

I respectfully urge the Court to reject the Proposed Rules that would make significant, detrimental changes to Rule 8.4 and the Standards of Professionalism and Civility. The Proposed Rules are too complex and confusing to be imposed on Utah's lawyers, who deserve and need clarity in the Rules of Professional Conduct and the Standards of Professionalism and Civility.

The Proposed Rules derive from the widely criticized, deeply flawed ABA Model Rule 8.4(g). After four years of deliberations in many states across the country, Vermont and New Mexico are the only states to have adopted that defective rule in full. In contrast, at least twelve states (Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, North Dakota, South Carolina, South Dakota, Tennessee, and Texas) have concluded, after careful study by their courts, attorneys general, or bar associations, that ABA Model Rule 8.4(g) is either unconstitutional, unworkable, or unwise. Prudence counsels to wait and see whether other states choose to experiment with ABA Model Rule 8.4(g), in order to analyze the practical impact on the lawyers in those states.

This is particularly so because after the ABA adopted Model Rule 8.4(g) in 2016, the United States Supreme Court issued two free speech decisions that make its unconstitutionality apparent. Under the Court's analysis in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), Model Rule 8.4(g) is likely to be an unconstitutional *content*-based restriction on lawyers' speech. The *NIFLA* Court held state restrictions on "professional speech" to be presumptively unconstitutional and subject to strict scrutiny. Under the analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Rule seems to be equally unconstitutional as a *viewpoint*-based restriction on lawyers' speech.

Scholars have found ABA Model Rule 8.4(g) to be a speech code for lawyers. As Professor Volokh, a nationally recognized First Amendment expert, explained in a short Federalist Society video, ABA Model Rule 8.4(g) is a speech code for lawyers. <https://www.youtube.com/watch?v=AfpdWmIOXbA>. The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics, 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>. Other scholars similarly have raised red flags. 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, 173 (2019); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics (2017).

Arizona practitioners, Andrew Halaby and Brianna Long, thoroughly examined ABA Model Rule 8.4(g) and concluded that it "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." 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). 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." *Id.* at 206.

Utah attorneys should not be made the subjects of the novel experiment that ABA Model Rule 8.4(g) represents. This is particularly true when Utah's *current* Rule 8.4(d) already makes it

professional misconduct to engage in any conduct that is prejudicial to the administration of justice. Furthermore, Utah's current Comment [3], which accompanies Rule 8.4(d), 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.

I thank the Court for considering these comments.