CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

November 8, 2023

Committee Secretary
Illinois Supreme Court Rules Committee
222 N. LaSalle Street, 13th Floor
Chicago, Illinois 60601

Via email (RulesCommittee@illinoiscourts.gov)

Re: Comments of Christian Legal Society on Proposal 22-06 (P.R. 00309) to Amend Illinois Rules of Professional Conduct Rule 8.4(j) to Conform to ABA Model Rule 8.4(g)

Dear Committee Members:

Christian Legal Society ("CLS") respectfully submits this comment letter to express opposition to the recently proposed amendment to Rule 8.4(j) of the Illinois Rules of Professional Conduct ("the proposed rule" or "the proposed Illinois rule"). Although CLS lauds the effort to prevent harassment and discrimination in the legal profession, approving a vague and overbroad rule like Proposed Rule 8.4(j)—one that impinges on the First Amendment rights of Illinois attorneys—is not the tool to accomplish this, especially when the existing rules are more than sufficient. For the reasons detailed in this comment letter, the proposed rule should not be adopted.

CLS is an Illinois not-for-profit corporation that is an interdenominational association of Christian attorneys, law students, and law professors, networking thousands of lawyers and law students in all fifty states. Incorporated in 1961 under Illinois' "General Not For Profit Corporation Act," CLS was headquartered in Oak Park, Illinois, for over two decades. CLS's membership includes many attorneys who practice in Illinois, even more in surrounding states who are barred in Illinois, two attorney chapters in Chicago and Northern Illinois, and law student chapters at several Illinois law schools.

Among its many activities, CLS engages in two nationwide public ministries through its Christian Legal Aid ministry and the Center for Law & Religious Freedom. Demonstrating its commitment to helping economically disadvantaged persons, the goal of CLS's Christian Legal Aid program is to meet urgent legal needs of the most vulnerable members of our society. CLS helped birth and sustains with resources and training approximately sixty local legal aid clinics nationwide, including two that serve Illinois citizens. This network increases access to legal aid services for the poor, the marginalized, and victims of injustice. Based on its belief that the Bible commands Christians to plead the cause of the poor and needy, CLS encourages and equips individual attorneys to volunteer their time and resources to help those in need in their communities.

Demonstrating its commitment to pluralism and the First Amendment, for almost 50 years, CLS has worked, through its Center for Law & Religious Freedom, to protect the right of all citizens to be free from discriminatory treatment based on their religious expression and religious exercise. CLS was instrumental in passage of the federal Equal Access Act of 1984 that protects the right of both religious and LGBT student groups to meet on public secondary school campuses. Equal Access Act ("EAA"), 20 U.S.C. §§ 4071-74. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting the EAA). *See*, *e.g.*, *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (EAA protects religious student groups' meetings); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (EAA protects LGBT student groups' meetings). Since 1975, CLS has protected free speech, religious exercise, assembly, and expressive association rights for all citizens, regardless of their race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status.

I. Current Illinois Supreme Court Rules 8.4(d) and (j) Should Be Preserved Because They Already Prohibit Discrimination by Attorneys and Perform an Excellent Job of Serving the Public and the Profession.

A. Current Illinois Rules 8.4(d) and (j) already provide adequate protection.

The current Illinois Supreme Court Rule of Professional Conduct Rule 8.4 already prohibits discrimination by attorneys. The current rule is written in a thoughtful and temperate manner that fairly balances the interests of both attorneys and the public. Specifically, current Illinois Rules 8.4(d) and (j) provide that:

> It is professional misconduct for a lawyer to:
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> **(d)** engage in conduct that is prejudicial to the administration of justice;
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> **(j)** violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found

that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

COMMENT

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[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

B. There has been no empirical showing of a need to abandon current Illinois Rules 8.4(d) and (j).

There is no empirical evidence to demonstrate a need in Illinois for the adoption of the proposed rule. Neither does the proposed rule solve a problem that is not already adequately addressed by application of both the current Rule 8.4(j) that makes attorneys subject to discipline for unlawful discrimination, as well as the current Rule 8.4(d) that subjects them to discipline for conduct that prejudices the administration of justice. Indeed, Rules 8.4(d) and (j), as currently written, have served both the public and the legal profession well. They provide a carefully crafted balance between the need to prevent unlawful discrimination with the need to respect attorneys' constitutional rights. The current rules protect the public from unlawful discrimination while simultaneously allowing individual attorneys to practice law free from the fear of false accusations of discrimination that would threaten their license to practice their livelihood.

II. The Proposed Rule Would Greatly Expand the Reach of the Professional Rules into the Lives of Illinois Attorneys and Chill their Speech.

In August 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, ABA Model Rule 8.4(g), that would make it professional misconduct for a lawyer to knowingly engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.[1] Unfortunately, in adopting the new model rule, the ABA largely ignored over 450 comment letters,[2] most opposed to the rule change. Even the ABA's

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[1] Rule 8.4: Misconduct, American Bar Association, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/. The model rule and its accompanying comments are attached hereto as Appendix 1.
[2] Comments to Model Rule 8.4, American Bar Association, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.

own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the vote).[3]

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.[4] But little was done to address these concerns. In their meticulous explication of the legislative history of ABA Model Rule 8.4(g), practitioners Andrew Halaby and Brianna 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."[5] 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."[6] 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.[7]

In many ways, the proposed Illinois rule resembles the highly criticized and deeply flawed ABA Model Rule 8.4(g). Indeed, the Illinois Supreme Court Rules Committee has stated that the proposed amendments to Illinois RPC 8.4(j) are "modeled after the ABA's model rule on discrimination." Since its adoption, renowned constitutional scholars have written about their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. The late Professor Ronald Rotunda, who taught at the University of Illinois College of Law from 1974 until 2002 and was the Albert E. Jenner, Jr., Professor of Law Emeritus, authored a treatise

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[3] Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

[4] 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, 216-223 (2017) (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).

[5] *Id.* at 203.

[6] *Id.*

[7] *Id.* at 233.

on American constitutional law,[8] as well as the ABA's treatise on legal ethics.[9] He demonstrated the problem Model Rule 8.4(g) poses for lawyers' speech in a *Wall Street Journal* article entitled "The ABA Overrules the First Amendment."[10] Influential First Amendment scholar and editor of the daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has similarly described the new rule as a speech code for lawyers.[11]

These significant red flags raised by leading First Amendment scholars should not be ignored. The proposed Illinois rule would create a multitude of potential problems for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, or otherwise engage in public discussions regarding current political, social, and religious questions.

The proposed rule poses a serious threat to the First Amendment rights of Illinois attorneys and should be rejected. If adopted, the proposed rule would have a chilling effect on the ability of Illinois attorneys to engage in free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square.

A. The proposed rule will operate as a speech code for Illinois attorneys.

There are many areas of concern with the proposed rule. Perhaps the most troubling is the likelihood that it will be used to chill attorneys' expression of disfavored political, social, and religious viewpoints on a multitude of issues. Because attorneys often are the spokespersons and leaders in political, social, or religious movements, a rule that can be employed to discipline an attorney for his or her speech on such issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief in a diverse society that continually births movements for justice in a variety of contexts.

Scholars have raised serious concerns about the impact of ABA Model Rule 8.4(g) on attorneys' speech. Since its adoption, leading scholars have determined ABA Model Rule 8.4(g)

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

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

[10] Ronald Rotunda, "*The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech*," *The Wall Street Journal,* August 16, 2016, http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418. Professor Rotunda also wrote a lengthy memorandum about the Rule's threat to lawyers' First Amendment rights. Ronald D. Rotunda, "*The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*," The Heritage Foundation, October 6, 2016.

[11]Eugene Volokh, "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities*," The Washington Post, August 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.

to be a speech code for lawyers.[12] Because the proposed Illinois rule so closely resembles the model rule, the proposed rule will similarly serve as a speech code for Illinois attorneys.

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, 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."[13] 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."[14]

The late Professor Ronald Rotunda warned that ABA Model Rule 8.4(g) threatens attorneys' First Amendment rights.[15] 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."[16] 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."[17] In a thoughtful analysis, Professor Michael McGinniss, Dean of the University of North Dakota School of Law, raised similar concerns.[18]

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

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[12] Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, discusses why ABA Model Rule 8.4(g) would impose a speech code on lawyers, https://www.youtube.com/watch?v=AfpdWmlOXbA. Professor Volokh debated a proponent of ABA Model Rule 8.4(g) at the Federalist Society National Student Symposium in March 2017, https://www.youtube.com/watch?v=b074xW5kvB8&t=50s. Highly respected constitutional scholar and ethics expert, the late Professor Ronald Rotunda debated leading proponents of ABA Model Rule 8.4(g) at the Federalist Society National Lawyers Convention in November 2017, https://www.youtube.com/watch?v=V6rDPjqBcQg. Professor Rotunda also wrote a lengthy memorandum about the Rule's threat to lawyers' First Amendment rights. Ronald D. Rotunda, "*The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought*," The Heritage Foundation, Oct. 6, 2016.

[13] Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).

[14] *Id.*

[15] Rotunda, *supra* note 10.

[16] 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."

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

[18] Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173, 173 (2019).

code that will have a serious impact on attorneys' speech.[19] Professor Volokh further explored its many flaws in a 2017 debate with a proponent of the model rule.[20]

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."[21]

Halaby and 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."[22] 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."[23] 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."[24]

B. The proposed Illinois rule would regulate attorneys' interactions with anyone while engaged in "conduct in the practice of law."

It is particularly important to understand just how broad in scope the proposed rule is. This rule, if adopted, would regulate attorneys' interactions with anyone while engaged in conduct in the practice of law, including participating in law-related professional activities and events, even social events.

The proposed rule raises troubling new concerns for every attorney because it explicitly applies to all "conduct in the practice of law." Comment [3] to the proposed rule explicitly delineates the extensive reach of the proposed rule: "Conduct in the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers *and others* when representing clients; operating or managing a law firm or law practice; and participating in law-related professional activities or events, including law firm or bar association educational or *social* events." (Emphasis supplied.)

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[19] Volokh, *supra* note 12.
[20] *Id*.
[21] 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).
[22] Halaby & Long, *supra* note 4, at 257.
[23] *Id.*
[24] *Id.* at 204.

Simply put, the proposed Illinois rule would regulate an attorney's "conduct in the practice of law … [while] … *interacting with ... others* … or participating in ... law-related professional activities … educational or social events." Indeed, proponents of ABA Model Rule 8.4(g)—on which the proposed Illinois rule is based—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."[25]

The compelling question becomes: What conduct would the proposed Illinois rule *not* reach? Virtually everything an attorney does can be characterized as "conduct in the practice of law."[26] Much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or potential future clients.

Moreover, the proposed Illinois rule and its accompanying Comment [3A] make clear that "harassment' and "discrimination" include, respectively, "unwelcome verbal or physical contact" and "harmful verbal or physical conduct." Verbal conduct, of course, is a euphemism for speech.

This is highly problematic for attorneys who are frequently asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions regarding sensitive social and political issues. Their commentary is sought by the media regarding controversial issues in their community, state, and nation. Of course, attorneys are asked to speak *because they are attorneys*. And an attorney's speaking engagements often have a dual purpose of increasing the attorney's visibility and creating new business opportunities.

The proposed rule raises numerous questions about whether various routine expressive activities could expose a lawyer to potential disciplinary action, including:

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

[25] 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 (October 22, 2015), https://www.christianlegalsociety.org/wp-content/uploads/2022/10/ABA_SOGI_Comm_2015-10-22_CLS_Center_for_Law_and_Religious_Freedom.pdf.

[26] Halaby & Long, *supra* note 4 ("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.").

- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to non-profits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one's religious congregation
- becoming a member of a religious organization that has particular religious beliefs on controversial subjects
- becoming a member of a house of worship that has a particular religious creed on certain subjects that are legally protected
- serving one's alma mater, if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving on the boards of fraternities or sororities
- volunteering with or working for political parties
- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues.

Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree.[47] Indeed, a troubling situation recently 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 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.[27]

Because attorneys frequently are the spokespersons and leaders in political, social, religious, or cultural associations, a rule that can be employed to discipline an attorney 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, attorneys can ill-

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

afford to wager their licenses on a rule that may be utilized to target and chill their constitutionally protected speech.

C. Attorneys could be disciplined for guidance they offer when serving on the boards of their religious congregations, religious schools and colleges, and other religious ministries.

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

As a volunteer on religious institutions' boards, an attorney may not be "representing a client," but may nonetheless be engaged in "conduct in the practice of law." For example, an attorney may be asked to help craft her church's policy regarding whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities. A religious college may ask an attorney 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 in the practice of law," but surely an attorney should not be disciplined for volunteer legal work she performs for her church or her alma mater.

By chilling attorneys' speech, the rule is likely to do real harm to religious institutions and their good works in their communities. An attorney should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law," yet the proposed rule would invariably breed such fear. Because the proposed rule seems to prohibit attorneys from providing counsel, whether paid or volunteer, in these contexts, the rule will also have a stifling and chilling effect on attorneys' free speech and free exercise of religion (*infra* p. 15) when serving religious congregations and institutions.

Moreover, as these concerns demonstrate, the proposed rule also threatens attorneys' rights under the Free Exercise Clause of the First Amendment. Since ABA Model Rule 8.4(g) was adopted in 2016, the United States Supreme Court, in numerous cases, has reinforced individuals' free exercise rights, including in the context of nondiscrimination laws and regulations.

The Court has clarified that nondiscrimination laws and rules are not presumptively "neutral and generally applicable."[28] Furthermore, in applying a nondiscrimination rule, the government

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[28] *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (city nondiscrimination policy was not generally applicable toward religious exercise because it allowed for discretion in its application and, therefore failed strict scrutiny); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 2217 (1993) (application of state nondiscrimination law was not neutral toward religious exercise and, therefore, failed strict scrutiny); *cf., 303 Creative v. Elenis*, 143 S. Ct. 2298 (2023) (nondiscrimination law could not be applied to compel speech).

may not "act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices."[29]

If a law is not "neutral and generally applicable," its application to a person's free exercise of religion must survive strict scrutiny.[30] In other words, "a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests."[31] ABA Model Rule 8.4(g) was not built to survive strict scrutiny, and neither is the proposed Illinois rule.

D. Despite its nod to speech concerns, the proposed Illinois rule will chill speech and cause lawyers to self-censor to avoid grievance complaints.

The proposed Illinois rule itself recognizes its potential for silencing lawyers when it asserts that it "does not preclude or limit the giving of advice, assistance, 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.

This proposed rule creates an unconstitutional minefield where an attorney will not know where their bar license may be blown up. Because enforcement of the proposed rule gives governmental officials unbridled discretion to determine which speech is permissible and which is impermissible, the rule clearly invites viewpoint discrimination based on governmental officials' subjective biases. "The Supreme Court has long held that the government violates the First Amendment when it gives a public official unbounded discretion to decide which speakers may access a traditional public forum. [32] The Seventh Circuit has so ruled.[33]

As a federal appellate court has explained:

> Such unbridled discretion threatens two specific harms in the First Amendment context. First, its existence "intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Lakewood,* 486 U.S. at 757. Second, "the absence of express standards" renders it difficult to differentiate between a legitimate denial of access and an "illegitimate abuse of censorial power." *Id.* at 758.

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[29] *Masterpiece Cakeshop*, 138 S. Ct. at 1731.
[30] *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).
[31] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).
[32] *See, e.g., Forsyth County,* 505 U.S. 123, 129–33 (1992); *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 769–72 (1988); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150–51 (1969).
[33] *See Southworth v. Bd. of Regents,* 307 F.3d 566, 575–80 (7th Cir. 2002) (holding that unbridled discretion inquiry is a component of viewpoint discrimination analysis, which applies in all forums); *DeBoer v. Village of Oak Park,* 267 F.3d 558, 572–74 (7th Cir.2001).

> The danger of such boundless discretion, therefore, is that the government may succeed in unconstitutionally suppressing particular protected speech by hiding the suppression from public scrutiny. As the Supreme Court has explained, "[a] government regulation that allows arbitrary application ... has the potential for becoming a means of suppressing a particular point of view." *Forsyth County,* 505 U.S. at 130 (internal quotation marks omitted).[34]

Proponents of ABA Model Rule 8.4(g) and its progeny often try to reassure its critics that, in actuality, the rule will only rarely be used and that they should 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."[35] 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."[36]

In the landmark case, *National Association for the Advancement of Colored People v. Button*,[37] which involved a First Amendment challenge to a state statute regulating 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.[38]

The proposed rule fails to protect an attorney from complaints being filed against her based on her speech. It fails to protect an attorney from an investigation into whether her speech is "harmful" and "manifests bias or prejudice" on the basis of one or more of the protected

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[34] *Child Evangelism Fellowship v. Montgomery County Public Schools*, 457 F.3d 376, 386-387 (4th Cir. 2006).
[35] *United States v. Stevens*, 599 U.S. 460, 480 (2010).
[36] *Id.* (emphasis added).
[37] *NAACP v. Button,* 371 U.S. 415 (1963).
[38] *Id.* at 438-39.

categories. The proposed rule fails to protect an attorney from the expense of protracted litigation to defend her speech and her license. Such litigation extracts significant expense and a substantial emotional toll. Even if the investigation or litigation eventually concludes that the attorney's speech was protected by the First Amendment, the attorney has had to inform courts that a complaint has been brought and that 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 will be the punishment, which brings us to another inevitable and unredeemable problem with the proposed rule. Rather than risk a prolonged investigation with an uncertain outcome and then time-consuming, costly, and public litigation, a rational, risk-adverse attorney will self-censor. Because an attorney's loss of her license to practice law is a staggering penalty, her calculus is entirely predictable: better to censor one's own speech than to risk a grievance complaint under the rule. The losers are not just the attorneys but our free civil society that depends on lawyers to protect—and contribute to—the free exchange of ideas, which is its lifeblood.

III. The Proposed Illinois Rule Raises Constitutional Issues.

A. The proposed rule is an unconstitutional content-based restriction.

The proposed rule expressly ignores recent U.S. Supreme Court precedent that demonstrates it is an unconstitutional content-based restriction on attorneys' speech. In particular, *National Institute of Family and Life Advocates v. Becerra ("NIFLA")*, 138 S. Ct. 2361 (2018), protects attorneys' speech from content-based speech restrictions like the proposed rule.

While *NIFLA* did not directly involve ABA Model Rule 8.4(g) or a version thereof, the Court's analysis makes clear that ABA Model Rule 8.4(g) and its variants such as the proposed rule are unconstitutional *content*-based restrictions on attorneys' speech. In *NIFLA*, the United States Supreme Court held that government restrictions on professionals' speech—including attorneys' professional speech—are generally subject to strict scrutiny review because they are content-based speech restrictions and, therefore, *presumptively unconstitutional*.

The Court explained that "[c]ontent-based regulations 'target speech based on its communicative content.'"[39] "[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.'"[40] 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."[41] The Court stressed that "*this Court has not recognized 'professional speech' as a separate category of speech. Speech*

[39] *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[40] *Id*.
[41] *Id.* at 2371.

is not unprotected merely because it is uttered by 'professionals.''"[42] 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."[43] 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."'"[44]

Even the ABA Section of Litigation recognized *Becerra's* impact.[45] 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.[46]

The operative assumption underlying both ABA Model Rule 8.4(g) and the proposed rule is that professional speech is less protected by the First Amendment than other speech. But the Supreme Court of the U.S. rejected that basic premise in *NIFLA*. Indeed, in striking down Pennsylvania's first Rule 8.4(g), a federal district court relied on *NIFLA* to "find[] that Rule 8.4(g) does not cover 'professional speech' that is entitled to less protection," but instead "[t]he speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment."[47]

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[42] *Id.* at 2371-72 (emphasis added).
[43] *Id.* at 2374.
[44] *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[45] C. Thea Pitzen, *First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g) Constitutional?*, ABA Section of Litigation Top Story (Apr. 3, 2019), https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-rulingmay-affect-model-rules-prof-cond/.
[46] *Id.*
[47] *Greenberg v. Haggerty,* 491 F.Supp.3d 12, 27-30 (E.D.Pa. 2020); *Greenberg v. Goodrich*, 593 FSupp.3d 174 (2022) (rev'd for lack of standing, *Greenberg v. Lehocky*, __ 4th ___, 2003 WL 5539272 (3rd Cir. 2023)).

B. The proposed rule not only invites unconstitutional viewpoint discrimination, but also institutionalizes viewpoint discrimination against many attorneys' public speech on current political, religious, and social issues.

Comment [3A] of the proposed Illinois rule explicitly protects some viewpoints over others by allowing lawyers to "engage in conduct undertaken to promote diversity and inclusion without violating paragraph (j) by, for example, implementing initiatives to encourage recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations." Because "conduct" includes "verbal conduct," the proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not.

But that is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). The proposed rule explicitly promotes one viewpoint over others.

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

As discussed above (*supra* pages 10-11), because enforcement of Rule 8.4(g) gives governmental actors unbridled discretion to determine which speech is permissible and which is impermissible, which speech "promote[s] diversity and inclusion" and which does not, the rule clearly countenances viewpoint discrimination based on governmental actors' subjective biases. Courts have recognized that giving any government official such unbridled discretion to suppress citizens' free speech is unconstitutional. *See, e.g.*, *Child Evangelism Fellowship*, 457 F.3d at 384; *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

The proposed rule also fails to meet the First Amendment Free Speech standards set forth by the highest court in *Matal v. Tam*, 137 S. Ct. 1744 (2017). Neither does the proposed rule comport with the Supreme Court decision in *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), a case reinforcing *Matal*. The Supreme Court in *Matal* and again in *Iancu* ruled that government officials may not determine whether speech is "derogatory or demeaning" because that invites viewpoint discrimination. Laws or rules violate the First Amendment, therefore, if they create opportunities for viewpoint discrimination and chilling speech.

The proposed rule's definition of "harassment"—in Comment [3A]—includes "derogatory or demeaning verbal or physical conduct." Its definition of "discrimination" in the same Comment

includes "harmful verbal or physical conduct." But these definitions run 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 and renders the proposed Illinois rule unconstitutional under *Matal* and *Iancu*.

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."[48] The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[49]

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."[50] 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.'"[51]

In his concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy stressed that "[t]he danger of viewpoint discrimination is that the government will remove certain ideas or perspectives from a broader debate," particularly "if the ideas or perspectives are ones a particular audience might think offensive."[52] 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.[53]

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[48] *Matal v. Tam,* 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) (emphasis supplied).
[49] *Id.* at 1753-1754, 1765 (plurality op.).
[50] *Id.* at 1751 (quotation marks and ellipses omitted).
[51] *Id.* at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting) (emphasis supplied).
[52] *Id.* at 1767 (Kennedy, J., concurring).
[53] *Id.* at 1769 (Kennedy, J., concurring).

Justice Kennedy explained that the federal statute allowed 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."[54]

In 2019, in *Iancu v. Brunetti*, the Supreme Court reaffirmed its rigorous rejection of viewpoint discrimination in *Matal*. The challenged statutory terms in *Iancu* were "immoral" and "scandalous" 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."[55] The Lanham 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.[56]

Under the *Matal* and *Inacu* analyses, these definitions found in the proposed Illinois rule are textbook examples of viewpoint discrimination. The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[57] The proposed rule permits government officials to punish lawyers for speech that the government determines to be "harmful" or "derogatory or demeaning" would be the epitome of an unconstitutional rule.

IV. Illinois Should Follow the Example of Other States that Have Opted not to Adopt ABA Model Rule 8.4(g) or a Similar Rule.

After more than seven years of careful study by state supreme courts and state bar associations in numerous states across the country, only two states (Vermont and New Mexico) have adopted ABA Model Rule 8.4(g) and a handful more (Alaska, Connecticut, Maine, New Hampshire, New York, and Pennsylvania) have adopted a modified version of the model rule, some after first

[54] *Id.* at 1766 (Kennedy, J., concurring) (emphasis supplied).
[55] *Iancu v. Brunetti,* 139 S. Ct. 2294, 2300 (2019).
[56] *Id.*
[57] 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).

rejecting the model rule itself. Indeed, the vast majority of states have abandoned ABA Model Rule 8.4(g) and its variants as unconstitutional or unworkable.

A. Numerous state supreme courts have rejected ABA Model Rule 8.4(g) or similar rule.

The Supreme Courts of **Arizona, Hawaii, Idaho, Minnesota, Montana, New Hampshire, South Carolina, South Dakota, Tennessee, and Wisconsin** have officially rejected adoption of ABA Model Rule 8.4(g), or a rule based on 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).[58] In October 2021, the Hawaii Supreme Court amended its Rule 8.4 by adopting new subsection (h) that specifically addresses sexual harassment by an attorney in his or her professional capacity.[59] In doing so, the Hawaii Supreme Court rejected the originally proposed rule that closely resembled ABA Model Rule 8.4(g). The **Idaho** Supreme Court not once but twice—in 2018[60] and 2023[61]—rejected a resolution by the Idaho State Bar Association to adopt a modified version of ABA Model Rule 8.4(g). A report from the ABA itself indicates that the **Minnesota** Supreme Court rejected the rule.[62] In March 2019, when the State Bar of **Montana** petitioned the state supreme court to revise 18 rules of the Montana Rules of Professional Conduct, that bar mentioned in a footnote (at 3, n.2) that Montana Rule of Professional Conduct Rule 8.4(g) was not included in the review as it had "earlier been the subject of Court attention … and the Supreme Court chose not to adopt the ABA's Model Rule 8.4(g)."[63] In July 2019, the **New Hampshire** Supreme Court "decline[d] to adopt the rule [ABA Model Rule 8.4(g)] proposed by the Advisory Committee on Rules."[64] In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).[65] In March 2020, the Supreme Court of **South Dakota** unanimously decided to deny the proposed

[58] Arizona Supreme Court Order re: No. R-17-0032 (Aug. 30, 2018), https://www.christianlegalsociety.org/wp-content/uploads/2023/04/Rules-Agenda-Denial-of-Amending-8.4.pdf.

[59] Hawaii Supreme Court Order SCRU-11-0001047 (October 26, 2021), https://www.christianlegalsociety.org/wp-content/uploads/2023/07/HI-8.4-amendment-order.pdf.

[60] Idaho Supreme Court, Letter to Executive Director, Idaho State Bar (September 6, 2018), https://www.christianlegalsociety.org/wp-content/uploads/2023/04/ISC-Letter-IRPC-8.4g.pdf.

[61] Idaho Supreme Court Order *In re* Idaho State Bar Resolution 21-01 (January 20, 2023), https://www.christianlegalsociety.org/wp-content/uploads/2023/02/2023-Idaho-Published-Opinion.pdf.

[62] American Bar Association Center for Professional Responsibility Policy Implementation Committee, *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (Sept. 19, 2018), at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.authcheckdam.pdf.

[63] Petition in Support of Revision of the Montana Rules of Professional Conduct, https://www.christianlegalsociety.org/wp-content/uploads/2023/04/MT-Petition-and-Memo.pdf.

[64] Supreme Court of New Hampshire, Order (July 15, 2019), https://www.courts.state nh.us/supreme/orders/7-1519-order.pdf. The court instead adopted a rule amendment that had been proposed by the Attorney Discipline Office and is unique to New Hampshire.

[65] Supreme Court of South Carolina, *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct Appellate Case No. 2017-000498*, Order (June 20, 2017), http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01 (if arrive at South Carolina Judicial Department homepage, select "2017" as year and then scroll down to "2017-06-20-01").

amendment to Rule 8.4 because the court was "not convinced that proposed Rule 8.4(g) is necessary or remedies an identified problem."[66] 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).[67] Most recently, on July 11, 2023, Illinois' northern neighbor, **Wisconsin**, denied a petition from the State Bar Standing Committee on Professional Ethics asking the court to replace existing Supreme Court Rule 20:8.4(i) with ABA Model Rule 8.4(g).[68]

B. State Attorneys General have identified core constitutional issues with ABA Model Rule 8.4(g).

In December 2016, the **Texas** Attorney General opined that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent."[69] 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."[70]

The following year, 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."[71]

Also in 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."[72] 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."[73]

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

[67] 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.

[68] Supreme Court of Wisconsin, Order No. 22-02 (July 11, 2023), https://www.christianlegalsociety.org/wp-content/uploads/2023/07/Wisconsin-22-02-Final-Order.pdf.

[69] Tex. Att'y Gen. Op. KP-0123 (December 20, 2016) at 3, https://www.christianlegalsociety.org/wp-content/uploads/2023/04/TX-AG-Opinion.pdf.

[70] *Id.*

[71] South Carolina Att'y Gen. Op. (May 1, 2017) at 13, https://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf.

[72] La. Att'y Gen. Op. 17-0114 (September 8, 2017) at 4, https://www.christianlegalsociety.org/wp-content/uploads/2023/07/Louisiana-AG-Op.-17-0114.pdf.

[73] *Id.* at 6.

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).[74] After a thorough analysis, the Attorney General concluded that the proposed rule "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[75]

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.[76]

In August 2019, the **Alaska** Attorney General identified numerous constitutional concerns with ABA Model Rules 8.4(g).[77]

In May 2022, the **Nebraska** Attorney General recommended that the Nebraska Supreme Court not adopt a proposed ABA Model Rule 8.4(g)-like amendment, calling the proposed amendment "unconstitutional" and opining that the "sweeping scope and vague language [of the proposed rule] will chill attorneys' constitutionally protected speech throughout Nebraska."[78]

C. State bar associations have rejected ABA Model Rule 8.4(g) and versions thereof.

The **Alaska** 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."[79] 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."[80] The **North Dakota** Joint Committee on

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[74] *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.
[75] *Id*.
[76] 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.
[77] Letter from Alaska Attorney General to Alaska Bar Association Board of Governors (August 9, 2019), http://www.law.state.ak.us/pdf/press/190809-Letter.pdf.
[78] Neb. Att'y Gen. Letter (May 2, 2022), https://www.christianlegalsociety.org/wp-content/uploads/2023/04/NE-General-Attorney-Commnet-Letter.pdf.
[79] Letter from Chairman Murtagh, Alaska Rules of Professional Conduct to President of the Alaska Bar Association (Aug. 30, 2019), https://www.christianlegalsociety.org/wp-content/uploads/2022/10/Report.ARPCcmte.on8_.4f_CLS_Center_for_Law_and_Religious_Freedom.pdf.
[80] Louisiana State Bar Association, *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee*

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."[81] The Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g).[82] 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."[83]

Federalism's great advantage is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see the effects on attorneys—in the handful of states that have adopted ABA Model Rule 8.4(g) or similar rule—of the real-life implementation of the rule. This is particularly true when ABA Model Rule 8.4(g) and its progeny have failed to survive close scrutiny by official entities in so many states.

Conclusion

Attorneys must remain free to engage in speech, religious exercise, assembly, and expressive association in their workplaces and the public square. Because adoption of the proposed rule would drastically curtail that freedom, the proposed rule should not be adopted. Unlike the proposed rule, Illinois' current misconduct rules strike a balance between disciplinary concerns and the First Amendment rights of Illinois attorneys. For these reasons, current Rules 8.4(d) and (j) should be

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Recommendations Re: ABA Model Rule 8.4(g), Oct. 30, 2017, https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892.

[81] Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. on Att'y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (December 14, 2017), at https://perma.cc/3FCP-B55J.

[82] Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4*, Order (September 25, 2017), https://www nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf.

[83] Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), https://www.christianlegalsociety.org/wp-content/uploads/2023/04/Bar-Letter-Retracting-Petition-17-32067.pdf.

retained, and the proposed Illinois rule, which is a version of ABA Model Rule 8.4(g), should not be imposed on Illinois attorneys for both constitutional and practical reasons.

Thank you for your consideration of these comments.

Respectfully submitted,

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Appendix 1: ABA Model Rule 8.4(g) and comments adopted August 2016

On August 8, 2016, the ABA House of Delegates adopted new Model Rule 8.4(g) and three accompanying comments, which provide as follows:

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

Comment [3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

Comment [4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

Comment [5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).