IN SUPREME COURT
STATE OF WISCONSIN

In the Matter of the Amendment of
Supreme Court Rule SCR 20:8.4

No. _____

APPENDIX TO PETITION

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1. FEEDBACK RECEIVED BY STATE BAR STANDING COMMITTEE ON PROFESSIONAL ETHICS

   - Letter – Pacific Legal Foundation – March 10, 2021
   - Memorandum – Christian Legal Society – February 26, 2021
   - Letter – Daniel R. Suhr – March 12, 2021
   - Memorandum – Thomas More Society of Madison – March 21, 2021
   - Letter – National Legal Foundation – March 12, 2021
   - Letter – Kevin M. Connelly – April 28, 2021
   - Memorandum – State Bar Legal Assistance Committee – April 2, 2021
   - Compilation of emails received by State Bar Standing Committee on Professional Ethics – March 18, 2021
   - Memorandum – Michael S. Anderson et al. – [undated]

2. EXCEL SPREADSHEET COMPARISON OF ANTI-DISCRIMINATION ETHICS RULES (updated December 2021)

PACIFIC LEGAL FOUNDATION

March 10, 2021

Committee Chair Ben Kempinen
kempinen@wisc.edu
Ethics Counsel Tim Price
tpierce@wisbar.org
Wisconsin Standing Committee on Professional Ethics

Re: Proposed Modification to Wisconsin Supreme Court Rule 20:8.4(i)

Pacific Legal Foundation submits this comment letter in response to the committee's request for feedback regarding a proposed modification to Wisconsin Supreme Court Rule 20:8.4(j) consistent with ABA Model Rule 8.4(g).

Pacific Legal Foundation writes to express concerns regarding the First Amendment implications of the proposed rule. The rule would impair freedom of speech and freedom of expression in the legal profession, and particularly penalize public interest lawyers who engage in litigation concerning controversial topics such as race and sex discrimination.

The Rejection of ABA Model Rule 8.4(g)

The Proposed Rule is closely modeled after ABA Model Rule 8.4(g), a proposal that has been rejected by nearly every state to consider it.

In 2016, the American Bar Association proposed Model Rule 8.4(g) which makes it professional misconduct to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." Model Rules of Prof'l Conduct r.8.4: Misconduct (Am. Bar Ass'n 2016). The rule utilizes a broad definition of "conduct related to the practice of law," which includes not only "representing clients; interacting with witnesses" and other in-court activities, but also "participating in bar association, business, or social activities in connection with the practice of law." *Id.* Comment 4.

After five years of intense deliberation, only two states—Vermont and New Mexico—have adopted Model Rule 8.4(g) in full into their own Rules of Professional Conduct, and Pennsylvania and Maine have adopted slightly less restrictive variations of the rule.[1] Pennsylvania's rule was nevertheless recently enjoined by the Eastern District of Pennsylvania because the court concluded that it violated the First Amendment rights of attorneys barred in the state. *Greenberg v. Haggerty*, 2:20-cv-03822, Memorandum Opinion Granting Preliminary Injunction (E.D. Pa Dec. 7, 2020).

On the other hand, many other states have expressly rejected the adoption of Model Rule 8.4(g). The Attorneys General of several states published opinions arguing that the rule would violate the Constitution.[2] More recently, Alaska Attorney General Kevin Clarkson filed a comment letter urging the Alaska Bar Association Board of Governors to reject Model Rule 8.4(g). Attorney General Clarkson raised a variety of serious First Amendment concerns, including the potential for the rule to intrude on freedom of association by penalizing lawyers who participate in private associations with exclusive membership practices or who advocate for policies that may be deemed discriminatory. Kevin Clarkson, Letter Re: Proposed Rule of Professional Conduct 8.4(f) submitted to the Alaska Bar Association (Aug. 9, 2019), http://www.law.state.ak.us/pdf/press/190809-Letter.pdf.

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[1] Maine adopted a variation of Model Rule 8.4(g), which does not bar discrimination on the basis of marital status or socio-economic status and which does not extend to participation in bar association, business, or social activities. The Pennsylvania rule hews closely to 8.4(g) but contains language noting that harassment will be defined by reference to anti-discrimination law and a few other relatively minor changes.

[2] ABA Model Rule of Professional Conduct 8.4(g) and Louisiana State Bar Association proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution, La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017), https://perma.cc/9TWR-8GY9; S.C. Att'y Gen. Op. Letter to Hon. John R. McCravy III, S.C. House of Representatives (May 1, 2017), https://perma.cc/ED72-8UGM; American Bar Association's New Model Rule of Professional Conduct 8.4(g), Tenn. Att'y Gen. Op. 18-11 (Mar. 16, 2018), https://perma.cc/DZY2-YG23; 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), https://perma.cc/M248-HKGG.

Problems with the Rule

A wide variety of First Amendment and Constitutional Law scholars have also criticized Model Rule 8.4(g) for its potential to stifle or censor attorney speech.[3]

This scholarship raises a series of overlapping concerns. First, the rule might penalize speech seen as "derogatory" or "demeaning," highly subjective terms that provide little guidance to Wisconsin attorneys.[4] This might include, for instance, a presentation arguing against race-based affirmative action due to the impact of "mismatch theory," or a speaker who argues that "low-income individuals who receive public assistance should be subject to drug testing."[5]

Second, the rule will apply to CLE presentations, academic symposia, and even to conversations at a local bar dinner, which will stifle conversations about significant legal topics of controversy.[6] As Professor Eugene Volokh put it, the rule could be applied to dinner conversations "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

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[3] 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; 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).

[4] Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g) The First Amendment and 'Conduct Related to the Practice of Law,'* 30 Geo. J. Legal Ethics 241, 245 (2017).

[5] *Id.* at 246.

[6] Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, Volokh Conspiracy (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/?noredirect=on.

misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on."[7]

Third, the rule penalizes attorneys for speech that they "reasonably should know" would cause offense.[8] This mens rea requirement places attorneys at risk of discipline for speech that they were not aware would or could cause any offense, further exacerbating the chilling effect on attorney speech.[9]

Fourth, the rule discriminates on the basis of viewpoint because it allows for the speech and conduct which is "undertaken to promote diversity and inclusion" but not speech or conduct critical of diversity and inclusion.[10]

These are just a few of the many well-founded criticisms of the rule.

The Rule is Incompatible with Recent Supreme Court Precedent

The Supreme Court has issued several recent decisions which make clear that the Proposed Rule would be presumptively unconstitutional and would likely be invalidated as a content-based and viewpoint-based restriction of professional speech. Its 2018 decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), is particularly on point. In that case, the Supreme Court invalidated a law which imposed speech requirements on clinics offering services to pregnant women. The Court explained that content-based regulations of professional speech "pose[] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information" and are accordingly subject to strict scrutiny. *Id.* at 2374. The Court emphasized that attorney speech cannot be regulated to impose "invidious discrimination of disfavored subjects." *Id.* at 2375.

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[7] *Id.*
[8] 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, 205 (2019).
[9] *Id.*
[10] *Id.* at 206.

In *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), the Supreme Court invalidated restrictions on the registration of "offensive," "immoral," and "scandalous" trademarks. The Court emphasized that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers," and that such restrictions are viewpoint-based and strongly disfavored. *Matal*, 137 S. Ct. at 1763.

If it was not already clear, these cases leave little doubt that a restriction on professional speech merely because some may find it offensive is unconstitutional.

The Rule Risks Stifling a Wide Variety of Lawyer Conduct and Expression

To illustrate some of the problems with the Proposed Rule, consider the following hypothetical scenarios. How would the proposed rule apply if someone who was offended by an attorney's speech filed a complaint? And how would an attorney in Wisconsin reading the vague and overly broad rule ever know?

1. A public interest lawyer in Wisconsin brings a lawsuit on behalf of an Asian college student who argues that he was denied admission at the University of Wisconsin because he alleges the school uses race-based affirmative action and employs negative stereotypes about Asian-Americans. In arguing the case, the attorney writes an op-ed and appears in radio and television interviews arguing that the Supreme Court should outlaw all forms of affirmative action because these policies violate the ideal of equal protection under the law and harm minorities by stigmatizing them and creating mismatch. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
2. Another Wisconsin attorney intervenes on behalf of a group of African-American high school students who are likely to benefit from the affirmative action policies. He argues that affirmative action is needed to counteract systemic racism which favors white Americans. How does the prohibition against discrimination on the basis of race in the Proposed Rule apply to this speech?
3. At a CLE event, two Wisconsin attorneys debate whether the state of Wisconsin should introduce rent control legislation. The speaker arguing in favor of rent control argues that absentee landlords are profiteering off the poor and that rent control is needed to mitigate their greed. The speaker

arguing against rent control argues that renters need to work harder rather than demand subsidies from landlords. How does the prohibition against discrimination on the basis of socioeconomic status in the Proposed Rule apply to either attorney's statements?

4. A Wisconsin attorney files an amicus brief arguing that the President has plenary authority to exclude individuals from admission to this country on the basis of their ethnicity or religion. Relatedly, another Wisconsin attorney writes an op-ed critiquing the attorney by name and calling her a racist and an islamophobe. How does the prohibition against discrimination on the basis of religion and national origin in the Proposed Rule apply to this speech?
5. A Wisconsin attorney represents an atheist group and challenges the availability of funds from the K-12 Private School Tuition Deduction Program to go to religious private schools. As part of the lawsuit the attorney argues that religious education is of a subpar quality and that students at religious schools are being indoctrinated to "believe in the truths of holy books that are so stupid and so fabricated that a child can—and all children do, as you can tell by their questions—actually see through them"[11] and that accordingly public funds should not go to such schools. How does the prohibition against discrimination on the basis of religion in the Proposed Rule apply to this speech?
6. A Wisconsin attorney refuses to represent an atheist who seeks to make an Establishment Clause challenge when two state lawmakers put up a sign at the Wisconsin State capitol stating "The Magic of Christmas is not in the presents but in his presence." The Wisconsin attorney is a Christian and his deeply held religious beliefs will not allow him to argue in favor of tearing down a religious symbol. How does the prohibition against discrimination on the basis of religion in the Proposed Rule apply to this speech?
7. A Wisconsin attorney attends a pro-life rally and shares a picture of her attending the rally on her social media feed which includes several other Wisconsin attorneys that she knows are strongly pro-choice. How does the prohibition against discrimination on the basis of sex in the Proposed Rule apply to this speech?

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[11] Christopher Hitchens, *Freedom of speech means freedom to hate* (Sept. 30 2014), https://blog.skepticallibertarian.com/2014/09/30/christopher-hitchens-freedom-of-speech-means-freedom-to-hate/.

8. Relatedly, a Wisconsin attorney films himself outside of an abortion clinic confronting several female pro-life demonstrators and accuses them of doing something that is "disgusting" and "wrong." How does the prohibition against discrimination on the basis of sex and religion in the Proposed Rule apply to this speech?
9. A Wisconsin attorney who is a member of the Boomer generation shares an article on social media which calls Millennials lazy and entitled. The following day in his law firm's lunch room the attorney discusses the article with another attorney within earshot of several young associates. How does the prohibition against discrimination on the basis of age in the Proposed Rule apply to this speech?
10. A Wisconsin attorney wears a MAGA hat to a bar social event and refuses to take the hat off even after another attorney informs him that she is offended because she sees the hat as a symbol of racism and sexism. How does the prohibition against discrimination on the basis of race and sex in the Proposed Rule apply to this speech?

Whatever the answer to each of these real-world-based hypotheticals illustrates, they show that the broad and unclear scope of the Proposed Rule threatens to stifle attorney speech on a wide variety of important issues of public concern. The Proposed Rule should accordingly be rejected.

Sincerely,

Daniel Ortner

Daniel Ortner
Attorney*
* *Licensed to practice law in the Commonwealth of Virginia and the State of California*

CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

Memorandum

To: Ben Kempinen, Chair, Ethics Committee
Tim Pierce, Ethics Counsel
Wisconsin State Bar's Standing Committee on Professional Ethics

From: David Nammo, Executive Director, Christian Legal Society
Kim Colby, Director, Center for Law and Religious Freedom, Christian Legal Society

Re: Proposal to Adopt ABA Model Rule 8.4(g)

Date: February 26, 2021

This memorandum is respectfully submitted in response to the request of the Standing Committee on Professional Ethics for input on whether Wisconsin Supreme Court Rule 20:8.4(i) should be modified to conform to ABA Model Rule 8.4(g). For the reasons detailed below, we explain why SCR 20:8.4(i) should not be so modified.

The deeply flawed and highly criticized ABA Model Rule 8.4(g) should not be imposed on Wisconsin attorneys for both constitutional and practical reasons. Perhaps most importantly, 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] In the nearly five years during which ABA Model Rule 8.4(g) has been urged upon state supreme courts, only two states have adopted it, and fourteen state supreme courts or state bar committees have rejected or abandoned it.[3] Two states have adopted modified versions, and one of those versions was recently held by a federal district court to be an unconstitutional restriction on attorneys' speech.[4]

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[1] Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AIpdWmJ0XbA. *See infra* Part I, pp. 5-8 (scholars' criticisms of ABA Model Rule 8.4(g)); Part III, pp. 18-25 (recent United States Supreme Court free speech decisions regarding regulation of professional speech and viewpoint discrimination indicate ABA Model Rule 8.4(g) is unconstitutional).

[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.unl.edu/_files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlpp-2019.pdf.

[3] *See infra* Part V, pp. 26-31 (describing various states' responses to ABA Model Rule 8.4(g)).

[4] *Greenberg v. Haggerty*, --- F. Supp.3d ---, 2020 WL 2772251 (E.D. Pa. 2020), *appeal docketed*, No. 20-3602 (3d Cir. Dec. 24, 2020) (attached as Appendix 1).

ABA Model Rule 8.4(g) will inevitably have a chilling effect on Wisconsin attorneys' speech regarding political, ideological, religious, and social issues to the detriment of Wisconsin attorneys, their clients, and civil society in general. A free society requires attorneys who are free to speak their minds without fear of losing their license to practice law. Both conservative and liberal 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 is given based on race, sex, religion, or sexual orientation would be in violation of ABA Model Rule 8.4(g).[5] Or a progressive attorney who tweets a common but hurtful sexual term aimed at a conservative presidential spokeswoman could be subject to discipline under the proposed rule.[6] 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.[7] Yale law

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[5] 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 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. 31-32 (why diversity programs cannot be protected).

[6] 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.

[7] *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.

students have described significant harassment by fellow law students simply because they hold religious or conservative ideas.[8]

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 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."[9] 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."[10] 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.[11] The CEO of Mozilla lost his position after he made a contribution, reflecting his traditional religious beliefs, to one side of a political debate regarding marriage laws.[12]

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

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[8] *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).

[9] 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.

[10] 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.

[11] *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).

[12] "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.

were publicly pressured to recant their support for free speech and its concomitant corollary of tolerance for others who hold different beliefs.[13]

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.[14]

Perhaps this is why after four years of deliberations by state supreme courts and state bar associations in many states across the country, Vermont and New Mexico are the only states to have adopted ABA Model Rule 8.4(g). In contrast, at least fourteen states have concluded, after careful study, that ABA Model Rule 8.4(g) is unconstitutional or unworkable. Many of those states have opted to take 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 their own bar members.

Two states, Maine and Pennsylvania, have adopted modified versions of ABA Model Rule 8.4(g). A federal district court ruled the Pennsylvania Rule 8.4(g) to be unconstitutional on its face in *Greenberg v. Haggerty*,[15] which is attached as Exhibit 1. A member of the Pennsylvania bar brought the pre-enforcement action because he "regularly conducts continuing legal education ('CLE') events on a variety of controversial issues." The federal court ruled that Pennsylvania Rule 8.4(g) has a "chilling effect" on lawyers' speech and "will hang over Pennsylvania attorneys like the sword of Damocles."[16] The court provided a real-world appraisal when it wrote:

> 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 [lawyer's] words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause . . . 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,

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[13] "J.K. Rowling Joins 150 Public Figures Warning Over Free Speech," BBC (July 8, 2020), https://www.bbc.com/news/world-us-canada-53330105.
[14] Volokh, *supra* note 1.
[15] --- F. Supp.3d ---, 2020 WL 7227251 (E.D. Pa. 2020), *appeal docketed*, 20-3602 (3d Cir. Dec. 24, 2020).
[16] *Id.* at *8.

> bench-bar conferences, or indeed at any of the social gatherings forming around these activities.[17]

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

1. Scholars' analysis of ABA Model Rule 8.4(g) as a speech code for lawyers (pp. 5-8);

2. ABA Model Rule 8.4(g)'s chilling effect on lawyers' speech and religious exercise, which is exacerbated by its use of a negligence standard (pp. 9-18);

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 ignores but the federal court decision in *Greenberg v. Haggerty* relies upon (pp. 18-25);

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. 25-26);

5. The fact that official bodies in Alaska, 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. 26-31);

6. ABA Model Rule 8.4(g)'s unintentional consequence of making it professional misconduct for law firms to engage in many diversity-oriented employment practices pp. 31-32);

7. Its ramifications for lawyers' ability to accept, decline, or withdraw from a representation (pp. 32-34); and

8. The strain ABA Model Rule 8.4(g) would place on the scarce resources of the grievance and disciplinary committees to process the likely increase in complaints against attorneys and firms (pp. 34-36).

I. Scholars have characterized ABA Model Rule 8.4(g) as a speech code for lawyers.

Scholars have raised serious concerns about ABA Model Rule 8.4(g)'s impact on lawyers' speech. Professor Margaret Tarkington, who teaches professional responsibility at

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[17] *Id.*

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."[18] 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."[19]

The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.[20] 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."[21] 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."[22] 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 rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.[23]

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[18] Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).
[19] *Id.*
[20] 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=VorDPjqlBcQe.
[21] 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."
[22] *Id.* at "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."
[23] Ron Rotunda, "*The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech*," *The Wall Street Journal,* Aug. 16, 2016, http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.

Professor 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.[24] Professor Volokh further explored its many flaws in a 2017 debate with a proponent of the model rule.[25]

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."[26]

Professor Michael S. McGinniss, the 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."[27] 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."[28] His article catalogues the many problems that ABA Model Rule 8.4(g) raises for lawyers who hold unpopular political or religious viewpoints.

In a thorough examination of the model 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."[29] 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."[30] 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."[31]

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[24] Volokh, *supra* note 1.
[25] *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=_b07-lxW5kw138&t=50s.
[26] 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).
[27] McGinniss, *supra* note 2, at 249.
[28] *Id.*
[29] 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).
[30] *Id.*
[31] *Id.* at 204.

In adopting ABA Model Rule 8.4(g), the ABA largely ignored over 480 comment letters,[32] 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.[33]

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.[34] 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."[35] 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."[36] 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.[37]

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

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[32] 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.

[33] Halaby & Long, *supra* note 29, 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.

[34] Halaby & Long, *supra* note 29, 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).

[35] *Id.* at 203.

[36] *Id.*

[37] *Id.* at 233.

II. ABA Model Rule 8.4(g) Would Greatly Expand the Reach of the Professional Rules of Conduct into Wisconsin 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 or 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." ABA Model Rule 8.4(g) and accompanying Comment [4] (numbering inserted).

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."[38]

The compelling question becomes: What conduct does ABA Model Rule 8.4(g) *not* reach? Virtually everything a lawyer does can be characterized as "conduct . . . while . . . interacting with . . . others while engaged in the practice of law" or "participating in . . . business or social activities in connection with the practice of law."[39] 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.

As ABA Model Rule 8.4(g) and its accompanying Comment [3] state, "[d]iscrimination and harassment" include "harmful verbal or physical conduct." "Verbal conduct," of course, is a euphemism for "speech."

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[38] 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.

[39] *See* Halaby & Long, *supra* note 29, 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.")

This is highly problematic for lawyers 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, lawyers are asked to speak *because they are lawyers.* And a lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business 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?[40]
- Is a lawyer subject to discipline when participating in legal panel discussions that touch on controversial political, religious, and social viewpoints? [41]
- 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?[42]

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[40] *Greenberg v. Haggerty*, --- F. Supp.3d ---, 2020 WL 2772251 (E.D. Pa. 2020), *appeal docketed*, No. 20-3602 (3d Cir. Dec. 24, 2020), *5-6 (lawyer has standing to challenge Pennsylvania Rule 8.4(g) because he fears complaints under the rule based on his CLE presentations on controversial issues). *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/.

[41] *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.").

[42] *See Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comn'n. (May 15, 2018) discussed *infra* note 48.

- Can a lawyer lose his license to practice law for a tweet calling a female public official a derogatory term?[43]
- 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?[44]
- 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?[45]
- Is a lawyer subject to discipline for comment letters she writes as a lawyer expressing her personal views regarding 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 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:

> 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,

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[43] 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.

[44] *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.

[45] 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 128, 139-140.

> 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."[46]

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.[48]

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

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[46] 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.

[47] *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).

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

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 target 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 for attorney speech."[49] ABA Model Rule 8.4(g) creates doubt as to whether particular speech is permissible and, therefore, will inevitably chill lawyers' public speech.[50] 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.[51] Public discourse and civil society will suffer from the ideological straitjacket that ABA Model Rule 8.4(g) will impose on lawyers.

B. 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.[52]

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

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[49] 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.)

[50] *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.")

[51] 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").

[52] Tex. Att'y Gen. Op., *supra* note 41, 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.").

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.[53] By making Wisconsin 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.

C. 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? [54] 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.[55] State attorneys general have voiced similar concerns.[56] Several attorneys general have warned that "serving as a member of the board of a religious organization, 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.'"[57] Attorneys should not have to choose between their faith and their livelihood.

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[53] *See* D.C. Bar Legal Ethics, Opinion 222, *supra* note 44. *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)").

[54] 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 .

[55] Rotunda & Dzienkowski, *supra* note 21, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."

[56] Tex. Att'y Gen. Op., *supra* note 41, 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 41, 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.").

[57] Tenn. Att'y Gen. Letter, *supra* note 49, at 10.

D. ABA Model Rule 8.4(g)'s potential for chilling Wisconsin 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."[58] 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.[59]

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 10 years ago may now be legitimately critiqued as discriminating against or harassing a person in one of the eleven enumerated categories.

E. 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."[60] 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."[61] Acting Law Professor Irene Oritseweyinmi Joe recently argued that while ABA Model Rule 8.4(g) "addresses explicit

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[58] *Id.* at 5. *See* Halaby & Long, *supra* note 29, at 243-245.

[59] 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/.

[60] At its mid-year meeting in February 2018, the ABA adopted Resolution 302, a model policy that "urges . . . all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity." ABA Res. 302 (Feb. 5, 2018), https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/302.pdf.

[61] McGinniss, *supra* note 2, at 205 & n.135.

attorney bias, . . . it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias."[62] 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."[63]

Proponents of ABA Model Rule 8.4(g) often are likewise proponents of the ABA's "Implicit Bias Initiative."[64] On its webpages devoted to its "Implicit Bias Initiative," the ABA defines "implicit bias" and "explicit biases" as follows:[65]

> **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.[66] 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) if someone thinks the lawyer "reasonably should have known" her communication manifested implicit bias.[67] Such

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[62] 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.").

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

[64] *See* Halaby & Long, *supra* note 29, 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.

[65] 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

[66] Halaby & Long, *supra* note 29, 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 26, at 144.

[67] *See, e.g.,* Irene Oritseweyinmi Joe, *supra* note 62 (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.").

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."[68]

F. 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 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. Courts have recognized that giving any government official unbridled discretion to suppress citizens' free speech is unconstitutional viewpoint discrimination.[69]

Proponents of ABA Model Rule 8.4(g) often try to reassure its critics that, in actuality, the rule will only rarely be used and 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."[70] 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."[71]

In the landmark case, *National Association for the Advancement of Colored People v. Button,*[72] which involved a First Amendment challenge to a state statute regulating attorneys'

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[68] Halaby & Long, *supra* note 29, 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).
[69] *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).
[70] *United States v. Stevens,* 599 U.S. 460, 480 (2010).
[71] *Id.* (emphasis added).
[72] *NAACP v. Button,* 371 U.S. 415 (1963).

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.[73]

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 and her license. Such litigation extracts significant expense and a substantial 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 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 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-adverse 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 observed in *Greenberg v. Haggerty.*[74] The losers are not just the lawyers, but our free civil society that depends on lawyers to protect—and contribute to—the free exchange of ideas, which is its lifeblood.

III. ABA Formal Opinion 493 Ignores Three Recent Supreme Court Decisions that Demonstrate the Likely Unconstitutionality of ABA Model Rule 8.4(g).

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"

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[73] *Id.* at 438-39.

[74] 2020 WL 2772251 (E.D. Pa. 2020), *appeal docketed*, No. 20-3602 (3d Cir. Dec. 24, 2020), at *8; *see supra* at pp. 2-5 and *infra* at pp. 34-36.

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*, a 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.[75]

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.'"[76] "[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.'"[77] 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."'"[78]

The Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech. As already noted, this is the operative assumption underlying ABA Model Rule 8.4(g).

To illustrate its point, the 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.[79] 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.'*"[80] 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."[81]

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[75] *Id.* at *9-15.
[76] *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[77] *Id.*
[78] *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[79] *Id.* at 2371.
[80] *Id.* at 2371-72 (emphasis added).
[81] *Id.* at 2371.

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."[82]

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 in a recently published article. Several section members understood that the decision raised grave concerns about the overall constitutionality of ABA Model Rule 8.4(g), as a 2019 article reported:

> 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. [83]

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." The document serves to underscore the breadth of ABA Model Rule 8.4(g) and the fact that it is intended to restrict lawyers' speech.[84] The opinion tries to reassure lawyers that ABA Model Rule 8.4(g) will only be used for "harmful" conduct, which the rule makes clear includes "verbal conduct" or "speech."[85]

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[82] *Id.* at 2374.

[83] 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-ruling-may-affect-model-rules-prof-cond/ (emphasis added).

[84] 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.

[85] *Id.* at 1.

But Formal Opinion 493 explains that the Rule's scope "is *not* restricted to conduct that is severe or pervasive."[86] Violations will "*often* be intentional and *typically* targeted at a particular individual or group of individuals." Far from reassuring, these qualifiers merely confirm 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.[87]

Formal Opinion 493 asserts 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.[88] And it may even reflect the alarming notion that lawyers' speech is akin to government speech, a topic that Professor Aviel briefly mentions in her article.[89] If lawyers' speech is treated as if it is government 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.[90] 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 and triggers a strict scrutiny standard.

Perhaps most baffling is the fact that *Formal Opinion 493 fails to mention the Supreme Court's Becerra decision at all*, even though *Becerra* was handed down two years earlier and has been frequently relied upon to analyze ABA Model Rule 8.4(g)'s constitutional deficiencies. This lack of mention, let alone analysis, of *Becerra* 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 most recent on-point decisions in *Becerra*, *Matal*, and *Iancu*. Burying its head in the sand does nothing to help the ABA fix its model rule's deep flaws.[91]

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[86] *Id.* (emphasis added).
[87] *Id.*
[88] *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.").
[89] 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 essentially is speech that is unprotected by the First Amendment—is deeply troubling and should be roundly rejected.
[90] Formal Op. 493, *supra* note 84, at 1.
[91] *Id.* at 9-12.

Formal Opinion 493 concedes that its definition of the term "harassment" is not the same as the EEOC uses,"[92] 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."[93] ABA Model Rule 8.4(g)'s definition of "harassment" in Comment [3] includes "derogatory or demeaning verbal or physical conduct." But 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 manner that would not be permissible regulation of the citizenry in the general marketplace."[94] 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."[95] Instead, the Court used lawyers' speech as an example of protected speech.

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."[96] But 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.

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[92] *Id.* at 4 & n.13.
[93] 510 U.S. 17, 21 (1993)
[94] Aviel, *supra* note 89, at 39 (citation and quotation marks omitted); *see also id.* at 44.
[95] *Becerra*, 138 S. Ct. at 2371.
[96] Aviel, *supra* note 89, at 48.

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

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."[97] The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[98]

In *Matal*, all nine justices agreed that a provision of a venerable 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."[99] 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.'"[100]

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."[101] 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.[102]

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

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."[103] And it was viewpoint discrimination even if it "applies in equal measure to any trademark that *demeans* or offends."[104]

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."[105] 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.[106]

D. As used in ABA Model Rule 8.4(g), the 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 *Inacu* 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,

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[103] *Id.* at 1766 (Kennedy, J., concurring) (emphasis supplied).
[104] *Id.* (emphasis supplied).
[105] *Iancu v. Brunetti,* 139 S. Ct. 2294, 2300 (2019).
[106] *Id.*

unconstitutional.[107] 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 also 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."[108]

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 is 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.

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."[109] But this claim has been shown to be factually incorrect. As the 2019 edition of the *Annotated Rules 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.*"[110]

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 Wisconsin, 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 is narrower than ABA Model Rule 8.4(g).*[111] Thirteen states had adopted a

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[107] 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).
[108] *See supra,* at p. 17 & n.69.
[109] *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.
[110] 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).
[111] *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,

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."[112] He highlighted several salient differences between the 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.[113]

V. Official Entities in Alaska, 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.[114]

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

The Supreme Courts of **Arizona, Idaho, Montana, New Hampshire, South Carolina, South Dakota,** and **Tennessee** have officially rejected adoption of ABA Model Rule 8.4(g). In

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https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final_authcheckdam.pdf.

[112] 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).

[113] *Id.* at 208.

[114] McGinniss, *supra* note 2, at 213-217.

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).[115] 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).[116] 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).[117] 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."[118] In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).[119] The Court acted after the state bar's house of delegates, as well as the state attorney general, recommended against its adoption.[120] In July 2019, the **New Hampshire** Supreme Court "decline[d] to adopt the rule proposed by the Advisory Committee on Rules."[121] 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."[122]

In May 2019, the **Maine** Supreme Court announced that it had adopted a modified version of ABA Model Rule 8.4(g).[123] The Maine rule is narrower than the ABA Model Rule in

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[115] 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.

[116] 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-%20RPC%208.4(g).pdf.

[117] 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.

[118] Tenn. Att'y Gen. Letter, *supra* note 49, at 1.

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

[120] 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.

[121] 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.

[122] 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.

[123] 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

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.[124] 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.[125]

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 8.4(g).[126] 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."[127] On March 1, 2019, the State Bar of **Montana** mentioned in a memorandum that Montana Rule of Professional Conduct Rule 8.4(g) had "earlier been the subject of Court attention ... and the Supreme Court chose not to adopt the ABA's Model Rule 8.4(g)."[128]

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

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 two states, Vermont and New Mexico, have 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. Pennsylvania's version has been ruled unconstitutional. *Greenberg v. Haggerty,* --- F. Supp.3d ---, 2020 WL 7227251 (E.D. Pa. 2020), *appeal docketed,* 20-3602 (3d Cir. Dec. 24, 2020).

[124]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-%20104416393101837186.pdf?cb=1.

[125] 2020 WL 7227251, *9-15 (E.D. Pa. 2020).

[126] 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/ADK-1-0526-withdraw-order.pdf.

[127] 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.

[128] Montana State Bar Association, *In Re Petition of the State Bar of Montana for Revision of the Rules of Professional Responsibility* 3 n.2, AF 09-0688 (Mar. 1, 2019), at https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Petition%20and%20Memo.pdf.

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."[129] 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."[130]

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."[131] 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."[132] 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."[133]

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).[134] 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."[135]

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.[136]

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

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[129] Tex. Att'y Gen. Op., *supra* note 41, at 3.
[130] *Id.*
[131] South Carolina Att'y Gen. Op., *supra* note 120, at 13.
[132] La. Att'y Gen. Op., *supra* note 41.
[133] *Id.* at 6.
[134] *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.
[135] Tenn. Att'y Gen. Letter, *supra* note 49, at 1.
[136] 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.

rule.[137] 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."[138]

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).[139] The impact of Model Rule 8.4(g) on "the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees" greatly concerned the legislature.[140]

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."[141] 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."[142] On October 30, 2017, the **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version

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[137] 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

[138] Letter from Chairman Murtagh, Alaska Rules of Professional Conduct to President of the Alaska Bar Association (Aug. 30, 2019), https://www.cfsreligionsfreedom.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.

[139] *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.

[140] *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 49, at 8 n.8.

[141] 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.

[142] 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.

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."[143]

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.'"[144] 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."[145]

He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:[146]

> *[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 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

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[143] 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.

[144] 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.

[145] *Id.* at 6.

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

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."[147]

He provided three reasons to support his conclusion that efforts to promote certain kinds of diversity would violate the rule and, therefore, would need to cease. *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 Wisconsin lawyers' and their firms' efforts "to promote diversity, equity, and inclusion" provide yet another reason to reject the proposed rule. 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 Wisconsin 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 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

[147] *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.")

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)."*[148]

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."[149] Rule 1.16 does not address *accepting* clients.[150] 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."[151]

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."[152] 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 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)."[153]

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*."[154] 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

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[148] 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/PROMULGATEDVRPrPS8.4(g).pdf (emphasis supplied).

[149] Rotunda & Dzienkowski, *supra* note 21, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis supplied by the authors).

[150] 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 49, at 11.

[151] *See* Rotunda & Dzienkowski, *supra* note 21.

[152] McGinniss, *supra* note 2, at 207-209.

[153] *Id.* at 207-208 & n.146, citing Stephen Gillers, *supra* note 112, 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."

[154] N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).

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).[155] And ABA Model Rule 8.4(g) reaches far broader than "unlawful discrimination."

In *Stropnicky v. Nathanson*,[156] 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.[157] 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 Disciplinary and Grievance Committees 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).[158] The ODC quoted from a February 23, 2016, email from the 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."[159]

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."[160] 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."[161] 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

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[155] *Id.* New York's Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is narrower.
[156] 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).
[157] Rotunda & Dzienkowski, *supra* note 21, *in* "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."
[158] 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.
[159] *Id.* at 3-4.
[160] *Id.*
[161] *Id.* at 3.

administrative agency" and further required that "the conduct must reflect adversely on the lawyer's fitness as a lawyer."[162]

Increased demand may drain the resources of the disciplinary and 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 disciplinary and 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 recommended 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."[163] The Illinois rule further requires that "any right of judicial review has been exhausted" before a disciplinary complaint can be acted upon.[164]

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."[165] Nor is "an allegedly injured party [required] to first invoke the civil legal system" before a lawyer can be charged with discrimination or harassment.[166]

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 note this risk:

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[162] *Id.* at 5.

[163] *Id.* (referring to ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j)).

[164] ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j).

[165] Rotunda & Dzienkowski, *supra* note 21 (parenthetical in original).

[166] *Id.*

> 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).[167]

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." They warn that "[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas."[168]

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. But ABA Model Rule 8.4(g) does not 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, Supreme Court Rule 20:8.4(i) should not be modified to conform to it. 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 Wisconsin attorneys to the ill-conceived experiment that ABA Model Rule 8.4(g) 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 Wisconsin attorneys cannot be undone.

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[167] *Id.*
[168] *Id.*

Exhibit 1

2020 WL 7227251
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

ZACHARY GREENBERG, Plaintiff,

v.

JAMES C. HAGGERTY, in his official capacity as Board Chair of The Disciplinary Board of the Supreme Court of Pennsylvania, et al., Defendants.

CIVIL ACTION No. 20-3822

|

12/08/2020

CHAD F. KENNEY, JUDGE

MEMORANDUM

*1 This case concerns the constitutionality of the amendments to Pennsylvania Rule of Professional Conduct 8.4, which were approved by the Supreme Court of Pennsylvania[1] and are set to take effect on December 8, 2020. The amendments added paragraph (g) to Rule 8.4 along with two new comments, (3) and (4). Plaintiff, Zachary Greenberg, Esquire, a Pennsylvania attorney who gives presentations on a variety of controversial legal issues, brings this pre-enforcement challenge alleging that these amendments violate the First Amendment because they are unconstitutionally vague, overbroad, and consist of viewpoint-based and content-based discrimination.

1 Justice Mundy dissented.

Before the Court are Defendants' Motion to Dismiss Plaintiff's Complaint (ECF No. 15) and Plaintiff's Motion for Preliminary Injunction (ECF No. 16).

A. BACKGROUND

Plaintiff Zachary Greenberg graduated from law school in 2016 and was admitted to the Pennsylvania Bar in May 2019. ECF No. 1 at ¶ 10, 11; ECF No. 21 at ¶¶ 2-4.[2] Plaintiff currently works as a Program Officer at the Foundation for Individual Rights in Education. ECF No. 1 at ¶ 13; ECF No. 21 at ¶ 6. In this position, Plaintiff speaks and writes on a number of topics, including freedom of speech, freedom of association, due process, legal equality, and religious liberty. ECF No. 1 at ¶ 14; ECF No. 21 at ¶ 7. Plaintiff is also a member of the First Amendment Lawyers Association, which regularly conducts continuing legal education ("CLE") events for its members. ECF No. 1 at ¶ 15; ECF No. 21 at ¶¶ 8-9. As a part of his association with the Foundation for Individual Rights in Education and the First Amendment Lawyers Association, Plaintiff speaks at a number of CLE and non-CLE events on a variety of controversial issues. ECF No. 1 at ¶ 16-19; ECF No. 21 at ¶ 10. Specifically, Plaintiff has written and spoken against banning hate speech on university campuses and university regulation of hateful online expression as protected by the First Amendment. ECF No. 1 at ¶¶ 19-20; ECF No. 21 at ¶¶ 14-15.

The facts included here were alleged in the Complaint (ECF No. 1) and also stipulated in the Stipulated List of Facts for Purposes of Preliminary Injunction Motion (ECF No. 21). Although the Court considered all allegations in the Complaint for purposes of Defendants' Motion to Dismiss and all stipulated facts for purposes of Plaintiff's Motion for Preliminary Injunction, the Court found these facts pertinent to its analysis and conclusion.

In 2016, the Disciplinary Board of the Supreme Court of Pennsylvania considered adopting a version of the American Bar Association Model Rule of Professional Conduct 8 4(g) in Pennsylvania. ECF No. 1 at ¶¶ 38-39; ECF No. 21 at ¶ 56. After an iterative process of notice and comment between December 2016 and June 2020, the Supreme Court of Pennsylvania approved the recommendation of the Board[3] and ordered that Pennsylvania Rule of Professional Conduct ("Pa.R.P.C.") 8.4 be amended to include the new Rule 8.4(g) (the "Rule") along with two new comments, (3) and (4), (together, the "Amendments"). ECF No. 1 at ¶ 40; ECF No. 21 at ¶ 61.

3 Justice Mundy dissented. ECF No. 1 at ¶ 40.

*2 The Amendments state:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (g) in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances, including but not limited to bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status. 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 advice or advocacy consistent with these Rules. Comment:
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> * * *
>
> [3] For the purposes of paragraph (g), conduct in the practice of law includes participation in activities that are required for a lawyer to practice law, including but not limited to continuing legal education seminars, bench bar conferences and bar association activities where legal education credits are offered.
>
> [4] The substantive law of antidiscrimination and anti-harassment statutes and case law guide application of paragraph (g) and clarify the scope of the prohibited conduct.
>
> ECF No. 1 at ¶ 40 (quoting Pa.R.P.C. 8.4); ECF No. 21 at ¶¶ 62-64 (quoting Pa.R.P.C. 8.4).

The Amendments take effect on December 8, 2020. ECF No. 1 at ¶ 41; ECF No. 21 at ¶ 61.

In terms of enforcement, the Office of Disciplinary Counsel ("ODC") is charged with investigating complaints against Pennsylvania-licensed attorneys for violation of the Pennsylvania Rules of Professional Conduct and, if necessary, charging and prosecuting attorneys under the Pennsylvania Rules of Disciplinary Enforcement. ECF No. 1 at ¶ 45; ECF No. 21 at ¶ 32. First, a complaint is submitted to the ODC alleging an attorney violated the Pennsylvania Rules of Professional Conduct. ECF No. 1 at ¶¶ 46-47; ECF No. 21 at ¶ 36. The ODC then conducts an investigation into the complaint and decides whether to issue a DB-7 letter. ECF No. 1 at ¶¶ 51-52; ECF No. 21 at ¶¶ 36-38. If the ODC issues a DB-7 letter, the attorney has thirty days to respond to that letter. *Id.* If, after investigation and a DB-7 letter response, the ODC determines that a form of discipline is appropriate, the ODC recommends either private discipline, public reprimand, or the filing of a petition for discipline to the Board. ECF No. 1 at ¶¶ 55-57; ECF No. 21 at ¶¶ 44-45. After further rounds of review and recommendation, along with additional steps, the case may proceed to a hearing before a hearing committee and de novo review by the Disciplinary Board and the Supreme Court of Pennsylvania. ECF No. 1 at ¶¶ 54-59; ECF No. 21 at ¶¶ 46-50.[4]

4 The Complaint (ECF No. 1) and the Stipulated List of Facts for Purposes of Preliminary Injunction Motion (ECF No. 21) contain different information regarding the process for a disciplinary action, but the discrepant facts are irrelevant to the Court's analysis of both Defendants' Motion to Dismiss and Plaintiff's Motion for Preliminary Injunction.

*3 Plaintiff filed a complaint in this Court alleging the Amendments consist of content-based and viewpoint-based discrimination and are overbroad in violation of the First Amendment (Count 1) and the Amendments are unconstitutionally vague in violation of the Fourteenth Amendment (Count 2). ECF No. 1.[5] Defendants filed a Motion to Dismiss (ECF No. 15), and Plaintiff filed a response in opposition (ECF No. 25). Plaintiff filed a Motion for Preliminary Injunction (ECF No. 16), and Defendants filed a response in opposition (ECF No. 24). The Court held oral argument on November 13, 2020, addressing both Defendants' Motion to Dismiss and Plaintiff's Motion for Preliminary Injunction. ECF No. 26.

5 All Defendants are sued in their official capacities only. ECF No. 1 at 3. "State officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them." *Hafer v. Melo*, 502 U.S. 21, 27 (1991). In this case, Defendants are members of either the Disciplinary Board of the Supreme Court of Pennsylvania or the Office of Disciplinary Counsel. ECF No. 1 at 3.

B. STANDARD OF REVIEW

Before the Court are Defendants' Motion to Dismiss the Complaint (ECF No. 15) and Plaintiff's Motion for Preliminary Injunction (ECF No. 16).

I. Standard of Review for Motion to Dismiss

When reviewing a motion to dismiss, the Court "accept[s] as true all allegations in plaintiff's complaint as well as all reasonable inferences that can be drawn from them, and [the court] construes them in a light most favorable to the non-movant." *Tatis v. Allied Interstate, LLC*, 882 F.3d 422, 426 (3d Cir. 2018) (quoting *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 557)). "The plausibility determination is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.' " *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 786-87 (3d Cir. 2016) (quoting *Iqbal*, 556 U.S. at 679).

Finally, courts reviewing the sufficiency of a complaint must engage in a three-step process. First, the court "must 'take note of the elements [the] plaintiff must plead to state a claim.' " *Id.* at 787 (alterations in original) (quoting *Iqbal*, 556 U.S. at 675). "Second, [the court] should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' " *Id.* (quoting *Iqbal*, 556 U.S. at 679). Third, ' "[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.' " *Id.* (alterations in original) (quoting *Iqbal*, 556 U.S. at 679).

II. Standard of Review for Preliminary Injunction

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Groupe SEB USA, Inc. v. Euro-Pro Operating LLC*, 774 F.3d 192, 197 (3d Cir. 2014) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). "Awarding preliminary relief, therefore, is only appropriate 'upon a clear showing that the plaintiff is entitled to such relief.' " *Id.* (quoting *Winter*, 555 U.S. at 22).

In order to "obtain a preliminary injunction the moving party must show as a prerequisite (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured...if relief is not granted....[In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest." *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017), *as amended* (June 26, 2017) (quoting *Del. River Port Auth. v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974)) (alteration in original).

*4 The Third Circuit has held that the first two factors act as "gateway factors," and that a "court must first determine whether the movant has met these two gateway factors before considering the remaining two factors—balance of harms, and public interest." *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 675 (E.D. Pa. 2018), *aff'd*, 922 F.3d 140 (3d Cir. 2019) (citing *Reilly*, 858 F.3d at 180). However, "[b]ecause this action involves the alleged suppression of speech in violation of the First Amendment, we focus our attention on the first factor, i.e., whether [Plaintiff] is likely to succeed on the merits of his constitutional claim." *Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")).

C. DISCUSSION

I. Standing

Defendants move to dismiss the Complaint contending that Plaintiff lacks standing to bring this pre-enforcement challenge to the Amendments. ECF No. 15 at 10-16.

"To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient "causal connection between the injury and the conduct complained of," and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.' " *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014) [hereinafter *SBA List*] (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "An injury sufficient to satisfy Article III must be 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Id.* at 158 (quoting *Lujan*, 504 U.S. at 560) (internal citations omitted).

"An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.' " *Id.* (quoting *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 437 (2014)) (internal quotation marks omitted). "The party invoking federal jurisdiction bears the burden of establishing standing." *Id.* (quoting *Clapper*, 568 U.S. at 411) (internal quotation marks omitted). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* (quoting *Lujan*, 504 U.S. at 561) (alteration in original).

Here, the Court must determine if "the threatened enforcement of" the Amendments "creates an Article III injury." *Id.* "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Id.* (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)) (additional citations omitted). The Supreme Court has "permitted pre-enforcement review under circumstances that render the threatened enforcement sufficiently imminent." *Id.* "Specifically, [the Supreme Court] ha[s] held that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.' " *Id.* at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

Many circuit courts have found a plaintiff's allegation that the law has or will have a chilling effect on the plaintiff's speech is sufficient to satisfy the injury-in-fact requirement. The Third Circuit held that "an allegation that certain conduct has (or will have) a chilling effect on one's speech must claim a 'specific present objective harm or a threat of specific future harm.' " *Sherwin-Williams Co. v. Cty. of Delaware, Pennsylvania*, 968 F.3d 264, 269–70 (3d Cir. 2020) (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)). The Fifth Circuit "has repeatedly held, in the pre-enforcement context, that '[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.' " *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330-331 (5th Cir. Oct. 28, 2020), as revised (Oct. 30, 2020) (quoting *Houston Chronicle v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007)) (alteration in original) (additional citations omitted). Similarly, the Ninth Circuit has held that "[a] chilling of First Amendment rights can constitute a cognizable injury, so long as the chilling effect is not 'based on a fear of future injury that itself [is] too speculative to confer standing.' " *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 826 (9th Cir. 2020) (quoting *Munns v. Kerry*, 782 F.3d 402, 410 (9th Cir. 2015)) (additional citations omitted). The Seventh Circuit has held "a plaintiff may show a chilling effect on his speech that is objectively reasonable, and that he self-censors as a result." *Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020), as amended on denial of reh'g and reh'g en banc (Sept. 4, 2020) [hereinafter *Killeen*] (citations omitted).

***5** In terms of Plaintiff's injury-in-fact, Plaintiff alleges in the Complaint that the "vast majority of topics" discussed at Plaintiff's speaking events "are considered biased, prejudiced, offensive, and hateful by some members of his audience, and some members of society at large." ECF No. 1 at ¶ 61.[6] Plaintiff further alleges that "during his presentations," Plaintiff's "discussion of hateful speech protected by the First Amendment involves a detailed summation of the law in this area, which includes a walkthrough of prominent, precedential First Amendment cases addressing incendiary speech." *Id.* at ¶ 62.

6 As the Court is determining whether to grant or deny Defendants' Motion to Dismiss the Complaint for lack of standing, the Court considers those allegations related to standing in the Complaint (ECF No. 1).

Plaintiff alleges that "it would be nearly impossible to illustrate United States First Amendment jurisprudence, such as by accurately citing and quoting precedent First Amendment cases, without engaging in speech that at least some members of his audience will perceive as biased, prejudiced, offensive, and potentially hateful." *Id.* at ¶ 63. Plaintiff alleges that he believes that "every one of his speaking engagements on First Amendment issues carries the risk that an audience member will file a bar disciplinary complaint against him based on the content of his presentation under rule 8.4(g)." *Id.* at ¶ 64. Plaintiff alleges that he fears "his writings and speeches could be misconstrued by readers and listeners, and state officials within the Board or Office, as violating Rule 8.4(g)." *Id.* at ¶ 72. Plaintiff alleges that he does not want to be subjected to disciplinary sanctions by the ODC or the Disciplinary Board and that a disciplinary investigation would harm his "professional reputation, available job opportunities, and speaking opportunities." *Id.* at ¶ 69. Plaintiff alleges that he will be "forced to censor himself to steer clear of an ultimately unknown line so that his speech is not at risk of being incorrectly perceived as manifesting bias or prejudice." *Id.* at ¶ 75.

Defendants contend that Plaintiff lacks standing because Plaintiff's injury "depends on an 'indefinite risk of future harms inflicted by unknown third parties.' " ECF No. 15 at 11-12 (quoting *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011)) (citing *Clapper*, 568 U.S. at 414 ("We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.")). Defendants contend that Plaintiff speculates an audience member will be offended by his presentation, then further speculates that that audience member will file a disciplinary complaint against Plaintiff, and then finally speculates that the ODC will not dismiss the complaint as frivolous but will require Plaintiff to file an official response and thereafter move to bring charges. *Id.* at 12.

Defendants further contend that Plaintiff lacks standing because there is no credible threat of enforcement. *Id.* First, Defendants note that there is no history of past enforcement, as the Amendments have not yet gone into effect, and Plaintiff failed to point to any attorneys anywhere who were charged with violating a similar provision. *Id.* at 13.

Next, Defendants note that the ODC has not "issued warning letters, opinions, or provided any other reason to believe that Plaintiff would be charged with violating the Amendments based on the conduct he wants to engage in." *Id.* Finally, Defendants contend that even if the ODC received a complaint, it is speculative whether Plaintiff would ever be notified, and further speculative whether Plaintiff would be required to respond or be charged with a violation. *Id.* at 14. Defendants reiterate that even if an audience member is offended by Plaintiff's presentation and makes a complaint to the ODC, "complainants do not institute disciplinary charges against an attorney: only ODC has that power – and only after approval by a Disciplinary Board hearing committee member." *Id.*

***6** Finally, Defendants contend that the conduct in which Plaintiff wants to engage, providing a detailed summation of the law regarding hateful speech, is not proscribed by the plain language of the Amendments. *Id.* at 15. As the Amendments require that the Plaintiff *knowingly* manifest bias or prejudice or *knowingly* engage in discrimination or harassment, Defendants contend that it "strains credulity" to believe that citing and quoting cases could lead to disciplinary action. *Id.* Furthermore, if Plaintiff intends to advocate that certain cases were wrongly decided or advance a different interpretation of the law, Defendants note that Rule 8.4(g) provides a safe harbor for advocacy and advice. *Id.*

Plaintiff responds that the Amendments arguably proscribe Plaintiff's alleged speech and that there is a credible threat of enforcement. ECF No. 25 at 11. Plaintiff also contends that the Amendments would create an "*objectively reasonable* chill to [Plaintiff's] protected speech." *Id.* at 12.

First, Plaintiff contends that he plans to continue speaking at CLE events on controversial and polarizing issues such as hate speech, regulation on college campuses or online, due process requirements for students accused of sexual misconduct, and campaign finance restrictions on monetary political contributions. *Id.* Plaintiff notes that his presentations include summarizing and using language from a number of cases that has in the past offended, and will continue to offend, audience members. *Id.* at 12. Plaintiff notes that Rule 8.4(g) proscribes words or conduct manifesting bias or prejudice at CLE seminars and that the Complaint contains many examples of people labeling speakers as biased and prejudiced "for taking policy positions, for discussing statistics or academic theories, for espousing legal views, or mentioning certain epithets as part of an academic discussion." *Id.*

Plaintiff further contends that although Rule 8.4(g) requires the manifestation of bias or prejudice to be "knowing[ ]," the ultimate decision of whether to file and bring a disciplinary action against Plaintiff "turn[s] on the reaction of the listener and judgment of those who administer the Rule." *Id.* at 13. Therefore, Plaintiff contends his lack of intention to manifest bias or prejudice does not undercut his standing to challenge Rule 8.4(g). *Id.*

Additionally, although Rule 8.4(g) "does not preclude advice or advocacy consistent with these Rules," Plaintiff contends that " 'advocacy' in this context refers to the only sort of advocacy contemplated by rules of professional conduct: the zealous advocacy in support of a client's interest." *Id.* (citing Pa.R.P.C. Preamble ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system); Pa.R.P.C. 1.3, cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf")). Therefore, Plaintiff contends that "[a]cademic advocacy" at CLE events is not covered within the advocacy or advice safe harbor. *Id.* at 14.

Furthermore, Plaintiff contends that his intention to mention epithets, slurs, and demeaning nicknames during his presentations and in the question-and-answer portion of his presentation is arguably proscribed under Rule 8.4(g). *Id.* Although Rule 8.4(g) does not provide examples of "manifestations of bias or prejudice," Plaintiff notes that the language of Rule 8.4(g) regarding "manifest[ing] bias or prejudice" was borrowed from Rule 2.3 of the Pennsylvania Code of Judicial Conduct. *Id.* Comment 2 to Rule 2.3 of the Pennsylvania Code of Judicial Conduct states that examples of manifestations of bias and prejudice "include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics." *Id.* (quoting Pa.C.J.C. Rule 2.3, cmt. 2). Plaintiff reiterates that he alleged in the Complaint that he mentions slurs, epithets, and demeaning nicknames during his presentations. *Id.* Plaintiff contends that he also exchanges ideas with audience members about the importance of affording Due Process and First Amendment rights to people who do and say "odious" things. *Id.* Plaintiff is concerned that people might construe his theories as manifesting bias or prejudice against those protected classes, akin to "suggestions of connections between race, ethnicity, or nationality and crime." *Id.* (quoting Pa.C.J.C. Rule 2.3).

*7 Next, Plaintiff contends that there is a credible threat of enforcement. *Id.* Although Defendants point out that no one has filed a disciplinary complaint against Plaintiff based on his past presentations, Plaintiff retorts that such a showing is not required for standing and Rule 8.4(g) is not yet in effect. *Id.* "When dealing with pre-enforcement challenges to recently enacted (or, at least, non-moribund) statutes that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence." *Id.* (quoting *ACLU v. Reno*, 31 F. Supp. 2d 473, 479 (E.D. Pa. 1999), eventually rev'd on other grounds sub. nom. *Ashcroft v. ACLU*, 535 U.S. 564 (2002)).

Plaintiff further contends that no Defendants have "declare[d] or present[d] other evidence that they would find this type of 8.4(g) complaint to be frivolous, let alone disavow[ed] their authority to take any enforcement steps in response to such complaints." *Id.* at 18 (collecting cases). Even if Defendants were to submit such evidence, Plaintiff maintains that the Complaint

contains numerous examples of individuals who have imputed bias and bigotry to speakers advancing legal views or mentioning incendiary words, which shows that a disciplinary complaint for this reason would not be considered "frivolous." *Id.*

The Court finds that Plaintiff has standing to bring this pre-enforcement challenge to the Amendments. First, the Court finds Plaintiff's allegation that his speech will be chilled by the Amendments shows a "threat of specific future harm." *Sherwin-Williams*, 968 F.3d at 269–70 (quoting *Laird*, 408 U.S. at 13–14); *see also Speech First*, 979 F.3d 319, 330-331. Plaintiff's alleged fear of a disciplinary complaint and investigation is objectively reasonable based on Plaintiff's allegation that the "vast majority of topics" discussed at Plaintiff's speaking events "are considered biased, prejudiced, offensive, and hateful by some members of his audience, and some members of society at large." ECF No. 1 at ¶ 61.

Furthermore, Plaintiff alleged specific examples of individuals filing disciplinary and Title IX complaints against speakers who were presenting on similar topics as those discussed by Plaintiff, which he alleges will "force[him] to censor himself to steer clear of an ultimately unknown line so that his speech is not at risk of being incorrectly perceived as manifesting bias or prejudice." ECF No. 1 at ¶ 75. Therefore, in addition to showing that the "chilling effect on his speech... is objectively reasonable," Plaintiff has shown that he will "self-censor[ ] as a result." *Killeen*, 968 F.3d at 638.

The Court concludes that Plaintiff's alleged chilling effect constitutes an injury in fact that is concrete, particularized, and imminent. *SBA List*, 573 U.S. at 158. Plaintiff's allegations of future injury suffice because Plaintiff has shown that "the threatened injury is 'certainly impending,' " and that "there is a 'substantial risk' that the harm will occur.' " *Id.* (quoting *Clapper*, 568 U.S. at 437) (internal citations omitted).

Plaintiff has further shown that he has "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *SBA List*, 573 U.S. at 157–58 (quoting *Babbitt*, 442 U.S. at 298). First, neither party challenges that the speech in which Plaintiff intends to engage is affected with a constitutional interest. *See generally* ECF No. 15; ECF No. 25 at 11.

Second, Plaintiff has also clearly shown a likelihood that the activity in which he intends to engage is "arguably proscribed" by the Amendments. *Speech First, Inc.*, 979 F.3d at 332. Plaintiff has alleged that he intends to mention epithets, slurs, and demeaning nicknames as part of his presentation on First Amendment and Due Process rights. ECF No. 1 at ¶¶ 62-63. Rule 8.4(g) explicitly states that it is attorney misconduct to, "by **words** or conduct, knowingly manifest bias or prejudice." Pa.R.P.C. 8.4(g) (emphasis added). Both parties agree that the language used in Rule 8.4(g) mirrors Pennsylvania Code of Judicial Conduct Rule 2.3, which provides, in Comment 2, that "manifestations of bias include...epithets; slurs; demeaning nicknames; negative stereotyping...." Plaintiff has shown that by repeating slurs or epithets, or by engaging in discussion with his audience members about the constitutional rights of those who do and say offensive things, he will need to repeat slurs, epithets, and demeaning nicknames. This is arguably proscribed by Rule 8.4(g).

***8** Defendants contend that because Rule 8.4(g) requires an attorney to "*knowingly* manifest bias or prejudice," it "strains credulity" to believe that citing and quoting cases could lead to disciplinary action. ECF No. 15 at 15 (emphasis added). However, since the Court has found that repeating slurs or epithets is arguably proscribed by the statute based on the plain language, whether Plaintiff "knowingly" repeated slurs or epithets is immaterial.

Defendants further contend that, "to the extent that Plaintiff intends to advocate that certain cases were wrongly decided or advanced a different interpretation of relevant law," Rule 8.4(g)'s "clear safe harbor for advocacy" would protect Plaintiff. *Id.* at 16. However, the "advice or advocacy" safe harbor was plainly intended to protect those giving advice or advocacy in the context of representing a client, and not in the context of Plaintiff's intended activity. Therefore, Plaintiff has shown that his intended conduct is arguably proscribed by the Amendments.

Third, Plaintiff has shown that there exists a credible threat of prosecution. Defendants' contention that Plaintiff's injury "depends on an 'indefinite risk of future harms inflicted by unknown third parties' " is not persuasive. *Id.* at 11-12 (quoting

Ceridian, 664 F.3d at 42) (additional citations omitted). Plaintiff alleged specific examples of individuals filing disciplinary and Title IX complaints against speakers who were presenting on similar topics as those discussed by Plaintiff. ECF No. 1 at ¶¶ 73, 74. Not every complaint filed with the ODC results in a letter to the accused attorney, nor every letter to the accused attorney results in any formal sanction. However, Plaintiff has demonstrated that there is a substantial risk that the Amendments will result in Plaintiff being subjected to a disciplinary complaint or investigation.

Ultimately, the Court is swayed by the chilling effect that the Amendments will have on Plaintiff, and other Pennsylvania attorneys, if they go into effect. Rule 8.4(g)'s language, "by words...manifest bias or prejudice," are a palpable presence in the Amendments and 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. Defendants further argue that, under the language of Rule 8.4(g) targeting "words," even if a complaint develops past the initial disciplinary complaint stage, actual discipline will not occur given the conduct targeted, good intentions of the Rule and those trusted arbiters that will sit in judgment and apply it as such. But Defendants do not guarantee that, nor did they remove the language specifically targeting attorneys' "words." Defendants effectively ask Plaintiff to trust them not to regulate and discipline his offensive speech even though they have given themselves the authority to do so. So, despite asking Plaintiff to trust them, there remains the constant threat that the Rule will be engaged as the plain language of it says it will be engaged.

It can hardly be doubted there will be those offended by the speech, or the written materials accompanying the speech, that manifests bias or prejudice who will, quite reasonably, insist that the Disciplinary Board perform its sworn duty and apply Rule 8.4(g) in just the way the clear language of the Rule permits. 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. Defendants' attempt to sidestep a direct constitutional challenge by claiming no final discipline will ever be rendered under Rule 8.4(g) fails. The clear threat to Plaintiff's First Amendment rights and the chilling effect that results is the harm that gives Plaintiff standing. Defendant's Motion to Dismiss the Complaint for lack of standing is denied.

II. First Amendment Violation

*9 In their Motion to Dismiss, Defendants contend that Plaintiff's claim that the Amendments constitute either content-based or viewpoint-based discrimination fails to state a claim because the Amendments regulate conduct, not speech. ECF No. 15 at 30. Even if the Amendments regulate speech, Defendants contend, the Amendments are narrowly tailored to achieve Pennsylvania's compelling interest in regulating the practice of law and ensuring that the judicial system is free from discriminatory and harassing conduct. *Id.*

Defendants further contend that the Amendments are not viewpoint-based since they were not enacted based on particular views but rather to prohibit discrimination and harassment. *Id.* at 30 (citing *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 32 (2d Cir. 2018)). Furthermore, Defendants note that the Amendments apply to all attorneys. *Id.* (citing *Barr v. Lafon*, 538 F.3d 554, 572 (6th Cir. 2008)).

Finally, Defendants contend that the Supreme Court has held that states have a "compelling interest" in regulating professions, and that "broad power" is "especially great" in "regulating lawyers[.]" *Id.* (quoting *In re Primus*, 436 U.S. 412, 422 (1978)) (additional citations omitted). Defendants further contend that states have a substantial interest both in "protect[ing] the integrity and fairness of a State's judicial system," *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1031 (1991), and in preventing attorneys from engaging in conduct that "is universally regarded as deplorable and beneath common decency," *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (internal citations omitted). ECF No. 15 at 31.

Plaintiff, on the other hand, contends that Rule 8.4(g)'s prohibition on using words to "manifest bias or prejudice, or engage in harassment or discrimination" is unconstitutional viewpoint discrimination. ECF No. 25 at 19. Plaintiff contends that the Amendments allow for "tolerant, benign, and respectful speech" while disallowing "biased, prejudiced, discriminatory, critical, and derogatory speech." *Id.* Plaintiff highlights *Matal v. Tam*, where the Supreme Court found that a federal statute prohibiting the registration of trademarks that may "disparage or bring into contempt or disrepute" any "persons, living or dead" was a viewpoint-based restriction. *Id.* (citing *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017)). The Court stated that this "law thus reflects the Government's disapproval of a subset of messages it finds offensive, the essence of viewpoint discrimination." *Matal*, 137 S. Ct. at 1750.

Plaintiff further disputes that Rule 8.4(g) regulates discriminatory and harassing *conduct* and not speech, since the plain language of Rule 8.4(g) restricts "words" in addition to "conduct" and "manifest[ing] bias or prejudice" in addition to "engag[ing] in harassment or discrimination." ECF No. 25 at 20. Plaintiff notes that Rule 8.4(g) mirrors Rule 2.3 of the Pennsylvania Judicial Code of Conduct, which states that "[e]xamples of manifestations of bias and prejudice include...epithets; slurs; demeaning nicknames," and this further underscores that Rule 8.4(g) prohibits the expression of certain words alone, apart from any conduct. *Id.*

Plaintiff further disputes Defendants' claim that because 8.4(g) applies to all attorneys it cannot be viewpoint discrimination. *Id.* at 21. Plaintiff contends that this is not the test for viewpoint discrimination and that the Supreme Court rejected the same argument. *Id.* Plaintiff contends that if the Court finds that the Amendments consist of viewpoint bias, that "end[s] the matter." *Id.* (quoting *Iancu v. Brunetti*, 204 L. Ed. 2d 714 (2019)).

***10** Plaintiff further contends that even though Rule 8.4(g) is a regulation of "professional speech," it is still unconstitutional viewpoint-based discrimination under the Supreme Court's ruling in *Nat'l Inst. of Family & Life Advocates v. Becerra*. *Id.* at 22 (citing *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018) [hereinafter *NIFLA*]). Plaintiff contends that Rule 8.4(g) does not fit within either of the two areas that the Court in *NIFLA* recognized justified regulation of professional speech. *Id.* Plaintiff contends that Rule 8.4(g) is not a law that "require[s] professionals to disclose factual, noncontroversial information in their 'commercial speech," nor does it merely "regulate professional conduct,...[that] incidentally involves speech." *Id.* (quoting *NIFLA*, 138 S. Ct. at 2372).

Plaintiff further contends that the Court in *Gentile* and *Sawyer* recognized that when an attorney's speech occurs as part of pending litigation or a client representation, it is "more censurable" because it can "obstruct the administration of justice." *Id.* at 23 (quoting *In re Sawyer*, 360 U.S. 622, 636 (1959)) (citing *Gentile*, 501 U.S. at 1074 ("[O]ur opinions... indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press."). Rule 8.4(g), however, contains no similar limitation, as it applies to any words or conduct uttered "in the practice of law," which includes participating in events where CLE credits are issued. *Id.* (quoting Pa.R.P.C. 8.4(g)).

1. Attorney Speech and Professional Speech

The Court recognizes that Pennsylvania has an interest in licensing attorneys and the administration of justice. However, contrary to Defendants' contention, speech by an attorney or by a professional is only subject to greater regulation than speech by others in certain circumstances, none of which are present here. The Supreme Court in *Gentile v. State Bar of Nevada* found that, "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." 501 U.S. at 1071. Furthermore, "[e]ven outside the courtroom...lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be." *Id.* (citing *In re Sawyer*, 360 U.S. 622 (1959)). The Supreme Court has "expressly contemplated that the speech of *those participating before the courts* could be limited." *Id.* at 1072. Additionally, in the commercial context, the Supreme Court's "decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise . ..have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other business." *Id.* at 1073 (collecting cases).

In contrast, Rule 8.4(g) does not limit its prohibition of "words...[that] manifest bias or prejudice" to the legal process, since it also prohibits these words or conduct "during activities that are required for a lawyer to practice law," including seminars or activities where legal education credits are offered. Pa.R.P.C. 8.4(g). Rule 8.4(g) does not seek to limit attorneys' speech only when that attorney is in court, nor when that attorney has a pending case, nor even when that attorney seeks to solicit business and advertise. Rule 8.4(g) much more broadly prohibits attorneys' speech.

This Court also finds that Rule 8.4(g) does not cover "professional speech" that is entitled to less protection. The Supreme Court "has not recognized 'professional speech' as a separate category of speech." *NIFLA*, 138 S. Ct. at 2371 (finding petitioners were likely to succeed on merits of claim that act requiring clinics that primarily serve pregnant women to provide certain notices violated the First Amendment). "Speech is not unprotected merely because it is uttered by 'professionals.' " *Id.* at 2371-2372.

***11** However, the Supreme Court "has afforded less protection for professional speech in two circumstances." *Id.* at 2372. "First, [Supreme Court] precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.' " *Id.* (collecting cases). "Second, under [Supreme Court] precedents, States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* (collecting cases).

Rule 8.4(g) does not fall into either of these categories. First, Rule 8.4(g) does not relate specifically to commercial speech, nor does it require that professionals "disclose factual, noncontroversial information." *Id.*

Second, Rule 8.4(g) does not regulate professional conduct that incidentally involves speech. The plain language of Rule 8.4(g) explicitly prohibits "words" that manifest bias or prejudice. Furthermore, a comment included in a May 2018 proposal of Rule 8.4(g) "explains and illustrates" that Rule 8.4(g) was intended to regulate speech. Pa.R.P.C., Preamble and Scope ("The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule.") This comment stated, "[e]xamples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics."[7] 48 Pa.B. 2936. This proposed comment reveals that the drafters of Rule 8.4(g) intended to explicitly restrict offensive words in prohibiting an attorney from "manifest[ing] bias or prejudice."

7 This exact language also appears in Comment 2 to Rule 2.3 of Pennsylvania Code of Judicial Conduct. Pa.C.J.C. Rule 2.3. Both parties agree Pennsylvania Code of Judicial Conduct Rule 2.3 mirrors Pennsylvania Rule of Professional Conduct Rule 8.4(g). *See* ECF No. 15 at 28; ECF No. 25 at 7.

Although the final version of Rule 8.4(g) does not include this comment, the fatal language, "by words...manifest bias or prejudice," remains. Removing this candid comment about the intent of the Rule does not also remove the intent of those words. That this language, "by words...manifest bias or prejudice," remained in the final version of Rule 8.4(g) illustrates the Rule's broad and chilling implications. If the drafters wished to reform the Rule, they could have easily removed the offending language from the Rule as well the proposed comment. Removing the comment alone did not rid Rule 4.8(g) of its language specifically targeting speech.

Despite this, Defendants tell us to look away from the clearly drafted language of the Rule and focus rather on the conduct component. Plaintiff agrees that if we were looking at conduct, the government has a right to regulate conduct of its licensed attorneys. *See* ECF No. 25 at 21. Defendants try to deflect our attention away from the clear speech regulation in the Rule because they themselves had to know in drafting the Rule they were venturing into the narrowest of channels that permit government to regulate speech. They merge "words" into "conduct" by blithely arguing that the shoal that confronts us is a mere illusion to be ignored and is simply nothing but part of the deep, blue channel. Yet, when the reality of the shoal hits the ship, it will not be the government left ensnared and churning in the sand, it will be the individual attorney and the attorney's practice embedded in an inquisition regarding the manifestation of bias and prejudice, and an exploration of the attorney's character and previously expressed viewpoints, to determine if such manifestation was "knowing."

***12** Defendants cite *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, to support their contention that Rule 8.4(g) is intended to prohibit "conduct carried out by words," and not speech. Transcript of Oral Argument at 25; ECF No. 15 at 17 (citing *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006)). In *Rumsfeld*, the Supreme Court held that speech was incidental to the challenged law's requirement that law schools afford equal access to military recruiters. 547 U.S. at 62. The challenged law denied federal funding to an institution of higher education that prohibited the military from recruiting on its campus. *Id.* at 47. The plaintiffs brought suit, seeking to deny the military from recruiting on their campuses because of "disagreement with the Government's policy on homosexuals in the military," and arguing that the law violated law schools' freedom of speech. *Id.* at 51, 60. The Supreme Court held that the law did not regulate speech, nor did the expressive nature of the conduct regulated bring it under the First Amendment's protection. *Id.* at 65. The Court held, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

The Supreme Court's holding in *Rumsfeld* is inapplicable to the case before this Court. Whereas the challenged law in *Rumsfeld* required the plaintiffs to provide equal campus access to military recruiters, a law that clearly regulates conduct, the Amendments explicitly limit what Pennsylvania attorneys may say in the practice of law. Rule 8.4(g)'s prohibition against using "words" to "manifest bias or prejudice" does not regulate conduct "carried out by means of language." *Rumsfeld*, 547 U.S. at 62. It simply regulates speech. Even if the Rule was *intended* to prohibit "harassment and discrimination...carried out by words," Transcript of Oral Argument at 25, Rule 8.4(g) plainly prohibits "words...manifest[ing] bias or prejudice," which regulates a much broader category of speech than supposedly intended.

"Outside of the two contexts discussed above—disclosures under [attorney advertising] and professional conduct—[the Supreme] Court's precedents have long protected the First Amendment rights of professionals." *NIFLA*, 138 S. Ct. at 2374. "The dangers associated with content-based regulations of speech are also present in the context of professional speech." *Id.* "As with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.' " *Id.* (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)). "States cannot choose the protection that speech receives under the First Amendment [by imposing a licensing requirement], as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.' " *Id.* (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423-424 (1993)) (additional citations omitted). Defendants may not impinge upon Pennsylvania attorneys' First Amendment rights simply because Rule 8.4(g) regulates speech by professionals.

Furthermore, in *In re Primus*, quoted by Defendants to establish that states have "broad power" to regulate attorneys, the Court ultimately concluded that the state's application of the disciplinary rules violated the First and Fourteenth Amendments, showing the limits to that "broad" regulation power. 436 U.S. 412, 438 (1978). In *In re Primus*, a lawyer informed a prospective client via letter that free legal assistance was available from a nonprofit organization with which this lawyer worked. *Id.* at 414. Based on this activity, the state disciplinary board charged the lawyer with soliciting a client in violation of the disciplinary rules and administered a private reprimand. *Id.* at 421. The state supreme court then adopted the board's findings and increased the sanction to a public reprimand. *Id.* The Supreme Court found that the "State's special interest in regulating members whose profession it licenses, and who serve as officers of its courts, amply justifies the application of *narrowly drawn* rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence." *Id.* at 438 (emphasis added). Even though the state had argued that the regulatory program was aimed at preventing undue influence "and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients," the Court found that "that '[b]road prophylactic rules in the area of free expression are suspect,' and that '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' " *Id.* at 432 (quoting *Button*, 371 U.S., at 438). "Because of the danger of censorship through selective enforcement of broad prohibitions, and '[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in [this] area only with narrow specificity.' " *Id.* at 432-433 (quoting

Button, 371 U.S., at 433) (alteration in original). This case does not, therefore, ultimately support Defendants' conclusion nor indicate that Defendants have broad power in this context to regulate attorneys' words.

***13** Rule 8.4(g) does not regulate the specific types of attorney speech or professional speech that the Supreme Court has identified as warranting a deferential review. The speech that Rule 8.4(g) regulates is entitled to the full protection of the First Amendment.

2. Viewpoint-Based Discrimination

The Court finds that the Amendments, Rule 8.4(g) and Comments 3 and 4, are viewpoint-based discrimination in violation of the First Amendment.

"[L]aws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Startzell v. City of Philadelphia, Pennsylvania*, 533 F.3d 183, 193 (3d Cir. 2008) (quoting *Turner Broadcasting*, 512 U.S. at 643) (alteration in original). Content-based restrictions "are subject to the 'most exacting scrutiny,'...because they 'pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.' " *Id.* (quoting *Turner Broadcasting*, 512 U.S. at 641-642).

Viewpoint discrimination is "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject." *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). "Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* (quoting *Rosenberger*, 515 U.S. at 829). "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (quoting *Rosenberger*, 515 U.S. at 829).

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "[T]hat is viewpoint discrimination: Giving offense is a viewpoint." *Matal*, 137 S. Ct. at 1763. The Supreme Court has "said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.' " *Id.* (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)) (additional citations omitted).

In *Matal v. Tam*, the Supreme Court considered the constitutionality of "a provision of federal law prohibiting the registration of trademarks that may 'disparage...or bring...into contemp[t] or disrepute' any 'persons, living or dead.' " 137 S. Ct. at 1751. The Court concluded that the provision violated the Free Speech Clause of the First Amendment because "[s]peech may not be banned on the ground that it expresses ideas that offend." *Id.* The Court noted that when the government creates a limited public forum for private speech "some content- and speaker-based restrictions may be allowed," but, "even in such cases...'viewpoint discrimination' is forbidden." *Id.* (citing *Rosenberger*, 515 U.S. at 830-831). The Court clarified that the term "viewpoint" discrimination is to be used in a broad sense and, even if the provision at issue "evenhandedly prohibits disparagement of all group," it is still viewpoint discrimination because "[g]iving offense is a viewpoint." *Id.* at 1763.

***14** In a concurring opinion, Justice Kennedy stated that "[t]he First Amendment guards against laws 'targeted at specific subject matter,' [a] form of speech suppression known as content based discrimination." *Id.* at 1765-1766 (Kennedy, J., concurring) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015)). "This category includes a subtype of laws that go further, aimed at the suppression of 'particular views...on a subject.' " *Id.* (Kennedy, J., concurring) (quoting *Rosenberger*, 515 U.S. at 829) (alteration in original). "A law found to discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.' " *Id.* (Kennedy, J., concurring) (quoting *Rosenberger*, 515 U.S. at 829–830).

"At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Id.* at 1766 (Kennedy, J., concurring) (citation

omitted). Justice Kennedy further stated that even though the provision at issue applied in "equal measure to any trademark that demeans or offends," it was not viewpoint neutral: "To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so." *Id.* at 1766 (Kennedy, J., concurring) (citation omitted).

Similarly, Rule 8.4(g) states that it is professional misconduct for a lawyer, "in the practice of law, by **words** or conduct, to knowingly **manifest bias** or **prejudice** ...." Pa.R.P.C. 8.4(g) (emphasis added). While Rule 8.4(g) restricts Pennsylvania attorneys' ability to express bias or prejudice "based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status," it allows Pennsylvania attorneys to express tolerance or respect based on these same statuses. *Id.* Defendants have "singled out a subset of message," those words that manifest bias or prejudice, "for disfavor based on the views expressed." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring) (citation omitted).

As in *Matal*, Defendants seek to remove certain ideas or perspectives from the broader debate by prohibiting *words* that manifest bias or prejudice. The American Civil Liberties Union defines censorship as "the suppression of words, images, or ideas that are 'offensive,' [which] happens whenever some people succeed in imposing their personal political or moral values on others." *What is censorship?*, ACLU, https://www.aclu.org/other/what-censorship (last visited December 7, 2020). This is exactly what Defendants attempt to do with Rule 8.4(g). Although Defendants contend that Rule 8.4(g) "was enacted to address discrimination, equal access to justice, [and] the fairness of the judicial system," the plain language of Rule 8.4(g) does not reflect this intention. Transcript of Oral Argument at 3. Rule 8.4(g) explicitly prohibits words manifesting bias or prejudice, i.e., "offensive" words. In short, Defendants seek to impose their personal moral values on others by censoring all opposing viewpoints.

"A law found to discriminate based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.' " *Id.* at 1766 (Kennedy, J., concurring) (quoting *Rosenberger*, 515 U.S. at 829-830). Therefore, "[t]he Court's finding of viewpoint bias end[s] the matter." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019).[8]

8 Even if the Court were to weigh the competing interests involved, Rule 8.4(g) would not pass either strict scrutiny or intermediate scrutiny. "To survive strict scrutiny analysis, a statute must: (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest." *ACLU v. Mukasey*, 534 F.3d 181, 190 (3d Cir. 2008). The compelling interest provided by Defendants is "ensuring that those who engage in the practice of law do not knowingly discriminate or harass someone so that the legal profession 'functions for all participants,' ensures justice and fairness, and maintains the public's confidence in the judicial system." ECF No. 15 at 22-23. However, as addressed at length in this Memorandum, by also prohibiting "words...[that] manifest bias or prejudice," the Amendments are neither narrowly tailored nor the least restrictive means of advancing that interest. Pa.R.P.C. 8.4(g). In the same way, the Amendments would not survive intermediate scrutiny as they are not "narrowly tailored to serve a significant governmental interest." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2356 (2020) (Sotomayor, J., concurring) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

***15** The irony cannot be missed that attorneys, those who are most educated and encouraged to engage in dialogues about our freedoms, are the very ones here who are forced to limit their words to those that do not "manifest bias or prejudice." Pa.R.P.C. 8.4(g). This Rule represents the government restricting speech outside of the courtroom, outside of the context of a pending case, and even outside the much broader playing field of "administration of justice." Even if Plaintiff makes a good faith attempt to restrict and self-censor, the Rule leaves Plaintiff with no guidance as to what is in bounds, and what is out, other than to advise Plaintiff to scour every nook and cranny of each ordinance, rule, and law in the Nation. Furthermore, the influence and insight of the May 2018 comments on this self-censorship will loom large as guidance as to the intent of the Rule. *See supra* p. 29.

There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance. Yet the government cannot set its standard by legislating diplomatic speech because although it embarks upon

a friendly, favorable tide, this tide sweeps us all along with the admonished, minority viewpoint into the massive currents of suppression and repression. Our limited constitutional Government was designed to protect the individual's right to speak freely, including those individuals expressing words or ideas we abhor.

Therefore, the Court holds that the Amendments, Rule 8.4(g) and Comments 3 and 4, consist of unconstitutional viewpoint discrimination in violation of the First Amendment. Because the Court finds that Plaintiff has standing and that the Amendments constitute unconstitutional viewpoint discrimination, Defendants' Motion to Dismiss is denied.[9]

9 The Court also denies Defendant's Motion to Dismiss as to Count II, alleging unconstitutional vagueness.

As for Plaintiff's Motion for a Preliminary Injunction, for the foregoing reasons, the Court finds Plaintiff has shown that the likelihood of success on the merits of his constitutional claim is "significantly better than negligible." *Reilly*, 858 F.3d at 179.

Second, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Stilp*, 613 F.3d at 409 (citing *Elrod*, 427 U.S. at 373). Plaintiff alleged that he will be chilled in the exercise of his First Amendment rights at CLE presentations and other speaking events if the Amendments go into effect as planned on December 8, 2020. ECF No. 16-1 at 28 (citing ECF No. 1 at ¶ 60). As the Court has found the Amendments constitute unconstitutional viewpoint discrimination and Plaintiff has alleged a chilling effect that is objectively reasonable in light of the plain language in Rule 8.4(g), Plaintiff has shown he is more likely than not to suffer irreparable harm in the absence of preliminary relief. Plaintiff has thus met the threshold for the "first two 'most critical' factors" in determining whether to grant a preliminary injunction. *Reilly*, 858 F.3d at 179.

As the Court has found that the Amendments violate the First Amendment, the last two factors, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest, also favor preliminary relief. On balance, and because Plaintiff has satisfied the first two factors, the factors favor granting the preliminary injunction.[10] Therefore, the Court grants Plaintiff's Motion for Preliminary Injunction.

10 The parties agree that there should be no bond. Transcript of Oral Argument at 50-51; ECF No. 21 at ¶ 50 ("The Defendants bear no risk of financial loss if they are wrongfully enjoined in this case.")

D. CONCLUSION

***16** For the foregoing reasons, the Court denies Defendants' Motion to Dismiss and grants Plaintiff's Motion for Preliminary Injunction.

An appropriate order will follow.

BY THE COURT:

DATE: _December 7, 2020_____

/s/ Chad F. Kenney

CHAD F. KENNEY, JUDGE

All Citations

Slip Copy, 2020 WL 7227251

March 12, 2021

Ben Kempinen, Chair, and Tim Pierce, Counsel
Wisconsin State Bar Committee on Professional Ethics
Via email: kempinen@wisc.edu & tpierce@wisbar.org

Re: Request for Comment on Proposal to Amend Wisconsin Supreme Court Rule 20:8.4(i) to Conform to ABA Model Rule 8.4(g)

Dear Professor Kempinen and Mr. Pierce,

We find ourselves living "[i]n a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others. . ." *Ams. for Prosperity v. Grewal*, No. 3:19-cv-14228-BRM-LHG, 2019 U.S. Dist. LEXIS 170793, at *61 (D.N.J. Oct. 2, 2019).

One aspect of cancel culture is the weaponization of disbarment proceedings against political opponents. Examples abound:

- Thousands of lawyers and law students signed a petition calling for the ethics authorities in Missouri, Texas, and the District of Columbia to disbar U.S. Senators Ted Cruz and Josh Hawley for their decision to contest the certification of certain electoral votes.[1]
- An organization, Lawyers Defending American Democracy, sought state bar investigations of the 18 state attorneys general who filed a petition in the U.S. Supreme Court seeking judicial review of electoral votes.[2]
- 27 members of the District of Columbia bar filed an ethics complaint against then-U.S. Attorney General William P. Barr for his administration of the Department of Justice.[3]
- Gun rights advocates sought the disbarment of then-U.S. Attorney General Eric Holder for his role in the "Fast and Furious" operation and subsequent congressional review.[4]
- A member of Congress joined two activist organizations in filing a judicial ethics complaint against U.S. Court of Appeals Judge Diane Sykes for appearing at a Federalist Society event.[5]
- The federal judiciary's Committee on Codes of Conduct proposed adopting a rule that would have barred membership in the Federalist Society or American Constitution Society, only dropping it after overwhelming push-back from over 200 judges, whose ranks

[1] Available online at https://www.wnpr.org/post/yale-harvard-law-school-petition-disbar-cruz-and-hawley-garners-thousands-signatures.
[2] Available online at https://lawyersdefendingdemocracy.org/press-release-national-lawyers-group-calls-for-bar-discipline-of-texas-ag-paxton-and-fellow-state-ags/.
[3] Available online at https://www.justsecurity.org/71598/why-we-filed-a-complaint-with-the-dc-bar-against-attorney-general-william-barr/.
[4] Available online at https://www.foxnews.com/politics/complaint-seeks-to-have-holder-disbarred-after-contempt-vote.
[5] Available online at https://www.commoncause.org/wp-content/uploads/legacy/issues/ethics/judicial-ethics/National_111313_Complaint_Against_Sykes.pdf.

included appointees of Presidents Ford, Carter, Reagan, Bush 41, Clinton, Bush 43, Obama, and Trump.[6]

- A coalition of progressive organizations filed disbarment complaints against former U.S. Attorneys General John Ashcroft, Alberto Gonzales, Michael Mukasey and nine other senior attorneys from the George W. Bush administration for their role in overseeing or approving the administration's handling of suspects after the 9/11 attacks.[7]

Though none of these bar complaints have succeeded to date, they reflect a worrisome trend within the profession towards the weaponization of the bar discipline process. Simply being subject to a filed complaint leads to negative media coverage and can cost large sums to defend. Even a complaint dismissed as frivolous can follow an attorney around for the rest of a career.

Adoption of Model Rule 8.4(g) will only accelerate these dangerous trends. Lawyers come from and represent clients with a variety of political and social viewpoints on the major issues of the day. And lawyers who represent and advocate unpopular causes are critical to sustaining a free society, in both courts of law and other public fora. "Just as a democratic society needs legislators willing and able to criticize national and state policy, so it needs lawyers who will defend unpopular causes and champion unpopular clients." *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 180-81, (1971) (Black, J., dissenting). "To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it." *In re Anastaplo*, 366 U.S. 82, 115-116 (1961) (Black, J., dissenting).

Model Rule 8.4(g) will push us towards a bar of orthodox, government-fearing individuals who self-suppress their speech for fear of the political correctness police filing a complaint that could cost them clients if not their careers. And it will equip activists with an agenda with a new tool to persecute attorneys who represent unpopular viewpoints in courts of law and the broader public square. For these reasons, the Committee should decline to recommend the rule.

Very truly yours,

Daniel R. Suhr
Senior Attorney
Wis. Bar 1056658
dsuhr@libertyjusticecenter.org

[6] See story available online at https://reason.com/volokh/2020/05/06/over-200-federal-judges-write-in-opposition-to-advisory-opinion-117/.

[7] See story available online at https://www.law.com/almID/1202430803403/.

12 March 2021

Mr. Ben Kempinen, Chair

Mr. Tim Pierce, Ethics Counsel

Standing Committee on Professional Ethics, Wisconsin State Bar

By email (kempinen@wisc.edu; tpierce@wisbar.org)

From: St. Thomas More Society of the Roman Catholic Diocese of Madison, Inc.

Subject: Memo in opposition to adoption of ABA Model Rule 8.4(g) by the State of Wisconsin Bar

1. This memo is to document the opposition by the St. Thomas More Society of the Roman Catholic Diocese of Madison to the adoption of the ABA Model Rule 8.4(g) by the State of Wisconsin Bar. It is the legal opinion of this society that the proposed rule is unconstitutional, violating the 1st, 5th and 14th Amendments, as well as Section 3 of the Wisconsin constitution. Further, the proposed rule violates the universally accepted freedom of thought, conscience and religion as enshrined under the Universal Declaration of Human Rights[1].

2. The proposed ABA Model Rule 8.4(g) reads:

   It is professional misconduct for a lawyer to: . . .

   (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph

[1] "Universal Declaration of Human Rights, Articles 18 and 19." United Nations. Last modified June 1, 2020. https://www.un.org/en/universal-declaration-human-rights/.

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.[2]

3. The plain reading of the text shows it will have a chilling effect, both on advocacy by attorneys and in addition to private, non-law related speech by attorneys. There is no time, place or manner restriction in the rule. Comment 2 and 3 to the ABA rules impliedly agrees with the position that this rule applies to an attorney's conduct and speech outside the practice of law.

4. The proposed rule is clearly unconstitutional. Messages targeted based on communicative content are considered content-based. These types of messages are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *see* Reed v. Town of Gilbert, Arizona, 576 U.S.,155, ___, 135 S.Ct., at 2228 (discussing *Button, supra,* at 438, 83 S.Ct. 328); NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); but cf. id., at 439, 83 S.Ct. 328 ("[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"). The Supreme Court has "been reluctant to mark off new categories of speech for diminished constitutional protection." Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 804, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part). Recent Supreme Court decisions are in accord with the view that the proposed rule is unconstitutional. Matal v. Tam, 582 U.S. ___ (2017)(holding disparagement clauses violates the Free Speech Clause of the First Amendment.) *Accord*, Iancu v. Brunetti, 588 U.S. ___ (2019). Cf. Greenberg v. Haggerty, 2020 WL 2772251 (E.D. Pa. 2020) (on appeal), holding ABA Model Rule 8.4(g) unconstitutional, discriminates

[2] "Amendments to Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct." American Bar Association. Accessed March 11, 2021. https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.pdf. *hereinafter* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR Ass'N 2016)

against viewpoints and covers private as well as professional speech and has a chilling effect on an attorney's speech).

5. The proposed rule appears to violate notice requirements by being vague. To survive a vagueness challenge the rule must explain the prohibited conduct "in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." US Civil Serv. Comm 'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 579 (1973). The proposed rule leaves open the possibility that an attorney could be disciplined for posing hypotheticals during CLE presentations, panel discussions and class room presentations Greenberg v. Haggerty, 2020 WL 2772251. An attorney's social media posts, press conferences or political activities could similarly be subject to discipline. For instance, there is nothing in the rule to prevent an attorney from being punished for expressing a candid opinion on the relative threats presented by police shootings of blacks as opposed to black-on-black crime. Similarly, discussions of illegal immigration, same-sex marriage, or transgender accommodations could easily run afoul Rule 8.4.

6. The inconsistency in the rule is further highlighted by the comments to the rule. For example, the rule prohibits discrimination, but in comment 4 to the rule, an attorney may engage in apparent discrimination if it is "…undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees."[3] The rule's vagueness, combined with the sanction of being charged with professional misconduct will inevitably result in attorneys self-censoring themselves in both their professional and personal capacities rather than risk public accusations of misconduct.

[3] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR Ass'N 2016)

7. Model Rule 8.4(g) applies to an attorney's participation in "business or social activities in connection with the practice of law."[4] Because of this, it could be applied to restrict an attorney's freedom to associate with a number of political, social, or religious legal organizations. Many attorneys belong to faith-based legal organizations, such as Christian, Jewish or Muslim legal societies. The Model Rule could curtail such participation for fear of discipline.

8. The Wisconsin Rules on "Maintaining the Integrity of the Profession" sufficiently address attorney misconduct to prohibit unlawful discrimination. Specifically, SCR 20:8.4(i) states an attorney shall not: **"harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par.(i)."** [5] These rules have been enforced in the state *Cf.* Disciplinary Proceedings Against Kratz, 2014 WI 31; Disciplinary Proceedings Against Isaacson, 2015 WI 33; Disciplinary Proceedings Against Beatse, 2006 WI 115.

[4] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR Ass'N 2016)

[5] Supreme Court of Wisconsin. "SCR 20:8.4 Bar admission and disciplinary matters: Misconduct." Wisconsin Court System. Accessed March 11, 2021. https://www.wicourts.gov/courts/offices/docs/olrscr20annotated.pdf.

March 12, 2021

Mr. Ben Kempinen, Chair
Mr. Tim Pierce, Ethics Counsel
Standing Committee on Professional Ethics
Wisconsin State Bar

Attn: Joseph DelCiampo, Esq.

By email submission (kempinen@wisc.edu; tpierce@wisbar.org)

Re: Comment Letter Opposing Proposed Adoption of
ABA Model Rule 8.4(g) to Replace Current SCR 20:8.4(i)

Dear Chair Kempinen and Mr. Pierce:

We respectfully file this letter pursuant to the request for comment by the Wisconsin Bar's Standing Committee on Professional Ethics ("committee"). The National Legal Foundation (NLF) opposes adoption of the proposed rule and its proposed comments, because the proposed rule follows exactly the deeply flawed and much criticized ABA Model Rule 8.4(g) ("model rule").

NLF is a public interest law firm dedicated to the defense of First Amendment liberties. We write on behalf of ourselves and donors and supporters, including those in Wisconsin. The NLF has had a significant federal and state court practice since 1985, including representing numerous parties and *amici* before the Supreme Court of the United States and the supreme courts of several states.

Deficiencies of ABA Model Rule 8.4(g), Which the Wisconsin Proposal Follows *Verbatim*

We agree with much of what the Christian Legal Society (CLS) expresses in its comments, dated February 26, 2021. Those comments note the substantial body of scholarly and professional criticism focusing on the model rule's constitutional deficiencies. CLS also ably summarizes the negative track record of the model rule to date, its potential for censoring speech and debate that undergird a free society, and its difficulty gaining traction because of its constitutional infirmities. As the proposed rule is identical to the model rule, those infirmities are exactly replicated in the proposed rule. In our comments below, we refer only to the "model rule," as it is the version being proposed by the committee.

In considering the merits of the model rule, the turbulence the model rule has encountered on its journey thus far is telling. The model rule is deeply flawed and troublesome on multiple fronts.

a. The model rule has been widely criticized by scholars and practitioners.

From the outset, the constitutional deficiencies of the model rule were widely discussed and documented in a body of scholarly and professional criticism. For a partial list, see Professor Josh Blackman's article, "Reply: A Pause for State Courts Considering Model Rule 8.4(g)," in the *Georgetown Journal of Legal Ethics*, vol. 30 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888204; the late Professor Ronald Rotunda's articles, "The ABA Overrules the First Amendment: The Legal Trade Ass'n Adopts a Rule to Regulate Lawyers' Speech," https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418, and *The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought,* http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf (Oct. 6, 2016); and Professor Eugene Volokh's article, "A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities," 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/?utm_term=.601be9a57646.

Regarding the model rule, Professor Rotunda and Professor John S. Dzienkowski wrote in the 2017-2018 edition of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, "The ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment." ("§ 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.") In the interim, nothing has changed to render the model rule less constitutionally infirm. This is catalogued by Professor Michael McGinniss in *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019), https://poseidon01.ssrn.com/delivery.php?ID=543090115005102089076119108088093031000088051011052055098092024112029117031087097022038102053054023043125069124122073019126095105039082035013126029089028074014108116038055022078090011125116095069115001092015020065116092065122004120028097068025008064022&EXT=pdf.

and the Alaska Attorney General in his letter analyzing the model rule for the Board of Governors of the Alaska Bar Association, http://www.law.state.ak.us/pdf/press/190809-Letter.pdf.

Andrew Halaby and Brianna Long, who are Arizona practitioners, thoroughly examined the model rule and concluded that it "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." *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). 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." And 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." *Id.* at 204.

b. The model rule fails to account for recent decisions by the U.S. Supreme Court.

Since the ABA's adoption of the model rule, the United States Supreme Court has issued two major free speech decisions that further demonstrate the model rule's unconstitutionality. Under the Court's analysis in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), the model rule is an unconstitutional, *content*-based restriction on lawyers' speech. The *NIFLA* Court held that state restrictions on "professional speech" are presumptively unconstitutional and subject to strict scrutiny. Under the Court's analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), the model rule is an unconstitutional, *viewpoint*-based restriction on lawyers' speech that cannot survive strict scrutiny. To the extent that the model rule allows exceptions to the race discrimination prohibition by allowing quotas, affirmative action, equity, and the like, but does not for SOGI discrimination based on sincerely held religious grounds, it also violates constitutional norms.

c. The model rule has not been adopted by most of the states that have considered it.

As noted in CLS's comment letter (at 26-31), official bodies in states that have considered the model rule have overwhelmingly declined to adopt it.

d. The ABA's recent efforts to assuage concern about the model rule are not persuasive.

The ABA's recent Formal Opinion 493, "Model Rule 8.4(g): Purpose, Scope, and Application," https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf, endeavors to allay concern about whether the model rule is fair and passes constitutional muster. It fails on both counts. As Professor Blackman notes, "The [Committee] . . . cites recent articles which rejected any possible First Amendment problems with Rule 8.4(g). But the Committee did not cite any contrary authority, including the opinions of several attorneys general. . . . The Committee also does not discuss recent precedents, such as *NIFLA* . . ., which cast serious doubt on ABA Model Rule 8.4(g). That case held that the government lacks an 'unfettered power' to regulate the speech of 'lawyers,' simply because they provide 'personalized services' after receiving a 'professional license.' The failure to grapple with *NIFLA* undermines the entire constitutional law analysis [of the formal opinion]." https://reason.com/2020/07/15/aba-issues-formal-opinion-on-purpose-scope-and-application-of-aba-model-rule-8-4g/.

Concern with Chilling of First Amendment Exercise

The model rule will have a chilling effect, in that a lawyer who exercises her constitutionally protected rights to express a socially unpopular viewpoint will be more susceptible to unfounded charges (and associated time and effort to defend herself) of violating the rule, simply because others are offended by the message conveyed. As we discuss later, in today's social climate it is not difficult to imagine that those who are easily offended would use the rule to attack and chill Wisconsin lawyers' constitutionally protected speech and conduct. The mere threat of an ethics investigation would have a chilling effect, regardless of whether exoneration followed.

Concern with Respect to the Official Commentary to the Model Rule

The official commentary that accompanies the model rule is replete with problems of overbreadth and ambiguity that do not assuage concerns that the model rule will be used to harass Wisconsin lawyers who exercise their constitutionally protected speech and conduct. In

Section II of its comment letter ("ABA Model Rule 8.4(g) Would Greatly Expand the Reach of the Professional Rules of Conduct into Wisconsin Attorneys' Lives and Chill Their Speech"), at 9-18, CLS ably details the concerns raised by the model rule's comments.

Concern with the Addition of "Gender Identity" as a Protected Category

"Gender identity," which is not a protected category under Wisconsin's anti-discrimination statutes dealing with housing, employment, or public accommodation, should not be included in the rule as a nondiscrimination category for several reasons.

- The movement for official acknowledgement that taking transgender actions is "normal," and that such inclinations should even be encouraged, contrasts with social science studies documenting the dramatic, long-term, deleterious effects on those who have elected to have transgender medical procedures performed. *See, e.g.*, "Transgender Surgery Isn't the Solution," by Dr. Paul McHugh, former Chief of Psychiatry at Johns Hopkins Hospital, in 6/12/14 *Wall St. J.,* available at http://www.wsj.com/articles/paul-mchugh-transgender-surgery-isnt-the-solution-1402615120.
- The term "gender identity" is unconstitutionally vague. This term has no fixed meaning and, by definition, is the product of an individual, subjective determination that may conflict with how the individual objectively appears to others. Moreover, because of its subjectivity, the term is malleable and can even be used by an individual in a temporally inconsistent manner. *See, e.g.*, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 Tex. J. on C.L. & C.R. 101, 103-04 (2006) ("The term [transgender] includes androgynous and gender queer people, drag queens and drag kings, transsexual people, and those who identify as bi-gendered, third gender or two spirit. 'Gender identity' refers to one's inner sense of being female, male, or some other gender. . . . Indeed, when used to categorically describe a group of people, even all of the terms mentioned above may be insufficient . . . , individuals may identify as any combination of gender identity referents simultaneously or identify differently in different contexts or communities."); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 381 & n.20 (3d Cir. 2008) (noting fluidity of the term *gender*). Such ambiguity in the term raises serious vagueness concerns. The ABA Ethics Committee, which drafted the proposed rule, demonstrated the ambiguity of the term when it stated in its December 22, 2015, memorandum (at 5) that the term *gender identity* recognizes that "a new social awareness of the individuality of gender has changed the traditional binary concept of sexuality." Any "identity" subject to changeable, subjective "individuality" untethered to time or objective biology is, by definition, vague and subject to abuse.

The model rule, whether by intent or not, particularly targets Christian attorneys. Christians believe that all people are created equal by God, and they also believe that God has set moral absolutes for behavior for us, including that life is sacred from conception to natural death, that sexual intercourse is only ethical when between a man and woman married to each other, and that violating God's moral norms does not bring true liberty either to an individual or to a culture. Social science amply supports the wisdom of these religious principles.

Christians do not believe those with transgender inclinations are any less persons for having such inclinations, but that is not the same as approving or supporting or advocating for *actions* taken in furtherance of that inclination or to advance its spread. Christians recognize that they

themselves and all other persons take immoral actions. Christians are enjoined by their Scriptures to love and serve all persons, even though they do not approve of the immoral actions persons perform.

But the text of the model rule is susceptible of being used to attack those who sincerely hold religiously based views on, and object to, what they understand to be sexual libertinism. This is no idle threat, as the desire of some in the LGBTQ movement is quite evident to punish and drum out of the public conversation any who disagree with them and who express their religious beliefs that homosexual and transgender conduct is immoral and deleterious to our civil society, as well as to the individuals involved. Wisconsin should not contribute to providing a platform for such actions by adopting the model rule and its accompanying comments.

The Threat to Wisconsin Lawyers' Constitutional Rights

Our concern about these proposed changes is not far-fetched. The desire of some to punish and drum out of the public conversation any who disagree with them is well documented. Consider a case in the United States District Court for the Middle District of Alabama, *Parker v. Judicial Inquiry Comm'n of the State of Ala.*, No. 2:16-CV-442-WKW, 2017 WL 3820958 (M.D. Ala., Aug. 31, 2017), and 295 F. Supp. 3d 1292 (M.D. Ala. 2018). In that case, a sitting state Supreme Court justice running for reelection "expressed his personal views on a number of highly contentious legal and political issues that his constituents, and the country at large, are currently debating." 2017 WL 3820958 at *3. The Southern Poverty Law Center (SPLC) was offended by the justice's criticism of the majority opinion of the United States Supreme Court decision in *Obergefell v. Hodges,* 576 U.S. 644 (2015)—an opinion also strongly criticized by the four dissenting justices—and filed an ethics complaint against the justice for his "'assault [on] the authority and integrity of the federal judiciary,'" 2017 WL 3820958 at *3, which prompted an ethics investigation and ensuing litigation. The federal district court judge hearing the case "recognized the First Amendment issues implicated by SPLC's attempt to use a state agency to suppress speech . . . ." *Id.* (internal quotation and citation omitted).

In Alaska, the Anchorage Equal Rights Commission (AERC) filed a complaint against an Anchorage law firm that professionally defended a religiously affiliated, private, non-profit shelter for homeless women, many of whom had been abused by men. The complaint originated when the AERC had learned 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 of, among other things, its policy against admitting persons who were inebriated, but also acknowledged its policy to refuse admission of biological men in its all-women facility. When the law firm responded to an unsolicited request for a media interview that was then published, 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. *See Basler v. Downtown Hope Ctr.*, No. 18-167 (AERC May 15, 2018).

The model rule will encourage attacks on Wisconsin lawyers' First Amendment rights similar to the attacks on Alabama Associate Justice Parker and the Alaska law firm. The ABA expressly stated that the model rule was to put lawyers on one side of a cultural movement that is widely debated. The ABA's position gives the appearance of seeking to punish lawyers who take a

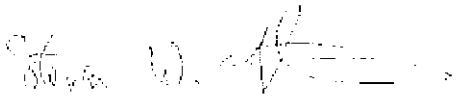
principled position that differs from the ABA's. Wisconsin should resist efforts to convince it to follow suit. Even if this cultural movement is justified, the model rule would undermine basic fairness and constitutionally protected, sincerely held religious beliefs and ethical standards.

Conclusion

In a February 4, 2021, draft memo from the Standing Committee to the Board of Governors, the committee states that it "believes Model Rule 8.4(g) is likely to survive constitutional challenges." This belief is overly optimistic, given that (a) the first district court to have considered it has struck it down, (b) multiple scholarly critiques in the years since the model rule was released have identified numerous First Amendment infirmities in the model rule, (c) the United States Supreme Court has decided cases (e.g., *Tam & NIFLA*) that bear negatively on the constitutionality of the model rule, (d) several state attorneys general have concluded that the model rule is unconstitutional, and (e) most states that have considered proposals to adopt the model rule or its variants have declined to adopt it.

For the reasons detailed above, we encourage the committee not to propose the model rule and its comments. Thank you for the opportunity to provide these comments and for your consideration of them.

Sincerely,



Steven W. Fitschen, President
The National Legal Foundation

Wills
Trusts
Real Estate

Connelly Legal Services
201 S. Main Street, Westby, WI 54667

ATTORNEY KEVIN M. CONNELLY
Carol L. Duhr, Office Coordinator

April 28, 2021

Board of Governors
State Bar of Wisconsin

Re: Racial bias training CLE proposal

Dear Board of Governors:

I saw a recent Wisconsin Bar website announcement that at your April 16 meeting, and a prior meeting, you discussed a proposal for a mandatory requirement of two of 30 CLE credits per reporting period "on topics of racial bias and other issues that promote education on diversity, equity, and inclusion." During your discussion, the word "training" was referred to seven times including "mandatory bias training" and "diversity and bias training." I understand a vote will be in June.

I believe it would be inappropriate to mandate that I pay for and attend a CLE that is likely to include "training" based upon scientifically dubious claims about racial bias. In addition, I anticipate such "training" is likely derived from "anti-racism" dogma which originates in the illiberal Critical Race Theory political ideology. I send this letter with four simple questions.

Request for information

1. Who are the likely vendors for this racial bias training?

2. Will implicit/unconscious bias training be involved?

The famous Implicit Association Test used by diversity trainers everywhere for at least a couple decades has been debunked as pseudoscience. The test[1] was developed in 1998 and, with the passage of time, psychometric data has been collected showing it fails on both bedrock standards as a useful psychological instrument: reliability and validity.

(1) Reliability: does it replicate with statistical accuracy? No. (2) Validity: does it measure what it claims to measure, that a positive score predicts discriminatory behavior? No.

[1] The test measures response times after seeing certain images and words mixed with faces of a white person or black person on a computer screen and hitting a button for "good" or "bad." If you were quicker to associate good words with white faces than good words with black faces or slower to associate bad words with white faces than bad words with black faces then you have unconscious bias according to the test.

> Unfortunately, none of that is true. A pile of scholarly work, some of it published in top psychology journals and most of it ignored by the media suggest that the IAT falls far short of the quality-control standards normally expected of psychological instruments...The IAT, this research suggests, is a noisy unreliable measure that correlates far too weakly with any real-world outcomes to be used to predict individuals' behavior—even the test creators have now admitted as such. "Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job" January 2017 *New York Magazine – The Cut.*

University of Wisconsin researcher Patrick Forscher explained that "The problem is that implicit measures, and the IAT in particular, became a critical part of a political narrative about why disparities between social groups exist in the Unites States... Thus, claims about implicit measures became, to a certain extent, political claims , not just scientific claims." *Id.*

3. Will anti-racism training be involved?

The bar's website reported on June 11, 2020 that at the last fiscal meeting of last year someone suggested anti-racism training. "Anti-racism" dogma was popularized by the famous woke activist Ibram X. Kendi, director of the Center for Antiracist Research at Boston University and the author of *How to Be an Antiracist,* and Robin DeAngelo author of *White Fragility.*

This creed comes straight out of the Critical Race Theory playbook. It goes something like this: all whites are racist and privileged, all systems are racist, and unless you confess your internal racism and engage in anti-racist action to dismantle the system, then you are a racist. In other words, shaming white people to act. This is the product of the cultural relativism worldview created by Critical Race Theory where marginalized groups see power imbalances and prejudice everywhere, in all social relations, all the time--though largely invisible.

Through this cynical lens even the loving act of adopting children can be reframed. Recall when Justice Amy Coney Barrett was being nominated for the United States Supreme last year. She and her husband are white and they had adopted black children from Haiti. Ibram X. Kendi said the following on twitter:

> Some White colonizers 'adopted' Black children. They "civilized" these "savage" children in the "superior" ways of White people, while using them as props in their lifelong pictures of denial, while cutting the biological parents of these children out of the picture of humanity.

This shaming strategy (and circular logic) stokes the Us v. Them mentality where everyone is the enemy unless they join your movement. History is full of mass movements where a broad enemy has to be invented or stereotyped to divide people, often leading to violence, as

examined in the well-known book *The True Believer - Thoughts on the Nature of Mass Movements*, 1951 by Eric Hoffer.

This demeaning stereotyping of whites is integral to racial bias training. For example, Glenn Singleton, founder of Courageous Conversation racial-sensitivity training, scoffs at "White" values such as "written communication over other forms" and "scientific, linear thinking. Cause and effect."[2] The company's website offers a two-day institute on "Leading While White" which involves "identifying and interrupting Whiteness when it prevents working in authentic partnership with White people and people of color."

4. Will microaggression/bias incident training be involved?

This is another manifestation of the policing of language according to critical race theory. (Ibram X. Kendi's above-mentioned twitter remark would seem to be a microaggression but this enforcement apparatus does not protect whites since all whites are deemed oppressors.) Bias response teams are common at universities where a minority member can report a student or faculty member for an innocent remark that is perceived as offensive. Is this the type of censure of free speech the bar will endorse at racial equity CLE's?

> Goebbels was in favor of free speech for views he liked. So was Stalin. If you're really in favor of free speech, then you're in favor of freedom of speech for precisely the views you despise. Otherwise, you're not in favor of free speech.
> Noam Chomsky

Such "training" violates individual rights

A wave of opposition to this ideology and training is emerging such as the formation of the nonpartisan organization Foundation Against Intolerance & Racism which states on its website:

> Increasingly, American institutions — colleges and universities, businesses, government, the media and even our children's schools — are enforcing a cynical and intolerant orthodoxy. This orthodoxy requires us to view each other based on immutable characteristics like skin color, gender and sexual orientation. It pits us against one another, and diminishes what it means to be human.

Also see "The New Ideology of Race and What's Wrong With It" *The Economist* magazine July 11, 2020; *Cynical Theories-How Activist Scholarship Made Everything About Race, Gender and Identity* (351 pages), 2020, by Helen Pluckrose and James Lindsay; "Is the Anti-Racism Training Industry Just Peddling White Supremacy?" July 16, 2020 *New York Magazine – The Intelligencer.*

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[2] "Is the Anti-Racism Training Industry Just Peddling White Supremacy?" July 16, 2020 *New York Magazine – The Intelligencer.*

Many highly respected black public intellectuals are voicing their objections. For example, John McWhorter in an NPR interview in July 2020 referred to the ideas in *White Fragility* as an "Orwellian indoctrination program;" Coleman Hughes, a black public intellectual and writer, thoroughly reviewed Kendi's "poorly argued, sloppily researched" in "How to be an Anti-Intellectual" Oct 27, 2019, *City Journal;* a the trenchant and insightful article "Unspeakable Truths about Racial Inequality" Feb. 10, 2021, Quillette, by Glenn Loury a black faculty fellow at the Watson Institute at Brown University and a senior fellow at the Manhattan Institute; *Discrimination and Disparities* (308 pages) 2019 by Thomas Sowell black economist and social theorist.

Attorney Alan Dershowitz describes this close-minded orthodoxy as the "new McCarthyism" and he pledged to defend any lawyer victimized by it:

> If any lawyer is the subject of this kind of McCarthyism, I will represent you pro bono…I will represent you in front of universities, in front of bar associations. I'm going to dedicate myself to making sure that the new McCarthyism of the hard left doesn't become American culture. Feb. 14, 2021 TV show *Sunday Morning Futures.*

Conclusion: The tools of our trade as lawyers include words and persuasion using facts, evidence and reason. Among the world of enlightenment values and beliefs buffeted around by today's countervailing cultural forces is the core liberal value we are often called upon to zealously defend: the dignity of the individual.

We should never, in any way, be aligning ourselves with a political ideology that defines everyone by the color of their skin, where every action is racist or anti-racist, and that pursues identity-politics through division, intimidation, and the silencing of its dissenters.

Science is real.

Respectfully,

Kevin M. Connelly

STATE BAR OF WISCONSIN

To: Standing Committee on Professional Ethics

From: Legal Assistance Committee

Date: April 2, 2021

Subject: Comments on Proposed Adoption of ABA Model Rule 8.4(g) and Memorandum to Board of Governors

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At the request of the Committee on Professional Ethics, the Legal Assistance Committee has reviewed the Ethics Committee memorandum and proposal to replace Wisconsin's SCR 20:8:4(i) with the language from ABA Model Rule 8.4(g). We support that proposal and also offer the following comments on the proposed rule change and the memorandum.

Proposed Adoption of ABA Model Rule 8.4(g)

We fully support the proposed adoption of ABA Model Rule 8.4(g). It makes many necessary updates to the current language of SCR 20:8:4(i), while improving the inclusiveness of protected categories. Taking note of the climate the past few years, it is especially important that the attorneys in the State of Wisconsin are actively conscious of the impact their words and actions may have on their fellow attorneys, court officials, and, most importantly, clients.

Notes on the memorandum to the Board of Governors

While reviewing the proposed memorandum, we noticed an inconsistency that may create confusion regarding the scope of the changes to SCR 20:8:4(i). The ABA Model Rule clearly includes both the phrases "sexual orientation" and "gender identity." We agree with the Committee on Professional Ethics that updating the language from "sexual preference" to "sexual orientation" is more inclusive and appropriate, as stated on page 5 of the memorandum.

On page 6, however, the memorandum discusses the addition of "gender identity" to SCR 20:8:4(i). The memorandum states, "[i]t appears this term was intended to embrace both 'gender identity' and 'sexual orientation,'" when referring to the use of "gender identity" in the new proposed rule. The memorandum further states that "gender identity" would be responsive to the objections to use of "sexual preference" and expand coverage as well. We disagree with this analysis. The phrases "gender identity" and "sexual orientation" refer to different protected classes. Individuals have both a gender identity and a sexual orientation, and the phrases are not interchangeable or inclusive of each other. Further, the ABA model rule includes both phrases. We encourage the Committee on Professional Ethics to clarify this distinction between the protected classes in its memorandum and to ensure that both phrases are included in any proposed language.

Concerns regarding the implementation of the new ethics rule

We applaud the efforts of the Committee on Professional Ethics and the State Bar to respond to issues of discrimination, diversity, and inclusion. We are concerned that merely changing the language of the rule is not sufficient to make a true impact on the members of the Bar. The reality is that most attorneys are not aware of a substantial rule change unless it significantly impacts the procedures of their day to day practice, or if it is the topic of a continuing education class. Without substantial effort to ensure that the members of the Bar are aware of the new language and understand its implications, the change is likely to have minimal impact.

We encourage the Committee on Professional Ethics to include in any proposal to the Board of Governors suggestions as to how to educate the members of the State Bar as to the

importance and substantial impact of SCR 20:8:4(i). Of particular concern was the note that this rule has rarely been the basis of lawyer discipline. While we would hope that is because of the infrequency of conduct contrary to this rule, it is more likely the result of a lack of awareness and understanding.

As such, any implemented changes to the language of SCR 20:8:4(i) should be coupled with concentrated efforts to actively educate current and future State Bar members. We suggest providing a free ethics CLE on a quarterly basis specifically on the issue of harassment of protected classes. We understand there has been discussion of requiring a mandatory professionalism credit, and believe a CLE on this topic would be ideal. Further, we recommend that both University of Wisconsin Law School and Marquette University Law School incorporate discussion of this rule in their professional responsibility courses. Finally, we suggest that Wisconsin Lawyer magazine feature a comprehensive summary of the changes to the rule, and an analysis of the implications of rule violations. This rule change should be an opportunity to educate the members of the Wisconsin legal community.

We thank you again for the opportunity to share our thoughts with you.

EMAIL COMMENTS TO PROPOSAL TO ADOPT ABA MODEL RULE 8.4(g) March 18, 2021
[compiled by State Bar Standing Committee on Professional Responsibility]

3/18/21

The Indian Law Section board met today and discussed the proposed modifications to the ethics rule. We are in support of the modifications. I apologize for our delay in not submitting comments by your requested March 12th deadline. I am reaching out to see if we should still move forward with formally submitting our written support. Martina Gast

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3/15/21

The Public Interest Law Board voted to support the Ethics Committee's proposed change to Supreme Court Rule: 20:8.4(i). Below is their rationale of support. Do you need this in a memo format or will this do? Cale Battles

Rationale: For the reasons laid out in the Standing Committee on Professional Ethics' 2/4/21 memo, the Public Interest Law Section supports the proposal to modify SCR 20:8.4(i). PILS supports the recommendation that legal rules of professional conduct prohibit discriminatory conduct connected with the lawyer's professional activities. Additionally, PILS agrees that it is important to include ethnicity, gender identity, and socio-economic status in the protected categories.

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3/15/21

Please find attached a letter regarding Rule 8.4(g). I'm sorry I'm a few days after the target for participating - I was only advised of the issue recently, and hope perhaps you're still collating Friday's responses on Monday morning. Daniel Suhr (memo included in Zip folder)

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3/13/21

I oppose adoption of ABA Model Rule 8.4(g) because it threatens Wisconsin lawyers' First Amendment rights. Existing Supreme Court Rule 20:8.4(i) already adequately addresses harassment "on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities." I respectfully request that the Committee reject ABA Model Rule 8.4(g). Regards, Jonathan Smies

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3/12/21

Good afternoon. Through this email, I wish to voice my *personal* opposition to the adoption of ABA Model Rule 8.4(g), because it threatens Wisconsin lawyers' First Amendment rights. To that end, existing Supreme Court Rule 20:8.4(i) already adequately addresses harassment "on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status in connection with the lawyer's professional activities." For this reason, I *personally*, respectfully request that the Committee reject ABA Model Rule 8.4(g). Thank you in advance for your time and consideration of my personally-held view. Bryan T. Symes

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3/12/21

Dear sirs, please accept for consideration the attached memo with the position of the St. Thomas More Society of the Roman Catholic Diocese of Madison regarding the proposed adoption of ABA Model Rule 8.4(g) in Wisconsin.
David R. J. Stiennon, Vice President and Acting President,
St. Thomas More Society of the Roman Catholic Diocese of Madison, Inc. (memo included in Zip folder)

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3/12/21

Attached please find the comments of the National Legal Foundation opposing the adoption of ABA Model Rule 8.4(g) to replace Current SCR 20:8.4(i). Sincerely, Steven W. Fitschen, President, National Legal Foundation (memo included in Zip folder)

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3/12/21

Gentlemen:
This is in response to the Memorandum dated February 4, 2021, in which the Standing Committee on Professional Ethics advocates for replacing the current Wisconsin SCR 20.8.4(i) with ABA Model Rule 8.4(g) and gives its reasons for doing so. Attached is "Joint Comment in Opposition to Amend Wisconsin Supreme Court Rule 20:8.4(i) to Conform to ABA Model Rule 8.4(g)." The Joint Comment is submitted on behalf of twelve lawyers licensed to practice in Wisconsin. The Standing Committee on Professional Ethics is requested to carefully consider the Joint Comment. Thank you. Respectfully, Donald Cayen
(memo included in Zip folder)

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3/12/21

Attached please find Christian Legal Society's comment memorandum regarding proposed adoption of ABA Model Rule 8.4(g) as a modification to Wisconsin Supreme Court Rule 20:8.4(i). We are submitting this memorandum in response to the Standing Committee on Professional Ethics' request for comments. If I can be of help to the Committee in its consideration of ABA Model Rule 8.4(g), please let me know. Thank you for taking comments.
Best, Kim Colby, Director, Center for Law and Religious Freedom, Christian Legal Society
(memo included in Zip folder)

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3/11/21

I urge you not to recommend adoption of ABA Model Rule 4.8(g), as I believe it is an unconstitutional restriction on my First Amendment right to freedom of speech. Moreover, it will not only adversely impact my ability to represent my clients adequately, but will also inhibit me from serving on boards of various religious institutions, as I do now and have done in the past. In fact, I think the Model Rule could cause and attorney to violate other ethical rules already on the books. In Wisconsin we pride ourselves on the University's "sifting and winnowing" of ideas. If we can't express ideas, they can't be sifted and winnowed, just merely banned without discussion. Do not recommend adoption of this Model Rule. Respectfully, Stuart C. Herro

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3/10/21

When I began practice in 1975, a major topic of discussion was the lack of civility then being displayed by members of the bar. It was a topic of interest for awhile but seemed to have died down. It appears to me that ABA Model Rule 8.4(g) is a well-intentioned effort to try to bring civility back into legal practice, however, it goes too far. I don't pretend to have done extensive research, but it appears to me that it would have a severe chilling effect on my freedom of speech, regulating me not just in the court room or during my professional representation of clients, but also into my social life and beyond. Attorneys need freedom of speech to defend those who others believe are indefensible. We need freedom of speech in our daily lives, not fearing loss of our livelihood by taking part in an intense debate. There are many safeguards already in place to protect people from the misuse of language. ABA Model Rule 8.4(g) is poorly drafted and overreaching in its effect. I would like to register my complete opposition to its proposed adoption in Wisconsin. Susanna D. Herro

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3/10/21

Please see the attached letter offering comments on the proposed modification to Wisconsin Supreme Court Rule 20:8.4(j). Let me know if you have any questions, Sincerely, Daniel M. Ortner | Attorney, Pacific Legal Foundation (memo included in Zip folder)

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3/5/21

I oppose adoption of ABA Model Rule 8.4(g) because it threatens Wisconsin lawyers' First Amendment rights. Existing Supreme Court Rule 20:8.4(i) already adequately addresses harassment 'on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities.' I respectfully request the Committee reject ABA Model Rule 8.4(g). I agree with the detailed reasoning in the Christian Legal Society Comment Memorandum dated February 26, 2021 previously provided to you. Steve Hartung
(memo included in Zip folder)

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3/4/21

I write (as a Minnesota resident & Wisconsin Bar member) to oppose adoption of ABA Model Rule 8.4(g) for 2 reasons. First, adoption of the rule threatens Wisconsin lawyers' First Amendment rights. For instance, adoption of the rule could chill a Wisconsin lawyer's willingness to speak in favor of pending legislation prohibiting the participation of transgender athletes in girls & women's sports. Second, adoption of the rule is unnecessary & redundant in light of existing Supreme Court Rule 20:8.4 (i) which already adequately addresses harassment "on the basis of sex, race, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities." I respectfully request that the Committee reject ABA Model Rule 8.4(g). Sincerely, Jim Ballentine

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3/3/21

I just wanted to write a quick note about the above model rule. From what I have heard and in reading the model rule, it seems Wisconsin already does a good job with attorney respectfulness and appropriateness among the public, with clients, etc. Conversely it seems open ended as modeled. So I would hope we can oppose using the ABA's rule and if we must, adopt some guidelines that are more Wisconsin friendly. I really would be concerned about radical uses of this rule to chill attorneys from representing free speech interests, separation issues, protecting freedoms of the press and rights of prisoners and indigents, voting rights. There are all sorts of issues de jure that could affect an already decent and generally compliant community of Wisconsin attorneys in negative ways based on which way the wind blows. Thank you for your time and help in working on these important issues! *Very Respectfully,* RYAN R. SEIB

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3/2/21

My name is Ryan Williams I am a former student of yours and current member of the Wisconsin Bar. I'm writing to say I oppose adoption of ABA Model Rule 8.4(g) because it threatens Wisconsin lawyers' First Amendment rights. Existing Supreme Court Rule 20:8.4(i) already adequately addresses harassment 'on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. I respectfully request the Committee reject ABA Model Rule 8.4(g). Sincerely, Ryan Williams

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2/15/21

I am in favor of anti-discrimination rules, although I recently saw a comment from an attorney who expressed a concern that if an attorney receives a complaint of employment discrimination that attorney will also face disciplinary procedures based on mere allegations. I am involved with the re-drafting of the State Bar By-laws. The drafting team has stricken the words "him or her" and "he or she", in favor of ungrammatical usage of they or them. I recall the former changes came in the 80s with the politically correct movement. I asked the governance committee why we need this change as I view the current language as sex neutral . It was then explained to me that there are some who do not "identify" as either. It appears to me that we have moved from politically correct to the new cancel culture. I have enough to worry about trying to do the best I can for my clients without worrying about what might possibly offend some overly sensitive twit. I identify as a rock star. That doesn't make me Elvis. I am worried that we are sliding into an age of ultra left puritans who are out of step with the culture of the State. I personally don't want to be disciplined for not being able to suppress a natural reaction if some guy walks into my office waring a moo moo. This identity thing might be a bridge too far for me. I am sure I will soon be sent away for re-grooving. Lawrence J. Wiesneske

STANDING COMMITTEE ON PROFESSIONAL ETHICS
WISCONSIN STATE BAR

Request for Comment on Proposal to Amend Wisconsin Supreme Court Rule 20:8.4(i) to Conform to ABA Model Rule 8.4(g)	))))	**Joint Comment in Opposition to Amend Wisconsin Supreme Court Rule 20:8.4(i) to Conform to ABA Model Rule 8.4(g)**

The Wisconsin-licensed attorneys listed below respectfully submit this Comment in opposition to the proposal to amend Wisconsin Supreme Court Rule 20:8.4(i) so as to conform to ABA Model Rule 8.4(g).

I. The Proposed Amendment

It is being proposed that Wisconsin Supreme Court Rule 20:8.4(i) be amended so as to conform to ABA Model Rule 8.4(g). Under that proposal, Supreme Court Rule 20:8.4(i) would be amended so as to read as follows:

> *It is professional misconduct for a lawyer to:*
>
> *(i) 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.*

The proposed amendment would also add three new Comments to the Rule, as follows:

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

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers, and others while engaged in the practice of law; operating or managing a law firm or 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.

[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 32:1.5(A). Lawyers also should be mindful of their professional obligations under rule 32:6.1 to provide legal services to those who are unable to pay, and their obligation under rule 32:6.2 not to avoid appointments from a tribunal except for good cause. See Rule 32:6.2(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.

The proposed amendment adopts ABA Model Rule 8.4(g) in its entirety and will hereafter sometimes be referred to as "the proposed Rule." Chapter 20 of the Supreme Court's Rules will sometimes hereafter be referred to as the "Rules of Professional Conduct" or "Rules."

II. Comments

A. The Proposed Rule Is Unconstitutional

ABA Model Rule 8.4(g) has been extensively criticized on constitutional grounds. Indeed, allegations that the Model Rule is unconstitutional have dogged the Rule since before it was adopted. And the only court to have considered the issue has found that a professional rule based on the Model Rule is, in fact, unconstitutional as a violation of the First Amendment of the U.S. Constitution. *Greenberg v. Haggerty,* ___ F.Supp.3d____ (E.D.Pa. 2020) (2020 WL 7227251).

And yet, the Standing Committee on Professional Ethics has dismissed – without even discussing – the constitutional objections to the Rule, stating that: "A thorough review of the First

Amendment issues is beyond the scope of this memorandum." Despite its failure to engage in even a modicum of constitutional analysis, the Committee still concludes that: "the committee believes Model Rule 8.4(g) is likely to survive constitutional challenges, that any limits it imposes upon lawyers are far outweighed by the benefits of taking a strong stand against discriminatory behavior, and that it would constitute a significant improvement over our current rule."

The Committee's first conclusion – that the Model Rule is likely to survive constitutional challenges – fails. It fails, first, because the Committee provides absolutely no legal analysis to support its claim. In fact, the Committee admits it has not engaged in any constitutional analysis because a constitutional analysis was "beyond the scope" of its memorandum. It also fails because the only court to have addressed the issue has found that a similar rule of professional conduct – based upon Model Rule 8.4(g) – does not, in fact, survive a constitutional challenge.

The Committee's second conclusion – that any limits the Rule imposes upon lawyers are far outweighed by the benefits of taking a strong stand against discriminatory behavior – also fails. It fails because First Amendment violations are not analyzed under a balancing test. Indeed, the U.S. Supreme Court has explicitly rejected such a balancing test, stating that the idea that free speech protection should be subject to a balancing test that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test, is a "startling and dangerous" proposition. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 (2011). See also *United States v. Stevens*, 559 U.S. 460, 470 (2010) (holding that "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some

speech is not worth it.")

And the Committee's third conclusion – that the Model Rule would constitute a significant improvement over Wisconsin's current rule – is also without merit because, again, the Committee's personal policy preferences are legally irrelevant to a constitutional analysis.

1. Attorney Speech is Constitutionally Protected

Citizens do not surrender their First Amendment speech rights when they become attorneys, including when they are acting in their professional capacities as lawyers. *NAACP v. Button*, 371 U.S. 415 (1963) (holding that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."); *see also Ramsey v. Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn.*, 771 S.W.2d 116, 121 (Tenn. 1989) (holding that an attorney's statements that were disrespectful and in bad taste were nevertheless protected speech and use of professional disciplinary rules to sanction the attorney would constitute a significant impairment of the attorney's First Amendment rights, and stating that "we must ensure that lawyer discipline, as found in Rule 8 of the Rules of this Court, does not create a chilling effect on First Amendment rights."); *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1444 (9th Cir. 1995) (stating that the substantive evil must be extremely serious and the degree of imminence must be extremely high before an attorney's utterances can be punished under the First Amendment).

Indeed, the ABA itself has acknowledged this very principle in an *amicus* brief it filed in the case of *Wollschlaeger. v. Governor of the State of Fla.*, 797 F.3d 859 (11th Cir. 2015). In its brief the ABA denied that a law regulating speech should receive less scrutiny merely because it regulates "professional speech." "On the contrary" – the ABA stated – "much speech by . . . a

lawyer . . . falls at the core of the First Amendment. The government should not, under the guise of regulating the profession, be permitted to silence a perceived 'political agenda' of which it disapproves. That is the central evil against which the First Amendment is designed to protect." "Simply put" – the ABA stated – "states should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession . . . Indeed," – the ABA stated – "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created."

The ABA is, of course, correct in stating that "the Supreme Court has never recognized 'professional speech' as a category of lesser protected expression." Indeed, the U.S. Supreme Court recently reiterated this principle in *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018), in which it devoted a part of its opinion to the subject of professional speech, stating: "[T]his Court's precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, . . .The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information" (internal citations omitted). The Court concluded that it was not presented with any persuasive reason for treating professional speech as a unique category of speech that is exempt from ordinary First Amendment principles.

In short, attorneys do not surrender their constitutional rights when they enter the legal profession – including with respect to their professional speech – and the state may not violate

attorneys' constitutional rights under the guise of professional regulation.

2. The Proposed Rule Prohibits Constitutionally Protected Speech

Some proponents of the Model Rule claim that the Rule prohibits only conduct, not speech, and that any speech that is prohibited is speech that is merely incidental to the prohibited conduct. For that reason – they claim – the Rule does not violate the First Amendment free speech rights of lawyers.

But that is incorrect. The proposed Rule prohibits "harassment" and "discrimination," and pure speech can constitute both harassment and discrimination under the Rule. Indeed, Comment [1] of the proposed Rule expressly prohibits what it calls "verbal conduct" – which is, of course, simply a euphemism for speech. The Comment elaborates that the Rule prohibits "derogatory," "demeaning," and "harmful" speech.

For that reason, the proposed Rule does not prohibit conduct that incidentally involves speech. Instead, the Rule prohibits speech that incidentally involves professional conduct. *See* Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harvard J. Law & Pub. Policy 173, 247 (2019).

Courts have rejected the attempt to avoid First Amendment violations by the expedient of characterizing speech as "conduct." *Otto, et al. v. City of Boca Raton, Florida, et al,* 981 F.3d 854 (11th Cir. 2020)(stating that the government cannot regulate speech by labeling it as conduct), and citing *Wollschlaeger v. Gov., Fla*, at 1308 stating that "the enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and subject to manipulation."

An event in Minnesota illustrates the point. In May of 2018 the Minnesota Lavender Bar

Association ("MLBA") – "a voluntary professional association of lesbian, gay, bisexual, transgender, gender queer, and allies, promoting fairness and equality for the LGBT community within the legal industry and for the Minnesota community" – objected to an accredited Continuing Legal Education presentation entitled "Understanding and Responding to the Transgender Moment/St. Paul," which was co-sponsored by a Roman Catholic law school and addressed transgender issues from a Roman Catholic perspective. The MLBA complained that the CLE – which was pure speech – was "discriminatory and transphobic," "encourages bias by arguing against the identities [of transgender people]," was contrary to the bar's diversity efforts, and constituted "harassing behavior" under Rule 8.4(g) of the Model Rules of Professional Conduct. The MLBA further characterized the presentation as "transphobic rhetoric" and stated that "Discrimination is not legal education." Minn. Lavender Bar Ass'n, https://gumroad.com/mlba (last visited Apr. 2, 2019). As a result of the MLBA's complaint, the CLE accrediting body of the Minnesota Bar revoked its CLE accreditation of the presentation – reportedly the first time such retroactive revocation of CLE credit had ever occurred in Minnesota. *See* Barbara L. Jones, *CLE credit revoked*, Minnesota Lawyer (May 28, 2018).

In this real-life example, the complained of behavior consisted of pure speech, was alleged to constitute "harassment" under Model Rule 8.4(g) – as well as discrimination – and was punished by the state by retroactively stripping the presentation of accreditation.

Thus, it is clear that the proposed Rule does, in fact, prohibit lawyer speech. And, as is discussed below, much of that speech is constitutionally protected. By prohibiting and threatening to punish attorneys for engaging in constitutionally protected speech, the proposed Rule violates attorneys' free speech rights.

3. Many Authorities Have Expressed Concerns About The Constitutionality Of The Model Rule

Many authorities have pointed out the constitutional infirmities of ABA Model Rule 8.4(g).

Indeed, when the ABA opened up Model Rule 8.4(g) for comment, a total of 481 comments were filed – and of those 481 comments, 470 of them opposed the Rule, most on the grounds that the Rule would be unconstitutional.

Indeed, the ABA's own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law Section, initially warned the ABA that Model Rule 8.4(g) may violate attorneys' First Amendment speech rights.

And prominent legal scholars, such as UCLA constitutional law professor Eugene Volokh and former U.S. Attorney General Edwin Meese, III, opined that ABA Model Rule 8.4(g) is constitutionally infirm. *See* Eugene Volokh, "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities,*" Wash. Post, Aug. 10, 2016; *see also* Edwin Meese III, August Letter to ABA House of Delegates, http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf. Attorney General Meese wrote that ABA Model Rule 8.4(g) constitutes "a clear and extraordinary threat to free speech and religious liberty" and "an unprecedented violation of the First Amendment." *Id.*

Indeed, 52 law professors have signed a letter – titled *The Unconstitutionality of ABA Model Rule 8.4(g)* – in which they conclude that "the scholars who have signed this letter believe that ABA Model Rule 8.4(g) would, if adopted by any state, be clearly unconstitutional."

In addition, the authors of many law review articles have concluded that Model Rule 8.4(g) threatens attorneys' First Amendment rights. *See, e.g.*, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional & Blatantly Political*, 32 Notre Dame J.L. Ethics & Pub. Pol'y 135

(2018); Andrew F. Halaby and Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, & a Call For Scholarship*, 41 J. Legal Prof. 201 (2017) (the new Model Rule 8.4(g) has due process and First Amendment free expression infirmities); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment & "Conduct Related to the Practice of Law,"* 30 Geo. J. Legal Ethics 241 (2017) (Model Rule 8.4(g) constitutes an unjustified incursion into constitutionally protected speech); Caleb C. Wolanek, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(G) Of The Model Rules of Professional Responsibility*, 40 Harv. J.L. & Pub. Policy 773 (June 2017) (Model Rule 8.4(g) goes too far and implicates the First Amendment); 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 (2018) (Model Rule 8.4(g) expands impulses within the legal profession to coerce viewpoint conformity and marginalize and deter dissenters); Bradley S. Abramson, *ABA Model Rule 8.4(g): Constitutional and Other Concerns for Matrimonial Lawyers*, 31 J. Am. Acad. Matrim. Law. 283 (2019)(Model Rule 8.4(g) would appear to prohibit constitutionally protected speech, chill constitutionally protected speech, and interfere with attorneys' free exercise of religion rights). *See also* Lindsey Keiser, *Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights,* 28 Geo. J. Legal Ethics 629 (Summer 2015) (rule violates attorneys' Free Speech rights); Dorothy Williams, *Attorney Association: Balancing Autonomy & Anti-Discrimination*, 40 J. Leg. Prof. 271 (Spring 2016) (rule violates attorneys' Free Association rights).

In several states that have considered adopting the Model Rule, important professional stakeholders have rejected it. For example, the Illinois State Bar Association, the Pennsylvania Supreme Court Disciplinary Board, the South Carolina Bar's Committee on Professional

Responsibility, the Louisiana District Attorneys Association, the North Dakota Supreme Court Joint Commission on Attorney Standards, the Tennessee District Attorneys General Conference, and the Memphis Bar Association Professionalism Committee have all opposed the Rule.

The National Lawyers Association's Commission for the Protection of Constitutional Rights has issued a Statement that ABA Model Rule 8.4(g) would violate an attorney's free speech, free association, and free exercise rights under the First Amendment to the U.S. Constitution. National Lawyers Association, https://www.nla.org/nla-task-force-publishes-statement-on-new-aba-model-rule-8.4g/ (last visited on Apr. 2, 2019).[1]

Likewise, the national Catholic Bar Association has taken a public position that the Rule is unconstitutional.

In Montana the state legislature adopted a Joint Resolution – Montana Senate Resolution 15 – that, if the Supreme Court of Montana were to enact ABA Model Rule 8.4(g), such would constitute an unconstitutional act of legislation and violate the First Amendment rights of Montana lawyers. In response, the Montana Supreme Court declined to adopt the Rule.

Significantly, the Attorneys General of four States – Texas, South Carolina, Louisiana, and Tennessee – have issued official opinions that ABA Model Rule 8.4(g) is unconstitutionally vague and overbroad, and violates the free speech, free exercise of religion, and free association rights of attorneys. *See* Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016); S.C. Att'y Gen. Op. 14 (May 1, 2017); La. Att'y Gen. Op. 17-0114 (Sept. 8, 2017); Tenn. Att'y Gen. Op. No. 18-11 (Mar. 16, 2018). In addition, the Attorney General of Arizona has written that the Rule "raises significant constitutional concerns, including potential infringement of speech and association rights." Ariz.

[1] With respect to the constitutional issues raised by the new Model Rule, those filing this Joint Comment agree with the discussion, analysis and conclusions set forth in the National Lawyers Association's Statement, and have adopted, restated, and in some respects expanded upon much of that discussion and analysis in this Joint Comment.

Att'y Gen.'s Comment to Petition to Amend ER 8.4, Rule 42, Ariz. Rules of the Sup. Ct., R-17-0032 (May 21, 2018). And the Attorney General of Alaska has opined that the Rule would "violate First Amendment freedoms, including freedom of speech, free exercise of religion, and freedom of association . . . As a policy it is unwise, and as a law it is unconstitutional." Letter of Alaska Attorney General to the Board of Governors of the Alaska Bar Association (August 9, 2019).

4. The Proposed Rule Is Unconstitutionally Vague

Due process requires that laws give people of ordinary intelligence fair notice of what is prohibited. And the lack of such notice in a law that regulates expression raises special First Amendment concerns because of its obvious chilling effect on free speech. For that reason, courts apply a more stringent vagueness test when a regulation interferes with the right of free speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

Vague laws present several due process problems. First, such laws may trap the innocent by not providing fair warning. Second, vague laws delegate policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. And third, such laws lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

(a) The Term "Harassment" is Unconstitutionally Vague

The proposed Rule prohibits attorneys from engaging in "harassment" on the basis of any of the protected classes. But the Rule does not define the term "harassment." Thus, the term "harassment" is subject to multiple interpretations – and no standard is provided by which an attorney can reasonably determine whether or not any particular

speech or conduct might violate the Rule.

For example, can simply being offended by an attorney's expressions constitute harassment? Might an attorney violate the Rule merely by sharing her religious beliefs with another attorney who finds such religious beliefs – or their expression – offensive? Could an attorney's body language – such as a dismissive hand gesture, a turning of one's back, the shaking of one's head, or the rolling of one's eyes – constitute harassment? Could an attorney's clothing or apparel – such as wearing a "Make America Great Again" cap – violate the Rule? Or what if a lawyer had a Gadsden flag ("Don't Tread on Me") sticker on her briefcase – might that violate the Rule? If not, why not – since some would consider this speech derogatory or demeaning and, therefore, harassing.

Indeed, some courts have explicitly found that the term "harass" – in and of itself – is unconstitutionally vague. *See, e.g.*, *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996) (holding that the term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague).

Because the term "harassment" as used in the proposed Rule is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid violating the Rule.

Further, Comment [3] of Model Rule 8.4(g) provides that harassment includes

derogatory or demeaning verbal or physical conduct. It should be noted, first, that "verbal conduct" is simply a euphemism for speech. So what the Rule prohibits is "derogatory or demeaning" speech. But what exactly is encompassed by the words "derogatory" and "demeaning" speech? Courts have found terms such as these unconstitutionally vague. *See, e.g.*, *Hinton v. Devine*, 633 F.Supp. 1023 (E.D. Pa. 1986) (holding that the term "derogatory" without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal. App. 4th 669 (Cal. App. 2012) (holding that a statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

Finally, the statement in proposed Comment [3] that "[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)" does not cure this vagueness defect because, first, the Comment does not identify which statutes and case law it is referring to; second, it merely provides that such unidentified statutes and case law "*may* guide" application of the Rule, leaving open the very real possibility that the Rule will *not* be applied in accord with substantive anti-harassment law; and, third, it provides no guidance whatsoever to the myriad applications of "harassment" that do not fall under any particular statute or ordinance. So the Comment provides attorneys with no real guidance as to what the Rule prohibits or how it will be applied.

(b) The Term "Discrimination" is Unconstitutionally Vague

The term "discrimination" is also unconstitutionally vague. Many proponents of the proposed Rule contend that the word "discrimination" is widely used and easily understood. And it is certainly true that many statutes and ordinances prohibit

discrimination, in a variety of contexts. But it is also true that such statutes and ordinances do not – as does the proposed Rule – merely prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

Title VII, for example, specifies what sorts of acts constitute discrimination under the statute. *See* 42 U.S.C. § 2000e-2. Similarly, the federal Fair Housing Act provides a detailed description of what, specifically, is prohibited under the Act. *See* 42 U.S.C. § 3604.

But the proposed Rule does not do that. It simply provides that "It is professional misconduct for a lawyer to: . . . engage in conduct that the lawyer knows or reasonably should know is . . . discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status" – thereby leaving to the attorney's imagination what sorts of speech and behavior might be encompassed in that proscription.

Again, if reference is made to proposed Comment [3] to the proposed Rule, the vagueness problem gets worse, because under Comment [3] the term "discrimination" includes "*harmful* verbal or physical conduct that *manifests bias or prejudice towards others.*" The term "harmful" – standing alone – is unconstitutionally vague because attorneys cannot determine with any degree of reasonable certainty what speech and conduct may constitute "harmful" speech or conduct. Indeed, the word "harmful" simply means "causing or capable of causing harm." *Harmful*, Dictionary.com, http://www.dictionary.com/browse/harmful (last visited Apr. 4, 2019). And "harm" encompasses a wide range of injury, from "physical injury or mental damage" to "hurt" to "moral injury." *Harm*, Dicionary.com, http://www.dictionary.com/browse/harm

(last visited Apr. 2, 2019). So "harmful" speech can encompass an almost limitless range of allegedly injurious effects on others. For that reason, mental injury or damage, for example, could easily be interpreted to include real, imagined, or even feigned, emotional distress at being exposed to expression someone finds offensive.

And for the same reasons addressed above under the discussion of the term "harassment," the statement in proposed Comment [3] that "[t]he substantive law of antidiscrimination . . . statutes and case law may guide application of paragraph (g)" does not cure the vagueness defect of determining what constitutes "discriminatory" speech.

It is also important to emphasize that speech does not lose its constitutional protection just because it is "harmful." *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995) (stating that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (noting that an interest in protecting bystanders from feeling offended or angry is not sufficient to justify a ban on expression); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (striking down a ban on picketing near embassies where the purpose was to protect the emotions of those who reacted to the picket signs' message). *See also Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011) (stating that "new categories of unprotected speech may not be added to the list [of unprotected speech – such as obscenity, incitement, and fighting words] by a legislature that concludes certain speech is *too harmful* to be tolerated")

(emphasis added).

(c) The Phrase "in conduct related to the practice of law" is Unconstitutionally Vague

The proposed Rule applies to any conduct of an attorney which is "related to the practice of law," including, according to proposed Comment [4], participating in bar association, business or social activities in connection with the practice of law." It hardly need be said, though, that what conduct is conduct "related to" or "in connection with" the practice of law and what conduct is not, is vague and subject to reasonable dispute.

The phrase is vague, first, because what does and does not constitute the practice of law is, itself, vague. In fact, the Supreme Court of Wisconsin has refrained from even attempting an all-inclusive definition of what constitutes the practice of law, holding that, what constitutes the practice of law must be determined on a case-by-case basis. *Seitzinger v. Community Health Network*, 676 N.W.2d 426, 434 (Wis. 2004), citing *State ex rel. Junior Ass'n of Milwaukee Bar v. Rice*, 294 N.W. 550, 556 (Wis. 1940)(for the proposition that "it is difficult, if not impossible, to lay down an all-inclusive definition of practice of law").

The problem with the proposed Rule is that it compounds the uncertainty of what constitutes the practice of law by sweeping in not just attorney conduct while engaged in the "practice of law," but attorney conduct – including bar association, business and even social activities – that are merely "*related to*" or "*in connection with* the practice of law."

Untethered, as it is, from any legal or historical understanding of what constitutes the "practice of law," the proposed Rule's use of the phrases "related to" and "in

connection with" the practice of law becomes nearly meaningless.

Considering some hypothetical situations brings the problem into focus. Would the Rule apply to comments made by an attorney while attending a law firm retirement party for a law firm co-worker? If so, would it also include comments made while the attorneys are walking to their vehicles after the party has ended? Would it apply to comments one attorney makes to another while car-pooling to or from work? Would it include comments an attorney makes while teaching a religious liberty class at the attorney's church? Or sitting on his church's governing board, where he is sometimes asked for his professionally informed opinion on some matter before the board? Or when attending an alumni function at the law school the attorney attended? Or when publishing a letter to the editor of a newspaper when the author is identified therein as a lawyer? Or, for that matter, in any behavior in which the actor is identified as being a lawyer? The answers to these inquiries are far from self-evident.

And it is not just our opinion that the phrase "conduct related to the practice of law" is unconstitutionally vague. The Chair of the ABA Policy & Implementation Committee, which is charged with advocating for the Model Rules of Professional Conduct, while serving on an ABA CLE panel discussing Model Rule 8.4(g), was asked what the phrase "related to the practice of law" in the Model Rule meant? In response, he stated "I don't have an answer for you." "It is extraordinarily broad." "I don't know where it begins or where it ends." *Model Rule 8.4 – Update, Discussion, and Best Practices in a #MeToo World*, August 2, 2018.

Because a lawyer cannot, with any degree of reasonable certainty, determine what behavior of an attorney is conduct "related to" or "in connection with" the practice of

law and what is not, the proposed Rule is unconstitutionally vague.

If attorneys face professional discipline for engaging in certain proscribed behavior, they are entitled to know, with reasonable precision, what behavior is being proscribed, and should not be left to speculate what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the Rule's essential terms, the proposed Rule is unconstitutional.

5. The Proposed Rule is Unconstitutionally Overbroad

Even if a law is clear and precise – thereby avoiding a vagueness challenge – it may nevertheless be unconstitutionally overbroad if it prohibits constitutionally protected speech.

Overbroad laws – like vague laws – deter protected activity. The crucial question in determining whether a law is unconstitutionally overbroad is whether the law sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. *Grayned*, 408 U.S. at 114-15.

Although some of the speech the proposed Rule prohibits might arguably be unprotected – such as speech that actually and substantially prejudices the administration of justice or speech that would actually and clearly render an attorney unfit to practice law – the proposed Rule would also sweep within its prohibitions lawyer speech that is clearly protected by the First Amendment, such as speech that might be offensive, disparaging, or hurtful and, therefore, considered, at least by some, as constituting discrimination or harassment, but that would not prejudice the administration of justice nor render the attorney unfit to practice law. *DeJohn v. Temple Univ.*, 537

F.3d 301 (2008) (holding that a University Policy on Sexual Harassment that prohibited "all forms of sexual harassment . . . including expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment" was unconstitutionally overbroad on its face).

Speech is not unprotected merely because it is harmful, derogatory, demeaning, or even discriminatory or harassing. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) (holding that there is no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs; harassing or discriminatory speech implicate First Amendment protections; there is no categorical rule divesting "harassing" speech of First Amendment protection).

Indeed, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder*, 562 U.S. at 458 (holding that the government cannot restrict speech simply because the speech is upsetting or arouses contempt); *Hurley*, 515 U.S. at 574 (noting that the point of all speech protection is to shield just those choices of content that in someone's eyes are misguided, or even hurtful); *see also Johnson*, 491 U.S. at 414 (stating that "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *see also Matal v. Tam*, 137 Sup. Ct. 1744 (2017) (stating that the government's attempt to prevent speech expressing ideas that offend strikes at the heart of the First Amendment) and *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019)(observing that "regulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be").

In fact, courts have found that terms such as "derogatory" and "demeaning" – both of which are used in the proposed Comment [3] of the proposed Rule to describe what the terms "discrimination" or "harassment" mean – are unconstitutionally overbroad. *Hinton*, 633 F.Supp. 1023 (holding that the term "derogatory information" is unconstitutionally overbroad); *Summit Bank*, 206 Cal. App. 4th 669 (finding that a statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech); s*ee also Saxe*, 240 F.3d 200 (holding that a school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional because it is overbroad).

The broad reach of the proposed Rule is well illustrated by the example that Senior Ethics Counsel Lisa Panahi and Ethics Counsel Ann Ching of the Arizona State Bar gave in their January 2017 article "Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g)," in the *Arizona Attorney*. They state that an attorney could be professionally disciplined under Model Rule 8.4(g)'s prohibition on discriminatory or harassing conduct in business or social activities "related to the practice of law" for telling an offensive joke at a law firm dinner party. The late Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provided another example of the broad reach of the Model Rule. He wrote: "If one lawyer tells another, at the water cooler or a bar association meeting on tax reform, 'I abhor the idle rich. We should raise capital gains taxes,' he has just violated the ABA rule by manifesting bias based on socioeconomic status." Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Legal Memorandum No. 191 at 4, The

Heritage Foundation (Oct. 6, 2016)

But the speech in both these examples would clearly be constitutionally protected. The fact that such constitutionally protected speech would violate the proposed Rule demonstrates that the Rule is unconstitutionally overbroad.

Indeed, regardless of whether any attorney is ultimately prosecuted under the Rule for engaging in protected speech, the mere possibility that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – which is precisely what the overbreadth doctrine is designed to prevent. *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (noting that overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression.).

Therefore, because the proposed Rule will prohibit a broad swath of protected speech and would chill lawyers' speech, the Rule would not pass constitutional muster.

6. The Proposed Rule Will Constitute An Unconstitutional Content-Based Speech Restriction

By only proscribing speech that is derogatory, demeaning, or harmful toward members of certain designated classes, the proposed Rule will constitute an unconstitutional content-based speech restriction. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (explaining that government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.); *see also Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 880 F. Supp. 2d 456 (S.D.N.Y. 2012) (holding that an ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the

First Amendment).

Indeed, the U.S. Supreme Court recently reiterated this principle in a case that is directly relevant when considering the constitutional infirmities of the proposed Rule. In *Tam*, supra, the Court found that a Lanham Act provision – prohibiting the registration of trademarks that may "disparage" or bring a person "into contempt or disrepute" – facially unconstitutional, because such a disparagement provision – even when applied to a racially derogatory term – ". . . offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." 137 Sup. Ct. 1744. In a concurring opinion joined by four Justices, Justice Kennedy described the constitutional infirmity of the disparagement provision as "viewpoint discrimination" – "an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Id.* at 1766. The problem, he pointed out, was that, under the disparagement provision, "an applicant may register a positive or benign [trade]mark but not a derogatory one" and that "This is the essence of viewpoint discrimination." *Id.* Likewise, under the proposed Rule here, attorneys may engage in positive or benign speech with regard to the protected classes, but not derogatory, demeaning, or harmful speech. Under the Supreme Court's *Tam* decision, this is the essence of viewpoint discrimination, and presumptively unconstitutional.

The late Professor Rotunda provided a concrete example of how the proposed Rule may constitute an unconstitutional content-based speech restriction. Referring to Model Rule 8.4(g), he explained: "At another bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.' Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally, another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline." Rotunda, *supra*.

"One reliable way to tell whether a law restricting speech is content-based is to ask whether enforcement authorities must 'examine the content of the message that is conveyed' to know whether the law has been violated." *Otto*, supra, at 862, citing *McCullen v. Coakley*, 573 U.S. 464, 479 (2014), quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984). That is precisely what enforcement authorities would have to do under the proposed Rule, because the content of a lawyer's speech will determine whether or not the lawyer has or has not violated the Rule. Enforcement authorities will have to examine the content of the complained of speech in order to determine whether the speech manifests bias or prejudice. For example, a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that some consider to be discriminatory based on sexual orientation or marital status, while a lawyer who speaks in favor of same-sex marriage would not be. Or as the Minnesota case discussed above illustrates, one may speak favorably about transgender issues, but not unfavorably. These are classic examples of unconstitutional viewpoint-based speech restrictions. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (holding that the government may not regulate speech based on hostility – or favoritism – towards the underlying message expressed). In *R.A.V.*, the Supreme Court struck down, as facially unconstitutional, the city of St. Paul's Bias-Motivated Crime Ordinance because it applied only to fighting words that insulted or provoked violence "on the basis of race, color, creed, religion or gender," whereas expressed hostility on the basis of other bases were not covered. *Id.* In striking down the Ordinance, the Court stated: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 390. That is precisely what the proposed Rule does. For that reason, commentators have described Model Rule 8.4(g) as a speech codes for lawyers.

For those who would deny that the proposed Rule creates an attorney speech code, we need

only point them to Indiana, a state that has adopted a black letter non-discrimination Rule – albeit not as broad as the Rule being proposed here. In *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Ind. 2010), an Indiana attorney was professionally disciplined under Indiana's Rule 8.4(g) for merely asking someone if they were "gay." And in *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Ind. 2010), an attorney had his license suspended for applying a racially derogatory term to himself. In both cases, the attorneys were professionally disciplined merely for using certain disfavored speech.

Because it constitutes an unconstitutional speech code for lawyers, the proposed Rule should be rejected.

7. The Proposed Rule Will Violate Attorneys' Free Exercise of Religion and Free Association Rights

The proposed Rule will also violate attorneys' constitutional right of free religious exercise because the Rule prohibits religious expression if such expression could be considered discriminatory or harassing.

The ACLU of New Hampshire opposed a similar rule – considered but not adopted – in that state, noting correctly that such rules threaten religious liberty because "one person's religious tenet could be another person's manifestation of bias." American Civil Liberties Union of New Hampshire, Letter to Advisory Committee on Rules, New Hampshire Supreme Court (May 31, 2018).

As an illustration of this problem, the late Professor Rotunda posited the example of Catholic attorneys who are members of the St. Thomas More Society, an organization of Catholic lawyers and judges. If the St. Thomas More Society should host a CLE program in which members

discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, Professor Rotunda explained that those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. In fact, Professor Rotunda pointed out that an attorney might be in violation of the Rule merely for being a member of such an organization. Rotunda, *supra* at 4-5. The fact that the Rule may prohibit such speech or membership indicates that the Rule will be unconstitutional.

To those who might deny the proposed Rule could or would be applied in that way, one need only note the above-referenced action of the CLE accrediting authorities in Minnesota upon the Minnesota Lavender Bar Association's complaint that a CLE co-sponsored by a Roman Catholic law school, discussing transgender issues from a Roman Catholic perspective, constituted "harassment" under ABA Model Rule 8.4(g), stating that the religiously based discussion constituted "transphobic rhetoric" and "discrimination." In essence, that case stands for the proposition that the prohibition of "harassment" and "discrimination" as embodied in professional conduct rules, such as the one proposed here, will apply to and prohibit religious speech – speech that expresses a religious tenet of some, but to others is viewed as discrimination or harassment.

Religiously based legal organizations have consistently opposed professional conduct rules like the one being considered here on the ground that such rules threaten religious liberty. Those groups include the Catholic Bar Association – which has adopted a resolution stating that Model Rule 8.4(g) is not only unconstitutional, but that it is "incompatible with Catholic teaching and the obligations of Catholic lawyers" – as well as the Christian Legal Society. Both organizations have cause for concern because, as Professor Rotunda presciently warned, merely being members of those organizations would violate rules like the Rule proposed here. How so? Because both

organizations limit their membership based on religion. The Christian Legal Society requires its members to subscribe to a Christian statement of faith. The Catholic Bar Association requires its members to be practicing Roman Catholics. Therefore, both legal organizations "discriminate" on the basis of religion – something explicitly prohibited under the terms of the proposed Rule. The proposed Rule would, essentially, destroy both organizations.

Because the proposed Rule will violate attorneys' Free Exercise and Free Association rights, it should be rejected.

8. The Proposed Rule Will Result In The Suppression of Politically Incorrect Speech While Protecting Politically Correct Speech

Under a literal reading of the proposed Rule, a law firm's affirmative action hiring practices would constitute a violation of the Rule, because the Rule makes clear that it is professional misconduct for a lawyer operating or managing a law firm or law practice to discriminate on the basis of race, sex, national origin, ethnicity, sexual orientation, or gender identity. Therefore, any hiring or other employment practices that favor applicants or employees on the basis of any of those characteristics are forbidden.

But does anyone really believe that a lawyer will ever be prosecuted for favoring women or racial minorities in hiring or promotion decisions, undertaken in order to increase diversity in the legal profession? Of course not. In fact, discrimination for those purposes will actually be favored.

Indeed, the proposed Comment [4] to the proposed Rule 8.4(g) makes this practice, of protecting favored speech and suppressing disfavored speech, explicit because Comment [4] to the Rule contains an express exception for "conduct undertaken to promote diversity and inclusion."

And proposed Comment [5] allows lawyers to limit their practices to certain clientele, as long as that clientele are "members of underserved populations" – whatever that may mean.

So, if an attorney engages in discriminatory conduct that furthers a *politically correct* interest, the disciplinary authority will find that the discrimination is undertaken to promote diversity or inclusion, or to serve an underserved population – and for that reason does not violate the Rule. But if an attorney engages in discriminatory conduct that furthers a *politically incorrect* interest, the state will prosecute that attorney for violating the Rule. And because the terms "harassment" and "discrimination" are both vague and overbroad, professional disciplinary authorities will be able to interpret those terms in ways that result in selective prosecution of politically incorrect or disfavored speech, while protecting politically correct or favored speech.

This phenomenon has already been observed in other similar contexts. For example, a Civil Rights Commission in Colorado prosecuted a Christian baker for declining to bake a wedding cake for a same-sex couple, but refused to prosecute three other bakers who refused to bake a cake for a Christian, finding that the first constituted illegal discrimination but that the second did not. The reason underlying this disparate treatment was obvious – in the first the complaining party was a member of a politically favored class, while in the second the complaining party was a member of a disfavored one. The U.S. Supreme Court condemned that unequal treatment, stating that it constituted a "clear and impermissible hostility toward the religious beliefs" of the baker the Commission selectively chose to prosecute. *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1729 (2018).

These exceptions also render the proposed Rule unconstitutional because – by prohibiting only disfavored discriminatory messages, while allowing favored ones – the Rule creates a viewpoint-based speech restriction. *See R.A.V.*, 505 U.S. 377.

No rule of professional conduct should punish certain viewpoints while protecting and advancing others. In fact, to do so would be unconstitutional.

9. Assurances That the Proposed Rule Will Not Be Applied in an Unconstitutional Manner Do Not Cure the Rule's Constitutional Infirmities

Supporters of the proposed Rule may argue that, although the Rule could be applied in an unconstitutional manner, it will not be -- or may suggest that, in order to assuage attorneys' concerns about the proposed Rule's constitutional infirmities, the proposed Rule be modified so as to provide that the Rule will not be applied in an unconstitutional manner. Neither approach, however, would remedy the Rule's constitutional infirmities.

First, proponents of the Rule do not have the authority to speak on behalf of a state's professional disciplinary authorities. Proponents of the Rule cannot say how the disciplinary authorities will or will not interpret or apply the Rule.

And second, this very argument was made and rejected in *Stevens*, supra. There, in a case challenging the constitutionality of a statute criminalizing certain depictions of animal cruelty, the U.S. Supreme Court addressed the government's claim that the statute was not unconstitutionally overbroad because the government would interpret the statute in a restricted manner so as to reach only "extreme" acts of animal cruelty, and that the government would not bring an action under the statute for anything less. In response, the high court pointed out that "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." The court pointed out the danger in putting faith in government representations of prosecutorial restraint, and stated that "The Government's assurance that it will apply § 48 far

more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading." *Id.* at 480.

In other words, far from curing its constitutional defects, representations that the proposed Rule will not be applied so as to violate the Constitution, constitute indirect admissions that the proposed Rule is, in fact, constitutionally infirm.

In arguing that the proposed Rule will not be applied unconstitutionally, proponents may also point to the Rule's provision that "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules." But that provision does not cure the defects either.

It does not cure the defects, first, because the cited provision is circular. It requires that, in order to qualify as "legitimate" the advice or advocacy must be "consistent with these Rules." But in order to be consistent with the Rules (in particular with proposed Rule 8.4(g) itself), the advice or advocacy cannot be discriminatory or harassing. In other words, under the proposed Rule, advice or advocacy that constitutes "discrimination" or "harassment" can, by definition, never constitute legitimate advocacy because "discriminatory" or "harassing" advice or advocacy is inconsistent with "these Rules" – which would include proposed Rule 8.4(g) itself.

Further, by stating that the Rule will not prohibit "legitimate advice or advocacy" the proposed Rule – for the first time – creates the concept of *illegitimate* advice or advocacy. Giving advice and advocating for clients are the very essence of what lawyers do. If the proposed Rule is adopted, however, an attorney will need to worry whether her advice or advocacy might be considered "illegitimate" and, therefore, a violation of professional ethics. And having to worry about that will chill the lawyer's speech and interfere with the attorney's ability to provide her client with zealous representation.

Finally, who will determine whether an attorney's advice or advocacy is legitimate or

illegitimate? The disciplinary authorities, of course, will make that determination, in their unfettered discretion, after the fact and, potentially, on political or ideological grounds.

10. The Proposed Rule Also Violates the Wisconsin Constitution.

Like the United States Constitution, the Wisconsin Constitution guarantees citizens the right to free speech without governmental infringement. Wis. Cost. Art. I, Sec. 3. The Wisconsin Constitution provides the same freedom of speech rights as the U.S. Constitution. *Lawson v. Housing Authority of City of Milwaukee,* 70 N.W.2d 605 (Wisc. 1950).

Therefore, for the same reasons discussed above, the Rule is unconstitutional not only under the U.S. Constitution but also under the Wisconsin Constitution.

11. The Only Court to Have Ruled on the Issue Found the Rule Unconstitutional.

On December 7, 2020, the Court, in *Greenberg v. Haggerty* (2020 WL 7227251) enjoined enforcement of a Rule of Professional Conduct adopted by Pennsylvania based on ABA Model Rule 8.4(g). Many of the Court's findings echo what critics of the Rule have contended.

In particular, the Court held that the Plaintiff attorney – who intended to discuss controversial topics in a CLE presentation that he believed might facially violate the Rule – successfully carried his burden in showing that the new Rule chilled his constitutionally protected speech. The Court stated that if Pennsylvania's new Rule 8.4(g) went into effect – which prohibited attorneys from using "words . . . manifesting bias or prejudice," "it will hang over Pennsylvania attorneys like the sword of Damocles."

The Court found, first, that – as set forth in the Supreme Court's *NIFLA* case – a lawyer's professional speech is protected First Amendment speech, even when the attorney is speaking in a

professional capacity.

Second, the Court found that the Rule prohibited speech, not mere conduct, because it specifically applied to "words" (just as ABA Model Rule 8.4(g) specifically applies to "verbal conduct" – a euphemism for "speech).

Third, the Court rejected the state's argument that the Rule was a legitimate exercise of its broad authority to regulate attorney speech under its professional regulatory authority.

And fourth – citing the *Tam* case – the Court determined that the Rule constituted unconstitutional viewpoint-based discrimination because the Rule allows attorneys to speak favorably about the protected classes, but not unfavorably.

In its conclusion, the Court stated: "There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes a government-favored viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice based on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance."

B. Only Two States Have Adopted Model Rule 8.4(g). All Other State Supreme Courts That Have Considered And Acted Upon the Rule Have Rejected It In Whole or In Part

In the four and a half years since the ABA adopted Model Rule 8.4(g) – although many states have considered it – only two states, Vermont and New Mexico, have adopted it. The supreme courts of six states – Arizona, Idaho, Montana, South Carolina, South Dakota, and Tennessee – have expressly rejected the Rule.

Indeed, the majority of states continue to have no blackletter nondiscrimination rule at all in their Rules of Professional Conduct.

In fact, not only do the majority of states have no blackletter antidiscrimination rule in their rules of professional conduct, but in those states that *do* have black letter antidiscrimination provisions in their rules, no state's rule – other than Vermont's and New Mexico's – is comparable to Model Rule 8.4(g).

Aside from Vermont and New Mexico, none of the jurisdictions with blackletter anti-discrimination rules extends its rule to conduct related to the practice of law or conduct in connection with the practice of law – including bar association, business, and social activities of attorneys – as does the Rule proposed here. (Although Maine's prohibition applies to "conduct related to the practice of law," it specifically declined to extend its prohibition to lawyers' bar association, business, or social activities). Indeed, seven of those jurisdictions specifically limit their coverage to conduct "in the representation of a client" or "in the course of employment" (Florida, Idaho, Nebraska, Missouri, North Dakota, Oregon, and Washington State). Eight states limit the applicability of their nondiscrimination rules to conduct toward other counsel, litigants, court personnel, witnesses, judges, and others involved in the legal process (Colorado, Florida, Idaho, Michigan, Nebraska, and Washington State). And Massachusetts limits its Rule to conduct "before a tribunal."

And unlike the Rule proposed here, nine of the states with black letter antidiscrimination rules require that the alleged discrimination actually either prejudice the administration of justice or render the attorney unfit to practice law (Florida, Illinois, Maryland, Minnesota, Nebraska, North Dakota, Pennsylvania, Rhode Island, and Washington State).

Further, unlike Model Rule 8.4(g) being proposed here – which has a "know or reasonably should know" standard – four states with black letter rules require the discriminatory conduct to be "knowing," "intentional" or "willful" (Maryland, New Jersey, New Mexico, and Texas). Indeed, New Hampshire's rule only applies to attorney conduct when the attorney's "primary purpose" is to embarrass, harass or burden another person. As an explanatory comment to New Hampshire's rule explains: "The rule does not prohibit conduct that lacks this primary purpose, even if the conduct incidentally produces, or has the effect or impact of producing" embarrassment, harassment, or a burden to another."

Finally, nine states (California, Minnesota, New Jersey, New York, Illinois, Ohio, Pennsylvania, Washington State, and Iowa) limit their antidiscrimination rules to "unlawful" discrimination or discrimination "prohibited by law." And of those nine states, nearly half of them (Illinois, New Jersey, New York, and Pennsylvania) actually require that, before any disciplinary claim can even be filed, a tribunal of competent jurisdiction *other than a disciplinary tribunal* must have found that the attorney has actually violated a federal, state, or local antidiscrimination statute or ordinance.

So, should Wisconsin adopt the proposed Rule, it will have adopted a Rule that impinges on attorney conduct in ways, and far more extensively, than any other jurisdictions – other than Vermont and New Mexico – has seen fit to do.

There are good reasons why the majority of jurisdictions have not adopted any blackletter nondiscrimination Rules in their Rules of Professional Conduct. And there are also good reasons why no states other than Vermont and New Mexico have adopted ABA Model Rule 8.4(g). And there are good reasons why the Supreme Courts of Arizona, Idaho, South Carolina, South Dakota,

Tennessee, and Montana have all expressly rejected ABA Model Rule 8.4(g). For these same reasons, Wisconsin would be wise to reject the Rule as well.

C. The Proposed Rule is Unnecessary, Will Not Remedy the Proponent's Concerns, and Will Unnecessarily Burden Wisconsin's Professional Disciplinary Authorities

Many of the circumstances the proposed Rule would address are already addressed by the current Rules of Professional Conduct or other laws.

First, Rule 8.4(d) already prohibits attorney conduct that prejudices the administration of justice. And, in fact, sexual harassment has been professionally disciplined in other states under Rule 8.4(d). *See, e.g., Attorney Grievance Comm'n of Md. v. Goldsborough*, 624 A.2d 503 (Ct. App. Maryland 1993) (holding that nonconsensual kissing of clients and spanking clients and employees can violate Rule 8.4(d) prohibiting lawyer from engaging in conduct that is prejudicial to the administration of justice).

And harassing and discriminatory judicial behavior – as well as discriminatory and harassing conduct of attorneys in proceedings before judicial tribunals – are already addressed in Wisconsin's Code of Judicial Conduct, Rule 60.04(1)(e) and (f).

For these reasons, the proposed Rule is redundant and unnecessary.

In addition, harassment and discrimination in the legal workplace are also already addressed in Title VII at the federal level, as well as in Wisconsin's employment nondiscrimination laws, including the Wisconsin Fair Employment Law (Wis. Stat. §§ Chapter 111.31 – 111.395) which covers all workplaces regardless of the number of employees employed. So the proposed Rule would create an entirely new layer of nondiscrimination and anti-harassment laws in the legal workplace, in addition to those already existing outside the Rules of Professional Conduct. By

doing so, the Rule will burden professional disciplinary authorities with having to process very fact-intensive, jurisprudentially complicated, and duplicative cases – cases that could and should be processed under some other statute or ordinance, by judicial authorities better informed and equipped to handle them.

Further, making discrimination and harassment a professional, as well as a statutory, offense, divorced from specific antidiscrimination and harassment laws, could very well subject attorneys to multiple prosecutions and inconsistent obligations and results. Lawyers could be forced to defend against parallel prosecutions, being pursued by different prosecutorial authorities, all at the same time. And, because different legal and evidentiary standards may apply in different proceedings, attorneys could – under the same set of facts – be exonerated from allegations of having violated a nondiscrimination or harassment law, but still be found to have engaged in harassing or discriminatory conduct that violates the Rules of Professional Conduct, or vice versa. Indeed, as noted above, some states have recognized the importance of this concern by (a) prohibiting only "unlawful" harassment or discrimination and (b) requiring that any claim against an attorney for unlawful discrimination be brought for adjudication before a tribunal other than a disciplinary tribunal before being brought before a disciplinary tribunal. See, for example, Illinois Rules of Professional Conduct Rule 8.4(j) and New York Rules of Professional Conduct Rule 8.4(g).

So for all these reasons, too, the proposed Rule should be rejected.

D. The Proposed Rule Will Invade The Historically Recognized Right And Duty Of Attorneys To Exercise Professional Autonomy In Choosing Whether To Engage In Legal Representation.

If the proposed Rule is adopted, attorneys will be subject to discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases – because, under the Rule, attorneys will not only be forced to take cases or clients they might have otherwise declined, they will be compelled to take cases or clients the Rules of Professional Conduct forbid them to take.

Proponents of Model Rule 8.4(g) often contend that the Rule will not require an attorney to accept any client or case the attorney does not want to accept. But that is not true, because the proposed Rule facially prohibits an attorney from engaging in any discriminatory conduct in any conduct related to the practice of law. Client selection decisions are clearly conduct related to the practice of law. Therefore, the proposed Rule will prohibit attorneys from engaging in discrimination when making their client and case selection decisions.

And the provision of the Model Rule, being proposed here in Wisconsin, that "[t]*his paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16*" (our emphasis) will not change this result, because Rule 1.16 does not even address the question of what clients or cases an attorney *may* decline. It only addresses the question of which clients and cases an attorney *must* decline.

What Rule 1.16 addresses are three circumstances in which an attorney is *prohibited* from representing a client, namely: (a) if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, (b) the lawyer is discharged, or (c) the representation will result in violation of the Rules of Professional Conduct or other law. None of these has anything whatever to do with an attorney's decision not to represent a client *because the attorney does not want to represent the client*. It only addresses the opposite situation – namely, in what circumstances an attorney who otherwise *wants* to represent a client *may not* do so. So what might

appear, to someone unfamiliar with Rule 1.16, to be some sort of safe harbor that would preserve an attorney's right to exercise his or her discretion to decline clients and cases, is no such thing. In short, if an attorney declines representation for a discriminatory reason, the attorney will have violated the Rule.

If there was ever any question about that, it is now clear from Vermont's adoption of the Model Rule that the Rule will, in fact, apply to an attorney's client selection decisions. In its *Reporter's Notes* to its adoption of Model Rule 8.4(g), the Vermont Supreme Court explicitly states that Rule 1.16's provisions about declining or withdrawing from representation "*must* [now] *also be understood in light of Rule 8.4(g)*" so that refusing or withdrawing from representation "*cannot be based on discriminatory or harassing intent without violating that rule.*" In other words, if an attorney declines or withdraws from representation for an allegedly discriminatory reason, the attorney violates Model Rule 8.4(g).

In short, contrary to the assertions of the Rule's proponents, the proposed Rule *will* apply to an attorney's client selection decisions and *will* prohibit attorneys from declining representation of particular clients if to do so could be considered discriminatory.

This is an alarming departure from the professional principles historically enshrined in Wisconsin's rules of professional conduct and its predecessors, which have, before now, always respected attorneys' freedom and professional autonomy when it comes to choosing who to represent and what cases to accept.

Although Wisconsin's Rules *have* placed restrictions on which clients attorneys may *not* represent (see, for example, Rule 1.7 which precludes attorneys from representing clients or cases in which the attorney has a conflict of interest, and Rule 1.16(a) which requires attorneys to decline or withdraw from representation when representation would compromise the interests of the

client), never before have the Rules required attorneys to *take* cases the attorney decides – for whatever reason – the attorney does not want to take, or to represent clients the attorney decides – for whatever reason – the attorney does not want to represent. (Although Rule 6.2 prohibits attorneys from seeking to avoid court appointed representation, that Rule does not apply to an attorney's day-to-day voluntary client selection decisions – and even in its peculiar context of court-appointed representation the Rule expressly allows attorneys to decline such appointments "for good cause" – including because the attorney finds the client or the client's cause repugnant.)

Indeed, up until now, the principle that attorneys were free to accept or decline clients or cases at will, for any or no reason, prevailed universally. See, for example, *Modern Legal Ethics*, Charles W. Wolfram, p. 573 (1986)("*a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.*"). The reasons underlying this historically longstanding respect for attorneys' professional autonomy in making client and case selection decisions are clear.

First, the Rules of Professional Conduct themselves respect an attorney's personal ethics and moral conscience. For example, the Preamble to Wisconsin's Rules provides that "*Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience*" (Preamble 7) and "*Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment . . .*" (Preamble 9).

If the Rules require a lawyer to accept a client or a case to which the attorney has a moral

objection, however, such would have the effect of forcing the attorney to violate his or her personal conscience, would interfere with the lawyer's interest in remaining an ethical person, and would prohibit lawyers from exercising their own moral judgment.

And second, the Rules impose upon attorneys a professional obligation to represent their clients zealously (Rule 1.3) and without personal conflicts (Rule 1.7(a)(2)). A lawyer's ability to do that, however, would be compromised should the lawyer have personal or moral objections to a client or a client's case. To force an attorney to accept a client or case the attorney does not want, and to then require the attorney to provide zealous representation to that client, is unfair to the attorney, because doing so places conflicting and unresolvable obligations upon the lawyer. But it will also harm clients because every client deserves an attorney who is not subject to or influenced by any interests which may, directly or indirectly, adversely affect the lawyer's ability to zealously, impartially, and devotedly represent the client's best interests.

We must always remember that a primary purpose of the Rules is to protect the public by ensuring that attorneys represent their clients competently and without personal interests that will adversely affect the attorney's ability to provide clients with undivided and zealous representation. It recognizes the principle that the client's best interest is never to have an attorney who – for any reason – cannot zealously represent them or who has a personal conflict of interest with the client.

The proposed Rule, however, will force an attorney to represent clients who the attorney cannot represent zealously or who, on account of the attorney's personal beliefs about the client or the case, the attorney will not be able to represent without a personal conflict of interest. In that respect, the proposed Rule will harm clients.

Indeed, the proposed Rule, if adopted, would introduce insidious deception into the attorney-client relationship because – in order to avoid violating the Rule – attorneys will be led

to conceal their personal animosities from clients, thereby saddling clients with attorneys who – if the client knew of the attorney's animosities – the client would not retain.

For these reasons, too, the proposed Rule should be rejected.

E. The Proposed Rule Conflicts with Other Professional Obligations and Rules of Professional Conduct.

Another significant problem with the proposed Rule is that it conflicts with other professional obligations and Rules of Professional Conduct. For example:

1. Rule 1.3. Zealous Representation. Attorneys have a professional duty to represent their clients zealously. Indeed, the U.S. Supreme Court has stated that lawyers have a fundamental duty to zealously represent their clients. *Evans v. Jeff D.*, 475 U.S. 717, 758 (1986). See also *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994)(stating that "a lawyer's first duty is zealously to represent his or her client"). So, this is a fundamental professional duty, independent of the Rules of Professional Conduct.

Rule 1.3 of Wisconsin's Rules also establishes such a duty. The Comment to Rule 1.3 (Diligence) states that "A lawyer must . . . act . . .with zeal in advocacy upon the client's behalf."

"Zeal" means "*a strong feeling of interest and enthusiasm that makes someone very eager or determined to do something.*" Merriam-Webster.com/dictionary/zeal. Synonyms are "passion" and "fervor."

But how would an attorney be able to *zealously* represent a client whose case runs counter to the attorney's deeply held religious, political, philosophical, or public policy beliefs?

Under the proposed Rule, the attorney may not be allowed to reject a case or client she might otherwise reject – due to the attorney's personal beliefs – but then must also represent that

client with passion and fervor, enthusiastically and in an eager and determined manner.

Is that humanly possible? We would submit that it is not. And we believe that is exactly why the Rules provide that, if a lawyer cannot do that, for whatever reason – even a discriminatory one – they must not take the case.

How is that conflict to be resolved?

2. The Proposed Rule Conflicts with Rule 1.7 (Conflicts of Interest). Rule 1.7 provides that: "*(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or* ***by a personal interest of the lawyer***" (our emphasis). And Restatement (Third) of the Law Governing Lawyers §125 (2000) clarifies that: "*A conflict under this Section need not be created by a financial interest. . .* ***Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy belief***" (our emphasis).

So – on the one hand the proposed Rule requires an attorney to accept clients and cases, despite the fact that such clients or cases might run counter to the attorney's deeply held religious, philosophical, political, or public policy beliefs, while at the same time Rule 1.7 provides that accepting a client or a case – when the client or case runs counter to such beliefs of the attorney – would violate Rule 1.7's Conflict of Interest prohibitions.

3. The Proposed Rule Conflicts with Rule 6.2 (Accepting Appointments) – Rule 6.2 provides that "*A lawyer shall not seek to avoid appointment by a tribunal to represent a person* ***except for good cause****: such as: . . . (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client*"

(our emphasis).

Although this Rule is technically applicable only to court appointments, it is important to what we are discussing here because it contains a principle that should be equally – if not more – applicable to an attorney's voluntary client-selection decisions. Namely, the Rule recognizes that a client or cause may be so repugnant to a lawyer that the lawyer-client relationship would be impaired or the lawyer's ability to represent the client be adversely affected.

Indeed, the Comment to Rule 6.2 sets forth the general principle that "*A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.*"

And yet, the proposed Rule would require an attorney to represent clients and cases the lawyer may find repugnant.

4. The Proposed Rule Conflicts with Rule 1.16 (Declining or Terminating Representation). Rule 1.16(a)(1) provides that: *(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the Iowa Rules of Professional Conduct or other law.* However, we have already seen that Rule 1.7 would prohibit an attorney from representing a client who – due to the lawyer's personal beliefs – the lawyer could not represent without a personal conflict of interest interfering with that representation; that Rule 1.3 would prohibit an attorney from representing a client if the attorney could not do so zealously; and that Rule 6.2 provides that a lawyer may decline court appointed representation if the attorney finds the client or the client's cause so repugnant as to interfere with the ability of the lawyer to provide un-conflicted representation. To represent clients in any of these situations would constitute a violation of the Rules of Professional Conduct. But the proposed Rule will require attorneys to accept clients and cases that – due to the attorney's personal beliefs about the client or the case –

the attorney would otherwise have to decline. So, the proposed Rule is in conflict with this Rule too.

In the event of an inevitable conflict, which Rule is going to prevail?

Indeed, the fact that the proposed Rule conflicts with other Rules of attorney conduct reveals a foundational problem with the proposed Rule – and that is that the proposed Rule is an attempt to impose upon the legal profession a non-discrimination construct that is, in its basic premises, inconsistent with who attorneys are and what they professionally do. It is an attempt to force a round peg into a square hole.

In considering the proposed Rule, we must remember that the non-discrimination template on which the Rule is based is taken from the context of public accommodation laws – non-discrimination laws that are imposed in the context of merchants and customers. But lawyers are not mere merchants, and a lawyer's clients are not mere customers. Unlike merchants and customers, attorneys have *fiduciary relationships* with their clients. *Berner Cheese Corp. v. Krug*, 752 N.W.2d 800, 810 (Wis. 2008)(holding that Wisconsin law has long recognized that attorneys owe a fiduciary duty to their clients).

Attorneys are made privy to the most confidential of their client's information and are bound to protect those confidentialities; they are bound to take no action that would harm their clients; and attorneys' relationships with their clients oftentimes last months or even years. And once an attorney is in an attorney-client relationship, the attorney oftentimes may not unilaterally sever that relationship. None of those things are true with respect to a merchant's relationship with a customer. So it is one thing to say a *merchant* may not pick and choose his *customers*. It is entirely another to say a *lawyer* may not pick and choose her *clients*.

No lawyer should be required to enter into what is, by definition, a fiduciary relationship with an unwanted client or on an unwanted case.

III. Conclusion

The proposed Rule is unconstitutional. It is unconstitutionally vague. It is unconstitutionally overbroad. And it constitutes an unconstitutional content-based speech restriction. It violates attorneys' Free Speech, Free Exercise, and Free Association rights.

In addition to being constitutionally infirm, the proposed Rule would conflict with other Rules of Professional Conduct and other professional obligations of attorneys. It would also authorize professional disciplinary authorities to discipline lawyers for non-commercial speech and conduct that neither prejudices the administration of justice nor renders attorneys unfit to practice law. It would create a strict liability speech code for lawyers. The proposed Rule would also subject attorneys to duplicative prosecutions, as well as inconsistent obligations and results. And it would harm clients.

The many infirmities of the proposed Rule are evidenced by the fact that, in the four and a half years since the ABA adopted Model Rule 8.4(g), only two states have adopted it. All other state supreme courts that have considered and acted upon the Rule have rejected it. So, should Wisconsin adopt the Rule, it would be embarking on a path that all states, but two, have – for good reasons – rejected.

For all these reasons, the proposal to amend Rule 8.4(i) of the Wisconsin Supreme Court Rules so as to conform to ABA Model Rule 8.4(g) should be rejected.

Respectfully submitted,

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"Comparison of State Anti-Discrimination Rules"

STATE	Adopted MR 8.4(g)?	Behavior Prohibited
Alabama	No	No rule regarding discrimination/harassment, AL. 8.4(g) "Engage in any othe conduct that adversely reflects on his fitness to practice law"
Alaska	No, but is considering adoption.	No rule regarding discrimination/harassment
Arizona	No	Bias or prejudice manifested by words or conduct in the course of representing a client
Arkansas	No	Discriminatory conduct committed by a lawyer while practicing law
California	No, but has amended their 8.4.1 to adopt similar language	Unlawfully harass or unlawfully discriminate; unlawfully retaliate; unlawfully refuse to hire
Colorado	No	Engaging in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person; engage in conduct that harms others; sexual harassment
Connecticut	Adopted rule 8.4(7) very similar	Engage in conduct that the lawyer knows or reasonbly should know is harassment or discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital status in conduct related to the practice of law
Delaware	No	Manifests bias or prejudice by words or conduct
District of Columbia	Under consideration by D.C. Bar	Engage in conduct at another person, with respect to the practice of law, that the lawyer knows or reasonably should know is harassment or discrimination on the basis of
Florida	No	Disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers
Georgia	No	No rule regarding discrimination/harassment
Hawaii	Adopted in part effective Jan. 2022	In a processional capacity, a lawyer shall note engage in sexual harassment
Idaho	Proposed adoption	Engage in discrimination or harassment…that the lawyer knows or reasonably should know is unlawful discrimination
Illinois	No, but considering since 2017	Violate a federal, state or local statute or ordinance that prohibits discrimination; manifests bias or prejudice by words or conduct

"Comparison of State Anti-Discrimination Rules"

STATE	Adopted MR 8.4(g)?	Behavior Prohibited
Indiana	No	Engages in conduct, in a professional capacity, manifesting bias or prejudice by words or conduct
Iowa	No,but amended version under consideration by Iowa Supreme Court	Engage in Conduct that the lawyer knows or reasonably shouwl know is harassment or discrimination
Kansas	No	No rule regarding discrimination/harassment
Kentucky	No	No rule regarding discrimination/harassment
Louisiana	No	No rule regarding discrimination/harassment
Maine	Yes, in most respects.	Engage in conduct or communication related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination
Maryland	No	Manifests bias or prejudice by words or prejudice, when acting in a professional capacity; sexual misconduct or sexual harassment
Massachusetts	No, but considering amending, in comment period	Engage in conduct manifesting bias or prejudice
Michigan	No	Treat with courtesy and respect all persons involved in the legal process; avoid treating such person discourteously or disrespectfully
Minnesota	No	Harass a person; commit a discriminatory act prohibited by federal, state, or local statute or ordinance
Mississippi	No	No rule regarding discrimination/harassment
Missouri	No	Manifests bias or prejudice by words or conduct; engage in harassment
Montana	No	No rule regarding discrimination/harassment
Nebraska	No	Engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel; manifests bias or prejudice by words or conduct
Nevada	No	No rule regarding discrimination/harassment
New Hampshire	No	Take any action that has the primary purpose to embarrass, harass or burden another person
New Jersey	No	Engage in conduct involving discrimination
New Mexico	Yes, in most respects.	Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination

"Comparison of State Anti-Discrimination Rules"

STATE	Adopted MR 8.4(g)?	Behavior Prohibited
New York	No, but under consideration by both the Administrative Board of the New York State Unified Court System as well as the New York Bar association	Unlawfully discriminate in the practice of law
North Carolina	No, but the State Bar Council is Considering adoption.	Prejudice or damage his or her client during the course of the professional relationship; threats, bullying, harassment and other conduct directed at anyone associated with judicial process
North Dakota	No	Engage in conduct that is prejudicial to the administration of justice, including to knowingly manifest bias or prejudice through words or conduct
Ohio	No	Engage in conduct involving discrimination prohibited by law
Oklahoma	No	No rule regarding discrimination/harassment
Oregon	No	Intimidate or harass a person
Pennsylvania	No	Manifest bias or prejudice or engage in harassment or discrimination
Rhode Island	No	Engage in conduct that is prejudicial to the administration of justice; manifests bias or prejudice by words or conduct
South Carolina	No, but proposed rule Amendment 8.4(h)	Manifests bias or prejudice by words or conduct
South Dakota	No	No rule regarding discrimination/harassment
Tennessee	No	Manifests bias or prejudice by words or conduct
Texas	No	Manifests bias or prejudice by words or conduct
Utah	No, but considering amending	Manifests bias or prejudice by words or conduct
Vermont	Yes	Engage in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination
Virginia	No	No rule regarding discrimination/harassment
Washington	No	Commit a discriminatory act prohibited by state law; engage in conduct that a reasonable person would interpret as manifesting prejudice or bias
West Virginia	No	Manifests bias or prejudice by words or conduct
Wisconsin	No	Harassment of a person
Wyoming	No	Manifests bias or prejudice by words or conduct

"Comparison of State Anti-Discrimination Rules"

STATE	Mental State	In Connection with Representation of Client
Alabama	N/A	N/A
Alaska	N/A	N/A
Arizona	Knowingly	Included
Arkansas	None - strict liability	Implicitly included
California	Knowingly	Included
Colorado	"Exhibits or is intended to appeal to or engender bias"	Included
Connecticut	Knowingly	Included
Delaware	Knowingly	Included
District of Columbia	Knowingly	Not mentioned
Florida	"Knowingly or through callous indifference"	Implicitly included
Georgia	N/A	N/A
Hawaii	Reasonable lawyer would know are offensive	Yes
Idaho	Knowingly	Included
Illinois	"Knew the act was prohibited by statute or ordinance"	Included
Indiana	None - strict liability	Implicitly included
Iowa	Knowingly	Included
Kansas	N/A	N/A
Kentucky	N/A	N/A
Louisiana	N/A	N/A
Maine	Knows or should know	Implicitly included
Maryland	Knowingly	Implicitly included
Massachusetts	None - strict liability	Not mentioned
Michigan	None - strict liability	Included
Minnesota	"Knew that the act was prohibited by statute or ordinance"	Implicitly included
Mississippi	N/A	N/A

"Comparison of State Anti-Discrimination Rules"

STATE	Mental State	In Connection with Representation of Client
Missouri	Knows or should know	Included
Montana	N/A	N/A
Nebraska	Knowingly	Included
Nevada	N/A	N/A
New Hampshire	"Knows or it is obvious that the action has the primary purpose to"	Included
New Jersey	Intended or likely to cause harm	Included
New Mexico	Knows or should know	Included
New York	None - strict liability	Implicitly included
North Carolina	Intentionally	Included
North Dakota	Knowingly	Included
Ohio	None - strict liability	Implicitly included
Oklahoma	N/A	N/A
Oregon	Knowingly	Included
Pennsylvania	Knowingly	Implicitly included
Rhode Island	Knowingly	Included
South Carolina	Knowingly	Included
South Dakota	N/A	N/A
Tennessee	Knowingly	Included
Texas	Willfully	Implicitly included
Utah	Knowingly	Included
Vermont	Knows or should know	Implicitly included
Virginia	N/A	N/A
Washington	Knowingly; reasonable person	Included
West Virginia	Knowingly	Included
Wisconsin	None - strict liability	Implicitly included
Wyoming	Knowingly	Included

"Comparison of State Anti-Discrimination Rules"

STATE	In Connection with Any Professional Activity	Protected Category - Sex
Alabama	N/A	N/A
Alaska	N/A	N/A
Arizona	Not included	Yes
Arkansas	"Performing duties in connection with the practice of law"	Yes
California	"In relation to a law firm's operations"	Yes
Colorado	Included	No
Connecticut	Included	Yes
Delaware	Included	Yes
District of Columbia	Included	Yes
Florida	"In connection with the practice of law"	No
Georgia	N/A	N/A
Hawaii	Yes	Yes
Idaho	In representing a client or operating or managing a law practice or in the course and scope of employment in a law practice	Yes
Illinois	"In connection with the lawyer's professional activities"	Yes
Indiana	"In a professional capacity"	yes
Iowa	"Practice of law"	Yes
Kansas	N/A	N/A
Kentucky	N/A	N/A
Louisiana	N/A	N/A
Maine	"Practice of law"	Yes
Maryland	"In a professional capacity"	Yes
Massachusetts	"In appearing in a professional capacity before a tribunal"	Yes
Michigan	"Serving as an adjudicative officer"	No
Minnesota	"In connection with a lawyer's professional activities"	Yes
Mississippi	N/A	N/A

"Comparison of State Anti-Discrimination Rules"

STATE	In Connection with Any Professional Activity	Protected Category - Sex
Missouri	Not included	Yes
Montana	N/A	N/A
Nebraska	Included	Yes
Nevada	N/A	N/A
New Hampshire	Included	Yes
New Jersey	Included	Yes
New Mexico	Included	Yes
New York	"Practice of law"	Yes
North Carolina	"Anyone associated with the judicial process"	No
North Dakota	"Against parties, witnesses, counsel, or others"	Yes
Ohio	Included	No
Oklahoma	N/A	N/A
Oregon	Not included	Yes
Pennsylvania	"Practice of law"	Yes
Rhode Island	Not included	No
South Carolina	Not included	Yes
South Dakota	N/A	N/A
Tennessee	Not included	Yes
Texas	"In connection with an adjudicatory proceeding"	Yes
Utah	Not included	Yes
Vermont	"Practice of law"	Yes
Virginia	N/A	N/A
Washington	"In connection with the lawyer's professional activities"	Yes
West Virginia	Not included	Yes
Wisconsin	"Professional activities"	Yes
Wyoming	Not included	Yes

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Race	Protected Category - Age
Alabama	N/A	N/A
Alaska	N/A	N/A
Arizona	Yess	Yes
Arkansas	Yes	No
California	Yes	Yes
Colorado	Yes	Yes
Connecticut	Yes	Yes
Delaware	Yes	Yes
District of Columbia	Yes	Yes
Florida	Yes	Yes
Georgia	N/A	N/A
Hawaii	No	No
Idaho	Yes	Yes
Illinois	Yes	Yes
Indiana	Yes	Yes
Iowa	Yes	Yes
Kansas	N/A	N/A
Kentucky	N/A	N/A
Louisiana	N/A	N/A
Maine	Yes	Yes
Maryland	Yes	Yes
Massachusetts	Yes	Yes
Michigan	Yes	No
Minnesota	Yes	Yes
Mississippi	N/A	N/A

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Race	Protected Category - Age
Missouri	Yes	Yes
Montana	N/A	N/A
Nebraska	Yes	Yes
Nevada	N/A	N/A
New Hampshire	Yes	Yes
New Jersey	Yes	Yes
New Mexico	Yes	Yes
New York	Yes	Yes
North Carolina	No	No
North Dakota	Yes	Yes
Ohio	Yes	Yes
Oklahoma	N/A	N/A
Oregon	Yes	Yes
Pennsylvania	Yes	Yes
Rhode Island	Yes	Yes
South Carolina	Yes	Yes
South Dakota	N/A	N/A
Tennessee	Yes	Yes
Texas	Yes	Yes
Utah	Yes	Yes
Vermont	Yes	Yes
Virginia	N/A	N/A
Washington	Yes	Yes
West Virginia	Yes	Yes
Wisconsin	Yes	Yes
Wyoming	Yes	Yes

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Religion	Protected Category - National Origin
Alabama	N/A	N/A
Alaska	N/A	N/A
Arizona	Yes	Yes
Arkansas	Yes	Yes
California	Yes	Yes
Colorado	Yes	Yes
Connecticut	Yes	Yes
Delaware	Yes	Yes
District of Columbia	Yes	Yes
Florida	Yes	Yes
Georgia	N/A	N/A
Hawaii	No	No
Idaho	Yes	Yes
Illinois	Yes	Yes
Indiana	Yes	Yes
Iowa	Yes	Yes
Kansas	N/A	N/A
Kentucky	N/A	N/A
Louisiana	N/A	N/A
Maine	Yes	Yes
Maryland	Yes	Yes
Massachusetts	Yes	Yes
Michigan	No	No
Minnesota	Yes	Yes
Mississippi	N/A	N/A

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Religion	Protected Category - National Origin
Missouri	Yes	Yes
Montana	N/A	N/A
Nebraska	Yes	Yes
Nevada	N/A	N/A
New Hampshire	Yes	Yes
New Jersey	Yes	Yes
New Mexico	Yes	Yes
New York	No	Yes
North Carolina	No	No
North Dakota	Yes	Yes
Ohio	Yes	Yes
Oklahoma	N/A	N/A
Oregon	Yes	Yes
Pennsylvania	Yes	Yes
Rhode Island	Yes	Yes
South Carolina	Yes	Yes
South Dakota	N/A	N/A
Tennessee	Yes	Yes
Texas	Yes	Yes
Utah	Yes	Yes
Vermont	Yes	Yes
Virginia	N/A	N/A
Washington	Yes	Yes
West Virginia	Yes	Yes
Wisconsin	Yes	Yes
Wyoming	Yes	Yes

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Disability	Protected Category Marital Status
Alabama	N/A	N/A
Alaska	N/A	N/A
Arizona	Yes	No
Arkansas	No	No
California	Yes	Yes
Colorado	Yes	No
Connecticut	Yes	Yes
Delaware	Yes	No
District of Columbia	Yes	Yes
Florida	Yes	Yes
Georgia	N/A	N/A
Hawaii	No	No
Idaho	Yes	Yes
Illinois	Yes	No
Indiana	Yes	No
Iowa	Yes	Yes
Kansas	N/A	N/A
Kentucky	N/A	N/A
Louisiana	N/A	N/A
Maine	Yes	No
Maryland	Yes	No
Massachusetts	Yes	No
Michigan	No	No
Minnesota	Yes	Yes
Mississippi	N/A	N/A

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Disability	Protected Category Marital Status
Missouri	Yes	Yes
Montana	N/A	N/A
Nebraska	Yes	No
Nevada	N/A	N/A
New Hampshire	Yes	Yes
New Jersey	Yes	Yes
New Mexico	Yes	Yes
New York	Yes	Yes
North Carolina	No	No
North Dakota	Yes	No
Ohio	Yes	Yes
Oklahoma	N/A	N/A
Oregon	Yes	Yes
Pennsylvania	Yes	Yes
Rhode Island	Yes	No
South Carolina	Yes	No
South Dakota	N/A	N/A
Tennessee	Yes	No
Texas	Yes	No
Utah	Yes	No
Vermont	Yes	Yes
Virginia	N/A	N/A
Washington	Yes	Yes
West Virginia	Yes	No
Wisconsin	Yes	Yes
Wyoming	Yes	No

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Creed	Protected Category - Sexual Preference
Alabama	N/A	N/A
Alaska	N/A	N/A
Arizona	No	Yes
Arkansas	No	No
California	Yes	Yes
Colorado	No	Yes
Connecticut	Yes	Yes
Delaware	No	Yes
District of Columbia	Yes	Yes
Florida	No	Yes
Georgia	N/A	N/A
Hawaii	No	Unclear
Idaho	No	Yes
Illinois	No	Yes
Indiana	No	Yes
Iowa	No	Yes
Kansas	N/A	N/A
Kentucky	N/A	N/A
Louisiana	N/A	N/A
Maine	No	Yes
Maryland	No	Yes
Massachusetts	No	Yes
Michigan	No	No
Minnesota	Yes	Yes
Mississippi	N/A	N/A

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Creed	Protected Category - Sexual Preference
Missouri	No	Yes
Montana	N/A	N/A
Nebraska	No	Yes
Nevada	N/A	N/A
New Hampshire	No	Yes
New Jersey	No	Yes
New Mexico	No	Yes
New York	Yes	Yes
North Carolina	No	No
North Dakota	No	Yes
Ohio	No	Yes
Oklahoma	N/A	N/A
Oregon	No	Yes
Pennsylvania	No	Yes
Rhode Island	No	Yes
South Carolina	No	Yes
South Dakota	N/A	N/A
Tennessee	No	Yes
Texas	No	Yes
Utah	No	Yes
Vermont	No	Yes
Virginia	N/A	N/A
Washington	Yes	Yes
West Virginia	No	Yes
Wisconsin	Yes	Yes
Wyoming	No	Yes

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Ethnicity	Protected Category - Gender Identity
Alabama	N/A	N/A
Alaska	N/A	N/A
Arizona	No	No
Arkansas	No	No
California	No	Yes
Colorado	No	Yes
Connecticut	Yes	Yes
Delaware	No	No
District of Columbia	Yes	Yes
Florida	Yes	Yes
Georgia	N/A	N/A
Hawaii	No	Unclear
Idaho	Yes	Yes
Illinois	No	No
Indiana	No	Yes
Iowa	Yes	Yes
Kansas	N/A	N/A
Kentucky	N/A	N/A
Louisiana	N/A	N/A
Maine	Yes	Yes
Maryland	No	No
Massachusetts	No	No
Michigan	No	Yes
Minnesota	Yes	No
Mississippi	N/A	N/A

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Ethnicity	Protected Category - Gender Identity
Missouri	Yes	Yes
Montana	N/A	N/A
Nebraska	No	Yes
Nevada	N/A	N/A
New Hampshire	Yes	Yes
New Jersey	No	No
New Mexico	Yes	Yes
New York	No	Yes
North Carolina	No	No
North Dakota	No	No
Ohio	No	Yes
Oklahoma	N/A	N/A
Oregon	No	Yes
Pennsylvania	Yes	Yes
Rhode Island	No	Yes
South Carolina	No	No
South Dakota	N/A	N/A
Tennessee	No	No
Texas	No	No
Utah	No	No
Vermont	Yes	Yes
Virginia	N/A	N/A
Washington	No	No
West Virginia	No	No
Wisconsin	No	No
Wyoming	No	No

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Socioeconomic Status	Exceptions
Alabama	N/A	N/A
Alaska	N/A	N/A
Arizona	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis
Arkansas	No	Legitimate advocacy; peremptory challenges on a discriminatory basis; representing a client accused of committing discriminatory conduct
California	Yes	Providing advice and engaging in advocacy as otherwise required or permitted by these rules; limiting lawyer's practice to members of underserved populations
Colorado	Yes	None
Connecticut	Yes	Legitimate advocacy
Delaware	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis
District of Columbia	Yes	None
Florida	Yes	None
Georgia	N/A	N/A
Hawaii	no	Advising a client,
Idaho	Yes	Accept, decline or withdraw from a representation otherwise permitted
Illinois	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis
Indiana	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis
Iowa	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis
Kansas	N/A	N/A
Kentucky	N/A	N/A
Louisiana	N/A	N/A
Maine	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis
Maryland	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis
Massachusetts	No	Legitimate advocacy
Michigan	No	Lawyer's right to speak and write bluntly, where appropriate

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Socioeconomic Status	Exceptions
Minnesota	Yes	Lawyer reasonably believed that his or her conduct was protected under state or federal constitution or that lawyer was acting in capacity for which the law provides exemption from civil liability
Mississippi	N/A	N/A
Missouri	No	Legitimate advocacy; the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 4-1.16
Montana	N/A	N/A
Nebraska	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis
Nevada	N/A	N/A
New Hampshire	No	Ability of lawyer to accept, decline, or withdraw from representation consistent with other Rules; engaging in conduct or speech or from maintaining assocations that are constitutionally protected
New Jersey	Yes	Employment discrimination unless resulting in a final agency or judicial determination
New Mexico	No	Legitimate advice or advocacy; engaging in conduct undertaken to promote diversity and inclusion; limiting the scope or subject matter of the lawyer's practice or limiting practice to members of underserved populations
New York	No	None
North Carolina	No	None
North Dakota	No	Legitimate advocacy; peremptory challenges on a discriminatory basis
Ohio	No	Lawyer's confidential communication to a client; legitimate advocacy where protected category is relevant to proceeding
Oklahoma	N/A	N/A
Oregon	No	Legitimate advocacy
Pennsylvania	Yes	Ability of a lawyer to accept, decline, or withdraw from representation in accordance with Rule 1.16; advice or advocacy consistent with these rules
Rhode Island	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis

"Comparison of State Anti-Discrimination Rules"

STATE	Protected Category - Socioeconomic Status	Exceptions
South Carolina	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis
South Dakota	N/A	N/A
Tennessee	Yes	Legitimate advocacy
Texas	No	Lawyer's decision whether to represent a particular person; jury selection; communications protected as confidential under these Rules; advocacy in connection with adjudicatory proceeding
Utah	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis
Vermont	Yes	Ability of lawyer to accept, decline, or withdraw from representation; legitimate advice or advocacy consistent with rules
Virginia	N/A	N/A
Washington	No	Ability of a lawyer to accept, decline, or withdraw from representation of a client; legitimate advocacy; peremptory challenges on a discriminatory basis
West Virginia	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis
Wisconsin	No	Legitimate advocacy; peremptory challenges on a discriminatory basis
Wyoming	Yes	Legitimate advocacy; peremptory challenges on a discriminatory basis