



CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

March 22, 2017

The Honorable Donald W. Beatty, Chief Justice
The Honorable John W. Kittredge, Associate Justice
The Honorable Kaye G. Hearn, Associate Justice
The Honorable John Cannon Few, Associate Justice
The Honorable George C. James, Jr., Associate Justice
Supreme Court
1231 Gervais Street
Columbia, SC 29201

Via email: rule8.4comments@sccourts.org

Re: Comments of Christian Legal Society Opposing Adoption of ABA Model Rule 8.4(g)

Dear Chief Justice Beatty, Justice Kittredge, Justice Hearn, Justice Few, and Justice James:

Founded in 1961, Christian Legal Society (“CLS”) is an interdenominational association of Christian attorneys, law students, and law professors that networks thousands of lawyers and law students in all fifty states, including South Carolina. 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. 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. CLS provides resources and training to assist approximately sixty local legal aid clinics nationwide. This network increases access to legal aid services for the poor and marginalized.

Demonstrating its commitment to pluralism and the First Amendment, CLS works 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, 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) (the Act protects religious student groups’ meetings); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (the Act protects LGBT student groups’ meetings). For forty years, CLS has protected free speech, religious exercise, assembly, and expressive association rights for all citizens.

I. This Court Should Not Adopt ABA Model Rule 8.4(g) But Instead Should Keep the Current Comment [3] that Accompanies Rule 8.4(e), Rule 407, SCACR.

Two months ago, the House of Delegates of the South Carolina Bar deliberated whether to recommend that this Court amend its current Rules of Professional Conduct to add the ABA's new Model Rule 8.4(g), along with its three accompanying Comments [3], [4], and [5]. But the House of Delegates "ultimately adopted a proposal 'to not approve Rule 8.4(g) as written and to have a public hearing and public comment.'" Request for Written Comments, at 1.

In its earlier recommendation to the House, the Professional Responsibility Committee adopted the position that the language of the new ABA Model Rule 8.4(g) "is overbroad and that South Carolina's Civility Oath and current Rule 8.4 with its comments are sufficient to address the issues identified by the proponents of the Model Rule." As a result, "[t]he Committee's position is that it would be an error to attempt to correct something that is working effectively. South Carolina's Rule 8.4 in connection with our civility oath is the most effective method of protecting the administration of justice without restricting unnecessarily the First Amendment rights of attorneys." The Professional Responsibility Committee, therefore, "requests that the SC Bar adopt a position opposing the adoption of proposed Rule 8.4(g) or, in the alternative, requests the Court hold a public comment period on the proposed rule and consider possible amendments."

For the reasons detailed below, CLS agrees with the recommendations of the House of Delegates and the Professional Responsibility Committee that South Carolina not become the first state to adopt the new, overly broad ABA Model Rule 8.4(g). As the Professional Responsibility Committee explained, current Comment [3] that accompanies Rule 8.4(e), Rule 407, SCACR, already strikes the appropriate balance between the public interest and South Carolina attorneys' First Amendment rights. Its prohibition is further bolstered by the Civility Oath that every attorney takes in order to be admitted to the South Carolina Bar.

In adopting its current Comment [3], this Court adopted verbatim the Comment [3] that accompanied the ABA Model Rule 8.4(d) from 1998 to August 2016. This Court's current Comment [3] prohibits bias and prejudice that are prejudicial to the administration of justice by an attorney in the course of representing a client. Specifically, current Comment [3] which accompanies Rule 8.4(e), Rule 407, SCACR, reads as follows:

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

challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

To be admitted to the South Carolina Bar, every attorney must take the Civility Oath and swear or affirm that “[t]o opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court but also in all written and oral communications.” Rule 402, (k)(3), SCACR. The Oath requires attorneys to show “respect and courtesy due to courts of justice, judicial officers, and those who assist them.” *Id.* Each attorney further swears or affirms to “maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged.” *Id.*

II. This Court Should Not Subject South Carolina Attorneys to a Rule that Has Not Been Adopted by Any Other State Supreme Court.

The ABA claims that “as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.”¹ *But this claim is factually incorrect because the ABA Model Rule 8.4(g) has not been adopted by any state bar.* Therefore, there is no empirical evidence to support the ABA’s claim that Model Rule 8.4(g) “will not impose an undue burden on lawyers.” There cannot be because, since the ABA adopted it in August 2016, *no state bar or state supreme court has adopted Model Rule 8.4(g).* Furthermore, ABA Model Rule 8.4(g) is not a duplicate of any prior rule of professional conduct adopted by a state bar or state supreme court.

Twenty-four states and the District of Columbia have adopted black-letter rules dealing with “bias” issues.² *But each of these black-letter rules differs from ABA Model Rule 8.4(g) and is in some significant way narrower than that rule.*

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

- Many states’ black-letter rules apply only to *unlawful discrimination* and require that another tribunal find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.

¹ Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, at 1.

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

- Many states limit their rules to “conduct in the course of representing a client,” in contrast to Model Rule 8.4(g)’s expansive scope of “conduct related to the practice of law.”
- Many states require that the misconduct be prejudicial to the administration of justice.
- Almost no state black-letter rule enumerates all eleven of the Model Rule 8.4(g)’s protected characteristics.
- No black-letter rule utilizes Model Rule 8.4(g)’s “circular non-protection” for “legitimate advocacy . . . consistent with these rules.”

Thirteen states, including South Carolina, have adopted a comment dealing with “bias” issues, but not a black-letter rule. Fourteen states have neither adopted a rule nor a comment addressing “bias” issues.

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 South Carolina for the adoption of the proposed rule. Nor does the proposed rule solve a problem that is not already adequately addressed by application of the current Comment [3] that accompanies Rule 8.4(e), Rule 407, SCACR, as well as the Civility Oath, Rule 402, (k)(3), SCACR.

III. ABA Model Rule 8.4(g) Should Not be Adopted by the Supreme Court of South Carolina Because its 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 engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.³ Unfortunately, in adopting the new model rule, the ABA largely ignored over 450 comment letters,⁴ most opposed to the rule change. The ABA’s own Standing

³ The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

⁴ American Bar Association website, Comments to Model Rule 8.4, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.

Committee on Professional Discipline filed a comment letter⁵ questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).

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

A. Model Rule 8.4(g) Operates as a Speech Code for Attorneys.

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

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

⁵ Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

⁶ The Attorney General of Texas recently issued an opinion that "if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent." Texas A.G. Op. No. KP-0123, 2016 WL 7433186 (Dec. 20, 2017), <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>.

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

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

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

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.”¹⁰ 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:¹¹

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

Again, you’ve engaged in “verbal . . . conduct” that the bar may see as “manifest[ing] bias or prejudice” and thus as “harmful.” This was at a “social activit[y] in connection with the practice of law.” The state bar, if it adopts this rule, might thus discipline you for your “harassment.”

These significant red flags raised by leading First Amendment scholars should not be ignored. The proposed rule would create a multitude of potential problems for attorneys who

¹⁰ Ronald D. Rotunda, “*The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*,” The Heritage Foundation, Oct. 6, 2016, <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>.

¹¹ Eugene Volokh, “*A Speech Code for Lawyers, Banning Viewpoints that Express ‘Bias,’ including in Law-Related Social Activities*,” The Washington Post, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

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,” the proposed Rule 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.

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

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

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

For example, activities likely to fall within the proposed Rule 8.4(g)’s scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds

- giving guest lectures at law school classes
 - speaking at public events
 - participating in panel discussions that touch on controversial political, religious, and social viewpoints
 - serving on the boards of various religious or other charitable institutions
 - lending informal legal advice to nonprofits
 - serving at legal aid clinics
 - serving political or social action organizations
 - lobbying for or against various legal issues
 - serving one's 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, substance abusers, and other vulnerable populations
 - serving on the boards of fraternities or sororities
 - volunteering with or working for political parties
 - working with social justice organizations
 - any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues
- 2. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their 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 nonprofit ministries. These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. These ministries also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform 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 ABA Model Rule 8.4(g) causes such concerns. Because ABA Model Rule 8.4(g) seems to

prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on 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 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 that 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 Model Rule 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, ABA Model Rule 8.4(g) chills 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.¹²

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 its adoption.

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

¹² Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, *available at* http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

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

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

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

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

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

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

Similarly, an official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court's adjudicatory process and the state civil courts' adjudicatory processes.¹⁴ In the words of the State Bar Court official, "the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings."¹⁵ First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different. "State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases."¹⁶ Any relevant evidence

¹³Justice 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>.

¹⁴Commission 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).

¹⁵ *Id.*

¹⁶ *Id.*

must be admitted, and hearsay evidence may be used. Third, “[i]n disciplinary proceedings, attorneys are not entitled to a jury trial.”¹⁷

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

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

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

V. Conclusion

South Carolina attorneys should be free to practice law without the fear of false accusations of discrimination or harassment threatening 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. South Carolina’s Rules of Professional Conduct already provide a carefully crafted balance between the need to prevent discrimination and the need to respect attorneys’ due process and First Amendment rights.

¹⁷ *Id.*

¹⁸ *Id.* at 13.

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

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

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

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

Respectfully submitted,

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