January 13, 2025

Chief Judge Anna Blackburne-Rigsby
Associate Judge Corinne A. Beckwith
Associate Judge Catharine F. Easterly
Associate Judge Roy W. McLeese
Associate Judge Joshua Deahl
Associate Judge John P. Howard
Associate Judge Vijay Shanker

Attn: 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 Opposing Proposal to Amend D.C. Rules of Professional Conduct by Adding Rule 8.4(h) and Deleting Current Comment 3 (No. M286-24)

Dear Chief Judge Blackburne-Rigsby and Associate Judges Beckwith, Easterly, McLeese, Deahl, Howard, and Shanker:

I write as a member of the District of Columbia Bar to oppose addition of the proposed Rule 8.4(h) and proposed Comments 3, 4, 5, 6, and 7 to the current Rules of Professional Conduct and to oppose deletion of current Comment 3. While there are numerous reasons, both legal and prudential, for not adding proposed Rule 8.4(h) and its proposed Comments 3, 4, 5, 6, and 7, I will focus on the fact that proposed Rule 8.4(h) and its comments will chill District of Columbia attorneys' freedom of speech in violation of the First Amendment to the United States Constitution. As discussed below, the Report of the District of Columbia Bar's Rules of Professional Conduct Review Committee entitled *Proposed Amendment to Rule 8.4 of the D.C. Rules of Professional Conduct, March 2021* [hereinafter "Rules Review Committee Report"], which was attached to the Notice dated November 13, 2024, fails to grapple with relevant United States Supreme Court free speech caselaw that illuminates the serious constitutional deficiencies of proposed Rule 8.4(h) and its comments.

Members of the District of Columbia Bar are particularly sensitive to the need to protect attorneys' freedom of speech. District of Columbia Bar members often lead the national debate on highly controversial issues from perspectives across the political and ideological spectrum. A proposed disciplinary rule like Rule 8.4(h) threatens District of Columbia attorneys' ability to engage in the intense discussions of controversial topics that are the lifeblood of our democracy.

I. Proposed Rule 8.4(h) would Further Increase the Regrettable Polarization of Our Public Discourse and Would Become Yet Another Means of Silencing Speech with which Political and Ideological Opponents Disagree.

Hanging like a sword of Damocles over District of Columbia attorneys' law licenses, proposed Rule 8.4(h) will have a chilling effect on lawyers' speech regarding political, social, and ideological issues to the detriment of their clients, their employers, and our civil society and democracy. A free society requires attorneys who are free to speak their minds without fear of losing their license to practice law.

Attorneys across the political and ideological spectrum should be concerned about proposed Rule 8.4(h)'s disturbing implications for their ability to practice law. Just as one example, attorneys who serve on their firms' hiring committees that make employment decisions in which, in order to achieve diversity goals, even modest preference is given based on race, sex, religion, or sexual orientation, would run afoul of proposed Rule 8.4(h).[1] Or a progressive attorney who tweets a common but hurtful sexual term aimed at a conservative presidential spokeswoman could be subject to discipline under the proposed rule.[2] Because the terms "harassment" and "discrimination" are difficult to define and hold greatly dissimilar meanings for different people, proposed Rule 8.4(h) threatens lawyers' speech across the political, ideological, cultural, and social spectrum.[3]

Sadly, we live at a time when many people, including lawyers, are increasingly willing to suppress the free speech of those with whom they disagree. Some lawyers purportedly have filed bar complaints in order to harass officeholders whose political views they dislike.[4] Yale law

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[1] Thomas Spahn, a highly respected professional ethics expert who has led CLE programs for the District of Columbia Bar, has concluded that ABA Model Rule 8.4(g) "prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc." He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:

> Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a "plus" when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms' head count on the basis of such attributes – but it is nevertheless discrimination. *In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.*

The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues* 5-7 (July 12, 2018) (emphasis supplied).

[2] Debra Cassens Weiss, *Big Law Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders,* ABA Journal, Oct. 1, 2018 (lawyer, honored in 2009 by the ABA Journal "for his innovative use of social media in his practice," apologized to firm colleagues, saying no "woman should be subjected to such animus"), https://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

[3] The definitions of "discrimination" and "harassment" in proposed Comment 4 raise severe issues for the constitutionality of proposed Rule 8.4(h).

[4] *See* Brian Sheppard, *The Ethics Resistance*, 32 Geo. J. Legal Ethics 235, 238 (2018):

> Ordinary ethics complaints have the capacity to ruin individual law careers and serve as cautionary examples to other lawyers. Ethics Resistance complaints have the additional capacity to prompt official action, alter staffing decisions at the highest levels of

students have described significant harassment by fellow law students simply because they hold religious or conservative ideas.[5]

In July 2020, the Judicial Conference Committee on Codes of Conduct withdrew a draft advisory opinion that had said it was improper for judges to be members of the Federalist Society or the American Constitution Society, but permissible to belong to the American Bar Association. A comment letter signed by 210 federal judges took exception to the opinion's underlying "double standard" and "untenable" "disparate treatment" as reflected in "the Committee['s] oppos[ing] judicial membership in the Federalist Society while permitting membership in the ABA."[6] In withdrawing its proposal, the Judicial Conference Committee noted that "judges confront a world filled with challenges arising out of emerging technologies, deep ideological disputes, a growing sense of mistrust of individuals and institutions, and an ever-changing landscape of competing political, legal and societal interests."[7] Far less sheltered than judges from these pressures, lawyers daily confront such a challenging environment.

Merely expressing support for freedom of speech has itself become controversial. In July 2020, several well-known liberal signatories to a public letter in support of freedom of speech were publicly pressured to recant their support for free speech and its concomitant corollary of tolerance for others who hold different beliefs.[8]

Given the current climate, lawyers who hold classical liberal, conservative, libertarian, or religious viewpoints are understandably unwilling to support a black letter rule that could easily be misused to deprive them of their license to practice law. As a nationally recognized First

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> government, influence high-ranking lawyers' willingness to comply with investigations, and terminate or preempt relationships between lawyers and the politically powerful. Most importantly, they can change public perception regarding the moral integrity of an administration. And they can do this even if they do not result in a sanction.

[5] *See, e.g.,* Aaron Haviland, "I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong," The Federalist (Mar. 4, 2019), https://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/ (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

[6] Letter from 210 Federal Judges to Robert P. Deyling, Ass't Gen. Counsel, Administrative Off. of the U.S. Courts (Mar. 18, 2020), https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf.

[7] Memorandum from James C. Duff, Director, Administrative Office of the United States Courts to All United States Judges, "Update Regarding Exposure Draft – Advisory Opinion No. 117 Information" (July 30, 2020), https://aboutblaw.com/SkA.

[8] "J.K. Rowling Joins 150 Public Figures Warning Over Free Speech," BBC (July 8, 2020), https://www.bbc.com/news/world-us-canada-53330105.

Amendment expert has explained, ABA Model Rule 8.4(g) is a speech code that threatens lawyers' speech.[9]

II. Proposed Rule 8.4(h) Would Expand the Reach of the Professional Rules of Conduct into District of Columbia Bar Members' Lives and Chill Their Speech.

A. Proposed Rule 8.4(h) would regulate lawyers' interactions with anyone while engaged in conduct "with respect to the practice of law," including when "participating in bar association events and work-related social functions."

Proposed Rule 8.4(h) would make professional misconduct *any* conduct "with respect to the practice of law" that a lawyer "knows *or reasonably should know* is harassment or discrimination" on thirteen separate bases ("race, color, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, family responsibility, or socioeconomic status")[10] whenever a lawyer is: 1) representing clients; 2) interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law; 3) operating or managing a law firm or law practice; and 4) participating in bar association events and work-related social functions.[11]

Simply put, proposed Rule 8.4(h) would regulate a lawyer's "conduct . . . while . . . *interacting with . . . others*" while engaged in "[c]onduct with respect to the practice of law," including "participating in bar association events and work-related social functions." Proponents of ABA Model Rule 8.4(g) candidly observed in 2016 that they sought a new black letter rule precisely because they wanted to regulate nonlitigating 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."[12]

The scope of ABA Model Rule 8.4(g) and proposed Rule 8.4(h), which "mirrors" it, is intentionally far-reaching and deliberately applies far beyond the scope of the current Comment 3 that accompanies Rule 8.4(d). The compelling question becomes: What conduct does proposed Rule 8.4(h) *not* reach? So much of what a lawyer does falls within "[c]onduct with respect to the practice of law."[13] Much of a lawyer's social life can be viewed as business development and

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[9] Eugene Volokh, A Nationwide Speech Code for Lawyers?, The Federalist Society (May 2, 2017), https://www.youtube.com/watch?v=AfpdWmlOXbA. As the Rules Review Committee Report states, Rule 8.4(h) "would be adopted as a subsection of Rule 8.4, more closely mirroring the [ABA] Model Rule [8.4(g)]." Rules Review Committee Report at 21.

[10] Proposed R. 8.4(h).

[11] Proposed Cmt. [5].

[12] ABA Commission on Sexual Orientation and Gender Identity, *Memorandum to Standing Committee on Ethics and Professional Responsibility: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4*, at 5, 7 (Oct. 22, 2015), https://www.clsnet.org/document.doc?id=1125.

[13] *See* 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, 226 (2017) (Referring to ABA Model

opportunities to cultivate relationships with current clients or potential future clients, all "[c]onduct with respect to the practice of law." *Because the verb "includes" comes before the list of activities in proposed Comment 5, the list of activities is not an exclusive list of activities encompassed by "[c]onduct with respect to the practice of law."* Other activities could well fall within the actual definition of "[c]onduct with respect to the practice of law."

As the proposed Comment 4 to proposed Rule 8.4(h) states, "harassment" includes "derogatory or demeaning verbal or physical conduct." "Verbal conduct," of course, is speech.

This speech limitation is highly problematic for District of Columbia Bar members who are frequently asked to speak to community groups, classes, and other audiences about current legal issues of the day. District of Columbia Bar members are asked to speak *because they are lawyers*. Of course, a lawyer's speaking engagements often have a dual purpose of increasing the lawyer's visibility in order to create new business opportunities and develop new clients.

Bar members frequently participate in panel discussions, including Bar-sponsored CLEs, panel discussions, and articles for the District of Columbia Bar's publication, *Washington Lawyer*, all of which often necessitate speech regarding sensitive political, social, cultural, and ideological issues. Proposed Rule 8.4(h), if adopted, will make Bar members less willing to participate in these Bar events, particularly if they are expressing views that are perceived to be minority viewpoints or unpopular viewpoints. In chilling Bar members' willingness to engage in free inquiry in Bar events, Proposed Rule 8.4(h) will impoverish all Bar members, both potential speakers and potential audience members.

Like ABA Model Rule 8.4(g), proposed Model Rule 8.4(h) raises numerous questions about whether various routine expressive activities could expose a lawyer to potential disciplinary action, including:

- Is a lawyer subject to discipline for her discussion of hypotheticals while presenting a CLE course sponsored by the D.C. Bar?[14]
- Is a lawyer subject to discipline when participating in a legal panel at a D.C. Bar event that touches on controversial political, religious, and social viewpoints? [15]

Rule 8.4(g), the authors note that "[t]he proposed comment of Version 3 expanded the ambit of 'conduct related to the practice of law' to include virtually anything a working lawyer might do.") The Halaby & Long article provides invaluable insights into the "legislative" history of ABA Model Rule 8.4(g), which explains the background for many of its constitutional flaws.

[14] *See, e.g.*, Kathryn Rubino, *Did D.C. Bar Course Tell Attorneys That It's Totally Cool to Discriminate If that's What the Client Wants?,* Above the Law (Dec. 12, 2018) (reporting on attendees' complaints regarding an instructor's discussion of a hypothetical about sex discrimination and the applicability of the ethical rules during the mandatory D.C. Bar Professional Ethics course for newly admitted D.C. attorneys), https://abovethelaw.com/2018/12/did-d-c-bar-course-tell-attorneys-its-totally-cool-to-discriminate-if-thats-what-the-client-wants/.

[15] *See, e.g., Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney's statutory or constitutional rights (RQ-0128-KP)*, Tex. Att'y Gen. Op. KP-0123 (Dec. 20, 2016) at 3, https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf. ("Given the broad nature of this rule, a court could apply it to an attorney's participation in a continuing legal

- Is a law professor or adjunct faculty member subject to discipline for a CLE panel, law review article, or class discussion that explores controversial topics or expresses unpopular viewpoints?
- Must lawyers abstain from writing blogposts or op-eds because they risk a bar complaint by an offended reader?
- Must lawyers forgo media interviews on topics about which they have some particularly insightful comments because anyone hearing the interview could file a complaint?[16]
- Can a lawyer lose his license to practice law for a tweet calling a female public official a derogatory term?[17]
- Is a lawyer subject to discipline for employment decisions made by religious or other charitable nonprofits if she sits on its board and ratifies its decisions or employment policies?[18]
- Is a lawyer subject to discipline for legislative testimony that she provides in favor of adding new protected classes to civil rights laws but only on the condition that religious exemptions (which some consider "a license to discriminate") are also added?[19]
- Is a lawyer subject to discipline for comment letters she writes expressing her personal views regarding proposed Title IX regulations, immigration issues, census questions, re-districting proposals, or capital gains tax proposals?
- Is a lawyer who is running for public office subject to discipline for socio-economic discrimination if she proposes that college loans be forgiven only for graduates earning below a certain income level?
- Is a lawyer subject to discipline for serving on the board of an organization, such as a social fraternity or sorority, that discriminates based on sex?
- Is a lawyer at risk for volunteer legal work on behalf of political candidates who express views that are considered bigoted by some?

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education panel discussion, authoring a law review article, or informal conversations at a bar association event."); *ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution*, 17 La. Att'y Gen. Op. 0114 (Sept. 8, 2017) at 4, https://lalegalethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384 , at 6 ("[A] lawyer who is asked his opinions, thoughts, or impressions on legal matters taking place in the news at a social function could also be found to be engaged in conduct related to the practice of law.").

[16] *See Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Comn'n. (May 15, 2018) (complaint filed with municipal human rights commission after lawyer representing client on a discrimination claim responded to media questions about the case).

[17] *See supra* note 2.

[18] *See* D.C. Bar Legal Ethics, Opinion 222 (1991) (punting the issue of whether a lawyer could be disciplined for arguably discriminatory employment decisions made by his church or a religious nonprofit while he was on its board), https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion222.cfm.

[19] The Montana Legislature passed a resolution expressing its concerns 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 before Legislative Committees." *See infra* notes 128, 139-140.

- Is a lawyer at risk for any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political positions?

Professor Eugene Volokh explored whether discipline under ABA Model Rule 8.4(g) could be triggered by conversation on a wide range of topics at a bar dinner, explaining:

> Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.
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> Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."[20]

Because lawyers frequently are the spokespersons and leaders in political, social, cultural, or ideological movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected because it constitutes a serious threat to a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights has been greatly diminished, lawyers can ill-afford to wager their licenses on a rule that may be utilized to target their speech. Our democracy depends on lawyers and their ability to speak freely.[21]

B. Proposed Rule 8.4(h)'s potential for chilling District of Columbia attorneys' speech is compounded by its use of a negligence standard rather than a knowledge requirement.

Proposed Rule 8.4(h) has a "fundamental defect" because it "wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech which is entirely unrelated to the practice of law. To the contrary, the First Amendment provides

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[20] Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities*, The Washington Post, Aug. 10, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

[21] "As a careful reading of th[e] text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 371 (1985) (Stevens, J., dissenting), *quoting* W. Shakespeare, King Henry VI, pt. II, Act IV, scene 2, line 72 ("The first thing we do is, let's kill all the lawyers.").

robust protection for attorney speech."[22] In *National Institute of Family and Life Advocates v. Becerra* (*"NIFLA"*), the Supreme Court was clear that government restrictions on professional speech, including lawyers' speech, generally are presumed to trigger strict scrutiny because they are content-based regulations.[23] "[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.'"[24]

Proposed Rule 8.4(h) creates doubt as to whether various speech is permissible and, therefore, will inevitably chill lawyers' public speech.[25] And, in all likelihood, it will chill speech representing minority viewpoints, rather than majoritarian viewpoints, regarding current political, social, cultural, or ideological issues.[26] Public discourse and civil society will suffer from the ideological straitjacket that proposed Rule 8.4(h) will impose on D.C. Bar members.

The lack of a knowledge requirement certainly compounds the problems with proposed Rule 8.4(h)'s constitutionality: "[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way."[27] Professor Dane Ciolino, an ethics law professor at Loyola University New Orleans College of Law, has explained:

> [ABA Model Rule 8.4(g)] subjects to discipline not only a lawyer who *knowingly* engages in harassment or discrimination, but also a lawyer who *negligently* utters a derogatory or demeaning comment. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the

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[22] Tenn. Att'y Gen. Letter, Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 7 (hereinafter "Tenn. Att'y Gen. Letter"), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf. The letter is incorporated into Tennessee Attorney General Opinion 18-11; however, for purposes of quoting the letter, citations are to the page numbers of the letter rather than the opinion. ("[T]he 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.") (Emphasis in original.).

[23] *National Institute for Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018).

[24] *Id*. at 766, *quoting Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

[25] Tenn. Att'y Gen. Letter, *supra* note 22, at 8 ("Even if the [Board of Professional Responsibility] may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place.").

[26] Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol'y 173, 217-249 (2019), (explaining the "justified distrust of speech restrictions" such as Model Rule 8.4(g), in light of its proponents' stated desire "for *a cultural shift* . . . to be captured in the rules of professional conduct") (emphasis added). https://law.und.edu/_files/docs/features/mcginnissexpressingconsciencewithcandor-harvardjlpp-2019.pdf.

[27] Tenn. Att'y Gen. Letter, *supra* note 22, at 5. *See also,* Halaby & Long, *supra* note 13, at 243-245.

> 'objectively reasonable lawyer' will be constructed for purposes of making this determination.[28]

This negligence standard makes it entirely foreseeable that proposed Rule 8.4(h) even could reach communication that demonstrates implicit bias, that is, conduct or speech which a lawyer is not consciously aware may be discriminatory. The Rules Review Committee Report states "that these influences may be unintentional does not change the fact that they are unfair. The negative effects of bias in the workplace, in the legal profession, or elsewhere, can be destructive."[29] As Professor McGinniss notes, "this relaxed mens rea standard" might even be used to "more explicitly draw lawyers' speech reflecting unconscious, or 'implicit,' bias within the reach of the rule."[30] Professor Irene Oritseweyinmi Joe argued that while ABA Model Rule 8.4(g) "addresses explicit attorney bias, . . . it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias."[31] Professor Joe explains that "the rule's use of 'knows or reasonably should know' arguably includes an understanding and reflection of unconscious bias and its effects."[32]

One can agree that implicit bias exists and still believe that bias "outside of human awareness" should not be grounds for a lawyer's loss of licensure or her suspension, censure, or admonition.[33] But nothing would seem to prevent a charge of discrimination based on "implicit bias" from being brought under proposed Rule 8.4(h) if someone believes a lawyer "reasonably should have known" that a communication manifested implicit bias. Such charges are foreseeable given that ABA Model Rule 8.4(g)'s "proponents repeatedly invoked that concept [of implicit bias] in arguing against any knowledge qualifier at all."[34]

Proponents of ABA Model Rule 8.4(g) have tried to reassure its critics that, in actuality, the rule will rarely be used and urge lawyers to trust that the disciplinary rule will be used judiciously. But of all persons, lawyers know that it is not enough for officials to promise to be

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[28] Prof. Dane S. Ciolino, *LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct*, Louisiana Legal Ethics (Aug. 6, 2017) (emphasis in original), https://lalegalethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/.

[29] Rules Review Committee Report at 7.

[30] McGinniss, *supra* note 26, at 205 & n.135.

[31] Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 Calif. L. Rev. 965, 975 (2020) (ABA Model Rule 8.4(g) "addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias.").

[32] *Id.* at 978 n.70.

[33] Halaby & Long, *supra* note 13, at 245 ("Even crediting the existence of implicit bias as well as corresponding concerns over its impact on the administration of justice, one recoils at the dystopian prospect of punishing a lawyer over unconscious behavior."). *See also,* McGinnis, *supra* note 26, at 204-205.

[34] Halaby & Long, *supra* note 13, at 244 ("When a new anti-bias rule proved unsaleable without a knowledge qualifier, one was added, but only with the alternative 'reasonably should know' qualifier alongside. That addition was not subjected to comment by the public or by the bar or the ABA's broader membership.") (footnote omitted).

careful in their enforcement of a rule, particularly one that has the acknowledged potential to be used to suppress speech.

The presumption is actually the opposite, as the Supreme Court has explained: "The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige.* We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[35] Instead, the Court has rejected "[t]he Government's assurance that it will apply [a statute] far more restrictively than its language provides" because such an assurance "is pertinent only as an *implicit acknowledgment of the potential constitutional problems* with a more natural reading."[36] Similarly, in his concurrence in *Matal v. Tam*, Justice Kennedy stressed that "[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."[37]

In the landmark case, *National Association for the Advancement of Colored People v. Button*,[38] which involved the NAACP's challenge to a Virginia statute regulating certain attorneys' conduct and speech used to "solicit[] legal business," the United States Supreme Court ruled that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," explaining:

> If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. *Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.*[39]

The proponents of rules derived from ABA Model Rule 8.4(g) mistakenly believe that government's benign intent ameliorates the unconstitutionality of a speech restriction. It does not. As the Supreme Court held in *Reed v. Gilbert*, "the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech" is subject to strict scrutiny if it is "content based on its face."[40]

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[35] *United States v. Stevens*, 559 U.S. 460, 480 (2010).

[36] *Id.* (emphasis added).

[37] *Matal v. Tam*, 582 U.S. 218, 253 (2017) (Kennedy, J., concurring).

[38] *NAACP v. Button,* 371 U.S. 415 (1963).

[39] *Id.* at 438-39 (emphasis added).

[40] *Reed v. Town of Gilbert*, 576 U.S. at 165.

Proposed Rule 8.4(h) fails to protect a lawyer from complaints being filed against her based on her speech. It fails to protect a lawyer from a disciplinary investigation into her speech and the expense of defending her law license, as well as the substantial emotional toll of responding to a complaint. Even if the investigation eventually concludes that her speech was protected by the First Amendment, the lawyer meanwhile must inform courts that a complaint has been brought and that she is under investigation, including whenever she applies for admission to another bar or seeks to appear *pro hac vice* in a case. In the meantime, her personal reputation may suffer damage through media reports.

As one federal judge has observed:

> Even if the disciplinary process does not end in some form of discipline, the threat of a disruptive, intrusive, and expensive investigation and investigatory hearing into the [lawyer's] words, speeches, notes, written materials, videos, mannerisms, and practice of law would cause . . . any attorney to be fearful of what he or she says and how he or she will say it in any forum, private or public, that directly or tangentially touches upon the practice of law, including at speaking engagements given during CLEs, bench-bar conferences, or indeed at any of the social gatherings forming around these activities.[41]

The process is the punishment. Rather than risk a prolonged investigation with an uncertain outcome, and then lengthy litigation, a rational, risk-adverse lawyer will self-censor. Because a lawyer's loss of her license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one's own speech than risk a grievance complaint under proposed Rule 8.4(h).

III. The Rules Review Committee Report and ABA Formal Opinion 493 Ignore Recent Supreme Court Decisions that Demonstrate the Likely Unconstitutionality of Both Proposed Rule 8.4(h) and ABA Model Rule 8.4(g).

A. For eight years, numerous legal ethics and constitutional law scholars have repeatedly explained the constitutional flaws of ABA Model Rule 8.4(g).

The late Professor Ronald Rotunda, a respected scholar in both constitutional law and legal ethics, was among the first to warn of the threat that ABA Model Rule 8.4(g) poses to lawyers' freedom of speech.[42] Writing in a op-ed entitled *The ABA Overrules the First Amendment*, Professor Rotunda explained:

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[41] *Greenberg v. Haggerty,* 491 F.Supp. 3d 12, 25 (E.D. Pa. 2020), *summary judgment granted plaintiff sub nom.*, *Greenberg v. Goodrich*, 593 F.Supp. 3d 174 (E.D. Pa. 2022), *rev'd for lack of standing sub nom., Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. 2023), *cert. denied*, 144 S. Ct. 1393 (2024).

[42] 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

> 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.[43]

Professor Eugene Volokh, a nationally recognized First Amendment expert, also early concluded that ABA Model Rule 8.4(g) is a speech code for lawyers.[44] Likewise, Professor Josh Blackman published seminal articles, cataloguing the constitutional concerns with ABA Model Rule 8.4(g). Professor Blackman highlighted its "unprecedented" nature "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."[45]

In an early, comprehensive examination of its legislative history, practitioners Andrew Halaby and Brianna Long concluded that ABA Model Rule 8.4(g) "cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected."[46] As a result of their study, they concluded that the model rule "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."[47]

In another early, influential article on the constitutional flaws of ABA Model Rule 8.4(g), Professor Michael S. McGinniss, professor of professional responsibility at the University of North Dakota School of Law, who previously served for twelve years in the Delaware Supreme Court's Office of Disciplinary Counsel, warned: A "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

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Rotunda also debated proponents of Rule 8.4(g). *See 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.

[43] 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.

[44] In a brief video, Professor Volokh explained ABA Model Rule 8.4(g)'s flaws. https://fedsoc.org/commentary/videos/a-nationwide-speech-code-for-lawyers. He also debated its proponents. *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), https://www.youtube.com/watch?v=b074xW5kvB8&t=50s.

[45] Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g),* 30 Geo. J. Legal Ethics 241, 243 (2017).

[46] Halaby & Long, *supra* note 13, at 204.

[47] *Id.* at 257.

deemed offensive, or is considered intrinsically 'harmful' or as reflecting adversely on the 'fitness' of the speaker."[48]

Likewise, Professor Margaret Tarkington, professor of professional responsibility at Indiana University Robert H. McKinney School of Law, raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. Professor Tarkington reminded the legal community 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."[49]

B. Both the Rules Review Committee Report and ABA Formal Opinion 493 neglect to mention highly relevant Supreme Court decisions that bear on the rules' constitutionality, including *Matal v. Tam*, 582 U.S. 218 (2017), *National Institute for Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018), and *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

Professor Bruce Green directs the Louis Stein Center for Law and Ethics at Fordham Law School, and Professor Rebecca Roiphe, Professor of Law at New York Law School, studies legal ethics and the history of the legal profession. Together they recently published an article examining ABA Model Rule 8.4(g) in which they explain that "[a] restriction on lawyers' speech in a given case would have to closely serve a compelling government interest."[50] As authority, they cite the Supreme Court's *NIFLA* decision, in which the Court held that a "restriction on professional speech [is] subject to strict scrutiny."[51] They conclude that "many realistic applications of [ABA Model] Rule 8.4(g) would fail" strict scrutiny.[52]

Professors Green and Roiphe urge "regardless of whether the rule targets a substantial amount of protected expression or a tolerable amount for constitutional purposes, state courts should not adopt it."[53] The professors are concerned that even if ABA Model Rule 8.4(g) and its progeny "target[] bad conduct that may and should be proscribed," such rules also "deliberately and unnecessarily target constitutionally protected speech, however objectionable."[54]

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[48] McGinniss, *supra* note 26, at 249.

[49] Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).

[50] Bruce A. Green and Rebecca Roiphe, *ABA Model Rule 8.4(g), Discriminatory Speech, and the First Amendment*, 50 Hofstra L. Rev. 543, 549 (2022) [hereinafter "Green and Roiphe"].

[51] *Id.* n.42.

[52] *Id.* at 549.

[53] *Id.*

[54] *Id.*

Nor can the addition of "directed at another person" save proposed Rule 8.4(h). The professors recommend against adopting a rule based on ABA Model Rule 8.4(g) even if Formal Opinion 493's[55] speculative assertion were correct, which it is not, "that the rule typically, though not invariably, applies when lawyers' remarks are directed at a particular person or persons."[56] As Professors Green and Roiphe note, Formal Opinion 493 "describes remarks that a hypothetical senior associate makes to newly hired associates denigrating Muslim lawyers and clients, including 'never trust a Muslim lawyer.'" "Without "specify[ing] who or what the remarks harm and how," Formal Opinion 493 nonetheless states that "'the fact that the comments may not have been directed at a specific individual would not insulate the lawyer from discipline.'"[57]

The professors further conclude that "[a] discriminatory or harassing speech at a firm event would be covered even if it were not directed at one or more individuals."[58] Quite simply, "[ABA Model] Rule 8.4(g) proscribes pure speech because it is not tied to conduct that might intrude on the rights of any particular listener" unlike "[f]ederal anti-harassment laws [that] require that the banned speech substantially interfere with the learning or work environment of particular persons."[59] Formal Opinion 493 claims that ABA Model Rule 8.4(g) "will typically apply to words directed at a specific person or persons."[60] But, as Professors Green and Roiphe note, "this language is not, however, binding. Nor is it dictated by the plain language of the rule and its comments. In addition, the use of the word 'typically' implies that a regulator would have the discretion to apply it in such circumstances."[61]

In a detailed discussion of the First Amendment standard to be applied, the professors conclude that ABA Model Rule 8.4(g) "is presumptively invalid and subject to this rigorous [strict scrutiny] standard both because . . . it constitutes impermissible viewpoint discrimination, and . . . it constitutes a content-based restriction."[62] As Professors Green and Roiphe elucidate, the Court's analysis in *Matal* shows that ABA Model Rule 8.4(g) creates impermissible viewpoint discrimination because "[g]iving offense is a viewpoint."[63] The federal trademark law at issue in *Matal* prohibited issuance of a mark that "disparage[d] persons who share a common race or ethnicity."[64] The Court rejected the claim that the restriction was constitutional because it protected

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[55] ABA Comm. on Ethics & Pro. Resp., Formal Op. 493 (2020).

[56] Green & Roiphe, at 549.

[57] *Id.* at 549 n.45, *citing* Formal Op. 493, *supra* n.55, at 12-13.

[58] *Id.* at 555.

[59] *Id.* at 555-56.

[60] *Id.* at n.107.

[61] *Id.*

[62] *Id.* at 550. *See generally*, Green and Roiphe, at 550-557 (applying Supreme Court precedent to show that ABA Model Rule 8.4(g) discriminates as to both the viewpoint and the content of lawyers' speech).

[63] *Id.* at 550, *quoting Matal*, 582 U.S. at 243.

[64] *Matal*, 582 U.S. at 233.

minority groups "from being 'bombarded with demeaning messages in commercial advertising.'"[65] The Court rejected that "idea" as "strik[ing] at the heart of the First Amendment."[66] Instead, "[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.'"[67] The Court reaffirmed its *Matal* analysis in *Iancu v. Brunetti.*[68]

Professors Green and Roiphe examine the various government interests put forth to justify the speech infringements that ABA Model Rule 8.4(g) creates and conclude that many applications of these rules would fail to satisfy strict scrutiny.[69] The interests examined and found lacking in many circumstances include: protecting the lawyer-client relationship; protecting the administration of justice; protecting the targets of demeaning, derogatory, and hurtful speech; promoting public confidence in the legal profession and the legal system; and identifying lawyers with bad character or bad views. Professors Green and Roiphe conclude:

> [P]urging the profession of biased, hateful speech is a noble cause. But like other such worthy causes, it should, as a general matter, be pursued by means other than banning speech. Rule 8.4(g) will chill valuable speech, and its broad language leaves a dangerous amount of discretion to regulators to pick and choose which violations to pursue.[70]

C. Recent federal appellate decisions call into question ABA Model Rule 8.4(g)'s constitutionality.

In *Greenberg v. Haggerty*, a member of the Pennsylvania bar brought a pre-enforcement action to enjoin Pennsylvania Rule of Professional Conduct 8.4(g) as a violation of his free speech rights because he regularly conducted CLEs in which he expressed his views on controversial legal and social issues. The district court enjoined enforcement of the rule because its application to plaintiff's speech would violate his free speech rights.[71] Although the chief disciplinary counsel initially filed an appeal, it was dismissed after the rule was revised to require that the attorney "knowingly" violate the rule and deleting "should reasonably know" language.

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[65] *Id*. at 245.

[66] *Id.*at 246.

[67] *Id.*

[68] 588 U.S. 388 (2019).

[69] *Id.* at 558-578.

[70] *Id.* at 571.

[71] *Greenberg v. Haggerty,* 491 F.Supp. 3d 12, 25 (E.D. Pa. 2020).

The district court ruled that the revised rule also violated plaintiff's free speech rights and granted his summary judgment motion.[72]

On appeal, the Third Circuit reversed for lack of standing based on particular factual developments during litigation.[73] First, the court relied heavily on the fact that the revised Pennsylvania Rule 8.4(g) required that a lawyer "*knowingly* . . . engage in harassment or discrimination, as those terms are defined in applicable federal, state or local statutes or ordinances."[74] Second, Pennsylvania's Chief Disciplinary Counsel submitted a declaration stating that plaintiff's presentations "do not violate Rule 8.4(g) and that the Office of Disciplinary Counsel would not pursue discipline because of them."[75]

Judge Ambro's concurrence implicitly but strongly suggested that the Office of Disciplinary Counsel consider revising its Rule 8.4(g) yet again, because "someday an attorney with standing will challenge Pennsylvania Rule of Professional Responsibility 8.4(g). When that day comes, the existing Rule and its commentary may be marching uphill needlessly."[76]

In *Cerame v. Slack*, the Second Circuit held that two lawyers had standing to challenge Connecticut's iteration of ABA Model Rule 8.4(g).[77] The court held that the lawyers "have alleged facts plausibly suggesting that a credible threat of initiation of disciplinary proceedings pursuant to [Connecticut] Rule 8.4(7) chills their speech" and so "have articulated an injury in fact that is sufficiently concrete and imminent to confer Article III standing at the motion to dismiss stage."[78] Specifically, "the chilling of protected speech caused by the potential for disciplinary proceedings for violating Rule 8.4(7)" was an injury sufficient to confer standing.[79] While the lawyers disavowed any intent to harass or discriminate against any members of the groups protected by Rule 8.4(7), they believed their disavowal "'provides no protection for their speech,' and they 'feel forced to speak less openly' on topics similar to those about which they are already outspoken 'to reduce the likelihood that [a misconduct complaint] will be filed.'" The court found this "more than enough" for standing.[80]

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[72] *Greenberg v. Goodrich*, 593 F.Supp. 3d 174 (E.D. Pa. 2022) (granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment).

[73] *Greenberg v. Lehocky*, 81 F.4th 376 (3d Cir. 2023), *cert. denied*, 144 S. Ct. 1393 (2024).

[74] 81 F.4th at 383.

[75] *Id.*

[76] Id. at 390 (Ambro, J., concurring).

[77] 123 F.4th 72 (2d Cir. 2024).

[78] *Id.* at 75-76.

[79] *Id.* at 80 & n.11.

[80] *Id.*

The Second Circuit distinguished the facts before it from those before the Third Circuit in *Greenberg*. For example, "sanctions are not limited to those attorneys who 'knowingly' engage in the prohibited verbal or physical conduct but extend to those attorneys who 'reasonably should know' that their conduct is prohibited."[81] Instead, Connecticut Rule 8.4(7) "has potential application to attorneys who may inadvertently offend their audience."[82]

The Second Circuit also distinguished *Greenberg* because the Pennsylvania Chief Disciplinary Counsel had provided a declaration that plaintiff's speech did not violate Pennsylvania's rule. By contrast, at oral argument, Connecticut's counsel "was unable to give a considered opinion as to the new Rule's application" to certain speech, including whether it would violate Rule 8.4(7) for an attorney to "refer[] to transgender individuals by pronouns other than those with which they wish to be addressed."[83]

Nor was Connecticut Rule 8.4(7) saved by its accompanying comment that provided that "[a] lawyer's conduct does not violate paragraph (7) when the conduct in question is protected under the first amendment to the United States Constitution or article first, § 4 of the Connecticut constitution."[84] The Second Circuit correctly identified the constitutional weaknesses of rules derived from ABA Model Rule 8.4(g).

IV. Conclusion

Proposed Rule 8.4(h) and its proposed comments should not be adopted, and current Comment 3 should be retained. For eight years, expert scholars who specialize in legal ethics, as well as First Amendment scholars, have correctly criticized ABA Model Rule 8.4(g) and its progeny as a substantial threat to the legal profession. Formal Opinion 493 and the Rules Review Committee Report both fail to take seriously these longstanding critiques of the rules' constitutional flaws.

District of Columbia Bar members deserve better than proposed Rule 8.4(h). They can ill afford the chilling effect that proposed Rule 8.4(h) will have on their speech addressing the critical political, social, cultural, and ideological issues that face our Nation.

Our democracy depends on lawyers and their ability to speak freely. Nowhere is that more true than for lawyers admitted to the Bar of our Nation's capital.

Respectfully submitted,

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[81] *Id.* at 78.

[82] *Id.* at 84.

[83] *Id.* at 83-84 & n.13.

[84] *Id.* at 78, 87 & n.15.