

Why New Hampshire Should Not Adopt ABA Model Rule 8.4(g): The New Hampshire Supreme Court Is Taking Comments Through April 11, 2019

The New Hampshire Supreme Court is holding a [public comment period](#) through April 11, 2019, on a [proposal](#) to impose a new Rule of Professional Conduct 8.4(g) on New Hampshire Bar members. The proposed rule is a particularly problematic version of the widely-criticized ABA Model Rule 8.4(g), as can be seen by reading the [Advisory Committee Report](#).

Comments may be sent to rulescomment@courts.state.nh.us. Christian Legal Society has prepared a sample [comment letter](#). Even brief emails are helpful.

ABA Model Rule 8.4(g) is a deeply-flawed rule adopted by the American Bar Association in August 2016. Professor Eugene Volokh, a nationally-recognized First Amendment expert, explains why Model Rule 8.4(g) is a speech code for lawyers in this helpful two-minute [video](#).

Professor Josh Blackman recently presented an excellent [Federalist Society teleforum](#) on ABA Model Rule 8.4(g).

Fortunately, ABA Model Rule 8.4(g) operates only in those states in which the highest court chooses to adopt it; but after two years, only the Vermont Supreme Court has done so. After examining ABA Model Rule 8.4(g) closely, at least 11 states have chosen the prudent course: wait to see whether other states adopt ABA Model Rule 8.4(g) and then observe its real-life consequences for attorneys in those states. And it seems probable that ABA Model Rule 8.4(g) has met a quiet demise in several additional states.

Some states have [backed away](#) from ABA Model Rule 8.4(g) in light of [two recent United States Supreme Court decisions](#) in [National Institute of Family and Life Advocates \(NIFLA\) v. Becerra](#) and [Matal v. Tam](#). In *NIFLA*, the 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 *Matal*, the Supreme Court unanimously struck down a longstanding federal statute because it allowed government officials to penalize “disparaging” speech and, therefore, was viewpoint discriminatory.

The proposed Rule of Professional Conduct 8.4(g) would create several new problems for New Hampshire attorneys because it would define punishable conduct too broadly as “conduct while acting as a lawyer in any context.” The proposed rule would apply to all speech or conduct that the lawyer “knew or reasonably should have known is harassment or discrimination” as to 11 separate classes. “Harassment” and “discrimination” are left undefined.

Activities that seem to fall within the extremely broad scope of proposed Rule of Professional Conduct 8.4(g) include:

- [presenting CLE courses](#);
- participating in panel discussions that touch on controversial political, religious, and social viewpoints;

- teaching law school classes as faculty, adjunct faculty, or guest lecturers;
- writing law review articles, op-eds, blogposts, or tweets;
- giving media interviews;
- servicing on the board of one's religious congregation, K-12 school, or college;
- providing *pro bono* legal advice to nonprofits;
- serving at legal aid clinics;
- lobbying on various legal issues;
- testifying before a legislative body;
- writing comment letters to government agencies;
- sitting on the board of a fraternity or sorority;
- volunteering for political parties; and
- advocating through social justice organizations.

In 2015, proponents of ABA Model Rule 8.4(g) candidly observed that they sought a new black letter rule precisely because they wanted to regulate non-litigating lawyers, such as “[a]cademics, nonprofit lawyers, and some government lawyers,” as well as “[t]ax lawyers, real estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system.”

Because proposed Rule of Professional Conduct 8.4(g) would drastically chill lawyers' freedom to express their viewpoints on political, social, religious, and cultural issues, the New Hampshire Supreme Court should reject it. At a minimum, the Court should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out – if and when it is adopted in other states.