



## Why Maine Should Not Adopt Proposed Rule 8.4(g): Maine Supreme Judicial Court To Hold Public Hearing on October 23, 2018

On October 23, 2018, the Maine Supreme Judicial Court will hold a public hearing on whether to adopt a new rule based on ABA Model Rule of Professional Conduct 8.4(g)<sup>1</sup> in Courtroom 12 of the Cumberland County Courthouse in Portland. Anyone can attend and provide oral comments on behalf of themselves or an organization. Commenters must arrive at the courtroom and report to the Executive Clerk by 1:20 p.m.

ABA Model Rule 8.4(g) is a deeply flawed rule adopted by the American Bar Association at its annual meeting in San Francisco, California, in August 2016. ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers, as Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, explains in a two-minute Federalist Society video at <https://www.youtube.com/watch?v=AfpdWmlOXbA>.<sup>2</sup>

Fortunately, ABA Model Rule 8.4(g) only operates in those states in which the highest court adopts it; and to date, only the Vermont Supreme Court has done so. After close scrutiny, many states have concluded that ABA Model Rule 8.4(g) is too flawed to impose on their bar members. They instead have chosen the prudent course of waiting to see whether other states adopt ABA Model Rule 8.4(g) in order to observe its real-life consequences for attorneys in those states.

Several states have rejected or abandoned attempts to impose Model Rule 8.4(g), including:

- **Formal rejection:** The ABA lists nine states as having rejected the rule: *Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina, and Tennessee*.<sup>3</sup> The state supreme courts of *Arizona, Idaho, Tennessee* and *South Carolina* formally rejected ABA Model Rule 8.4(g) after holding comment periods.<sup>4</sup>
- **Petitions to adopt withdrawn:** Petitions to adopt ABA Model Rule 8.4(g) were withdrawn in *Nevada* (supreme court) and *Louisiana* (state bar committee) after comment periods.<sup>5</sup>
- **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 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

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<sup>1</sup> [http://www.courts.maine.gov/maine\\_courts/supreme/prof\\_conduct\\_public\\_hearing\\_notice.html](http://www.courts.maine.gov/maine_courts/supreme/prof_conduct_public_hearing_notice.html).

<sup>2</sup> Prof. Volokh’s Federalist Society debate is at <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>. See also, Prof. Ronald Rotunda, “The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought,” The Heritage Foundation, Oct. 6, 2016, and his Federalist Society debate at <https://www.youtube.com/watch?v=V6rDPjqBcQg>; 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 Georgetown Journal of Legal 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).

<sup>3</sup> American Bar Association Center for Professional Responsibility Policy Implementation Committee, *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (Sept. 19, 2018), at

[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chart\\_adapt\\_8\\_4\\_g\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adapt_8_4_g_authcheckdam.pdf).

<sup>4</sup> [https://www.tncourts.gov/sites/default/files/order\\_denying\\_8.4g\\_petition\\_.pdf](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](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.secourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (South Carolina).

<sup>5</sup> <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>;

<https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

legislative matters or testifying about legislation,” as well as its effect on state legislators’ speech when speaking about legislative matters, talking to constituents, or campaigning.<sup>6</sup>

- **Comment period without announced decision:** Comment periods have been held in *New Hampshire*, *Pennsylvania*, and *Utah*, but the supreme courts’ decisions have not been announced.
- **State bar activity:** The *Illinois* Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule.”<sup>7</sup> The *North Dakota* Joint Committee on Attorney Standards recommended rejection; a *Colorado* subcommittee tabled consideration; and the *Louisiana* Rules of Professional Conduct Committee, after a year studying Model Rule 8.4(g), voted not to recommend.

The proposed Rule 8.4(g) being considered by the Maine Supreme Judicial Court would make it professional misconduct for a lawyer to “engage in conduct or communication related to the practice of law that the lawyer knows or reasonably should know is harassment, or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity.”<sup>8</sup> The many problems with the rule are discussed in several comment letters<sup>9</sup> and include:

**1. Proposed Rule 8.4(g) regulates speech too broadly.** It applies to all “communication related to the practice of law,” which would seem to include:

- speaking at public events on legal issues or presenting CLE courses;
- publishing law review articles, blogposts, tweets, op-eds, and 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;
- volunteering at legal aid clinics;
- participating in panel discussions on controversial political and social legal issues;
- performing work for political or social action organizations, political parties, or campaigns;
- lobbying or testifying before legislative committees; or
- pro bono work for one’s congregation, a religious college, or a K-12 religious school.

**2. Proposed Rule 8.4(g) is unconstitutional under two recent United States Supreme Court decisions.** 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.<sup>10</sup> Under the Court’s analysis, Proposed Rule 8.4(g) is a content-based speech regulation that violates the First Amendment. In June 2017, a unanimous United States Supreme Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize “disparaging” speech.<sup>11</sup> The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is viewpoint discriminatory and, therefore, unconstitutional under the First Amendment.<sup>12</sup>

**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. Bar disciplinary counsel in some states have questioned whether they have the resources needed to enforce such an overly broad rule.

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<sup>6</sup> <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

<sup>7</sup> <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

<sup>8</sup> [http://www.courts.maine.gov/rules\\_adminorders/rules/proposed/2018-5-22/mr\\_prof\\_conduct\\_proposed\\_amends\\_2018-5-22.pdf](http://www.courts.maine.gov/rules_adminorders/rules/proposed/2018-5-22/mr_prof_conduct_proposed_amends_2018-5-22.pdf).

<sup>9</sup> [http://www.courts.maine.gov/rules\\_adminorders/rules/proposed/2018-5-22/comments/volokh.pdf](http://www.courts.maine.gov/rules_adminorders/rules/proposed/2018-5-22/comments/volokh.pdf);

[http://www.courts.maine.gov/rules\\_adminorders/rules/proposed/2018-5-22/comments/christianlegal.pdf](http://www.courts.maine.gov/rules_adminorders/rules/proposed/2018-5-22/comments/christianlegal.pdf);

[http://www.courts.maine.gov/rules\\_adminorders/rules/proposed/2018-5-22/comments/blackman.pdf](http://www.courts.maine.gov/rules_adminorders/rules/proposed/2018-5-22/comments/blackman.pdf); <https://fedsoc.org/commentary/blog-posts/aba-model-rule-8-4-g-cannot-survive-the-supreme-court-s-recent-decisions-in-nifla-and-matal>.

<sup>10</sup> *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

<sup>11</sup> *Matal v. Tam*, 137 S. Ct. 1744 (2017).

<sup>12</sup> *Id.* at 1753-1754, 1765; *see also, id.* at 1766 (unconstitutional to suppress speech that “demeans or offends”) (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).