

Christian Legal Society (“CLS”) is a national association of Christian attorneys, law students, and law professors, founded in 1961, to help lawyers and law students integrate their faith with their practice of law. CLS has members in Utah. CLS’s current president, as well as its immediate past president, are women who have practiced law for a number of years. Women constitute a significant percentage of CLS’s attorney and law student members and leaders, and CLS opposes harassment and discrimination against women in the legal profession.

For a number of constitutional and policy reasons, CLS urges the Utah Supreme Court not to adopt Proposed Rules 8.4(g) and 8.4(h) or the proposed changes to USB Rule 14-301.

CLS commends two recent written analyses of ABA Model Rule 8.4(g) and rules derived from it. First, Professor Michael McGinniss, Dean of the University of North Dakota School of Law, recently produced a thoughtful, careful analysis of ABA Model Rule 8.4(g), entitled *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol’y 173 (2019), https://law.und.edu/_files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlp-2019.pdf. Dean McGinniss “examine[d] 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.” *Id.* at 173.

Second, last summer, the Alaska Attorney General wrote a seventeen-page letter to the Board of Governors of the Alaska Bar Association, opposing the modified version of ABA Model Rule 8.4(g) that the Board then had under consideration. Letter from Attorney General Kevin Clarkson to Board of Governors of Alaska Bar Association (Aug. 9, 2019), <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>. The Alaska Attorney General warned that “[t]he idea that the Proposed Rule could be used to suppress an attorney’s constitutionally protected speech on behalf of a client is far from speculative.” *Id.* at 10. The attorney general drew on his own personal experience when in private practice of being “unconstitutionally targeted with a complaint under municipal non-discrimination law for my representation of a faith-based women’s shelter before the Anchorage Equal Rights Commission.” *Id.* He expressed “little doubt that if the Proposed Rule is enacted, it will be weaponized in similar fashion to intimidate or punish attorneys for vigorously representing their clients.” *Id.* at 10-11.

Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. *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).

Many proponents of ABA Model Rule 8.4(g) and its derivative rules, such as the Utah 2020 Proposed Rules, sincerely believe that the Rule will only be used to punish lawyers who truly are bad actors. But recently we have witnessed too many times when people are punished,

and their livelihoods placed at risk, for holding traditional religious views that may be currently disfavored by the popular culture. Indeed, simply supporting freedom of speech has become controversial, in and of itself, as we have seen in recent weeks when well-known liberal signatories to a letter were publicly pressured to recant their support for freedom of speech and tolerance of others' differing beliefs. "J.K. Rowling Joins 150 Public Figures Warning Over Free Speech," BBC (July 8, 2020), <https://www.bbc.com/news/world-us-canada-53330105>.

We live in a time when the CEO of Mozilla lost his position because of his religious beliefs regarding marriage. "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>. The African-American Fire Chief of Atlanta, who was appointed the U.S. Fire Administrator by President Obama in 2009, was fired by the City of Atlanta because he wrote a book that discussed his religious beliefs regarding marriage and sexual conduct. *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).

Lawyers, whether classical liberal, conservative, libertarian, or religious, understandably are unwilling to support a black letter rule that could easily be similarly misused to deprive them of their license to practice law. As Professor Volokh, a nationally recognized First Amendment expert, has explained in a short Federalist Society video, <https://www.youtube.com/watch?v=AfpdWmlOXbA>, ABA Model Rule 8.4(g) is a speech code for lawyers.

The 2020 Proposed Rules are essentially the same as the 2019 Proposed Rules, and should not be adopted for the same reasons as the 2019 Proposed Rules were not adopted. CLS's letter urging that the 2019 Proposed Rules not be adopted can be found [here](#), and its letter regarding the 2017 Proposed Rules, [here](#).

I. This Court Should Not Subject Utah Attorneys to a Complicated and Confusing Set of Rules that Have Not Been Tested in Another State.

A. The 2020 Proposed Rules are not necessary because 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 the Comment [3] that accompanied ABA Model Rule 8.4 from 1998 to 2016.

Because the 2020 Proposed Rules are experimental and risky, they should not be imposed on Utah attorneys. This is particularly true when there is readily available 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 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. Unraveling the 2020 Proposed Rules is tricky because of the interplay between the Proposed Changes to the Standards of Professionalism and Civility and new Proposed Rules 8.4(g) and (h).

No state has adopted a rule like the 2020 Proposed Rules, which are a complex and confusing combination of elements of ABA Model Rule 8.4(g) with some disjointed elements of other states' rules. The result is a set of rules, which if adopted, greatly expands the grounds upon which Utah lawyers may be subject to discipline.

The Court was wise not to adopt the 2017 and 2019 Proposed Rules and should not adopt the 2020 Proposed Rules. Indeed, the 2020 Proposed Rules are quite similar to the 2019 Proposed Rules. Where there have been changes, they are largely for the worse.

1. The 2020 Proposed Rules would make major changes to the Standards of Professionalism and Civility.

Creating great confusion, the 2020 Proposed Rules amend the Standards of Professionalism and Civility so that violations of the Standards will now subject Utah lawyers to discipline for professional misconduct. Indeed, if the 2020 Proposed Rules were adopted, Proposed Standard 3 would become the primary black letter rule instead of Proposed Rule 8.4(g) or current Rule 8.4(d) with its current Comment [3].

The interaction of the Proposed Rules 8.4(g) and 8.4(h) with the Proposed Standards – which would all be transformed into black letter rules themselves – is quite complicated. The main anti-discrimination black letter rule actually would not be found in Rule 8.4(g) or (h) but in Proposed Standard 3, which would now itself be a black letter rule like the rest of the Standards. A major change to the Standards is found in the final paragraph of the preamble, which would read as follows: “[T]he term ‘standard’ has historically pointed to the aspirational nature of this rule. But Rule 8.4(h) now makes the provisions of this rule mandatory for all lawyers.” Standards of Professionalism and Civility, Preamble (USB14-301 Amend. Draft May 15, 2020).

Proposed Standard 3 would provide, in part, as follows:

Standard 3 (in part): Lawyers shall avoid hostile, demeaning, humiliating, or discriminatory conduct *in law-related activities*. Discriminatory conduct includes all discrimination against protected classes as those classes are enumerated in the Utah Antidiscrimination Act of 1965, Utah Code section 34A-5-106(1)(a), and federal statutes, *as amended from time to time*.

Comment (in part): *Law-related activities* include, *but are not limited to*, settlement negotiations; depositions; mediations; court appearances; *CLEs*; events sponsored by the Bar, Bar sections, or Bar associations; and firm parties.

There are several problems to note with the Proposed Standard 3:

- “Law-related activities” is broadly defined to include CLEs and firm parties;
- “Discriminatory conduct” is broadly defined as *including* (but not limited to) “all discrimination against protected classes” enumerated in Utah and federal law. But note that this definition is not limited to what is actually unlawful under Utah and federal statutes. Standard 3 uses Utah and federal statutes merely to provide the list of “protected classes.” Standard 3 does not limit “discriminatory conduct” to unlawful conduct. A lawyer’s conduct could be deemed “discriminatory” and, therefore, subject to discipline even though the conduct was not unlawful under Utah or federal law;
- The list will enlarge as state and federal statutes are amended or re-interpreted to include additional protected classes; and
- As explained below, terms in Standard 3, including “demeaning” and “humiliating,” run afoul of the First Amendment’s prohibition on viewpoint discrimination in laws that restrict speech.

2. The Standards of Professionalism and Civility should not be transformed into black letter rules.

The 2020 Proposed Rules would convert the Standards of Professionalism and Civility – which were adopted to “encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism” – from being aspirational *guidance* into *black letter rules* for which attorneys could be sanctioned for violating them.

Specifically, the 2020 Proposed Rules would amend the Standards’ preamble to expressly state that “the term ‘standard’ has historically pointed to the aspirational nature of this rule. But Rule 8.4(g) now make the provisions of this rule mandatory for all Utah lawyers.” Proposed Rule 8.4(h) would read: “It is professional misconduct for a lawyer to . . . (h) egregiously violate, or

engage in a pattern of repeated violations of Rule 14-301 [Standards of Professionalism and Civility] if such violations harm the lawyer’s client or another lawyer’s client or are prejudicial to the administration of justice.”

Among other changes, the 2020 Proposed Rules would amend the Standards to require lawyers to “avoid hostile, demeaning, humiliating, or discriminatory conduct in law-related activities.” The definitions of both “discriminatory conduct” and “law-related activities” are expansive. “Discriminatory conduct” would “include[]” but not be limited to “all discrimination against protected classes as those classes are enumerated in the Utah Antidiscrimination Act of 1965, Utah Code section 34A-5-106(1)(a), and federal statutes, as amended from time to time.” *Id.* “Law-related activities” would include “CLE’s; events sponsored by the Bar, Bar sections, or Bar Associations; and firm parties.”

But the bigger problem with the 2020 Proposal Rules’ conversion of the Standards of Professionalism and Civility into black letter rules is that “aspirational” language typically does not have the specificity and clarity that the Constitution requires of rules that carry such heavy penalties for violations. Words like “demeaning” and “disparaging” are appropriate in aspirational guidance but are unconstitutional viewpoint discrimination when used to sanction lawyers’ speech. *Cf., National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Matal v. Tam*, 137 S. Ct. 1744 (2017).

For these reasons, CLS urges the Court not to transform the Standards of Professionalism and Civility into black letter rules.

3. The 2020 Proposed Rules would make major changes to Rule 8.4 by adding two new black letter rules.

The 2020 Proposed Rules would add two new black letter rules to Rule 8.4 that make it professional misconduct to:

Rule 8.4(g): 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, except that for the purposes of this paragraph and in applying those statutes, “employer” shall mean any person or entity that employs one or more persons; or

Rule 8.4(h): egregiously violate, or engage in a pattern of repeated violations of, Rule 14-301 if such violations harm the lawyer’s client or another lawyer’s client or are prejudicial to the administration of justice.

At first glance, Proposed Rule 8.4(g) seems to be tracking some states’ rules, such as Illinois’ rule, which require that a lawyer’s conduct be found to be “unlawful” by an adjudicatory body other than the bar disciplinary counsel before a charge of professional misconduct can be brought against the lawyer. Indeed, Illinois’s rule requires that the appeals be final before a

charge can be brought by bar counsel. But on closer scrutiny, Proposed Rule 8.4(g) lacks key safeguards found in the Illinois rule.

For instance, 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.” Because of the comma after “unlawful,” Proposed Rule 8.4(g) punishes more than an “unlawful” employment practice, but also punishes “discriminatory, or retaliatory” employment practices that are not necessarily “unlawful.” The use of the disjunctive “or” reinforces this reading. If the revised proposal is intended to be limited only to “unlawful” conduct, then the modifiers “discriminatory, or retaliatory” should be deleted. Otherwise there needs to be an explanation as to which “discriminatory, or retaliatory employment practice[s]” are not “unlawful” but nonetheless will be considered professional misconduct. *CLS made this same comment regarding the same language in the 2019 Proposed Comments, but the problem was not corrected, adding to the concern that the language is not intended to be limited to “unlawful” conduct.*

Additionally, the Illinois rule requires that a judicial or administrative tribunal, other than a state bar tribunal, find that an attorney committed unlawful discrimination *before* the state bar may entertain a disciplinary complaint against the attorney. And any appeal must have been finalized before disciplinary action can be pursued. 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 typically are available in the bar disciplinary process. The 2020 Proposed Rules should have included the requirement that any conduct found to be professional misconduct have been first adjudicated to be “unlawful” by a tribunal other than bar disciplinary process. *CLS made this same comment regarding same language in the 2019 Proposed Comments, but no change was made.*

Finally, the term “employer” would be broadened to subject solo practitioners and firms with fewer than 15 employees to complaints of professional misconduct for their employment decisions. Solo practitioners and firms with fewer than 15 employees are not subject to Title VII claims of employment discrimination, but they will be subject to Proposed Rule 8.4(g).

4. The 2020 Proposed Rules would add several problematic Comments to accompany Proposed Rules 8.4(g) and 8.4(h) that raise questions about a lawyer’s ability to decline representation of a client and other problems.

The 2020 Proposed Rules would add several comments that combine elements of ABA Model Rule 8.4(g) with state and federal law, as well as other states’ rules, in a complicated and confusing way.

a. Proposed Comment [4], first sentence.

The first sentence of Proposed Comment [4] provides: “The substantive law of antidiscrimination and anti-harassment statutes and case law governs the application of

paragraph (g), except that for purposes of determining a violation of paragraph (g), the size of a law firm or number of employees is not a defense.”

There are two things to note about this first sentence. First, as already noted, solo practitioners and small firms will be subject to discipline as employers.

Second, Proposed Comment 4 provides that substantive antidiscrimination and anti-harassment law governs application of Proposed Rule 8.4(g), but there is no mention of either Proposed Rule 8.4(h) or Proposed Standard 3, both of which, if adopted, would be black letter rules prohibiting “discriminatory conduct in law-related activities.” Unlike Proposed Rule 8.4(g), Proposed Rule 8.4(h) and Standard 3 evidently are not to be “govern[ed]” by “[t]he substantive law of antidiscrimination and anti-harassment statutes.” This makes Proposed Rule 8.4(h) and Proposed Standard 3 broader than Proposed Rule 8.4(g).

b. Proposed Comment [4], second sentence (first half).

The first half of the second sentence of Proposed Comment [4] provides: “Paragraph (g) does not limit the ability of a lawyer to accept, decline, or, in accordance with Rule 1.16, withdraw from a representation, . . .”

To the contrary, the 2020 Proposed Rules could limit Utah 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 and point to the Rule’s language that it “does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.”

Here’s the problem. Proposed Comment [4] mentions only Proposed Rule 8.4(g) and not Proposed Rule 8.4(h), which is significant because it is Proposed Rule 8.4(h) that extends to Proposed Standard 3. And it is Proposed Standard 3 that actually does more of the work than does Proposed Rule 8.4(g). According to the Proposed Rules’ plain text, the prohibition on “discriminatory conduct in law-related activities” found in Proposed Standard 3 would apply to a lawyer’s ability to accept, decline, or withdraw from a representation.

This would be consistent with the Vermont Supreme Court’s understanding of ABA Model Rule 8.4(g). When Vermont became the first state to adopt the model rule, its 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).”

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.). In the facts before the Committee, a potential client requested a lawyer to represent him in a claim against a religious institution. Because the lawyer was of the same religion as the institution, the lawyer was unwilling to represent the person in a

suit against the religious 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).” (Emphasis supplied.)

The Massachusetts Commission Against Discrimination found that a law firm that specialized in representing women in divorce cases had violated state nondiscrimination law when it refused to represent a man. *Stropnick v. Nathanson*, 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.

Not surprisingly, law professors who teach professional responsibility agree that this is a genuine concern with ABA Model Rule 8.4(g), despite its inclusion of reassuring language. As the late 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, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, ed. April 2017, 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 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 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. 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).” *Id.* at 207-208 & n.146.

c. Proposed Comment [4], second sentence (second half)

The second half of the second sentence of Proposed Comment [4] provides: . . . “nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules.”

Again, this provision does not apply to Proposed Rule 8.4(h) or Proposed Standard 3, which prohibit “discriminatory conduct in law-related activities.” This language is drawn from ABA Model Rule 8.4(g) and, therefore, suffers from the same defect: language that appears to protect speech does not. The first problem is self-evident: Who gets to determine whether

advocacy is “legitimate” or “illegitimate” under proposed ABA Model Rule 8.4(g)? The second problem is that the qualifying phrase “consistent with these rules” makes it utterly circular. Like the proverbial dog chasing its tail, the Proposed Comment protects “legitimate advice or advocacy” only if it is “consistent with” the Rule itself.

As Andrew Halaby and Brianna Long note in their catalogue of the Rule’s problems, “the word ‘legitimate’ cries for definition.” Indeed, “one difficulty with the ‘legitimate’ qualifier – lawyers need to make the arguments in order to change the law, yet the new model rule obstructs novel legal arguments,” particularly when “the subject matter is socially, culturally, and politically sensitive.” They further assert that “[i]n fact, the proposed rule would effectively require enforcement authorities to be guided by their ‘personal predilections’ because whether a statement is ‘harmful’ or ‘derogatory or demeaning’ depends on the subjective reaction of the listener. Especially in today’s climate, those subjective reactions can vary widely.” 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, 238 (2017).

Dean McGinniss notes that this language especially concerns “lawyers with traditional religious or moral convictions, often disparaged as so-called bigotry in contemporary political and popular culture and which may be deemed illegitimate by state bar authorities.” McGinniss, *supra*, at 210.

Likewise, the Tennessee Attorney General warned that “the [Board of Professional Responsibility] would presumably get to draw the line between legitimate and illegitimate advocacy, creating a further risk that advocacy of controversial or politically incorrect positions would be deemed harassment or discrimination that constitutes professional misconduct.” Tenn. Att’y Gen. Letter, Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>.

d. Proposed Comment [4], third sentence

The third sentence of Proposed Comment [4] provides: “Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of paragraph (g).”

As already noted, Proposed Rule 8.4(g) gives the semblance of applying only to unlawful discriminatory conduct, seeming to follow Illinois’ example in its Illinois Rule of Professional Conduct 8.4(j). But the Illinois rule requires that a tribunal other than the bar disciplinary counsel have found the conduct to be unlawful discrimination, and appeal exhausted, before a charge will be brought. Proposed Comment 4 demonstrates that Proposed Rule 8.4(g) is not actually employing the Illinois rule as a model. Proposed Comment 4 makes clear that the disciplinary counsel process will be the tribunal of first resort for employment discrimination claims under Proposed Rule 8.4(g), as well as claims of “discriminatory conduct in law-related activities” brought under Proposed Rule 8.4(h) and Proposed Standard 3. This places a tremendous new burden on the bar’s disciplinary staff, as well as depriving accused lawyers of the greater due process, discovery opportunities, and evidentiary protections offered to the accused in other tribunals.

e. Proposed Comment [4], fourth and fifth sentences.

The fourth and fifth sentences of Proposed Comment [4] provide: “Lawyers may discuss the benefits and challenges of diversity and inclusion without violating paragraph (g). Unless otherwise prohibited by law, implementing or declining to implement initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations, are not violations of paragraph (g).”

Again, by specifying Proposed Rule 8.4(g) but not Proposed Rule 8.4(h) or Proposed Standard 3, the plain text suggest that lawyers may not discuss the benefits and challenges of diversity and inclusion, and that lawyers may not implement or decline to implement diversity and inclusion initiatives, without violating Proposed Rule 8.4(h) and Proposed Standard 3. If nothing else, Proposed Comment [4] supports the belief that the 2020 Proposed Rules, if adopted, will mean that there are permissible topics of discussion -- and impermissible topics for discussion.

II. Under the Analyses of Two Recent United States Supreme Court Decisions, ABA Model Rule 8.4(g) and Rules Derived from It Are Likely to be Found Unconstitutional.

Since the ABA adopted Model Rule 8.4(g), the Supreme Court has issued two key free speech decisions that demonstrate its unconstitutionality, *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), and *Matal v. Tam*, 137 S. Ct. 1744 (2017). The ABA Section of Litigation published an article in which several section members concurred that the *Becerra* decision raises serious concerns about the rule’s overall constitutionality:

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.

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) (emphasis supplied), <https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond/>.

Under the Court’s analysis in *Becerra*, ABA Model Rule 8.4(g) and rules derived from it, such as the 2020 Proposed Rules, represent unconstitutional content-based restrictions on lawyers’ speech. The *Becerra* Court held that state restrictions on “professional speech” are presumptively unconstitutional and subject to strict scrutiny. The Court repudiated the idea that

professional speech is less protected by the First Amendment than other speech. Three federal courts of appeals had recently 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. In abrogating those decisions, the Court stressed 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.’” 138 S. Ct. at 2371-72. 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.” *Id.*

Under the Court’s analysis in *Matal*, ABA Model Rule 8.4(g) and rules derived from it, such as the 2020 Proposed Rules, are unconstitutional viewpoint-based restrictions on lawyers’ speech that cannot survive the strict scrutiny triggered by viewpoint discrimination. In *Matal*, all nine justices agreed that a provision of a longstanding federal law allowing government officials to deny trademarks for terms that may “disparage or bring into contempt or disrepute” living or dead persons was unconstitutional because “[i]t offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.” 137 S. Ct. at 1751. 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.’” *Id.* at 1764.

In his concurrence, joined by Justice Ginsburg, Justice Sotomayor, and Justice 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.” *Id.* at 1767. 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.

Id. at 1769 (Kennedy, J., concurring).

As to the 2020 Proposed Rules, many elements of ABA Model Rule 8.4(g) and its Comments [3], [4], and [5] appear in the 2020 Proposed Rules’ Comments [3], [4], and [5]. As discussed in CLS’ 2017 submission, those comments continue to be the source of many of the First Amendment concerns with the 2020 Proposed Rules, just as they were with the 2019 Proposed Rules.

Moreover, the 2020 Proposed Rules, specifically 8.4(h), introduce a whole new set of concerns about chilling attorneys’ speech. By explicitly incorporating the Standards of Professionalism and Civility as a black letter rule, the Standards’ long list of aspirational guidelines becomes a fertile source of professional misconduct claims.

For example, 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 “expressing scorn, superiority, or disrespect.” This standard would seem to be unconstitutional under the *Matal* and *Becerra* analyses. Other Standards raise similar First Amendment concerns.

Proposed Comment [5]’s assertion that the 2020 Proposed Rules “do[] not apply to expression or conduct protected by the First Amendment” does not mitigate the unconstitutional chilling effect on lawyers’ speech. In *United States v. Stevens*, the Supreme Court rejected the federal government’s defense that a statute was not unconstitutionally overbroad because the government had given assurances that it would only enforce the law as to “extreme” acts of animal cruelty. 559 U.S. 460, 480-81 (2010). The Court refused to “uphold an unconstitutional statute merely because the Government promised to use it responsibly.” *Id.* at 480. As the Court explained, “[t]he Government’s assurance that it will apply [the statute] far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.” *Id.*

III. Official Entities in Arizona, Idaho, Illinois, Montana, New Hampshire, South Carolina, South Dakota, Tennessee, and Texas Have Rejected ABA Model Rule 8.4(g), and Several Other States, including Nevada, Minnesota, North Dakota, and Louisiana, Have Abandoned Efforts to Impose It on Their Attorneys.

Federalism permits one state to 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. McGinniss, *supra*, at 213-217.

A. Several state supreme courts have rejected ABA Model Rule 8.4(g) or similar proposals.

The Supreme Courts of **Arizona, Idaho, Montana, South Carolina, South Dakota,** and **Tennessee** have officially rejected adoption of ABA Model Rule 8.4(g). On March 9, 2020, the **South Dakota** Supreme Court announced that it would not adopt the proposed amendment to Rule 8.4 of the South Dakota Rules of Professional Conduct that had been submitted by the State Bar. The court wrote:

After carefully considering the submissions received from those on both sides of this issue, the Court has unanimously decided to deny the proposed amendment to Rule 8.4. The Court is not convinced that proposed Rule 8.4(g) is necessary or remedies an identified problem.

The court also announced that a commission would be appointed “to study and make recommendations to the Court regarding how best to prevent and redress sexual harassment within the legal profession in South Dakota.”

In a memorandum dated March 1, 2019, the **Montana** Supreme Court noted that it “chose not to adopt the ABA’s Model Rule 8.4(g)” after holding a six-month comment period in 2016-17. 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). 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. 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 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.”

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

In a seventeen-page letter that merits careful study, the Attorney General of **Alaska** masterfully detailed the flaws in a proposed rule on which the Alaska Bar Association had sought public comment. Letter from Attorney General Kevin Clarkson to Board of Governors of Alaska Bar Association, <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>. As the Alaska Attorney General explained:

Parts of the Proposed Rule laudably promote professionalism and respect by attorneys to all individuals regardless of personal traits or characteristics. However, by regulating the expression of ideas and religious practices, Proposed Rule 8.4(f) burdens attorneys’ fundamental constitutional rights and threatens the core of what it means to be an attorney: protecting the rule of law, including the United States Constitution, and advocating zealously for clients.

On September 5, 2019, the Board of Governors of the **Alaska** Bar Association unanimously voted to remand a version of ABA Model Rule 8.4(g) back to the Alaska Bar Association's Rules Committee for further action. This decision followed the recommendation made on August 29, 2019, by the Chair of the Alaska Bar Association's Rules of Professional Conduct Committee. The Rules Committee, having reviewed “unprecedented” “amounts of comments,” voted 8-1 to recommend to the Board of Governors that it not submit the proposed rule to the Alaska Supreme Court, but instead remand the matter back to the Rules Committee for further drafting. Public comment is open until August 10, 2020, on a revised proposal.

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)*, 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.”

In May 2017, 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.”

In May 2018, the **Arizona** Attorney General filed a comment letter urging the Arizona Supreme Court to consider 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.

C. The Montana Legislature Recognized the Problems that ABA Model Rule 8.4(g) Presents for Legislators, Hearing 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. The Legislature urged 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. Various 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 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.” The ABA describes **Minnesota** as having rejected ABA Model Rule 8.4(g), presumably in the state bar association.

E. Only Vermont and New Mexico have fully adopted ABA Model Rule 8.4(g).

In the four years since the ABA adopted its Model Rule 8.4(g), only **Vermont** and **New Mexico** have adopted it fully. In May 2019, the **Maine** Supreme Court announced that it had adopted a modified version of ABA Model Rule 8.4(g). The Maine rule is significantly narrower than the ABA Model Rule in several ways. First, the Maine rule’s definition of “discrimination” is substantially more circumscribed. Second, its definition of “conduct related to the practice of law” is much narrower because it does not include “participating in bar association, business or social activities in connection with the practice of law.” Third, it enumerates fewer protected categories. Despite these modifications, the Maine rule is still likely unconstitutional because it overtly targets protected speech.

In July 2019, the **New Hampshire** Supreme Court specifically noted that it was not adopting ABA Model Rule 8.4(g) when it adopted its own distinctive rule. The New Hampshire Advisory Committee on Rules had proposed adoption of a rule closely modeled on ABA Model Rule 8.4(g), but the court declined to adopt it, explaining that “[i]n light of the nascent and ongoing discussion regarding the model rule, the court declines to adopt the rule proposed by the Advisory Committee on Rules.”

In June 2020, the **Pennsylvania** Supreme Court, over one justice’s dissent, adopted a highly modified version to take effect December 8, 2020. The novel new rule is not limited to specific protected classes, but instead seems to prohibit any “words or conduct” that “knowingly manifest bias or prejudice, or engage in harassment or discrimination” against *anyone*. Furthermore, the terms “bias,” “prejudice,” “harassment,” or “discrimination” are defined by “applicable federal, state, or local statutes or ordinances,” which seems to mean that words and conduct that are professional misconduct for a lawyer in Pittsburgh will not be for a lawyer in Lancaster.

IV. Scholars Correctly Characterize Model Rule 8.4(g) as a Speech Code for Lawyers.

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>.

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

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, Professor Rotunda 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 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).

In a thoughtful examination of the rule’s legislative history, practitioners Andrew Halaby and Brianna Long concluded 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.” 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.” 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).

Conclusion

The 2020 Proposed Rules are so complicated and confusing that their constitutional and practical shortcomings seem irreparable. Utah lawyers deserve clear rules that allow them to speak and act confidently, knowing what does and does not trigger disciplinary sanctions. They should not be the subjects of the failed experiment that ABA Model Rule 8.4(g) represents. At a minimum, waiting to see what happens in the two states that have adopted ABA Model Rule 8.4(g) would seem the prudent course to take.

For all these reasons, CLS respectfully requests that the Court reject the 2020 Proposed Rules. It is grateful to the Court for considering these comments.