

September 19, 2016

The Honorable Ken Paxton
Attorney General of Texas
Opinions Committee
P.O. Box 12548
Austin, TX 78711-2548

Re: Request for an Attorney General's opinion concerning whether adoption of the American Bar Association's (ABA) new Model Ethics Rule 8.4(g) for attorneys, would constitute a violation of an individual attorney's rights under any applicable statute or constitutional provision?

Dear General Paxton:

Please accept this letter as a request for an Attorney General's opinion pursuant to Government Code, Section 402.042(b)(7), concerning the constitutionality of the adoption of the American Bar Association's Model Rule 8.4(g)[1] by the State Bar of Texas.

The ABA has adopted a new amendment to their Model Ethics of Professional Conduct Rule 8.4(g) (model rule). Rule 8.4(g) deems it 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 ... sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law." [2] The amendment could open doors to punish lawyers who express views contrary to the ABA with regard to religion, sexual orientation, and gender identity "both in professional service to clients and in the lawyer's business and personal affairs." [3]

Since, the ABA is a private organization, Model Rule 8.4(g) does not create any enforceable law. However, many states look to the ABA model rules in their creation of ethical requirements, thus creating risk of a dangerous precedent in Texas.

Discriminatory behavior by a lawyer is already prohibited in Texas. Texas Rule of Disciplinary Procedure Rule 5.08 already provides robust protections against a host of misconduct by lawyers. [4] Rule 5.08 states, "A lawyer shall not willfully, in connection with an adjudicatory proceeding ... manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation, towards any person..." [5] ABA Rule 8.4(g) seems to go much further than the current rule in Texas—going so far as to suppress a person's right to free speech and freedom to express his or her religious belief—in an unacceptably troubling way.

If the State Bar of Texas were to adopt such a rule, my concern is that lawyers who practice a religion may be reluctant to express those beliefs and values, hindered from associating with religious organizations, and targeted for elimination from the legal profession.

From a constitutional perspective, there are a host of other troubling complications such a rule could cause. This model rule has raised questions for me, such as:

Could a lawyer be subject to discipline or disbarment for challenging the merits of same-sex marriage or the federal government's guidance on transgender bathrooms during a legal education class?

Could a lawyer be subject to discipline or disbarment for being part of a legal association that holds religious beliefs that marriage is between one man and one woman and that a person's gender is fixed at birth?

Could a lawyer who is an atheist and criticizes religion in a legal education class be subject to discipline or disbarment?

Could an elected official, who is also an attorney, be subject to discipline or disbarment for debating proposed laws regarding sexual orientation, gender identity, marital status, or socioeconomic status?

These examples illustrate the tension between the model rule and the right to free speech and freedom of association, guaranteed under the Texas Constitution[6] and the First Amendment of the United States Constitution.

The First Amendment [7] provides that no government shall make any law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech ... or of the people peaceably to assemble, and to petition the Government for a redress of grievances." [8] A person's decision to join or pursue a profession should not jeopardize their rights guaranteed under the constitution, nor should faith create the risk of losing one's career. Many have fought to protect our freedoms so that any person may worship, or refrain from worship, without intimidation or fear of retribution from our government. We must have laws in place to ensure basic religious freedoms are protected and that every person has the unfettered right to express viewpoints of the faith to which they belong. I believe this level of contempt for our constitution is unprecedented. It is shameful that a person could be shut out of a profession because of what they express to believe.

As recently as 2015, the United States Supreme Court recognized certain religious organizations hold as a tenant of faith that marriage, "is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world." [9]

Should the State Bar of Texas adopt the rule, I fear lawyers could be disciplined or disbarred for associating with a group that espouses a faith-based belief or participates in a discussion about controversial social issues. I also fear that similar rules could be duplicated for other professions. Such rules could curtail religious freedoms in these professions as well.

Question Presented: If Texas were to adopt the American Bar Association's (ABA) new Model Ethics Rule 8.4(g), could that adoption constitute a violation of an individual attorney's rights under any applicable statute or constitutional provision?

Thank you for your time and attention to this request. Please feel free to contact me or my staff if you have any questions or need any further information.

Sincerely,

Charles Perry
Texas State Senator
Senate District 28

[1] Misconduct, Mod. Rules Prof. Cond. § 8.4.

[2] Id.

[3] Preamble: A Lawyer's Responsibilities, Mod. Rules Prof. Cond. Preamble §[5].

[4] See Tex.R. Disciplinary P. 5.08, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A-1 (West Supp.2016).

[5] Id.

[6] Tex. Const. art. I, § 4; Tex. Const. art. I, § 6; Tex. Const. art. I, § 8.

[7] In combination with the Fourteenth Amendment, as incorporated by case law. See *Fiske v. Kansas*, 274 U.S. 380 (1927) (incorporating the First Amendment right to freedom of speech into the fourteenth amendment); see also *DeJonge v. Oregon*, 299 U.S. 353 (1937) (incorporating the First Amendment freedom of assembly into the fourteenth amendment); see also *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the First Amendment free exercise of religion into the fourteenth amendment); see also *Everson v. Bd. of Education*, 330 U.S. 1 (1947) (incorporating the First Amendment freedom from state establishment of religion into the fourteenth amendment).

[8] U.S. Const. amend. I.

[9] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).