



Why New York Should Not Adopt ABA Model Rule 8.4(g): Public Comment Deadline June 18, 2021

The Administrative Board of the Courts of the New York State Court System is seeking public comments regarding a [proposal](#) to adopt [ABA Model Rule 8.4\(g\)](#). The proposal was made by the New York City Bar and would apply to all attorneys who practice in New York State. Comments should be sent to rulecomments@nycourts.gov by **June 18, 2021**, or mailed to Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver St., 11th Fl., New York, New York, 10004.

[ABA Model Rule 8.4\(g\)](#) is the deeply-flawed and highly-criticized rule adopted by the American Bar Association in August 2016. ABA Model Rule 8.4(g) has been condemned by numerous scholars as a speech code for lawyers, as UCLA Professor Eugene Volokh, a nationally recognized First Amendment expert, explains in a [two-minute Federalist Society video](#). "[Why ABA Model Rule 8.4\(g\) Should Not Be Adopted in New York](#)" may also be helpful.

Please send comments by June 18, 2021: Send a short, respectful email to rulecomments@nycourts.gov urging the Administrative Board to reject ABA Model Rule 8.4(g), perhaps saying: **"I oppose adoption of ABA Model Rule 8.4(g) because it threatens New York lawyers' free speech. [New York's existing Rule 8.4\(g\)](#) already adequately addresses issues of unlawful discrimination. I respectfully request that the Administrative Board reject the proposal to adopt ABA Model Rule 8.4(g) or any similar rules."**

Other options include emailing this [sample comment letter](#) to rulecomments@nycourts.gov, or preparing a comment letter drawing on the [CLS comment letter](#) dated May 18, 2021.

A federal district court ruled that Pennsylvania's version of ABA Model Rule 8.4(g) unconstitutionally chilled attorneys' free speech in [Greenberg v. Haggerty](#), 491 F. Supp. 3d 12 (E.D. Pa. 2020). Several leading scholars have criticized ABA Model Rule 8.4(g).¹

Fortunately, ABA Model Rule 8.4(g) operates only in those states in which the highest court adopts it. After nearly five years, only two states, Vermont and New Mexico, have fully adopted ABA Model Rule 8.4(g). After careful consideration, at least **thirteen** states have concluded that ABA Model Rule 8.4(g) is too flawed and have instead chosen the prudent course of waiting to see whether other states adopt ABA Model Rule 8.4(g) and its real-life consequences for attorneys in those states. These states have rejected or abandoned efforts to adopt ABA Model Rule 8.4(g):

- **Formal rejection:** The state supreme courts of *Arizona*, *Idaho*, *Montana*, *New Hampshire*, *South Carolina*, *South Dakota*, and *Tennessee* formally rejected ABA Model Rule 8.4(g).²

¹ See, e.g., Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019); Prof. Ronald Rotunda, "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' But Not Diversity of Thought," The Heritage Foundation, Oct. 6, 2016; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g), The First Amendment and "Conduct Related to the Practice of Law,"* 30 Geo. J. Leg. Ethics 241 (2017); Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201 (2017). See also, Prof. Volokh's Federalist Society debate at <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s> (Mar. 2017), and Prof. Rotunda's Federalist Society debate at <https://www.youtube.com/watch?v=V6rDPjQbcQg> (Nov. 2017).

² https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf (Tennessee); https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf (Arizona); [https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%2020IRPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%2020IRPC%208.4(g).pdf) (Idaho); <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (South Carolina).

ABA Model Rule 8.4(g) has also been rejected or abandoned by other official entities in *Illinois, Louisiana, Minnesota, Nevada, North Dakota, and Texas*.

- **State legislature action:** The *Montana* Legislature adopted a joint resolution urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g). The Legislature was concerned about its impact on “the speech of legislative staff and legislative witnesses, ... when they are working on legislative matters or testifying about legislation.”³
- **State bar activity:** The *Illinois* Bar Association Assembly “voted overwhelmingly to oppose adoption of the rule.”⁴ The *North Dakota* Joint Committee on Attorney Standards recommended rejection. The *Louisiana* Rules Committee voted not to recommend.
- **State Attorneys General:** Several state attorneys general, including *Texas, Tennessee, Alaska, Louisiana, South Carolina, and Arizona* have issued opinions stating the rule was likely unconstitutional.⁵

Proposed ABA Model Rule 8.4(g) would prohibit “a lawyer or law firm” from “engag[ing] in conduct related to the practice of law that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity or expression, marital status or socioeconomic status.”

1. The proposed rule is broad in scope and would regulate nearly everything a lawyer says or does, including:

- speaking at public events, presenting CLE courses, or participating in panel discussions on controversial legal issues;
- writing law review articles, blogposts, and op-eds;
- giving media interviews or podcasts;
- teaching law school classes as faculty, adjunct faculty member, or guest lecturer;
- belonging to organizations with belief-based membership or leadership requirements;
- tweeting, re-tweeting, or “liking” anything someone disagrees with;
- performing work for political or social action organizations, political parties, or campaigns;
- lobbying or testifying before legislative committees; and
- sitting on the boards of single-sex fraternities or sororities;
- providing pro bono work for religious congregations, colleges, or schools or sitting on their boards.

2. The proposed rule is unconstitutional under the analyses in two recent United States Supreme Court decisions.⁶ In June 2018, the United States Supreme Court held that government restrictions on professionals’ speech – including lawyers’ professional speech – are generally subject to strict scrutiny because they are *content*-based speech restrictions and, therefore, presumptively unconstitutional. In June 2017, a unanimous United States Supreme Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is *viewpoint* discriminatory and, therefore, unconstitutional under the First Amendment.

3. The mens rea requirement is mere negligence. A lawyer can violate the proposed rule without intending to do so or even being aware of having done so, which is particularly concerning if implicit bias is considered to fall within the broad definitions of “discrimination” or “harassment.”

4. Proposed Rule 8.4(h) would make it professional misconduct for lawyers and law firms to engage in many current initiatives aimed at promoting diversity in their employment practices.

³ <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

⁴ <https://iln.isba.org/blog/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

⁵ Alaska Att’y Gen. Comment letter (August 9, 2019), <http://www.law.state.ak.us/press/releases/2019/080919-Rule8.html>; Tex. Att’y Gen. Op. KP0123 (Dec. 20, 2016), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>; Tenn. Att’y Gen. Op. 18-11, <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>.

⁶ *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Matal v. Tam*, 137 S. Ct. 1744 (2017).