



Why Hawai'i Should Not Adopt Proposed Rule 8.4(h): Supreme Court Public Comment Period Ends September 25, 2020

The Hawai'i Supreme Court is holding a public comment period that **ends Friday, September 25, 2020** on whether to add [Proposed Rule 8.4\(h\)](#) to the Hawai'i Rules of Professional Conduct. Proposed Rule 8.4(h) is essentially [ABA Model Rule 8.4\(g\)](#), the deeply-flawed and highly-criticized rule adopted by the American Bar Association in August 2016. ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers, as UCLA Professor Eugene Volokh, a nationally recognized First Amendment expert, explains in a [two-minute Federalist Society video](#).

Take action before September 25, 2020: Interested organizations, individuals, or agencies may express their view of Proposed Rule 8.4(h) by posting comments on the Hawai'i Supreme Court's comment page at <https://www.courts.state.hi.us/comment-on-proposed-rules-changes>. (The proposed rule title is "Proposal to Amend Rules of Court to Address Harassment and Discrimination within the Practice of Law.") Or written comments may be submitted by mail to the Judiciary Communications & Community Relations Office, 417 South King Street, Honolulu, HI 96813, or by fax to (808) 539-4801.

Ideas for comments may be found in this [sample comment letter](#), these [talking points](#), Christian Legal Society's own [comment letter](#), or several helpful legal articles.¹

Fortunately, ABA Model Rule 8.4(g) operates only in those states in which the highest court adopts it. After four years, only two states, Vermont and New Mexico, have adopted ABA Model Rule 8.4(g). After careful consideration, many states have concluded that ABA Model Rule 8.4(g) is too flawed and have instead chosen the prudent course of waiting to see whether other states adopt ABA Model Rule 8.4(g) and its real-life consequences for attorneys in those states. At least **thirteen** states have rejected or abandoned efforts to impose ABA Model Rule 8.4(g), including:

- **Formal rejection:** The state supreme courts of *Arizona, Idaho, Montana, New Hampshire, South Carolina, South Dakota, and Tennessee* formally rejected ABA Model Rule 8.4(g) after holding comment periods.² The rule has also failed in Illinois, Louisiana, Minnesota, Nevada, North Dakota, and Texas.
- **State legislature action:** The *Montana* Legislature adopted a joint resolution urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g). The Legislature was concerned 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."³

¹ See, e.g., Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019); Prof. Ronald Rotunda, "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," The Heritage Foundation, Oct. 6, 2016; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law,"* 30 Geo. J. Leg. Ethics 241 (2017); 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 (2017). See also, Prof. Volokh's Federalist Society debate at <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s> (Mar. 2017), and Prof. Rotunda's Federalist Society debate at <https://www.youtube.com/watch?v=V6rDPjqBcQg> (Nov. 2017).

² https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf (Tennessee); https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf (Arizona); [https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%2020IRPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%2020IRPC%208.4(g).pdf) (Idaho); <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (South Carolina).

³ <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

- **State bar activity:** The *Illinois* Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule.”⁴ The *North Dakota* Joint Committee on Attorney Standards recommended rejection. The *Louisiana* Rules of Professional Conduct Committee voted not to recommend.
- **State Attorneys General:** Several state attorneys general, including *Texas*, *Tennessee*, *Alaska*, *Louisiana*, *South Carolina*, and *Arizona* have issued opinions stating the rule was likely unconstitutional.⁵

Proposed Rule 8.4(h) would make it professional misconduct for a lawyer “to engage in conduct while acting in a professional capacity that the lawyer knew or reasonably should have known is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status, gender identity and/or gender expression.” “Professional capacity” *includes but is not limited to* “interacting with . . . others while engaged in the practice of law.”

1. The proposed rule is broad in scope and would regulate nearly everything a lawyer says or does, including:

- speaking at public events, presenting CLE courses, or participating in panel discussions on controversial legal issues;
- publishing law review articles, blogposts, tweets, and op-eds;
- giving media interviews;
- teaching law school classes as faculty, adjunct faculty member, or guest lecturer;
- sitting on the boards of religious institutions, charities, or fraternities or sororities;
- belonging to organizations with membership or leadership requirements based on shared belief;
- lawyer’s tweets;
- performing work for political or social action organizations, political parties, or campaigns;
- lobbying or testifying before legislative committees; and
- performing pro bono work for one’s congregation, religious college, or religious K-12 school.

2. The proposed rule is unconstitutional under the analyses in two recent United States Supreme Court decisions.⁶ In June 2018, the United States Supreme 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. In June 2017, a unanimous United States Supreme Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is viewpoint discriminatory and, therefore, unconstitutional under the First Amendment.

3. The mens rea requirement is mere negligence. A lawyer can violate the proposed rule without intending to do so or even being aware of having done so.

4. Proposed Rule 8.4(h) would make it professional misconduct for lawyers and law firms to engage in many current initiatives aimed at promoting diversity in their employment practices.

⁴ <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

⁵ Alaska Att’y Gen. Comment letter (August 9, 2019), <http://www.law.state.ak.us/press/releases/2019/080919-Rule8.html>; Tex. Att’y Gen. Op. KP0123 (Dec. 20, 2016), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>; Tenn. Att’y Gen. Op. 18-11, <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>.

⁶ *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Matal v. Tam*, 137 S. Ct. 1744 (2017).