CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

January 13, 2025

Clerk, D.C. Court of Appeals
430 E Street, N.W.
Washington, D.C. 20001

Sent via email to rules@dcappeals.gov

Re: Comment Letter Regarding Proposal to Amend D.C. Rules of Professional Conduct Rule 8.4

Dear Justices:

Christian Legal Society ("CLS") respectfully submits this comment letter to express opposition to the proposal to amend the D.C. Rules of Professional Conduct ("the proposed D.C. rule" or "Proposed Rule 8.4(h)"). Although CLS lauds the effort to prevent harassment and discrimination in the legal profession, approving a vague and overbroad rule like Proposed Rule 8.4(h)—one that chills the First Amendment rights of D.C. attorneys—is not the tool to accomplish this, especially when the existing rules are more than sufficient. The proposed rule should not be adopted because it is unconstitutional under U.S. Supreme Court precedent and would act as a speech code for the D.C. legal community.

I. D.C.'s Proposed Rule 8.4(h) Is a Mere Variant of ABA Model Rules 8.4(g), Which Is Unconstitutional and Has Been Aptly Labeled a "Speech Code for Lawyers."

A. Proposed Rule 8.4(h) and ABA Model Rule 8.4(g) are nearly identical.

The proposed rule would amend the D.C. Rules of Professional Conduct by adopting a version of ABA Model Rule 8.4(g) and its accompanying Comments. The relevant language of ABA Model Rule 8.4(g) below is followed by the corresponding language of Proposed Rule 8.4(h), along with their accompanying Comments. Taken together, they show that the proposed rule is nothing more than a version of the highly criticized and deeply flawed ABA Model Rule 8.4(g).

> **ABA Model Rule 8.4(g):** It is professional misconduct for a lawyer to 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 in conduct 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.

Proposed D.C. Rule 8.4(h): It is professional misconduct for a lawyer to engage in conduct directed at another person, with respect to the practice of law, that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, color, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status. This Rule does not limit the ability of a lawyer to accept, decline, or in accordance with Rule 1.16, withdraw from a representation. This Rule does not preclude legitimate advice or advocacy consistent with these rules.

ABA Model Rule 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).

Proposed D.C. Rule Comment [4] Discrimination includes conduct that manifests an intention to treat a person as inferior, to deny a person an opportunity, or to take adverse action against a person, because of one or more of the characteristics enumerated in the Rule. Harassment includes derogatory or demeaning verbal or physical conduct based on the characteristics enumerated in the Rule. In addition, sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. Antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (h).

ABA Model Rule 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.
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> **Proposed D.C. Rule Comment [5]** Conduct with respect 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 events and work-related social functions.

As seen above, the only substantive difference between ABA Model Rule 8.4(g) and Proposed Rule 8.4(h) is the addition in Proposed Rule 8.4(h) of the phrase "directed at another person." The D.C. Bar's Rules of Professional Conduct Review Committee ("Rules Review Committee") added the phrase "directed at another person" in Proposed Rule 8.4(h) "[i]n response to objections that [the 2019 version of] the proposed rule was unconstitutionally vague and addressed speech protected by the First Amendment."[1] The addition, however, does not remove the constitutional concerns, as most, if not all, speech is *directed at* another person. The Rules Review Committee's attempt to make a rule that is not unconstitutionally vague and that does not trample attorneys' free speech rights is simply that—an attempt. Moreover, the Rules Review Committee admitted that the proposed rule "more closely mirror[s] the Model Rule" that the 2019 proposed changes.[2]

According to the Rules Review Committee, "[b]ecause of the requirement that the speech in question is 'directed at another person,' Proposed Rule 8.4(h) is properly viewed not as prohibiting speech but [prohibiting] abusive behaviors."[3] Speech is speech, and the attempt to disguise speech as abusive behaviors by adding "directed at" language does not work—it's still speech that is being unconstitutionally curtailed. The concerns about workability remain. The constitutional infirmities found in ABA Model Rule 8.4(g) remain in Proposed Rule 8.4(h), and its application continues to be unbounded to specific situations that attorneys face—meaning it leaves them open to critique in unexpected areas of their public lives, without the kinds of clear guardrails that will cabin or prevent abuse from politically motivated accusations.

B. Because the Proposed Rule is nearly identical to ABA Model Rule 8.4(g), the proposed rule is subject to the same First Amendment concerns as the model rule.

As seen above, the modifications made to ABA Model Rule 8.4(g), the result of which is Proposed Rule 8.4(h), are minor at best. As such, the proposed rule is nothing more than a slightly modified version of ABA Model Rule 8.4(g) and is, therefore, subject to the same critiques as the highly criticized and deeply flawed ABA Model Rule 8.4(g) upon which it is based.

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[1] Memo dated March 9, 2021 to The Board of Governors of the D.C. Bar from the Rules of Professional Conduct Review Committee, p.32 ("Rules Review Committee Memo").
[2] *Id*. at p.21.
[3] *Id*. at 28.

The American Bar Association adopted ABA Model Rule 8.4(g) at its annual meeting in August 2016. In adopting it, the ABA largely ignored over 480 comment letters,[4] most opposed to the new rule. Even the ABA's own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule and raising concerns about its enforceability, although the Committee, without explanation, dropped its opposition immediately prior to the House of Delegates' vote.[5]

At the time the ABA adopted the model rule, the ABA claimed that "[t]wenty-two states and the District of Columbia . . . have adopted anti-discrimination and/or anti-harassment provisions in the black letter of their rules of professional conduct."[6] While the Rules Review Committee pointed this out in its memo, what the Rules Review Committee failed to note is that each of those anti-discrimination and/or anti-harassment misconduct rules had a limiting provision—such as occurring while representing a client or requiring the discrimination violate a federal, state or local statute or ordinance that prohibits discrimination—that prevents those provisions from being anywhere near as broad as ABA Model Rule 8.4(g). Furthermore, this would explain why, as the Rules Review Committee points also out, "neither the [pre-ABA Model Rule 8.4(g)] rules nor the associated comments have been struck down on First Amendment grounds."[7] This lack of specific application is exactly what makes the model rule and its variants still subject to these strong and widely articulated concerns, and the additional language proposed here does not change that there are no boundaries around when this rule may come into play.

Since its adoption, scholars have explained in detail the constitutional issues with ABA Model Rule 8.4(g) and have also accurately characterized it as a speech code for lawyers. For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has summarized his view, in a two-minute video, that ABA Model Rule 8.4(g) is a speech code that will have a serious impact on attorneys' speech.[8] Professor Volokh also explored its many flaws in a debate with a proponent of the model rule.[9]

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[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.

[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, 220 & n.97 (2017) (listing the Committee's concerns as including: lack of empirical evidence of need for Rule; vagueness of key terms; enforceability; constitutionality; coverage of employment discrimination complaints; mens rea requirement; and potential limitation on ability to decline representation), *citing* Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016.

[6] Rule Review Committee Memo, *supra* note 1, at p.26 (citing ABA Report (Aug. 2016) at 4-5).

[7] Rules Review Committee Memo, *supra* note 1 at p.26.

[8] Halaby & Long, *supra* note 5.

[9] *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=b074xW5kvB8&t=50s.

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that "[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers' First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants."[10] She insists that "lawyer speech, association, and petitioning" are "rights [that] must be protected" because they "play a major role in checking the use of governmental and non-governmental power in the United States."[11]

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.[12] 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."[13] They observed that "[t]he language the ABA has adopted in Rule 8.4(g) and its associated Comments are similar to laws that the Supreme Court has invalidated on free speech grounds."[14] In a *Wall Street Journal* commentary entitled *The ABA Overrules the First Amendment*, Professor Rotunda explained:

> 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.[15]

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[10] Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).
[11] *Id.*
[12] 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. Professor Rotunda and Texas Attorney General Ken Paxton debated two proponents of Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention. *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, The Federalist Society (Nov. 20, 2017), https://www.youtube.com/watch?v=V6rDPjqBcQg.
[13] Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, ed. April 2017 [hereinafter "Rotunda & Dzienkowski"], "§ 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."
[14] *Id.* at "§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise."
[15] 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, https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418.

Professor Josh Blackman has explained that "Rule 8.4(g) is unprecedented, as it extends a disciplinary committee's jurisdiction to conduct merely 'related to the practice of law,' with only the most tenuous connection to representation of clients, a lawyer's fitness, or the administration of justice."[16]

Professor Michael S. McGinniss, the dean of the University of North Dakota School of Law who teaches professional responsibility, warns against "the widespread ideological myopia about what it truly means to have a diverse and inclusive profession" that seems to be an impetus for ABA Model Rule 8.4(g).[17] He explains that a genuinely "diverse and inclusive profession . . . does not mean silencing or chilling diverse viewpoints on controversial moral issues on the basis that such expression manifests 'bias or prejudice,' is 'demeaning' or 'derogatory' because disagreement is deemed offensive, or is considered intrinsically 'harmful' or as reflecting adversely on the 'fitness' of the speaker."[18]

In a thorough examination of the rule's legislative history, practitioners Andrew Halaby and Brianna Long conclude that ABA Model Rule 8.4(g) "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 free expression infirmities."[19] 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."[20] 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."[21]

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.[22] But little was done to address these concerns. In their meticulous explication of the legislative history of ABA Model Rule 8.4(g), Halaby and Long conclude that "the new model rule's afflictions derive in part from indifference on the part of rule change proponents, and in part from the hasty manner in which the rule change proposal was pushed through to passage."[23] Specifically, the rule went through five versions, of which three versions evolved "in the two weeks before passage, none of these was subjected to review and

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[16] Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g),* 30 Geo. J. Legal Ethics 241, 243 (2017). *See also,* George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political,* 32 Notre Dame J.L. Ethics & Pub. Pol'y 135 (2018).
[17] Michael McGinniss, Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession, 42 Harv. J.L. & Pub. Pol'y 173, 249 (2019), https://law.und.edu/_files/docs/features/mcginnissexpressingconsciencewithcandor-harvardjlpp-2019.pdf.
[18] *Id.*
[19] Andrew F. Halaby & Brianna L. Long, *supra* note 5, at 257.
[20] *Id.*
[21] *Id.* at 204.
[22] Halaby & Long, *supra* note 5, at 216-223 (summarizing concerns expressed at the only public hearing on an early version of ABA Model Rule 8.4(g), as well as the main concerns expressed in the comment letters).
[23] *Id.* at 203.

comment by the ABA's broader membership, the bar at large, or the public."[24] Halaby and Long summarized the legislative history of the rule:

> Model Rule 8.4(g) and its associated comments evolved rapidly between the initial letter from the Goal III entities in July 2014, through initial circulation of Version 1 in July 2015, to final adoption of Version 5 the following August. There was solicitation of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.[25]

These scholars' red flags should not be ignored. ABA Model Rule 8.4(g) and its progeny, like Proposed Rule 8.4(h), would dramatically shift the disciplinary landscape for D.C. attorneys. The proposed rule, which is nothing more than a version of ABA Model Rule 8.4(g), should not be imposed on D.C. attorneys for both constitutional and practical reasons.

II. The Proposed Rule Does Not Comport with U.S. Supreme Court Precedent.

Since the ABA adopted Model Rule 8.4(g) in 2016, the U.S. Supreme Court has issued three free speech decisions that make clear that it and rules like it (such as Proposed Rule 8.4(h)) unconstitutionally chill attorneys' speech: *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). The *NIFLA* decision clarified that the First Amendment protects "professional speech" just as fully as other speech. That is, there is no free speech carve-out that countenances content-based restrictions on professional speech. The *Matal* and *Iancu* decisions affirm that the terms used in ABA Model Rule 8.4(g) and Proposed Rule 8.4(h) create unconstitutional viewpoint discrimination.

Thus, under Supreme Court precedent, the First Amendment fully protects offensive, derogatory, or demeaning speech.[26] Any state effort to single out such speech for sanction is a viewpoint-based speech restriction and is subject to the strictest First Amendment scrutiny.[27] Such a speech restriction survives First Amendment scrutiny only if the government actually demonstrates that the restriction serves a compelling state interest that cannot be achieved in a more narrowly tailored manner. Additionally, the First Amendment analysis does not change simply because the speech restriction is imposed on an attorney. "Derogatory" or "demeaning" speech is not subject to decreased constitutional protection simply because it is spoken by an attorney in a setting "related to the practice of law." The First Amendment protects "professional speech" as fully as it does speech by nonprofessionals.[28]

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[24] *Id.*
[25] *Id.* at 233.
[26] *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017).
[27] *Id.*
[28] *NIFLA*, 138 S. Ct. at 2371-72.

The ABA issued Formal Opinion 493 in July 2020—almost four year after the ABA adopted Model Rule 8.4(g)—in an attempt to "unstall" state adoption of the model rule. Remarkably, ABA Formal Opinion 493 fails to mention, let alone explain how ABA Model Rule 8.4(g) survives constitutional analysis under, the Supreme Court's decisions in *NIFLA*, *Matal*, and *Iancu*. The Rules Review Committee tried hard to show how Proposed Rule 8.4(h) is constitutional under ABA Formal Opinion 493 and U.S. Supreme Court cases.[29] But the Rules Review Committee, just like ABA Formal Opinion 493, ignores *recent* U.S. Supreme Court cases that demonstrate the likely unconstitutionality of rules like Proposed Rule 8.4(h).[30]

A. *NIFLA v. Becerra* protects attorney speech from content-based restrictions.

While *NIFLA* did not directly involve ABA Model Rule 8.4(g), the Court's analysis makes clear that ABA Model Rule 8.4(g) and rules like it (such as Proposed Rule 8.4(h)) are an unconstitutional *content*-based restriction on attorneys' speech. In *NIFLA*, the Court held that government restrictions on professionals' speech—including attorneys' professional speech—are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, *presumptively unconstitutional*. That is, a government regulation that targets speech must survive strict scrutiny—a close examination of whether the regulation is narrowly tailored to achieve a compelling government interest.

The Court explained that "[c]ontent-based regulations 'target speech based on its communicative content.'"[31] "[S]uch laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'"[32] As the Court observed, "[t]his stringent standard reflects the fundamental principle that governments have '"no power to restrict expression because of its message, its ideas, its subject matter, or its content."'"[33]

The Court rejected the idea that "professional speech" was an exception "from the rule that content-based regulations of speech are subject to strict scrutiny."[34] The Court stressed that "*this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.*'"[35] The Court reaffirmed that its "precedents have long protected the First Amendment rights of professionals" and "has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers."[36] As the Court observed, "[t]his stringent standard reflects the fundamental principle that governments have

[29] *Id*. at pp.25-27 and case cited therein.
[30] The most recent case cited by the Rules Review Committee is from 2013, which is *three years before* the adoption of ABA Model Rule 8.4(g).
[31] *NIFLA*, 138 S. Ct. at 2371 (2018) (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)).
[32] *Id*.
[33] *Id.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).
[34] *Id.* at 2371.
[35] *Id.* at 2371-72 (emphasis added).
[36] *Id.* at 2374.

'"no power to restrict expression because of its message, its ideas, its subject matter, or its content."'"[37]

The operative assumption underlying both ABA Model Rule 8.4(g) and proposed Rule 8.4(h) is that professional speech is less protected by the First Amendment than other speech, but the Court rejected that basic premise. Instead, the Court was clear that a state's regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its "precedents have long protected the First Amendment rights of professionals" and "has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers."[38] Indeed, the speech that both the model rule and the proposed rule regulate is entitled to the full protection of the First Amendment.

B. ABA Formal Opinion 493 and the Rules Review Committee Memo fail to address the *NIFLA* decision.

The ABA Section of Litigation recognized *NIFLA's* impact in an article published months before ABA Formal Opinion 493. Several section members understood that the decision raised grave concerns about the overall constitutionality of ABA Model Rule 8.4(g):

> Model Rule 8.4(g) "is intended to combat discrimination and harassment and to ensure equal treatment under the law," notes Cassandra Burke Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section's Civil Rights Litigation Committee. While it serves important goals, *"the biggest question about Rule 8.4(g) has been whether it unconstitutionally infringes on lawyers' speech rights—and after the Court's decision in* Becerra*, it increasingly looks like the answer is yes,"* Robertson concludes. [39]

But on July 15, 2020, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 493, "Model Rule 8.4(g): Purpose, Scope, and Application." The document serves to underscore the breadth of ABA Model Rule 8.4(g) and the fact that it is

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[37] *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).
[38] *Id.* at 2374.
[39] C. Thea Pitzen, *First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g) Constitutional?*, ABA Section of Litigation Top Story (Apr. 3, 2019), https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond/ (emphasis added).

intended to restrict attorneys' speech.[40] The opinion reassures that it will only be used for "harmful" conduct, which the rule makes clear includes "verbal conduct" or "speech."[41]

Formal Opinion 493 claims that "[t]he Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern." But that is hardly reassuring because "matters of public concern" is a term of art in free speech jurisprudence that appears in the context of the broad limits that the government is allowed to place on its employees' free speech. The category actually provides *less* protection for free speech rather than more protection.[42] And it may even reflect the false idea that attorneys' speech is akin to government speech. If attorneys' speech is treated as if it were the government's speech, then attorneys have minimal protection for their speech.

Formal Opinion 493 claims that ABA Model Rule 8.4(g) does not "limit a lawyer's speech or conduct in settings unrelated to the practice of law," but fails to grapple with just how broadly the Rule defines "conduct related to the practice of law," for example, to include social settings.[43] In so doing, Formal Opinion 493 ignores the Court's instruction in *NIFLA* that attorneys' *professional* speech—not just their speech "unrelated to the practice of law"—is protected by the First Amendment under a strict scrutiny standard.

Perhaps most baffling is the fact that *Formal Opinion 493 does not even mention the Supreme Court's* NIFLA *decision*, even though the decision was handed down two years earlier and has been frequently relied upon to illuminate ABA Model Rule 8.4(g)'s constitutional deficiencies. This lack of mention, let alone analysis, of *NIFLA* is inexplicable. Formal Opinion 493 has a four-page section that discusses "Rule 8.4(g) and the First Amendment," yet never mentions the U.S. Supreme Court's on-point decisions in *NIFLA*, *Matal*, and *Iancu.* Like the proverbial ostrich burying its head in the sand, the ABA adamantly refuses to see the deep flaws of Model Rule 8.4(g).[44] The D.C. Court of Appeals does not have that luxury.

Formal Opinion 493 concedes that its definition of the term "harassment" is not the same as the EEOC uses,"[45] citing *Harris v. Forklift Systems, Inc.,* which ruled that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's

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[40] American Bar Association Standing Comm. on Ethics and Prof. Resp., Formal Op., 493, *Model Rule 8.4(g): Purpose, Scope, and Application* (July 15, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf.
[41] *Id.* at 1.
[42] *Garcetti v. Cabellos*, 547 U.S. 410, 417 (2006) ("the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern"); *id.* at 418 ("To be sure, conducting these inquiries sometimes has proved difficult.").
[43] Formal Op. 493, *supra* note 86, at 1.
[44] *Id.* at 9-12.
[45] *Id.* at 4 & n.13.

purview."[46] ABA Model Rule 8.4(g)'s definition of "harassment" in Comment [3] includes "derogatory or demeaning verbal or physical conduct." Of course, this definition runs headlong into the Supreme Court's ruling that the mere act of government officials determining whether speech is "disparaging" is viewpoint discrimination that violates freedom of speech. In Formal Opinion 493, the ABA offers a new definition for "harassment" ("aggressively invasive, pressuring, or intimidating") that is not found in either ABA Model Rule 8.4(g) or Proposed Rule 8.4(h). Formal Opinion 493 signifies that the ABA itself recognizes that the term "harassment" is the model rule's—and by virtue of their similarity, the proposed rule's—Achilles' heel.

Similarly, the Rules Review Committee's Memo should not be relied upon in assessing Proposed Rule 8.4(h)'s chilling effect on attorneys' freedom of speech because it also fails to address *NIFLA*. In arguing Proposed Rule 8.4(h) does not violate attorney's freedom of speech the memo cites to cases decided even before the ABA adopted Model Rule 8.4(g).[47] Thus, the memo is not helpful in assessing the constitutionality of Proposed Rule 8.4(h), a rule that involves attorneys' speech.

C. *Matal* and *Iancu* protect attorney speech from viewpoint-discrimination restrictions.

Under the Court's analysis in *Matal*, both ABA Model Rule 8.4(g) and its progency Proposed Rule 8.4(h) are unconstitutional *viewpoint*-based restrictions on attorneys' speech. In *Matal*, a unanimous Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. In his concurrence, Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, observed that it is unconstitutional to suppress speech that "*demeans* or offends."[48] The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[49]

All justices agreed that a provision of a longstanding federal law, the Lanham Act, was unconstitutional because it allowed government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons. Allowing government officials to determine what words do and do not "disparage" a person "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."[50] Justice Alito, writing for a plurality of the Court, noted that "[s]peech that *demeans* on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful;

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[46] 510 U.S. 17, 21 (1993)
[47] *See*, *supra* note 30.
[48] *Matal,* 137 S. Ct. at 1766 (Kennedy, J., concurring) (emphasis supplied).
[49] *Id.* at 1753-1754, 1765 (plurality op.).
[50] *Id.* at 1751 (quotation marks and ellipses omitted).

but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[51]

In his concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy stressed that "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate," particularly "if the ideas or perspectives are ones a particular audience might think offensive."[52] Justice Kennedy closed with a sober warning:

> A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.[53]

Justice Kennedy explained that the federal statute was unconstitutional viewpoint discrimination because the government permitted "a positive or benign mark but not a *derogatory* one," which "reflects the Government's disapproval of a subset of messages it finds offensive," which is "the essence of viewpoint discrimination."[54] And it was viewpoint discriminatory even if it "applies in equal measure to any trademark that *demeans* or offends."[55]

In 2019, the Supreme Court reaffirmed its rigorous rejection of viewpoint discrimination. The challenged terms in *Iancu* were "immoral" and "slanderous" and, once again, the Court found the terms were viewpoint discriminatory because they allowed government officials to pick and choose which speech to allow.

In her opinion for the Court, Justice Kagan explained that "immoral" and "scandalous" insert a "facial viewpoint bias in the law [that] results in viewpoint-discriminatory application."[56] The Lanham Act, was unconstitutional because:

> [I]t allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of

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[51] *Id.* at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting) (emphasis supplied).
[52] *Id.* at 1767 (Kennedy, J., concurring).
[53] *Id.* at 1769 (Kennedy, J., concurring).
[54] *Id.* at 1766 (Kennedy, J., concurring) (emphasis supplied).
[55] *Id.* (emphasis supplied).
[56] *Iancu,* 139 S. Ct. at 2300.

> approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.[57]

Proposed Rule 8.4(h) cannot withstand viewpoint-discrimination analysis under the *Matal* and *Inacu* decisions. The definition of "harassment" in Comment [4] of the proposed rule states:

> Harassment *includes derogatory or demeaning verbal* or physical conduct . . . . In addition, sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. (Emphasis supplied.)

But in *Matal*, the Supreme Court unanimously held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.[58] Justice Kennedy stressed that "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate," particularly "if the ideas or perspectives are ones a particular audience might think offensive."[59] Justice Alito reminded that "[s]peech that *demeans* on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[60]

Like its definition of "harassment," Proposed Rule 8.4(h)'s definition of "discrimination" is unconstitutional viewpoint discrimination. Comment [4] states that "[d]iscrimination includes conduct that manifests an intention to treat a person as inferior." But a rule that permits government officials to punish attorneys for something that the government determines to be "an *intention* to treat a person as *inferior*" is the epitome of an unconstitutional rule.

D. Proposed Rule 8.4(h) is Void for Vagueness.

Besides creating unconstitutional content-based restrictions and viewpoint discrimination, the vagueness of the terms "harassment" and "discrimination" in Proposed Rule 8.4(h) necessarily will chill attorneys' speech. Compounding the unconstitutionality, the terms "harassment" and "discrimination" fail to give D.C. attorneys fair notice of what speech might subject them to discipline. The language is dangerously vague and infringes upon the rights of every lawyer and law firm in Washington, D.C., particularly with respect to hiring rights. For example, the "retirement" age for many firms would prevent anyone older than that age from employment,

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[57] *Id.*
[58] 137 S. Ct. at 1753-1754, 1765 (plurality op.); *see also, id.* at 1766 (unconstitutional to suppress speech that "demeans or offends") (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).
[59] *Id.* at 1767.
[60] *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)(emphasis supplied).

which would be a violation of the proposed rule. Or, if a religious nonprofit decided to hire people of the same faith, it would also run afoul of this rule. As such, Proposed Rule 8.4(h) does not provide the clear enforcement standards that are necessary when the loss of one's livelihood is at stake.

III. D.C. Should Follow the Example of Other States that Have Opted not to Adopt ABA Model Rule 8.4(g) or a Similar Rule.

After more than eight years of careful study by state supreme courts and state bar associations in numerous states across the country, only one state has adopted ABA Model Rule 8.4(g) verbatim and only a handful more have adopted a modified version of the model rule. Indeed, the vast majority of states that have even considered it have abandoned ABA Model Rule 8.4(g) and its variants as unconstitutional or unworkable. This includes Arizona, Hawaii, Idaho, Iowa, Louisiana, Minnesota, Montana, Nebraska, Nevada, North Dakota, South Carolina, South Dakota, Tennessee, Texas, and Wisconsin.

A. Numerous state supreme courts have rejected ABA Model Rule 8.4(g) and similar rules.

State supreme courts around the nation of have officially rejected adoption of ABA Model Rule 8.4(g), or a rule based on ABA Model Rule 8.4(g). For example, in August 2018, after a public comment period, the **Arizona** Supreme Court rejected a petition from the Central Arizona Chapter of the National Lawyer Guild urging adoption of ABA Model Rule 8.4(g).[61] In October 2021, the Hawaii Supreme Court amended its Rule 8.4 by adopting new subsection (h) that specifically addresses sexual harassment by an attorney in his or her professional capacity.[62] In doing so, the Hawaii Supreme Court rejected the originally proposed rule that closely resembled ABA Model Rule 8.4(g). The **Idaho** Supreme Court not once but twice—in 2018[63] and 2023[64]—rejected a resolution by the Idaho State Bar Association to adopt a modified version of ABA Model Rule 8.4(g). A report from the ABA itself indicates that the **Minnesota** Supreme Court rejected the rule.[65] In March 2019, when the State Bar of **Montana** petitioned the state supreme court to revise 18 rules of the Montana Rules of Professional Conduct, that bar mentioned in a footnote (at

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[61] Arizona Supreme Court Order re: No. R-17-0032 (Aug. 30, 2018), https://www.christianlegalsociety.org/wp-content/uploads/2023/04/Rules-Agenda-Denial-of-Amending-8.4.pdf.

[62] Hawaii Supreme Court Order SCRU-11-0001047 (October 26, 2021), https://www.christianlegalsociety.org/wp-content/uploads/2023/07/HI-8.4-amendment-order.pdf.

[63] Idaho Supreme Court, Letter to Executive Director, Idaho State Bar (September 6, 2018), https://www.christianlegalsociety.org/wp-content/uploads/2023/04/ISC-Letter-IRPC-8.4g.pdf.

[64] Idaho Supreme Court Order *In re* Idaho State Bar Resolution 21-01 (January 20, 2023), https://www.christianlegalsociety.org/wp-content/uploads/2023/02/2023-Idaho-Published-Opinion.pdf.

[65] 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* (Sept. 19, 2018), at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.authcheckdam.pdf.

3, n.2) that Montana Rule of Professional Conduct Rule 8.4(g) was not included in the review as it had "earlier been the subject of Court attention … and the Supreme Court chose not to adopt the ABA's Model Rule 8.4(g)."[66] Similarly, in August 2020, the Iowa Supreme Court, after soliciting public comments on amendments. Similarly, in August 2020, the **Iowa** Supreme Court, after soliciting public comments on amendments to its professional conduct rules, adopted some but not all of the proposed amendments. One of those not adopted was the amendment to its misconduct rule. In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).[67] In March 2020, the Supreme Court of **South Dakota** unanimously decided to deny the proposed amendment to Rule 8.4 because the court was "not convinced that proposed Rule 8.4(g) is necessary or remedies an identified problem."[68] In April 2018, after a public comment period, the Supreme Court of **Tennessee** denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).[69] Most recently, on July 11, 2023, **Wisconsin**, denied a petition from the State Bar Standing Committee on Professional Ethics asking the court to replace existing Supreme Court Rule 20:8.4(i) with ABA Model Rule 8.4(g).[70]

B. State Attorneys General have identified core constitutional issues with ABA Model Rule 8.4(g).

Moreover, state attorneys general have issued opinions critical of ABA Model Rule 8.4(g) in Alaska, Arizona, Arkansas, Louisiana, South Carolina, and Texas. In fact, the Attorney General of Tennessee wrote that "the goal of the proposed rule is to subject to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment." And, in 2017, the Montana Legislature passed a joint resolution condemning ABA Model Rule 8.4(g) when a version was under consideration by the Montana Supreme Court.

Most recently, in May 2022, the **Nebraska** Attorney General recommended that the Nebraska Supreme Court not adopt a proposed ABA Model Rule 8.4(g)-like amendment, calling the proposed amendment "unconstitutional" and opining that the "sweeping scope and vague

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[66] Petition in Support of Revision of the Montana Rules of Professional Conduct, https://www.christianlegalsociety.org/wp-content/uploads/2023/04/MT-Petition-and-Memo.pdf.

[67] Supreme Court of South Carolina, *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct Appellate Case No. 2017-000498*, Order (June 20, 2017), http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01 (if arrive at South Carolina Judicial Department homepage, select "2017" as year and then scroll down to "2017-06-20-01").

[68] Letter from Chief Justice Gilbertson to the South Dakota State Bar (March 9, 2020), https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_20.pdf.

[69] Supreme Court of Tennessee, *In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, Order No. ADM2017-02244 (Apr. 23, 2018), https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf.

[70] Supreme Court of Wisconsin, Order No. 22-02 (July 11, 2023), https://www.christianlegalsociety.org/wp-content/uploads/2023/07/Wisconsin-22-02-Final-Order.pdf.

language [of the proposed rule] will chill attorneys' constitutionally protected speech throughout Nebraska."[71] In December 2016, the **Texas** Attorney General opined 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."[72] The opinion declared that "[c]ontrary to … basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys' ability to engage in meaningful debate on a range of important social and political issues."[73] The following year, the Attorney General of **South Carolina** determined that "a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of Religion and is void for vagueness."[74] Also in 2017, the **Louisiana** Attorney General concluded that "[t]he regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid."[75] Because of the "expansive definition of 'conduct related to the practice of law'" and its "countless implications for a lawyer's personal life," the Attorney General found the Rule to be "unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct."[76] In March 2018, the Attorney General of **Tennessee** filed Opinion 18-11, *American Bar Association's New Model Rule of Professional Conduct Rule 8.4(g),* attaching his office's comment letter to the Supreme Court of Tennessee, opposing adoption of a proposed rule closely modeled on ABA Model Rule 8.4(g).[77] After a thorough analysis, the Attorney General concluded that the proposed rule "would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct."[78] In May 2018, the **Arizona** Attorney General filed a comment letter urging the Arizona Supreme Court to heed the opposition of other states, state attorneys general, and state bar associations to adoption of ABA Model Rule 8.4(g). He also noted the constitutional concerns that ABA Model Rule 8.4(g)

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[71] Neb. Att'y Gen. Letter (May 2, 2022), https://www.christianlegalsociety.org/wp-content/uploads/2023/04/NE-General-Attorney-Commnet-Letter.pdf.
[72] Tex. Att'y Gen. Op. KP-0123 (December 20, 2016) at 3, https://www.christianlegalsociety.org/wp-content/uploads/2023/04/TX-AG-Opinion.pdf.
[73] *Id.*
[74] South Carolina Att'y Gen. Op. (May 1, 2017) at 13, https://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf.
[75] La. Att'y Gen. Op. 17-0114 (September 8, 2017) at 4, https://www.christianlegalsociety.org/wp-content/uploads/2023/07/Louisiana-AG-Op.-17-0114.pdf.
[76] *Id.* at 6.
[77] *American Bar Association's New Model Rule of Professional Conduct 8.4(g)*, 18 Tenn. Att'y Gen. Op. 11 (Mar. 16, 2018) https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf.
[78] *Id*.

raises as to free speech, association, and expressive association.[79] And, in August 2019, the **Alaska** Attorney General identified numerous constitutional concerns with ABA Model Rules 8.4(g).[80]

C. State bar associations have rejected ABA Model Rule 8.4(g) and versions thereof.

The **Alaska** Bar Association's Rules of Professional Conduct recommended that the Board not advance the proposed rule to the Alaska Supreme Court but instead remand it to the committee for additional revisions, noting that "[t]he amount of comments was unprecedented."[81] The **Louisiana** Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of Model Rule 8.4(g), voted "not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court."[82] The **North Dakota** Joint Committee on Attorney Standards voted not to recommend adoption of ABA Model Rule 8.4(g), expressing concerns that it was "overbroad, vague, and imposes viewpoint discrimination" and that it might "have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views."[83] The Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g).[84] In a letter to the Court, the State Bar President explained that "the language used in other jurisdictions was inconsistent and changing," and, therefore, "the Board of Governors determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions."[85]

Federalism's great advantage is that one state can reap the benefit of other states' experience. Prudence counsels waiting to see the effects on attorneys—in the handful of states that have adopted ABA Model Rule 8.4(g) or similar rule—of the real-life implementation of the

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[79] Attorney General Mark Brnovich, *Attorney General's Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court* (May 21, 2017), https://www.clsnet.org/document.doc?id=1145.
[80] Letter from Alaska Attorney General to Alaska Bar Association Board of Governors (August 9, 2019), http://www.law.state.ak.us/pdf/press/190809-Letter.pdf.
[81] Letter from Chairman Murtagh, Alaska Rules of Professional Conduct to President of the Alaska Bar Association (Aug. 30, 2019), https://www.christianlegalsociety.org/wp-content/uploads/2022/10/Report.ARPCcmte.on8_.4f_CLS_Center_for_Law_and_Religious_Freedom.pdf.
[82] Louisiana State Bar Association, *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, Oct. 30, 2017, https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892.
[83] Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. on Att'y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (December 14, 2017), at https://perma.cc/3FCP-B55J.
[84] Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4*, Order (September 25, 2017), https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf.
[85] Letter from Gene Leverty, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), https://www.christianlegalsociety.org/wp-content/uploads/2023/04/Bar-Letter-Retracting-Petition-17-32067.pdf.

rule. This is particularly true when ABA Model Rule 8.4(g) and its progeny have failed to survive close scrutiny by official entities in so many states.

Conclusion

Attorneys who live in a free society should rightly insist upon the freedom to speak without fear in their social activities, their workplaces, and the public square. Because the proposed amendment to the D.C. Rules of Professional Conduct Rule 8.4 would drastically curtail that freedom, this Court should reject it. This proposed rule will irreparably harm D.C. attorneys' First Amendment rights and, if adopted, it would operate as a speech code for D.C. attorneys. The additional proposed language does not resolve this concern and will not prevent the likelihood that the rule could be misused to target disfavored speech from all sides of the political spectrum.

The proposed rule creates several other serious concerns, but the concerns already discussed adequately illustrate why this court should reject the proposed rule. Many state supreme courts have adopted the prudent course of waiting while other states experiment with ABA Model Rule 8.4(g) and its variants to evaluate its actual effect on the attorneys in those jurisdictions before imposing it on their own attorneys. Rejecting the proposed rule would seem a prudent and constitutionally wise course for the D.C. Court of Appeals to choose.

Thank you for your consideration of these comments.

Respectfully submitted,

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