practice of law. Though these laws may survive a facial challenge, they are quite vulnerable to individual challenges. Gillers takes solace that an attorney "remains free to argue that as applied to his or her conduct the rule is unconstitutional."[70] I am not so sanguine. If a jurisdiction adopts Rule 8.4(g), some lucky attorney can become a test case with his or her livelihood on the line. This is not a mere academic exercise.

States must be very careful about adopting this novel new approach to discipline that may end up censoring speech on matters of public concern, only to have those actions reversed by the courts.

B. THE BROAD SWEEP OF RULE 8.4(G)

The comments to Rule 8.4(g) provide several examples of the various fora where the regime would apply, such as "social activities" or "bar association" functions. However, the long-deliberated rule does not offer examples of the types of speech that could be deemed "harassment." Professor Gillers does. He writes, "[n]o lawyer has a First Amendment right to demean another *lawyer* (or

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68. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

69. Donald R. Lundberg, *Of Telephonic Homophobia and Pigeon-Hunting Misogyny: Some Thoughts on Lawyer Speech*, RES GESTAE, June 2010, at 22, 23, http://lawyerfinder.indybar.org/_files/11th%20Hour/D.LundbergReRule8.4.pdf [https://perma.cc/VT9M-NQVN].

70. Gillers, *supra* note 3, at 230–31.

anyone else involved in the *legal process*)."[71] Gillers adds, "[t]here is no First Amendment right, for example, to call a *female opponent* 'a c__,' or to mock *another lawyer's* accent, or to use a racial epithet in addressing an *opposing party*." Finally, he observes that "[t]here is no constitutional right to sexually harass an *employee or a client*." Gillers asks, rhetorically, "[w]hy should identical biased words or conduct be forbidden in litigation but allowed in all other *work* lawyers do?"[72]

As my added emphases reveal, Gillers only discusses disciplinable speech uttered *during* the practice of law, such as statements to opposing counsel, clients, or employees. These are activities squarely within the state bar's longstanding and traditional interest in regulating the legal profession. In this entreaty, he does not reference the far more novel concept that speech at "social activities," which is merely "related" to the practice of law, could be subject to discipline. As speech bears a weaker and weaker connection to the delivery of legal services, the bar's justification in regulating it becomes less and less compelling. The bar lacks a sufficiently compelling interest to censor an attorney who makes a remark deemed "demeaning" at a CLE lecture, or makes a comment viewed as "derogatory" at the dinner table during a bar association gala. These are the sorts of problems that can be resolved by refusing to re-invite offending speakers—not by threatening to suspend or revoke a lawyer's license. Here, the nexus between the bar's mission to regulate the practice of law is far too attenuated to justify this incursion into constitutionally protected speech.

To return to Gillers' rhetorical question, the Constitution expressly protects "biased words" that can usually be prohibited in the course of litigation.[73] Demeaning speech, as opposed to *defamatory* conduct, is constitutionally protected. In *FCC v. Pacifica*, the Supreme Court recognized "cunt," one of George Carlin's seven dirty words, as protected by the First Amendment.[74] (Some may find a reading of the appendix in *Pacifica* to be "demeaning" toward women.) In *Snyder v. Phelps*, the Supreme Court upheld the right of funeral protestors to hold signs that said "God Hates Fags."[75] *R.A.V. v. City of St. Paul* invalidated a city's law that prohibited "arous[ing] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[76] Comments that would constitute sexual harassment in the workplace are perfectly lawful if uttered in public. A private sphere must remain in a lawyer's life, when it is

71. *Id.* at 237 (emphasis added).

72. *Id.* at 220 (emphasis added).

73. In certain cases, cursing is especially appropriate during the course of litigation. *See* Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 642 n.127 (2016) (recounting how counsel in *Cohen v. California*, against the wishes of Chief Justice Burger, used the word "fuck" during oral arguments at the Supreme Court).

74. 438 U.S. 726, 751 (1978) ("The original seven words were shit, piss, fuck, *cunt*, cocksucker, motherfucker, and tits.") (emphasis added).

75. *See* 562 U.S. 443, 460–61 (2011).

76. *See* 505 U.S. 377, 391 (1992).

separate from the practice of law or representing a client, and does not reflect on a lawyer's fitness or prejudice the administration of justice.

Finally, there is a separation of powers element of this analysis. It is not surprising that disciplinary actions for speech fall within three heads: (1) conduct during the practice of law or representing a client; (2) conduct that reflects on a lawyer's fitness to practice; and (3) conduct prejudicing the administration of justice. State bar associations are chartered to supervise these regulatory purposes.[77] Disciplinary committees do not have boundless discretion over all aspects of an attorney's life. Like all administrative agencies, bar associations only have the authority that the relevant state legislature or court-of-last resort has delegated. When a bar association attempts to regulate conduct that is beyond its jurisdiction, the action is *ultra vires*. Beyond the First Amendment implications of Rule 8.4(g), state courts should consider whether bar associations even have the statutory authority to assert jurisdiction over speech that is increasingly attenuated from the practice of law. It is not enough to proclaim that "*[t]he public expects no less of us*."[78] The law demands more. As a matter of the separation of powers under state constitutional law, Rule 8.4(g) may also be impermissible.

C. COMMENT FOUR'S IMPOSITION OF VIEWPOINT DISCRIMINATION

Comment [4] to Rule 8.4(g) provides, in part, that "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 added). Though well-intentioned, this provision explicitly sanctions one perspective on a divisive issue—affirmative action—while punishing those who take the opposite perspective. This comment amounts to an unconstitutional form of viewpoint discrimination. Consider a debate hosted by a bar association about affirmative action. One speaker *promotes* racial preferences

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77. *See, e.g.*, *About the Bar*, VA. STATE BAR, http://www.vsb.org/site/about [https://perma.cc/5UES-RKNP] (last visited Jan. 26, 2017) ("The mission of the Virginia State Bar, as an administrative agency of the Supreme Court of Virginia, is to regulate the legal profession of Virginia; to advance the availability and quality of legal services provided to the people of Virginia; and to assist in improving the legal profession and the judicial system."); *Our Mission*, STATE BAR OF TEX., https://www.texasbar.com/Content/NavigationMenu/AboutUs/OurMission/default.htm [https://perma.cc/6GQM-V7MJ] (last visited Jan. 26, 2017) ("The mission of the State Bar of Texas is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the administration of justice and the practice of law."); *About the Bar*, FLA. BAR, http://www.floridabar.org/TFB/TFBOrgan.nsf/043adb7797c8b9928525700a006b647f/90c2ad07d0bd71fc85257677006a8401?OpenDocument [https://perma.cc/NN3T-TC3J] (last visited Jan. 26, 2017) ("To inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.").

78. Gillers makes a similar point at Gillers, *supra* note 3, at 200 ("Second, adoption of Rule 8.4(g) tells the public that the legal profession will not tolerate this conduct, not solely when aimed at other lawyers, but at anyone. The rule tells the public who we are.").

as a means to advance diversity. His speech would be entirely protected under Rule 8.4(g). Another speaker *critiques* racial preferences in light of mismatch theory. His speech would *not* be protected under Rule 8.4(g). This is a blatant instance of preferring one perspective over another. That the ABA sought to include this provision suggests that there was a concern that bar complaints could be filed over speech about affirmative action, or other diversity measures, that some could find "demeaning." But not for other types of speech about affirmative action.

Beyond speech about diversity, Rule 8.4(g) will disproportionately affect speech on the right side of the ideological spectrum. Speech supporting a right to same-sex marriage will not be considered "derogatory"; speech critiquing it will. Speech supporting an interpretation of Title IX that permits bathroom assignments based on gender identity will not be considered "demeaning"; speech critiquing it will. Speech opposing immigration policy that excludes people based on their nationality will not be considered discriminatory; speech endorsing it will. A range of theories would be silenced under the threat of an unconstitutionally vague standard of "harassment." Experiences with political correctness and speech codes on college campuses provide a roadmap of the sorts of speech that complaints filed under Rule 8.4(g) would likely target.[79]

D. "WE WOULD HAVE TO JUST TRUST THEM"

I will begin this concluding section by chronicling a debate that should have occurred before the adoption of Rule 8.4(g), but alas, was only held months after

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79. *See generally* Scott Jaschik, *If You Say You're Sorry*, INSIDE HIGHER ED (Mar. 25, 2016), https://www.insidehighered.com/news/2016/03/25/marquette-suspends-controversial-faculty-blogger-requires-him-apologize [https://perma.cc/F8BE-M54U] ("McAdams, however, has maintained that he was being punished for his opinions that are free speech. He also maintained that Marquette shouldn't be attacking him, given that he is defending an undergraduate's views against gay marriage that are consistent with Roman Catholic teachings."); Adam Liptak, *Students' Protests May Play Role in Supreme Court Case on Race in Admissions*, N.Y. TIMES (Dec. 1, 2015), http://www.nytimes.com/2015/12/02/us/politics/justices-to-rule-once-again-on-race-in-college-admissions.html?_r=0 [https://perma.cc/NY6T-Z8WW] ("The justices are almost certainly paying close attention to the protests, including those at Princeton, where three of them went to college, and at Yale, where three of them went to law school. At both schools, there have been accusations that protesters, many of them black, have tried to suppress the speech of those who disagree with them. Others welcomed the protests as part of what they called a healthy debate."); Jessica Murphy, *Toronto Professor Jordan Peterson Takes on Gender-Neutral Pronouns*, BBC NEWS (Nov. 4, 2016), http://www.bbc.com/news/world-us-canada-37875695 [https://perma.cc/4C5T-4MEV] ("Dr. Peterson was especially frustrated with being asked to use alternative pronouns as requested by trans students or staff, like the singular 'they' or 'ze' and 'zir,' used by some as alternatives to 'she' or 'he.' In his opposition, he set off a political and cultural firestorm that shows no signs of abating. At a free speech rally mid-October, he was drowned out by a white noise machine. Pushing and shoving broke out in the crowd. He says the lock on his office door was glued shut. At the same time, the University of Toronto said it had received complaints of threats against trans people on campus. His employers have warned that, while they support his right to academic freedom and free speech, he could run afoul of the Ontario Human Rights code and his faculty responsibilities should he refuse to use alternative pronouns when requested. They also said they have received complaints from students and faculty that his comments are 'unacceptable, emotionally disturbing and painful' and have urged him to stop repeating them.").

its approval. During the 2016 Federalist Society National Lawyers Convention, Professors Eugene Volokh and Deborah Rhode debated how the new rule interacted with the First Amendment.[80] The event was moderated by Judge Jennifer Walker Elrod of the U.S. Court of Appeals for the Fifth Circuit. Along similar lines to the analysis in this Article, Professor Volokh worried that complaints could be filed against a speaker at a CLE event who critiques the Supreme Court's decision in *Obergefell v. Hodges*.[81] He charged that Rule 8.4(g) amounts to a "deliberate[] . . . attempt to suppress particular derogatory views in a wide-range of conduct, expressly including social and . . . bar association activities." Volokh stressed that what the drafters of the rule "are getting is exactly what they are intending. They are intending to suppress particular views in these kinds of debates."

Professor Rhode was not particularly concerned with the potential for abuse. From her experiences, disciplinary committees "don't have enough resources to go after people who steal from their clients' trust fund accounts."[82] She found "wildly out of touch with reality" the "notion that they are going to start policing social conferences and go after people who make claims about their own views about" religion or sexual orientation. Rhode added that "many people who are in bar disciplinary agencies care a lot about First Amendment values," and "[b]ar associations don't want to set off their members and go down those routes." An aggrieved party could "file a complaint," she acknowledged, but "we can say that about pretty much anything in this country, right?" But such complaints would go nowhere, Rhode maintained, because "we as a profession have the capacity to deal with occasional abuses." She concluded her remarks, "We're a profession that knows better than that." Rhode paused. "I would hope."

Moments later, Judge Elrod asked whether Professor Rhode's position "would depend on a trust . . . that the organizations would not be going after people that they don't like, such as . . . conservatives." She asked, "We would have to just trust them?" The Federalist Society luncheon, packed with right-of-center lawyers, laughed aloud. Professor Rhode interjected that Rule 8.4(g) did not depend on trusting the disciplinary crowds alone. "And the Courts!" she added. "My god, I never thought I'd be saying this at a Federalist Society conference, the Rule of Law people, it's still out there!" Professor Rhode concluded, "I don't think we'd see a lot of toleration for those aberrant complaints." In other words, trust the bar such that the rules would not be abused.

Professor Gillers takes a similar "trust-us" approach to Rule 8.4(g). "We can be confident that the kind of biased or harassing speech that will attract the attention

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80. The Federalist Soc'y, *Ninth Annual Rosenkranz Debate: Hostile Environment Law and the First Amendment*, YOUTUBE (Nov. 20, 2016), https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s [https://perma.cc/7Y32-HPG7].

81. *Id.* (https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s#t=49m58s).

82. *Id.* (https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s#t=52m10s).

of disciplinary counsel," he writes, "will not enjoy First Amendment protection."[83] Or stated in the converse, he is confident that disciplinary committees will not target speech that is protected by the First Amendment. This argument, on its own terms, is a non sequitur, because speech often loses its First Amendment protections if it is uttered during the delivery of legal services. In other words, if the disciplinary committee successfully targets such speech, it will be *because* in this context it lacks First Amendment protections. This argument elides the threshold question of what speech is within a bar association's jurisdiction.

Further, Professor Gillers cites a series of cases to illustrate the types of speech that have resulted in punishment. None of these cases, however, support Professor Gillers' conclusion as they *all* concern speech uttered during the delivery of legal services—often at depositions—and each involved anti-bias provisions that are far more narrow than Rule 8.4(g). First, in *Florida Bar v. Martocci*, a lawyer was disciplined where "[t]he entire record" in a marriage dissolution case was "replete with evidence of Martocci's verbal assaults and sexist, racial, and ethnic insults."[84] The Florida rule at issue applied with respect to "conduct in connection with the practice of law." Second, in *In re Kratz*, a lawyer, acting in his capacity as the district attorney, was disciplined for "sending deliberate, unwelcome, and unsolicited sexually suggestive text messages to S.V.G., a domestic abuse crime victim and witness, while prosecuting the perpetrator of the domestic abuse crime."[85] Third, in *In re Griffith*, an adjunct law professor, who was supervising law students in a clinic, engaged in physical conduct of a sexual nature with a student.[86] This harassment, the court found was "in connection with professional activities." Fourth, in *In re McGrath*, an attorney "sent two ex parte communications to the judge disparaging the opposing party based upon her national origin."[87] Professor Gillers also cites several more cases involving harassing comments made during depositions.[88]

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83. Gillers, *supra* note 3, at 235.

84. *See, e.g.*, 791 So. 2d 1074, 1077 (2001).

85. 851 N.W.2d 219, 223 (Wis. 2014) (disciplining district attorney for sending a victim text messages suggesting that the two have sexual contact).

86. 838 N.W.2d 792, 792 (2013). A different analysis would likely apply under Minnesota law with respect to a doctrinal class that was not connected with the delivery of legal services. However, under the capacious standard set by Rule 8.4(g), all professors that engage in "mentoring" while teaching a class required to sit for the bar exam could be subject to discipline. *See supra* text accompanying note 21.

87. 280 P.3d 1091, 1093 (Wash. 2012).

88. Claypole v. Cty. of Monterey, No. 14-cv-02730-BLF, 2016 WL 145557, at *5 n.37 (N.D. Cal. Jan. 12, 2016) ("At a contentious deposition, when Plaintiffs' counsel asked Bertling not to interrupt her, Bertling told her, '[D]on't raise your voice at me. It's not becoming of a woman or an attorney who is acting professionally under the rules of professional responsibility'"); Cruz-Aponte v. Caribbean Petroleum Corp., 123 F. Supp. 3d 276, 279 (D.P.R. 2015); Laddcap Value Partners, LP v. Lowenstein Sandler P.C., No. 600973-2007, 2007 WL 4901555, at *2–7 (N.Y. Sup. Ct. 2007); Principe v. Assay Partners, 586 N.Y.S.2d 182, 184 (Sup. Ct. 1992); *In re* Monaghan, 743 N.Y.S.2d 519, 520 (App. Div. 2002); Mullaney v. Aude, 730 A.2d 759, 761–62 (Md. Ct. Spec. App. 1999); *In re* Schiff, 599 N.Y.S.2d 242 (App. Div. 1993).

It is unremarkable that *all* of these cases involve speech uttered during the delivery of legal services, and not during social activities merely connected to the practice of law. Rule 8.4(g) broke new ground by explicitly expanding a disciplinary committee's jurisdiction from the "practice of law," to "social activities," while simultaneously deleting a comment that expressly protected the First Amendment. I was unable to find a single case, in any jurisdiction, where a lawyer was sanctioned for a derogatory comment made at a social function. I doubt such a case exists, as no other state has previously permitted such discipline. The unprecedented nature of Rule 8.4(g) does not leave me confident that it will be enforced in a constitutional manner.

In any event, if such concerns are indeed "wildly out of touch with reality," then state courts should pause before adopting Model Rule 8.4(g) and its comments in their entirety. Professor Gillers writes that "[d]rafting demands precision and the elimination of ambiguity so far as words allow. Mathematical precision is not possible. We must strive to draft a rule that identifies the behavior we mean to forbid and not the behavior we do not."[89] He's right. With three slight tweaks to comments [3] and [4], the rule would have a far more narrowly tailored application to avoid censoring constitutionally protected speech, while still serving its intended purpose of rooting out sexual harassment.

- First, the amendments should clarify that for discrimination or harassment to fall within Rule 8.4(g), it must be "severe or pervasive." Along these same lines, stress that the law of antidiscrimination and anti-harassment statutes "will," and not "may" guide application of the paragraph. There is a well-established body of federal caselaw that disciplinary committees *should* rely on when determining if there has been discrimination or harassment.[90] This tweak would also put all parties on notice of the relative burdens of proof.
- Second, the exclusion for speech about promoting diversity was no doubt well-intentioned, but it creates an explicit form of viewpoint discrimination that cannot withstand a constitutional challenge. It should be eliminated.
- Third, I restored the exact language from the December 2015 comment and its accompanying report concerning the First Amendment and an attorney's "private sphere" of conduct. To make the point strikingly clear, I specified that speech on "matters of public concern" cannot give rise to liability.

89. Gillers, *supra* note 3, at 201.

90. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64–67 (1986).

Here, an edited version of the comments, with insertions bolded:

> [Comment 3] ***"Severe or pervasive"*** discrimination and harassment by lawyers in violation of paragraph (g) undermines 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 ***federal*** antidiscrimination and anti-harassment statutes and case law ~~may~~ ***will*** guide application of paragraph (g).
>
> [Comment 4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. ~~**Paragraph (g) does not prohibit conduct undertaken to promote diversity. 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.**~~ ***Paragraph (g) does not apply to conduct protected by the First Amendment, as a lawyer does retain a "private sphere" where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to this rule. For example, paragraph (g) does not apply to speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.***

This revised rule would permit disciplinary actions for lawyers that engage in forms of severe or pervasive verbal harassment at social activities and bar functions, but it would also amply protect speech on matters of public concern that listeners may find "demeaning" or "derogatory."

CONCLUSION

During her remarks at the Federalist Society conference, Professor Rhode admitted that she viewed Rule 8.4(g) as "a largely symbolic gesture," and that "the reason why proponents wanted it in the Code was as a matter of educating the next generation of lawyers as well as a few practitioners in this one about *other* values besides First Amendment expression." Her answer is quite revealing. Even before Rule 8.4(g) was adopted, attorneys who engaged in sexual harassment and other forms of discrimination were already subject to liability under federal, state, and local employment law, which extend beyond the actual workplace. As a practical matter, Rule 8.4(g) amounts to little more than a pile-on. In addition to facing injunctive relief or monetary fines from civil suits,

lawyers can now potentially lose their law licenses for misconduct. In this sense, the new model rule—a product of zealous advocacy by disparate interest groups over the course of two decades—is indeed little more than a "largely symbolic gesture."

What Rule 8.4(g) does accomplish is "educating the next generation of lawyers" about what sorts of speech are permitted, and what sorts of speech are not. Professor Rhode's candor, acknowledging that there are "*other* values besides First Amendment expression," is refreshing after slogging through the entire administrative record of Rule 8.4(g). But if this was only a project of education, state bars could have accomplished it by launching a public relations campaign and distributing brochures. Of course, the rule is about much more than education. Failure to comply results in disciplinary action that can destroy an attorney's livelihood. This sanction is not a trivial matter. At bottom, this rule, and its expansion of censorship to social activities with only the most tenuous connection with the delivery of legal services, is not about education. It is about reeducation.

State courts should pause before adopting this rule, and think carefully about the primacy of our first freedom.

Lisa Marsh - Fwd: New rule 8

From: appellatecourtclerk
To: Lisa Marsh
Date: 11/30/2017 1:38 PM
Subject: Fwd: New rule 8

ADM2017-02244

>>> Myers Morton <Myers.Morton@knoxcounty.org> 11/30/2017 11:38 AM >>>
Clerk Hivner:

Thank you for the opportunity to comment.

I only observe that your proposed new rule 8(g) appears to assume that discrimination on the basis of sexual orientation and gender identity is illegal.

"...Plaintiff Shirit Pankowsky is identified in the Complaint as a rising senior at Martin Luther King, Jr. High School, a public academic magnet school in Davidson County, and the president and founder of the school's Gay/Straight Alliance. Plaintiff Pankowsky claims that HB600, by limiting the term "discriminatory practices" to its definition set forth in the **Tennessee Human Rights—which does not include gender identity or sexual orientation-based discrimination**—voided protections previously guaranteed by the Metropolitan Nashville Public Schools' Policy on Bullying and Harassment, which stated:..." (Emphasis supplied.)

Howe v. Haslam, 2013 Tenn. App. LEXIS 425, *12

I have not researched this issue completely. I only noticed this annotation recently.

May I pose a query?

If a father who is a lawyer blocks/forbids/excludes a male person dressed up as a woman from entering a woman's bathroom where his young daughter is, can he be disbarred or somehow punished as a result?

What does "socioeconomic status" mean?

Thank you again.

J. Myers Morton, BPR# 013357

Cell 865-680-8424

ADM2017-02244

Lisa Marsh - Fwd: Proposed Amendment to Rule 8

FILED
NOV 22 2017
Clerk of the Courts
Rec'd By _____

From: appellatecourtclerk
To: Jim Hivner; Lisa Marsh
Date: 11/22/2017 3:15 PM
Subject: Fwd: Proposed Amendment to Rule 8

>>> "Greg Hall" <ghall@wghlaw.net> 11/22/2017 3:59 PM >>>
I am opposed to the proposed revisions to Rule 8 as the language is overly broad and the issues sought to be addressed are adequately covered by the existing Rule. (BPR #014875)

Wm. Gregory Hall, Jr.
General Counsel
Gulf & Ohio Railways, Inc.
ghall@gulfandohio.com
Office: 865.525.9400 Ext. 130
Cell: 865.385.6021