

**To:** Del Ciampo, Joseph  
**Subject:** RE: Comment Letter Opposing Propose Rule of Professional Conduct 8.4(7)

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**From:** John Berman <[JBerman@westhartfordlaw.com](mailto:JBerman@westhartfordlaw.com)>  
**Sent:** Tuesday, November 3, 2020 2:43 PM  
**To:** Del Ciampo, Joseph <[Joseph.DelCiampo@jud.ct.gov](mailto:Joseph.DelCiampo@jud.ct.gov)>  
**Subject:** Comment Letter Opposing Propose Rule of Professional Conduct 8.4(7)

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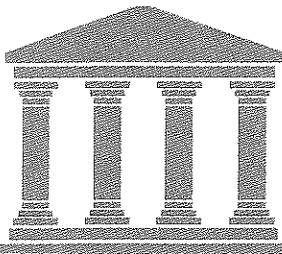
Thank you.  
John

John A. Berman

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November 3, 2020

ATTN: Joseph DelCiampo, Esq.

VIA E-MAIL: [joseph.delciampo@jud.ct.gov](mailto:joseph.delciampo@jud.ct.gov)

RE: Comment Letter Opposing Proposed Rule of Professional Conduct 8.4(7)  
Dear Justice McDonald, Judge Abery-Wetstone, Judge Bellis, Judge Cobb, Judge Farley, Judge Hernandez, Judge Nguyen-O'Dowd, Judge Prats and Judge Truglia:

Proposed Rule 8.4(7) is modeled on the widely criticized ABA Model Rule 8.4(g), proposed by the ABA in 2016. After four years of deliberations in many states across the country, only two states, Vermont and New Mexico, have fully adopted this flawed rule. In contrast, over a dozen states have concluded that ABA Model Rule 8.4(g) is both unconstitutional and unworkable. I respectfully request that the Court reject Proposed Rule 8.4(7). One prudent course is to wait and see whether other states choose to experiment with ABA Model Rule 8.4(g) and the practical effect of that experiment on the lawyers in those states.

A number of scholars have characterized ABA Model Rule 8.4(g) as a speech code for lawyers.<sup>1</sup> 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.<sup>2</sup> 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

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

<sup>2</sup> Ronald D. Rotunda, The ABA Decision 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>.

protected speech under the First Amendment.”<sup>3</sup> Professor Michael McGinniss, Dean of the University of North Dakota School of Law, raised similar concerns in a recent article.<sup>4</sup>

Two Arizona practitioners thoroughly examined ABA Model Rule 8.4(g) and concluded that it “is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression of infirmities.”<sup>5</sup> 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.” And 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.”<sup>6</sup>

Since the ABA adopted Model Rule 8.4(g) in August 2016, the United States Supreme Court has issued two important free speech decisions that demonstrate its unconstitutionality. First, under the Court’s analysis in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), ABA Model Rule 8.4(g) is an unconstitutional content-based restriction on lawyers’ speech. In *Becerra*, the Supreme Court held that state restrictions on “professional speech” are presumptively unconstitutional and subject to strict scrutiny. Second, under the Court’s analysis in *Matal v. Tam*, 137 S. Ct. 1744 (2017), ABA Model Rule 8.4(g) is an unconstitutional viewpoint-based restriction on lawyers’ speech that cannot survive strict scrutiny.

**The proposed rule is broad in scope and would regulate nearly everything a lawyer says or does, including:**

- Speaking in public events, presenting CLE courses, or participating in panel discussions on controversial legal issues;
- Writing law review articles, blogposts, tweets, and op-eds;
- Giving media interviews;
- Teaching law school classes as faculty, adjunct faculty member, or guest lecturer;
- Belonging to organizations with belief-based membership or leadership requirements;
- Performing work for political or social action organizations, political parties, or campaigns;
- Lobbying or testifying before legislative committees;
- Providing pro bono work for religious congregations, colleges, or schools or sitting on their boards; and
- Sitting on boards of single sex organizations.

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

<sup>4</sup> Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol’y 173, 173 (2019).

<sup>5</sup> Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201., 257 (2017).

<sup>6</sup> *Id.* At 204.

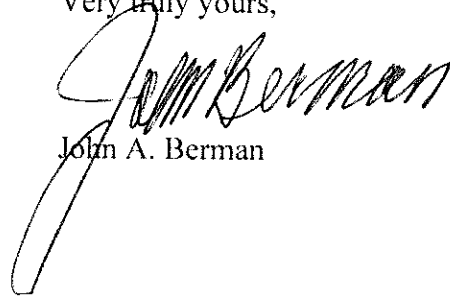
Connecticut attorneys should not be subject to a rule of questionable constitutionality and one that has not been adequately tested in other states. I respectfully request that the Court reject Proposed rule 8.4(7).

The foregoing is not my personal work, but somewhat follows a model provided to me.

I do not consider myself a “conservative,” but firmly believe in free speech including that which is “incorrect.”

I have had considerable experience as a legislator, private attorney and probate judge with attempts to curtail or manage attorneys’ speech and I do not believe Proposed Rule 8.4(7) is needed. The cons far outweigh the pros, even in these speech fraught times in my view.

Very truly yours,

A handwritten signature in black ink that reads "John A. Berman". The signature is written in a cursive style with a large, sweeping initial "J".

John A. Berman

JAB:lab