Public Comments Submitted:

Christy Ford Allen
James Atkins
Benjamin Baroody
Christina Bradford
Johnnie Burgess
James G. Carpenter
Christopher Castro
Christian Legal Society
Hank Ehlies
Tom Epting
Gary Finklea
S. M. Gaddy
Matthew Gerald, et al
Ryan Gilsenan
M. Richardson Hyman
Noel Ingram
Judicial Conduct and Lawyer Conduct
Angela Kohel
Philip Little
Gary Lovell
B. Faith Martzin
Gayla McSwain
National Legal Foundation
Frank Potts
Tiffany Richardson
Ron Riebold
Cheryl Shoun
Lindsay Smith-Yancey
Hayes Stanton
Renee Tedrick
Henry P. Wall
Susan Wall
Mike Warren
Elizabeth Wright

From:	Christy F. Allen
To:	Rule8.4comments
Subject:	in support
Date:	Friday, March 17, 2017 9:56:43 AM
Attachments:	image002.png

If lawyers intend to continue to govern ourselves, then we should apply the rules that apply to others outside of the legal field to ourselves. And, it is important that we are viewed as doing so. The parsing of words within this rule does not serve our interests. It will be applied on a case by case basis as nearly everything is applied.

I support adopting the rule, and moving on to other serious issues in our profession.

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From: James Atkins
To: Rule8.4comments
Cc: Beth Atkins
Subject: Propsoed ABA Amendment to Rule 8.4(g) of the Model Rules of Professonal Conduct
Date: Tuesday, March 21, 2017 12:19:22 PM

As solicited this public comment is submitted in opposition to the proposed change to the above referenced rule of professional conduct. Although an arguably laudable attempt at proscribing harassment and discrimination in the practice of law, this proposed amendment is little more than an attempt to impose a speech code on lawyers in violation of the first amendment. As such it is in reality little more than another example of political correctness run amok and is inappropriate even under the guise of "practice of law".

From: Baroody, Benjamin A
To: Rule8.4comments
Subject: Comment Upon ABA Proposed Rule 8.4 Amendment
Date: Wednesday, March 08, 2017 12:03:00 PM

Dear Sir/Madam,

I am writing to express my strong opposition to ABA's proposed amendment to Rule 8.4 of the SCRPC. I have read the Memorandum of our Bar's PR Committee and agree with its recommendation and reasoning whole-heartedly.

I am very proud and thankful that our Bar's committee is so thorough and considerate, as opposed to political.

Please do not adopt this Rule.

With kind regards,

Ben Baroody
(Horry County Bar Association Past President)

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March 29, 2017

The Honorable Donald W. Beatty, Chief Justice
The Honorable John W. Kittredge, Associate Justice
The Honorable Kaye G. Hearn, Associate Justice
The Honorable John Cannon Few, Associate Justice
The Honorable George C. James, Jr., Associate Justice
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

Via email: rule8.4comments@sccourts.org

Dear Chief Justice Beatty, Justice Kittredge, Justice Hearn, Justice Few, and Justice James, Jr.:

Please allow this correspondence to reflect that I would like to join the comment submitted by the Christian Legal Society in opposition to South Carolina adopting ABA Model Rule 8.4(g). My position is that the language adopted by the ABA is overbroad, and the issues addressed by proponents of the Model Rule are sufficiently addressed through South Carolina's Civility Oath and current Rule 8.4 and comments.

Thus, as a licensed member of the South Carolina Bar, I would object to the adoption of ABA Model Rule 8.4(g).

Thank you for your consideration of this comment.

Respectfully Submitted,

s/Christina M. Bradford
Attorney, South Carolina

From: Johnnie Burgess
To: Rule8.4comments
Subject: Opposition
Date: Thursday, March 09, 2017 5:22:01 PM

Your Honor,

I support the decision by the House of Delegates to oppose the adoption of the proposed revision of Rule 8.4(g). More clearly, I oppose the adoption of the revision. While I certainly oppose discriminatory or harassing conduct by anyone, I believe regulation or law on such topics is best left to generally applicable law adopted by the Legislature. Based on my twenty-plus year experience in the practice of law, I believe redundant revisions such as this invite collateral attacks on the profession by those who are unhappy with the primary outcome of their original matter in controversy. We already have rules that obligate us to serve the best interests of our clients to the best of our ability within the bounds of the law. Discriminatory or harassing conduct would clearly be in violation of such rules. For that reason, I believe the proposed revision is both unnecessary and counterproductive.

Johnnie J. Burgess
SC Bar No.: 102662
Mo. Bar No.: 38997

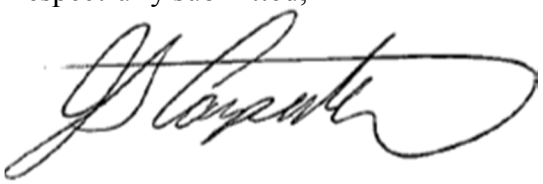
johnnie.burgess2020@gmail.com

To the Justices of the South Carolina Supreme Court:

I write to express my opposition to the proposed Rule 4.8, adopted by the ABA. It seems to me to be political correctness run amok. A lawyer could lose his license for conduct and speech protected by the First Amendment.

I heartily endorse the thoughtful and well-reasoned letter on this issue written by the Christian Legal Society. I attach a copy for your convenience.

Respectfully submitted,



James G Carpenter

From: Chris Castro
To: Rule8.4comments
Subject: Comments
Date: Monday, March 13, 2017 4:58:07 PM

Good day. I wish to commend the House of Delegates on their proposal NOT to approve Rule 8.4(g) as written.

The amended version of ABA Model Rule 8.4 should never be adopted in South Carolina. This proposed rule is a not-so-subtle attempt by the ABA to force nouveau definitions of sexual and gender identity on Americans who believe in the traditional meanings those words.

I took the time to read the recommendation created by the Bar's Professional Responsibility Committee. I agree completely with their reasoning and conclusions.
I applaud the House of Delegates for standing firm for free speech, and for standing up for South Carolina attorneys.

With kind regards,

W. Christopher Castro
License #75322.

CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

March 22, 2017

The Honorable Donald W. Beatty, Chief Justice
The Honorable John W. Kittredge, Associate Justice
The Honorable Kaye G. Hearn, Associate Justice
The Honorable John Cannon Few, Associate Justice
The Honorable George C. James, Jr., Associate Justice
Supreme Court
1231 Gervais Street
Columbia, SC 29201

Via email: rule8.4comments@sccourts.org

Re: Comments of Christian Legal Society Opposing Adoption of ABA Model Rule 8.4(g)

Dear Chief Justice Beatty, Justice Kittredge, Justice Hearn, Justice Few, and Justice James:

Founded in 1961, Christian Legal Society ("CLS") is an interdenominational association of Christian attorneys, law students, and law professors that networks thousands of lawyers and law students in all fifty states, including South Carolina. Among its many activities, CLS engages in two nationwide public ministries through its Christian Legal Aid ministry and its Center for Law & Religious Freedom.

Demonstrating its commitment to helping economically disadvantaged persons, the goal of CLS's Christian Legal Aid program is to meet urgent legal needs of the most vulnerable members of our society. Based on its belief that the Bible commands Christians to plead the cause of the poor and needy, CLS encourages and equips individual attorneys to volunteer their time and resources to help those in need in their communities. CLS provides resources and training to assist approximately sixty local legal aid clinics nationwide. This network increases access to legal aid services for the poor and marginalized.

Demonstrating its commitment to pluralism and the First Amendment, CLS works through its Center for Law & Religious Freedom to protect the right of all citizens to be free from discriminatory treatment based on their religious expression and religious exercise. CLS was instrumental in passage of the federal Equal Access Act of 1984 that protects the right of both religious and LGBT student groups to meet on public secondary school campuses. Equal Access Act, 20 U.S.C. §§ 4071-74. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting the EAA). *See, e.g., Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (the Act protects religious student groups' meetings); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (the Act protects LGBT student groups' meetings). For forty years, CLS has protected free speech, religious exercise, assembly, and expressive association rights for all citizens.

I. This Court Should Not Adopt ABA Model Rule 8.4(g) But Instead Should Keep the Current Comment [3] that Accompanies Rule 8.4(e), Rule 407, SCACR.

Two months ago, the House of Delegates of the South Carolina Bar deliberated whether to recommend that this Court amend its current Rules of Professional Conduct to add the ABA's new Model Rule 8.4(g), along with its three accompanying Comments [3], [4], and [5]. But the House of Delegates "ultimately adopted a proposal 'to not approve Rule 8.4(g) as written and to have a public hearing and public comment.'" Request for Written Comments, at 1.

In its earlier recommendation to the House, the Professional Responsibility Committee adopted the position that the language of the new ABA Model Rule 8.4(g) "is overbroad and that South Carolina's Civility Oath and current Rule 8.4 with its comments are sufficient to address the issues identified by the proponents of the Model Rule." As a result, "[t]he Committee's position is that it would be an error to attempt to correct something that is working effectively. South Carolina's Rule 8.4 in connection with our civility oath is the most effective method of protecting the administration of justice without restricting unnecessarily the First Amendment rights of attorneys." The Professional Responsibility Committee, therefore, "requests that the SC Bar adopt a position opposing the adoption of proposed Rule 8.4(g) or, in the alternative, requests the Court hold a public comment period on the proposed rule and consider possible amendments."

For the reasons detailed below, CLS agrees with the recommendations of the House of Delegates and the Professional Responsibility Committee that South Carolina not become the first state to adopt the new, overly broad ABA Model Rule 8.4(g). As the Professional Responsibility Committee explained, current Comment [3] that accompanies Rule 8.4(e), Rule 407, SCACR, already strikes the appropriate balance between the public interest and South Carolina attorneys' First Amendment rights. Its prohibition is further bolstered by the Civility Oath that every attorney takes in order to be admitted to the South Carolina Bar.

In adopting its current Comment [3], this Court adopted verbatim the Comment [3] that accompanied the ABA Model Rule 8.4(d) from 1998 to August 2016. This Court's current Comment [3] prohibits bias and prejudice that are prejudicial to the administration of justice by an attorney in the course of representing a client. Specifically, current Comment [3] which accompanies Rule 8.4(e), Rule 407, SCACR, reads as follows:

> [3] 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 (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (e). A trial judge's finding that peremptory

> challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

To be admitted to the South Carolina Bar, every attorney must take the Civility Oath and swear or affirm that "[t]o opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court but also in all written and oral communications." Rule 402, (k)(3), SCACR. The Oath requires attorneys to show "respect and courtesy due to courts of justice, judicial officers, and those who assist them." *Id.* Each attorney further swears or affirms to "maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged." *Id.*

II. This Court Should Not Subject South Carolina Attorneys to a Rule that Has Not Been Adopted by Any Other State Supreme Court.

The ABA claims that "as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers."[1] *But this claim is factually incorrect because the ABA Model Rule 8.4(g) has not been adopted by any state bar*. Therefore, there is no empirical evidence to support the ABA's claim that Model Rule 8.4(g) "will not impose an undue burden on lawyers." There cannot be because, since the ABA adopted it in August 2016, *no state bar or state supreme court has adopted Model Rule 8.4(g).* Furthermore, ABA Model Rule 8.4(g) is not a duplicate of any prior rule of professional conduct adopted by a state bar or state supreme court.

Twenty-four states and the District of Columbia have adopted black-letter rules dealing with "bias" issues.[2] *But each of these black-letter rules differs from ABA Model Rule 8.4(g) and is in some significant way narrower than that rule*.

Examples of the differences between state black-letter rules and Model Rule 8.4(g)'s expansive scope include:

- Many states' black-letter rules apply only to *unlawful discrimination* and require that another tribunal find that an attorney has engaged in unlawful discrimination before the disciplinary process can be initiated.

[1] Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, at 1.

[2] Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.

- Many states limit their rules to "conduct in the course of representing a client," in contrast to Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law."

- Many states require that the misconduct be prejudicial to the administration of justice.

- Almost no state black-letter rule enumerates all eleven of the Model Rule 8.4(g)'s protected characteristics.

- No black-letter rule utilizes Model Rule 8.4(g)'s "circular non-protection" for "legitimate advocacy . . . consistent with these rules."

Thirteen states, including South Carolina, have adopted a comment dealing with "bias" issues, but not a black-letter rule. Fourteen states have neither adopted a rule nor a comment addressing "bias" issues.

Because no state has adopted ABA Model Rule 8.4(g), the proposed rule has no track record whatsoever. There is no empirical evidence to demonstrate a need in South Carolina for the adoption of the proposed rule. Nor does the proposed rule solve a problem that is not already adequately addressed by application of the current Comment [3] that accompanies Rule 8.4(e), Rule 407, SCACR, as well as the Civility Oath, Rule 402, (k)(3), SCACR.

III. ABA Model Rule 8.4(g) Should Not be Adopted by the Supreme Court of South Carolina Because its Expansive Scope Threatens Attorneys' First Amendment Rights.

In August 2016, the American Bar Association's House of Delegates adopted a new disciplinary rule, Model Rule 8.4(g), making it professional misconduct for a lawyer to engage in harassment or discrimination in conduct related to the practice of law on the basis of eleven protected characteristics.[3] Unfortunately, in adopting the new model rule, the ABA largely ignored over 450 comment letters,[4] most opposed to the rule change. The ABA's own Standing

[3] The rule is found at American Bar Association Standing Committee on Ethics and Professional Responsibility, Section of Civil Rights and Social Justice Commission on Disability Rights, Diversity & Inclusion 360 Commission, Commission on Racial and Ethnic Diversity in the Profession, Commission on Sexual Orientation and Gender Identity, Commission on Women in the Profession, Report to the House of Delegates accompanying Revised Resolution 109, Aug. 2016,
http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

[4] American Bar Association website, Comments to Model Rule 8.4,
http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.

Committee on Professional Discipline filed a comment letter[5] questioning whether there was a demonstrated need for the rule change and raising concerns about its enforceability (although the Committee dropped its opposition immediately prior to the August 8th vote).

The ABA's new Model Rule 8.4(g) poses a serious threat to attorneys' First Amendment rights and should be rejected. If adopted, the proposed rule would have a chilling effect on attorneys' ability to engage in free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square.[6]

A. Model Rule 8.4(g) Operates as a Speech Code for Attorneys.

There are many areas of concern with the proposed rule. Perhaps the most troubling is the likelihood that it will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on a multitude of issues. Because lawyers often are the spokespersons and leaders in political, social, or religious movements, a rule that can be employed to discipline a lawyer for his or her speech on such 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 that continually births movements for justice in a variety of contexts.

Two renowned constitutional scholars have written about their concerns regarding the chilling effect of ABA Model Rule 8.4(g) on attorneys' freedom of speech. Professor Ronald Rotunda has written a treatise on American constitutional law,[7] as well as the ABA's treatise on legal ethics.[8] He demonstrated the problem Model Rule 8.4(g) poses for lawyers' speech in a *Wall Street Journal* article entitled "The ABA Overrules the First Amendment."[9] He explained that:

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[5] Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair of the ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

[6] The Attorney General of Texas recently issued an opinion 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." Texas A.G. Op. No. KP-0123, 2016 WL 7433186 (Dec. 20, 2017), https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf.

[7] See, *e.g.*, AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME I – INSTITUTIONAL POWERS (West Academic Publishing, St. Paul, MN. 2016); AMERICAN CONSTITUTIONAL LAW: THE SUPREME COURT IN AMERICAN HISTORY, VOLUME II – LIBERTIES (West Academic Publishing, St. Paul, MN. 2016); Principles of Constitutional Law (Thomson/West, St. Paul, Minnesota, 5th ed. 2016) (with John E. Nowak).

[8] *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA-Thomson Reuters, Eagan, Minn., 14th ed. 2016).

[9] Ron Rotunda, "*The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech*," *The Wall Street Journal*, Aug. 16, 2016, http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.

> In the case of rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of "verbal" conduct when one lawyer tells another, in connection with a case, "I abhor the idle rich. We should raise capital gains taxes." The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.

Professor Rotunda also recently published an extensive critique of Model Rule 8.4(g), entitled "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought."[10] His analysis is essential to understanding the threat that the new rule poses to attorneys' freedom of speech.

Influential First Amendment scholar and editor of *The Washington Post*'s daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has similarly described the new rule as a speech code for lawyers, explaining:[11]

> Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.
>
> Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."

These significant red flags raised by leading First Amendment scholars should not be ignored. The proposed rule would create a multitude of potential problems for attorneys who

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[10] 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.

[11] Eugene Volokh, "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities*," The Washington Post, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

serve on nonprofit boards, speak on panels, teach at law schools, or otherwise engage in public discussions regarding current political, social, and religious questions.

1. By expanding its coverage to include all "conduct related to the practice of law," the proposed Rule 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.

Proposed Rule 8.4(g) raises troubling new concerns for every attorney because it explicitly applies to all "conduct related to the practice of law." Comment [4] to ABA Model Rule 8.4(g) explicitly delineates Model Rule 8.4(g)'s extensive reach: "Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law, operating or managing a law firm or law practice; and participating in bar association, business *or social activities in connection with* the practice of law." (Emphasis supplied.)

Note that Model Rule 8.4(g) greatly expands upon its predecessor Comment [3] that accompanied ABA Model Rule 8.4(d) from 1998 through July 2016. First, the proposed Model Rule 8.4(g) has an accompanying comment that makes clear that "conduct" encompasses "speech," when it states that "discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others." (Emphasis supplied.) Second, Model Rule 8.4(g) is much broader in scope than its predecessor Comment [3], which applied only to conduct "in the course of representing a client." Instead, the ABA's Model Rule 8.4(g) applies to all "conduct related to the practice of law," including "business or social activities in connection with the practice of law." As will be discussed below, this is a breathtaking expansion of the scope of former ABA Comment [3], which is the current Comment [3] that accompanies Rule 8.4(e) in this Court's Rules of Professional Conduct. Third, the predecessor ABA Comment [3] speaks in terms of "actions when prejudicial to the administration of justice." By deleting that qualifying phrase, the new Rule 8.4(g) also greatly expands the reach of the rule into attorneys' lives.

Indeed, the substantive question becomes, what conduct does Rule 8.4(g) *not* reach? Virtually everything a lawyer does is "conduct related to the practice of law." Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Most likely, the rule includes all "business or social activities in connection with the practice of law" because there is no real way to delineate between the two. Much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

For example, activities likely to fall within the proposed Rule 8.4(g)'s scope include:

- presenting CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds

- giving guest lectures at law school classes
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social viewpoints
- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to nonprofits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one's religious congregation
- serving one's alma mater college, if it is a religious institution of higher education
- serving religious ministries that assist prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving on the boards of fraternities or sororities
- volunteering with or working for political parties
- working with social justice organizations
- any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political issues

2. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their religious congregations, religious schools and colleges, and other religious ministries.

Many lawyers sit on the boards of their religious congregations, religious schools and colleges, and other religious nonprofit ministries. These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. These ministries also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not be disciplined for volunteer legal work she performs for her church or her alma mater.

By chilling attorneys' speech, the rule is likely to do real harm to religious institutions and their good works in their communities. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law," yet ABA Model Rule 8.4(g) causes such concerns. Because ABA Model Rule 8.4(g) seems to

prohibit lawyers from providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyer's free speech and free exercise of religion when serving religious congregations and institutions.

3. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline.

Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues. Of course, lawyers are asked to speak *because they are lawyers*. A lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Writing -- "Verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics or expresses unpopular viewpoints? Must lawyers forswear writing blogposts or letters to the editor because someone may file a complaint with the bar because that person perceives the speech as "manifest[ing] bias or prejudice towards others"? If so, public discourse and civil society will suffer from the ideological paralysis that ABA Model Rule 8.4(g) will impose on lawyers, who are often at the forefront of new movements and unpopular causes.

Speaking -- It would seem that all public speaking by lawyers on legal issues falls within ABA Model Rule 8.4(g)'s prohibition. But even if some public speaking were to fall outside the parameters of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of "sexual orientation" or "gender identity" as a protected category in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in Model Rule 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, ABA Model Rule 8.4(g) chills attorneys' speech.

4. Attorneys' membership in religious, social, or political organizations may be subject to discipline.

ABA Model Rule 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibits all California state judges from participating in Boy Scouts because of the organization's teaching regarding sexual conduct.[12]

Would ABA Model Rule 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage? These are serious concerns that mitigate against its adoption.

ABA Model Rule 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs or that holds to the religious belief that marriage is only between a man and a woman or numerous other religious beliefs implicated by the rule's strictures. For example, according to some government officials, the right of a religious group to choose its leaders according to its religious beliefs is "religious discrimination." But it is simple common sense and basic religious liberty that a religious organization's leaders should agree with its religious beliefs. As the Supreme Court explained in a recent unanimous opinion:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 710 (2012).

[12] Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, *available at* http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

B. ABA Model Rule 8.4(g) Would Institutionalize Viewpoint Discrimination Against Many Lawyers' Public Speech on Current Political, Religious, and Social Issues.

As seen in the ABA's Comment [4], ABA Model Rule 8.4(g) explicitly protects some viewpoints over others by allowing lawyers to "engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations." Because "conduct" includes "verbal conduct," the proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not.

But that is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). ABA Model Rule 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, what speech or action does or does not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of conformity, uniformity, or orthodoxy.

Because enforcement of ABA Model Rule 8.4(g) gives governmental actors unbridled discretion to determine which speech is permissible and which is impermissible, which speech "promote[s] diversity and inclusion" and which does not, the rule clearly countenances viewpoint discrimination based on governmental actors' subjective biases. Courts have recognized that giving any government official such unbridled discretion to suppress citizens' free speech is unconstitutional. *See, e.g.*, *Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

C. A Troubling Gap Exists Between Protected and Unprotected Speech Under ABA Model Rule 8.4(g).

ABA Model Rule 8.4(g) cursorily states that it "does not preclude legitimate advice or advocacy *consistent with these rules*." But the qualifying phrase "consistent with these rules" makes Rule 8.4(g) utterly circular. Like the proverbial dog chasing its tail, Rule 8.4(g) protects "legitimate advice or advocacy" only if it is "consistent with" Rule 8.4(g). That is, speech is permitted by Rule 8.4(g) if it is permitted by Rule 8.4(g).

This circularity itself compounds the threat proposed Rule 8.4(g) poses to attorneys' freedom of speech. The epitome of an unconstitutionally vague rule, Rule 8.4 violates the Fourteenth Amendment as well as the First Amendment. Again, who decides what speech is permissible? By what standards? It is not good for the profession or for a robust civil society for lawyers to be potentially subject to disciplinary action every time they speak or write on a topic that may cause someone to disagree and file a disciplinary complaint to silence the attorney.

IV. Bar Officials in California and Pennsylvania Have Expressed Grave Reservations About Whether State Bars Have the Resources to Become the Tribunal of First Resort for Employment Claims Against Attorneys and Law Firms.

California State Bar authorities voiced serious concerns last year when considering whether to modify their disciplinary rule to something more akin to the ABA Model Rule 8.4(g). California's current Rule 2-400 requires that a separate judicial or administrative tribunal have found that a lawyer committed unlawful discrimination before disciplinary charges can be brought. According to Justice Lee Smalley Edmon, the presiding justice of the Second District, Division Three of the California Courts of Appeals and the Chair of the State Bar's Second Commission for the revision of the Rules of Professional Conduct, "[t]he proposed elimination of current Rule 2-400(C)'s pre-discipline adjudication requirement has raised concerns among some members of the commission and the Board of Trustees concerning due process, the increased demands on State Bar resources that may result, and questions regarding any evidentiary or preclusive effects a State Bar Court decision may have in other proceedings."[13] For that reason, she explained, an alternative was being offered to leave in place Rule 2-400(C)'s requirement that an attorney cannot be disciplined for unlawful discrimination unless a court, other than the State Bar Court, has found that the attorney engaged in unlawful discrimination under state or federal law and any appeal is final and leaves the finding of unlawful discrimination standing.

Similarly, an official for the California State Bar Court noted that the Commission should seriously reflect upon the differences between the State Bar Court's adjudicatory process and the state civil courts' adjudicatory processes.[14] In the words of the State Bar Court official, "the unique nature of the State Bar Court and its own Rules of Procedure differ significantly from Superior Court civil proceedings."[15] First, discovery is significantly more limited in State Bar Court proceedings. Second, the rules of evidence are different. "State Bar Court proceedings are not conducted according to the Evidence Code as applied in civil cases."[16] Any relevant evidence

[13] Justice Lee Smalley Edmon, "*Wanted: Input on Proposed Changes to the Rules of Professional Conduct*," California Bar Journal, August 2016, http://calbarjournal.com/August2016/Opinion/LeeSmalleyEdmon.aspx.
[14] Commission Provisional Report and Recommendation: Rule 8.4.1 [2-400], at 9, http://ethics.calbar.ca.gov/Portals/9/documents/2d_RRC/Public%20Comment%20X/RRC2%20-%208.4.1%20[2-400]%20-%20Rule%20-%20DFT5%20(02-19-16)%20w-ES-PR.pdf.
[15] *Id.*
[16] *Id.*

must be admitted, and hearsay evidence may be used. Third, "[i]n disciplinary proceedings, attorneys are not entitled to a jury trial."[17]

The California Commission Provisional Report noted other concerns raised by removing the pre-discipline adjudication requirement. It described the problems with the requirement's deletion as follows:

> Eliminating current rule 2-400's threshold requirement that a court of competent jurisdiction has found that the alleged unlawful conduct had occurred raises substantial concerns, including due process, . . . lack of [the State Bar's Office of Chief Trial Counsel] resources and expertise to prosecute the charge effectively, and the potential that disciplinary proceedings would be used as the testing ground for new theories of discrimination, or as leverage in otherwise unrelated civil disputes between lawyers and former clients.[18]

Similarly, a recent memorandum outlining Pennsylvania's Proposed Rule 8.4(g) correctly identified two defects of ABA Model Rule 8.4(g) that Pennsylvania's Proposed Rule 8.4(g) would avoid.[19] Pennsylvania's proposed rule would adopt a rule like several states have, including Illinois, Iowa, and California, that 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. The memorandum identifies the first defect of ABA Model Rule 8.4(g) to be its "potential for Pennsylvania's lawyer disciplinary authority to become the tribunal of first resort for workplace harassment or discrimination claims against lawyers." Mem. at 2. Second, as the Memorandum concluded, "after careful review and consideration … the breadth of ABA Model Rule 8.4(g) will pose difficulties for already resource-strapped disciplinary authorities." *Id.*

V. Conclusion

South Carolina attorneys should be free to practice law without the fear of false accusations of discrimination or harassment threatening their livelihood. The threat of losing one's license to practice law is a heavy penalty and demands a stringent process, one in which the standards for enforcement are rigorous and respectful of the attorneys' rights, as well as the rights of others. South Carolina's Rules of Professional Conduct already provide a carefully crafted balance between the need to prevent discrimination and the need to respect attorneys' due process and First Amendment rights.

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[17] *Id.*
[18] *Id.* at 13.
[19] "Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct," 46 Pa.B. 7519 (Dec. 3, 2016) ["Memorandum"].

Because adoption of the ABA Proposed Model Rule 8.4(g) would have a chilling effect on attorneys' First Amendment rights, it should not be adopted. Attorneys must remain free to engage in speech, religious exercise, assembly, and expressive association in their workplaces and the public square.

Because no state has adopted ABA Model Rule 8.4(g), it has no track record. Nor is there any empirical evidence showing a need to adopt the excessively broad ABA Model Rule 8.4(g).

For all of these reasons, we urge that the ABA Model Rule 8.4(g) not be adopted. Thank you for your consideration of these comments.

Respectfully submitted,

/s/ David Nammo
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WILLIAM H. EHLIES, P.A.
Attorney at Law

"It has always belonged to the truly great and strong to care for the weak and feeble." Victor Hugo March 15, 1832.

March 27, 2017

Re: ABA Proposed Amendment to Rule 8.4(g)

1) The conduct proscribed by this proposal does not exist.

2) If it did, Rules 407 8.4 and 413 7.5 are perfectly adequate to discipline the offender.

3) The proposal is both overly broad - as it applies to conduct in no way connected to the practice of law - and it is impermissibly vague.

4) The proposal offends the First – speech - and Fourteenth – equal protection - Amendments to the Constitution of the United States of America.

5) The proposal is a colossal waste of time, wholly unenforceable and completely unnecessary. Let us spend our time and energy on something worthy of it.

Sincerely yours,

WILLIAM H. EHLIES, II

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From:	Tom Epting
To:	Rule8.4comments
Subject:	Response to Request for Written Comments Regarding Model Rule 8.4(g)
Date:	Wednesday, March 29, 2017 7:35:46 PM
Attachments:	House of Delegates materials copy.pdf

I respectfully request that the South Carolina Supreme Court not approve Model Rule 8.4(g).

As noted in the attached recommendation of the Professional Responsibility Committee of the South Carolina Bar and the memorandum therein, the South Carolina Civility Oath, together with our current Rule 8.4, are sufficient to address the issues raised by Model Rule 8.4(g)'s proponents.

Accordingly, Model Rule 8.4(g) is unnecessary and should not be adopted.

Respectfully submitted,

Thomas W. Epting, Esq.
18 West Hillcrest Drive
Greenville, South Carolina 29609

FINKLEA LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW

Gary I. Finklea
Charlie J. Blake, Jr.
J. Gregory Hendrick
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Patrick B. Ford

March 27, 2017

VIA EMAIL TO
rule8.4comments@sccourts.org
The Supreme Court of South Carolina
Post Office Box 12159
Columbia, SC 29211

Re: Request to Oppose ABA Proposed Amendments to Rule 8.4, SCRPC
Our File No.: 17001GF

Dear Sir or Madam:

Although I am currently a member of the American Bar Association, I am very concerned regarding its political activity which does not seem to promote the practice of the law, but promotes a political agenda inconsistent with our legal heritage.

The proposal to Rule 8.4(g) rule in my opinion does not foster the practice of law nor the delivery of services to clients. In my opinion, not only is the language within the rule very vague and overbroad, the language is crafted by a very small special interest group which seeks to create discrimination and division within our well established profession. Our current oath and rules adequately govern our practice and this rule which serves no purpose but to potentially create problems in the future. As a personal matter, although the specific language within the rule may appear to be germane, the beliefs and motives behind the special interest group which seeks to have these changes violate my deep religious convictions. I appreciate the Bar seeking its members' input.

With kindest regards, I am

Very truly yours,

GARY I. FINKLEA

GIF/jea

From:	S. M. Gaddy
To:	Rule8.4comments
Cc:	S. M. Gaddy
Subject:	comment on Rule 8.4
Date:	Wednesday, March 15, 2017 4:41:04 PM

Lawyers have ways of writing that are unclear to the reader and which create confusion as to what is intended. This morning I read a client's will who told me that his mother's trust could not be found. The mother spent $5000 in estate planning. The will itself contained the trust but was so poorly drafted that after reading it out loud to the trustee, taking notes, re-reading it and discussing it with the trustee, I had to guess what was intended.

That is my reaction to what I have read on the written discussion and background on Rule 8.4. The whole thing leaves me wondering what in the world is going on.

I oppose sexual harassment. I started working full-time in a law office 30 years ago working for my father in his firm that had 4 other lawyers. During that time, one of his law partners used to hit on me. It was very frustrating. When I spoke to my father about it, he replied "you can handle it." The inappropriate behavior of the partner went on for months until I went to law school. When I returned over a school break, he resumed. I made a snide comment that cut to the quick. He never bothered me again. Instead it became funny to him to assert that I stomped on him in my boots or some such nonsense.

After graduating from law school in 1992, I worked for the Administrative Office of the US Courts as an attorney advisor. A Ph.d male professional in the office began making inappropriate comments and generally trying to get somewhere with me. It was very annoying. I must have shut him down also. Then there was the librarian at the Supreme Court of the US library whose conduct made me so uncomfortable that I stopped going to the Supreme Court of the US library to avoid him. Later I learned his reputation.

I could add that I stopped going to the SC Trial Lawyers Association (as it was then-called) Annual Meeting in Hilton Head because I got tired of the same married, drunk men hitting on me every year. It would make me uncomfortable to be in the same room with them even with hundreds of people present. Once I had to yell at a male lawyer to stop. His wife was within 15 feet. How humiliating for her and how often she must have witnessed her husband carrying on in embarrassing ways.

My point is that I don't know who is doing what with this issue. But I can tell you that it is wrong for people who have not experienced sexual harassment to be in charge of what becomes the ethical rule.

I don't see why people don't support the ABA Model Rules. It looks like a diversion or tangent to support anything other than the most comprehensive language possible.

Susan M. Gaddy, Esq.
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SC Supreme Court Certified Mediator
Adjunct Law Professor of Foreclosure Law, Charleston School of Law

THE SUPREME COURT OF SOUTH CAROLINA

IN RE:	**PROPOSED ADOPTION OF**	**)**
	ABA MODEL RULE OF	**)**
	PROFESSIONAL CONDUCT 8.4(g)	**)**

Joint Comment Opposing Adoption of ABA Model Rule of Professional Conduct 8.4(g)

This Joint Comment, submitted by 21 South Carolina licensed attorneys, opposes South Carolina's adoption of new ABA Model Rule 8.4(g) and Comments thereto, for the reasons set forth herein.

I. The Rule

A. South Carolina's Current Rule

South Carolina's current Rule of Professional Conduct 8.4 provides, in pertinent part, as follows:

It is professional misconduct for a lawyer to: . . . (e) engage in conduct that is prejudicial to the administration of justice.

Comment [3] 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 (e) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the forgoing factors does not violate paragraph (e). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

B. <u>The New Model Rule 8.4(g) and Comments</u>

Adopting the new ABA Model Rule 8.4(g) would amend South Carolina Rule 8.4 by adding an entirely new subsection (g), which reads:

> *It is professional misconduct for a lawyer to: . . . (g) engage in conduct 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, gender identity, marital status or socioeconomic status related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.*

In addition, three new Model Comments to the new Model Rule 8.4(g) are being considered for adoption. Those Comments read:

> ***Comment [3]*** *– Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).*
>
> ***Comment [4]*** *– Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating*

in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

***Comment [5]** – A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).*

C. <u>The Objections</u>

A. The New Rule Is Unconstitutional.

1. Many Authorities Have Expressed Concerns About The Constitutionality Of The New Model Rule

Many authorities have pointed out constitutional infirmities of the new Model Rule.

When the ABA opened up the new Model Rule for comment, a total of 487 comments were filed – and of those 487 comments, 470 of them opposed the new Rule, many on the grounds that the new Rule would be unconstitutional.

Indeed, the ABA's own Standing Committee on Attorney Discipline, as well as the Professional Responsibility Committee of the ABA Business Law Section, warned the ABA that the new Rule may violate attorneys' First Amendment speech rights.

And prominent legal scholars, such as UCLA constitutional law professor Eugene Volokh and former U.S. Attorney General Edwin Meese, III, have opined that the new Rule is constitutionally infirm. "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities,*" Eugene Volokh, The Washington Post, August 10, 2016 and http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf.

Attorney General Meese wrote that the new Rule constitutes "*a clear and extraordinary threat to free speech and religious liberty*" and "*an unprecedented violation of the First Amendment.*" http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf

In addition, the authors of at least two law review articles have noted that these sorts of professional Rules violate attorneys' First Amendment rights. See, for example, *Lawyers Lack Liberty: State Codification of Comment 3 of Rule 8.4 Impinge On Lawyers' First Amendment Rights,* Lindsey Keiser, 28 Geo. J. Legal Ethics 629(Summer 2015)(Rule violates attorneys' Free Speech rights) and *Attorney Association: Balancing Autonomy and Anti-Discrimination*, Dorothy Williams, 40 J. Leg. Prof. 271 (Spring 2016)(Rule violates attorneys' Free Association rights).

In fact, in several states that have already considered adopting the new Model Rule, important professional stakeholders have rejected it. For example, the Illinois State Bar Association has taken an official position opposing the Rule; the Pennsylvania Supreme Court

Disciplinary Board is opposing the Rule; and here in South Carolina the South Carolina Bar's Committee on Professional Responsibility is opposing the new Rule stating that the Rule is unconstitutionally vague, unconstitutionally overbroad, and constitutes unconstitutional content discrimination.

Further, the National Lawyers Association's Commission for the Protection of Constitutional Rights has issued a Statement that ABA Model Rule 8.4(g) would violate an attorney's free speech, free association, and free exercise rights under the First Amendment to the U.S. Constitution. (With respect to the constitutional issues raised by the new Model Rule, the attorneys filing this Joint Comment agree with the discussion, analysis and conclusions set forth in the National Lawyers Association's Statement, and have adopted, restated, and in some respects expanded upon much of that discussion and analysis in this Joint Comment.)

Finally, the Attorney General of the State of Texas has issued an official Opinion that a court would likely conclude that the ABA Model Rule 8.4(g) is an unconstitutional restriction on the free speech, free exercise of religion, and freedom of association of members of the Texas State Bar, and that the new Rule is overbroad and void for vagueness. Opinion No. KP-0123, Attorney General of Texas, December 20, 2016.

2. The New Model Rule is Unconstitutionally Vague: It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws offend several important values, among which are the following:

First, due to the fact that we assume that people are free to steer between lawful and unlawful conduct, we insist that laws give people of ordinary intelligence a reasonable opportunity

to know what is prohibited, so that they may act accordingly. Vague laws may trap the innocent by not providing fair warning. *Grayned*, supra, at 108.

Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to state agents for enforcement on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned*, supra, at 108-109.

And third, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. *Grayned*, supra, at 109.

The language of the new Model Rule 8.4(g) violates all these principles.

(a) The Term "Harassment" is Unconstitutionally Vague. The new Model Rule prohibits attorneys from engaging in *harassment* on the basis of one of the protected classes. But the term "harassment" is not defined in the Rule, is subject to varied interpretations, and no standard is provided to determine whether conduct is or is not harassing.

Does expressing disagreement with someone's religious beliefs constitute harassment based on religion? Can merely being offended by an attorney's conduct or expressions constitute harassment? Can a single act constitute harassment, or must there be a series of acts? In order to constitute harassment, must the offending behavior consist of words, or could body language constitute harassment?

Many courts have expressly determined that the term "harass" is unconstitutionally vague. See, for example, *Kansas v. Bryan*, 910 P.2d 212 (Kan. 1996)(holding that the

term "harasses," without any sort of definition or objective standard by which to measure the prohibited conduct, was unconstitutionally vague). See also *Are Stalking Laws Unconstitutionally Vague Or Overbroad*, 88 Nw. U. L. Rev. 769, 782 (1994)(the definition of "harass" is a constitutionally problematic provision due to the vagueness of the term "harass.").

Because the term "harassment" as used in the new Rule is vague, it presents all three problems condemned by the U.S. Supreme Court – (1) it does not provide attorneys with sufficient notice as to what behavior is proscribed; (2) it allows those charged with enforcing the Rules of Professional Conduct to enforce the Rule arbitrarily and selectively; and (3) its vagueness will chill the speech of attorneys who, not knowing where harassment begins and ends, will be forced to censor their free speech rights in an effort to avoid inadvertently violating the Rule.

But it gets worse. Comment [3] to the new Rule provides that harassment includes *derogatory or demeaning verbal or physical conduct*. What exactly is encompassed by the words "derogatory" and "demeaning"? Courts have found these terms to be unconstitutionally vague. *Hinton v. Devin*e, 633 F.Supp. 1023 (E.D. Pennsylvania 1986)(the term "derogatory" without further definition is unconstitutionally vague); *Summit Bank v. Rogers*, 206 Cal.App.4th 669 (Cal.App. 2012)(statute prohibiting statements that are "derogatory to the financial condition of a bank" is facially unconstitutional due to vagueness).

(b) The Term "Discrimination" is Unconstitutionally Vague. It is certainly true that many statutes and ordinances prohibit discrimination, in a variety of contexts. But it is also true that such statutes and ordinances do not – as does the proposed Rule – merely

prohibit "discrimination" and leave it at that. Rather, they spell out what specific behavior constitutes discrimination.

For example, Title VII does not merely provide that it shall be an unlawful employment practice for an employer to discriminate against persons on the basis of race, color, religion, sex, or national origin. Rather, Title VII sets forth in detail what employers are prohibited from doing. Title VII provides that "*It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive, or tend to deprive, any individual of employment opportunities or otherwise adversely affect his status as an employee, on the basis of such individual's race, color, religion, sex or national origin*." 42 U.S.C. § 2000e-2.

Likewise, the federal Fair Housing Act does not simply provide that one may not discriminate in housing based on race, color, religion, familial status, or national origin. It provides a description of what, specifically, is being prohibited: "[I]*t shall be unlawful (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. . . (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available. (e) For profit, to induce or attempt to*

induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604. And the Act provides precise definitions of important terms used in the Act, such as "*dwelling*," "*person*," "*to rent*," and "*familial status*." 42 U.S.C. § 3602.

Unlike other non-discrimination enactments, however, the new Model Rule simply states that "*It is professional misconduct for a lawyer to: . . . (g) knowingly . . . discriminate against persons, on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law*" – leaving to the attorney's imagination what sorts of behavior might be encompassed in that proscription.

Indeed, Model Comments [3] to the Model Rule 8.4(g) states that the term "discrimination" includes "*harmful* verbal or physical conduct that *manifests bias or prejudice towards others.*" The term "harmful" – in the context of attorney speech and conduct – is unconstitutionally vague because attorneys cannot determine with any degree of reasonable certainty what speech and conduct may be included or excluded from that category of speech or conduct.

(c) The Phrase "conduct related to the practice of law" is Unconstitutionally Vague.

Whereas the current Rule applies only to attorney conduct while the attorney is representing a client – a relatively narrow and reasonably determinable aspect of a lawyer's activities – the new Rule applies to any conduct of an attorney that is in any way "*related to the practice of law*." What conduct is related to the practice of law and

what conduct is unrelated to the practice of law, however, is vague and not easily or readily determinable.

Comment [4] attempts to provide guidance as to what the phrase "related to the practice of law" means. But not only is the Comment's definition nearly limitless, including within it *representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law,* but it also an explicitly non-exclusive list. So who can say with any degree of certainty where conduct related to the practice of law ends? For example, does the phrase include comments made by an attorney while attending a birthday celebration for a law firm co-worker; or a statement made by an attorney at a cocktail party the attorney is attending, at least in part, in order to make connections that will hopefully result in future legal work; or comments an attorney makes while teaching a religious liberty class at the attorney's church?

Because no attorney, with any degree of certainty, can determine what behavior is or is not "related to the practice of law," the new Rule is unconstitutionally vague.

If attorneys face professional discipline for engaging in certain proscribed behavior, they are entitled to know precisely what behavior is being proscribed, and should not be left to guess what the proscription might encompass. Anything less is a deprivation of due process.

Because of the vagueness of several of the Rule's important terms, the new Model Rule is unconstitutional.

3. The New Model Rule is Unconstitutionally Overbroad.

Even if an enactment is otherwise clear and precise in what conduct it proscribes, the law may nevertheless still be unconstitutionally overbroad if its reach prohibits constitutionally protected conduct. *Grayned*, supra, at 114.

It is clear that the new Model Rule is not only unconstitutionally vague, it is also unconstitutionally overbroad because, although it may apply to attorney conduct that might be unprotected – such as conduct that actually prejudices the administration of justice or that would clearly render an attorney unfit to practice law – Model Rule 8.4(g) would also sweep within its orbit lawyer speech that is clearly protected by the First Amendment, such as speech that might be offensive, disparaging, or hurtful but that would not prejudice the administration of justice nor render the attorney unfit.

It does not take a constitutional scholar to recognize that "harmful verbal conduct" and "derogatory or demeaning verbal conduct" sweep into their ambit speech that is clearly constitutionally protected. Speech is not unprotected merely because it is harmful, derogatory or demeaning. In fact, offensive, disagreeable, and even hurtful speech is exactly the sort of speech the First Amendment protects. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). See also, *Texas v. Johnson*, 491 U.S. 397, 414 (1989)("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

And courts have found terms such as "derogatory" and "demeaning" unconstitutionally overbroad. *Hinton v. Devine*, supra (the term "derogatory information" is unconstitutionally overbroad); *Summit Bank v. Rogers*, supra (statute defining the offense of making or transmitting an untrue "derogatory" statement about a bank is unconstitutionally overbroad because it brushes

constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech). See also *Saxe v. State College Area School Dist.*, 240 F.3d 200, 215 (3rd Cir. 2001)(school anti-harassment policy that banned any unwelcome verbal conduct which offends an individual because of actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics is facially unconstitutional).

The broad reach of the new Rule is well illustrated by the example that Senior Ethics Counsel Lisa Panahi and Ethics Counsel Ann Ching of the Arizona State Bar give in their article "Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g), " *Arizona Attorney*, January 2017, page 34. They state that an attorney could be professionally disciplined under the new Rule for telling an offensive joke at a law firm dinner party. Distinguished Professor of Jurisprudence at Chapman University, Fowler School of Law, Ronald Rotunda, provides another example of the broad reach of the new Rule. He writes: "*If one lawyer tells another, at the water cooler or a bar association meeting on tax reform, 'I abhor the idle rich. We should raise capital gains taxes,' he has just violated the ABA rule by manifesting bias based on socioeconomic status.*" *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, p. 4

But the speech in both these examples would clearly be constitutionally protected. The fact that such constitutionally protected speech would violate the new Rule demonstrates that the new Rule is unconstitutionally overbroad.

And it is irrelevant whether such speech would ever actually be prosecuted by disciplinary authorities under the new Rule. The fact that a lawyer *could* be disciplined for engaging in such speech would, in and of itself, chill lawyers' speech – the very danger the overbreadth doctrine is

designed to prevent.

For these reasons, the new Model Rule would not pass constitutional muster.

4. **The New Model Rule Will Constitute An Unconstitutional Content-Based Speech Restriction.**

By only proscribing speech that is derogatory, demeaning, or harmful toward members of certain designated classes, the Rule will constitute an unconstitutional content-based speech restriction. *American Freedom Defense Initiative v. Metropolitan Transp. Authority*, 880 F.Supp.2d 456 (S.D.N.Y. 2012)(ordinance prohibiting demeaning advertisements only on the basis of race, color, religion, national origin, ancestry, gender, age, disability or sexual orientation is an unconstitutional content-based violation of the First Amendment).

Professor Rotunda provides a concrete example of how the new ABA Rule may constitute an unconstitutional content-based speech restriction. He explains: "*At another bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, 'Black lives matter.' Another responds, 'Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime.' A third says, 'All lives matter.' Finally, another lawyer says (perhaps for comic relief), 'To make a proper martini, olives matter.' The first lawyer is in the clear; all of the others risk discipline.*" *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, p. 4.

In other words, whether a lawyer has or has not violated the Rule will be determined solely by reference to the *content* of the attorney's speech. Under the Rule, a lawyer who speaks against same-sex marriage may be in violation of the Rule for engaging in speech that constitutes

discrimination on the basis of sexual orientation, while a lawyer who speaks in favor of same-sex marriage would not be. That is a classic example of an unconstitutional content-based speech restriction.

Indeed, in some states that have modified their Rules in ways similar to the new Model Rule, such Rules are already being enforced as free-standing speech codes. See, for example, *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Indiana Supreme Court 2010), in which an Indiana attorney was professionally disciplined merely for asking someone if they were "gay"; and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698 (Indiana 2010) in which an attorney had his license suspended for applying a racially derogatory term to himself.

5. **The New Model Rule Will Violate Attorneys' Free Exercise of Religion and Free Association Rights.**

The new Rule will also violate an attorney's free exercise of religion and freedom of association rights. As an illustration of this problem, Professor Rotunda posits the example of Catholic attorneys who are members of the St. Thomas More Society, an organization of Catholic lawyers and judges. If the St. Thomas More Society should host a CLE program in which members discuss and, based on Catholic teaching, voice objection to the Supreme Court's same-sex marriage rulings, Professor Rotunda explains that those attorneys may be in violation of the Rule because they have engaged in conduct related to the practice of law that could be considered discrimination based on sexual orientation. Indeed – he points out – attorneys might be in violation of the new Rule merely for being members of such an organization. *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Ronald D. Rotunda, Legal Memorandum No. 191, The Heritage Foundation, October 6, 2016, pp. 4-5. But, clearly,

that speech and an attorney's membership in such an organization are both constitutionally protected. The fact that the Rule may prohibit either indicates that the Rule will be unconstitutional.

Because the new Model Rule is clearly unconstitutional, it should be rejected.

B. The New Model Rule Would, For The First Time, Sever The Rules From Any Legitimate Interests Of The Legal Profession.

The legal profession has a legitimate interest in proscribing attorney conduct that – if not proscribed – would either adversely affect an attorney's fitness to practice law or that would prejudice the administration of justice. South Carolina's current Rule 8.4 recognizes this principle by prohibiting attorneys from engaging in seven types of conduct, all of which might either adversely impact an attorney's fitness to practice law or would prejudice the administration of justice. Those types of conduct are:

(a) Violating the Rules of Professional Conduct;

(b) Committing criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Committing a criminal act involving moral turpitude;

(d) Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation;

(e) Engaging in conduct that is prejudicial to the administration of justice;

(f) Stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; and

(g) Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

The first proscribed conduct – violating the Professional Conduct Rules – is self-explanatory and obvious, since the Rules are enacted for the precise purpose of regulating the conduct of attorneys as attorneys. The Rules would hardly serve their purpose if an attorney's violation of them did not constitute professional misconduct.

The second, third, and fourth proscriptions are targeted at attorney conduct which directly impacts the attorney's ability to be entrusted with the professional obligations with which all attorneys are entrusted – namely, to serve their clients and the legal system with honesty and trustworthiness. But– revealingly – those Rules do not proscribe conduct that, although perhaps not praiseworthy, does not warrant the conclusion that the attorney engaging in such conduct is unfit to practice law. Indeed, it is worth noting that Rule 8.4(b) and (c) do not even conclude that all *criminal* conduct is a violation of the Rules of Professional Conduct. Instead, the Rule proscribes only criminal conduct "*that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*" or that involves "*moral turpitud*e." As Comment [2] to South Carolina's current Rule 8.4 explains: "*Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. The South Carolina version of this Rule also specifically includes criminal acts involving moral turpitude as professional misconduct*" (our emphasis).

The fifth type of proscribed conduct is conduct that would prove prejudicial to the administration of justice. Historically, conduct falling within the parameters of this proscription has been limited to misconduct that would seriously interfere with the proper and efficient functioning of the judicial system. For example, the Supreme Court of Oregon analyzed this provision and determined that prejudice to the administration of justice referred to actual harm or injury to judicial proceedings. See, for example, *In re Complaint as to the Conduct of David R. Kluge*, 66 P.3d 492 (Or. 2003), which held that to establish a violation of this Rule it must be shown that the accused lawyer's conduct occurred during the course of a judicial proceeding or a proceeding with the trappings of a judicial proceeding. And in *In re Complaint as to the Conduct of Eric Haws*, 801 P.2d 818, 822-823 (Or. 1990), the court noted that the Rule encompasses attorney conduct such as failing to appear at trial; failing to appear at depositions; interfering with the orderly processing of court business, such as by bullying and threatening court personnel; filing appeals without client consent; repeated appearances in court while intoxicated; and permitting a non-lawyer to use a lawyer's name on pleadings. See also, *Iowa Supreme Court Attorney Disciplinary Board v. Wright*, 758 N.W.2d 227, 230 (Iowa 2008)(Generally, acts that have been deemed prejudicial to the administration of justice have hampered the efficient and proper operation of the courts or of ancillary systems upon which the courts rely); *Rogers v. The Mississippi Bar*, 731 So.2d 1158,1170 (Miss. 1999)(For the most part this rule has been applied to those situations where an attorney's conduct has a prejudicial effect on a judicial proceeding or a matter directly related to a judicial proceeding); *In re Hopkins*, 677 A.2d 55, 60-61 (D.C.Ct.App. 1996)(In order to be prejudicial to the administration of justice, an attorney's conduct must (a) be improper, (b) bear directly upon the judicial process with respect to an identifiable case or tribunal, and (c) must taint the judicial process in more than a *de minimus* way, that is, at least potentially

impact upon the process to a serious and adverse degree); and *In re Karavidas*, 999 N.E.2d 296, 315 (Ill. 2013)(In order for an attorney to be found guilty of having prejudiced the administration of justice, clear and convincing proof of actual prejudice to the administration of justice must be presented). Therefore, this provision, too, is directed at attorney conduct that exposes the judicial process itself to serious harm.

And the last two proscriptions in South Carolina's current Rule also targets what is clearly attorney conduct that, if engaged in, would adversely affect the integral operation of the judicial system – namely, improperly influencing a government agency or official or knowingly assisting a judge or judicial officer in conduct that violates the rules of judicial conduct or other law.

In short, South Carolina's Rule 8.4 has always – heretofore – been solely concerned with attorney conduct that might adversely affect an attorney's fitness to practice law or that seriously interferes with the proper and efficient operation of the judicial system.

The new Model Rule 8.4(g), however, takes Rule 8.4 in a completely new and different direction because, for the first time, the new Rule would subject attorneys to discipline for engaging in conduct that neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system. Indeed, because the new Rule would not require *any* showing that the proscribed conduct prejudice the administration of justice or that such conduct adversely affects the offending attorney's fitness to practice law, the new Rule will constitute a free-floating non-discrimination provision – the only restriction on which will be that the conduct be "related to the practice of law."

To fully appreciate what this departure from the historic principles of attorney regulation will mean, we need only look to the two Indiana cases cited above - *In the Matter of Stacy L. Kelley*, 925 N.E.2d 1279 (Indiana 2010) and *In the Matter of Daniel C. McCarthy*, 938 N.E.2d 698

(Indiana 2010). In neither case did the offending conduct have any demonstrable prejudicial effect on the administration of justice or render the attorneys unfit to practice law. It was deemed sufficient that the attorneys had simply used certain offensive language.

Strikingly, if the new Model Rule is adopted, an attorney could actually engage in *criminal* conduct without violating the Rules (see, for example, *Formal Opinion Number 124 (Revised) – A Lawyer's Use of Marijuana* (October 19, 2015)(a lawyer's use of marijuana, which would constitute a federal crime, does not necessarily violate Colo.R.P.C. 8.4(b))), because Rules 8.4(b) and (c) only apply to a lawyer's "*criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*" or that involve "*moral turpitude*," but could be disciplined merely for engaging in politically incorrect speech.

Such a dramatic departure from the historic regulation of attorney conduct in South Carolina should not be taken lightly. It would represent an entirely new and precedent-setting intrusion on the professional autonomy, freedom of speech, and freedom of association of South Carolina's attorneys..

Because the new Model Rule constitutes an extreme and dangerous departure from the principles and purposes historically underlying South Carolina's Rule 8.4 and the legitimate interests of professional regulation, it should be rejected.

C. The New Model Rule Will Invade The Historically Recognized Right And Duty Of Attorneys To Exercise Professional Autonomy In Choosing Whether To Engage In Legal Representation.

The most important decision for any attorney – perhaps the greatest expression of a lawyer's professional and moral autonomy – is the decision whether to take a case, whether to

decline a case, or whether to withdraw from representation once undertaken.

If the new Model Rule 8.4(g) is adopted, however, attorneys will be subject to professional discipline for acting in accordance with their professional and moral judgment when making decisions about whether to accept, reject, or withdraw from certain cases – because, under the new Rule, attorneys will be affirmatively precluded from declining certain clients or cases. They will, in other words, be forced to take cases or clients they might have otherwise declined.

(Some contend that the new Rule will not require an attorney to accept any client or case the attorney does not want to accept – pointing to the language of the new Rule that provides: "*This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16*." But Rule 1.16 does not even address the question of what clients or cases an attorney *may* decline. It only addresses the question of which clients and cases an attorney *must* decline. What Rule 1.16 addresses are three circumstances in which an attorney is *prohibited* from representing a client, namely: (a) if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client, (b) the lawyer is discharged, or (c) the representation will result in violation of the Rules of Professional Conduct or other law. None of these has anything whatever to do with an attorney's decision not to represent a client *because the attorney does not want to represent the client*. It only addresses the opposite situation – namely, in what circumstances an attorney who otherwise *wants* to represent a client *may not* do so. So what might appear, to someone unfamiliar with Rule 1.16, to be some sort of safe harbor that would preserve an attorney's right to exercise his or her discretion to decline clients and cases, is no such thing.)

So this is another grave departure from the professional principles historically enshrined in South Carolina's Rules of Professional Conduct and its predecessors, which have, before now,

always respected the attorney's freedom and professional autonomy when it comes to choosing who to represent and what cases to accept.

Although the Rules *have* placed restrictions on which clients attorneys may *not* represent (see, for example, Rule 1.7 which precludes attorneys from representing clients or cases in which the attorney has a conflict of interest, and Rule 1.16(a) which requires attorneys to decline or withdraw from representation when representation would compromise the interests of the client), never before have the Rules required attorneys to *take* cases the attorney decides – for whatever reason – he or she does not want to take, or to represent clients the attorney decides – for whatever reason – he or she does not want to represent. (Although Rule 6.2 prohibits attorneys from seeking to avoid court appointed representation, the Rule allows attorneys to decline such appointments "for good cause" – including because the attorney finds the client or the client's cause repugnant.)

Indeed, up until now, the principle that attorneys were free to accept or decline clients or cases at will, for any or no reason, prevailed universally. See, for example, *Modern Legal Ethics*, Charles W. Wolfram, p. 573 (1986)("*a lawyer may refuse to represent a client for any reason at all – because the client cannot pay the lawyer's demanded fee; because the client is not of the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.*").

There are, of course, good reasons why the profession has left to the attorney the professional decision as to which cases the attorney will accept and which the attorney will decline and which clients the attorney will or will not represent. The reasons underlying this historically longstanding respect for attorneys' professional autonomy are twofold.

First, the Rules themselves respect an attorney's personal ethics and moral conscience. See, for example, South Carolina Rules Preamble [7] ("*Many of a lawyer's professional*

responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience"), and [9] ("*Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment . . .*").

If a lawyer is required to accept a client or a case to which the attorney has a moral objection, however, the Rules would have the effect of forcing the attorney to violate his or her personal conscience. The Rules have never – until perhaps now – done so.

And second, the Rules impose upon attorneys a professional obligation to represent their clients zealously, Model Rule 1.3, Comment [1], and without personal conflicts, Model Rule 1.7. A lawyer's ability to do that, however, would be compromised should the lawyer have personal or moral objections to a client or a client's case

In the same vein Rule 1.16(b)(4) recognizes that a lawyer may withdraw from representing a client if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

And as noted above, although Rule 6.2 prohibits attorneys from seeking to avoid accepting cases that are appointed to them by judicial tribunals, the Rule explicitly recognizes that good cause to refuse such appointments includes the situation where the client or cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client (Rule 6.2(c)) – an acknowledgement in the Rules themselves that a lawyer's personal view of a client or a case can be expected to adversely affect the attorney's ability to provide zealous and effective representation.

To force an attorney to accept a client or case the attorney does not want, and then require

the attorney to provide zealous representation to that client, is both unfair to the attorney – because doing so places conflicting obligations upon the lawyer – and to the client, because every client deserves an attorney who is not subject to or influenced by any interests which may, directly or indirectly, adversely affect the lawyer's ability to zealously, impartially, and devotedly represent the client's best interests (see, for example, 1.7(a)(2), which prohibits an attorney from representing a client if there is a significant risk that the representation will be materially limited by a personal interest of the lawyer).

It must be admitted that human nature is such that an attorney who – for whatever reason – has an aversion to a client or a case will not be able to represent that client or case as well as could an attorney who has no such aversion. For that reason, recognizing an attorney's unfettered freedom to choose which clients and cases to accept and which to decline serves the best interests of the client.

This is not only a self-evident principle, in conformance with universal human experience, but is also well attested in the lives of some of our greatest lawyers. For example, it was well known that Abraham Lincoln was not an effective lawyer unless he had a personal belief in the justice of the case he was representing. "Fellow lawyers testified that Mr. Lincoln needed to believe in a case to be effective." An Honest Calling: The Law Practice of Abraham Lincoln, Mark A. Steiner, Northern Illinois University Press (2006).

Indeed, as noted above, the Rules themselves recognize this principle in that Rule 6.2(c) itself recognizes that a client or cause that is repugnant to the attorney may impair the lawyer's ability to represent the client.

Should a gay attorney be forced to represent the Westboro Baptist Church? Should an African American attorney be forced to represent a member of the KKK? Should a Jewish lawyer

be forced to represent a neo-Nazi? And, if so, would these attorneys be able to provide zealous representation to these clients? To pose these questions is sufficient to answer them, in the negative. And yet that is exactly what the new Model Rule would do. (If you doubt this, ask yourself whether, under the new Model Rule, an adoption attorney who has sincerely held religious beliefs against same-sex couples adopting children, would be allowed – for that reason – to decline representation of same-sex couples seeking to adopt, or whether the attorney, by declining that representation, would be held to have discriminated against the same-sex couple on the basis of sexual orientation? We think the answer is obvious, and that proponents of the Rule would admit that such an attorney would be in danger of professional prosecution under the new Rule.)

For these reasons, too, Model Rule 8.4(g) should be rejected.

D. The New Model Rule Conflicts With Other Professional Obligations and Rules of Professional Conduct.

Another significant problem with the new Model Rule 8.4(g) is that it conflicts with other professional obligations and Rules of Professional Conduct. For example:

1. Rule 1.7 Conflicts of Interest – Rule 1.7 provides that: "*(a) . . . a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or* ***by a personal interest of the lawyer***" (our emphasis).

And Restatement (Third) of the Law Governing Lawyers §125 (2000) clarifies that: "*A conflict under this Section need not be created by a financial interest. . .* ***Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy belief***" (our

emphasis).

So – on the one hand the new Rule appears to require an attorney to accept clients and cases, despite the fact that such clients or cases might run counter to the attorney's deeply held religious, philosophical, political, or public policy principles; while at the same time Rule 1.7 provides that accepting a client or a case – when the client or case runs counter to the attorney's beliefs – would violate Rule 1.7's Conflict of Interest prohibitions!

How is that conflict to be resolved?

2. Rule 1.3. Rule 1.3 requires that a lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. Rule 1.3, Comment [1].

"Zeal" means "*a strong feeling of interest and enthusiasm that makes someone very eager or determined to do something.*" Synonyms are "passion" and "fervor". Merriam-Webster.com.

But how would an attorney be able to *zealously* represent a client whose case runs counter to the attorney's deeply held religious, political, philosophical, or public policy beliefs?

Under the new Model Rule, the attorney may not be allowed to reject a case or client she might otherwise reject – due to the attorney's personal beliefs – but then must also represent that client with passion and fervor, enthusiastically and in an eager and determined manner.

Is that humanly possible? We would submit that it is not. And we believe that is exactly why the Rules provide that, if a lawyer cannot do that – for whatever reason – even a discriminatory one – they should not take the case.

How is that conflict to be resolved?

3. Rule 6.2 Accepting Appointments: Rule 6.2 provides that "*A lawyer shall not seek to avoid appointment by a tribunal to represent a person* ***except for good cause****: such as: . .*

. (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client" (our emphasis).

Although this Rule is technically applicable only to court appointments, it's important to what we're discussing here because it contains a principle that should be equally – if not more – applicable to an attorney's voluntary client-selection decisions. Namely, the Rule recognizes that a client or cause may be so repugnant to a lawyer that the lawyer-client relationship would be impaired or the lawyer's ability to represent the client be adversely affected.

Indeed, Model Comment [1] to Rule 6.2 sets forth this general principle that "*A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant*."

Note that Rule 6.2 does not concern itself with *why* the attorney finds the client or cause repugnant – because that's irrelevant. The only relevant issue is whether the attorney – for *whatever* reason – cannot provide the client with zealous representation because the lawyer finds the client or cause repugnant. If not, the attorney must not – for the client's sake – take the case. Clients deserve that.

4. Rule 1.16: Declining or Terminating Representation.

Rule 1.16(a)(4) provides that: *(a) . . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in the violation of the rules of professional conduct or other law.*

But we've already seen that Rule 1.7 would prohibit an attorney from representing a client who – due to the lawyer's personal beliefs – the lawyer could not represent without a personal conflict of interest interfering with that representation. To do so would constitute a violation of the Rules of Professional Conduct.

So, this Rule too is in conflict with the new Rule.

Which Rule is going to prevail when they conflict?

Indeed, the fact that the new Model Rule conflicts with other Professional Rules reveals and highlights a basic problem with the proposed Rule – and that is that the new Rule is an attempt to impose upon the legal profession a non-discrimination construct that is, in its basic premises, inconsistent with who attorneys are and what they professionally do. It is an attempt to force a round peg into a square hole.

In considering the new Rule, we must remember that the non-discrimination template on which the new Rule is based is taken from the context of public accommodation laws – non-discrimination laws that are imposed in the context of merchants and customers – where a merchant sells a product or service to a customer who the merchant does not know and will probably never see again. A transient and impersonal commercial transaction.

But attorneys are not mere merchants, and clients are not mere customers.

Unlike mere merchants – who usually have only distant impersonal commercial relationships with their customers – attorneys have *fiduciary relationships* with their clients.

Attorneys are made privy to the most confidential of their client's information, and are bound to protect those confidentialities. That's not true between a merchant and a customer.

Attorneys are bound to take no action that would harm their clients. That is not true between a merchant and a customer.

And an attorney's relationship with his or her clients is often a long-term relationship, oftentimes lasting months, or even years. That is rarely true between a merchant and a customer.

And once an attorney is in an attorney-client relationship, unlike a merchant the attorney

oftentimes may not unilaterally sever that relationship.

So it's one thing to say a *merchant* may not pick and choose his *customers*. It's entirely another to say a *lawyer* may not pick and choose her *clients*.

No lawyer should be required to enter into what is, by definition, a fiduciary, and what could turn out to be a long-term, relationship with a client the attorney does not want – whatever the reason.

Because the effect of adopting the new Model Rule 8.4(g) would be to impose professional obligations upon South Carolina's lawyers that conflict with other professional rules, and that are incompatible with the very nature of the attorney-client relationship, the new Model Rule 8.4(g) should be rejected.

*E. **The New Model Rule Will Harm Clients***

A primary purpose of the Rules is to protect the public, by ensuring that attorneys represent their clients competently and without personal interests that will adversely affect the attorney's ability to provide clients with undivided and zealous representation. It recognizes the principle that the client's best interest is never to have an attorney who – for any reason – cannot zealously represent them or who has a personal conflict of interest with the client.

The new Model Rule, however, will force an attorney to represent clients who the attorney cannot represent zealously or who, on account of the attorney's personal beliefs about the client or the case, will not be able to represent without a personal conflict of interest.

Indeed, the new Rule, if adopted, would introduce insidious deception into the attorney-client relationship because – in order to avoid violating the Rule – some attorneys will be led to conceal their personal animosities from clients, thereby saddling clients with attorneys who – if

the client knew of the attorney's animosities – the client would not retain.

For these reasons the new Rule will harm clients and should be rejected.

F. There Is No Need For the New Model Rule Because Rule 8.4 Already Contains Provisions Sufficient To Address Discrimination.

Given the fact, as addressed above, that the only legitimate interest the bar has in proscribing attorney conduct is in proscribing conduct that either renders an attorney unfit to practice law or that prejudices the administration of justice, South Carolina's current Rules of Professional Conduct are already sufficient to address serious cases of harassment or discrimination.

First, Rule 8.4(e) already prohibits any and all attorney conduct that prejudices the administration of justice. As noted above, alleged harassment or discrimination that does not prejudice the administration of justice may be regrettable, but it is not a fit subject for professional discipline. So because the existing Rule 8.4(e) is already adequate to address all cases of attorney harassment or discrimination that prejudices the administration of justice, the new Rule is unnecessary.

Further, many of the circumstances the new Model Rule 8.4(g) might address are already addressed by other laws. For example, to the extent the new Rule addresses harassment or discrimination in the legal workplace, such behavior is already addressed in Title VII at the federal level as well as in this state's non-discrimination laws. And to the extent a law practice would constitute a public accommodation, discrimination in that context is covered by this state's public accommodation laws well as a myriad of local public accommodation non-discrimination laws. And harassing and discriminatory judicial behavior is already addressed

in the Code of Judicial Ethics. Therefore, the new Rule is unnecessary.

Indeed, by creating another entirely new layer of non-discrimination and non-harassment rules on top of those that already exist outside the Code of Professional Conduct, the new Rule, if adopted, would burden professional disciplinary authorities with having to process duplicative cases – that is, cases that are, at the same time, also being processed under some other non-discrimination statute or ordinance, such as Title VII – and could actually subject attorneys to inconsistent obligations and results. Indeed, some states have recognized the importance of this issue by (a) prohibiting only "unlawful" harassment or discrimination and (b) requiring that any claim against an attorney for unlawful discrimination be brought for adjudication before a tribunal other than a disciplinary tribunal before being brought before a disciplinary tribunal. See, for example, Illinois Rules of Professional Conduct Rule 8.4(j) and New York Rules of Professional Conduct Rule 8.4(g).

For these reasons, too, the Model Rule 8.4(g) should be rejected.

G. There Is No Demonstrated Need For The New Model Rule.

It is striking to note that there is little or no evidence that harassment or invidious discrimination actually exists to any significant degree in the legal profession – or that, if it does exist, it is such a serious and widespread problem that the already existing plethora of other discrimination statutes and ordinances are insufficient, and that the Rules must be amended, and attorneys' professional and constitutional rights infringed, to address it.

Where *is* the evidence that the legal profession in this state is so rife with harassment and invidious discrimination that the Rules of Professional Conduct simply *must* be amended to address the problem?

Those who would support this effort to amend Rule 8.4 would have to believe that – despite the lack of any actual evidence that attorneys are, in fact, pervasively engaged in invidious harassment and discrimination, many of their fellow lawyers are so vile and depraved that, unless the professional disciplinary authorities are armed with a new precedent-setting tool enabling them to encroach upon the sanctity of all lawyers' professional autonomy, not to mention their personal consciences and constitutional rights, dictating to attorneys who they must represent and which cases they must accept and disciplining them for using politically incorrect speech – lawyers, on the whole, cannot be trusted to behave honorably. We, who join this Comment, have greater respect for and confidence in our fellow members of South Carolina's legal profession. And we take it upon ourselves – perhaps a bit presumptuously – to speak on their behalf.

There is no demonstrated need for the new Model Rule 8.4(g) – and the effort to enshrine this amendment in the Rules is a personal insult to members of this state's legal profession. It is the equivalent of using a sledge hammer to swat a gnat. And – perhaps most disturbing of all – by enacting this amendment, this state's legal profession would be forging its own chains.

H. ***The New Model Rule Will Result in the Suppression of Politically Incorrect Speech While Protecting Politically Correct Speech.***

Comment [4] of the new Rule contains an explicit exception for "*conduct undertaken to promote diversity and inclusion*" and Comment [5] allows lawyers to limit their practice to certain clientele, as long as that clientele are "*members of underserved populations*" (whatever that means).

These exceptions to the new Rule illustrate that this Rule is not going to be a Rule of general applicability and equal application.

Rather, it will allow attorneys who are discriminating in politically *correct* ways to continue that discrimination – but will prohibit attorneys from discriminating in politically *incorrect* ways.

Here's how it will work: If an attorney engages in discriminatory conduct that furthers a *politically correct* interest, the disciplinary authority will find that the discrimination is undertaken to promote diversity or inclusion, or to serve an underserved population – and for that reason does not violate the Rule. However, if an attorney engages in discriminatory conduct that furthers a *politically incorrect* interest, the state will prosecute that attorney for violating the Rule.

This phenomenon has already been seen in other similar contexts. For example, a Civil Rights Commission in Colorado prosecuted a Christian baker for declining to bake a wedding cake for a same-sex couple, but refused to prosecute another baker who refused to bake a cake for a Christian, finding that the first constituted illegal discrimination but that the second did not. The reason underlying this disparate treatment was obvious – in the first the complaining party was a member of a politically favored class, while in the second the complaining part was a member of a disfavored one.

These nefarious exceptions built into the Rule – decrying discrimination generally, while at the same time explicitly approving of it as long as the discrimination furthers an approved interest – reveals that the Rule's interest in prohibiting discrimination is not a compellingly general and neutral interest, but rather a narrow and politically motivated interest.

No state should adopt a Rule constructed so as to punish certain viewpoints while protecting and advancing others – in fact, to do so would itself be unconstitutional.

I. The New Rule Will Trespass On Attorney Conscience Rights.

Comment [5] of the new Rule provides that "*A lawyer's representation of a client does not*

constitute an endorsement by the lawyer of the client's views or activities."

At first glance, this provision might appear to assist attorneys, by getting them "off the hook" – so to speak – from having to worry about becoming morally complicit in a client's behavior. But, in fact, that's precisely the problem with the Rule. By adopting this Rule the state is presuming to take on the role of the attorney's spiritual advisor.

(To understand why this is so, consider the Catechism of the Catholic Church, which explicitly teaches that it is a sin for one to become complicit in the sins of others – by participating in them, by advising them, by not hindering them, or by protecting them.)

The new Rule purportedly attempts to absolve attorneys from any moral culpability they may incur in representing a client.

The U.S. Constitution forbids government from doing this. The state cannot dictate to a citizen what does or does not – or should or should not – violate the citizen's religious beliefs.

And the state certainly may not place itself between its citizens and their God by purporting to absolve citizens of their sins.

If an attorney sincerely believes that representing a client or being involved in a case makes him morally complicit in the client's cause or behavior – and for that reason the lawyer cannot represent the client without violating his conscience – the state may not determine otherwise or purport to "absolve" the attorney of the moral complicity.

Indeed, by preemptively depriving attorneys of the claim that representing a client will make them complicit in a client's behavior – the very purpose of this provision of the new Rule appears to be to foreclose attorneys from being able to assert religious or moral considerations in making client selection decisions – thereby forcing attorneys to either act against their conscience or face professional discipline.

No state should adopt a Rule that would do that.

D. Conclusion

For all the foregoing reasons, South Carolina should reject Model Rule 8.4(g) and its Comments.

Respectfully submitted,

Hammond A. Beale #0599

Reese R. Boyd III #07151

Larry N. Briggs #9024

Doug Churdar #11971

William C. Clark #0001251

Miles E. Coleman #78264

William J. Condon, Jr. #72632

Casey Crumbley #81241

David Brian Dennison #0070695

Nathan Earle #73814

Kathleen Moraska Feri #06639

Matt Gerrald #76236

Samuel D. Harms #13537

Jason Luther #78021

Adam J. Neil #69594

Tim J. Newton #71640

Paul Ribeiro #78114

Timothy D. Savidge #75512

L. Shawn Sullivan #78501

Jay T. Thompson #75030

Hank Wall #5797

From: Gilsenan, Ryan
To: Rule8.4comments
Subject: Amendment to Rule 8.4, SCRPC
Date: Thursday, March 09, 2017 4:01:23 PM
Attachments: ABA Proposed Amendments to Rule 8.4, SCRPC.pdf

To Whom It May Concern:

Thank you for the invitation to comment on the proposed Amendment to Rule 8.4, SCRPC, to adopt the Model Rule 8.4 proposed by the ABA. I write to oppose the adoption of such an Amendment in South Carolina. The South Carolina Bar Convention House of Delegates, of which I am not a member, summed up the matter up well when it recognized that our present Civility Oath is working very well, and that the ABA Model Rule is an impermissible and unconstitutional limitation on freedom of speech and association. I particularly endorse the House of Delegates' view that the Model Rule could be used as weapon against any lawyer who opposes the "cultural zeitgeist" of the moment, as many free thinking adults surely might.

Please do not fix what is not broken. The Civility Oath works well. The ABA appears to have embarked on a downward slide of political correctness that is neither needed nor welcome, the result of which is promotion of a further erosion of individual liberty.

Thank you.

Sincerely,

RYAN GILSENAN
WOMBLE CARLYLE SANDRIDGE & RICE, LLP
5 Exchange Street | Charleston SC 29401 | 843.720.4617 (O) | 843.847.8003 (m)
rgilsenan@wcsr.com | Firm Website | Bio | VCard

From: mrhchas@comcast.net
To: Rule8.4comments
Subject: Comment
Date: Monday, March 20, 2017 12:48:55 PM

As a member of the Bar of the State of South Carolina, I applaud the decision of the House of Delegates and strongly concur that this amendment should not be adopted in the State of South Carolina. No matter how well intended the policy behind the changes, the adoption would cause more problems than it would ever solve, and in light of the fact that the civility oath affords the maximum constitutional control over such issues already, there is no wisdom in adopting a constitutionally questionable and practically unmanageable provision.

M. Richardson Hyman, Jr.
Attorney at Law
P. O. Box 127
Charleston, South Carolina 29402
(843) 416-1047

From:	Noel Ingram
To:	Rule8.4comments
Cc:	noelingramlaw@comcast.net
Subject:	I am opposed to the Adoption of this rule.
Date:	Thursday, March 16, 2017 10:18:13 AM

SC already has adequately addressed this issue and I do not support any amendment to our current Rules.

Noel O'Neal Ingram
SC Bar No. 0004281

The Supreme Court of South Carolina
OFFICE OF COMMISSION COUNSEL

Deborah S. McKeown
Commission Counsel

1220 Senate St., Suite 305
Columbia, South Carolina 29201
Telephone: (803) 734-2037
Fax: (803) 734-0363

May 4, 2017

The Honorable Daniel E. Shearouse, Clerk
The Supreme Court of South Carolina
Post Office 11330
Columbia, SC 29211

Re: ABA Amendments to Model Rule 8.4(g) of the Rules of Professional Conduct

Dear Mr. Shearouse:

The Commissions on Lawyer and Judicial Conduct have reviewed the amendments to Rule 8.4(g) of the Model Rules of Professional Conduct adopted by the American Bar Association in August 2016. The Commissions have the same reservations as the South Carolina Bar, and others, regarding whether the amendments are vague and overbroad from a constitutional perspective. Therefore, the Commissions do not recommend that the Supreme Court incorporate the ABA amendments into the current version of Rule 8.4 of the South Carolina Rules of Professional Conduct.

The Commissions are, however, of the opinion that discrimination and lack of diversity within the legal profession are issues that need to be addressed in some fashion. The Commissions are currently engaging in additional study of these issues and would like the opportunity to present the Supreme Court with some recommended alternatives to the adoption of the ABA amendments to Rule 8.4.

Very truly yours,

Thomas W. Cooper, Jr.
Chair, Commission on Judicial Conduct

Christopher G. Isgett
Chair, Commission on Lawyer Conduct

/dsm

From:	Angela Kohel
To:	Rule8.4comments
Subject:	ABA Rule 8.4(g)
Date:	Friday, March 17, 2017 10:13:49 AM

Good morning.

While I understand the intent of the proposed Rule, I agree with the SC Bar's position on the adoption of the Rule in South Carolina and echo their concerns.

Angie

Angela L. Kohel, Esq.
Legal Services Manager

Richland County
Court Appointed Special Advocates (CASA)
Richland County Judicial Center
1701 Main Street, Rm. 407
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Phone: 803.576.1735
Fax: 803.576.1734
Direct: 803.576.1732

To Whom It May Concern,

I am greatly concerned about the amendment to Rule 8.4. While an attorney must treat a gay or transgender client with respect and courtesy, as is owed to all clients, my concern is that this could be used as a tool against lawyers who have fundamental beliefs that could be considered "discriminatory." In particular, could lawyers who publicly say that homosexuality is wrong or make similar statements be punished under these rules? Perhaps the language from the rule "conduct related to the practice of law" and "does not preclude legitimate . . . advocacy" is sufficient to protect those lawyers, but perhaps not. Without additional clarification and protection for religious lawyers, I would oppose this rule.

Philip D. Little, Jr.
Assistant Public Defender
^^
Sumter County Public Defender's Office
215 N. Harvin Street, Rm #151
Sumter, South Carolina 29150
Phone: 803.436.2424
Fax: 803.436.2423
plittle@sumtercountysc.org

Dennis Gary Lovell, Jr.
2424 Middle Street
Sullivans Island, SC 29482

3/13/2017

South Carolina Supreme Court
Columbia, SC

RE: ABA requested changes to Rule 8.4 of the South Carolina Rules of Professional Conduct, contained in Rule 407 of the South Carolina Appellate Court Rules.

Dear Justices,

Please accept this public comment to the proposal/request of the ABA to amend rule 8.4. The changes requested by the ABA are, in my opinion, overly broad, vague, uncertain and likely unconstitutional. While the goals of the ABA are likely laudable, the attempt to micromanage the day to day activities in our state via this type of language is likely unnecessary, unduly burdensome, and perhaps an unconstitutionally vague attempt to dictate the activity and actions of many of the attorneys in the state.

The terminology and words proposed by the ABA is vague and subject to many different interpretations among those who choose to interpret them. Having practiced in several other states in addition to South Carolina, I can attest that the members of the South Carolina bar is do a very good job of "self-policing" any activity that falls within the parameters of activity sought to be discouraged by this proposed amendment. This language will add nothing to what we already have in our Rules, and do in our day to day practice, here in South Carolina. That language opens us all up to unnecessary and potentially damaging accusations of improper conduct under vague and unclear "standards". I request that you decline to participate in this amendment.

Sincerely Yours,

Gary Lovell

Dennis Gary Lovell, Jr.
SC Bar # 69293

B. Faith Martzin, PC

ATTORNEY AT LAW

South Carolina Supreme Court

Via Email: rule8.4comments@sccourts.org

Thank you for the opportunity to comment on the proposed rule changes. I find the comments by our own House of Delegates highly persuasive and urge the Court not to adopt the ABA's proposal. I believe that attorneys from all political and religious persuasions would find the rule change to be onerous, overreaching and detrimental to zealous client representation and community service.

I especially found the comments regarding differing interpretations of harassment in Pickens and Colleton to be interesting. I clerked for two years at the state court level and found the behaviors by the bar to be extremely different from county to county. In Pickens, attorneys would put their feet up on my judge's desk; in Richland, attorneys would stand until asked to be seated. In Anderson, a somewhat relaxed atmosphere with impersonations pervaded, and in Greenville, jokes might be told, but with restraint. Harassment can be somewhat objective, but is far more likely to be interpreted subjectively. "Inside jokes" can make what might seem off-putting to actually be inclusive. A comment intended to be kind could be construed by someone in a bad mood or with a different cultural background to be cruel. Sometimes we just "put our feet in our mouths."

I believe the current rules give an adequate basis for collegiality within the profession.

Thank you,

B. Faith Martzin

33 MARKET POINT DRIVE, GREENVILLE, SOUTH CAROLINA 29607
(864)551-2604 | MARTZINLAW.COM

From: Gayla McSwain
To: Rule8.4comments
Cc: executivedirector@scwla.org
Subject: rule 8.4(g)
Date: Wednesday, March 15, 2017 6:04:11 PM

ABA Rule 8.4(g) should be adopted into South Carolina's Rules of Professional Conduct for lawyers. This adoption seems to be a no brainer. I am a woman lawyer practicing in South Carolina. I have experienced discrimination by male judges and by male lawyers, even law firm colleagues, who adjudicate and practice law in South Carolina because I am a woman. That behavior should be defined as unethical under our Rules of Professional Conduct. It is unfortunate that it must, literally, be spelled out for some - not all - of my brothers of the Bar, that such behavior is unacceptable and will be punished but, alas, it must be or they will continue to misbehave themselves. So, adopt!

THE NATIONAL LEGAL FOUNDATION

2224 VIRGINIA BEACH BOULEVARD, SUITE 204, VIRGINIA BEACH, VA 23454; (757) 463-6133; FAX: (757) 463-6055

WEBSITE: WWW.NLF.NET ♦ E-MAIL: NLF@NLF.NET

March 29, 2017

The Honorable Donald W. Beatty, Chief Justice
The Honorable John W. Kittredge, Associate Justice
The Honorable Kaye G. Hearn, Associate Justice
The Honorable John Cannon Few, Associate Justice
The Honorable George C. James, Jr., Associate Justice
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201

Via email only: rule8.4comments@sccourts.org

Re: Comments of The National Legal Foundation Opposing Adoption of ABA Model Rule 8.4(g)

Dear Chief Justice Beatty, Justice Kittredge, Justice Hearn, Justice Few, and Justice James:

The National Legal Foundation (NLF) writes in support of the recommendation made by the South Carolina Bar House of Delegates opposing adoption of the referenced model rule.

The NLF is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. We endorse the reasons expressed by the House of Delegates, including the reference (in footnote 3 of the memorandum prepared by the Bar's Professional Responsibility Committee) to comments submitted to the ABA on March 3, 2016, by the Christian Legal Society.

Concerns about the vagueness and overbreadth of the model text have been widely expressed (see, for example, Professor Josh Blackman's article, "Reply: A Pause for State Courts Considering Model Rule 8.4(g)" in the *Georgetown Journal of Legal* Ethics, Vol. 30, 2017 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888204). As drafted, the ABA's model text would unconstitutionally infringe the rights of the members of South Carolina's bar and would set a disturbing precedent for undermining the First Amendment.

Thank you for the opportunity to provide this comment supporting the recommendation of the South Carolina Bar's House of Delegates that the ABA's model text for Rule 8.4(g) not be adopted as drafted, a position that we believe is shared by many members of the South Carolina Bar.

Respectfully,

Steven W. Fitschen, President
National Legal Foundation

It appears that the breach of the provision is being changed from actual harassment or discrimination to conduct which may or may not be harassment or discrimination but which someone else thinks that the lawyer should think is harassment or discrimination. This appears to approach if not be designed to control conduct based on the supposition of others. The proposal appears to be stretching the boundaries and is designed to, in many cases, stifle unpopular protest and speech. I am opposed to this amendment. Frank Potts Bar No. 4538

From: Tiffany Richardson
To: Rule8.4comments
Subject: Rule 8.4(g)
Date: Wednesday, March 15, 2017 4:35:35 PM

Good afternoon,

I am writing to comment on the adoption of Model Rule 8.4(g). At the fundamental heart of my opinion is the question, how many non-male, non-white individuals serve on the Professional Responsibility Committee and were present for the in-depth conversation on harassment and discrimination. I can only guess there were none. Furthermore, I can only assume that the conversation amongst this homogenous group of provincial white men centered on the fact that they do not believe there is ever a racial or sexual divide in society or the practice of law. Well, I beg to differ. It is 2017 and time to wake up!

Model Rule 8.4(g) is simply the anti-discrimination and anti-harassment statement that is a requirement for every federal and state entity across the United States. I write policies for SC school districts so I can attest to this. Why should this fundamental principle not apply to the practice of law? It does not paint a negative stain on anyone, nor does it prevent a lawyer from declining representation as she or he so chooses. However, it does mandate that a lawyer's behavior should never cross over the line of repugnancy as to discriminate or harass someone who is different. Wow, that is such a scary concept! Why is that?

To say that the civility clause in the oath covers this is a joke and an utter embarrassment to the committee for imparting that nonsense on paper. As a former ODC employee, I can tell you how often the oath deters incivility. The answer is never. So please, tell me how it will ever deter behavior that leaps over the line of civility to embrace the ugliness that is harassment and discrimination.

I am ashamed that the SC Bar had to consider this through public comment. We, as a professional society of learned people, should be the first to embrace the fundamental principles of law.

Thanks,

Tiffany Richardson

Dr. Tiffany N. Richardson
General Counsel and Director of Policy and Legal Services
South Carolina School Boards Association
111 Research Drive
Columbia, SC 29203

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800.326.3679
Fax 877.859.6437
www.scsba.org

"An investment in knowledge always pays the best interest."
Ben Franklin

From: Rob Reibold
To: Rule8.4comments
Subject: Rule 8.4
Date: Thursday, March 16, 2017 4:09:09 PM

To whom it may concern:

I am concerned about possible unintended consequences with the adoption of this Rule. If this rule were adopted, potentially member of any law firm subsequently sued for an employment claim based upon gender, race, religion, etc and which is unsuccessful at trial would, in addition to a monetary judgment, be subject to lawyer discipline and loss of their license.

That would create tremendous pressure on any law firm defendant to settle any such claim, regardless of the merits of the dispute.

Robert L. Reibold
Walker || Reibold
Post Office Box 61140
Columbia, SC 29260
(803) 454-0955

(803) 454-0956 (fax)

From: Shoun, Cheryl D.
To: Rule8.4comments
Date: Wednesday, March 15, 2017 9:35:09 AM
Attachments: image001.png

Good morning.

I am absolutely in favor of adoption of the new Model Rule, or, at a minimum, some version thereof.

I disagree that our Civility Oath and current Rule 8.4 provide sufficient basis to cover the issues addressed in the Model Rule. As a result, I suspect that many instances of discriminatory behavior are going unreported, or alternatively, that if reported, ODC lacks sufficient grounds upon which to investigate and pursue the subject behavior.

I am happy to discuss further; please contact me at the number below if desired.

Thank you,
Cheryl

Cheryl D. Shoun
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CShoun@nexsenpruet.com
www.nexsenpruet.com

From: Lindsay K. Smith-Yancey
To: Rule8.4comments
Subject: Comment of Rule 8.4(g)
Date: Wednesday, March 22, 2017 8:48:56 AM

Dear Honorable Justices,

I am writing to request that you consider adoption of Rule 8.4(g), or a revised version. I strongly believe this rule is required as our current civility oath does not apply to colleagues, subordinates or superiors in the work place. As a female member of the SC Bar, I have experienced sexual harassment as a law school student, clerk, associate and partner, and know many others who have had similar experiences. When confronted with this, currently, the only relief is legal action which is costly, time consuming and often has detrimental effects on the woman's career and reputation among the legal community. Allowing those faced with this issue to report inappropriate conduct to the Office of Disciplinary Counsel would allow a more efficient and less onerous method of addressing harassment in the legal workplace. I recognize and understand the concern that such a mechanism may encourage meritless reporting, but I have faith in the Office of Disciplinary counsel that baseless complaints under this rule can and will be dismissed just as the other meritless complaints against bar members made every day. I also recognize and understand the concern that the rule as written may be too broad and would encourage the formation of a committee to suggest revisions.

Thank you for your consideration and I stand ready to answer questions, provide further information and continue to be part of the discussion.

Sincerely,
Lindsay K. Smith-Yancey

ROGERS TOWNSEND
ATTORNEYS AT LAW

Lindsay K. Smith-Yancey
Special Counsel

Rogers Townsend & Thomas, PC
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subject you to civil liability. If you have received this communication in error, please immediately notify us by telephone at 803-771-7900 (Columbia office) or 704-442-9500 (Charlotte office) or by return e-mail, and destroy any copies (electronic, paper, or otherwise) that you may have of this communication.

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COMMENTS AS TO THE PROPOSED AMENDMENT OF RULE 8.4

I have read the Professional Responsibility Committee's Memorandum to the SC House of Delegates (voting in favor of OPPOSING the proposed amendments). I am in complete agreement with the PR Committee's recommendation and I believe that our oath and the current versionare sufficient and the amendment should NOT be adopted.

I OPPOSE THE ADOPTION OF THE AMENDMENT TO RULE 8.4, based on views expressed in the Professional Responsibility Committee's Memorandum to the SC House of Delegates.

Hayes K. Stanton

Bellamy, Rutenberg, Copeland, Epps,

Gravely & Bowers, P.A.

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I oppose adoption of the ABA's Model Rule 8.4(g) Rule as it is vague both in the scope of individuals who can file grievances, and vague in its prohibited conduct. This Rule exposes lawyers and law firms to an infinite class of individuals in time and place who may file grievances. Comment 4 to the proposed Rule states in part as follows:

"…. interacting with witnesses, coworkers, court personnel, lawyers and **others** while engaged in the practice of law; operating or managing a law firm or law practice; and **participating in bar association, business or social activities** in connection with the practice of law." [emphasis added]

As I read the comment above, it occurs to me that it encompasses nearly every activity and individual with whom I engage in on a daily basis, excepting the time I spend alone in my house. I am a courteous and professional female sole practitioner. I combine rainmaking with social activities. I would like to focus on competently practicing law and serving my clients to the best of my ability, rather than worrying that some unknown individual who perceived discrimination can bludgeon me with a grievance. Even specious, unfounded grievances are required to be reported to my liability carrier and can create a tremendous time burden to respond.

Thank you.

3-29-17

Henry P. Wall
1735 St. Julian Place
Suite 200
Columbia, S.C.
29204

The South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: Requests for Written Comments
Model Rule 8.4(g)

May It Please This Honorable Court:

I write to you under my own name, rather than on my firm's letter head, to ensure clarity that the views reflected in this letter are entirely my own. As a member of this bar since 1985, I wanted to share my concerns over proposed Model Rule 8.4(g) and the new proposed commentary for that rule. I have previously joined in a statement issued from the Alliance Defending Freedom, and I oppose the adoption of the rule for the general reasons stated in that submission, but I also wanted to share some individual concerns and warnings about how the adoption of this rule may affect my law practice, my ability associate with Christian law societies, follow my conscience in the workplace, and balance the practice of my Christianity with the practice of law.

As a threshold matter, I concur wholeheartedly with the sentiment and idea that there is no place for invidious discrimination in the practice of law. I consider every person, including the conceived, yet unborn, to be children made in the image of God. I also recognize the rich diversity of God's kingdom and creation, and accept the truth of the maxim that every family must have in order to survive: "we can love one another while still disagreeing with one another". When we lose the ability to disagree, we lose the ability to speak, associate with others, reconcile our faith with our work, and we impose a standard of censorship, coercion and thought conformity that destroys rights of conscience, stifles reason, and destroys the soul. This is the great danger of proposed Model Rule 8.4(g).

The current rule proscribes discrimination, as it should, in the administration of justice. The proposed rule actually proscribes viewpoints and other conduct "related to the practice of law". [1] Let me give you a few practical examples of how the adoption of the proposed rule may effect me, personally:

---

[1] ***Comment [4]*** – *Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without*

- I serve as Chancellor (i.e. lawyer) to a Cathedral of a traditional Anglican Church in Columbia, South Carolina. The teachings of my church hold to the historic, apostolic tradition and heritage of male priests; however, women are allowed to serve as deacons. I do not charge for my services. I assist the church in preparing written guidance and bylaws which are in fact discriminatory on their face on the basis of gender. There is no exemption for the representation of faith-based organizations in the proposed rule, many would say I am in violation of the proposed standard, and I could be disciplined, or sued for this conduct under the proposed rule.

- I am on the board of directors of a pro-life organization that provides abortion counseling services. I am willing to offer free legal representation to potential birth mothers who are poor and without means. Some may choose to pursue adoption. I hold a conviction that children should have the benefit of a Mother and a Father. I also hold a conviction that poverty should not be a bar to potential adoptive parents. My convictions may be wrong, but in my view, they are based upon faith in God's created order, and they are not driven by hate. In assisting a birth mother in the selection of adoptive parents who shares my convictions and beliefs (thereby evidencing a bias for Christian, married, heterosexual couples who also may be too poor to afford a lawyer, and potentially discriminating against single persons, same sex couples, wealthy secular couples, or non-Christian families) have I violated the proposed rule? It appears that the proponents of the Model Rule would say that I have.

- I am a member of Alliance Defending Freedom and serve on several non-profit faith- based boards. I conduct a free seminar as a lawyer entitled: "Protecting you Ministry from Discrimination Claims". I decide to seek and obtain CLE credit for the seminar from the South Carolina Bar and open the seminar to other lawyers and the public at large. A segment of the seminar is aimed specifically to keeping the physical plant and real property of the organizations from becoming places of "public accommodation". The logic for that is to preserve the views of these organizations that they may continue to teach and express a viewpoint that marriage is between a man and a woman. Have I violated the proposed rule?

These are three very real examples of how the proposed rule will directly affect how I integrate faith and vocation. I see no separation here, but I realize that he drafters of the model rule do.[2]

Respectfully, I disagree. The Rule expressly allows "implementing initiatives aimed at....{diversity}" while preventing true diversity: diversity of thought. It is hard to imagine a more illiberal point of view than the philosophy captured in this note. Why not say that the rule protects

---

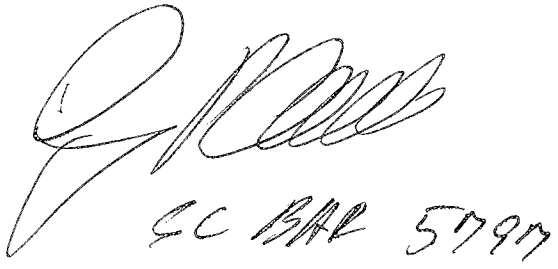
violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[2] And whatever you do or say, do it as a representative of the Lord Jesus, giving thanks through him to God the Father (Col 3:17)

all rights of conscience, whether based upon faith or otherwise? Indeed, it appears that this rule, taken to its logical course, would conceivably abolish South Carolina lawyer participation in the Federalist Society while promoting South Carolina lawyer participation in the ACLU and SPLC simply because those organizations see diversity as a virtue instead of a fact. The very language of the rule is tainted with viewpoint discrimination and special protections for some ideas, while censoring other points of view.

For these reasons, I would request the Court to leave the current rule intact. Thank you for your consideration and please know that I am pleased to assist or participate in any further discussions concerning this rule. I give thanks for your public service.

With highest regards,



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The South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RECEIVED
MAR 29 2017
S.C. SUPREME COURT

From: Wall, Susan
To: Rule8.4comments
Subject: Fwd: Comment - proposed ABA Model Rule 8.4(g)
Date: Monday, March 27, 2017 12:25:24 PM

Subject: Comment - proposed ABA Model Rule 8.4(g)

It is respectfully submitted that the proposed ABA Model Rule 8.4(g), as currently written, be rejected for inclusion in the South Carolina Rules of Professional Conduct. Concerns with the proposed rule are set forth below in summary fashion.

1. The proposed rule is not necessary. The existing South Carolina Rules of Professional Conduct include a number of provisions that more clearly and less subjectively state the parameters for prohibited conduct. In addition, the South Carolina Oath of Office for Attorneys, Rule 402(k), speaks to the principles of professionalism.

2. The proposed rule contains terms that allow for subjective definition, and thus the rule cannot be uniformly and fairly enforced. Certainty and consistent application are prerequisites for a rule of professional conduct.

The proposed rule declares as misconduct harassment and discrimination in conduct related to the practice of law. Harassment may be defined as any offensive conduct, yet what may be offensive to one person may not be offensive to another, and the proposed rule does not (and cannot meaningfully) define offensive conduct applicable to every situation. Discrimination may be defined as bias; yet what one person sees as a biased point of view may be the result of that own person's bias. An offensive or biased statement may be read into any word usage depending on the purely personal sensibilities of the listener, who may hold bias views. The conduct that the proposed rule seeks to prohibit may be defined by current "popular" definitions which may change from time to time, depending on prevalent political or social views. The lack of certainty in the current language of the proposed rule renders it problematic and subject to unfair and disparate application.

The proposed rule continues the problem of using generalized and undefined terms by stating that the prohibition on harassment and discrimination does not preclude "legitimate" advice or advocacy. The proposed rule does not define what is "legitimate", except to say that legitimate advice and/or advocacy is that which is consistent with the rule itself. If advice to a client were to be tested by what is legitimate under this proposed rule, numerous problems arise. One could conclude from the text of the proposed rule that the only "legitimate" advice or advocacy is that which is not, in the eyes of the beholder, harassing or discriminatory, terms that are subjective and may be defined as conduct and words that are currently considered politically or socially correct.

The rules of professional conduct should not be subject to changing

definitions depending on current social or political views not shared by all. The rules of professional conduct should define prohibited conduct that is objectively understood and may be uniformly applied. The current rules of professional conduct sufficiently and fairly place all attorneys on notice of the conduct to which each attorney must adhere.

3. The proposed rule undermines representation of unpopular or controversial persons and entities. This result is contrary to the existing rules of professional conduct.

An important foundation of American jurisprudence is the right of all persons and entities to zealous representation, regardless of the claims or defenses asserted. Although the proposed rule claims that it does not limit an attorney from accepting representation, it references in the same phrase Rule 1.16, which rule precludes an attorney from accepting representation if representing a client "will result in violation of the rules of professional conduct". If the Court were to adopt the proposed rule as written, it could be argued that if an attorney were to accept representation of a cause that might be viewed by someone as advocating a biased or offensive position, the attorney would be in violation of the rules of professional conduct (that is, proposed Rule 8.4(g)), and thus the attorney could not accept the representation. Further, if the attorney were to take on the representation and zealously advocate the client's position, as the attorney is otherwise required to do under the rules of professional conduct, and that advocacy was viewed by someone as biased or offensive, the proposed rule would allow the attorney to be sanctioned. The resulting disincentive to take representation or, once taken, to zealously advocate for a client whose position is unpopular or politically or socially charged, is contrary to existing rules of professional conduct and is not in the best interest of the public.

4. The proposed rule has a chilling effect on free speech.

The overly broad and subjective reach of the proposed rule infringes on an attorney's right and obligation to freely participate in discourse concerning not only a client's position but an attorney's own views. The proposed rule reaches all conduct "related to the practice of law". A wide variety of social gatherings, debates and presentations, including CLE and law school teaching events, would be included under this broad language as would law firm meetings and even casual conversations between lawyers. The proposed rule would stifle conversation and curtail debate for fear that someone hearing a statement would feel that the speaker is biased or not sensitive to persons who define themselves in a way that the speaker has no knowledge of. Persons who define themselves solely by age or socioeconomic status, for example, might be offended by a statement that someone else would not find disrespectful or biased. The fact that the proposed rule diminishes the free speech rights of attorneys in public and private discourse also implicates the scope of an attorney's ability to give candid advice to a client and to argue the client's position, however unpopular or politically charged, for fear that the attorney's statements might be interpreted as evidence of his or her own bias or prejudice. Careful consideration must be given to the problems of adopting a rule that appears to favor ideological unanimity through the control of language.

CONCLUSION

The proposed rule is written in a manner that violates fundamental rights of attorneys and clients , is in opposition to existing rules of professional conduct, and is a rule that cannot be objectively and consistently enforced. The potential that the proposed rule could be used to punish unpopular causes and clients through disciplining attorneys who serve such clients and the proposed rule's chilling effect on discourse related to the practice of law is contrary to an independent legal profession. As members of society, attorneys should be encouraged to participate in debate over social, economic and political matters and should not be punished for views that are not currently popular or held by one group as opposed to another.

RECOMMENDATION

It is suggested that the Court appoint a panel to study the proposed rule and recommend changes to the current language to avoid the problems set forth above. Certain language from the proposed rule might be appropriately incorporated as a part of the Preamble to the South Carolina Rules of Professional Conduct to reinforce the goals of responsibility, respect and courtesy.

Respectfully submitted,

Susan Taylor Wall

From: 172mike@gmail.com
To: Rule8.4comments
Subject: In opposition to adoption of the ABA Rule 8.4(g)
Date: Tuesday, March 28, 2017 2:22:21 AM

My opposition to ABA Rule 8.4(g), to include its comments, may seem radical as I am opposing current law as interpreted by the United States Supreme Court in *Obergefell*, but the Bar should protect those members who, with civility, seek to reform current law, even if it is a return to a previous state of the law. It seems clear that ABA Rule 8.4(g) was created in order to extend the principles of the *Obergefell* decision to attorney speech and conduct.

I hope to appeal to your rationality that "discrimination" is a meaningless term apart from an ethical system that distinguishes between, on the one hand, moral discrimination against immoral behavior, and on the other hand, immoral discrimination against moral behavior or morally-indifferent behavior or characteristics. I think we can agree that behavior such as rape, theft, and murder is immoral and that "discrimination" against this kind of behavior is exactly the task of the legal system. We should also agree that discrimination against a person's skin color is immoral discrimination because skin color is a morally-indifferent characteristic. And what ethical system shall a court appeal to? The Court in *Obergefell* appealed to individual autonomy as its ethical system for justifying same-sex marriage. Yet anyone with philosophical training should know the problems with making individual autonomy the basis for ethics. With the individual as the source of ethics, all ethical discourse becomes meaningless. We can no longer ask if a person ought to do something because the mere choice to do something makes it right. We cannot rationally appeal to the qualification "except where the decision harms another" because if we are serious about the individual as the source of ethics, the individual can define what counts as "harm." To emphasize the theory-dependent nature of discrimination, you might recall that capitalism and socialism involve different definitions of harm, with socialism defining harm to include one business putting another business out of business by offering the public a better product at a lower price. Of course, capitalists would not want that included in the definition of harm.

Although the Court did not appeal to the principle of utility, its popularity requires a brief reply (Oliver Wendell Holmes famously appealed to this principle against the idea of moral absolutes in his essay, "The Path of the Law"). As all trained philosophers of ethics know, the problem with utilitarianism is that utility has no meaning apart from a goal that ought to be achieved, but merely appearing to utility does not supply the answer to the question of what that goal should be. Individual autonomy cannot supply a goal that others ought to achieve. Individual autonomy undermines all universals, whether they be ethical principles, laws of mathematics, or laws of logic. In short, individual autonomy undermines the possibility of ethics and rationality. Any rational person should reject this irrationalism.

Our nation was not founded on individual autonomy. It was founded on the principle that we are endowed with rights by our Creator. The explicitly Christian meaning to this was somewhat watered-down by the influence of Enlightenment natural law theory, but at least that makes an attempt to account for universals, which are necessary for the possibility of ethics and rationality. The *Obergefell* decision and ABA Rule 8.4(g) stand against the founding principles of our nation, and under these founding principles opposition to same-sex marriage is not discrimination. Marriage is an institution created by God based on the complimentary difference between male and female. To treat same-sex marriage as equivalent to heterosexual marriage is to treat different things as equal. Resist the Court's move to arrive

at legal rules by irrational, ethically vacuous philosophical principles.

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Re: Requests for Written Comments
Model Rule 8.4(g)

I respectfully request that this Honorable Court reject Model Rule 8.4(g) ("Model Rule") in its entirety because it is a poorly-written, unenforceable rule. Model Rule is unduly burdensome for two reasons: (1) it does not give adequate notice as to what an attorney must do to comply, and (2) the overly-broad scope of Model Rule allows too many potential parties to bring grievances against attorneys, leading to undue harassment. Our present Rule 8.4 and its subparts, together with the Oath of Civility, are effective and should remain in place.

Model Rule 8.4(g) does not give adequate notice.

Drivers in South Carolina are put on notice of speed limits by signs posted at intervals stating how fast drivers can go. Whether it is 70 m.p.h., 55 m.p.h., or 35 m.p.h., drivers know that to comply, they should not drive faster that the posted speed limit. Suppose that speed limit signs used language similar to that of the Rule. The speed limit sign would read something like this:

> It is a violation of the law for drivers to engage in conduct that the driver knows, or reasonably should know, is speeding.

We would see drivers and police engaged in heated arguments and the arguments would then clog the courts while judges tried to determine whether or not the motorist was speeding. Of course, this scenario is absurd, but given the vague wording of Model Rule, this Court might find itself in a similar predicament if Model Rule is adopted.

Model Rule states in part: "It is professional misconduct for a lawyer to: (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, ……..in conduct related to the practice of law".

The problem is that given the dramatic and rapid changes in our society, it is impossible to determine what is discrimination or harassment. We have seen the storm and fury resulting over the issue of which restroom to use or which pronoun is appropriate in addressing someone. Am I guilty of discrimination if I provide separate bathrooms for males and females? Or am I guilty of harassment in providing a unisex bathroom, in which the males in the office continually leave the toilet seat up to the annoyance of the females? Do I harass or discriminate when I refer to someone as "she" when she identifies as "he", though I have no way of knowing that? Given the vagueness of Model Rule, it is impossible to tell.

Comment 3 to Model Rule fails to add any clarity because it fails to define harassment and states only that it <u>includes</u> sexual harassment (also undefined) and that it is derogatory or demeaning verbal or physical conduct. (more undefined terms). Discrimination is also undefined and the wording says it <u>includes</u> harmful verbal or physical conduct that manifests bias or prejudice towards others.

Of course, the use of the word "includes" begs the question of what else could be included. If discrimination includes harmful verbal or physical conduct, does that mean harmless conduct is also included? Or does that mean there is a sliding scale of discrimination? If harassment includes derogatory or demeaning verbal or physical conduct, then presumably complimentary or supportive conduct could also cause a lawyer to be disciplined. Comment 3 fails to add any clarity to Model Rule and the lawyer who diligently wants to be in compliance and avoid discrimination or harassment is left with no guidance at all.

The scope is too broad and could lead to undue harassment of attorneys.

While attorneys cannot determine under Model Rule 8.4(g) what they need to do to avoid being disciplined, disgruntled clients, prospective clients, other attorneys, employees and members of the public all now have the opportunity to file grievances and harass members of the Bar. Comment 4 reads in part as follows:

> Conduct related to the practice of law **includes** representing clients; interacting with witnesses, coworkers, court personnel, lawyers and **others** while engaged in the **practice of law**; **operating or managing a law firm or law practice; and participating in bar association, business or social activities** in connection with the practice of law. *Emphasis added.*

Comment 4 has an appalling number of problems. First, there's the problematic word "includes", so apparently there is other conduct related to the practice of law, but what it is remains a mystery. Then there is the use of the word "others", suggesting that, for disciplinary purposes, an attorney's interaction with people during the practice of law is not limited to witnesses, coworkers, court personnel, and lawyers, but could also include all of the general population. What is meant by the "practice of law"? And when does business or social activities come in connection with the practice of law? Model Rule and its Comments are so vague that the average lawyer could be in constant violation from the time she gets up until the time she goes to bed. Consider the following hypothetical situations in which a lawyer could be disciplined based on Comment 4.

Scenario #1 – Declining representation.

Mr. Doe, a Muslim, meets with Attorney Ann to see if she will take his case. His case is interesting, but Attorney Ann has a trial coming up that may take a week or longer. She explains this to Mr. Doe and follows up with a letter of non-representation. The day after she mails the

letter, the case settles. Mr. Doe is suspicious that the trial was an excuse because she did not want to take his case due to his religious beliefs. When Mr. Doe gets on line and discovers the case settled, he figures his suspicions were correct and he makes a complaint with the ODC. Attorney Ann now has to respond to his complaint.

Scenario #2 – Social activities

Tom, Dick and Harry, rising associates at Mega Law Firm, went to a Clemson tailgating party and they wore golf shirts exhibiting the firm's logo. They had a bit too much to drink, causing them to whistle and make lewd comments to comely females passing by. Their pictures end up on FaceBook and one of the women recognized them and filed a complaint with the ODC, alleging that not only were Tom, Dick and Harry sexually harassing her, but Mega Law Firm condoned the behavior. Tom, Dick and Harry, along with the managing partners of Mega Law Firm, could be disciplined, given the overly-broad wording of the Rule and Comment 4.

Scenario #3 – Community Service

Lawyer George coaches a boy's wrestling group at a local private school and has done so for many years. Lawyer George prevailed upon his partners to make a financial contribution to the wrestling team and as a result, the firm is listed in the wrestling event programs and a banner displaying the firm's name and logo hangs in the gym during wrestling meets. At one wrestling meet, Lawyer George learned that the opposing team had a transgender member competing at the meet. Lawyer George told his players not to compete with the transgender wrestler. The wrestler filed a complaint with the ODC, stating that Lawyer George discriminated against him based on his gender. The wrestler also complained that Lawyer George's firm knew of and

condoned Lawyer George's behavior. Both Lawyer George and his partners now have to respond to the complaint and cooperate with the ODC in its investigation.

Scenario #4 – Employees

Lawyer Dudley read the brief submitted by Associate Tiffany and he informed the associate that the brief was fit only to line the bottom of a bird cage and that she had to do it all over immediately. Associate Tiffany called her mother, who told her she ought to turn in Lawyer Dudley to the ODC because he was harassing her. Associate Tiffany took her mother's advice and now Lawyer Dudley is in the middle of an investigation by the ODC.

Upon reading the above scenarios, one could say that they are absurd and would never happen. However, that is the problem with poorly worded, vague and overly broad rules – they lead to absurd results. Comment 4 to Model Rule 8.4(g) opens the lawyer to potential discipline complaints from the general public, not just people connected with the lawyer's practice such as clients, court personnel and opposing counsel. Broadening the scope to include the practice of law opens the lawyer to being disciplined in instances when she might reasonably think she was "off the clock" and not working as a lawyer. The effect under Model Rule is that a lawyer is perceived as always practicing law in some aspect or other and therefore always subject to discipline. This is both unreasonable and unnecessary. Even lawyers need time off from the job where they can unwind and relax without fear of retribution. Further, the ABA has not demonstrated why South Carolina's Rule 8.4 as written is inadequate and requires such draconian changes. In its letter to this Court the ABA did not cite any instances of South Carolina attorneys committing acts of harassment or discrimination and did not include any evidence to show acts of discrimination and harassment were on the rise in South Carolina. I personally have reviewed the Advance Sheets from January 2016 through March 22, 2017 and I

did not find any instances of lawyers being disciplined for harassment or discrimination. Seeing as there is no evidence of an epidemic of harassment and discrimination within the South Carolina Bar, this Court is justified in rejecting Model Rule 8.4(g) in its entirety.

It has been stated that the Office of Disciplinary Counsel will not be going around looking for violations of Model Rule. Nevertheless, when a complaint against an attorney is made, the ODC is required to contact the attorney and provide her with a copy of the complaint. The attorney then has to drop everything, gather her files, and prepare a response. The attorney also has to inform her E&O carrier that she is now involved in a disciplinary proceeding. While it is true that this is the current procedure involving disciplinary investigations, the overly-broad scope of Model Rule and Comment 4 could subject attorneys to a higher number of disciplinary complaints. This would in turn create an undue burden in particular for solo and small firm attorneys who cannot earn billable hours while preparing a response to a disciplinary complaint. Further, the increase in disciplinary actions could drive up the rates for E&O insurance, thus creating another burden for solo and small firm attorneys.

It has also been argued that other states adopting Model Rule have not been inundated with grievances. However, to date no state has adopted Model Rule in its entirety. Therefore, it may very well be that adopting the Model Rule in its entirety as requested by the ABA may very well lead to situations resembling the scenarios described above. Further, if no state adopting some version of Model Rule has been inundated with complaints, then perhaps Model Rule is unnecessary and we should not be trying to fix something that is not broken.

Rule 1.16 lack of protection.

Model Rule states, "This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16". However, South Carolina's Rule 1.16 states that a lawyer shall not represent a client of (1) the representation will result in the violation of the Rules of Professional Conduct or other law or (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client or (3) the lawyer is discharged. Further Rule 1.16(b)(4) states a lawyer may withdraw if the client insists on taking an action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. Note that under Rule 1.16(b)(4) a lawyer may withdraw, but makes no provision for declining representation. Given the vague wording and overly-broad scope of Model Rule 8.4(g) and Comments 3 and 4, South Carolina's Rule 1.16 does not provide any protection at all. That is because to withdraw under Rule 1.16(b)(4) could conceivably be in violation of the Model Rule. For example, if a lawyer seeks to withdraw from representation because the client wants to open an abortion clinic and the lawyer cites Rule 1.16(b)(4) as support, the client could in turn use Model Rule 8.4(g) to support its opposition because lawyer is discriminating against women. It is apparent that Model Rule 8.4(g) could be in opposition to Rule 1.16 and therefore Rule 1.16 does not provide an attorney with any defense.

Conclusion

I come from the "if it isn't broke, don't fix it" school of thought. There are numerous problems with Model Rule 8.4(g) and its comments that would lead to further litigation, not to mention chaos in attempts to enforce the rule. Further, I have not seen any convincing proof that our current Rule 8.4 needs to be changed. Model Rule 8.4(g) is overly broad, vague and it fails

to provide attorneys with guidance on how to comply. For these reasons, Model Rule 8.4(g) should be rejected in its entirety.

Respectfully submitted.

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