



Memorandum

To: Roy Simon, Chair of Committee on Standards of Attorney Conduct
Ellen Yaroshefsky, Chair, COSAC 8.4(g) Subcommittee
Justin Chu, Member, COSAC 8.4(g) Subcommittee
Brenda Dorsett, Member, COSAC 8.4(g) Subcommittee
David Schraver, Member, COSAC 8.4(g) Subcommittee

From: David Nammo, Executive Director, Christian Legal Society
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Re: ABA Model Rule 8.4(g)

Date: January 15, 2021

This memorandum is respectfully submitted in response to the request of the Committee on Standards of Attorney Conduct (COSAC) for input on whether New York should amend its existing version of Rule 8.4(g) of the New York Rules of Professional Conduct to a version based on the ABA Model Rule 8.4(g). For the reasons detailed below, we explain why New York Rule 8.4(g) should not be amended.

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

¹ Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>. See *infra* Part I, pp. 6-9 (scholars’ criticisms of ABA Model Rule 8.4(g)); Part III, pp.18-25 (recent United States Supreme Court free speech decisions regarding regulation of professional speech and viewpoint discrimination).

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

³ See *infra* Part V, pp. 27-31 (describing states’ responses to ABA Model Rule 8.4(g)).

recently held to be an unconstitutional restriction on attorneys' speech by a federal court, in the only decision to address a bar regulation derived from ABA Model Rule 8.4(g).⁴

ABA Model Rule 8.4(g) will inevitably have a chilling effect on New York attorneys' speech regarding political, ideological, religious, and social issues to the detriment of New York attorneys, their clients, and society in general. A free society requires attorneys who speak their minds freely 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 an attorney who tweets a common but hurtful sexual term aimed at a 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

⁴ *Greenberg v. Haggerty*, 2020 WL 2772251 (E.D. Pa. 2020) (attached as Appendix 1).

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. 31-33 (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.

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 because he made a contribution that reflected his religious beliefs to one side of a political debate regarding marriage laws.¹²

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.

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>.

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

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

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 2020 WL 7227251 (E.D. Pa. 2020).

¹⁶ *Id.* at *8.

law, including at speaking engagements given during CLEs, 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 recommended for adoption, 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 ignored but the federal court decision in *Greenberg v. Haggerty* relied 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 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 increase in complaints against attorneys and firms (pp. 34-36).

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

A number of scholars have accurately characterized ABA Model Rule 8.4(g) as a speech code for lawyers. For example, Professor Eugene Volokh of UCLA School of Law, a nationally

¹⁷ *Id.*

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.¹⁸ Professor Volokh also explored its many flaws in a debate with a proponent of the model rule.¹⁹

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that “[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers’ First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants.”²⁰ 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.”²¹

The late Professor Ronald Rotunda, a deeply respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers’ First Amendment rights.²² 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.”²³ 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.”²⁴ 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

¹⁸ Volokh, *supra* note 1.

¹⁹ *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>.

²⁰ Margaret Tarkington, *Throwing Out the Baby: The ABA’s Subversion of Lawyer First Amendment Rights*, 24 *Tex. Rev. L. & Pol.* 41, 80 (2019).

²¹ *Id.*

²² Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>. Professor Rotunda and Texas Attorney General Ken Paxton debated two proponents of Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention. *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, The Federalist Society (Nov. 20, 2017), <https://www.youtube.com/watch?v=V6rDPjqBcQg>.

²³ 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 Disciplinary Conduct.”

²⁴ *Id.* at “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

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.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” that seems to be an impetus for ABA Model Rule 8.4(g).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

In a thorough examination of the rule’s legislative history, practitioners Andrew Halaby and Brianna Long conclude that ABA Model Rule 8.4(g) “is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities.”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

²⁵ 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>.

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 New York attorneys.

³²American 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 New York Attorneys' Lives and Chill Their Speech.

A. ABA Model Rule 8.4(g) would regulate lawyers' interactions with anyone while engaged in conduct related to the practice of law 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 gain exposure to new 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.”

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.clnet.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

⁴⁰ *Greenberg v. Haggerty*, 2020 WL 2772251, *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 Com'n. (May 15, 2018) discussed *infra* note 49.

- Can a lawyer lose his license to practice law for a tweet calling a female public official a derogatory sexist 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 on proposed Title IX regulations, immigration issues, census questions, re-districting proposals, or capital gains tax proposals?
- Is a lawyer who is running for public office subject to discipline for socio-economic discrimination if she proposes that college loans be forgiven only for graduates earning below a certain income level?
- Is a lawyer subject to discipline for 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, black-on-black crime, illegal immigration, differences between the

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 129, 140-141.

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 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.

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 Com'n (May 15, 2018).

At bottom, ABA Model Rule 8.4(g) has a “fundamental defect” because it “wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech which is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech.”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 If so, public discourse and civil society will suffer from the ideological straitjacket that ABA Model Rule 8.4(g) will impose on lawyers.

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

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

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.”).

not fear being disciplined for pro bono legal work that she performs for her church or her alma mater.⁵³ By making New York lawyers hesitant to serve on these nonprofit boards, ABA Model Rule 8.4(g) would do real harm to religious and charitable institutions and hinder their good works in their communities.

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

ABA Model Rule 8.4(g) could chill lawyers' willingness to associate with political, cultural, or religious organizations that promote traditional values regarding sexual conduct and marriage. Would ABA Model Rule 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage?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.

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 23, 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.

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

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

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

This negligence standard makes it entirely foreseeable that ABA Model Rule 8.4(g) could reach communication or conduct that demonstrates “implicit bias, that is, conduct or speech that the lawyer is not consciously aware may be discriminatory.”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 Oritseyinmi Joe recently argued that while ABA Model Rule 8.4(g) “addresses explicit

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://lalegaethics.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 was discriminatory.⁶⁷ Such charges

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.”).

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

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

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

This is a constitutional thicket. Because enforcement of proposed ABA Model Rule 8.4(g) gives 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 the rule actually will only rarely be used and to trust that its use will be judicious. But it is not enough for government officials to promise to be careful in their enforcement of a rule that lawyers have reason to fear will suppress their speech. As the Supreme Court has observed, "The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."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'

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 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 explained 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 Rules Like ABA Model Rule 8.4(g) and Predates the Federal Court Decision in *Greenberg v. Haggerty*.

Since the ABA adopted Model Rule 8.4(g) in 2016, the United States Supreme Court has issued three free speech decisions that make clear that it unconstitutionally chills attorneys’ speech: *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). The *Becerra* decision clarified that the First Amendment protects “professional speech”

⁷³ *Id.* at 438-39.

⁷⁴ 2020 WL 7227251, at *8; *see supra* at pp. 4-5 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

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):

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 reassures that it will only be used for “harmful” conduct, which the rule makes clear includes “verbal conduct” or “speech.”⁸⁵

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.

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.” This merely confirms that a lawyer can be disciplined for speech that is not necessarily intended to harm and that does not necessarily “target” a particular person or group.⁸⁷

Formal Opinion 493 claims that “[t]he Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern.” But that is hardly reassuring because “matters of public concern” is a term of art in free speech jurisprudence that appears in the context of the broad limits that the government is allowed to place on its employees’ free speech. The category actually provides *less*, rather than more, protection for free speech.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 the government’s speech, then lawyers have minimal protection for their speech.

Formal Opinion 493 claims that ABA Model Rule 8.4(g) does not “limit a lawyer’s speech or conduct in settings unrelated to the practice of law,” but fails to grapple with just how broadly the Rule defines “conduct related to the practice of law,” for example, to include social settings.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 under a strict scrutiny standard.

Perhaps most baffling is the fact that *Formal Opinion 493 fails to mention the Supreme Court’s Becerra decision*, even though it 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

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 is essentially government speech that is unprotected by the First Amendment, is deeply troubling and should be soundly 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.

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

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 discriminatory 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. ABA Model Rule 8.4(g)’s terms “harassment” and “discrimination” are viewpoint discriminatory.

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

Under the *Matal* and *Iancu* analyses, these definitions are textbook examples of viewpoint discrimination. In *Matal*, the Supreme Court unanimously held that a federal statute was facially unconstitutional because it allowed government officials to penalize “disparaging” speech. The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore,

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 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 New York, had adopted some version of a black letter rule dealing with “bias” issues before the ABA promulgated Model Rule 8.4(g) in 2016; *however, each of these black letter rules was narrower than ABA Model Rule 8.4(g).*¹¹¹ (The COSAC 8.4(g)

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.scbarr.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,

Subcommittee’s memorandum dated October 8, 2020, explains how New York Rule of Professional Conduct 8.4(g) is narrower than ABA Model Rule 8.4(g). Thirteen states had adopted a comment rather than a black letter rule to deal with bias issues. Fourteen states had adopted neither a black letter rule nor a comment.

A proponent of ABA Model Rule 8.4(g) observed that “[a]lthough courts in twenty-five American jurisdictions (twenty-four states and Washington, D.C.) have adopted anti-bias rules in some form, these rules differ widely.”¹¹² He highlighted the primary differences between these pre-2016 rules and ABA Model Rule 8.4(g):

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

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.

The Supreme Courts of **Arizona, Idaho, Montana, New Hampshire, South Dakota, Tennessee, and South Carolina** have officially rejected adoption of ABA Model Rule 8.4(g). In August 2018, after a public comment period, the **Arizona** Supreme Court rejected a petition from the Central Arizona Chapter of the National Lawyer Guild urging adoption of ABA Model Rule 8.4(g).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

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-%20IRPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%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](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_20.pdf).

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 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

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 ABA Model Rule 8.4(g)), <http://bernabepr.blogspot.com/2019/06/maine-becomes-second-state-to-adopt-aba.html>. See The State of New Hampshire Supreme Court of New Hampshire Order 1, July 15, 2019, (“As of this writing, only one state, Vermont, has adopted a rule that is nearly identical to the model rule. Maine has adopted a rule that is similar, but is not nearly identical, to Model Rule 8.4(g).”), <https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf>.

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-%20104446393101837486.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/ADKT-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.

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

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated that “if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent.”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

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>.

In August 2019, the **Alaska** Attorney General provided a letter to the Alaska Bar Association during a public comment period that it held on adoption of a rule modeled on ABA Model Rule 8.4(g). The letter identified numerous constitutional concerns with the proposed rule.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

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.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4\(g\)/Report.ARPCcmte.on8_.4f.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Report.ARPCcmte.on8_.4f.pdf). A subsequent public comment period on a revised proposed rule closed August 10, 2020.

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>.

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 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.***

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>.

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).

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 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 New York 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 New York Lawyers’ Ability to Accept, Decline, or Withdraw from a Representation.

The proponents of ABA Model Rule 8.4(g) generally claim that it will not affect a lawyer’s ability to refuse to represent a client. They point to the language in the rule that it “does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.” But in the one state 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 of

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.”)

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

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/PROMULGATEDVRPrP8.4\(g\).pdf](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf) (emphasis supplied).

¹⁴⁹ Rotunda & Dzienkowski, *supra* note 23, 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 23.

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 But ABA Model Rule 8.4(g) reaches far broader than “unlawful discrimination.”

In *Stropnick 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

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 23, 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 required that “the conduct must reflect adversely on the lawyer’s fitness as a lawyer.”¹⁶² The Illinois rule is quite similar to New York’s Rule 8.4(g).

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:

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 23 (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. 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, it should be rejected. At a minimum, there should be a pause to wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out if and when it is adopted in several other states. There is no reason to subject New York attorneys to the ill-conceived experiment that ABA Model Rule 8.4(g) represents. A decision to not recommend ABA Model Rule 8.4(g) can always be revisited, but the damage its premature adoption may do to New York attorneys cannot be undone.

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 Pennsylvania¹ 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.

² 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 Board³ 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:

* * *

[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[i]hood’ 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

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