

March 2021

Mr. Ben Kempinen, Chair
Mr. Tim Pierce, Ethics Counsel
Standing Committee on Professional Ethics
Wisconsin State Bar

By email (kempinen@wisc.edu; tpierce@wisbar.org)

RE: Comment Letter Opposing Adoption of ABA Model Rule 8.4(g)

Dear Chair Kempinen and Mr. Pierce:

ABA Model Rule 8.4(g), proposed by the ABA in 2016, should not be imposed on Wisconsin lawyers. After four years of deliberations in many states across the country, only two states, Vermont and New Mexico, have fully adopted this highly flawed rule. In contrast, fourteen states have concluded, after careful study, that ABA Model Rule 8.4(g) is both unconstitutional and unworkable. I respectfully request that the Committee reject any proposal to adopt ABA Model Rule 8.4(g) or to modify current Supreme Court Rule 20:8.4(i). Instead, the prudent course is to wait and see whether other states choose to experiment with ABA Model Rule 8.4(g) and the practical effect of that experiment on the lawyers in those states.

A number of scholars have characterized ABA Model Rule 8.4(g) as a speech code for lawyers.¹ The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers' First Amendment rights.² Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, "[t]he ABA's efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment."³ Professor Michael McGinniss, Dean of the University of North Dakota School of Law, raised similar concerns in a recent article.⁴

Two Arizona practitioners thoroughly examined ABA Model Rule 8.4(g) and concluded that it "is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment

¹ Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>.

² 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>.

³ Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017, "§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech" & "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise" in "§ 8.4-2 Categories of Disciplinable Conduct."

⁴ 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, 173 (2019).

free expression infirmities.”⁵ They recommend that “jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all.” They conclude that “the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected.”⁶

Since the ABA adopted Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued three free speech decisions that demonstrate it is unconstitutional. Under the Court’s analysis in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), ABA Model Rule 8.4(g) is an unconstitutional content-based restriction on lawyers’ speech. In *Becerra*, the Supreme Court held that state restrictions on “professional speech” are presumptively unconstitutional and subject to strict scrutiny. Under the Court’s unanimous analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), and *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019), ABA Model Rule 8.4(g) is an unconstitutional viewpoint-based restriction on lawyers’ speech.

Wisconsin attorneys should not be subject to a rule of questionable constitutionality nor one that has not been adequately tested in other states. I respectfully request that the Committee reject ABA Model Rule 8.4(g) and leave Supreme Court Rule 20:8.4(i) as it currently is written. I thank the Court for considering these comments.

Yours truly,

⁵ 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, 257 (2017).

⁶ *Id.* at 204.