

Reply: A Pause for State Courts Considering Model Rule 8.4(g)

The First Amendment and “Conduct Related to the Practice of Law”

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ABSTRACT

In August 2016, the American Bar Association approved Model Rule of Professional Conduct 8.4(g). Under the amendment, it is misconduct for an attorney 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.” Comment [4] explains that “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.” The Model Rule is just that—a model, which does not apply in any jurisdiction. Now the project goes to the states, as state courts consider whether to adopt Rule 8.4(g).

Professor Stephen Gillers analyzes the new provision in this Issue with A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g). This reply urges state courts to pause before adopting Rule 8.4(g) in light of its First Amendment implications.

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INTRODUCTION

In August 2016, the American Bar Association (ABA) approved Model Rule of Professional Conduct 8.4(g). Under the amendment, it is misconduct for an attorney 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.”¹ Comment [4] explains that:

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.²

The model rule is just that—a model that does not apply in any jurisdiction. Now the project goes to the states, as state courts consider whether to adopt Rule 8.4(g).

Professor Stephen Gillers analyzes the new provision in this Issue with *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts*

1. STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY ET AL., REPORT TO THE HOUSE OF DELEGATES 1 (Aug. 8, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [<https://perma.cc/K2XB-T76E>] [hereinafter 2016 ABA REPORT].

2. *Id.* at 2.

*Considering Model Rule 8.4(g).*³ This reply urges state courts to pause before adopting Rule 8.4(g) in light of its First Amendment implications. (Professor Gillers was given an opportunity to reply to my Article, but declined to do so.)⁴

Part I focuses on how Rule 8.4(g) extends a disciplinary committee's jurisdiction to "conduct related to the practice of law" for speech that can be deemed "harassment." Lectures given at CLE events, or dinner-time conversation at a bar association function, would now be subject to discipline if the speaker reasonably should know someone would find it "derogatory." The threat of sanction will inevitably chill speech on matters of public concern. Neither the rule nor its comments express any awareness of this novel intrusion into the private spheres of an attorney's professional life.

Part II compares the operation of Rule 8.4(g) with previous ABA model rules, as well as state-adopted anti-bias regimes. 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.

Part III discusses Rule 8.4(g)'s chilling effects. Though courts have generally upheld the regulation of attorney speech in the context of the practice of law, as the expression becomes more attenuated from the bar association's traditional purposes, the state interest becomes far less compelling. In this sense, past precedents upholding disciplinary actions for attorney speech are largely unhelpful. Rule 8.4(g) sweeps in a vast amount of speech on matters of public concern, and imposes an unlawful form of viewpoint discrimination. At bottom, the defenders of the model rule can only urge us to trust the disciplinary committees. The First Amendment demands more. This Article concludes by offering three simple tweaks to the comments accompanying Rule 8.4(g) that would still serve the drafters' purposes, but provide stronger protection for free speech.

I. MODEL RULE 8.4(G)

Rule 8.4(g)'s overarching purpose was to eliminate discrimination and harassment in "conduct related to the practice of law." Part I analyzes how the rule's design to eradicate "verbal" harassment sweeps in vast amounts of speech protected by the First Amendment.

3. Professor Gillers notes his personal connection with the promulgation of the rule. Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 197 n.2 (2017) ("My wife, Barbara S. Gillers, was a member of the Standing Committee on Ethics and Professional Responsibility, the sponsor of the amendment. I say this in the spirit of full disclosure.")

4. See *id.* at 195 n.*.

A. “CONDUCT RELATED TO THE PRACTICE OF LAW”

Rule 8.4(g)’s drafters were well intentioned. During a two-hour hearing held in February 2016, several witnesses expressed their concerns about sexual harassment that occurs during the practice of law, and in particular at after-hours social functions.⁵ Attorney Wendi Lazar of New York, for example, acknowledged that “no one wants to engage in the . . . private aspects of a lawyer[’s],” life, but stressed that she was “concerned that so much sexual harassment and bullying against women actually takes place on the way home from an event or in a limo traveling on the way back from a long day of litigation.”⁶ Ms. Lazar explained “that to say that these events are *social events* as opposed to professional events is” not accurate, as a more narrow definition would allow misconduct to go unpunished.⁷

Laurel Bellows, a past president of the ABA, offered anecdotes of sexual harassment occurring at a “Christmas party,” or when a male partner asks a female associate to “dinner after the deposition is over,” followed by a “social invitation” to “come to my room.”⁸ Ms. Bellows asked, rhetorically, “[i]s that in relation to the practice of law?” She suggested that the rule should govern conduct that is more than “simply related to the *technical* practice of law.” The ABA’s report, justifying the final version of Rule 8.4(g), cited the “substantial anecdotal information” provided to the Standing Committee of “sexual harassment” at “activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law.”⁹ Read against this history, Rule 8.4(g) and comment [4] were crafted to allow disciplinary boards to punish lawyers who engage in sexual harassment at social activities that are not strictly connected with the attorney-client relationship or the operation of a law practice.

B. “HARASSMENT”

Rule 8.4(g) and comment [4], however, accomplish far, far more than punishing sexual harassment.¹⁰ As a threshold matter, the rule does not proscribe only sexual harassment, but it also extends to the far broader category of

5. See ABA House of Delegates, Tr. of Proceedings, Feb. 7, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.pdf [<https://perma.cc/WNZ3-BA4Y>] [hereinafter 2016 ABA HOD Proceedings].

6. *Id.* at 39.

7. *Id.* at 42.

8. *Id.* at 62.

9. 2016 ABA REPORT, *supra* note 1, at 11.

10. Joseph J. Martins, a law professor at Liberty University, submitted a comment addressing the likely unintended consequences of this rule. “The overbreadth and vagueness of the draft language imperils First Amendment liberties and the right to practice law itself. I cannot imagine this was the intent of the Committee, but the language of the proposed amendments leads me to this conclusion nonetheless.” Joseph J. Martins, *Re: Proposed ABA Model Rule of Professional Conduct 8.4(g) and Comment [3]* (Mar. 11, 2016), <http://www>

“harassment,” which comment [3] defines to include “derogatory or demeaning verbal . . . conduct.” Black’s Law Dictionary defines “demeaning” as “[e]xhibiting less respect for a person or a group of people than they deserve, or causing them to feel embarrassed, ashamed, or scorned.”¹¹ “Derogatory,” not included in Black’s, is defined by the Oxford Living Dictionary as “[s]howing a critical or disrespectful attitude.”¹² Random House defines “derogatory” as “tending to lessen the merit or reputation of a person or thing; disparaging; depreciatory.”¹³ In the abstract, speech that satisfies *any* of these definitions is entirely protected by the First Amendment, and does not fall into any of the special exceptions to free speech, such as “fighting words” or “incitement.”¹⁴ As then-Judge Alito observed, there is no “categorical harassment exception” to the First Amendment.¹⁵

The courts have generally permitted the imposition of damages for verbal—that is, non-physical—sexual harassment in the employment context so long as the speech was so “severe or pervasive” that it created an “offensive work environment.”¹⁶ While comment [3] to Model Rule 8.4(g) explains that the “substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g),”¹⁷ it does not impose a requirement of severity or pervasiveness. A single “harassing” comment could result in

americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/martins_3_11_16.authcheckdam.pdf [<https://perma.cc/SW9N-YPLW>].

11. *Demeaning*, BLACK’S LAW DICTIONARY (10th ed. 2014).

12. *Derogatory*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/derogatory> [<https://perma.cc/U28W-PXB8>] (last visited Apr. 20, 2017).

13. *Derogatory*, RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 1998).

14. *See* *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 791 (2011) (“These limited areas—such as obscenity, incitement, and fighting words—represent ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.’”) (citations omitted).

15. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001). It is worth noting that there is much uncertainty in the law concerning how the First Amendment limits hostile environment law; these laws may not be constitutional in the first instance. *See* *DeAngelis v. El Paso Mun. Police Officers Ass’n*, 51 F.3d 591, 596–97 (5th Cir. 1995) (“Where pure expression is involved, Title VII steers into the territory of the First Amendment Whether such applications of Title VII are necessarily unconstitutional has not yet been fully explored. The Supreme Court’s offhand pronouncements are unilluminating.”) (citations omitted). For purposes of this analysis of Rule 8.4(g), I will assume such a regime that polices verbal harassment, as distinguished from sexual harassment or discrimination, is constitutional. If it is not, then no tweaks will save the model rule from facial invalidation.

16. *See, e.g.,* *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998) (“[I]n order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. We directed courts to determine whether an environment is sufficiently hostile or abusive by ‘looking at all the circumstances,’ including the ‘frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.’ Most recently, we explained that Title VII does not prohibit ‘genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.’ A recurring point in these opinions is that ‘simple teasing,’ offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”) (citations omitted).

17. 2016 ABA REPORT, *supra* note 1, at 2.

discipline. Further, the rule expressly extends beyond the work environment. Rule 8.4(g) and comment [4] provide a near-infinite number of fora where speech can be give rise to discipline.

Lectures and debates hosted by bar associations that offer Continuing Legal Education (CLE) credits are necessarily held “in connection with the practice of law.” Lawyers are required to attend such classes to maintain their law licenses. It is not difficult to imagine how certain topics could reasonably be found by attendees to be “derogatory or demeaning” on the basis of one of the eleven protected classes in Rule 8.4(g). Consider several examples:

- *Race*—A speaker discusses “mismatch theory,” and contends that race-based affirmative action should be banned because it hurts minority students by placing them in education settings where they have a lower chance of success.
- *Gender*—A speaker argues that women should not be eligible for combat duty in the military, and should continue to be excluded from the selective service requirements.
- *Religion*—A speaker states that the owners of a for-profit corporation who request a religious exemption from the contraceptive mandate are bigoted and misogynistic.
- *National Origin*—A speaker contends that the plenary power doctrine permits the government to exclude aliens from certain countries that are deemed dangerous.
- *Ethnicity*—A speaker states that *Korematsu v. United States* was correctly decided, and that during times of war, the President should be able to exclude individuals based on their ethnicity.
- *Disability*—A speaker explains that people with mental handicaps should be eligible for the death penalty.
- *Age*—A speaker argues that minors convicted of murder can constitutionally be sentenced to life without parole.
- *Sexual Orientation*—A speaker contends that *Obergefell v. Hodges* was incorrectly decided, and that the Fourteenth Amendment does not prohibit classifications on the basis of sexual orientation.
- *Gender Identity*—A speaker states that Title IX cannot be read to prohibit discrimination on the basis of gender identity, and that students should be assigned to bathrooms based on their biological sex.
- *Marital Status*—A speaker remarks over dinner that unmarried attorneys are better candidates for law firms because they will be able to dedicate more time to the practice.
- *Socioeconomic Status*—A speaker posits that low-income individuals who receive public assistance should be subject to mandatory drug testing.

For each topic—chosen for its deliberate provocativeness—a speaker “reasonably should know” that someone at the event could find the remarks disparaging

towards one of the eleven protected groups. A person whose marriage was legalized by *Obergefell*, or who gained access to a bathroom of choice under an interpretation of Title IX, or who immigrated from a country subject to an immigration ban, or who was admitted to college under an affirmative action plan, could plausibly feel demeaned by such arguments. Lest you think these charges are implausible, consider the tempestuous reaction to Justice Scalia's discussion of mismatch theory during oral arguments in *Fisher v. University of Texas at Austin*.¹⁸ CLE lectures on any of these eleven topics would each be entirely protected by the First Amendment, yet could still give rise to liability under Rule 8.4(g). These eleven examples should reveal another fairly obvious result: speech on the right side of the political spectrum would disproportionately give rise to liability.¹⁹ We will return to this unconstitutional form of viewpoint discrimination in Part III.

Further, comment [4] provides an even greater number of fora that could be deemed "connected to the practice of law." For example, dinners hosted by bar associations or similar legal groups, such as the Federalist Society or the NAACP, are "social activities" with a connection to the practice of law. If any of these eleven topics were discussed at the dinner table of such events, an attendee who felt demeaned could file a bar complaint.²⁰

Additionally, teaching a law school class could be deemed "conduct related to the practice of law," as in virtually all states, attending an accredited law school is a prerequisite to becoming an attorney. The report accompanying the final

18. See, e.g., Stephen Dinan, *Scalia Accused of Embracing 'Racist' Ideas for Suggesting 'Lesser' Schools for Blacks*, WASH. TIMES (Dec. 10, 2015), <http://www.washingtontimes.com/news/2015/dec/10/antonin-scalia-accused-of-embracing-racist-ideas-f/> [<https://perma.cc/V6CX-DWHY>]; Lauren French, *Pelosi: Scalia Should Recuse Himself from Discrimination Cases*, POLITICO (Dec. 11, 2015, 12:56 PM), <http://www.politico.com/story/2015/12/nancy-pelosi-antonin-scalia-216680> [<https://perma.cc/BCL5-VGWY>]; Joe Patrice, *Scientists Agree: Justice Scalia Is a Racist Idiot*, ABOVE THE LAW (Dec. 14, 2015, 9:58 AM), <http://abovethelaw.com/2015/12/scientists-agree-justice-scalia-is-a-racist-idiot/> [<https://perma.cc/9GA8-2NGT>]; David Savage, *Justice Scalia Under Fire for Race Comments During Affirmative Action Argument*, L.A. TIMES (Dec. 10, 2015, 2:40 PM), <http://www.latimes.com/nation/la-na-scalia-race-20151210-story.html> [<https://perma.cc/U3T2-CBAE>]; Debra Cassens Weiss, *Was Scalia's Comment Racist?*, A.B.A. J. (Dec. 10, 2015, 7:32 AM), http://www.abajournal.com/news/article/was_scalias_comment_racist_some_contend_blacks_may_do_better_at_slower_trac/ [<https://perma.cc/G7DH-U5H3>].

19. See Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' Including in Law-Related Social Activities*, WASH. 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> [<https://perma.cc/HEJ7-CLBH>] ("And, of course, the speech restrictions are overtly viewpoint-based: If you express pro-equality viewpoints, you're fine; if you express the contrary viewpoints, you're risking disciplinary action.").

20. See *id.* ("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.").

resolution also discusses how “lawyers engage in mentoring.”²¹ In many cases, teaching embraces forms of “mentoring” that are connected to bar exam preparation. Admittedly, this reading of the rule is somewhat tenuous. However, speaking from personal experience, students in my classes from various walks of life have found offensive lectures on a host of these topics.²² The prospect of a bar complaint, where the Associate Dean’s response does not provide enough solace, could be appealing to aggrieved students. The important question is not whether a student’s reaction is “reasonable,” but whether a professor should “reasonably” know a student will be triggered by disrespectful speech.

The rule could even apply to an attorney speaking at career day at his child’s Catholic school about the role of faith in the practice of law.²³ Whether or not such complaints lead to any disciplinary action, the threat of liability would chill speech during a CLE debate, over dinner, and in the classroom.

C. “PROTECTED BY THE FIRST AMENDMENT”

The most striking aspect of the adoption of Model Rule 8.4(g) is how little awareness the ABA expressed about the boundless scope of prohibited speech.²⁴ Neither the rule nor the comments even reference the First Amendment. Charitably, such concerns simply may not have been on the drafters’ minds, as they focused primarily on “substantial anecdotal information” provided to the Standing Committee about sexual harassment at after-hours events. Addressing such misconduct, which would also violate well-established employment law, was their primary target. But there is reason to suspect that there was a deliberate effort to include otherwise-protected speech as well.

An earlier draft of comment [3] from December 2015 stressed that the rule “does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment.”²⁵ The accompanying report “ma[d]e clear that a lawyer does retain a ‘private sphere’ where personal opinion, freedom of association, religious expression, and political speech is protected by the First

21. 2016 ABA REPORT, *supra* note 1, at 10.

22. Josh Blackman, *My (Rejected) Proposal for the AALS President’s Program on Diversity*, JOSH BLACKMAN’S BLOG (Nov. 15, 2016), <http://joshblackman.com/blog/2016/11/15/my-rejected-proposal-for-the-aals-presidents-program-on-diversity-the-effect-of-model-rule-of-professional-conduct-8-4g-and-law-school-pedagogy-and-academic-freedom/> [<https://perma.cc/ZSL3-8TQ3>].

23. Lindsey Keiser, Note, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers’ First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629, 637–38 (2015).

24. Gillers devotes two sentences, all descriptive, to the scope of the new 8.4(g). Gillers, *supra* note 3, at 219 (“Not only would this language apply to client matters that are not before a tribunal, such as negotiation or counseling, it would also apply to a lawyer’s words or conduct toward others in his or her law office and at professional meetings or on bar committees. It would cover a lawyer who made unwelcome sexual overtures to a subordinate lawyer or a legal assistant.”).

25. STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY, AM. BAR ASS’N, NOTICE OF PUBLIC HEARING 14 (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.pdf [<https://perma.cc/US3Z-F9BJ>].

Amendment and not subject to the Rule.”²⁶ The Standing Committee stressed that this provision “is a useful clarification,” and “would appropriately address” some of the “possible First Amendment challenges” that may arise when “state court[s] adopted similar black letter provisions.”²⁷ I wholeheartedly endorsed this analysis as I read through the rule’s record chronologically.

Several comments that were supportive of Model Rule 8.4(g) praised the inclusion of this First Amendment proviso, as it assuaged concerns about possible constitutional infirmities. Myles Lynk, a member of the Standing Committee on Ethics and Professional Responsibility, endorsed comment [3]’s explicit reference to the First Amendment as “a useful clarification” that “avoid[s] other possible ambiguities.”²⁸ The ABA’s Standing Committee on Professional Discipline worried that even with this provision, the language was “overbroad,” and questioned whether it “would withstand constitutional scrutiny” as it may “result in infringement upon lawyers’ exercise of their First Amendment rights.”²⁹ Other groups that opposed Rule 8.4(g), such as the Christian Legal Society, took little solace in this proviso, but appreciated its inclusion.

During the February 2016 hearing, however, Laurel Bellows, a past president of the ABA, took the opposite position. Including that provision, Bellows contended, would make it unduly difficult to mete out punishment because it “take[s] away” from the purpose of the rule.³⁰ She explained, “We know that the constitution governs,” and the New York rule³¹ “does not have any exception for conduct that might be protected by the First Amendment.”³² As a result, Bellows urged the Standing Committee to excise that provision.

Her argument is something of a non sequitur. New York Rule of Professional Conduct 8.4(g) applies only to the “practice of law,” not “conduct related to the practice of law,” and is limited to “discrimination,” and not the more nebulous speech acts embraced by “harassment.”³³ Attorneys, when engaged in the

26. *Id.* at 5.

27. *Id.*

28. STANDING COMM. ON SEXUAL ORIENTATION & GENDER IDENTITY, AM. BAR ASS’N, PROPOSED AMENDMENT TO ABA MODEL RULE OF PROFESSIONAL CONDUCT 8.4, app. c (Feb. 7, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/sogi_comments_2_7_16.authcheckdam.pdf [<https://perma.cc/Z76E-TNRC>].

29. Letter from Arnold R. Rosenfeld, Chair, Am. Bar Ass’n Standing Comm. on Prof’l Discipline, to Myles V. Lynk, Chair, Am. Bar Ass’n Standing Comm. on Ethics & Prof’l Responsibility, at 4 (Oct. 8, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MRPC%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf [<https://perma.cc/4UW4-RKB2>].

30. See 2016 ABA HOD Proceedings, *supra* note 5, at 63.

31. N.Y. RULES OF PROF’L CONDUCT R. 8.4(g) (2017) (“A lawyer or law firm shall not . . . unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status or sexual orientation.”).

32. 2016 ABA HOD Proceedings, *supra* note 5, at 63–64.

33. *Id.* at 39–40.

“practice of law,” admittedly have severely constrained First Amendment rights. Ultimately, Bellows’ position prevailed, and the proviso was *removed* in the second draft. Neither the final rule, nor the comments, nor the ratified report, makes any reference to the First Amendment.³⁴ This regrettable omission was deliberate.

II. ANTI-BIAS PROVISIONS BEFORE MODEL RULE 8.4(G)

The scope of Rule 8.4(g) is unprecedented in how far it goes beyond regulating conduct related to the practice of law, conduct related to a lawyer’s fitness to practice, or conduct prejudicial to the administration of justice. Part II will analyze how Model Rules 8.4(a)–(f) operated before the amendment, and document how the states have narrowly tailored their anti-bias disciplinary provisions.

A. MISCONDUCT PROHIBITED BY THE MODEL RULES

The first seven sections of the *Model Rules of Professional Conduct* govern the responsibilities, duties, and restrictions on attorneys when they are practicing law or representing clients. Rules 1.0–1.18 define the various attributes of the client-lawyer relationship, including conflicts of interest and duties owed to clients. Rules 2.1–2.4 discuss the attorney’s role as a counselor. Rules 3.1–3.9 prescribe an attorney’s responsibilities as an advocate before tribunals and other fora. Rules 4.1–4.4 establish how an attorney must transact with people other than clients. Rules 5.1–5.7 govern an attorney’s responsibilities as part of a law firm or association. Rules 6.1–6.5 center around an attorney’s commitment to public service, including pro bono work. Rules 7.1–7.6 focus on how an attorney can convey information about legal services, such as through advertising to, and solicitation of, clients. If an attorney violates any of these rules, he or she is in violation of Rule 8.4(a).³⁵

The remainder of Rule 8.4, however, governs conduct that is increasingly more attenuated from the actual practice of law. Rule 8.4(b) states that it is misconduct to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” Not *all* criminal acts are misconduct—only those that “reflect[] adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” In a sense, white-collar crimes, more so than violent crimes, warrant this disapprobation. Rule 8.4(c)

34. Gillers writes that an attorney “remains free to argue that as applied to his or her conduct the rule is unconstitutional . . . whether or not the rule says, for example, ‘subject to the First Amendment.’” Gillers, *supra* note 3, at 231.

35. MODEL RULES OF PROF’L CONDUCT R. 8.4(a) (2016) (“It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”).

provides that it is misconduct to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Thus, even if an action is not criminal, so long as it “involv[es] dishonesty, fraud, deceit, or misrepresentation,” it warrants disciplinary action. Indeed, Rule 8.4(c) swallows up virtually all of the conduct that satisfies 8.4(b), and then some. These two provisions articulate a standard that a lawyer’s actions, even when unconnected with the practice of law, must at all times promote honesty and trustworthiness, so there is no doubt about his or her fitness to practice law.

Rule 8.4(d) states that lawyers cannot “engage in conduct that is prejudicial to the administration of justice.” For example, the ABA’s May 2016 report on the proposed Model Rule 8.4(g) cited *Neal v. Clinton*.³⁶ In this Arkansas case, former-President Clinton was suspended from the practice of law for five years because “he gave knowingly evasive and misleading discovery responses concerning his relationship with Ms. Lewinsky.” This conduct, the court found, was “prejudicial to the administration of justice,” even though Mr. Clinton was not even engaged in the practice of law.³⁷ More pressingly, Clinton lied under oath, which would arguably also run afoul of Model Rule 8.4(c).

Rule 8.4(e) prohibits lawyers from “stat[ing] or imply[ing] an ability to influence improperly a government agency or official.” Finally, Rule 8.4(f) prohibits “knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct.” Rules 8.4(e) and 8.4(f) are in large respects duplicative of 8.4(d). Each concern conduct—including speech—that undermines the neutrality and fairness of our legal system, even if not engaged in during the course of a representation.

Prior to amending Rule 8.4 in August 2016, the *Model Rules* generally prohibited three heads of conduct: (1) conduct during the practice of law or representing a client; (2) conduct that reflects on a lawyer’s fitness to practice law; and (3) conduct prejudicing the administration of justice.³⁸ Model Rule 8.4(g), which covers “conduct related to the practice of law,” including speech at “bar association[s]” and “social activities,” represents an unprecedented expansion of the disciplinary committee’s jurisdiction over the private lives and speech of attorneys.

During the February 2016 hearing over Model Rule 8.4(g), Ben Strauss, a past-president of the Delaware State Bar Association, warned that “[w]e need to be a little bit careful in terms of how we get involved in the life of people that are *not related to the delivery of legal services* which is ultimately what we’re all

36. 2016 ABA REPORT, *supra* note 1, at 9 n.19 (citing *Neal v. Clinton*, No. CIV 2000-5677, 2001 WL 34355768 (Ark. Cir. Ct. Jan. 19, 2001)).

37. *Clinton*, 2001 WL 3435576, at *2.

38. See generally RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4-2 (2016–17 ed.).

about.”³⁹ Myles Lynk, the Chairman of the Standing Committee, promptly replied, “I know you’re familiar with [Model Rule] 8.4(c),” which provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Lynk continued, “so the rules do contemplate that some conduct which is unrelated to the practice of law can constitute professional misconduct.” The ABA included a virtually identical argument in its written report, stating “[s]uch conduct need not be related to the lawyer’s practice of law, but may reflect adversely on the lawyer’s fitness to practice law or involve moral turpitude.”⁴⁰

This position, however, disregards the three categories that were traditionally limited by the *Model Rules*. Rule 8.4(g) opens up for liability an entirely new realm of conduct unrelated to the actual practice of law or a lawyer’s fitness to practice, and not connected with the administration of justice. Along these lines, Mr. Strauss concisely responded that “the behavior which constitutes misconduct is one that goes to the character that impacts on the person’s ability to deliver legal services,” while this rule regulated mere “social behavior.”⁴¹ He added that “the purposes of the new rule might be different.”⁴² Indeed it was different. The Delawarean cautioned that “there is a certain risk” when we “go[] overboard to the point where the vast majority of our membership may think we’ve gone too far.”⁴³

The ABA acknowledged that the new Rule 8.4(g) is indeed “broader than the current provision,”⁴⁴ but insisted that the “change is necessary.”⁴⁵ The final resolution concluded, “ethics rules should make clear that the profession will not tolerate harassment and discrimination in any conduct related to the practice of law.” Beyond serving as “officers of the court” and “managers of their law practices,” the ABA resolved, lawyers are “public citizens” with a “special responsibility for the administration of justice.” This notion of an attorney as a *public citizen* is derived from Preamble [6] to the *Model Rules*. Critically, by its own terms, the Preamble still treats as private almost the entirety of an attorney’s interactions. Preamble [6] speaks of the attorney’s duty as a public citizen to include seeking “improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.” It does not, and cannot, reach constitutionally protected speech that demeans others at bar-related functions.

39. 2016 ABA HOD Proceedings, *supra* note 5, at 72–73 (emphasis added).

40. 2016 ABA REPORT, *supra* note 1, at 9–10.

41. See 2016 ABA HOD Proceedings, *supra* note 5, at 73.

42. *Id.*

43. *Id.* at 34.

44. 2016 ABA REPORT, *supra* note 1, at 10. Professor Gillers agrees that no state has a rule “as broad as the new ABA rule.” Gillers, *supra* note 3, at 198.

45. 2016 ABA REPORT, *supra* note 1, at 10.

The strongest textual hook for the ABA in Preamble [6] is an attorney's duty to "further the public's . . . confidence in the rule of law." The report, and several instances of the model rule's legislative history, suggest that the drafters were concerned about what message the bar sends to the public when attorneys misbehave. For example, the conclusion of the resolution states, "As the premier association of attorneys in the world, the ABA should lead antidiscrimination, anti-harassment, and diversity efforts not just in the courtroom, but *wherever it occurs* in conduct by lawyers related to the practice of law. *The public expects no less of us.*"⁴⁶ This may be a laudable goal, but it is important to recognize how far afield such concerns are from Rule 8.4(a)–(f), and what the states have traditionally adopted. State courts that consider this rule should be very careful about relying on public perception of attorney behavior as an impetus for the overregulation of what has *long* been considered private speech.

B. STATE ANTI-BIAS PROVISIONS

Over the past two decades, nearly three dozen jurisdictions have amended their local version of Rule 8.4 to prohibit discrimination, harassment, or other forms of bias against specifically defined groups.⁴⁷ With few exceptions, these rules *only* govern conduct within the three heads of conduct reached by Model Rule 8.4(a)–(f). First, the narrowest category regulated bias *during the representation of a client* or *in the practice of law*. This standard is set by fifteen states in their rules,⁴⁸ and ten states in their comments.⁴⁹ Second, a far broader standard

46. *Id.* at 15 (emphasis added). Gillers makes a similar point. Gillers, *supra* note 3, at 200. ("Second, adoption of Rule 8.4(g) tells the public that the legal profession will not tolerate this conduct, not solely when aimed at other lawyers, but at anyone. The rule tells the public who we are.")

47. See 2016 ABA REPORT, *supra* note 1, at 5.

48. CAL. RULES OF PROF'L CONDUCT R. 2-400(B) (2015) ("In the management or operation of a law practice"); COLO. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("engage in conduct, in the representation of a client"); D.C. RULES OF PROF'L CONDUCT R. 9.1 (2007) ("in conditions of employment"); FLA. RULES OF PROF'L CONDUCT R. 4-8.4(d) (2017) ("engage in conduct in connection with the practice of law"); IDAHO RULES OF PROF'L CONDUCT R. 4.4(a) (2014) ("[i]n representing a client"); IOWA RULES OF PROF'L CONDUCT R. 32:8.4(g) (2015) ("in the practice of law"); MASS. RULES OF PROF'L CONDUCT R. 3.4(i) (2013) ("in appearing in a professional capacity before a tribunal"); MICH. RULES OF PROF'L CONDUCT R. 6.5(a) (2015) ("involved in the legal process"); N.J. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("engage, in a professional capacity"); N.M. RULES OF PROF'L CONDUCT R. 16-300 (2009) ("In the course of any judicial or quasi-judicial proceeding before a tribunal"); N.Y. RULES OF PROF'L CONDUCT R. 8.4(g) (2017) ("in the practice of law"); OHIO RULES OF PROF'L CONDUCT R. 8.4(g) (2016) ("in a professional capacity"); OR. RULES OF PROF'L CONDUCT R. 8.4(a)(7) (2015) ("in the course of representing a client"); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 5.08 (2016) ("in connection with an adjudicatory proceeding"); VT. RULES OF PROF'L CONDUCT R. 8.4(g) (2009) ("in hiring, promoting or otherwise determining the conditions of employment of that individual").

49. DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013) ("in the course of representing a client"); IDAHO RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) ("in the course of representing a client"); ME. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) ("a lawyer who, in the course of representing a client"); N.C. RULES OF PROF'L CONDUCT R. 8.4 cmt. 5 (2015) ("anyone associated with the judicial process"); S.C. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2015) ("in the course of representing a client"); S.D. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2004) ("in the course of representing a client"); TENN. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2016)

regulates bias that implicates a *lawyer's fitness to practice law*, whether or not it occurs in the practice of law. Only two states impose this standard in their rules.⁵⁰ (Such a provision would be largely duplicative of Model Rules 8.4(b) and 8.4(c).) Third, the broadest, most nebulous standard at issue prohibits bias that would *prejudice the administration of justice*. This standard, which can reach conduct entirely outside the client-lawyer relationship or the practice of law, is imposed by seven states.⁵¹ None of these jurisdictions provide a precedent for the new Model Rule 8.4(g).

Three jurisdictions have adopted far broader scopes to their anti-bias provisions. First, Indiana regulates such misconduct when “engage[d] . . . in a *professional capacity*.”⁵² Second and third, Washington state and Wisconsin both regulate such misconduct that is committed “in connection with the *lawyer's professional activities*.”⁵³ None of these rules define “professional capacity” or “professional activities.” A note in the *Georgetown Journal of Legal Ethics* explained that the rule from Wisconsin—and by extension, the other two—is “extraordinarily broad and loses its main justification of why attorney speech needs to be restricted at all,” which is “[p]reserving the administration of justice.”⁵⁴ Yet, these three provisions still have a concrete nexus to delivering legal services,⁵⁵ and do not purport to reach “social activities,” such as bar-sponsored dinners that are merely “connected with the practice of law.” Model Rule 8.4(g) is unprecedented in its scope. Efforts to cite precedents from these states as evidence that Model Rule 8.4(g) would not censor protected speech are unavailing.

(“in the course of representing a client”); UTAH RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2013) (“in the course of representing a client”); W. VA. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2015) (“in the course of representing a client”); WYO. RULES OF PROF'L CONDUCT R. 8.4 cmt. 3 (2014) (“in the course of representing a client”).

50. ILL. RULES OF PROF'L CONDUCT R. 8.4(j) (2016) (“conduct that reflects adversely on the lawyer's fitness as a lawyer”); MINN. RULES OF PROF'L CONDUCT R. 8.4(h) (2015) (“reflects adversely on the lawyer's fitness as a lawyer”).

51. ARIZ. RULES OF PROF'L CONDUCT R. 8.4(d) (2004) (“prejudicial to the administration of justice”); ARK. RULES OF PROF'L CONDUCT R. 8.4(d) (2016) (“conduct that is prejudicial to the administration of justice”); CONN. RULES OF PROF'L CONDUCT R. 8.4(4) (2006) (“conduct that is prejudicial to the administration of justice”); MD. ATTORNEY'S RULES OF PROF'L CONDUCT R. 19-308.4(e) (2016) (“when acting in a professional capacity . . . when such action is prejudicial to the administration of justice”); NEB. RULES OF PROF'L CONDUCT R. 8.4(d) (2016) (“engage in conduct that is prejudicial to the administration of justice . . . [when] employed in a professional capacity”); N.D. RULES OF PROF'L CONDUCT R. 8.4(f) (2006) (“engage in conduct that is prejudicial to the administration of justice”); R.I. RULES OF PROF'L CONDUCT R. 8.4(d) (2007) (“engage in conduct that is prejudicial to the administration of justice”).

52. IND. RULES OF PROF'L CONDUCT R. 8.4(g) (2016) (emphasis added).

53. WASH. RULES OF PROF'L CONDUCT R. 8.4(g) (2015) (emphasis added); WISC. RULES OF PROF'L CONDUCT R. 8.4(i) (2017) (emphasis added).

54. Keiser, Note, *supra* note 23, at 636.

55. See Gillers, *supra* note 3, at 199–200 n.18 (citing cases from Indiana, Washington, and Wisconsin).

III. RULE 8.4(G) AND THE FIRST AMENDMENT

The ABA's report accompanying Rule 8.4(g) provides only the most cursory First Amendment analysis. As discussed in Part II, without any explanation, the final report deleted both comments and analysis from an earlier draft that explicitly protected the freedom of speech. In his article, Professor Gillers provides what he admits is a "brief" analysis of the First Amendment issues implicated by the new Model Rule 8.4(g). Due to the new rule's intrusion into the private spheres of attorneys' speech and conduct, a "brief" discourse does not suffice.

Gillers' First Amendment analysis centers around whether Rule 8.4(g) would survive a facial challenge. "An overbreadth claim is likely to fail," we are told, in light of the Supreme Court's difficult-to-satisfy test for invalidating overbroad statutes.⁵⁶ A void-for-vagueness challenge will fail, Gillers writes, "[s]o long as the rule is drafted in a way that seeks to define only the conduct or speech that will and constitutionally can be the basis of discipline."⁵⁷ These analyses are premature in an article titled *A Guide for State Courts Considering Model Rule 8.4(g)*. The far more important question presented to state courts is whether they are willing to adopt a new model rule designed to root out harassment and discrimination, which also prohibits speech outside the delivery of legal services. This is a profound policy question that the ABA elided and that Professor Gillers considers a mere afterthought.⁵⁸

Part III will analyze this vague standard's chilling effects on speech, how the rule sweeps in a range of constitutionally protected speech, and how the comments establish an invalid form of viewpoint discrimination. Next, three tweaks to Rule 8.4(g) are offered that would still maintain the drafters' intent, while providing protection for free expression. This Article will close with an admonition that state courts should not be content to simply trust disciplinary committees to exercise discretion.

A. THE CHILLING EFFECT OF RULE 8.4(G)

Professor Gillers accurately notes that courts have upheld numerous efforts by state bar associations to discipline various forms of attorney speech. He writes that provisions of the *Model Rules* "subordinate[] the right to speak in order to protect the fairness of and public confidence in the legal system . . ."⁵⁹ When confronted with language "even more general" than *harassment* "that offers even less notice of the forbidden conduct," Gillers observes, void-for-vagueness

56. *Id.* at 235 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003) (emphasis in original)).

57. *Id.* at 236 (citing *United States v. Wunsch*, 84 F.3d 1110, 1116 (9th Cir. 1996)).

58. *Id.* at 230–31 ("Any lawyer charged with violating Rule 8.4(g) remains free to argue that as applied to his or her conduct the rule is unconstitutional.")

59. *Id.* at 235.

challenges have failed.⁶⁰ For example, a New York court censured a lawyer who, during a deposition, “called the opposing female lawyer a ‘bitch,’ described her with anatomical references (‘c_____’ and ‘a_____’), and told her to ‘go home and have babies.’”⁶¹ On appeal, the court concluded that such speech uttered in a legal proceeding was “conduct that adversely reflects on the lawyer’s fitness as a lawyer.”⁶² Indeed, as Gillers points out, the concept of conduct that “adversely reflects” a lawyer’s fitness is quite capacious, though it too has been upheld in the face of constitutional challenges.⁶³ The court stressed that “[b]road standards governing professional conduct are permissible and indeed often necessary where it is almost impossible to enumerate every offense for which an attorney ought to be removed or disciplined.”⁶⁴

These precedents, however, do not resolve the question at hand, as they considered challenges in the context of disciplinary actions that related to the representation of a client, a lawyer’s fitness for practice, or the administration of justice—all conduct within the state bar’s competencies.

Constitutional scrutiny amounts to a balance of the means and the ends.⁶⁵ As the government’s interest becomes more compelling, the rule’s tailoring need not be as narrow. Conversely, when the government’s interest becomes less compelling, narrow tailoring becomes essential. “Governing professional conduct” is a compelling interest within a bar association’s core jurisdiction.⁶⁶ Here, the government’s authority is at its apex, and narrow tailoring is not as critical. “Broad standards,” to use the phrasing of the New York court, suffice.

However, when conduct is merely “related to the practice of law,” which includes speech at social events, the government’s interest becomes far less compelling, as it is outside the traditional regulatory functions of bar associations. In other words, when the nexus between the legal practice and the speech at issue becomes more attenuated, the disciplinary committee’s authority to regulate an attorney’s expressions becomes weaker.⁶⁷ As a result, narrow tailoring becomes critical to salvage the sanction’s constitutionality. Stated differently, the same capacious standard of “harassment” could constitutionally support a

60. *Id.* at 236.

61. *Id.* at 237–38 (citing *In re Schiff*, No. HP 22/92 (Departmental Disc. Comm. N.Y. Sup. Ct. Feb. 2, 1993)).

62. *Id.* at 216 n.80 (citing *In re Schiff*, 599 N.Y.S.2d 242 (1993)).

63. *See id.* (citing *In re Holley*, 729 N.Y.S.2d 128, 132 (N.Y. App. Div. 2001)).

64. *Id.*

65. *See, e.g.*, *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) (“In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available.”).

66. *In re Holley*, 729 N.Y.S.2d at 220.

67. In its report, the ABA cited only “substantial *anecdotal* information” about “sexual harassment” at “activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with their practice of law” (emphasis added). That conjectural standard does not satisfy the lofty standard needed to establish a *compelling* state interest. 2016 ABA REPORT, *supra* note 1, at 11.

punishment for an incident during a deposition, but *not* during a bar association dinner or CLE lecture. Context matters for the First Amendment.

Because no jurisdiction has ever attempted to enforce a speech code over social activities merely “connected with the practice of law,” there are no precedents to turn to in order to assess such a regime’s constitutionality. (Professor Gillers fails to acknowledge this gap in his otherwise thorough analysis.) While discrimination and sexual harassment do have established bodies of case law that can be referred to,⁶⁸ longstanding ethics rules do not penalize harassment by itself in the context of private speech at various social functions. In such fora, the government’s interest is at its nadir, and tailoring must be extremely narrow to survive judicial scrutiny. Even before Rule 8.4(g) was adopted, attorneys often found themselves “in the midst of that recurring inquiry into when lawyer conduct has a sufficient nexus with fitness to practice law that it ought to be a basis for lawyer discipline, even when it is marginal to the direct representation of clients.”⁶⁹ Now discipline can be imposed for conduct merely related to the practice of law, and totally unrelated to the direct representation of any clients.

It is against this backdrop that the chilling effects of Rule 8.4(g) must be assessed. As drafted, the rule could discipline a wide range of speech on matters of public concern at events with only the most dubious connection with the practice of law. Though these laws may survive a facial challenge, they are quite vulnerable to individual challenges. Gillers takes solace that an attorney “remains free to argue that as applied to his or her conduct the rule is unconstitutional.”⁷⁰ I am not so sanguine. If a jurisdiction adopts Rule 8.4(g), some lucky attorney can become a test case with his or her livelihood on the line. This is not a mere academic exercise.

States must be very careful about adopting this novel new approach to discipline that may end up censoring speech on matters of public concern, only to have those actions reversed by the courts.

B. THE BROAD SWEEP OF RULE 8.4(G)

The comments to Rule 8.4(g) provide several examples of the various fora where the regime would apply, such as “social activities” or “bar association” functions. However, the long-deliberated rule does not offer examples of the types of speech that could be deemed “harassment.” Professor Gillers does. He writes, “[n]o lawyer has a First Amendment right to demean another *lawyer* (or

68. See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

69. Donald R. Lundberg, *Of Telephonic Homophobia and Pigeon-Hunting Misogyny: Some Thoughts on Lawyer Speech*, RES GESTAE, June 2010, at 22, 23, http://lawyerfinder.indybar.org/_files/11th%20Hour/D.LundbergReRule8.4.pdf [<https://perma.cc/VT9M-NQVN>].

70. Gillers, *supra* note 3, at 230–31.

anyone else involved in the *legal process*).⁷¹ Gillers adds, “[t]here is no First Amendment right, for example, to call a *female opponent* ‘a c___,’ or to mock *another lawyer’s* accent, or to use a racial epithet in addressing an *opposing party*.” Finally, he observes that “[t]here is no constitutional right to sexually harass an *employee or a client*.” Gillers asks, rhetorically, “[w]hy should identical biased words or conduct be forbidden in litigation but allowed in all other *work lawyers do*?”⁷²

As my added emphases reveal, Gillers only discusses disciplinable speech uttered *during* the practice of law, such as statements to opposing counsel, clients, or employees. These are activities squarely within the state bar’s longstanding and traditional interest in regulating the legal profession. In this entreaty, he does not reference the far more novel concept that speech at “social activities,” which is merely “related” to the practice of law, could be subject to discipline. As speech bears a weaker and weaker connection to the delivery of legal services, the bar’s justification in regulating it becomes less and less compelling. The bar lacks a sufficiently compelling interest to censor an attorney who makes a remark deemed “demeaning” at a CLE lecture, or makes a comment viewed as “derogatory” at the dinner table during a bar association gala. These are the sorts of problems that can be resolved by refusing to re-invite offending speakers—not by threatening to suspend or revoke a lawyer’s license. Here, the nexus between the bar’s mission to regulate the practice of law is far too attenuated to justify this incursion into constitutionally protected speech.

To return to Gillers’ rhetorical question, the Constitution expressly protects “biased words” that can usually be prohibited in the course of litigation.⁷³ Demeaning speech, as opposed to *defamatory* conduct, is constitutionally protected. In *FCC v. Pacifica*, the Supreme Court recognized “cunt,” one of George Carlin’s seven dirty words, as protected by the First Amendment.⁷⁴ (Some may find a reading of the appendix in *Pacifica* to be “demeaning” toward women.) In *Snyder v. Phelps*, the Supreme Court upheld the right of funeral protestors to hold signs that said “God Hates Fags.”⁷⁵ *R.A.V. v. City of St. Paul* invalidated a city’s law that prohibited “arous[ing] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”⁷⁶ Comments that would constitute sexual harassment in the workplace are perfectly lawful if uttered in public. A private sphere must remain in a lawyer’s life, when it is

71. *Id.* at 237 (emphasis added).

72. *Id.* at 220 (emphasis added).

73. In certain cases, cursing is especially appropriate during the course of litigation. See Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 642 n.127 (2016) (recounting how counsel in *Cohen v. California*, against the wishes of Chief Justice Burger, used the word “fuck” during oral arguments at the Supreme Court).

74. 438 U.S. 726, 751 (1978) (“The original seven words were shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.”) (emphasis added).

75. See 562 U.S. 443, 460–61 (2011).

76. See 505 U.S. 377, 391 (1992).

separate from the practice of law or representing a client, and does not reflect on a lawyer's fitness or prejudice the administration of justice.

Finally, there is a separation of powers element of this analysis. It is not surprising that disciplinary actions for speech fall within three heads: (1) conduct during the practice of law or representing a client; (2) conduct that reflects on a lawyer's fitness to practice; and (3) conduct prejudicing the administration of justice. State bar associations are chartered to supervise these regulatory purposes.⁷⁷ Disciplinary committees do not have boundless discretion over all aspects of an attorney's life. Like all administrative agencies, bar associations only have the authority that the relevant state legislature or court-of-last resort has delegated. When a bar association attempts to regulate conduct that is beyond its jurisdiction, the action is *ultra vires*. Beyond the First Amendment implications of Rule 8.4(g), state courts should consider whether bar associations even have the statutory authority to assert jurisdiction over speech that is increasingly attenuated from the practice of law. It is not enough to proclaim that “[t]he public expects no less of us.”⁷⁸ The law demands more. As a matter of the separation of powers under state constitutional law, Rule 8.4(g) may also be impermissible.

C. COMMENT FOUR'S IMPOSITION OF VIEWPOINT DISCRIMINATION

Comment [4] to Rule 8.4(g) provides, in part, that “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” (emphasis added). Though well-intentioned, this provision explicitly sanctions one perspective on a divisive issue—affirmative action—while punishing those who take the opposite perspective. This comment amounts to an unconstitutional form of viewpoint discrimination. Consider a debate hosted by a bar association about affirmative action. One speaker *promotes* racial preferences

77. See, e.g., *About the Bar*, VA. STATE BAR, <http://www.vsb.org/site/about> [https://perma.cc/5UES-RKNP] (last visited Jan. 26, 2017) (“The mission of the Virginia State Bar, as an administrative agency of the Supreme Court of Virginia, is to regulate the legal profession of Virginia; to advance the availability and quality of legal services provided to the people of Virginia; and to assist in improving the legal profession and the judicial system.”); *Our Mission*, STATE BAR OF TEX., <https://www.texasbar.com/Content/NavigationMenu/AboutUs/OurMission/default.htm> [https://perma.cc/6GQM-V7MJ] (last visited Jan. 26, 2017) (“The mission of the State Bar of Texas is to support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law, and promote diversity in the administration of justice and the practice of law.”); *About the Bar*, FLA. BAR, <http://www.floridabar.org/TFB/TFBOrgan.nsf/043adb7797c8b9928525700a006b647f90c2ad07d0bd71fc85257677006a8401?OpenDocument> [https://perma.cc/NN3T-TC3J] (last visited Jan. 26, 2017) (“To inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.”).

78. Gillers makes a similar point at Gillers, *supra* note 3, at 200 (“Second, adoption of Rule 8.4(g) tells the public that the legal profession will not tolerate this conduct, not solely when aimed at other lawyers, but at anyone. The rule tells the public who we are.”).

as a means to advance diversity. His speech would be entirely protected under Rule 8.4(g). Another speaker *critiques* racial preferences in light of mismatch theory. His speech would *not* be protected under Rule 8.4(g). This is a blatant instance of preferring one perspective over another. That the ABA sought to include this provision suggests that there was a concern that bar complaints could be filed over speech about affirmative action, or other diversity measures, that some could find “demeaning.” But not for other types of speech about affirmative action.

Beyond speech about diversity, Rule 8.4(g) will disproportionately affect speech on the right side of the ideological spectrum. Speech supporting a right to same-sex marriage will not be considered “derogatory”; speech critiquing it will. Speech supporting an interpretation of Title IX that permits bathroom assignments based on gender identity will not be considered “demeaning”; speech critiquing it will. Speech opposing immigration policy that excludes people based on their nationality will not be considered discriminatory; speech endorsing it will. A range of theories would be silenced under the threat of an unconstitutionally vague standard of “harassment.” Experiences with political correctness and speech codes on college campuses provide a roadmap of the sorts of speech that complaints filed under Rule 8.4(g) would likely target.⁷⁹

D. “WE WOULD HAVE TO JUST TRUST THEM”

I will begin this concluding section by chronicling a debate that should have occurred before the adoption of Rule 8.4(g), but alas, was only held months after

79. See generally Scott Jaschik, *If You Say You're Sorry*, INSIDE HIGHER ED (Mar. 25, 2016), <https://www.insidehighered.com/news/2016/03/25/marquette-suspends-controversial-faculty-blogger-requires-him-apologize> [https://perma.cc/F8BE-M54U] (“McAdams, however, has maintained that he was being punished for his opinions that are free speech. He also maintained that Marquette shouldn’t be attacking him, given that he is defending an undergraduate’s views against gay marriage that are consistent with Roman Catholic teachings.”); Adam Liptak, *Students’ Protests May Play Role in Supreme Court Case on Race in Admissions*, N.Y. TIMES (Dec. 1, 2015), http://www.nytimes.com/2015/12/02/us/politics/justices-to-rule-once-again-on-race-in-college-admissions.html?_r=0 [https://perma.cc/NY6T-Z8WW] (“The justices are almost certainly paying close attention to the protests, including those at Princeton, where three of them went to college, and at Yale, where three of them went to law school. At both schools, there have been accusations that protesters, many of them black, have tried to suppress the speech of those who disagree with them. Others welcomed the protests as part of what they called a healthy debate.”); Jessica Murphy, *Toronto Professor Jordan Peterson Takes on Gender-Neutral Pronouns*, BBC NEWS (Nov. 4, 2016), <http://www.bbc.com/news/world-us-canada-37875695> [https://perma.cc/4C5T-4MEV] (“Dr. Peterson was especially frustrated with being asked to use alternative pronouns as requested by trans students or staff, like the singular ‘they’ or ‘ze’ and ‘zir,’ used by some as alternatives to ‘she’ or ‘he.’ In his opposition, he set off a political and cultural firestorm that shows no signs of abating. At a free speech rally mid-October, he was drowned out by a white noise machine. Pushing and shoving broke out in the crowd. He says the lock on his office door was glued shut. At the same time, the University of Toronto said it had received complaints of threats against trans people on campus. His employers have warned that, while they support his right to academic freedom and free speech, he could run afoul of the Ontario Human Rights code and his faculty responsibilities should he refuse to use alternative pronouns when requested. They also said they have received complaints from students and faculty that his comments are ‘unacceptable, emotionally disturbing and painful’ and have urged him to stop repeating them.”).

its approval. During the 2016 Federalist Society National Lawyers Convention, Professors Eugene Volokh and Deborah Rhode debated how the new rule interacted with the First Amendment.⁸⁰ The event was moderated by Judge Jennifer Walker Elrod of the U.S. Court of Appeals for the Fifth Circuit. Along similar lines to the analysis in this Article, Professor Volokh worried that complaints could be filed against a speaker at a CLE event who critiques the Supreme Court's decision in *Obergefell v. Hodges*.⁸¹ He charged that Rule 8.4(g) amounts to a "deliberate[] . . . attempt to suppress particular derogatory views in a wide-range of conduct, expressly including social and . . . bar association activities." Volokh stressed that what the drafters of the rule "are getting is exactly what they are intending. They are intending to suppress particular views in these kinds of debates."

Professor Rhode was not particularly concerned with the potential for abuse. From her experiences, disciplinary committees "don't have enough resources to go after people who steal from their clients' trust fund accounts."⁸² She found "wildly out of touch with reality" the "notion that they are going to start policing social conferences and go after people who make claims about their own views about" religion or sexual orientation. Rhode added that "many people who are in bar disciplinary agencies care a lot about First Amendment values," and "[b]ar associations don't want to set off their members and go down those routes." An aggrieved party could "file a complaint," she acknowledged, but "we can say that about pretty much anything in this country, right?" But such complaints would go nowhere, Rhode maintained, because "we as a profession have the capacity to deal with occasional abuses." She concluded her remarks, "We're a profession that knows better than that." Rhode paused. "I would hope."

Moments later, Judge Elrod asked whether Professor Rhode's position "would depend on a trust . . . that the organizations would not be going after people that they don't like, such as . . . conservatives." She asked, "We would have to just trust them?" The Federalist Society luncheon, packed with right-of-center lawyers, laughed aloud. Professor Rhode interjected that Rule 8.4(g) did not depend on trusting the disciplinary crowds alone. "And the Courts!" she added. "My god, I never thought I'd be saying this at a Federalist Society conference, the Rule of Law people, it's still out there!" Professor Rhode concluded, "I don't think we'd see a lot of toleration for those aberrant complaints." In other words, trust the bar such that the rules would not be abused.

Professor Gillers takes a similar "trust-us" approach to Rule 8.4(g). "We can be confident that the kind of biased or harassing speech that will attract the attention

80. The Federalist Soc'y, *Ninth Annual Rosenkranz Debate: Hostile Environment Law and the First Amendment*, YouTube (Nov. 20, 2016), <https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s> [<https://perma.cc/7Y32-HPG7>].

81. *Id.* (<https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s#t=49m58s>).

82. *Id.* (<https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s#t=52m10s>).

of disciplinary counsel,” he writes, “will not enjoy First Amendment protection.”⁸³ Or stated in the converse, he is confident that disciplinary committees will not target speech that is protected by the First Amendment. This argument, on its own terms, is a non sequitur, because speech often loses its First Amendment protections if it is uttered during the delivery of legal services. In other words, if the disciplinary committee successfully targets such speech, it will be *because* in this context it lacks First Amendment protections. This argument elides the threshold question of what speech is within a bar association’s jurisdiction.

Further, Professor Gillers cites a series of cases to illustrate the types of speech that have resulted in punishment. None of these cases, however, support Professor Gillers’ conclusion as they *all* concern speech uttered during the delivery of legal services—often at depositions—and each involved anti-bias provisions that are far more narrow than Rule 8.4(g). First, in *Florida Bar v. Martocci*, a lawyer was disciplined where “[t]he entire record” in a marriage dissolution case was “replete with evidence of Martocci’s verbal assaults and sexist, racial, and ethnic insults.”⁸⁴ The Florida rule at issue applied with respect to “conduct in connection with the practice of law.” Second, in *In re Kratz*, a lawyer, acting in his capacity as the district attorney, was disciplined for “sending deliberate, unwelcome, and unsolicited sexually suggestive text messages to S.V.G., a domestic abuse crime victim and witness, while prosecuting the perpetrator of the domestic abuse crime.”⁸⁵ Third, in *In re Griffith*, an adjunct law professor, who was supervising law students in a clinic, engaged in physical conduct of a sexual nature with a student.⁸⁶ This harassment, the court found was “in connection with professional activities.” Fourth, in *In re McGrath*, an attorney “sent two ex parte communications to the judge disparaging the opposing party based upon her national origin.”⁸⁷ Professor Gillers also cites several more cases involving harassing comments made during depositions.⁸⁸

83. Gillers, *supra* note 3, at 235.

84. *See, e.g.*, 791 So. 2d 1074, 1077 (2001).

85. 851 N.W.2d 219, 223 (Wis. 2014) (disciplining district attorney for sending a victim text messages suggesting that the two have sexual contact).

86. 838 N.W.2d 792, 792 (2013). A different analysis would likely apply under Minnesota law with respect to a doctrinal class that was not connected with the delivery of legal services. However, under the capacious standard set by Rule 8.4(g), all professors that engage in “mentoring” while teaching a class required to sit for the bar exam could be subject to discipline. *See supra* text accompanying note 21.

87. 280 P.3d 1091, 1093 (Wash. 2012).

88. *Claypole v. Cty. of Monterey*, No. 14-cv-02730-BLF, 2016 WL 145557, at *5 n.37 (N.D. Cal. Jan. 12, 2016) (“At a contentious deposition, when Plaintiffs’ counsel asked Bertling not to interrupt her, Bertling told her, ‘[D]on’t raise your voice at me. It’s not becoming of a woman or an attorney who is acting professionally under the rules of professional responsibility’”); *Cruz-Aponte v. Caribbean Petroleum Corp.*, 123 F. Supp. 3d 276, 279 (D.P.R. 2015); *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, No. 600973–2007, 2007 WL 4901555, at *2–7 (N.Y. Sup. Ct. 2007); *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 184 (Sup. Ct. 1992); *In re Monaghan*, 743 N.Y.S.2d 519, 520 (App. Div. 2002); *Mullaney v. Aude*, 730 A.2d 759, 761–62 (Md. Ct. Spec. App. 1999); *In re Schiff*, 599 N.Y.S.2d 242 (App. Div. 1993).

It is unremarkable that *all* of these cases involve speech uttered during the delivery of legal services, and not during social activities merely connected to the practice of law. Rule 8.4(g) broke new ground by explicitly expanding a disciplinary committee's jurisdiction from the "practice of law," to "social activities," while simultaneously deleting a comment that expressly protected the First Amendment. I was unable to find a single case, in any jurisdiction, where a lawyer was sanctioned for a derogatory comment made at a social function. I doubt such a case exists, as no other state has previously permitted such discipline. The unprecedented nature of Rule 8.4(g) does not leave me confident that it will be enforced in a constitutional manner.

In any event, if such concerns are indeed "wildly out of touch with reality," then state courts should pause before adopting Model Rule 8.4(g) and its comments in their entirety. Professor Gillers writes that "[d]rafting demands precision and the elimination of ambiguity so far as words allow. Mathematical precision is not possible. We must strive to draft a rule that identifies the behavior we mean to forbid and not the behavior we do not."⁸⁹ He's right. With three slight tweaks to comments [3] and [4], the rule would have a far more narrowly tailored application to avoid censoring constitutionally protected speech, while still serving its intended purpose of rooting out sexual harassment.

- First, the amendments should clarify that for discrimination or harassment to fall within Rule 8.4(g), it must be "severe or pervasive." Along these same lines, stress that the law of antidiscrimination and anti-harassment statutes "will," and not "may" guide application of the paragraph. There is a well-established body of federal caselaw that disciplinary committees *should* rely on when determining if there has been discrimination or harassment.⁹⁰ This tweak would also put all parties on notice of the relative burdens of proof.
- Second, the exclusion for speech about promoting diversity was no doubt well-intentioned, but it creates an explicit form of viewpoint discrimination that cannot withstand a constitutional challenge. It should be eliminated.
- Third, I restored the exact language from the December 2015 comment and its accompanying report concerning the First Amendment and an attorney's "private sphere" of conduct. To make the point strikingly clear, I specified that speech on "matters of public concern" cannot give rise to liability.

89. Gillers, *supra* note 3, at 201.

90. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64–67 (1986).

Here, an edited version of the comments, with insertions bolded:

[Comment 3] ***“Severe or pervasive”*** 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 ***federal*** antidiscrimination and anti-harassment statutes and case law **may will** guide application of paragraph (g).

[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. **Paragraph (g) does not prohibit conduct undertaken to promote diversity. 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.** *Paragraph (g) does not apply to conduct protected by the First Amendment, as a lawyer does retain a “private sphere” where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to this rule. For example, paragraph (g) does not apply to speech on matters of public concern at bar association functions, continuing legal education classes, law school classes, and other similar forums.*

This revised rule would permit disciplinary actions for lawyers that engage in forms of severe or pervasive verbal harassment at social activities and bar functions, but it would also amply protect speech on matters of public concern that listeners may find “demeaning” or “derogatory.”

CONCLUSION

During her remarks at the Federalist Society conference, Professor Rhode admitted that she viewed Rule 8.4(g) as “a largely symbolic gesture,” and that “the reason why proponents wanted it in the Code was as a matter of educating the next generation of lawyers as well as a few practitioners in this one about *other* values besides First Amendment expression.” Her answer is quite revealing. Even before Rule 8.4(g) was adopted, attorneys who engaged in sexual harassment and other forms of discrimination were already subject to liability under federal, state, and local employment law, which extend beyond the actual workplace. As a practical matter, Rule 8.4(g) amounts to little more than a pile-on. In addition to facing injunctive relief or monetary fines from civil suits,

lawyers can now potentially lose their law licenses for misconduct. In this sense, the new model rule—a product of zealous advocacy by disparate interest groups over the course of two decades—is indeed little more than a “largely symbolic gesture.”

What Rule 8.4(g) does accomplish is “educating the next generation of lawyers” about what sorts of speech are permitted, and what sorts of speech are not. Professor Rhode’s candor, acknowledging that there are “*other* values besides First Amendment expression,” is refreshing after slogging through the entire administrative record of Rule 8.4(g). But if this was only a project of education, state bars could have accomplished it by launching a public relations campaign and distributing brochures. Of course, the rule is about much more than education. Failure to comply results in disciplinary action that can destroy an attorney’s livelihood. This sanction is not a trivial matter. At bottom, this rule, and its expansion of censorship to social activities with only the most tenuous connection with the delivery of legal services, is not about education. It is about reeducation.

State courts should pause before adopting this rule, and think carefully about the primacy of our first freedom.