



CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

February 3, 2017

Ms. Julia Frankston-Morris, Esq.
Office of the Secretary
The Disciplinary Board of the
Supreme Court of Pennsylvania
601 Commonwealth Avenue
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By Facsimile (717-231-3382) and email (Dboard.comments@pacourts.us)

Re: Comments of the Christian Legal Society on Proposed Changes to Pennsylvania Rules of Professional Conduct, including Model Rule 8.4(g)

Dear Ms. Frankston-Morris:

Founded in 1961, the Christian Legal Society (“CLS”) is a not-for-profit corporation that is an interdenominational association of Christian attorneys, law students, and law professors, networking thousands of lawyers and law students in all fifty states, including Pennsylvania. Among its many activities, CLS engages in two nationwide public ministries through its Christian Legal Aid ministry and its Center for Law & Religious Freedom.

Demonstrating its commitment to helping economically disadvantaged persons, the goal of CLS’s Christian Legal Aid program is to meet urgent legal needs of the most vulnerable members of our society. CLS provides resources and training to help sustain approximately sixty local legal aid clinics nationwide. This network increases access to legal aid services for the poor, the marginalized, and victims of injustice. Based on its belief that the Bible commands Christians to plead the cause of the poor and needy, CLS encourages and equips individual attorneys to volunteer their time and resources to help those in need in their communities.

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

I. The Rule Proposed by the Disciplinary Board on December 3, 2016, Strikes the Appropriate Balance and Should be Adopted.

The Christian Legal Society urges adoption of the Proposed Rule [hereinafter “Pennsylvania Proposed Rule 8.4(g)”] set forth in Annex A of the “Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct,” 46 Pa.B. 7519 (Dec. 3, 2016) [hereinafter “Memorandum” or “Mem.”]. The Pennsylvania Proposed Rule 8.4(g) is written in a thoughtful and temperate manner that fairly balances the interests of both attorneys and the public. It reads as follows:

“It is professional misconduct for a lawyer to:

“(g) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. If there is an alternative forum available to bring a complaint, no charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.”

A. Pennsylvania Proposed Rule 8.4(g) has noteworthy positive strengths.

The memorandum accompanying the Pennsylvania Proposed Rule 8.4(g) correctly identifies two immediate benefits it offers compared to the defective ABA Model Rule 8.4(g). First, “the requirement of a judicial or administrative finding of discriminatory conduct . . . will eliminate the potential for Pennsylvania’s lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers.” Mem. at 2. Second, as the Memorandum concludes “after careful review and consideration , , , the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities.” *Id.*

California bar officials recently voiced similar concerns when considering whether to modify their disciplinary rule to something more akin to the ABA Rule 8.4(g). California’s Rule 2-400 is substantially similar to the Pennsylvania Proposed Rule 8.4(g). Both require that a

separate judicial or administrative tribunal have found that a lawyer committed unlawful discrimination before disciplinary charges can be brought. According to Justice Lee Smalley Edmon, the presiding justice of the Second District, Division Three of the California Courts of Appeals and the Chair of the State Bar's Second Commission for the revision of the Rules of Professional Conduct, "[t]he proposed elimination of current Rule 2-400(C)'s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings."¹ For that reason, she explained, an alternative was being offered to leave in place Rule 2-400(C)'s requirement that an attorney cannot be disciplined for unlawful discrimination unless 1) a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law and 2) any appeal is final and leaves the finding of unlawful discrimination standing.

Similarly, an official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court's adjudicatory process and the state civil courts' adjudicatory processes.² In the words of the State Bar Court official, "the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings."³ First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different because "State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases."⁴ For example, any relevant evidence must be admitted, and hearsay evidence may be used. Third, "[i]n disciplinary proceedings, attorneys are not entitled to a jury trial."⁵

The California Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement, as follows:

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

¹Justice Lee Smalley Edmon, "Wanted: Input on Proposed Changes to the Rules of Professional Conduct," California Bar Journal, August 2016, <http://calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx>.

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

³ *Id.*

⁴ *Id.*

⁵ *Id.*

otherwise unrelated civil disputes between lawyers and former clients.⁶

Similar legitimate concerns weigh heavily in favor of adoption of Pennsylvania Proposed Rule 8.4(g) instead of the ABA's Model Rule 8.4(g). Already tested for a number of years in several large states, a rule like Pennsylvania Proposed Rule 8.4(g) serves well both the public and the legal profession. A rule that allows an attorney to be disciplined for unlawful discrimination, but only after a judicial or administrative non-bar tribunal finds that the attorney committed unlawful discrimination, protects the public while simultaneously allowing individual attorneys to practice law free from the fear of false accusations of discrimination that would threaten their license to practice their livelihood. The threat of losing one's license to practice law is a heavy penalty and demands a stringent process, one in which the standards for enforcement are rigorous and respectful of the attorneys' rights as well as the rights of others. A rule like Pennsylvania Proposed Rule 8.4(g) provides a carefully crafted balance between the need to prevent unlawful discrimination and the need to respect attorneys' constitutional rights.

Importantly, as the Report notes, "a lawyer can still be disciplined for certain kinds of discriminatory or harassing conduct based on violation of other rules of professional conduct," quite apart from Pennsylvania's Proposed Rule. Mem. at 2. *See, e.g.*, RPC 4.4(a) (prohibiting means intended only to "embarrass, delay or burden a third person"); RPC 8.4(d) (prohibition on "a lawyer engaging in conduct that is prejudicial to the administration of justice.").

B. Two amendments would improve Pennsylvania Proposed Rule 8.4(g).

Finally, CLS would suggest that two amendments would improve Pennsylvania Proposed Rule 8.4(g) and provide additional protection for lawyers' First Amendment rights. CLS proposes that two sentences be added either to the black-letter rule or as accompanying comments:

1. CLS requests that the following sentence be added to Pennsylvania Proposed Rule 8.4(g): "This paragraph does not apply to speech or conduct undertaken by a lawyer because of sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment or applicable federal or state laws."

2. CLS requests that the following sentence be added to Pennsylvania Proposed Rule 8.4(g): "This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation."

⁶ *Id.* at 13.

II. The ABA Proposed Rule 8.4(g) should not be adopted by the Supreme Court of Pennsylvania Because Its Exceedingly Expansive Scope Threatens Attorneys' First Amendment Rights.

In August 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, Model Rule 8.4(g), making it professional misconduct for a lawyer to knowingly engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.⁷ Unfortunately, in adopting the new model rule, the ABA largely ignored nearly 500 comment letters,⁸ most opposed to the rule change. The ABA's own Standing Committee on Professional Discipline filed a comment letter⁹ questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).

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

Because no state has adopted ABA Model Rule 8.4(g), the proposed rule has no track record whatsoever. There is no empirical evidence to demonstrate a need in Pennsylvania for the adoption of ABA Model Rule 8.4(g). Nor does the proposed rule solve a problem that is not already adequately addressed by application of Pennsylvania's current rules of professional conduct, or by Pennsylvania Proposed Rule 8.4(g) that would subject attorneys to discipline for unlawful discrimination, or by current Rule 8.4(d) that subjects attorneys to discipline for conduct that prejudices the administration of justice.

⁷ The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

⁸ 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.

⁹ Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

The ABA claims that twenty-four states and the District of Columbia have adopted black-letter rules dealing with “bias” issues.¹⁰ But all state black-letter rules are narrower in significant ways than ABA Model Rule 8.4(g)’s expansive scope. Examples of the differences between state black-letter rules and ABA Model Rule 8.4(g)’s expansive scope include the following:

- Many states’ black-letter rules prohibit *unlawful discrimination* and require that another tribunal find that an attorney has engaged in unlawful discrimination before disciplinary charges can be brought;
- Many states’ rules apply to “conduct in the course of representing a client,” in contrast to Model Rule 8.4(g)’s expansive scope of “conduct related to the practice of law;”
- Many states’ black-letter rules require, that misconduct be prejudicial to the administration of justice, unlike Model Rule 8.4(g).

As previously noted, rules like Pennsylvania Proposed Rule 8.4(g) have a track record of success in some large states. ABA Model Rule 8.4(g) has no track record because it has not yet been adopted in any state.

A. ABA Model Rule 8.4(g) operates as a speech code for attorneys.

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

Two renowned constitutional scholars have written about their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys’ freedom of speech. Professor Ronald Rotunda has written a treatise on American constitutional law,¹¹ as well as the ABA’s treatise on

¹⁰ Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf. Twelve states have adopted a comment, but not a black-letter rule, while fourteen states have neither adopted a rule nor a comment addressing bias.

¹¹ See, e.g., AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME I – INSTITUTIONAL POWERS (West Academic Publishing, St. Paul, MN. 2016); AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME II – LIBERTIES

legal ethics.¹² He demonstrated the problem ABA Model Rule 8.4(g) poses for lawyers' speech in a *Wall Street Journal* article entitled "The ABA Overrules the First Amendment."¹³ He explained that:

In the case of rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.

Professor Rotunda also recently published an extensive critique of Model Rule 8.4(g), entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought,"¹⁴ which is attached as Appendix 1 to this letter. His analysis is essential to understanding the threat that the new rule poses to attorneys' freedom of speech.

Influential First Amendment scholar and editor of *The Washington Post's* daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has similarly described the new rule as a speech code for lawyers, explaining:¹⁵

Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

(West Academic Publishing, St. Paul, MN. 2016); Principles of Constitutional Law (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).

¹² *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016).

¹³ 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>.

¹⁴ 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>.

¹⁵ 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.

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."

These significant red flags raised by leading constitutional scholars should not be ignored.¹⁶ The proposed rule would create a multitude of potential problems for attorneys who serve on nonprofit boards, speak on panels, teach at law schools, or otherwise engage in public discussions regarding current political, social, and religious questions.

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

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

Note that ABA Model Rule 8.4(g) greatly expands upon its predecessor Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 through July 2016. First, ABA Model Rule 8.4(g) has an accompanying comment that makes clear that "conduct" encompasses "speech," when it states that "discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others." (Emphasis supplied.) Second, ABA Model Rule 8.4(g) is much broader in scope than either its predecessor Comment [3], which applied only to conduct "in the course of representing a client."¹⁷ Instead, the ABA's Model Rule 8.4(g) applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." As will be discussed below, this is a breathtaking expansion of the scope of former Comment [3]. Third, the predecessor Comment [3] speaks in terms of "actions

¹⁶ Echoing these scholars' concerns, the Texas Attorney General issued an opinion on December 20, 2016, that concluded: "[I]f 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." Tex. A.G. Op. KP-0123 (Dec. 20, 2016), <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>

¹⁷ Comment [3] to Model Rule 8.4(d) was in place from 1998-2016 and is found in the attached Appendix 2.

when prejudicial to the administration of justice.” By deleting that qualifying phrase, ABA Model Rule 8.4(g) also greatly expands the reach of the rule into attorneys’ lives.

Indeed, the substantive question becomes, what conduct does Rule 8.4(g) *not* reach? Virtually everything a lawyer does is “conduct related to the practice of law.” Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Most likely, the rule includes all “business or social activities in connection with the practice of law” because there is no real way to delineate between the two. Much of a lawyer’s social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

Activities that arguably fall within ABA Model Rule 8.4(g)’s scope include:

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

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

Many lawyers sit on the boards of their religious congregations, religious schools and colleges, and other religious non-profit ministries. These ministries provide incalculable good to

people in their local communities, as well as nationally and internationally. But they also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not be disciplined for volunteer legal work she performs for her church or her alma mater.

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

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

Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues. Of course, lawyers are asked to speak *because they are lawyers*. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Writing -- "Verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics, uses controversial words to make a point, or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar because that person perceives the speech as "manifest[ing] bias or prejudice towards others"? If so, public discourse and civil society will suffer from the ideological paralysis ABA Model Rule 8.4(g) will impose on lawyers, who are often at the forefront of new movements and unpopular causes.

Speaking -- It would seem that all public speaking by lawyers on legal issues falls within ABA Model Rule 8.4(g)'s prohibition. But even if some public speaking were to fall outside the

parameters of “conduct related to the practice of law,” how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of “sexual orientation” or “gender identity” as a protected category in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in ABA Model Rule 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

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

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

ABA Model Rule 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibits all California state judges from participating in Boy Scouts because of the organization’s teaching regarding sexual conduct.¹⁸

Would ABA Model Rule 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage? These are serious concerns that mitigate against adoption of ABA Model Rule 8.4(g).

ABA Model Rule 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or numerous other religious beliefs implicated by the proposed rule’s strictures. For example, according to some government officials, the right of a religious group to choose its

¹⁸ Calif. Sup. Ct., Media Release, “Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate,” Jan. 23, 2015, *available at* http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

leaders according to its religious beliefs is “religious discrimination.” But it is simple common sense and basic religious liberty that a religious organization’s leaders should agree with its religious beliefs. As the United States Supreme Court explained in a recent unanimous opinion:

The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 710 (2012).

B. ABA Model Rule 8.4(g) would institutionalize viewpoint discrimination against many lawyers’ public speech on current political, religious, and social issues.

As seen in its Comment [4], Proposed Rule 8.4(g) explicitly protects some viewpoints over others by allowing lawyers to “engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.” Because “conduct” includes “verbal conduct,” the proposed rule would impermissibly favor speech that “promote[s] diversity and inclusion” over speech that does not.

But that is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is “an egregious form of content discrimination,” and that “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). ABA Model Rule 8.4(g) explicitly promotes one viewpoint over others.

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

Because enforcement of ABA Model Rule 8.4(g) gives governmental actors unbridled discretion to determine which speech is permissible and which is impermissible, which speech “promote[s] diversity and inclusion” and which does not, the rule clearly countenances

viewpoint discrimination based on governmental actors' subjective biases. Courts have recognized that giving any government official such unbridled discretion to suppress citizens' free speech is unconstitutional. See, e.g., *Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

C. A troubling gap exists between protected and unprotected speech under ABA Model Rule 8.4(g).

ABA Model Rule 8.4(g) cursorily states that it “does not preclude legitimate advice or advocacy *consistent with these rules*.” But the qualifying phrase “consistent with these rules” makes ABA Model Rule 8.4(g) utterly circular. Like the proverbial dog chasing its tail, Rule 8.4(g) protects “legitimate advice or advocacy” only if it is “consistent with” ABA Model Rule 8.4(g). That is, speech is permitted by Rule 8.4(g) if it is permitted by Rule 8.4(g).

This circularity itself compounds the threat ABA Model Rule 8.4(g) poses to attorneys' freedom of speech. The epitome of an unconstitutionally vague rule, ABA Model Rule 8.4 violates the Fourteenth Amendment as well as the First Amendment. Again, who decides what speech is permissible? By what standards? It is not good for the profession or for a robust civil society for lawyers to be potentially subject to disciplinary action every time they speak or write on a topic that may cause someone to disagree and file a disciplinary complaint to silence the attorney.

Conclusion

Because ABA Model Rule 8.4(g) would have a chilling effect on attorneys' First Amendment rights, it should not be adopted. Attorneys must remain free to engage in speech, religious exercise, assembly, and expressive association in their workplaces and the public square. Because no state has adopted ABA Model Rule 8.4(g), the proposed rule has no track record. Nor is there any empirical evidence showing a need to adopt the excessively broad ABA Model Rule 8.4(g).

For all of these reasons, we urge that ABA Model Rule 8.4(g) not be adopted and that the Pennsylvania Proposed Rule 8.4(g) be adopted instead. We ask that consideration be given to the two amendments we suggest.

Thank you for your attention to these comments. We deeply appreciate the careful deliberation that the Disciplinary Board and the Supreme Court of Pennsylvania are giving to a proposed rule that will have a daily impact on, and far-reaching consequences for, the livelihoods of all Pennsylvania attorneys.

Letter to Ms. Julia Frankston-Morris, Esq.
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Respectfully submitted,

/s/ David Nammo

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