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May 18, 2021

Ms. Eileen D. Millett, Esq.
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25 Beaver Street, 11th Floor
New York, New York 10004

By email (rulecomments@nycourts.gov)

Re: In Opposition to the New York City Bar's Professional Responsibility Committee's Proposed Amendment to New York Rule of Professional Conduct 8.4(g)

Dear Ms. Millett:

This letter is respectfully submitted in response to the request of the Office of Court Administration for public comment on a proposal to impose the deeply flawed, highly criticized ABA Model Rule 8.4(g) on all members of the New York State Bar. Specifically, the New York City Bar's Professional Responsibility Committee has proposed that current New York Rule of Professional Conduct 8.4(g) be replaced by the much broader ABA Model Rule 8.4(g) with only minor modifications. The New York City Bar's proposal should be rejected for the reasons detailed below.

Summary

Deeply flawed and highly criticized, ABA Model Rule 8.4(g) should not be imposed on New York attorneys. Leading scholars have determined ABA Model Rule 8.4(g) to be a speech code for lawyers.[1] A thoughtful recent analysis of ABA Model Rule 8.4(g) by Professor Michael McGinniss, Dean of the University of North Dakota School of Law, entitled *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019), "examine[s] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."[2]

As the United States District Court for the Eastern District of Pennsylvania held in December 2020, Pennsylvania's Rule 8.4(g), derived from ABA Model Rule 8.4(g), was facially

[1] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA. *See infra* Part I, pp. 6-9 (scholars' criticisms of ABA Model Rule 8.4(g)); Part III, pp.20-26 (recent United States Supreme Court free speech decisions regarding regulation of professional speech and viewpoint discrimination).

[2] Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol'y 173, 173 (2019), https://law.und.edu/_files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlpp-2019.pdf.

unconstitutional because it violated attorneys' freedom of speech.[3] In striking down the rule, the federal district court in *Greenberg v. Haggerty* explained:

> *[The rule] will hang over Pennsylvania attorneys like the sword of Damocles.* This language will continuously threaten the speaker to self-censor and constantly mind what the speaker says and how the speaker says it or the full apparatus and resources of the Commonwealth may be engaged to come swooping in to conduct an investigation. Defendants dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive. . . .
>
> *Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing* into the Plaintiff's words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause Plaintiff and any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities. The government, as a result, de facto regulates speech by threat, thereby chilling speech.[4]

In the nearly five years since ABA Model Rule 8.4(g) was first urged upon state supreme courts, thirteen state supreme courts or state bar committees have rejected or abandoned it.[5] Two states have adopted it (Vermont and New Mexico), and two states (Maine and Pennsylvania) have adopted modified versions with Pennsylvania's rule struck down as unconstitutional.[6]

By contrast, current New York Rule of Professional Conduct 8.4(g) is looked to as a model of reasonableness and clarity by bar committees in several other states. The current rule allows a lawyer to be disciplined for unlawful employment discrimination if a tribunal determines that her conduct was unlawful and the appeals process has been completed. But if the New York City Bar Proposal is adopted, any lawyer and law firm which has been found by a tribunal not to have engaged in unlawful discriminatory conduct could nonetheless be subject to discipline. Indeed, ABA Model Rule 8.4(g) subjects a lawyer or law firm to discipline for any conduct related to the practice of law, including social activities.

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[3] *Greenberg v. Haggerty,* 491 F. Supp. 3d 12 (E.D. Pa. 2020), *appeal voluntarily dismissed*, No. 20-3602 (3d Cir. Mar. 17, 2021). The Disciplinary Board of the Pennsylvania Supreme Court initially appealed the decision but subsequently voluntarily dismissed its appeal.
[4] *Id.* at 24-25.
[5] *See infra* Part V, pp. 28-32 (describing states' responses to ABA Model Rule 8.4(g)).
[6] *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020).

A broader rule is unnecessary because current New York Rules of Professional Conduct 8.4(d) and 8.4(h) respectively provide for discipline if a lawyer or law firm "engage[s] in conduct that is prejudicial to the administration of justice" or "engage[s] in any other conduct that adversely reflects on the lawyer's fitness as a lawyer." As the Connecticut Office of Chief Disciplinary Counsel and the Statewide Grievance Committee recently observed, a rule like 8.4(d) makes ABA Model Rule 8.4(g) unnecessary if the current rules of professional conduct are "applied robustly" by committees and courts "to limit and deter [] conduct, bias or prejudice."[7]

Most importantly, the United States Supreme Court has issued three recent decisions that make clear that ABA Model Rule 8.4(g) is an unconstitutional content-based and viewpoint-based restriction on attorneys' speech. Those decisions, which were relied upon by the *Greenberg* court, are *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). *See infra* pp. 20-26. Proponents of ABA Model Rule 8.4(g) often rely on ABA Formal Opinion 493, but this reliance is misplaced. For reasons that are hard to fathom, *Formal Opinion 493 not only fails to distinguish these recent Supreme Court decisions; it fails to mention them at all.* But ignoring Supreme Court precedent does not make it go away.

ABA Model Rule 8.4(g) will inevitably chill New York attorneys' speech regarding political, ideological, religious, and social issues to the detriment of New York attorneys, their clients, and society in general. But a free society depends on attorneys being able to speak their minds freely without fear of losing their license to practice law.

Both liberal and conservative lawyers should be concerned about ABA Model Rule 8.4(g)'s disturbing implications for their ability to practice law. For example, attorneys who serve on their firms' hiring committees and make employment decisions in which, in order to achieve diversity goals, even modest preference in hiring or promotion is given based on race, sex, religion, or sexual orientation would be in violation of ABA Model Rule 8.4(g).[8] Or an

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[7] Email from Brian B. Staines, Chief Disciplinary Counsel, to Rules Committee of the Superior Court (Dec. 31, 2020), https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20ggg%20-%20Comments%20from%20Chief%20Disciplinary%20Counsel.pdf. *See also*, Email from Michael Bowler, Statewide Bar Counsel, Statewide Grievance Committee, to Rules Committee for the Superior Court (Dec. 29, 2020), https://www.jud.ct.gov/committees/rules/pdfs/2020-012%20fff%20-%20Comments%20from%20Statewide%20Grievance%20Comm.pdf.

[8] Thomas Spahn, a highly respected professional ethics expert, has concluded that ABA Model Rule 8.4(g) "prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc." He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:

> Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a "plus" when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law

attorney who tweets a common but hurtful sexual term aimed at a presidential spokeswoman could be subject to discipline under the proposed rule.[9] Or a law professor whose comments to the media employ racial and gender stereotypes to describe the critics of ABA Model Rule 8.4(g) could be subject to discipline under the proposed rule.[10] Because the terms "harassment" and "discrimination" are difficult to define and hold greatly dissimilar meanings for different people, ABA Model Rule 8.4(g) threatens lawyers' speech across the political, ideological, social, and religious spectrum.

Sadly, we live at a time when many people, including lawyers, are increasingly willing to suppress the free speech of those with whom they disagree. Some lawyers purportedly have filed bar complaints in order to harass officeholders whose political views they dislike.[11] Yale law students have described significant harassment by fellow law students simply because they hold religious or conservative ideas.[12]

In July 2020, the Judicial Conference Committee on Codes of Conduct withdrew a draft advisory opinion that had said it was improper for judges to be members of the Federalist Society or the American Constitution Society, but permissible to belong to the American Bar Association. A comment letter signed by 210 federal judges took exception to the opinion's

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> firms' head count on the basis of such attributes – but it is nevertheless discrimination. *In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.*

The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues* 5-7 (July 12, 2018) (emphasis supplied). *See infra*, Part VI, pp. 32-34 (why diversity programs cannot be protected).

[9] Debra Cassens Weiss, *Big Law Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders,* ABA Journal, Oct. 1, 2018 (lawyer, honored in 2009 by the ABA Journal "for his innovative use of social media in his practice," apologized to firm colleagues, saying no "woman should be subjected to such animus"), https://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

[10] Eugene Volokh, *Professor Stephen Gillers (NYU) Unwittingly Demonstrates Why ABA Model Rule 8.4(g) Chills Protected Speech*, The Volokh Conspiracy, June 17, 2019, https://reason.com/2019/06/17/professor-stephen-gillers-nyu-unwittingly-demonstrates-why-aba-model-rule-8-4g-chills-protected-speech/. The article explains that in a media interview regarding ABA Model Rule 8.4(g), a proponent of the Rule stereotyped critics of the Rule by race and gender. The article suggests that the same comment made in the context of a bar association debate might be grounds for discipline under ABA Model Rule 8.4(g).

[11] *See* Brian Sheppard, *The Ethics Resistance*, 32 Geo. J. Legal Ethics 235, 238 (2018):

> Ordinary ethics complaints have the capacity to ruin individual law careers and serve as cautionary examples to other lawyers. Ethics Resistance complaints have the additional capacity to prompt official action, alter staffing decisions at the highest levels of government, influence high-ranking lawyers' willingness to comply with investigations, and terminate or preempt relationships between lawyers and the politically powerful. Most importantly, they can change public perception regarding the moral integrity of an administration. And they can do this even if they do not result in a sanction.

[12] *See, e.g.,* Aaron Haviland, "I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong," The Federalist (Mar. 4, 2019), https://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/ (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

underlying "double standard" and "untenable" "disparate treatment" as reflected in "the Committee['s] oppos[ing] judicial membership in the Federalist Society while permitting membership in the ABA."[13] In withdrawing its proposal, the Judicial Conference Committee noted that "judges confront a world filled with challenges arising out of emerging technologies, deep ideological disputes, a growing sense of mistrust of individuals and institutions, and an ever-changing landscape of competing political, legal and societal interests."[14] Far less sheltered than judges from these competing interests, lawyers daily confront such an environment.

Many proponents of ABA Model Rule 8.4(g) sincerely believe that the Rule will only be used to punish lawyers who are bad actors. Unfortunately, we have recently witnessed too many times when people have lost their livelihoods for holding traditional religious views. For example, the Fire Chief of Atlanta, an African-American man who had been appointed National Fire Marshal by President Obama, was fired because he wrote a book that briefly referred to his religious beliefs regarding marriage and sexual conduct.[15] The CEO of Mozilla lost his position because he made a contribution that reflected his religious beliefs to one side of a political debate regarding marriage laws.[16]

Merely expressing support for freedom of speech has itself become controversial. In July 2020, several well-known liberal signatories to a public letter in support of freedom of speech were publicly pressured to recant their support for free speech and its concomitant corollary of tolerance for others who hold different beliefs.[17]

Given the current climate, lawyers who hold classical liberal, conservative, libertarian, or religious viewpoints are understandably unwilling to support a black letter rule that could easily be misused to deprive them of their license to practice law. As a nationally recognized First Amendment expert has explained, ABA Model Rule 8.4(g) is a speech code that threatens lawyers' speech.[18]

Perhaps this is why after nearly five years of deliberations by state supreme courts and state bar associations in many states across the country, only two states have adopted ABA

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[13] Letter from 210 Federal Judges to Robert P. Deyling, Ass't Gen. Counsel, Administrative Off. of the U.S. Courts (Mar. 18, 2020), https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf.
[14] Memorandum from James C. Duff, Director, Administrative Office of the United States Courts to All United States Judges, "Update Regarding Exposure Draft – Advisory Opinion No. 117 Information" (July 30, 2020), https://aboutblaw.com/SkA,
[15] *Testimony Before the House Committee on Oversight and Government Reform on Religious Freedom & The First Amendment Defense Act*, 114th Cong. (July 12, 2016) (statement of Kelvin J. Cochran).
[16] "Did Mozilla CEO Brendan Eich Deserve to Be Removed from His Position?" Forbes (Apr. 11, 2014), https://www.forbes.com/sites/quora/2014/04/11/did-mozilla-ceo-brendan-eich-deserve-to-be-removed-from-his-position-due-to-his-support-for-proposition-8/#483d85c02158.
[17] "J.K. Rowling Joins 150 Public Figures Warning Over Free Speech," BBC (July 8, 2020), https://www.bbc.com/news/world-us-canada-53330105.
[18] Volokh, *supra* note 1.

Model Rule 8.4(g). In contrast, at least thirteen states have concluded, after careful study, that ABA Model Rule 8.4(g) is unconstitutional or unworkable. Those states have opted for the prudent course of letting other states experiment with ABA Model Rule 8.4(g) in order to evaluate its actual effect on the lawyers in those states before imposing it on lawyers in their states. See *infra* pp. 28-32.

This memorandum explains the numerous reasons why ABA Model Rule 8.4(g) should not be recommended for adoption, including:

1. Scholars' analysis of ABA Model Rule 8.4(g) as a speech code for lawyers (pp. 6-9);

2. ABA Model Rule 8.4(g)'s overreach into attorneys' lives, particularly its chilling effect on lawyers' speech and religious exercise, which is exacerbated by its use of a negligence standard (pp. 10-19);

3. ABA Model Rule 8.4(g)'s unconstitutionality under the analyses in three recent United States Supreme Court decisions, which ABA Formal Opinion 493 ignored, but the federal court decision in *Greenberg v. Haggerty* relied upon (pp. 20-26);

4. The fact that only Vermont and New Mexico have adopted ABA Model Rule 8.4(g), contrary to the inaccurate claim that 24 states have a similar rule (pp. 26-27);

5. The fact that official bodies in Arizona, Idaho, Illinois, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas have rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada have abandoned proposals to adopt it (pp. 28-32);

6. ABA Model Rule 8.4(g)'s unintended consequence of making it professional misconduct for law firms to engage in many diversity-oriented employment practices (pp. 32-34);

7. Its ramifications for lawyers' ability to accept, decline, or withdraw from a representation (pp. 34-35); and

8. The strain ABA Model Rule 8.4(g) would place on the scarce resources of the attorney grievance committees to process the increase in complaints against attorneys and firms (pp. 35-37).

I. Scholars have explained that ABA Model Rule 8.4(g) is a speech code for lawyers.

For four years before the *Greenberg* decision, a number of scholars had accurately characterized ABA Model Rule 8.4(g) as a speech code for lawyers. For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has

summarized his view, in a two-minute video, that ABA Model Rule 8.4(g) is a speech code that will have a serious impact on attorneys' speech.[19] Professor Volokh also explored its many flaws in a debate with a proponent of the model rule.[20]

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that "[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers' First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants."[21] She insists that "lawyer speech, association, and petitioning" are "rights [that] must be protected" because they "play a major role in checking the use of governmental and non-governmental power in the United States."[22]

The late Professor Ronald Rotunda, a deeply respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.[23] Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, "[t]he ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment."[24] They observed that "[t]he language the ABA has adopted in Rule 8.4(g) and its associated Comments are similar to laws that the Supreme Court has invalidated on free speech grounds."[25] In a *Wall Street Journal* commentary entitled *The ABA Overrules the First Amendment*, Professor Rotunda explained:

> In the case of Rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle

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[19] Volokh, *supra* note 1.
[20] *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=b074xW5kvB8&t=50s.
[21] Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).
[22] *Id.*
[23] Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought,* The Heritage Foundation (Oct. 6, 2016), http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf. Professor Rotunda and Texas Attorney General Ken Paxton debated two proponents of Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention. *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, The Federalist Society (Nov. 20, 2017), https://www.youtube.com/watch?v=V6rDPjqBcQg.
[24] Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017 [hereinafter "Rotunda & Dzienkowski"], "§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech" & "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" in "§ 8.4-2 Categories of Disciplinable Conduct."
[25] *Id.* at "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

> rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.[26]

Professor Josh Blackman has explained that "Rule 8.4(g) is unprecedented, as it extends a disciplinary committee's jurisdiction to conduct merely 'related to the practice of law,' with only the most tenuous connection to representation of clients, a lawyer's fitness, or the administration of justice."[27]

Professor McGinniss, Dean of the University of North Dakota School of Law, who teaches professional responsibility, warns against "the widespread ideological myopia about what it truly means to have a diverse and inclusive profession" that seems to be an impetus for ABA Model Rule 8.4(g).[28] He explains that a genuinely "diverse and inclusive profession . . . does not mean silencing or chilling diverse viewpoints on controversial moral issues on the basis that such expression manifests 'bias or prejudice,' is 'demeaning' or 'derogatory' because disagreement is deemed offensive, or is considered intrinsically 'harmful' or as reflecting adversely on the 'fitness' of the speaker."[29]

In a thorough examination of the rule's legislative history, practitioners Andrew Halaby and Brianna Long conclude that ABA Model Rule 8.4(g) "is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities."[30] They recommend that "jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all."[31] They conclude that "the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected."[32]

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[26] 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.
[27] Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g),* 30 Geo. J. Legal Ethics 241, 243 (2017). *See also,* George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political,* 32 Notre Dame J.L. Ethics & Pub. Pol'y 135 (2018).
[28] McGinniss, *supra* note 2, at 249.
[29] *Id.*
[30] Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201, 257 (2017).
[31] *Id.*
[32] *Id.* at 204.

In adopting ABA Model Rule 8.4(g), the ABA largely ignored over 480 comment letters,[33] most opposed to the new rule. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule and raising concerns about its enforceability, although the Committee dropped its opposition immediately prior to the House of Delegates' vote.[34]

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.[35] But little was done to address these concerns. In their meticulous explication of the legislative history of ABA Model Rule 8.4(g), Halaby and Long conclude that "the new model rule's afflictions derive in part from indifference on the part of rule change proponents, and in part from the hasty manner in which the rule change proposal was pushed through to passage."[36] Specifically, the rule went through five versions, of which three versions evolved "in the two weeks before passage, none of these was subjected to review and comment by the ABA's broader membership, the bar at large, or the public."[37] Halaby and Long summarized the legislative history of the rule:

> Model Rule 8.4(g) and its associated comments evolved rapidly between the initial letter from the Goal III entities in July 2014, through initial circulation of Version 1 in July 2015, to final adoption of Version 5 the following August. There was solicitation of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.[38]

These scholars' red flags should not be ignored. ABA Model Rule 8.4(g) would dramatically shift the disciplinary landscape for New York attorneys.

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[33] 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.

[34] Halaby & Long, *supra* note 30, at 220 & n.97 (listing the Committee's concerns as including: lack of empirical evidence of need for Rule; vagueness of key terms; enforceability; constitutionality; coverage of employment discrimination complaints; mens rea requirement; and potential limitation on ability to decline representation), *citing* Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MABA MODEL RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

[35] Halaby & Long, *supra* note 30, at 216-223 (summarizing concerns expressed at the only public hearing on an early version of ABA Model Rule 8.4(g), as well as the main concerns expressed in the comment letters).

[36] *Id.* at 203.

[37] *Id.*

[38] *Id.* at 233.

II. ABA Model Rule 8.4(g) Would Greatly Expand the Reach of the Rules of Professional Conduct into New York Attorneys' Lives and Chill Their Speech.

A. ABA Model Rule 8.4(g) would regulate lawyers' interactions with anyone while engaged in conduct related to the practice of law, including when participating in business or social activities in connection with the practice of law.

ABA Model Rule 8.4(g) would make professional misconduct *any* conduct related to the practice of law that a lawyer "knows *or reasonably should know* is harassment or discrimination" on eleven separate bases ("race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status") whenever a lawyer is: "1) representing clients; 2) interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law; 3) operating or managing a law firm or law practice; or 4) participating in bar association, business *or social activities in connection with the practice of law*."

Simply put, ABA Model Rule 8.4(g) would regulate a lawyer's "conduct . . . while . . . *interacting with . . . others* while engaged in the practice of law . . . or participating in . . . bar association, business *or social activities in connection with the practice of law*." Proponents of ABA Model Rule 8.4(g) candidly observed that they sought a new black letter rule precisely because they wanted to regulate nonlitigating lawyers, such as "[a]cademics, nonprofit lawyers, and some government lawyers," as well as "[t]ax lawyers, real estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system."[39]

The compelling question becomes: *What conduct doesn't ABA Model Rule 8.4(g) reach?* Virtually everything a lawyer does can be characterized as conduct while interacting with others while engaged in the practice of law. [40] 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.

The Rule's scope is of particular concern when "conduct" is euphemistically defined to include "harmful verbal conduct," which is speech. As ABA Model Rule 8.4(g) and its accompanying Comment [3] state, "[d]iscrimination and harassment" include "harmful verbal or physical conduct." Thus, ABA Model Rule 8.4(g) would regulate pure speech.

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[39] ABA Commission on Sexual Orientation and Gender Identity, *Memorandum to Standing Committee on Ethics and Professional Responsibility: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4*, at 5, 7 (Oct. 22, 2015), https://www.clsnet.org/document.doc?id=1125.

[40] *See* Halaby & Long, *supra* note 30, at 226 ("The proposed comment of Version 3 expanded the ambit of 'conduct related to the practice of law' to include virtually anything a working lawyer might do.")

ABA Model Rule 8.4(g) is a minefield for New York lawyers who frequently speak to community groups, classes, and other audiences about current legal issues of the day. Lawyers frequently participate in panel discussions, present CLEs, write op-eds, or tweet regarding sensitive social and political issues. Their commentary is sought by the media regarding controversial issues in their community, state, and nation. 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 professional opportunities.

ABA Model Rule 8.4(g) raises numerous questions about whether various routine expressive activities could expose a lawyer to potential disciplinary action, including:

- Is a lawyer subject to discipline for her discussion of hypotheticals while presenting a CLE course?[41]
- Is a lawyer subject to discipline when participating in legal panel discussions that touch on controversial political, religious, and social viewpoints? [42]
- Is a law professor or adjunct faculty member subject to discipline for a law review article or a class discussion that explores controversial topics or expresses unpopular viewpoints?
- Must lawyers abstain from writing blogposts or op-eds because they risk a bar complaint by an offended reader?
- Must lawyers forgo media interviews on topics about which they have some particularly insightful comments because anyone hearing the interview could file a complaint?[43]

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[41] The *Greenberg* case was a facial challenge to Pennsylvania's version of ABA Model Rule 8.4(g) by a lawyer who regularly presents CLEs on controversial freedom of speech topics. The court found his concerns legitimate and his speech unconstitutionally chilled. 491 F. Supp. 3d at 16, 20-21. *Cf.,* Kathryn Rubino, *Did D.C. Bar Course Tell Attorneys That It's Totally Cool to Discriminate If that's What the Client Wants?,* Above the Law (Dec. 12, 2018) (reporting on attendees' complaints regarding an instructor's discussion of a hypothetical about sex discrimination and the applicability of the ethical rules during the mandatory D.C. Bar Professional Ethics course for newly admitted D.C. attorneys), https://abovethelaw.com/2018/12/did-d-c-bar-course-tell-attorneys-its-totally-cool-to-discriminate-if-thats-what-the-client-wants/.

[42] *Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney's statutory or constitutional rights (RQ-0128-KP)*, Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016) at 3, https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf. ("Given the broad nature of this rule, a court could apply it to an attorney's participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event."); *ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution*, 17 La. Att'y Gen. Op. 0114 (Sept. 8, 2017) at 4, https://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384 , at 6 ("[A] lawyer who is asked his opinions, thoughts, or impressions on legal matters taking place in the news at a social function could also be found to be engaged in conduct related to the practice of law.").

[43] *See Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comn'n. (May 15, 2018) discussed *infra* note 51.

- Can a lawyer lose his license to practice law for a tweet calling a female public official a derogatory sexist term?[44]
- Is a lawyer subject to discipline for employment decisions made by religious or other charitable nonprofits if she sits on its board and ratifies its decisions or employment policies?[45]
- May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various groups as protected classes in a nondiscrimination law being debated in the state legislature?
- Is a lawyer at risk if she provides legislative testimony in favor of adding new protected classes to state or local civil rights laws, but only if religious exemptions (which some consider "a license to discriminate") are also added?[46]
- Is a lawyer subject to discipline for comment letters she writes as a lawyer expressing her personal views on proposed Title IX regulations, immigration issues, census questions, re-districting proposals, or capital gains tax proposals?
- Is a lawyer who is running for public office subject to discipline for socio-economic discrimination if she proposes that college loans be forgiven only for graduates earning below a certain income level?
- Is a lawyer subject to discipline for failing to use "preferred" pronouns or names that she believes are not objectively accurate?[47]
- Is a lawyer subject to discipline for serving on the board of an organization that discriminates based on sex, such as a social fraternity or sorority?
- Is a lawyer at risk for volunteer legal work for political candidates who take controversial positions?
- Is a lawyer at risk for any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political positions?

Professor Eugene Volokh has explored whether discipline under ABA Model Rule 8.4(g) could be triggered by conversation on a wide range of topics at a local bar dinner, explaining:

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

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

[46] The Montana Legislature passed a resolution expressing its concerns about the impact of ABA 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." *See infra* notes 144.

[47] *See, e..g., Meriwether v. Hartop,* 992 F.3d 492 (6th Cir. 2021) (tenured professor's free speech implicated when he was disciplined by university for violating its nondiscrimination policies because he refused to address a transgender student using the student's preferred gender identity title and pronouns).

> 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."[48]

Professor Josh Blackman similarly has a thought-provoking list of CLE topics that would expose their presenters to grievance complaints by persons who disagree with the ideas or beliefs that a lawyer expresses.[49]

Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree.[50] Such a troubling situation arose in Alaska when the Anchorage Equal Rights Commission (AERC) filed a complaint against an Anchorage law firm, alleging that the firm violated a municipal nondiscrimination law. The firm represented a religiously affiliated, private nonprofit shelter for homeless women, many of whom had been abused by men. The firm represented the shelter in a proceeding arising from a discrimination complaint filed with the AERC, alleging that the shelter had refused admission to a biological male who identified as female. The shelter denied the complaint, explaining that it had denied shelter to the individual because, among other things, of its policy against admitting persons who were inebriated, but acknowledging that it also had a policy against admitting biological men. The law firm responded to an unsolicited request for a media interview. When the interview was published providing the shelter's version of the facts, the AERC brought a discrimination claim

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[48] 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.

[49] Blackman, *supra* note 27 at 246.

[50] *See, e.g.,* Aaron Haviland, "I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong," The Federalist (Mar. 4, 2019), http://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/ (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

against the law firm alleging it had published a discriminatory policy. The AERC complaint was eventually dismissed, but only after several months of legal proceedings.[51]

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected because it constitutes a serious threat to a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish by the day, lawyers can ill-afford to wager their licenses on a rule that may be utilized to punish their speech.

At bottom, ABA Model Rule 8.4(g) has a "fundamental defect" because it "wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech which is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech."[52] ABA Model Rule 8.4(g) creates doubt as to whether particular speech is permissible and, therefore, will inevitably chill lawyers' public speech.[53] In all likelihood, it will chill speech on one side of current political and social issues, while simultaneously creating little disincentive for lawyers who speak on the opposing side of these controversies.[54] If so, public discourse and civil society will suffer from the ideological straitjacket that ABA Model Rule 8.4(g) will impose on lawyers.

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

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit organizations. These organizations provide incalculable good to people in their local communities, as well as nationally and internationally. They also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.[55]

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[51] *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comn'n (May 15, 2018).
[52] Tenn. Att'y Gen. Letter, Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 7 (hereinafter "Tenn. Att'y Gen. Letter"), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf. The letter is incorporated into Tennessee Attorney General Opinion 18-11; however, for purposes of quoting the letter, we cite to the page numbers of the letter rather than the opinion. ("[T]he goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.") (Emphasis in original.)
[53] *Id.* at 8 ("Even if the [Board of Professional Responsibility] may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place.")
[54] McGinniss, *supra* note 2, at 217-249 (explaining the "justified distrust of speech restrictions" such as Model Rule 8.4(g), in light of its proponents' stated desire "for a cultural shift . . . to be captured in the rules of professional conduct").
[55] Tex. Att'y Gen. Op., *supra* note 42, at 4 ("Model Rule 8.4(g) could also be applied to restrict an attorney's religious liberty and prohibit an attorney from zealously representing faith-based groups.").

As a volunteer on a charitable institution's board, a lawyer arguably is engaged "in conduct related to the practice of law" when serving on the risk management committee or providing legal input during a board discussion about the institution's policies. For example, a lawyer may be asked to help craft her congregation's policy regarding whether its clergy will perform marriages or whether the institution's facilities may be used for wedding receptions 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 pro bono legal work that she performs for her church or her alma mater.[56] By making New York lawyers hesitant to serve on these nonprofit boards, ABA Model Rule 8.4(g) would do real harm to religious and charitable institutions and hinder their good works in their communities.

D. Attorneys' membership in religious, social, or political organizations could be subject to discipline.

ABA Model Rule 8.4(g) could chill lawyers' willingness to associate with political, cultural, or religious organizations that promote traditional values regarding sexual conduct and marriage. 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? [57] Would lawyers be subject to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

The late Professor Rotunda and Professor Dzienkowski expressed concern that ABA Model Rule 8.4(g) would subject lawyers to discipline for attending events sponsored by the St. Thomas More Society, an organization of Catholic lawyers and judges who meet together to share their faith.[58] State attorneys general have voiced similar concerns.[59] Several attorneys general have warned that "serving as a member of the board of a religious organization,

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[56] *See* D.C. Bar Legal Ethics, Opinion 222, *supra* note 45. *See also,* Tenn. Att'y Gen. Letter, *supra* note 49, at 8 n.8 ("statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization" "could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)").

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

[58] Rotunda & Dzienkowski, *supra* note 24, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

[59] Tex. Att'y Gen. Op., *supra* note 42, at 5 ("Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline."); La. Att'y Gen. Op., *supra* note 42, at 6 ("Proposed 8.4(h) could apply to many of the faith-based legal societies such as the Christian Legal Society, Jewish Legal Society, and Muslim Legal Society.").

participating in groups such as Christian Legal Society or even speaking about how one's religious beliefs influence one's work as an attorney" could "be deemed conduct 'related to the practice of law.'"[60] Attorneys should not have to choose between their faith and their livelihood.

E. ABA Model Rule 8.4(g)'s potential for chilling New York attorneys' speech is compounded by its use of a negligence standard rather than a knowledge requirement.

The lack of a knowledge requirement is a serious flaw: "[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way."[61] 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.[62]

ABA Model Rule 8.4(g) is perilous because the list of words and conduct deemed "discrimination" or "harassment" is ever shifting, often in unanticipated ways. Phrases that were generally acceptable ten years ago may now be critiqued as discriminating against or harassing a person in one of the eleven enumerated categories.

F. ABA Model Rule 8.4(g) does not preclude a finding of professional misconduct based on a lawyer's "implicit bias."

This negligence standard makes it entirely foreseeable that ABA Model Rule 8.4(g) could reach communication or conduct that demonstrates "implicit bias, that is, conduct or speech that the lawyer is not consciously aware may be discriminatory." As Dean McGinniss notes, "this relaxed mens rea standard" might even be used to "more explicitly draw lawyers' speech reflecting unconscious, or 'implicit,' bias within the reach of the rule."[63] Acting Law Professor Irene Oritseweyinmi Joe recently argued that while ABA Model Rule 8.4(g) "addresses explicit attorney bias, . . . it also provides a vehicle for those tasked with governing attorney behavior to

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[60] Tenn. Att'y Gen. Letter, *supra* note 52, at 10.
[61] *Id.* at 5. *See* Halaby & Long, *supra* note 30, at 243-245.
[62] Prof. Dane S. Ciolino, *LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct*, Louisiana Legal Ethics (Aug. 6, 2017) (emphasis in original), https://lalegalethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/.
[63] McGinniss, *supra* note 2, at 205 & n.135.

address implicit bias."[64] She explains that "the rule's use of 'knows or reasonably should know' arguably includes an understanding and reflection of unconscious bias and its effects."[65]

Proponents of ABA Model Rule 8.4(g) often are likewise proponents of the ABA's "Implicit Bias Initiative."[66] On its webpages devoted to its "Implicit Bias Initiative," the ABA defines "implicit bias" and "explicit biases" as follows:[67]

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

One can agree that implicit bias exists and still believe that bias "outside of human awareness" should not be grounds for a lawyer's loss of licensure or her suspension, censure, or admonition.[68] But nothing would prevent a charge of discrimination based on "implicit bias" from being brought against an attorney under ABA Model Rule 8.4(g).[69] Such charges are foreseeable given that ABA Model Rule 8.4(g)'s "proponents repeatedly invoked that concept [of implicit bias] in arguing against any knowledge qualifier at all."[70]

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[64] Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 Calif. L. Rev. 965, 975 (2020) (ABA Model Rule 8.4(g) "addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias.").

[65] *Id.* at 978 n.70.

[66] *See* Halaby & Long, *supra* note 30, at 216-217, 243-245. Halaby and Long eventually conclude that implicit-bias conduct probably would not fall within the "reasonably should know" standard. *Id.* at 244-245. We are not so certain.

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

[68] Halaby & Long, *supra* note 30, at 245 ("Even crediting the existence of implicit bias as well as corresponding concerns over its impact on the administration of justice, one recoils at the dystopian prospect of punishing a lawyer over unconscious behavior."). *See also,* McGinnis, *supra* note 2, at 204-205; Dent, *supra* note 27, at 144.

[69] *See, e.g.,* Irene Oritseweyinmi Joe, *supra* note 64 (ABA Model Rule 8.4(g) "addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias."); *id.* at 978n.70 ("[T]he rule's use of 'knows or reasonably should know' arguably includes an understanding and reflection of unconscious bias and its effects.").

[70] Halaby & Long, *supra* note 30, at 244 ("When a new anti-bias rule proved unsaleable without a knowledge qualifier, one was added, but only with the alternative 'reasonably should know' qualifier alongside. That addition was not subjected to comment by the public or by the bar or the ABA's broader membership.") (footnote omitted).

G. Despite its nod to speech concerns, ABA Model Rule 8.4(g) will chill speech and cause lawyers to self-censor in order to avoid grievance complaints.

ABA Model Rule 8.4(g) itself recognizes its potential for silencing lawyers when it asserts that it "does not preclude legitimate advice or advocacy consistent with these rules." This provision affords no substantive protection for attorneys' speech: It merely asserts that the rule does not do what it in fact does. And what qualifies as "legitimate" advice or advocacy? Or what "legitimate" advice or advocacy is not "consistent with these rules"? And who makes that determination?

This is a constitutional thicket. Because enforcement of proposed ABA Model Rule 8.4(g) gives government officials unbridled discretion to determine which speech is permissible and which is impermissible, the rule clearly invites viewpoint discrimination based on government officials' subjective biases. Courts have recognized that giving any government official unbridled discretion to suppress citizens' free speech is unconstitutional viewpoint discrimination.[71]

Proponents of ABA Model Rule 8.4(g) often try to reassure its critics that the rule actually will only rarely be used and to trust that its use will be judicious. But it is not enough for government officials to promise to be careful in their enforcement of a rule that lawyers have reason to fear will suppress their speech. As the Supreme Court has observed, "The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige.* We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[72] Instead, the Court has rejected "[t]he Government's assurance that it will apply [a statute] far more restrictively than its language provides" because such an assurance "is pertinent only as an *implicit acknowledgment of the potential constitutional problems* with a more natural reading."[73]

The *Greenberg* court likewise rejected such assurances by observing that "[government officials] dismiss these concerns with a paternal pat on the head and suggest that the genesis of the disciplinary process is benign and mostly dismissive." But given "the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the [lawyer's] words, speeches, notes, written materials, videos, mannerisms, and practice of law," the government is "de facto regulat[ing] speech by threat, thereby chilling speech."[74]

Moreover, in the landmark case, *National Association for the Advancement of Colored People v. Button*,[75] which involved a First Amendment challenge to a state statute regulating

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[71] *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).
[72] *United States v. Stevens*, 599 U.S. 460, 480 (2010).
[73] *Id.* (emphasis added).
[74] *Greenberg*, 491 F. Supp. 3d at 24-25.
[75] *NAACP v. Button,* 371 U.S. 415 (1963).

attorneys' speech, the Supreme Court ruled that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," explaining:

> If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.[76]

ABA Model Rule 8.4(g) fails to protect a lawyer from complaints being filed against her based on her speech. It fails to protect a lawyer from an investigation into whether her speech is "harmful" and "manifests bias or prejudice" on the basis of one or more of the eleven protected categories. The provision fails to protect a lawyer from the expense of protracted litigation to defend her speech as protected speech. Litigation in free speech cases often lasts for years. It extracts great personal expense and a significant emotional toll. Even if the investigation or litigation eventually concludes that the lawyer's speech was protected by the First Amendment, the lawyer has had to inform courts that a complaint has been brought and she is under investigation whenever she applies for admission to another bar or seeks to appear pro hac vice in a case. In the meantime, her personal reputation may suffer damage through media reports.

The process is the punishment. This brings us to the real problem with ABA Model Rule 8.4(g). Rather than risk a prolonged investigation with an uncertain outcome, and then lengthy litigation, a rational, risk-averse lawyer will self-censor. Because a lawyer's loss of her license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one's own speech than to risk a grievance complaint under ABA Model Rule 8.4(g), as the federal judge warned in *Greenberg*.[77] The losers are not just the legal profession, but our free civil society, which depends on lawyers to protect—and contribute to—the free exchange of ideas that is its lifeblood.

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[76] *Id.* at 438-39.
[77] 491 F. Supp. 3d at 24-25.

III. ABA Formal Opinion 493 Ignores Three Recent Supreme Court Decisions that Demonstrate the Likely Unconstitutionality of Rules Like ABA Model Rule 8.4(g) and Predates the Federal Court Decision in *Greenberg v. Haggerty*.

Since the ABA adopted Model Rule 8.4(g) in 2016, the United States Supreme Court has issued three free speech decisions that make clear that it unconstitutionally chills attorneys' speech: *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). The *Becerra* decision clarified that the First Amendment protects "professional speech" just as fully as other speech. That is, there is no free speech carve-out that countenances content-based restrictions on professional speech. The *Matal* and *Iancu* decisions affirm that the terms used in ABA Model Rule 8.4(g) create unconstitutional viewpoint discrimination. In *Greenberg v. Haggerty*, the federal district court relied on these three Supreme Court cases to hold Pennsylvania's version of ABA Model Rule 8.4(g) unconstitutional on its face because it invites viewpoint discrimination.[78]

A. *NIFLA v. Becerra* protects lawyers' speech from content-based restrictions.

Under the Court's analysis in *Becerra,* ABA Model Rule 8.4(g) is an unconstitutional *content*-based restriction on lawyers' speech. The Court held that government restrictions on professionals' speech – including lawyers' professional speech – are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, presumptively unconstitutional. That is, a government regulation that targets speech must survive strict scrutiny – a close examination of whether the regulation is narrowly tailored to achieve a compelling government interest.

The Court explained that "[c]ontent-based regulations 'target speech based on its communicative content.'"[79] "[S]uch laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'"[80] As the Court observed, "[t]his stringent standard reflects the fundamental principle that governments have '"no power to restrict expression because of its message, its ideas, its subject matter, or its content."'"[81]

The Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech, which is the operative assumption underlying ABA Model Rule 8.4(g). In striking down Pennsylvania's Rule 8.4(g), the district court relied on *Becerra* to "find[] that Rule 8.4(g) does not cover 'professional speech' that is entitled to less protection" but

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[78] *Id.*
[79] *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[80] *Id*.
[81] *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

instead "[t]he speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment."[82]

To illustrate its point, the Supreme Court noted three recent federal courts of appeals that had ruled that "'professional speech' [w]as a separate category of speech that is subject to different rules" and, therefore, less protected by the First Amendment.[83] The Court then abrogated those decisions, stressing that "*this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.*'"[84] The Court rejected the idea that "professional speech" was an exception "from the rule that content-based regulations of speech are subject to strict scrutiny."[85]

Instead, the Court was clear that a State's regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its "precedents have long protected the First Amendment rights of professionals" and "has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers."[86]

B. ABA Formal Opinion 493 and Professor Aviel's article fail to address the Supreme Court's decision in *NIFLA v. Becerra*.

1. ABA Formal Opinion 493 fails even to mention *Becerra.*

The ABA Section of Litigation recognized *Becerra's* impact. Several section members understood that the decision raised grave concerns about the overall constitutionality of ABA Model Rule 8.4(g):

> Model Rule 8.4(g) "is intended to combat discrimination and harassment and to ensure equal treatment under the law," notes Cassandra Burke Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section's Civil Rights Litigation Committee. While it serves important goals, *"the biggest question about Rule 8.4(g) has been whether it unconstitutionally infringes on lawyers' speech rights—and after the Court's decision in Becerra, it increasingly looks like the answer is yes*," Robertson concludes. [87]

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[82] *Greenberg,* 491 F. Supp. 3d at 27-30.
[83] *NIFLA,* 138 S. Ct. at 2371.
[84] *Id.* at 2371-72 (emphasis added).
[85] *Id.* at 2371.
[86] *Id.* at 2374.
[87] C. Thea Pitzen, *First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g)*

But two years after *Becerra*, in July 2020, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 493, "Model Rule 8.4(g): Purpose, Scope, and Application." *Formal Opinion 493 does not even mention the Supreme Court's* Becerra *decision*, even though it was handed down two years earlier and has been frequently relied upon to identify ABA Model Rule 8.4(g)'s constitutional deficiencies. This lack of mention, let alone analysis, is inexplicable. Formal Opinion 493 has a four-page section that discusses "Rule 8.4(g) and the First Amendment, " yet never mentions the United States Supreme Court's on-point decisions in *Becerra*, *Matal*, and *Iancu.*[88] Like the proverbial ostrich burying its head in the sand, the ABA adamantly refuses to see the deep flaws of Model Rule 8.4(g). But New York attorneys deserve honest scrutiny of a rule that would "hang over [New York] attorneys like the sword of Damocles."[89]

Instead, Formal Opinion 493 serves to underscore the breadth of ABA Model Rule 8.4(g) and the fact that it is intended to restrict lawyers' speech. The Opinion reassures that it will only be used for "harmful" conduct, which the Rule makes clear includes "verbal conduct" or "speech."[90] Formal Opinion 493 explains that the Rule's scope "is *not* restricted to conduct that is severe or pervasive."[91] Violations will "*often* be intentional and *typically* targeted at a particular individual or group of individuals." This merely confirms that a lawyer can be disciplined for speech that is not necessarily intended to harm and that does not necessarily "target" a particular person or group.[92]

Formal Opinion 493 claims that "[t]he Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern." But that is hardly reassuring because "matters of public concern" is a term of art in free speech jurisprudence that appears in the context of the broad limits that the government is allowed to place on its employees' free speech. The category actually provides *less*, rather than more, protection for free speech.[93] And it may even reflect the alarming notion that lawyers' speech is akin to government speech, a topic

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Constitutional?, ABA Section of Litigation Top Story (Apr. 3, 2019), https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond/ (emphasis added).

[88] American Bar Association Standing Comm. on Ethics and Prof. Resp., Formal Op., 493, *Model Rule 8.4(g): Purpose, Scope, and Application* (July 15, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf.

[89] *Greenberg*, 491 F. Supp. 3d at 24.

[90] *Id.* at 1.

[91] *Id.* (emphasis added).

[92] *Id.*

[93] *Garcetti v. Cabellos*, 547 U.S. 410, 417 (2006) ("the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern"); *id.* at 418 ("To be sure, conducting these inquiries sometimes has proved difficult.").

that Professor Aviel briefly mentions in her article.[94] If lawyers' speech is treated as the government's speech, then lawyers have minimal protection for their speech.

Formal Opinion 493 claims that ABA Model Rule 8.4(g) does not "limit a lawyer's speech or conduct in settings unrelated to the practice of law," but fails to grapple with just how broadly the Rule defines "conduct related to the practice of law," for example, to include social settings.[95] In so doing, Formal Opinion 493 ignores the Court's instruction in *Becerra* that lawyers' *professional* speech – not just their speech "unrelated to the practice of law" – is protected by the First Amendment under a strict scrutiny standard.

Formal Opinion 493 concedes that its definition of the term "harassment" is not the same as the EEOC uses,"[96] citing *Harris v. Forklift Systems, Inc.,* which ruled that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview."[97] ABA Model Rule 8.4(g)'s definition of "harassment" in Comment [3] includes "derogatory or demeaning verbal or physical conduct." Of course, this definition runs headlong into the Supreme Court's ruling that the mere act of government officials determining whether speech is "disparaging" is viewpoint discrimination that violates freedom of speech. In Formal Opinion 493, the ABA offers a new definition for "harassment" ("aggressively invasive, pressuring, or intimidating") that is not found in ABA Model Rule 8.4(g). Formal Opinion 493 signifies that the ABA itself recognizes that the term "harassment" is the Rule's Achilles' heel.

2. The Aviel article fails to mention *Becerra* and, therefore, is not a reliable source of information on the constitutionality of ABA Model Rule 8.4(g).

Professor Rebecca Aviel's article, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. L. Ethics 31 (2018), should not be relied upon in assessing ABA Model Rule 8.4(g)'s constitutionality because it too fails to mention *Becerra*. It seems probable that the article was written before the Supreme Court issued *Becerra.*

Of critical importance, Professor Aviel's article rests on the assumption that "regulation of the legal profession is legitimately regarded as a 'carve-out' from the general marketplace" that "appropriately empowers bar regulators to restrict the speech of judges and lawyers in a

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[94] Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. L. Ethics 31, 34 (2018) ("[L]awyers have such an intimate relationship with the rule of law that they are not purely private speakers. Their speech can be limited along lines analogous with government actors because, in a sense, they embody and defend the law itself"). The mere suggestion that lawyers' speech is akin to government actors' speech, which is essentially government speech that is unprotected by the First Amendment, is deeply troubling and should be soundly rejected.
[95] Formal Op. 493, *supra* note 89, at 1.
[96] *Id.* at 4 & n.13.
[97] 510 U.S. 17, 21 (1993)

manner that would not be permissible regulation of the citizenry in the general marketplace."[98] But this is precisely the assumption that the Supreme Court *rejected* in *Becerra*. Contrary to Professor Aviel's assumption, the Court explained in *Becerra* that the First Amendment does not contain a carve-out for "professional speech." [99] Instead, the Court used lawyers' speech as an example of protected speech.

Because she wrote without the benefit of *Becerra*, compounded by her reliance on basic premises repudiated by the Court in *Becerra*, her free speech analysis cannot be relied upon as authoritative. Interestingly, even without the *Becerra* decision to guide her, Professor Aviel conceded that the "expansiveness" of ABA Model Rule 8.4(g)'s comments "may well raise First Amendment overbreadth concerns."[100]

C. Under *Matal v. Tam* and *Iancu v. Brunetti*, ABA Model Rule 8.4(g) fails viewpoint-discrimination analysis.

As the federal district court held in *Greenberg*, under the Court's analysis in *Matal*, ABA Model Rule 8.4(g) is an unconstitutional *viewpoint*-based restriction on lawyers' speech. In *Matal*, a unanimous Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. In his concurrence, Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, observed that it is unconstitutional to suppress speech that "*demeans* or offends."[101] The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[102]

In *Matal*, all nine justices agreed that a provision of a longstanding federal law, the Lanham Act, was unconstitutional because it allowed government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons. Allowing government officials to determine what words do and do not "disparage" a person "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[103] Justice Alito, writing for a plurality of the Court, noted that "[s]peech that *demeans* on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[104]

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[98] Aviel, *supra* note 95, at 39 (citation and quotation marks omitted); *see also id.* at 44.
[99] *Becerra*, 138 S. Ct. at 2371.
[100] Aviel, *supra* note 95, at 48.
[101] *Matal v. Tam,* 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring)(emphasis supplied).
[102] *Id.* at 1753-1754, 1765 (plurality op.).
[103] *Id.* at 1751 (quotation marks and ellipses omitted).
[104] *Id.* at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes,J., dissenting)(emphasis supplied).

In his concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy stressed that "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate," particularly "if the ideas or perspectives are ones a particular audience might think offensive."[105] Justice Kennedy closed with a sober warning:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.[106]

Justice Kennedy explained that the federal statute was unconstitutional viewpoint discrimination because the government permitted "a positive or benign mark but not a *derogatory* one," which "reflects the Government's disapproval of a subset of messages it finds offensive," which is "the essence of viewpoint discrimination."[107] And it was viewpoint discriminatory even if it "applies in equal measure to any trademark that *demeans* or offends."[108]

In 2019, the Supreme Court reaffirmed its rigorous rejection of viewpoint discrimination. The challenged terms in *Iancu* were "immoral" and "slanderous" and, once again, the Court found the terms were viewpoint discriminatory because they allowed government officials to pick and choose which speech to allow.

In her opinion for the Court, Justice Kagan explained that "immoral" and "scandalous" insert a "facial viewpoint bias in the law [that] results in viewpoint-discriminatory application."[109] The Act was unconstitutional because:

> [I]t allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.[110]

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[105] *Id.* at 1767 (Kennedy, J., concurring).
[106] *Id.* at 1769 (Kennedy, J., concurring).
[107] *Id.* at 1766 (Kennedy, J., concurring)(emphasis supplied).
[108] *Id.* (emphasis supplied).
[109] *Iancu v. Brunetti,* 139 S. Ct. 2294, 2300 (2019).
[110] *Id.*

D. ABA Model Rule 8.4(g)'s terms "harassment" and "discrimination" are viewpoint discriminatory.

Because ABA Model Rule 8.4(g) would punish lawyers' speech on the basis of viewpoint, it is unconstitutional under the analyses in *Matal* and *Iancu.* As Comment [3] explains, under ABA Model Rule 8.4(g), "discrimination includes *harmful* verbal . . . conduct that manifests bias or prejudice towards others." And harassment includes "*derogatory* or *demeaning* verbal . . . conduct."

Under the *Matal* and *Iancu* analyses, these definitions are textbook examples of viewpoint discrimination. In *Matal*, the Supreme Court unanimously held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[111] A rule that permits government officials to punish lawyers for speech that the government determines to be "harmful" or "derogatory or demeaning" is the epitome of an unconstitutional rule.

As explained earlier, viewpoint discrimination occurs when government officials have unbridled discretion to determine the meaning of a statute, rule, or policy in such a way that they can favor particular viewpoints while penalizing other viewpoints. The provision of ABA Model Rule 8.4(g) that exempts "*legitimate* advice or advocacy *consistent with these rules*" permits such unbridled discretion, as do the terms "harmful" and "derogatory or demeaning."[112]

Finally, in addition to unconstitutional viewpoint discrimination, the vagueness in the terms "harassment" and "discrimination" will necessarily chill lawyers' speech. The terms further fail to give lawyers fair notice of what speech might subject them to discipline. At bottom, ABA Model Rule 8.4(g) fails to provide the clear enforcement standards that are necessary when the loss of one's livelihood may be at stake.

IV. The ABA's Original Claim that 24 States have a Rule Similar to ABA Model Rule 8.4(g) Is Not Accurate Because Only Vermont and New Mexico have Fully Adopted ABA Model Rule 8.4(g).

When the ABA adopted Model Rule 8.4(g), 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."[113] But this claim has been shown to be factually incorrect. As the 2019 edition of the *Annotated Rules*

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[111] 137 S. Ct. at 1753-1754, 1765 (plurality op.); *see also, id.* at 1766 (unconstitutional to suppress speech that "demeans or offends") (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).
[112] *See supra,* at p. 18 & n.72.
[113] *See, e.g.*, Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, https://www.scbar.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf, at 56-57.

of Professional Conduct states: "Over half of all jurisdictions have a specific rule addressing bias and/or harassment – *all of which differ in some way from the Model Rule* [*8.4(g)*] *and from each other*."[114]

No empirical evidence, therefore, supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers. As even its proponents have conceded, ABA Model Rule 8.4(g) does not replicate any black letter rule adopted by a state supreme court before 2016. Twenty-four states, including New York, had adopted some version of a black letter rule dealing with "bias" issues before the ABA promulgated Model Rule 8.4(g) in 2016; *however, each of these black letter rules was narrower than ABA Model Rule 8.4(g)*.[115] Thirteen states had adopted a comment rather than a black letter rule to deal with bias issues. Fourteen states had adopted neither a black letter rule nor a comment.

A proponent of ABA Model Rule 8.4(g) observed that "[a]lthough courts in twenty-five American jurisdictions (twenty-four states and Washington, D.C.) have adopted anti-bias rules in some form, these rules differ widely."[116] He highlighted the primary differences between these pre-2016 rules and ABA Model Rule 8.4(g):

> Most contain the nexus "in the course of representing a client" or its equivalent. Most tie the forbidden conduct to a lawyer's work in connection with the "administration of justice" or, more specifically, to a matter before a tribunal. Six jurisdictions' rules require that forbidden conduct be done "knowingly," "intentionally," or "willfully." Four jurisdictions limit the scope of their rules to conduct that violates federal or state anti-discrimination laws and three of these require that a complainant first seek a remedy elsewhere instead of discipline if one is available. Only four jurisdictions use the word "harass" or variations in their rules.[117]

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[114] Ellen J. Bennett & Helen W. Gunnarsson, Ctr. for Prof. Resp., American Bar Association, *Annotated Model Rules of Professional Conduct* 743, (9th ed. 2019) (emphasis supplied).
[115] *Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative* (July 16, 2015), App. B, *Anti-Bias Provisions in State Rules of Professional Conduct,* at 11-32, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.
[116] Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 195, 208 (2017) (footnotes omitted).
[117] *Id.* at 208.

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

Federalism's great advantage is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see whether states, besides Vermont and New Mexico, adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on attorneys in those states. This is particularly true when ABA Model Rule 8.4(g) has failed to survive close scrutiny by official entities in many states.[118]

A. Several State Supreme Courts have rejected ABA Model Rule 8.4(g).

The Supreme Courts of **Arizona, Idaho, Montana, New Hampshire, South Dakota, Tennessee,** and **South Carolina** have officially rejected adoption of ABA Model Rule 8.4(g). In August 2018, after a public comment period, the **Arizona** Supreme Court rejected a petition from the Central Arizona Chapter of the National Lawyer Guild urging adoption of ABA Model Rule 8.4(g).[119] In September 2018, the **Idaho** Supreme Court rejected a resolution by the Idaho State Bar Association to adopt a modified version of ABA Model Rule 8.4(g).[120] The **Montana** Supreme Court considered but chose not to adopt ABA Model Rule 8.4(g).[121]

In April 2018, after a public comment period, the Supreme Court of **Tennessee** denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).[122] The petition had been filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility. The Tennessee Attorney General filed a comment letter, explaining that a black letter rule based on ABA Model Rule 8.4(g) "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[123] In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).[124] The Court acted after the state

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[118] McGinniss, *supra* note 2, at 213-217.
[119] Arizona Supreme Court Order re: No. R-17-0032 (Aug. 30, 2018), https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf.
[120] Idaho Supreme Court, Letter to Executive Director, Idaho State Bar (Sept. 6, 2018), https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf.
[121] *In re Petition of the State Bar of Montana for Revision of the Montana Rules of Professional Conduct*, AF 09-0688, at 3 n.2 (Mar. 1, 2019) ("the Supreme Court chose not to adopt the ABA's Model Rule 8.4(g)"), https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Petition%20and%20Memo.pdf.
[122] The Supreme Court of Tennessee, *In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, Order No. ADM2017-02244 (Apr. 23, 2018), https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf.
[123] Tenn. Att'y Gen. Letter, *supra* note 52, at 1.
[124] The Supreme Court of South Carolina, *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct Appellate Case No. 2017-000498*, Order (June 20, 2017),

bar's house of delegates, as well as the state attorney general, recommended against its adoption.[125] In July 2019, the **New Hampshire** Supreme Court "decline[d] to adopt the rule proposed by the Advisory Committee on Rules."[126] In March 2020, the Supreme Court of **South Dakota** unanimously decided to deny the proposed amendment to Rule 8.4 because the court was "not convinced that proposed Rule 8.4(g) is necessary or remedies an identified problem."[127]

In May 2019, the **Maine** Supreme Court announced that it had adopted a modified version of ABA Model Rule 8.4(g).[128] The Maine rule is narrower than the ABA Model Rule in several ways. First, the Maine rule's definition of "discrimination" differs from the ABA Model Rule's definition of "discrimination." Second, its definition of "conduct related to the practice of law" also differs. Third, it covers fewer protected categories. Despite these modifications, if challenged, the Maine rule will likely be found unconstitutional because it overtly targets protected speech.

In June 2020, the **Pennsylvania** Supreme Court adopted a modified version of ABA Model Rule 8.4(g) to take effect December 8, 2020.[129] A federal district court, however, issued a preliminary injunction on the day it was set to take effect. In *Greenberg v. Haggerty,* the court ruled that Pennsylvania Rule 8.4(g) violated lawyers' freedom of speech under the First Amendment.[130]

In September 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

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http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01 (if arrive at South Carolina Judicial Department homepage, select "2017" as year and then scroll down to "2017-06-20-01").

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

[126] Supreme Court of New Hampshire, Order (July 15, 2019), https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf. The court instead adopted a rule amendment that had been proposed by the Attorney Discipline Office and is unique to New Hampshire.

[127] Letter from Chief Justice Gilbertson to the South Dakota State Bar (Mar. 9, 2020), https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_20.pdf.

[128] State of Maine Supreme Judicial Court Amendment to the Maine Rules of Professional Conduct Order, 2019 Me. Rules 05 (May 13, 2019), https://www.courts.maine.gov/rules_adminorders/rules/amendments/2019_mr_05_prof_conduct.pdf. Alberto Bernabe, *Maine Adopts (a Different Version of) ABA Model Rule 8.4(g)-Updated,* Professional Responsibility Blog, June 17, 2019 (examining a few differences between Maine rule and ABA Model Rule 8.4(g)), http://bernabepr.blogspot.com/2019/06/maine-becomes-second-state-to-adopt-aba.html. *See* The State of New Hampshire Supreme Court of New Hampshire Order 1, July 15, 2019, ("As of this writing, only one state, Vermont, has adopted a rule that is nearly identical to the model rule. Maine has adopted a rule that is similar, but is not nearly identical, to Model Rule 8.4(g)."), https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf.

[129] Supreme Court of Pennsylvania, Order, *In re Amendment of Rule 8.4 of the Pennsylvania Rules of Professional Conduct* (June 8, 2020), http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Entered%20-%20104446393101837486.pdf?cb=1.

[130] 491 F. Supp. 3d 12 (E.D. Pa. 2020).

8.4(g).[131] In a letter to the Court, 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."[132]

B. State Attorneys General have identified core constitutional issues with 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 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."[133] The opinion declared that "[c]ontrary to . . . basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues."[134]

In 2017, the Attorney General of **South Carolina** determined that "a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of Religion and is void for vagueness."[135] In September 2017, the **Louisiana** Attorney General concluded that "[t]he regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid."[136] Because of the "expansive definition of 'conduct related to the practice of law'" and its "countless implications for a lawyer's personal life," the Attorney General found the Rule to be "unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct."[137]

In March 2018, the Attorney General of **Tennessee** filed Opinion 18-11, *American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g),* attaching his office's comment letter to the Supreme Court of Tennessee, opposing adoption of a proposed rule closely modeled on ABA Model Rule 8.4(g).[138] After a thorough analysis, the Attorney General

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[131] The Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4*, Order (Sep. 25, 2017), https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf.
[132] Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), https://www.clsnet.org/document.doc?id=1124.
[133] Tex. Att'y Gen. Op., *supra* note 42, at 3.
[134] *Id.*
[135] South Carolina Att'y Gen. Op., *supra* note 125, at 13.
[136] La. Att'y Gen. Op., *supra* note 42.
[137] *Id.* at 6.
[138] *American Bar Association's New Model Rule of Professional Conduct 8.4(g)*, 18 Tenn. Att'y Gen. Op. 11 (Mar. 16, 2018), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf.

concluded that the proposed rule "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[139]

In May 2018, the **Arizona** Attorney General filed a comment letter urging the Arizona Supreme Court to heed the opposition of other states, state attorneys general, and state bar associations to adoption of ABA Model Rule 8.4(g). He also noted the constitutional concerns that ABA Model Rule 8.4(g) raises as to free speech, association, and expressive association.[140]

In August 2019, the **Alaska** Attorney General provided a letter to the Alaska Bar Association during a public comment period that it held on adoption of a rule modeled on ABA Model Rule 8.4(g). The letter identified numerous constitutional concerns with the proposed rule.[141] The Bar Association's Rules of Professional Conduct recommended that the Board not advance the proposed rule to the Alaska Supreme Court but instead remand it to the committee for additional revisions, noting that "[t]he amount of comments was unprecedented."[142] A second comment period closed August 10, 2020.

C. The Montana Legislature recognized the problems that ABA Model Rule 8.4(g) poses for legislators, witnesses, staff, and citizens.

On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).[143] 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

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[139] Tenn. Att'y Gen. Letter, *supra* note 52, at 1.
[140] Attorney General Mark Brnovich, *Attorney General's Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court* (May 21, 2017), https://www.clsnet.org/document.doc?id=1145.
[141] Letter from Alaska Attorney General to Alaska Bar Association Board of Governors (Aug. 9, 2019), http://www.law.state.ak.us/pdf/press/190809-Letter.pdf
[142] Letter from Chairman Murtagh, Alaska Rules of Professional Conduct to President of the Alaska Bar Association (Aug. 30, 2019), https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Report.ARPCcmte.on8_.4f.pdf. A subsequent public comment period on a revised proposed rule closed August 10, 2020.
[143] *A Joint Resolution of the Senate and the House of Representatives of the State of Montana Making the Determination that it would be an Unconstitutional Act of Legislation, in Violation of the Constitution of the State of Montana, and would Violate the First Amendment Rights of the Citizens of Montana, Should the Supreme Court of the State of Montana Enact Proposed Model Rule of Professional Conduct 8.4(G)*, SJ 0015, 65th Legislature (Mont. Apr. 25, 2017), http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf.

Committees" greatly concerned the legislature.[144] The Montana Supreme Court chose not to adopt ABA model Rule 8.4(g).[145]

D. Several state bar associations or committees have rejected ABA Model Rule 8.4(g).

On December 10, 2016, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois."[146] On September 15, 2017, the **North Dakota** Joint Committee on Attorney Standards voted not to recommend adoption of ABA Model Rule 8.4(g), expressing concerns that it was "overbroad, vague, and imposes viewpoint discrimination" and that it might "have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views."[147] 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."[148]

VI. ABA Model Rule 8.4(g) Would Make it Professional Misconduct for Attorneys to Engage in Hiring Practices that Favor Persons Because they are Women or Belong to Racial, Ethnic, or Sexual Minorities.

A professional ethics expert has explained that "ABA Model Rule 8.4(g)'s flat prohibition covers any discrimination on the basis of race, sex, or any of the other listed attributes" and "extends to any lawyer conduct 'related to the practice of law,' including 'operating or managing a law firm or law practice.'"[149] In written materials for a CLE presentation, the expert concluded that ABA Model Rule 8.4(g) "thus prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc."[150]

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[144] *Id.* at 3. The Tennessee Attorney General similarly warned that "[e]ven statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra* note 52, at 8 n.8.
[145] See *supra* note 121.
[146] Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals,* Illinois Lawyer Now, Dec. 15, 2016, https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals.
[147] Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. n Att'y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (Dec. 14, 2017), at https://perma.cc/3FCP-B55J.
[148] Louisiana State Bar Association, *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, Oct. 30, 2017, https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892.
[149] The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues* 5-6 (July 12, 2018) (quoting Comment [4] to ABA Model Rule 8.4(g)). The written materials used in the program are on file with Christian Legal Society and may be purchased from the D.C. Bar CLE program. See *supra* note 8.
[150] *Id.* at 6.

He further concluded that ABA Model Rule 8.4(g) would impose a *per se* discrimination ban in hiring practices:[151]

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

The ethics expert dismissed the idea that Comment [4] of ABA Model Rule 8.4(g) would allow these efforts to promote certain kinds of diversity to continue. Even though Comment [4] states that "[l]awyers may engage in conduct undertaken to promote diversity and inclusion . . . by . . . implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations," as the ethics expert explained, "[t]his sentence appears to weaken the blanket anti-discrimination language in the black letter rule, but on a moment's reflection it does not—and could not—do that."[152]

He provided three reasons to support his conclusion that efforts to promote certain kinds of diversity would violate the rule and, therefore, would be grounds for disciplinary complaints. *First*, the language in the comments is only guidance and not binding. *Second*, the drafters of the rule "clearly knew how to include exceptions to the binding black letter anti-discrimination rule" because two exceptions actually are contained in the black letter rule itself, so "[i]f the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule." *Third*, the comment "says nothing about discrimination" and "does not describe activities permitting discrimination on the basis of the listed attributes." The references could be to "political viewpoint diversity, geographic diversity, and law school diversity" which "would not involve discrimination prohibited in the black letter rule."

ABA Model Rule 8.4(g)'s consequences for New York lawyers' and their firms' efforts to promote diversity, equity, and inclusion provide yet another reason to reject the proposed rule.

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[151] *Id.* at 7 (emphasis supplied).

[152] *Id.* at 5. *See also, id*. at 5-6 ("Perhaps that sentence was meant to equate 'diversity' with discrimination on the basis of race, sex, etc. But that would be futile – because it would fly in the face of the explicit authoritative prohibition in the black letter rule. It would also be remarkably cynical, by forbidding discrimination in plain language while attempting to surreptitiously allow it by using a code word.")

The substantial value of firms' programs to promote diversity, equity, and inclusion, as well as the importance of affinity legal groups based on gender, race, sexual identity, or other protected classes, would seem to far outweigh any practical benefits likely to come from ABA Model Rule 8.4(g).

VII. ABA Model Rule 8.4(g) Could Limit New York Lawyers' Ability to Accept, Decline, or Withdraw from a Representation.

The proponents of ABA Model Rule 8.4(g) generally claim that it will not affect a lawyer's ability to refuse to represent a client. They point to the language in the rule that it "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16." But in one of the two states to have fully adopted ABA Model Rule 8.4(g), the Vermont Supreme Court explained in its accompanying Comment [4] that "[t]he optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule." The Vermont Supreme Court further explained that, under the mandatory withdrawal provision of Rule 1.16(a), *"a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)*."[153]

As Professor Rotunda and Professor Dzienkowski explained, Rule 1.16 actually "deals with when a lawyer must or may *reject* a client or *withdraw* from representation."[154] Rule 1.16 does not address *accepting* clients.[155] Moreover, as Professor Rotunda and Professor Dzienkowski have observed, Comment [5] to ABA Model Rule 8.4(g) would seem to limit any right to decline representation, if permitted at all, to "limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations."[156]

Dean McGinniss agrees that "[d]espite its ostensible nod of non-limitation, Model Rule 8.4(g) offers lawyers no actual protection against charges of 'discrimination' based on their *discretionary* decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer."[157] Because Model Rule 1.16 "addresses only when lawyers *must* decline representation, or when they may or must *withdraw* from representation" but not when they "are *permitted* to decline client representation," Model Rule 8.4(g) seems only

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[153] Vermont Supreme Court, *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, July 14, 2017, at 3, https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf (emphasis supplied).
[154] Rotunda & Dzienkowski, *supra* note 24, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis supplied by the authors).
[155] A state attorney general concurs that "[a]n attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra* note 52, at 11.
[156] *See* Rotunda & Dzienkowski, *supra* note 24.
[157] McGinniss, *supra* note 2, at 207-209.

to allow what was already required, not declinations that are discretionary. Dean McGinniss warns that "if state bar authorities consider a lawyer's declining representation . . . as 'manifest[ing] bias or prejudice,' they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g)."[158]

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*."[159] 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).[160] Of course, ABA Model Rule 8.4(g)'s reach goes beyond "unlawful discrimination."

In *Stropnicky v. Nathanson*,[161] the Massachusetts Commission Against Discrimination found a law firm that specialized in representing women in divorce cases had violated state nondiscrimination law when it refused to represent a man.[162] As these examples demonstrate, reasonable doubt exists that Rule 1.16 provides adequate protection for attorneys' ability to accept, decline, or withdraw from a representation if ABA Model Rule 8.4(g) were adopted.

VIII. Do the Attorney Grievance Committees and Their Staffs have Adequate Resources to Process an Increased Number of Discrimination and Harassment Claims?

Concerns have been expressed by some state bar disciplinary counsel as to whether bar disciplinary offices have adequate financial and staff resources for adjudicating complex harassment and discrimination claims, particularly employment discrimination claims. For example, the Montana Office of Disciplinary Counsel (ODC) voiced concerns about the breadth of ABA Model Rule 8.4(g).[163] The ODC quoted from a February 23, 2016, email from the

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[158] *Id.* at 207-208 & n.146, citing Stephen Gillers, *supra* note 117, at 231-32, as, in Dean McGinniss' words, "conceding that the United States Conference of Catholic Bishops' concerns about religious lawyers' loss of freedom in client selection under Model Rule 8.4(g) are well founded, though not a basis for objecting to the rule."
[159] N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).
[160] *Id.*
[161] 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, *Nathanson v. MCAD,* No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003).
[162] Rotunda & Dzienkowski, *supra* note 24, *in* "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."
[163] Office of Disciplinary Counsel, *In re the Model Rules of Professional Conduct: ODC's Comments re ABA Model Rule 8.4(g)*, *filed in* Montana Supreme Court, No. AF 09-0688 (Apr. 10, 2017), at 3, https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Letter%20of%20Chief%20Disciplinary%20Counsel%20Opposing%208.4.pdf.

National Organization of Bar Counsel ("NOBC") to its members explaining that the NOBC Board had declined to take a position on then-proposed ABA Model Rule 8.4(g) because "there were a number of simple regulatory issues, not the least of which is the possibility of diverting already strained resources to investigate and prosecute these matters."[164]

The Montana ODC thought that "any unhappy litigant" could claim that opposing counsel had discriminated on the basis of "one or more of the types of discrimination named in the rule."[165] The ODC also observed that ABA Model Rule 8.4(g) did not require "that a claim be first brought before an appropriate regulatory agency that deals with discrimination."[166] In that regard, the ODC recommended that the court consider "Illinois' rule [that] makes certain types of discrimination unethical and subject to discipline" because it required that "the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or administrative agency" and required that "the conduct must reflect adversely on the lawyer's fitness as a lawyer."[167] The Illinois rule is quite similar to New York's Rule 8.4(g).

Increased demand may drain the resources of the attorney grievance committees as they serve as tribunals of first resort for an increased number of discrimination and harassment claims against lawyers and law firms, including employment claims. Serious questions arise about the evidentiary or preclusive effects that a state bar proceeding might have on other tribunals' proceedings. State bar tribunals have their own rules of procedure and evidence that may be significantly different from state and federal court rules. Often, discovery is more limited in bar proceedings than in civil court. And, of course, there is no right to a jury trial in state bar proceedings.

The staff of the attorney grievance committees may feel ill-equipped to understand complicated federal, state, and local antidiscrimination and antiharassment laws well enough to understand how they interact with discriminatory and harassment complaints brought under ABA Model Rule 8.4(g). Comment [3] instructs that "[t]he substantive law of antidiscrimination or anti-harassment statutes and case law may guide application of [the rule]." (Note the permissive "may" rather than "shall.") To avoid this new burden on the staff of the disciplinary and grievance committees, the Montana ODC commended the Illinois rule's requirement that "the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or administrative agency."[168] The Illinois rule further requires that "any right of judicial review has been exhausted" before a disciplinary complaint can be acted upon.[169] New York's current 8.4(g), of course, incorporates these guardrails.

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[164] *Id.* at 3-4.
[165] *Id.*
[166] *Id.* at 3.
[167] *Id.* at 5.
[168] *Id.* (referring to ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j)).
[169] ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j).

Moreover, under ABA Model Rule 8.4(g), an attorney may be disciplined regardless of whether her conduct is a violation of any other law. Professor Rotunda and Professor Dzienkowski warn that ABA Model Rule 8.4(g) "may discipline the lawyer who does not violate any statute or regulation [except Rule 8.4(g)] dealing with discrimination."[170] Nor is "an allegedly injured party [required] to first invoke the civil legal system" before a lawyer can be charged with discrimination or harassment.[171]

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

> If lawyers do not follow this proposed Rule, they risk discipline (e.g., disbarment, or suspension from the practice of law). In addition, courts enforce the Rules in the course of litigation (e.g., sanctions, disqualification). Courts also routinely imply private rights of action from violation of the Rules – malpractice and tort suits by third parties (non-clients).[172]

Unsurprisingly, Professor Rotunda and Professor Dzienkowski disagree with the rule's proponents that lawyers "should rely on prosecutorial discretion because disciplinary boards do not have the resources to prosecute every violation." Instead, the scholars warn that "[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas."[173]

A lawyer's loss of his or her license to practice law is a staggering penalty and demands a stringent process, one in which the enforcement standards are clear and respectful of the attorneys' rights, as well as the rights of others. ABA Model Rule 8.4(g) simply fails to provide the clear enforcement standards that are necessary when the loss of one's livelihood is at stake.

Conclusion

Because ABA Model Rule 8.4(g) will drastically chill lawyers' freedom to express their viewpoints on political, social, religious, and cultural issues, and for the additional reasons given in this letter, it should be rejected. At a minimum, there should be a pause to wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out—if and when it is adopted in several other states. There is no reason to subject New York attorneys to the ill-conceived experiment that ABA Model Rule 8.4(g)

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[170] Rotunda & Dzienkowski, *supra* note 24 (parenthetical in original).
[171] *Id.*
[172] *Id.*
[173] *Id.*

represents. A decision to not recommend ABA Model Rule 8.4(g) can always be revisited, but the damage its premature adoption may do to New York attorneys would be less easily remedied.

Respectfully submitted,

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