



Why Pennsylvania Should Not Adopt Proposed Rule 8.4(g): Public Comment Period Ends September 30, 2019

The Pennsylvania Disciplinary Board has announced its third attempt in three years to impose a version of ABA Model Rule 8.4(g) on Pennsylvania attorneys.¹ The deadline for submitting public comments is **September 30, 2019**. ABA Model Rule 8.4(g) is the deeply-flawed and highly-criticized rule adopted by the American Bar Association in August 2016. It has been condemned by numerous scholars as a speech code for lawyers, as Professor Eugene Volokh, a nationally recognized First Amendment expert, explains in a two-minute Federalist Society video.²

Take action before September 30, 2019: Interested persons may submit written comments on Proposed Rule 8.4(g) to Dboard.comment@pacourts.us.³ Or they can mail or fax letters to the Executive Office, The Disciplinary Board of the Supreme Court of Pennsylvania, 601 Commonwealth Avenue, Suite 5600, P.O. Box 62625, Harrisburg, PA 17106-2625, fax number (717-231-3381).

Ideas for comments may be found in this sample comment letter⁴ or helpful legal articles.⁵ But even a brief email simply stating opposition to Proposed Rule 8.4(g) is helpful.

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

At least eleven states have rejected or abandoned efforts to impose ABA Model Rule 8.4(g), including:

- **Formal rejection:** The state supreme courts of *Arizona*, *Idaho*, *South Carolina*, and *Tennessee* formally rejected ABA Model Rule 8.4(g) after holding comment periods.⁶ The ABA itself lists nine states as declining to adopt the rule: *Arizona*, *Idaho*, *Illinois*, *Louisiana*, *Minnesota*, *Montana*, *Nevada*, *South Carolina*, and *Tennessee*.⁷ CLS includes *Texas* and *North Dakota* on its list.
- **Petitions to adopt withdrawn:** On September 5, 2019, after a public comment period, the Board of Governors for the Alaska Bar Association withdrew a proposed rule modeled on ABA Model Rule 8.4(g). In a thoughtful letter that examined the flaws of the proposed rule, the Alaska Attorney General concluded that it was unconstitutional.⁸ Petitions to adopt ABA Model Rule 8.4(g) were also withdrawn in *Nevada* (supreme court) and *Louisiana* (state bar committee) after comment periods.⁹

¹ <https://www.pabulletin.com/secure/data/vol49/49-35/1309.html>.

² The video is at <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

³ <https://www.padisiplinaryboard.org/news-media/news-article/1144/disciplinary-board-seeks-comments-on-proposed-harassment-and-discrimination-rule>.

⁴ The sample comment letter can be found at <https://www.clsreligiousfreedom.org/aba-model-rule-pennsylvania> ("Pennsylvania comment letter").

⁵ 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).

⁶ 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-%20IRPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf) (Idaho);

<http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (South Carolina).

⁷ American Bar Association Center for Professional Responsibility Policy Implementation Committee, *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct* (June 13, 2019),

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.pdf.

⁸ <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>.

⁹ <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>;

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

- **State legislative action:** The *Montana* Legislature adopted a joint resolution urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g). The Legislature was concerned about the impact of ABA Model Rule 8.4(g) on “the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation.”¹⁰
- **State bar activity:** State bar entities in *Illinois*, *North Dakota*, and *Louisiana* have rejected the rule. State attorneys general, including *Alaska*, *Texas*, and *Tennessee*, have issued opinions finding the rule is likely to violate the Constitution.¹¹

The Disciplinary Board’s Proposed Rule 8.4(g) is actually even more expansive than the highly problematic ABA Model Rule 8.4(g). Proposed Rule 8.4(g) would make it professional misconduct for a lawyer to “in the practice of law, by *words* or conduct knowingly *manifest bias or prejudice*, or engage in harassment or discrimination, as those terms are defined in applicable federal, state *or local* statutes or ordinances, *including but not limited to* bias, prejudice, harassment or discrimination based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status.”¹²

Obvious problems with Proposed Rule 8.4(g) immediately stand out, including:

- 1. Proposed Rule 8.4(g) is unconstitutional under the analyses in two recent United States Supreme Court decisions.** In 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.¹³ In 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.¹⁴
- 2. Like a previous proposal in July 2018, Proposed Rule 8.4(g)’s ban on “words . . . [that] knowingly manifest bias or prejudice” regarding any person would make it professional misconduct for lawyers to tell lawyer jokes.**¹⁵ Proposed Rule 8.4(g) makes it professional misconduct for a lawyer to “knowingly manifest bias or prejudice” against *anyone*. Because the language “including but not limited to” leaves the Proposed Rule wide open, the protected classes that are listed serve merely as examples of persons who are protected when, in fact, the Proposed Rule applies to words about *any person*. Therefore, jokes that “manifest bias or prejudice” regarding any person -- including lawyers, doctors, or politicians -- would be professional misconduct.
- 3. Lawyers’ speech will be chilled because it is nearly impossible to know with any certainty which words might be deemed to manifest “bias or prejudice” or constitute “harassment or discrimination” under every federal, state, and local law, ordinance, regulation, and guidance as interpreted by the courts and the administrative agencies.** How is “bias” defined under *all* “applicable federal, state or local statutes or ordinances”? Or “prejudice”? Or “harassment”? Or “discrimination”? At best, the definitions of these terms vary significantly among federal, state, and local laws. Local laws tend to be broader than state laws, and state laws tend to be broader than federal laws. Applicable law includes not merely statutes and case law, but also administrative agencies’ regulations.
- 4. Proposed Rule 8.4(g) does not apply uniformly to all Pennsylvania attorneys because its applicability varies by the locality in which an attorney works.** Proposed Rule 8.4(g) purports to define the terms “bias,” “prejudice,” “harassment,” and “discrimination” “as those terms are defined in applicable federal, state *or local* statutes or ordinances.” Words spoken by a Lancaster lawyer might not violate Proposed Rule 8.4(g), but the same words spoken by a Philadelphia lawyer might.

¹⁰ <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

¹¹ 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>.

¹² The proposed rule can be found at <https://www.pabulletin.com/secure/data/vol49/49-35/1309.html>.

¹³ *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

¹⁴ *Matal v. Tam*, 137 S. Ct. 1744 (2017). *Id.* at 1753-1754, 1765; *see also, id.* at 1766 (unconstitutional to suppress speech that “demeans or offends”) (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).

¹⁵ <https://fedsoc.org/commentary/blog-posts/is-telling-a-lawyer-joke-professional-misconduct-pennsylvania-considers-a-version-of-aba-model-rule-8-4-g>.