

Christian Legal Society (“CLS”) is an interdenominational association of Christian attorneys, law students, and law professors, founded in 1961, to network lawyers and law students nationwide, including members in Utah.

**2017 Proposal:** In the previous comment period, which closed July 28, 2017, CLS filed its comment letter on July 18, 2017. Those comments addressed the proposed addition of Utah Rules of Professional Conduct Rule 8.4(g) that would essentially have adopted ABA Model Rule 8.4(g). Those comments continue to be applicable to several parts of the second proposed rule that are the subject of the current second comment period. The comments can be read at <https://www.utcourts.gov/utc/rules-comment/2017/06/13/rules-of-professional-conduct-comment-period-closes-july-28-2017/>.

In its July 2017 comments, CLS explained that it opposed adoption of ABA Model Rule 8.4(g) because, if adopted, Model Rule 8.4(g) would have a chilling effect on lawyers’ expression of disfavored political, social, and religious viewpoints on a multitude of issues. If adopted, Model Rule 8.4(g) would create ethical concerns for attorneys who serve on nonprofit boards, speak publicly on legal topics, teach at law schools, advocate for legislation, or otherwise discuss current political, social, or religious issues. Because lawyers often serve as spokespersons for political, social, or religious movements, a rule that could be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to freedom of speech, free exercise of religion, and freedom of political belief in a diverse society.

**United States Supreme Court Decisions in 2017 and 2018:** On August 17, 2018, CLS filed with the Utah Supreme Court a supplemental comment letter in order to bring to the Court’s attention the United States Supreme Court’s decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (“*NIFLA*”). [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/Christian%20Legal%20Society%20Supplemental%20Comment%20Letter%20Submitted%202018-08-17%20UT.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/Christian%20Legal%20Society%20Supplemental%20Comment%20Letter%20Submitted%202018-08-17%20UT.pdf)

Basically, since the ABA adopted Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued two major free speech decisions that demonstrate the unconstitutionality of ABA Model Rule 8.4(g). First, under the Court’s analysis in *NIFLA*, ABA Model Rule 8.4(g) is an unconstitutional content-based restriction on lawyers’ speech. The *NIFLA* Court held that state restrictions on “professional speech” are presumptively unconstitutional and subject to strict scrutiny. Second, under the Court’s analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), ABA Model Rule 8.4(g) is an unconstitutional viewpoint-based restriction on lawyers’ speech that cannot survive the strict scrutiny triggered by viewpoint discrimination.

Recently, the ABA Section of Litigation published an article confirming that several section members see the Court’s *NIFLA* decision as raising serious 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.

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/>.

**Utah 2019 Revised Proposal:** A second comment period is now open to consider a complicated revised proposal that would:

1. Add new Utah Rules of Professional Conduct Rule 8.4(g) that is a confusing hybrid of elements of ABA Model Rule 8.4(g) with Title VII and the Utah Antidiscrimination Act;
2. Add new Utah Rules of Professional Conduct Rule 8.4(h) that would make it professional misconduct to violate the Utah Standards of Professionalism and Civility in certain instances; and
3. Amend the Utah Standards of Professionalism and Civility to regulate attorneys’ speech in ways that violate the First Amendment as analyzed by the United States Supreme Court in *NIFLA* and *Matal*.

This revised proposal should be rejected if for no other reason than it is so complicated and confusing that lawyers cannot be sure which speech triggers disciplinary action. In addition to serious constitutional concerns, numerous other practical reasons for rejecting the revised proposal exist as well.

**I. This Court Should Not Subject Utah Attorneys to a Complicated and Confusing Set of Rules That Have Not Been Adopted by Any Other State Supreme Court.**

**A. Utah Already has Rule of Professional Conduct 8.4(d) and Its Comment 3.**

Utah Rule of Professional Conduct 8.4(d) currently provides that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.” Utah has adopted Comment 3 to that rule, which provides:

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

a discriminatory basis does not alone establish a violation of this rule.

Utah R. Prof'l Conduct 8.4 cmt.3. Comment 3 is a verbatim adoption of Comment 3 that accompanied ABA Model Rule 8.4 from 1998 to 2016.

Utah attorneys should not be made the subjects of the novel experiment that the revised proposal represents. This is particularly true when the Utah Supreme Court has the prudent option of waiting to see what other jurisdictions decide to do and then observing the real-world consequences for attorneys in those states. There is no need for haste because current Utah Rule 8.4(d) already prohibits a lawyer from engaging in conduct prejudicial to the administration of justice, and current Comment [3] to Rule 8.4 already deems bias and prejudice in the course of representing a client to be professional misconduct if the conduct is prejudicial to the administration of justice.

**B. No Jurisdiction has Adopted the Revised Proposal, and Only One Jurisdiction, Vermont, has Adopted ABA Model Rule 8.4(g).**

To the best of our knowledge, no state has adopted a rule like the revised proposal, which is a complex combination of elements of ABA Model Rule 8.4(g) with elements of some other states' rules that require conduct be unlawful before it is subject to discipline. But as explained below, the revised proposal fails to track those other states' rules in important ways. To add to the confusion, the revised proposal also amends the Utah Standards of Professionalism and Civility in troubling ways and subjects some violations of those standards to discipline for professional misconduct. The result is a set of rules, which if adopted, greatly expands the grounds upon which Utah lawyers may be subject to discipline.

The Utah Supreme Court was wise to reject the 2017 proposal, which essentially called for adoption of ABA Model Rule 8.4(g). After nearly three years of deliberations in many states across the country, Vermont remains the only state to have adopted ABA Model Rule 8.4(g). In contrast, at least eleven states have concluded, after careful study, that ABA Model Rule 8.4(g) is both unconstitutional and unworkable.

**II. Official Entities in Arizona, Idaho, Illinois, Montana, North Dakota, South Carolina, 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.**

One of federalism's great advantages is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see whether other states 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 close scrutiny by official entities in many states. 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, 213-217 (2019).

### **A. Several State Supreme Courts Have Rejected ABA Model Rule 8.4(g).**

The Supreme Courts of **Arizona, Idaho, Tennessee, South Carolina, and Montana** have officially rejected adoption of ABA Model Rule 8.4(g). On August 30, 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). A week later, on September 6, 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).

On April 23, 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). 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.”

On October 26, 2016, the **Montana** Supreme Court announced a public comment period through December 9, 2016, to consider adoption of ABA Model Rule 8.4(g), but then announced an extension of the comment period until April 21, 2017. In a memorandum dated March 1, 2019, the court noted that it “chose not to adopt the ABA’s Model Rule 8.4(g).”

On September 25, 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). In a letter to the Court, dated September 6, 2017, 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.”

In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g). The Court acted after the state bar’s House of Delegates, as well as the state attorney general, recommended against its adoption.

On January 23, 2019, the ABA published a summary of the states’ consideration of ABA Model Rule 8.4(g) to date. By the ABA’s own count, nine states have declined to adopt Model Rule 8.4(g): **Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina, and Tennessee.** (We add **Texas** and **North Dakota** to that list.) The ABA lists **Vermont** as the only state to have adopted 8.4(g).

### **B. State Attorneys General Have Identified Core Constitutional Issues with ABA Model Rule 8.4(g).**

On March 16, 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). 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.”

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.” The Attorney General 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.”

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.” 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.”

Agreeing with the Texas Attorney General’s assessment of the unconstitutionality of ABA Model Rule 8.4(g), 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.”

On May 21, 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. (Links to referenced documents can be found in CLS’ comment letter dated April 11, 2019, to the New Hampshire Supreme Court at 10-13, [https://www.clsreligiousfreedom.org/sites/default/files/site\\_files/Christian%20Legal%20Society%20Comment%20Letter%202019.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/Christian%20Legal%20Society%20Comment%20Letter%202019.pdf)).

### **C. The Montana Legislature Recognized the Problems That ABA Model Rule 8.4(g) Might Create 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 on the constitutional rights of Montana citizens and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g). 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 Montana Legislature.

#### **D. Several State Bar Associations 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.” On October 30, 2017, the **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of ABA 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.”

On September 15, 2017, the **North Dakota** Joint Committee on Attorney Standards voted not to recommend adoption of ABA Model Rule 8.4(g), expressing concerns that it was “overbroad, vague, and imposes viewpoint discrimination” and that it might “have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views.”

#### **III. Scholars Continue to Critique ABA Model Rule 8.4(g).**

Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has summarized his view that ABA Model Rule 8.4(g) is a speech code that will have a serious impact on attorneys’ speech in a short video for the Federalist Society at <https://www.youtube.com/watch?v=AfpdWmlOXbA>. Professor Volokh expanded on the many problems of ABA Model Rule 8.4(g) in a debate at the Federalist Society National Student Symposium at <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>.

The late Professor Ronald Rotunda, a highly-respected scholar in both constitutional law and legal ethics, early warned that ABA Model Rule 8.4(g) threatens lawyers’ First Amendment rights. 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 at <https://www.youtube.com/watch?v=V6rDPjqBcQg>.

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.” Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, ed. April 2017, “§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech” & “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise” in “§ 8.4-2 Categories of Disciplinable Conduct.”

Dean Michael S. McGinniss, who teaches professional responsibility, recently “examine[d] multiple aspects of the ongoing ABA 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.” 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, 173 (2019). Professor Josh Blackman has explained that ABA Model “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.” Josh

Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 241, 243 (2017).

In a thoughtful examination of the rule's legislative history, practitioners Andrew Halaby and Brianna Long concluded 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." They recommend that "jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all." And they conclude that "the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected." 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, 204, 257 (2017).

The basic First Amendment concerns with the impact of a rule incorporating significant parts of ABA Model Rule 8.4(g) were explained in CLS' 2017 comments and will not be repeated here. But there are at least four reasons the revised proposal exacerbates the already existing concerns about the chilling effect that proposed Rule 8.4(g) will have on attorneys' speech.

First, it is a major problem that the revised proposal retains many elements of ABA Model Rule 8.4(g)'s Comments [3], [4], and [5] in the revised proposal's Comments [4] and [5]. Those comments are the source of many of the First Amendment concerns highlighted in CLS' 2017 comments.

Second, the proposed Rule 8.4(h) introduces a whole new set of concerns as to the chilling effect of the revised proposal on attorneys' speech. By explicitly incorporating the Standards of Professionalism and Civility as a fertile source of professional misconduct claims, the revised proposal transforms a long list of largely aspirational standards into a breeding ground for professional misconduct claims.

Third, the proposed Rule 8.4(h) would make it professional misconduct for a lawyer to fail to "avoid hostile, demeaning, humiliating . . . conduct" (Standards of Professionalism and Civility, Std. 3), which its comment makes clear includes "communications." The same comment directs that lawyers "should refrain from expressing scorn, superiority, or disrespect." This standard would seem to be unconstitutional under the *Matal* and *NIFLA* analyses. Other standards that apply to attorneys' speech would seem to raise the same First Amendment concerns. For example, Standard 1 states that "[l]awyers are expected to refrain from inappropriate language . . . in telephone calls, email, and other exchanges."

Fourth, Comment [4a] applies only to proposed Rule 8.4(g) and not to proposed Rule 8.4(h). Even if it applied to both, however, its mere assertion that these new proposed rules "do[] not apply to expression or conduct protected by the First Amendment" is not enough to ameliorate the chilling effect of the revised proposal on lawyers' speech. For all of these reasons, as well as those below, the revised proposal should be rejected.

#### **IV. Proposed Rule 8.4(g) Introduces Several New Problems.**

The revised proposal would adopt two new black letter rules. At first glance, the proposed Rule 8.4(g) seems to be like state rules, such as Illinois, that require that conduct be found to be “unlawful” before it can trigger a charge of professional misconduct. But on closer examination that is not the case, and the revised proposal lacks key elements of the Illinois rule.

First, the proposed Rule 8.4(g) would make it professional misconduct for a lawyer to “engage in conduct that is an unlawful, discriminatory, or retaliatory employment practice under Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act.” Confusion is created by the fact that the proposed rule seems to punish more than an “unlawful” employment practice, but seems also to punish “discriminatory, or retaliatory” employment practices. The use of the disjunctive “or” reinforces that it is not limited to “unlawful” employment practices. Yet a superficial reading of the revised proposal sounds as if it is intended to be limited solely to “unlawful” employment practices. If the revised proposal is intended to be so limited, then the modifiers “discriminatory, or retaliatory” need to be deleted. If it is not intended to be so limited, then there needs to be more explanation regarding which “discriminatory, or retaliatory employment practice[s]” that are not “unlawful” will be considered professional misconduct.

Second, relatedly, proposed Comment [4] states that the “substantive law of antidiscrimination and anti-harassment statutes and case law guides the application” of proposed Rule 8.4(g). This adds to the confusion because if the purpose is to limit proposed Rule 8.4(g) to conduct that is “unlawful” under Title VII and the Utah Antidiscrimination Act, the substantive law should *govern, not guide*, the application. Otherwise, the limitation to “unlawful” conduct is meaningless.

Third, and perhaps most importantly, the Illinois rule requires a judicial or administrative tribunal, other than a state bar tribunal, find that an attorney committed unlawful discrimination before the state bar may entertain a disciplinary complaint against the attorney. This requirement ensures that the attorney has been found to have engaged in unlawful conduct in a tribunal that provides the attorney with greater due process rights, access to discovery, and evidentiary protections than may typically be found in the bar disciplinary process. Any black letter rule should include the requirement that any conduct found to be professional misconduct have been first adjudicated to be “unlawful” by a tribunal other than the screening panel of the Ethics and Discipline Committee. Proposed Rule 8.4(g) lacks this requirement.

Fourth, the re-definition of “employer” means that solo practitioners and small firms will be particularly vulnerable to complaints of professional misconduct. A person who wishes to complain regarding the conduct of a firm of 15 or more lawyers will have a choice to pursue a remedy in federal court under Title VII, in state court under the Utah Antidiscrimination Act, or lodge a disciplinary complaint. But if the subject of a complaint is a solo practitioner or a small firm, the new – but only – option is to lodge a disciplinary complaint.

Fifth, additional confusion is created by the attempt to meld an Illinois-type rule with comments based on ABA Model Rule 8.4(g). If the proposed Rule 8.4(g) is not ABA Model Rule 8.4(g),

then why attach comments that accompany the ABA Model Rule 8.4(g) to a black letter rule that is not ABA Model Rule 8.4(g)?

#### **V. Proposed Rule of Professional Conduct 8.4(g) Could Limit Utah Lawyers' Ability to Accept, Decline, or Withdraw from a Representation.**

The proponents of ABA 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." (The revised proposal states that proposed Rule 8.4(g) "does not limit the ability of a lawyer to accept, decline, or in accordance with Rule 1.16, withdraw from a representation.")

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 Rule 1.16(a)*, "a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g)."

Professional ethics experts agree that this is a genuine concern with ABA Model Rule 8.4(g) despite its inclusion of reassuring language. As Professor Rotunda and Professor Dzienkowski explain, Rule 1.16 actually "deals with when a lawyer must or may *reject* a client or *withdraw* from representation." Rotunda & Dzienkowski, *supra*, in "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" (emphasis in original). Rule 1.16 does not address *accepting* clients. 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."

Dean Michael 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." McGinniss, *supra*, at 207-209. 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 to only allow what was already required, not declinations that are discretionary. Professor 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)." *Id.* at 207-208 & n.146.

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.*" N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.). 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 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). In *Stropnick v. Nathanson*, 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. 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). 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.

### **Conclusion**

The revised proposal is an amalgamation of elements of ABA Model Rule 8.4(g), an Illinois-type rule, and the Utah Standards of Professionalism and Civility that suffers from both constitutional and practical shortcomings.

The revised proposal should be rejected because it is so complicated and confusing that lawyers cannot be sure whether or not any particular speech would trigger disciplinary action. In addition to serious constitutional concerns, numerous other practical reasons exist for rejecting the revised proposal. CLS urges the Utah Supreme Court to reject the revised proposal and thanks the Court for considering its comments.