

2017

# Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political

George W. Dent Jr.

*Case Western University School of Law*, [george.dent@case.edu](mailto:george.dent@case.edu)

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## Repository Citation

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**MODEL RULE 8.4(g): BLATANTLY UNCONSTITUTIONAL AND BLATANTLY POLITICAL**

-- George W. Dent, Jr.<sup>1</sup>

**I. Introduction**

In 2016 the American Bar Association adopted a new Rule 8.4(g) in its Model Rules of Professional Conduct.<sup>2</sup> The rule provides, *inter alia*, that a lawyer may not “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of” several listed factors “in conduct related to the practice of law.” Comment 3 to the new rule provides that “discrimination” in the rule “includes harmful verbal or physical conduct that manifests bias or prejudice towards others.”<sup>3</sup>

The new rule goes beyond existing Model Rule 8.4(d), which forbids “conduct that is prejudicial to the administration of justice.”<sup>4</sup> Comment 3 to Rule 8.4 was amended in 1998 to state that the rule is violated if a lawyer “knowingly manifests by words or conduct bias or

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<sup>1</sup> Professor of Law. Case Western Reserve University School of Law. The author thanks Brad Abramson, Josh Blackman, and Cassandra Robertson for their extremely helpful comments.

<sup>2</sup> Rule 8.4, as amended, provides:

It is professional misconduct for a lawyer to:

....

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

<sup>3</sup> The Comment reads in full:

Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

<sup>4</sup> MODEL RULES PROF'L CONDUCT R. 8.4(d) (1998).

prejudice . . . in the course of representing a client.”<sup>5</sup> Thus the new rule effects several major changes. It extends its prohibition to behavior that a lawyer does not know, but “reasonably should know,” violates the rule. It expands the list of prohibited bases for discrimination.<sup>6</sup> Most significantly, it expands the scope of covered activities from conduct that is “prejudicial to the administration of justice” or that occurs “in the course of representing a client” to encompass all “conduct related to the practice of law.”

New Rule 8.4(g) raises a host of troubling questions, including the wisdom of replacing the old *scienter* standard with a negligence standard and the propriety of the bar’s dictating labor law for lawyers. However, by far the biggest problems with the new rule are its breadth and vagueness that clearly threaten conduct protected by the First Amendment; its viewpoint discrimination, which also violates the First Amendment; and its potential to be applied selectively as a partisan political weapon. One wonders how the august ABA could have approved such a blatantly unconstitutional stricture.

Part II of this article explores the history of Rule 8.4(g), focusing on the reasons given for its adoption. Part III considers issues of interpretation and implementation of the new rule. Part IV analyzes the rule’s First Amendment problems. Part V looks at the rule’s unprecedented intrusion by the bar into the regulation of employment law. Part VI discusses how the ABA could have adopted such an egregiously unconstitutional rule. Part VII concludes.

## II. The Campaign for Rule 8.4(g)

What were the problems with the old rule? What abuses did the ABA cite to explain the need for a much broader rule? A report by the ABA Ethics Committee listed examples justifying adoption of the new rule.<sup>7</sup> Presumably the Ethics Committee cited the worst incidents it could find, but even some of these incidents are hardly atrocities. In one, a lawyer representing his wife and her business in a dispute with a Canadian employee sent the judge two *ex parte* communications with statements like “are you going to believe an alien or a U.S. citizen?”<sup>8</sup> Taken together, they hardly suggest an epidemic of intolerance ravaging the profession.

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<sup>5</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. 3 (2014).

<sup>6</sup> See *infra* notes 106-09 and accompanying text.

<sup>7</sup> Report of the Standing Committee on Ethics and Professional Responsibility 6 (Aug. 2016). Professor Stephen Gillers reports that “the targets of the [inappropriate] conduct are predominantly women” and that the “reported decisions suggest that biased conduct based on race or ethnicity occurs less often.” Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, x GEO. J. LEGAL ETHICS x, x [5] (2017). Professor Gillers concedes that, “[j]udging by reported decisions *only*, bias and harassment in the practice of law is a persistent but not a pervasive problem.” Gillers, *supra*, at [4] (emphasis in original). However, he gives no evidence of the magnitude of the problem apart from reported decisions.

<sup>8</sup> *In re McGrath*, 280 P.3d 1091 (2012).

Moreover, in the cases cited by the Ethics Committee the offenders were disciplined under existing rules. Neither that committee nor anyone else documented cases of outrageous behavior that went unpunished but would be barred by the new rule. Professor Gillers admitted the lack of such cases but pronounced it “irrelevant”!<sup>9</sup> Instead, the rule was justified by a supposed need for a “cultural shift” and because it “tells the public who we are.”<sup>10</sup>

Despite the absence of a strong demonstrated need for a new rule, it was adopted hastily, with little opportunity for scrutiny of the substantially revised final draft.<sup>11</sup> The biggest change in the new rule is the extension to “conduct *related to* the practice of law,” but almost none of the cases cited by the Committee occurred outside the practice of law.<sup>12</sup> One case it cited was the disbarment of President Bill Clinton for giving evasive and misleading answers to questions in a deposition, in violation of a judge’s order, in an effort to conceal the true nature of his relationship with Monica Lewinsky.<sup>13</sup> However, the court specifically found that this behavior was prejudicial to the administration of justice. Another was a case of sexual harassment (including highly offensive sexual contact) by a lawyer acting as an adjunct professor.<sup>14</sup> This kind of behavior could have been addressed in a much narrower rule. The ABA showed no need to police exclusively *verbal* conduct that does not amount to harassment and is merely *related to* the practice of law.

The ABA’s Model Rules are, of course, just that; a model that binds no one unless and until adopted by state supreme courts, which may either stop short of the provisions of the Model Rules or go beyond them. The response of the states to Rule 8.4(d) and Comment 3 is instructive. Again, the old rule applied only to “conduct that is prejudicial to the administration of justice.” Old Comment 3 applied only to conduct “in the course of representing a client.” Despite these limitations, the adoption of old Comment 3 gave rise to serious First Amendment concerns.<sup>15</sup> Perhaps that is why fewer than half the states have followed 8.4(d).<sup>16</sup>

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<sup>9</sup> See *infra* note 27 and accompanying text.

<sup>10</sup> See *infra* notes 28, 30 and accompanying text

<sup>11</sup> 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, 211-32 (2017).

<sup>12</sup> Professor Gillers refers only to conduct “in the practice of law.” Gillers, *supra* note 7, at [4]. He offers no evidence of problems in conduct merely “related to the practice of law.”

<sup>13</sup> *Neal v. Clinton*, 2001 WL 334355768 (Ark. Cir. Ct. Jan. 19, 2001).

<sup>14</sup> *In re Griffith*, 838 N.W.2d 792 (2013).

<sup>15</sup> See Lindsey Keiser, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers’ First Amendment Rights*, 28 GEO. J. LEGAL ETHICS 629 (2015).

<sup>16</sup> “Today, twenty-four states and Washington, D.C., have [an anti-bias] rule.” Gillers, *supra* note 7, at [13]. An even smaller number transferred the language of Comment 3 into the rule. . . .” See Keiser, *supra* note 15, at 629 (stating that only seventeen states and the District of Columbia had “elevated Comment 3, or some version of it, into the Rule itself”).

Moreover, none of the state rules was as broad as the new rule,<sup>17</sup> and so far only one state has adopted the new rule, while in several states official objections have been registered.<sup>18</sup> Most regulate only conduct “‘in the course of representing a client’ or its equivalent. Most state rules tie the forbidden conduct to a lawyer’s work in connection with the ‘administration of justice’ or, more specifically, to a matter before a tribunal.”<sup>19</sup> None has sought to discipline speech in activities merely related to the practice of law.<sup>20</sup> Nonetheless, the Committee cited not a single case where heinous conduct escaped sanction because existing rules were too narrow. In other words, even by the Committee’s own brief, the new rule seems to be a solution for a non-existent problem.

To bolster the Ethics Committee’s case Professor Gillers offers a litany of cases he has found “[o]ver the years, for my casebook and continuing legal education talks” that “address biased or harassing comments.”<sup>21</sup> A couple involve outrageous conduct.<sup>22</sup> Most involve derogatory comments made during litigation that would be dismissed as bad manners but not causes for discipline except that they alluded to someone’s sex or ethnicity. In some cases it is not even clear whether a comment referred to sex or race.<sup>23</sup> Certainly, one could find much more abusive comments involving matters other than race or sex. More important, all these cases involved conduct *in* the practice of law. If they prejudice the administration of justice, they can

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<sup>17</sup> Gillers, *supra* note 7, at [13].

<sup>18</sup> Only Vermont has adopted the new rule. See Andrew Stickler, *Vermont’s Anti-Bias Rule Vote an Outlier*, Law360 (Aug. 14, 2017), at <https://www.law360.com/articles/953530/vermont-s-anti-bias-rule-vote-an-outlier-in-heated-debate>. The Montana passed by a large margin a resolution opposing adoption. See Matthew Perlman, *Mont. Lawmakers Say ABA Anti-Bias Rule Is Unconstitutional*, Law360 (Aug. 14, 2017), at <https://www.law360.com/articles/913579/mont-lawmakers-say-aba-anti-bias-rule-is-unconstitutional>. See also Suevon Lee, *Texas AG Says ABA Ethics Rules Restricts Speech, Religion*, Law360 (Dec. 20, 2016), at <https://www.law360.com/articles/875243/texas-ag-says-aba-ethics-rule-restricts-speech-religion>; Louisiana Attorney General Opinion 17-0114 (Sept. 8, 2017) (state attorney general expresses opinion that ABA Rule 8.4(g) would be unconstitutional if adopted); *ISBA Assembly Opposes Adoption of 8.4(g) in Illinois*, 2Civility (Jan. 1, 2017), at <https://www.2civility.org/isba-assembly-opposes-adoption-8-4g-illinois> (assembly of Illinois State Bar Association registers opposition to Rule 8.4(g)); Josh Blackman, *Vermont Quietly Adopts ABA Model Rule 8.4(g), Other States Should “Pause,”* at <http://joshblackman.com/blog/2017/08/21/vermont-quietly-adopts-aba-model-rule-8-4g-other-states-should-pause> (listing some other official expressions of opposition to the rule).

<sup>19</sup> Gillers, *supra* note 7, at [13-14]; see also Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS x, x (2017).

<sup>20</sup> See Blackman, *supra* note 19, at x.

<sup>21</sup> Gillers, *supra* note 7, at x [Appendix].

<sup>22</sup> *E.g.*, *In re Schiff*, 599 N.Y.S.2d 242 (1st Dep’t 1993) (during a deposition “respondent was unduly intimidating and abusive toward the defendant’s counsel, and he directed vulgar, obscene and sexist epithets toward her anatomy and gender.”).

<sup>23</sup> *E.g.*, in *In re Monaghan*, 743 N.Y.S.2d 519, 520 (1st Dep’t 2002), the respondent criticized opposing counsel, an African-American, for her alleged mispronunciation of the words “establish” and “especially.”

be addressed under existing rules. They do not show any need to regulate the speech of lawyers in conduct merely *related to* the practice of law.

Comment 3 to Rule 8.4 offers a somewhat different justification for the new rule: “Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system.”<sup>24</sup> What empirical evidence is offered to show that discrimination by lawyers on the basis of, for example, gender identity—either in the course of the administration of justice or in conduct merely “related to the practice of law”—has had this effect? None. Neither is any evidence—even anecdotal evidence—offered to show that any of the skimpy handful of incidents cited above has “undermine[d] confidence in the legal profession.” Certainly, proponents of the rule have never adduced any evidence that statements made in CLE or law school presentations have “undermine[d] confidence in the legal profession and the legal system.”

Some behavior within this rubric, like racial discrimination by law firms in employment or “severe or pervasive” sexual harassment in law firms could undermine that confidence, but this behavior is already illegal under state and federal laws,<sup>25</sup> and Rule 8.4(g) is not limited to such behavior. It is hard to know what the public knows or believes about politics and government and how accurate its knowledge and beliefs are,<sup>26</sup> but certainly the public *should* understand that even a blatantly racist statement by a lawyer does not constitute a systemic problem in the legal profession or legal system.

Professor Gillers recognizes the lack of evidence demonstrating a need for the new rule, but he says that “the full extent of biased conduct is . . . irrelevant”!<sup>27</sup> The motive for the amendment is made explicit in a statement quoted in a Memorandum from the Ethics Committee:

There is a need for a cultural shift in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the rules of professional conduct.<sup>28</sup>

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<sup>24</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. 3 (2016).

<sup>25</sup> See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (barring employment discrimination based on race or sex (including sexual harassment)); see also *infra* notes 40-41 and accompanying text.

<sup>26</sup> See ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER x (2013) (“One of the biggest problems with modern democracy is that most of the public is usually ignorant of politics and government.”).

<sup>27</sup> Gillers, *supra* note 7, at [5].

<sup>28</sup> Standing Committee on Ethics and Professional Responsibility, Draft Proposal to Amend Model Rule 8.4 at 2 (Dec. 22, 2015), quoting a proposal from the Oregon New Lawyers Division, *available at* [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/rule\\_8\\_4\\_language\\_choice\\_memo\\_12\\_22\\_2015.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2015.authcheckdam.pdf) [hereinafter *Standing Committee, Draft Proposal*].

Professor Gillers offers two similar grounds. First, the rule “tells the bar as a whole that its licensing authority deems the behavior the rule describes as unacceptable.”<sup>29</sup> “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.”<sup>30</sup>

ABA Model Rule 8.4(d) already forbids lawyers to “engage in conduct that is prejudicial to the administration of justice,”<sup>31</sup> so the new rule serves only to extend sanctions to conduct that is *not* “prejudicial to the administration of justice.” Thus the question is whether it is appropriate and permissible under the First Amendment for the bar to proscribe behavior that does *not* prejudice the administration of justice simply because the bar establishment “deems the behavior . . . unacceptable” and wants to conscript all lawyers into a campaign to project to the public the control group’s notion of “who we are”? This question will be considered below.<sup>32</sup>

The ABA previously acknowledged the First Amendment and Due Process difficulties of an anti-bias rule, even a much narrower one than new 8.4(g). In 1995 the ABA Ethics Committee abandoned an attempt to draft an anti-bias rule in part because it “determined that no disciplinary rule could be drawn that would, to its satisfaction, meet the standards of precision and therefore standards of due process, and would also not unduly impinge on the First Amendment.”<sup>33</sup> A 1998 report to the ABA expressed similar concerns, because “manifestations of bias and prejudice may include protected speech, and because race, gender, and other factors are sometimes legitimate subjects of consideration and comment in the legal process.”<sup>34</sup>

Some commentators argued that the term “harassment” in the new rule was too vague to give fair warning of what is forbidden and might be unconstitutional.<sup>35</sup> The comment to Rule 8.4(g) offers little help. It says that harassment or sexual harassment “includes” certain behavior, but does not say that it is confined to such behavior.<sup>36</sup> It states further: “The substantive law of . . . anti-harassment statutes and case law may guide application of paragraph (g).”<sup>37</sup> Or it may not; the comment shows that the rule is not limited by those statutes and case law, including the “severe or pervasive” standard. The Report of the Standing Committee on Ethics and Professional Responsibility in support of Rule 8.4(g) underscores this point. It says that the

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<sup>29</sup> Gillers, *supra* note 7, at x.

<sup>30</sup> *Id.* at [6].

<sup>31</sup> MODEL RULES PROF’L CONDUCT R. 8.4(d) (1998).

<sup>32</sup> *See infra* notes 143-308 and accompanying text.

<sup>33</sup> Annual Report of the American Bar Association Including the Proceedings of the One Hundred Eighteenth Annual Meeting of the House of Delegates at 61 (1995).

<sup>34</sup> Annual Report of the American Bar Association Including Proceedings of the Sixtieth Midyear Meeting of the House of Delegates at 82 (1998).

<sup>35</sup> *See* Gillers, *supra* note 7, at [21 & n.85].

<sup>36</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. 3 (2016).

<sup>37</sup> *Id.*

comment “makes clear that the substantive law on antidiscrimination and anti-harassment is not necessarily dispositive in the disciplinary context.”<sup>38</sup>

Professor Gillers expresses dismay over these reservations, noting that “Anti-discrimination and anti-harassment rules regulate many American institutions, public and private, and populate many statutes and agency rules of the federal and local governments.”<sup>39</sup> He is right, but the rules to which he refers regulate actions affecting matters like employment and housing. To prove denial of housing or of an employment opportunity requires objective evidence.

The harm required to constitute harassment is less concrete but, as Gillers acknowledges, sexual harassment in employment is actionable only if it is “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”<sup>40</sup> In education the test is even more restrictive: “[A]n action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”<sup>41</sup>

Rule 8.4(g) requires neither objective evidence of harm nor “severe, pervasive, and objectively offensive behavior.” It requires only that the accused have uttered a statement about a listed matter that someone considers “unreasoned” and, maybe, that someone have been bothered by the statement.<sup>42</sup> Thus the rule is much vaguer and more subjective than any other rule against discrimination or harassment.

Professor Gillers argues that many terms in the Model Rules are just as vague as “harassment” in 8.4(g).<sup>43</sup> However, even if he is right that the rule is not unconstitutional, its vagueness is another reason for state bars to reject the rule as drafted as bad policy. Moreover, the other terms he cites do not generally entail speech, and especially not speech that does not prejudice the administration of justice or that is not even uttered in the practice of law. Given the astonishing breadth of Rule 8.4(g), its vagueness raises serious First Amendment problems.<sup>44</sup>

### III. Issues of Interpretation and Implementation

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<sup>38</sup> Report of the Standing Committee on Ethics and Professional Responsibility 7 (Aug. 2016).

<sup>39</sup> Gillers, *supra* note 7, at x [10].

<sup>40</sup> Gillers, *supra* note 7, at [10 n.43] (quoting *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

<sup>41</sup> *Davis v. Monroe Bd. of Educ.*, 526 U.S. 629, 633 (1999).

<sup>42</sup> Whether the rule requires proof of any kind of harm at all is unclear. *See infra* notes 117-35 and accompanying text.

<sup>43</sup> Gillers, *supra* note 7, at [23].

<sup>44</sup> *See infra* notes 150-57 and accompanying text.



Rule 8.4(g) features a new term—“conduct related to the practice of law;” a new standard of culpability; and three terms—“bias or prejudice,” “discrimination on the basis of,” and “manifest”—that are carried over from the old rule and comments, but that take on much greater significance because of the wider scope of the new rule. It is also unclear whether the rule requires proof of harm and, if it does, what kind of harm; and who has standing to file a complaint under the rule.

#### **A. Conduct “Related to the Practice of Law,” Including Classroom Teaching**

Existing Rule 8.4(d) is limited to “conduct that is prejudicial to the administration of justice.” New Rule 8.4(g) extends to all “conduct related to the practice of law.” Comment 4 explains this phrase:

Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.<sup>45</sup>

The legislative history of Rule 8.4(g) illuminates its unprecedented scope. The Ethics Committee Report refers to “organized bar-related activities to promote access to the legal system and improvements in the law.”<sup>46</sup> The latter would include any talk or debate about possible legislation. The Report also mentions “social activities in connection with the practice of law.”<sup>47</sup> This would include a firm golf outing or lunch with a client and any event at which a lawyer discussed the law. If a lawyer travels to a law-related event, the entire journey is “connect[ed] with the practice of law.” Any talk to any group by a lawyer about the law would be “conduct related to the practice of law.” A letter to the editor of a newspaper or an entry on a blog or in other social media would seem to be “conduct related to the practice of law” if the author is identified as a lawyer. The constitutionality of this extension of the bar’s regulation will be taken up below.<sup>48</sup>

Many protest demonstrations and rallies concern legal issues and would seem to be “conduct related to the practice of law,” at least for a lawyer who participates in the action as a lawyer. A lawyer who denounced the wealthy as greedy at an Occupy Wall Street demonstration and demanded tax increases on the wealthy, for example, might be deemed to be engaged in

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<sup>45</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. 4 (2016).

<sup>46</sup> Report of the Standing Committee on Ethics and Professional Responsibility 10 (Aug. 2016).

<sup>47</sup> *Id.* See also *Standing Committee, Draft Proposal*, *supra* note 28 (stating that the coverage of the new rule “would include conduct at activities such as law firm dinners and events at which lawyers were present solely because of their association with the firm”).

<sup>48</sup> See *infra* notes 143-308 and accompanying text.

“conduct related to the practice of law” and to violate the rule by manifesting bias based on socioeconomic status. A lawyer acting as an instructor in a law school class or interacting with students is engaged in “conduct related to the practice of law.”<sup>49</sup> Publishing an article about the law would be “conduct related to the practice of law.”

Brendan Eich was forced out as CEO of Mozilla because he had contributed \$1,000 to the campaign for California’s Proposition 8, which limited marriage to one man and one woman.<sup>50</sup> Could a lawyer be charged under Rule 8.4(g) for the same behavior? Although the campaign is certainly related to law, the lawyer’s financial contribution is no different from a layman’s, so it is probably not “conduct related to *the practice of law*.” If the gift were made by a law firm, however, it could be deemed to violate the rule.

## B. The Culpability Standard

Earlier proposals for an ABA anti-bias rule forbade only knowing conduct.<sup>51</sup> The new rule forbids “conduct that the lawyer knows *or reasonably should know* is harassment or discrimination . . . .” (emphasis added). This is essentially a negligence standard. There is no authority to explain what the term means; no state anti-bias rule had such a term when the ABA adopted the new rule.<sup>52</sup>

Given the extreme breadth of expressions that have been condemned as racist, sexist, homophobic, etc., it is not at all clear what a lawyer “reasonably should know” is subject to such condemnation. How well-informed and sophisticated is a lawyer required to be? The President of Smith College and others were vilified for saying “all lives matter.”<sup>53</sup> Should a lawyer “reasonably know” that such language is harmful and discriminatory? Should a lawyer “reasonably know” that criticizing opposing counsel’s pronouncement of the words “establish” and “especially” would be considered racial bias?<sup>54</sup> Or referring to a person as “the black man” or “the black guy”?<sup>55</sup> Would referring to a person as a “white guy” or an “Italian guy” be a manifestation of prejudice?

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<sup>49</sup> In *In re Griffith*, 838 N.W.2d 792 (Minn. 2013), the court found that a lawyer who “engaged in unwelcome physical contact of a sexual nature . . . with respect to a law student he had taught and was supervising in an independent clinic” violated, *inter alia*, Minnesota Rule of Professional Conduct 8.4(g), which applies to conduct “in connection with a lawyer’s professional activities.”

<sup>50</sup> See *infra* note 88 and accompanying text.

<sup>51</sup> In 2015 the Ethics Committee proposed to forbid a lawyer to “harass or knowingly discriminate.” *Standing Committee Draft Proposal*, *supra* note 28.

<sup>52</sup> See Halaby & Long, *supra* note 11, at 253 n.275.

<sup>53</sup> See Jessica Chasmar, *Liberal on Liberal Attack: Smith College President Apologizes for Email Saying “All Lives Matter,”* WASH. TIMES, Dec. 9, 2014, available at <http://www.washingtontimes.com/news/2014/dec/9/smith-college-president-apologizes-for-email-sayin>.

<sup>54</sup> See *In re Monaghan*, 743 N.Y.S.2d 519, 520 (1st Dep’t 2002).

<sup>55</sup> See *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2010).

Political correctness condemns microaggressions, which may be committed “unconsciously,”<sup>56</sup> but perhaps a lawyer “reasonably should know” what behavior constitutes a microaggression. As the experience of the Smith College President shows, the politically correct definition of bias is continuously and rapidly expanding, so lawyers may have to update themselves constantly about what is the new taboo.

The “reasonably should know” standard is particularly troubling because professional discipline is punishment. The Supreme Court has called it “quasi-criminal.”<sup>57</sup> A lawyer can be deprived of the ability to earn a living if she is found to have violated the rule. The breadth and vagueness of the “reasonably should know” standard exacerbate the rule’s First Amendment problems.<sup>58</sup>

### C. “Bias or Prejudice”

Comment 3 says that Rule 8.4(g) forbids “verbal . . . conduct that manifests bias or prejudice toward others.” The terms “bias or prejudice” are problematic. They are not defined in the rule or the comment. Unlike “harassment or discrimination,” they are not common legal terms. The potential for confusion about their meaning is not fanciful; uncertainty about the meaning of “bias” is already a problem with the “bias reporting systems” imposed by many colleges and universities.<sup>59</sup>

The terms “bias or prejudice” were used in former comment 3 to Rule 8.4(d), but that comment was adopted by the ABA only in 2014, and most states have not adopted it.<sup>60</sup> As a result, there is almost no case law interpreting these terms. The dictionary defines bias as “an inclination of temperament or outlook; *esp*: [but not only] a personal and sometimes unreasoned judgment : PREJUDICE.”<sup>61</sup> “Prejudice” is similarly defined as “an adverse opinion or leaning formed without just grounds or before sufficient knowledge.”<sup>62</sup> I will take it on faith that no disciplinary committee will apply the rule to inclinations that it considers well-reasoned, but which inclinations are not well reasoned?

In matters of taste, reasonable people can agree to disagree. I can disagree with your preferences in, for example, music, art, or wine, without feeling that your preferences are

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<sup>56</sup> Hannah Yi, *What Exactly Is a Microaggression? Let These Examples from Hollywood Movies Explain*, QUARTZ, available at <https://qz.com/787504/what-exactly-is-a-microaggression-let-these-examples-from-hollywood-movies-explain>.

<sup>57</sup> *In re Ruffalo*, 390 U.S. 544, 551 (1968).

<sup>58</sup> See *infra* notes 143-57 and accompanying text.

<sup>59</sup> See Foundation for Individual Rights in Education, *Bias Response Team Report 2017*, at <https://www.thefire.org/first-amendment-library/special-collections/fire-guides/report-on-bias-reporting-systems-2017/> [hereinafter *FIRE Bias Response Report*].

<sup>60</sup> See *supra* note 16 and accompanying text.

<sup>61</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 110 (10th ed. 1993).

<sup>62</sup> *Id.* at 919.

“unreasoned.” Most political controversies are different; each side considers the views of the other side wrong, “unreasoned.” Rarely does anyone say “Your views are well reasoned, but I think they are wrong.”

The First Amendment generally forbids those in power to bar speech simply because they consider it biased, wrong, “unreasoned,” or even outrageous.<sup>63</sup> New Rule 8.4(g), as illuminated by comment 3, however, forbids speech that, in the opinion of the members of a tribunal, manifests “bias”—*i.e.*, is unreasoned—in enumerated categories in “conduct related to the practice of law.” The rule, then, is a weapon for the exercise of raw political power; the power to decide which views about public issues are well-reasoned and permitted and which “manifest . . . bias or prejudice” and should be punished.

The range of mainstream opinions that could be barred by this rule almost unlimited. Professor Blackman lists eleven areas that are potentially particularly troubling.<sup>64</sup> Consider Lawrence Summers’ statement about sexual imbalance among top mathematicians.<sup>65</sup> He noted a hypothesis of greater variability among men (compared to women) in tests of cognitive abilities, leading to proportionally more males than females at both the lower and upper tails of the test score distributions. He then said that “even small differences in the standard deviation [between the sexes] will translate into very large differences in the available pool substantially out [from the mean].”<sup>66</sup> Summers cited research finding differences between the standard deviations of males and females in the top 5% of twelfth graders under various tests. He then argued that, if this research were accurate, “whatever the set of attributes . . . that are precisely defined to correlate with being an aeronautical engineer at MIT or being a chemist at Berkeley . . . are probably different in their standard deviations as well.”<sup>67</sup> Many experts believe that women and men have essential differences beyond their reproductive organs.<sup>68</sup> Others disagree,<sup>69</sup> as Dr. Summers discovered when he was forced out as president of Harvard over his comments.

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<sup>63</sup> See *infra* notes 143-71 and accompanying text.

<sup>64</sup> Blackman, *supra* note 19, at x.

<sup>65</sup> See Lawrence H. Summers, Remarks at NBER Conference on Diversifying the Science & Engineering Workforce (Jan. 14, 2005), at [http://www.harvard.edu/president/speeches/summers\\_2005/nber.php](http://www.harvard.edu/president/speeches/summers_2005/nber.php).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See generally STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 343-50 (2002); DAVID C. GEARY, FEMALE: THE EVOLUTION OF HUMAN SEX DIFFERENCES (1968); Debra W. Soh, *Dismissing Gender Science Undermines a Noble Cause*, Plain Dealer (Cleveland), Feb. 20, 2017 (“studies have shown sex differences across a wide variety of cognitive domains”); Dorion Sagan, *Gender Specifics: Why Women Aren’t Men*, N.Y. TIMES, June 21, 1998, § 1, at 1 (stating that hormonal differences affect all organs of the body, abilities, behaviors, and effects of medication).

<sup>69</sup> See CORDELIA FINE, TESTOSTERONE REX: MYTHS OF SEX, SCIENCE, AND SOCIETY (2017); Elizabeth S. Spelke, *Sex Differences in Intrinsic Aptitude for Mathematics and Science? A Critical Review*, 60 AM. PSYCH. 950 (Dec. 2005).

Whatever one thinks about Summers' expulsion from Harvard, his legal rights were not violated. Lawyers, however, do have some rights in bar membership, including First Amendment rights. If a lawyer ascribed the sexual imbalance among large law firm partners in part to the same reasons that Summers cited, could the lawyer be disbarred under Rule 8.4(g)? Given the political fervor of the promoters of the new rule—evidenced, for example, by their demand for a “cultural shift”<sup>70</sup>—it is easy to imagine such a result. Even if the lawyer did escape punishment, either by a favorable ruling from a disciplinary committee or by an appeal to the courts, she would have lost substantial time, money and effort and suffered severe emotional distress in mounting her defense. Certainly the rule will intimidate those with politically incorrect opinions who are unwilling to endure persecution.

Similarly, consider the charge of racism leveled against Justice Antonin Scalia's comments about mismatch theory during oral arguments in *Fisher v. University of Texas, Austin*.<sup>71</sup> What if a speaker refers to a person with gender dysphoria using pronouns according to the person's biological sex rather than the person's gender identity? Even a law firm that allows its bathrooms to be used according to whether one identifies as male or female may not satisfy the rule because some people identify as “non-binary.”<sup>72</sup> Firms may be required to have a bathroom available to anyone. On the other hand, firms that allow (biological) men to use women's bathrooms might be sued under state laws for sexual harassment.

The inclusion of “socioeconomic status” in the rule is also troubling. What does it even mean?<sup>73</sup> Are white people in Appalachia a socioeconomic group for purposes of the rule? Since partners of a general partnership are jointly and severally liable personally for the debts of the firm,<sup>74</sup> each partner may be concerned about the financial condition of the others. Under the new rule this factor could not be considered in deciding whether to admit or remove someone as a

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<sup>70</sup> See *supra* note 28 and accompanying text.

<sup>71</sup> See <http://abovethelaw.com/2015/12/scientists-agree-justice-scalia-is-a-racist-idiot/>  
[http://www.abajournal.com/news/article/was\\_scalias\\_comment\\_racist\\_some\\_contend\\_blacks\\_may\\_do\\_better\\_at\\_slower\\_trac/](http://www.abajournal.com/news/article/was_scalias_comment_racist_some_contend_blacks_may_do_better_at_slower_trac/)  
<http://www.washingtontimes.com/news/2015/dec/10/antonin-scalia-accused-ofembracing-racist-ideas-f/>  
<http://www.latimes.com/nation/la-na-scalia-race-20151210-story.html>  
<http://www.politico.com/story/2015/12/nancy-pelosi-antonin-scalia-216680>. See also Blackman, *supra* note 19, at x.

<sup>72</sup> See Liam Stack, *Transgender on Tinder?: Now You Can Identify Yourself That Way*, Nov. 15, 2016 (stating that Tinder now allows users to choose from nearly forty gender identity options).

<sup>73</sup> Professor Volokh notes that courts have used the definition of the term in the Sentencing Guidelines: “an individual's status in society as determined by subjective criteria such as education, income, and employment.” Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints That Express “Bias,” Including in Law-Related Social Activities*, *The Volokh Conspiracy*, WASH. POST, Aug. 10, 2016, available at [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/?utm\\_term=.ce25a5bb8365](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/?utm_term=.ce25a5bb8365).

<sup>74</sup> See Rev. Unif. Partnership Act § 306(a) (1997).

partner. Derogatory comments about rich or poor people in conduct related to the law would also violate the rule.

Consider also the Boycott, Divestment, Sanctions (“BDS”) movement against Israel.<sup>75</sup> Critics consider the movement anti-Semitic.<sup>76</sup> Supporters disagree.<sup>77</sup> This is not a question of taste; either the BDS movement is anti-Semitic or it is not. The First Amendment generally prevents government from punishing those it considers wrong or unreasonable in such controversies. Under Rule 8.4(g), however, biased speech is professional misconduct. Suppose that two lawyers participate in a debate over the BDS movement and whether to impose legal sanctions on Israel (so that the debate is “related to the practice of law”). The lawyer supporting BDS could be accused of bias (anti-Semitism) violating the rule; and the other lawyer could be accused of bias toward Arabs, Palestinians, and Muslims. A disciplinary tribunal would have to decide if either lawyer manifested bias. That prospect could certainly deter lawyers from participating in such an event.

What of the claim that Jews are God’s chosen people? Some consider this claim bias. Bernard-Henri Lévy says that the concept of “election” of the Jews is a “scandalous, almost scabrous word.”<sup>78</sup> If the claims that Jews are God’s chosen people are acceptable, what of claims of white supremacy? The prohibition of “bias or prejudice” is especially problematic as to religion in general. The other categories listed in the rule are at least arguably, to some extent, matters of a person’s status. Religion is a matter of belief. Many atheists believe that all religion is superstition--i.e., unreasoned---so that all claims of religious belief are bias.

Suppose an atheist lawyer charges that an expression of faith at a continuing legal education session organized by the Christian Legal Society violates Rule 8.4(g) because there is no God. The Christian lawyer countercharges that the atheist’s complaint manifests bias on the basis of religion. Under the First Amendment courts refuse to entertain either charge. Under Rule 8.4(g) a disciplinary committee does not have that luxury. If a trier is agnostic and believes that the existence of God can neither be confirmed nor refuted, she would have to find that both lawyers have made unreasoned statements and violated the rule.

What if a lawyer advocating revival of criminal sodomy laws says that homosexual behavior is a mortal sin that, if not repented of, will deprive one of eternal salvation? This statement of religious belief violates the rule and the lawyer must be punished unless the tribunal finds that the statement is reasonable and therefore not biased.

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<sup>75</sup> See <https://bdsmovement.net>.

<sup>76</sup> See Abraham H. Foxman, An Open Letter on Academic Freedom and University Responsibility, Feb. 8, 2013, available at <http://www.adl.org/assets/pdf/press-center/NYT-Ad.pdf> (“The BDS movement at its very core is anti-Semitic.”).

<sup>77</sup> The website of the BDS movement says “the BDS movement . . . opposes as a matter of principle all forms of racism, including Islamophobia and anti-semitism.” See <https://bdsmovement.net/faqs>.

<sup>78</sup> BERNARD-HENRI LÉVY, THE GENIUS OF JUDAISM X (2016).

The experience under prior state rules is bad enough. In *In re McCarthy* a lawyer, responded to a demand from opposing counsel that he arrange a meeting of all the parties in a dispute with an email message saying: “I’m not your nigger.”<sup>79</sup> The epithet referred to the speaker, and the recipient was not a person of color and not a client or subordinate of the speaker. There was no employment harassment, no discrimination, and no impairment of anyone’s rights in the justice system. The word might be considered obscene, but it wasn’t an expression of hate. The email message was not publicized by McCarthy, so it could not be said to have “undermine[d] confidence in the legal profession and the legal system.”<sup>80</sup>

Was the epithet categorically unacceptable? Suppose on a Friday afternoon a black junior partner is about to leave her office for a long-awaited weekend trip with her family. The white managing partner enters and informs her that an emergency has arisen and she has to work on it through the weekend. Upset, she replies: “I’m not your nigger.” I cannot imagine that she would be disciplined at all, much less suspended from practice.<sup>81</sup> McCarthy’s fault was not that he said the wrong thing but that he was the wrong color. What might be acceptable from others was forbidden for him. That this rule can easily be applied discriminatorily is problematic. The Supreme Court in *Gentile v. State Bar of Nevada* stressed that the First Amendment requires skepticism about speech restrictions that invite “discriminatory enforcement.”<sup>82</sup>

Taken alone, the sanction against McCarthy might be defended on the ground that his statement had no political significance or First Amendment value.<sup>83</sup> He could have made his point by saying “I’m not your errand boy.” In other contexts, though, the offending word does have First Amendment value. It is used incessantly in hip-hop music. To punish McCarthy but not rappers requires fine distinctions based on context. This is just the kind of “discriminatory enforcement” that should be avoided.

*McCarthy* also shows the possibility that Rule 8.4(g) will be wielded opportunistically as a weapon against adversaries. Perhaps the recipient of McCarthy’s email was sincerely offended, but the contentious nature of the exchange raises the possibility that the recipient simply saw an opening to injure a difficult opponent. The filing of a formal charge of professional misconduct puts a lawyer under a cloud, at least until the complaint is dismissed. Certainly the remarkable breadth of Rule 8.4(g) invites such abuses.

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<sup>79</sup> *In re McCarthy*, 938 N.E.2d 698, 698 (Ind. 2010).

<sup>80</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. 3 (2016).

<sup>81</sup> Gillers tacitly agrees. He notes that McCarthy “did not apply the word ‘nigger’ to describe himself as an African-American.” Gillers, *supra* note 7, at [29]. The implication is that the result would have been different if McCarthy had been African-American.

<sup>82</sup> 501 U.S. 1030, 10xx (1991). *See infra* note 157 and accompanying text.

<sup>83</sup> The First Amendment provides less or no protection to certain categories of “low- value” speech. *See infra* note 145 and accompanying text.

This does not mean that discriminatory remarks never warrant lawyer discipline. In *Principe v. Assay Partners*<sup>84</sup> a lawyer made demeaning remarks to a woman attorney during a deposition, including calling her “little lady,” “little mouse,” “young girl,” and “little girl” and making rude hand gestures in front of other counsel, the witness, and a court reporter. In this case there clearly was both harm inflicted on a person during the practice of law and prejudice to the administration of justice.

By contrast, the court in *United States v. Wunsch* found “a single incident involving an isolated expression of a privately communicated bias with no facts that would show how that communication adversely affected the administration of justice.”<sup>85</sup> Since the rule in question forbade only conduct that “interferes with the administration of justice,” the court overturned the sanction that had been imposed.<sup>86</sup> Perhaps a sanction could have been upheld if the rule had also forbidden abusive conduct that meets that “severe or pervasive” standard for harassment.<sup>87</sup> However, Rule 8.4(g) contains no such language that might save it from unconstitutional overbreadth and vagueness.

Rule 8.4(g) prohibits not just speech but any conduct that manifests bias or prejudice. Consider the case of Brendan Eich, who was forced out as CEO of Mozilla because he had contributed \$1,000 to the campaign for California’s Proposition 8, which limited marriage to one man and one woman.<sup>88</sup> This case did not involve the practice of law, but what if a law firm contributed to a similar campaign? To supporters of the gay movement, that would certainly be “conduct that manifests bias or prejudice” and, for that reason, not “legitimate” advocacy. A contribution made by a law firm would be “conduct related to the practice of law.”

I hope that courts would find application of Rule 8.4(g) in such a case to be a flagrant violation of the First Amendment. Those who want the rule to achieve a “cultural shift” and to “tell[. . .] the public who we are” will disagree.<sup>89</sup>

#### **D. “Discrimination on the Basis of . . .”**

Rule 8.4(g) is selective. It is not enough to show that a lawyer has manifested discrimination, harassment, bias, or prejudice; one must also show an improper *basis* for this conduct. Because the rule covers hitherto unregulated conduct, it raises the question of what constitutes “discrimination” or proof of discrimination. In particular, it raises the question whether an improper motive must be shown, or whether conduct that has a disparate impact on a

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<sup>84</sup> 154 Misc.2d 702, 586 N.Y.S.2d 182 (N.Y. Sup.Ct. 1992).

<sup>85</sup> 84 F.3d at 111x. The facts of the case are discussed *infra* notes 235-37 and accompanying text.

<sup>86</sup> Local Civ. R. Prac., U.S. Dist Ct., C.D. Calif. 2.5.2.

<sup>87</sup> See *supra* notes 40-41 and accompanying text.

<sup>88</sup> See Mozilla’s Chief Felled by View on Gay Unions, N.Y. TIMES, Apr. 3, 2014, available at [https://bits.blogs.nytimes.com/2014/04/03/eich-steps-down-as-mozilla-chief/?\\_r=0](https://bits.blogs.nytimes.com/2014/04/03/eich-steps-down-as-mozilla-chief/?_r=0).

<sup>89</sup> See *supra* notes 28-30 and accompanying text.



listed class violates the rule regardless of the actor’s motive.<sup>90</sup> The “basis” requirement makes the scope of the rule even more mysterious and even more subject to political abuse.

Of course, proof of discriminatory motive is a common problem in anti-discrimination laws.<sup>91</sup> However, the problem is much greater here—and much more troubling—because the rule covers not only acts causing harm in employment, or housing, or the like, but extends to speech that causes no more harm than to be disagreeable to someone who hears or learns of it. Former Comment 3 to Rule 8.4(d) also prohibited discrimination, but Rule 8.4 applied only to “conduct that is prejudicial to the administration of justice.” Questions of discrimination rarely occur in that context, as evidenced by the paucity of state cases alleging discrimination.<sup>92</sup>

The problem is not chimerical. One lawyer was disciplined for criticizing opposing counsel’s pronouncement of the words “establish” and “especially.”<sup>93</sup> The court imposed sanctions despite uncertainty about the lawyer’s motive.<sup>94</sup> Although this case just involved rude behavior, discriminatory motive is often an issue in matters of public debate. For example, Baronelle Stutzman’s florist shop had for years cordially served Robert Ingersoll and Curt Freed, a gay couple. However, when they asked her to design flower arrangements for their wedding, she declined because of her religious beliefs.<sup>95</sup>

Stutzman argued that she did not discriminate “on the basis of” sexual orientation, as evidenced by her long service to the couple. The wedding was different because it required her active participation in a ceremony (including custom design work of floral arrangements, delivery to the forum, staying at the ceremony to touch up arrangements, and assisting the wedding party)<sup>96</sup> rather than merely filling an order, and that this participation would make her complicit in the same-sex wedding rather than simply tolerating it. Her refusal did not involve the couple’s sexual orientation, or even its sexual behavior; she would not assist a wedding between people of the same sex (as a florist or otherwise) even if they were not in a sexual relationship. Nonetheless, the court found Baronelle Stutzman guilty of discrimination on the

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<sup>90</sup> See *infra* notes 106-11 and accompanying text.

<sup>91</sup> See I MERRICK T. ROSSEIN, *EMPL. DISCRIM. L. & LITIG.* § 2.43 (2017) (discussing complications of proof of various kinds of employment discrimination cases).

<sup>92</sup> In *Nathanson v. MCAD*, WL 199901657 (Ma. 2003) a lawyer was disciplined because she would represent women only in divorce cases. With this arguable exception, no precedent cited by Gillers, *supra* note 7, involved discrimination prejudicial to the administration of justice.

<sup>93</sup> *In re Monaghan*, 743 N.Y.S.2d 519, 520 (1st Dep’t 2002).

<sup>94</sup> The court rejected the finding of a Special Referee that the lawyer’s conduct was “substantially more likely to have been gender-related rather than race-related.” *Id.* at x. However, the court cited no basis for either inference as opposed, say, to the possibility that the lawyer was obnoxious to everyone—which apparently is not a basis for professional discipline.

<sup>95</sup> See *State v. Arlene’s Flowers, Inc.*, x P.3d x (Wash. Feb. 16, 2017).

<sup>96</sup> See *Judge: Arlene’s Flowers Owner Can Be Sued in Her Personal Capacity*, *Tri-State Herald*. January 7, 2015; “*Wash. floral artist’s home, savings at risk of state seizure after court ruling*,” *Alliance Defending Freedom*, Feb. 18, 2015.

basis of sexual orientation.<sup>97</sup> Several other courts have reached similar results under similar facts.<sup>98</sup> The Supreme Court has agreed to review one such case.<sup>99</sup>

Such cases may proliferate because of the radical extension of the ban under the new rule. Could lawyers be sanctioned for organizing a Federalist Society discussion that does not have enough members of a protected group, or advocates for a protected group? The ABA insists on certain standards of diversity of race and sex on law faculties.<sup>100</sup> Comment 3 to Rule 8.4 provides: “The substantive law of antidiscrimination and anti-harassment statutes and case law *may* guide application of paragraph (g).”<sup>101</sup> However, the law is unclear whether a disparate impact proves discrimination. Moreover, the Comment shows that interpretation of the rule is not necessarily bound by antidiscrimination law. Not only the organizers but all attendees might be charged with a violation since their attendance would certainly be “conduct related to the practice of law.” Similarly, opposition to abortion is often characterized as discrimination against women and might be claimed to violate the rule.<sup>102</sup>

The mandate of Rule 8.4(g) can also clash with Model Rule 2.1, which provides: “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”<sup>103</sup> As a comment to Rule 2 notes, “moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”<sup>104</sup> Many common moral precepts concern marital status, sexual orientation, gender expression, and socioeconomic status and behavior and could be deemed inconsistent with Rule 8.4(g)'s ban on bias or prejudice with respect to these factors. Perhaps the proviso for “legitimate advice or advocacy” subordinates 8.4(g) to 2.1, but the scope of that proviso is not at all clear.<sup>105</sup>

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<sup>97</sup> *State v. Arlene's Flowers, Inc.*, x P.3d x (Wash. Feb. 16, 2017).

<sup>98</sup> *See, e.g., Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014); *Odgaard v. Iowa* [get cite]; *George Rede, Sweet Cakes Owners Pay Damages While Continuing Appeal of \$135,000 Bias Case*, THE OREGONIAN, Dec. 28, 2015, at [http://www.oregonlive.com/business/index.ssf/2015/12/sweet\\_cakes\\_owners\\_pay\\_damages.html](http://www.oregonlive.com/business/index.ssf/2015/12/sweet_cakes_owners_pay_damages.html).

<sup>99</sup> *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111.

<sup>100</sup> American Bar Ass'n, *Standards and Rules of Procedure for Approval of Law Schools 2016-2017*, Standard 206(b) (“a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.”).

<sup>101</sup> Emphasis added.

<sup>102</sup> *See Twiss Butler, Abortion Law: “Unique Problem for Women” Or Sex Discrimination*, 4 YALE J.L. & FEMINISM 133, 145 (1991) (stating that “laws that treat abortion differently from other standard medical procedures [are] sex discrimination . . .”).

<sup>103</sup> MODEL RULES PROF'L CONDUCT R. 2.1.

<sup>104</sup> MODEL RULES PROF'L CONDUCT R. 2, cmt. 2.

<sup>105</sup> *See infra* notes 276-84 and accompanying text.

The meaning of “discrimination” in Rule 8.4(g) is also problematic in categories (such as sexual orientation) that get no special treatment under the law of many states or (as in the case of socioeconomic status) in any state. For example, most students at prestigious universities come from wealthy families.<sup>106</sup> Does a law firm violate Rule 8.4(g) if it hires most of its associates from the top law schools?<sup>107</sup> Does a firm violate the rule if its use of traditional hiring criteria results in its having a percentage of minority (which minority?) lawyers that is lower than the percentage of that minority in some (which?) geographical area?<sup>108</sup> In such a case political activists could file complaints against the firm. A disciplinary committee using disparate impact analysis could find the firm guilty of discrimination and impose hiring quotas similar to those that have been imposed on some police and fire departments.<sup>109</sup>

A law firm could violate the rule if it does not retain a sufficient number of contractors from a protected group. Some states forbid employers to inquire about the criminal records of job applicants,<sup>110</sup> in part because such inquiries have a racially disparate impact. Does Rule 8.4(g) prohibit such inquiries even in states that do not forbid them?

Could a progressive or minority lawyers’ group be charged with violating the rule if its programs included too few white males? No, because Comment 4 says: “Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating the Rule . . . .”<sup>111</sup> Could the Federalist Society plead this proviso as a defense? Presumably not. The rule lists several protected categories, but viewpoint is not one of them, so evidently the diversity that may be promoted is not viewpoint diversity.

#### **E. “Manifest:” Secondary Participants**

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<sup>106</sup> See Amanda Cox et al., *A Bigger Affluence Gap Than Expected at Elite Colleges*, N.Y. TIMES, Jan. 19, 2017, at A3 (reporting study of 38 elite colleges that found that “more students came from the top 1 percent of the income scale than from the entire bottom 60 percent”).

<sup>107</sup> One supporter of 8.4(g) acknowledged that the permissibility of this practice under the rule may not be clear. See *A Speech Code for Lawyers*, 101 JUDICATURE 70, 73 (2017) (comments of Keith Swisher) [hereinafter “*Speech Code*”].

<sup>108</sup> It is unclear what minorities might be deemed to count (whites from Appalachia?) for purposes of the prohibition against discrimination or how the geographical baseline would be determined for each law firm.

<sup>109</sup> See *Bratton v. City of Detroit*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 703 (1984) (upholding 50-50 quota for hiring of blacks and non-blacks for Detroit police force). Courts have also upheld hiring quotas adopted in consent decrees. See *Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland*, 669 F.3d 737 (6th Cir. 2012) (overturning district court’s termination of a consent decree in effect for thirty years requiring that one out of every three new firefighters hired by the city be non-Caucasian).

<sup>110</sup> See M. Rodriguez & B. Avery, *Ban The Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*, Apr., 2016, National Employment Law Project Guide, at <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide> (stating that 23 states and more than 100 jurisdictions have passed such laws)..

<sup>111</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. 4 (2016).

A person who participates in the commission of a tort, including an act of employment discrimination or sexual harassment, can be liable with the primary actor.<sup>112</sup> Accordingly, it is not unusual or problematic that a lawyer who participates in or aids conduct that interferes with the administration of justice can be disciplined together with the primary violator. With the extension of Rule 8.4(g) to conduct “related to the practice of law,” however, difficult questions arise about the degree to which the term “conduct that manifests bias or prejudice”<sup>113</sup> applies to secondary participants.

As noted, the new rule applies to activities like CLE programs, law-related protest demonstrations and rallies, and social events with clients.<sup>114</sup> A lawyer who entertains a client at a club or restaurant that requires use of its bathrooms according to one’s biological sex might be charged with “conduct that manifests bias or prejudice.” A lawyer who simply attends a protest demonstration probably cannot be considered engaged in “conduct related to the practice of law.” However, a lawyer listed as a supporter or organizer of an Occupy Wall Street demonstration, for example, might be charged with “conduct that manifests bias or prejudice” if he “knows or reasonably should know”<sup>115</sup> that the demonstration will include biased statements against the wealthy. This is core speech protected by the First Amendment.<sup>116</sup>

#### **F. Does the Rule Require Proof of Harm?**

Rule 8.4(g) does not require proof of prejudice to the administration of justice. Does it require any kind of harm and, if so, does the requirement salvage the constitutionality of the rule? The rule itself does not mention harm. Comment 3 says that “discrimination *includes* harmful verbal or physical conduct,”<sup>117</sup> which suggests that it does not *require* harm.

Even if some harm is required, the comments do not indicate what *kind* of harm qualifies. Professor Gillers opines: “Harmfulness does remain a consideration for valuating whether the rule was violated but it includes harm to the justice system, not necessarily personal harm to the target.”<sup>118</sup> Similarly, Comment 3 says that the rule is intended to prevent activities that “undermine confidence in the legal profession and the legal system.”<sup>119</sup> What does that mean? If

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<sup>112</sup> See MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW § 50.02(b), at 329 (3d ed. 2010) (stating that those who “act in concert” with or render “substantial assistance or encouragement to” the primary tortfeasor may also be held liable).

<sup>113</sup> MODEL RULES OF PROF’L CONDUCT R. 8, cmt. 3 (2016).

<sup>114</sup> See *supra* notes 45-49 and accompanying text.

<sup>115</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4(g) (2016).

<sup>116</sup> Even Professor Haupt, who generally defends the constitutionality of the rule, finds its application to social events to be “on constitutionally weak footing.” Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, 19 U. PA. J. CONST. L. ONLINE x, [20] (2017).

<sup>117</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. 3 (2016) (emphasis added).

<sup>118</sup> Gillers, *supra* note 7, at [31].

<sup>119</sup> MODEL RULES OF PROF’L CONDUCT R. 8, cmt. 3 (2016).

specific proof of such an effect is required, how could it be shown that a given statement had “undermine[d] confidence in the legal profession [or] the legal system”? “Confidence” of whom? A majority of those asked in a poll? The claim of a single individual that her own confidence was undermined? More likely, however, the comment and Professor Gillers’ statement suggest a conclusive presumption that statements manifesting bias or prejudice cause such harm; no specific proof is necessary, and the defendant cannot try to refute the presumption of harm.

As the case of Brendan Eich shows,<sup>120</sup> political activists may hunt for behavior they dislike and seek to punish the actor.<sup>121</sup> These people will treat lawyers as they treated Brendan Eich. Under Rule 8.4(g), disciplinary committees must review these political grievances. Even if a committee is properly sensitive to the First Amendment and ultimately dismisses a complaint, the prospect of facing a disciplinary proceeding will deter lawyers from conduct that might provoke political agitators. And, of course, there is no guarantee that disciplinary committees *will* be sensitive to the First Amendment.

Gillers lists some examples that he says would not violate the rule, but these are so innocuous as to give little reassurance about the scope of the rule.<sup>122</sup> He also cites *Faragher v. City of Boca Raton*,<sup>123</sup> where the Supreme Court suggested that a statement would not constitute sexual harassment under Title VII if it were “a mere offensive utterance” or an “isolated incident . . . (unless extremely serious).”<sup>124</sup> The Court added that “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.”<sup>125</sup>

Title VII covers only employment discrimination; its scope is much narrower than Rule 8.4(g), which covers any “conduct related to the practice of law.” First Amendment concerns are also narrower in the Title VII context. In particular, the potential victims are a “captive audience.”<sup>126</sup> Rule 8.4(g) is not so limited.

Moreover, nothing in 8.4(g) or the comments invokes the *Faragher* standard. The ABA specifically rejected a proposal to “include a statement that the Rule be interpreted and implemented in accordance with Title VII case law.”<sup>127</sup> The *McCarthy* case shows that in some

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<sup>120</sup> See *supra* note 88 and accompanying text.

<sup>121</sup> This has also happened to florists, bakers, and others. See *supra* notes 95-99 and accompanying text.

<sup>122</sup> Gillers, *supra* note 7, at [31].

<sup>123</sup> 524 U.S. 775 (1998), cited in Gillers, *supra* note 7, at [31].

<sup>124</sup> *Id.* at 787-88.

<sup>125</sup> *Id.*

<sup>126</sup> See Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2307 (1999) ; Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the Dog That Didn't Bark*, 1994 SUP. CT. REV. 1, 43.

<sup>127</sup> Report of the Standing Committee on Ethics and Professional Responsibility 21 (Aug. 2016).

states a lawyer can already be suspended for “a mere offensive utterance,” an “isolated incident” that was not “extremely serious.”<sup>128</sup>

Professor Gillers objects to requiring proof of harm to a particular person because that would require the complainants to profess their own weakness, to testify that “they were unable ‘to take’” a biased comment.<sup>129</sup> Under the *Faragher* standard this is not much of a problem because the conduct in question “must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did perceive to be so.”<sup>130</sup> Since the conduct must be of a kind “that a reasonable person would find hostile or abusive,” a complainant need not claim to be unusually sensitive. Indeed, under *Faragher* there is no point in claiming to be unusually sensitive since conduct is not actionable unless it is objectively offensive; *i.e.*, offensive to a reasonable person.

Moreover, under *Faragher* a complainant need not claim that she could not “take” a biased comment if that means she was rendered incapable of continuing what she was doing. She can satisfy *Faragher* by, for example, testifying that “I did find these comments hostile and abusive, although I’m resilient and managed to press on with renewed determination.”

Again, Professor Gillers says that 8.4(g) bars acts that cause “harm to the justice system,” meaning comments that “create the impression that the rule of law can be distorted by name calling grounded in identity.”<sup>131</sup> That reading of the rule raises the question of the meaning of “identity.” Is it invoked by a derogatory comment about the “religious right”? More important, when do the words of a lawyer “create the impression that the rule of law can be distorted.” That might be understood as meaning “prejudicial to the administration of justice.” However, the rule clearly is not so limited. When would a statement in a CLE program or at lunch with a client create such an impression? In *In re McCarthy*<sup>132</sup> the lawyer’s statement “I’m not your nigger” was in an email sent to one person with an adversary law firm. It could hardly have “create[d] the impression that the rule of law can be distorted.” Nonetheless, McCarthy was suspended.

What if McCarthy had used an equally offensive non-racial term? In one other case, a lawyer sent opposing counsel an email message saying, *inter alia*, “You’re an asshole;” “If you try any shit with the court, I welcome it;” and “Don’t fuck me.”<sup>133</sup> The court issued a warning to the lawyer, but imposed no sanctions. The disparate results can be explained only by the same kind of political correctness that underlies the adoption of 8.4(g)—that is, the determination to

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<sup>128</sup> See *supra* notes 79-83 and accompanying text.

<sup>129</sup> Gillers, *supra* note 7, at [30].

<sup>130</sup> 524 U.S. at 787-88.

<sup>131</sup> Gillers, *supra* note 7, at [30-31]

<sup>132</sup> See *supra* notes 79-83 and accompanying text.

<sup>133</sup> *Alexander Interactive v. Adorama*, 12 Civ. 6608 (S.D.N.Y. June 26, 2014), N.Y.L.J., July 3, 2014, at <http://www.newyorklawjournal.com/id=1202661703410>.

impose a “cultural shift”<sup>134</sup> and to tell “the public who we are.”<sup>135</sup> Although citizens are free to promote such goals, it is not the province of the bar to impose such rules on the entire profession.

### **G. The Range of Potential Complainants**

In general, there is no standing requirement to file an ethics complaint against a lawyer; anyone may do so.<sup>136</sup> However, the old model rule required “prejudice to the administration of justice.”<sup>137</sup> By contrast, Rule 8.4(g) applies to any “conduct related to the practice of law” and is intended to prevent activities that “undermine confidence in the legal profession and the legal system.”<sup>138</sup> Apparently, anyone who hears or learns of a presentation by a lawyer about the law or of a comment made by a lawyer in a courthouse or law office or to a client may file a complaint under Rule 8.4(g). A similar situation exists at the many colleges and universities that have established Bias Reporting Systems to receive and process allegations of bias.<sup>139</sup> Most of these systems allow the accuser to remain anonymous, ostensibly to shield the accuser from retaliation.<sup>140</sup> Nothing in Rule 8.4(g) suggests that anonymous reporting would be inappropriate.

Groups will form to ferret out and file complaints about politically incorrect statements. They will, for example, monitor Federalist Society and Catholic Bar Association programs and scan law review articles and institute charges against anyone who speaks against legal recognition of same-sex marriage, racial preferences, or men in women’s bathrooms. They will also conduct sting operations. Groups have hunted for bakers, florists, and other service providers who decline on religious grounds to assist same-sex weddings.<sup>141</sup> They uncovered the names of and attacked those who contributed to the campaign for California’s Proposition 8, including forcing out Brendan Eich as CEO of Mozilla.<sup>142</sup> Similar groups could, for example, contact law firm employees seeking evidence of violations of the rule by lawyers.

Nothing in the old rule precluded such activity, but the limitation of the old rule to conduct prejudicial to justice meant that violations were not very common and that only people

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<sup>134</sup> See *supra* note 28 and accompanying text.

<sup>135</sup> See *supra* note 30 and accompanying text.

<sup>136</sup> For example, Ohio allows anyone to file an ethics complaint; the complainant need not allege any harm from the alleged violation or even contact with the lawyer. See Ohio State Bar Ass’n, How to File a Complaint, at <https://www.ohiobar.org/ForPublic/AboutLawyers/Pages/StaticPage-84.aspx>.

<sup>137</sup> See *supra* note 4 and accompanying text.

<sup>138</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. 3 (2016).

<sup>139</sup> “During the course of 2016, at least 231 Bias Response Teams were reported on American university of college campuses.” *FIRE Bias Response Report*, *supra* note 59.

<sup>140</sup> See *id.* (“At a conservative estimate, at least 2.84 million American students are subject to often-anonymous reporting systems monitored by administrators and police officers.”) (footnotes omitted).

<sup>141</sup> See *supra* notes 79-83 and accompanying text.

<sup>142</sup> See *supra* note 88 and accompanying text.

involved in judicial proceedings would know about the conduct. The new rule opens unlimited opportunities to politically partisan interlopers.

The new rule is also an inviting weapon against adversaries in litigation. One party can file a complaint against another with almost no cost and without having to show any tangible harm. Given the rule's extreme breadth and vagueness, it will be hard to get a complaint summarily dismissed. The threat of the cost, distraction, and negative publicity from a prolonged disciplinary proceeding may pressure a lawyer in litigation to cave in or to pull punches, even if the lawyer is confident that ultimately no violation would be found.

#### IV. First Amendment Issues

##### A. Content Regulation, Overbreadth, and Vagueness

The First Amendment forbids laws “abridging the freedom of speech.”<sup>143</sup> A government action that “imposes content-based restrictions on speech . . . can stand only if they survive strict scrutiny, ‘which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.’”<sup>144</sup>

The Supreme Court has narrowly defined what constitutes a “compelling interest.” It has delineated certain kinds of “low-value” speech, such as obscenity, defamation, and fighting words, that may be restricted because of their content.<sup>145</sup> However, government may not bar speech simply because it is “offensive” because that concept is “inherently boundless” and “one man’s vulgarity is another man’s lyric.”<sup>146</sup> “[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”<sup>147</sup> A person may even advocate criminal conduct “except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action.”<sup>148</sup>

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<sup>143</sup> U.S. Const., amd. I.

<sup>144</sup> *Reed v. Town of Gilbert*, x S. Ct. x, x, slip. op. at 14 (2015), quoting *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. x, x (2011) (slip op., at 8), quoting *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 340 (2010).

<sup>145</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 3xx (1992).

<sup>146</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971).

<sup>147</sup> *Id.* at 26. For other Supreme Court cases holding that the state cannot forbid speech merely because it is vulgar and offensive, see *Lewis v. New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972).

<sup>148</sup> *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (*per curiam*) (emphasis in original), quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).



Rule 8.4(g) imposes content-based restraints; it bars certain speech “on the basis of race, sex, religion” etc. Accordingly, it can survive only if it “furthers a compelling interest and is narrowly tailored to achieve that interest.”<sup>149</sup>

The First Amendment also forbids vague restrictions on speech “because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.”<sup>150</sup> “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”<sup>151</sup> A law is unconstitutionally vague if persons of “common intelligence must necessarily guess at its meaning and differ as to its application.”<sup>152</sup> If a law is ambiguous, the Court “will not presume that [it] curtails constitutional activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression.”<sup>153</sup> Further, “it matters not that the words [defendant] used might have been constitutionally prohibited under a narrowly and precisely drawn statute.”<sup>154</sup> If the scope of a speech restriction cannot be determined with reasonable certainty, or if it extends to protected as well as unprotected speech, it will be struck down.<sup>155</sup>

In a vagueness challenge “perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”<sup>156</sup>

In *Gentile v. State Bar of Nevada* the Supreme Court said:

The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement. . . . for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility.<sup>157</sup>

## **B. Viewpoint Discrimination**

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<sup>149</sup> See *supra* note 144 and accompanying text.

<sup>150</sup> *Gooding v. Wilson*, 405 U.S. 518, 5xx (1972).

<sup>151</sup> *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963).

<sup>152</sup> *Connally v. General Constr. Co.*, 269 U.S. 385, 291 (1926).

<sup>153</sup> *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963).

<sup>154</sup> *Gooding v. Wilson*, 405 U.S. at x.

<sup>155</sup> See *United States v. Stevens*, 559 U.S. 460 (2010); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

<sup>156</sup> *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

<sup>157</sup> 501 U.S. 1030, 10xx (1991).

The First Amendment standard of review is even stricter if a law forbids not a general category of speech but only certain viewpoints. In general, content restraints cover a category of speech. They become viewpoint discrimination if they single “out a subset of messages for disfavor based on the views expressed.”<sup>158</sup> “The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.”<sup>159</sup> “The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”<sup>160</sup> “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>161</sup>

Just last term the Court decided *Matal v. Tam*, in which a band was denied a trademark for its name, The Slants, under a law barring marks that “may disparage . . . persons, living or dead . . . or bring them into contempt, or disrepute.”<sup>162</sup> The name was admittedly a term of racial disparagement, a racial epithet. The case also involved commercial speech (to which the Court has often granted less protection). Nonetheless, the Court *unanimously* held the statute invalid *on its face*.<sup>163</sup> The Court reiterated its long-standing principle that “Speech may not be banned on the ground that it expresses ideas that offend.”<sup>164</sup>

Although there is no reason to think that the Court had Rule 8.4(g) in mind when it decided *Matal*, the opinion seems to anticipate that rule. Incorporating Justice Holmes’s famed phrase, the Court said: “Speech 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.’”<sup>165</sup>

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<sup>158</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring). The opinion of Justice Kennedy was joined by three colleagues. Three other justices joined the opinion of Justice Alito which applied less strict scrutiny, but only because they viewed the case as involving commercial speech. *See id.*, at 1763.

<sup>159</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). *See also* *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976).

<sup>160</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

<sup>161</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989). *See also* *Snyder v. Phelps*, 562 U.S. 443 (2011) (forbidding curbs on public speech, even if it is “outrageous,” including a sign saying “God Hates Fags”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (striking down law that prohibited “arous[ing] anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender”); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>162</sup> 15 U.S.C. § 1052(a) (2017).

<sup>163</sup> *Matal v. Tam*, 137 S. Ct. 1744 (2017).

<sup>164</sup> *Id.* at x.

<sup>165</sup> *Id.* at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). *See generally* ANTHONY B. LEWIS, *FREEDOM FOR THE THOUGHT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT* (2007).

The Court has also protected derogatory statements about sexual orientation. In *Snyder v. Phelps*<sup>166</sup> the family of a Marine killed in Iraq sued for defamation and intentional infliction of emotional distress by members of a religious congregation who picketed the soldier’s funeral, carrying signs that said, *inter alia*, “Fag troops,” “Semper fi fags,” and “God Hates Fags.”<sup>167</sup> It is hard to imagine speech more distressing to someone than this was to the dead soldier’s family. Nonetheless, the Court ruled overwhelmingly that such speech is constitutionally protected.

To survive strict scrutiny the government must demonstrate that there is a compelling need for a restriction and that the means chosen are the least restrictive available.<sup>168</sup> Although the Supreme Court has not categorically prohibited such laws, “the Court has never openly approved a government action punishing an individual merely on the basis that the government’s views of a particular issue differed from those of the individual.”<sup>169</sup>

Some people now believe that the unique harm of “hate speech” warrants an exception under the First Amendment.<sup>170</sup> This position expressly embraces both viewpoint discrimination and identity-group discrimination; members of supposedly oppressed groups are allowed much greater freedom to speak than others are, and speech about supposedly oppressed groups is rigorously regulated while speech about supposedly dominant groups is not.<sup>171</sup> This is ironic; for saying that certain minorities are less resilient and less able than others to withstand the rigors of free public debate, proponents of this view could be accused of manifesting racial bias in violation of the rule. In any case, however, the survey above shows that the Supreme Court has not accepted this argument in the least.

### **C. Rule 8.4(g) Under the First Amendment**

By virtue of old Comment 3, Rule 8.4(d) already forbade certain verbal conduct.<sup>172</sup> However, that comment referred only to conduct “in the course of representing a client,” and the

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<sup>166</sup> 562 U.S. 443 (2011).

<sup>167</sup> *Id.* at 448.

<sup>168</sup> *See* *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

<sup>169</sup> JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 16.1(b), at 1254 (20xx).

<sup>170</sup> *See, e.g.*, Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1597, 1599-1600, 1627 (2010) (listing the “grounds of race, ethnicity, religion, gender, and in some cases sexual orientation”); Maria Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989) (arguing the uniqueness of race). *See also* RANDALL KENNEDY, NIGGER: THE STRANGE CAREER OF A TROUBLING WORD 51, 154, 158-59 (2002) (noting that proposals to ban hate speech turn out to be “puzzlingly narrow, frighteningly broad, or disturbingly susceptible to discriminatory manipulation”).

<sup>171</sup> *See, e.g.*, Matsuda, *supra* note 170, at 2332, 2336-37, 2357, 2359 (referring to the vulnerability of “selectee victim groups” and to speech “directed against a historically oppressed group”).

<sup>172</sup> It said that a lawyer who “knowingly manifests by words or conduct bias or prejudice . . . in the course of representing a client” violates Rule 8.4(d). MODEL RULES PROF’L CONDUCT R. 8, cmt. 3 (2014).

underlying rule applied only to “conduct that is prejudicial to the administration of justice.”<sup>173</sup> These limitations removed most First Amendment problems. A law may forbid speech that is part of conduct if the law is “directed not against speech but against conduct.”<sup>174</sup> Thus, speech that is part of “conduct that is prejudicial to the administration of justice” or occurs while “representing a client” may be regulated in ways that other speech cannot be regulated.

Rule 8.4(g) is problematic because it is not so limited. In *R.A.V. v. City of St. Paul*<sup>175</sup> the Supreme Court struck down an ordinance forbidding “fighting words” because it did not forbid all “fighting words” but only “‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color creed, religion, or gender.’”<sup>176</sup> If 8.4(g) mandated genteel behavior by lawyers in conduct related to the practice of law, or simply forbade any abusive behavior by lawyers, there could be an interesting debate about the propriety of such a rule, but that is not what the ABA did. Instead, it adopted a rule that, like the ordinance struck down in *R.A.V.*, forbids only certain kinds of bias.

For example, statements vilifying American soldiers or police slain in the course of duty do not violate Rule 8.4(g).<sup>177</sup> Certainly such behavior is at least as repugnant to the public and at least as injurious to the reputation of the profession as the behavior barred by 8.4(g). Nothing in the rule or its legislative history explains the restriction to certain viewpoints. Did the new rule omit some kinds of bias because lawyers rarely commit them? There is no evidence of that, but in any case Professor Gillers has declared the frequency of biased behavior “irrelevant.”<sup>178</sup>

An interesting question is suggested by *In re Monaghan*.<sup>179</sup> During a deposition Monaghan “engaged in a continuing harangue of Ms. Perry for her alleged mispronunciation of the words ‘establish’ and ‘especially.’”<sup>180</sup> There was disagreement whether this harangue was gender-related rather than race-related.<sup>181</sup> In that case it made no difference because both were forbidden under the applicable rule.<sup>182</sup> However, mockery of a regional (e.g., Brooklyn or Southern) accent would not violate rule 8.4(g). Under Rule 8.4(g), then, a disciplinary committee

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<sup>173</sup> MODEL RULES PROF’L CONDUCT R. 8.4(d) (1998).

<sup>174</sup> *R.A.V. v. City of St. Paul*, 505 U.S. at 3xx.

<sup>175</sup> 505 U.S. 377 (1992).

<sup>176</sup> *Id.* at 3xx.

<sup>177</sup> Unless soldiers and police are a “socioeconomic” group for purposes of the rule. *See infra* note 188 and accompanying text.

<sup>178</sup> Gillers, *supra* note 7, at x [5].

<sup>179</sup> 743 N.Y.S.2d 519, 520 (1st Dep’t 2002).

<sup>180</sup> *Id.* at x.

<sup>181</sup> A proceeding in the federal court found that the abuse was “race-based,” but the Special Referee in the state proceeding found that it was “more likely to have been gender-related rather than race-related.” 743 N.Y.S.2d at x.

<sup>182</sup> *See id.* at x. Monaghan stipulated to “engaging in conduct prejudicial to the administration of justice.” *Id.* at x.

might have to decide whether an incident of mockery was based on race or gender or socioeconomic status, any of which *would* violate the rule; or on regional or geographic bias, which would *not* be a violation. Again, some viewpoints are permitted, others are forbidden.

The framing of the protected categories in Rule 8.4(g) is inherently discriminatory. The rule forbids not bias on issues *relating to* those categories, but “*on the basis of*” those categories. Consider a debate about the law as to which public bathroom should be used by people with gender dysphoria. One lawyer says people should be required to use public bathrooms according to their biological sex. Another lawyer says that people should be allowed to choose a bathroom according to their gender identity and that anyone who disagrees is disgusting and should be ostracized by decent people and the law should treat such people as murderers.

The statement by the first speaker manifests “an inclination of temperament or outlook” that relates to “gender identity” and violates the rule if the statement is deemed unreasonable. The second statement, however, relates to people who hold a particular opinion, not to any group protected by the rule. The statement does not violate the rule, no matter how intemperate it may be, even if it violated a criminal law forbidding fighting words. The only reason for banning certain kinds of speech under 8.4(g) is that such speech is considered politically incorrect.

Whatever the arguments for banning “hate speech,” Rule 8.4(g) is no such ban. For one thing, it includes the category of socioeconomic status, which no one has claimed needs special protection. More important, the rule is not limited to “hate speech,” however it might be defined, but bars any statement concerning the preferred categories that a disciplinary committee later deems unreasonable.<sup>183</sup> Some cases decided under existing rules have punished speech that could not be characterized as “hate speech.”<sup>184</sup> The legislative history and commentary on the rule suggest its coverage is broad and is not confined to anything like “hate speech.”<sup>185</sup>

The rule also imposes on lawyers a particular viewpoint about the nature of human identity. Consider a biological white male who identifies as a black woman. 8.4(g) forbids discrimination on the basis of gender identity, so a lawyer violates the rule by calling this person a man rather than respecting his/her gender identity as a woman. However, the rule does not forbid discrimination based on racial identity, so a lawyer does not violate the rule by calling this person white, disregarding his/her racial identity as black. The rule dictates which aspects of human identity (like race) lawyers must treat as objective, and which (like gender) they may treat as subjective.

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<sup>183</sup> See *supra* notes 161-62 and accompanying text.

<sup>184</sup> See, e.g., *In re Monaghan*, 743 N.Y.S.2d 519, 520 (1st Dep’t 2002) (lawyer disciplined for mocking the pronunciation of a minority woman); *In re McCarthy*, 938 N.E.2d 698, 698 (Ind. 2010) (lawyer suspended from practice for sending an email message saying “I’m not your nigger.”). See *supra* notes 79-83 and accompanying text.

<sup>185</sup> See *supra* notes 59-111 and accompanying text.

This is precisely what the Supreme Court in *R.A.V. v. City of St. Paul* said may not be done. Under the ordinance in question there

[o]ne could hold up a sign saying, for example, that all “anti-Catholic bigots” are misbegotten; but not that all “papists” are, for that would insult and provoke violence “on the basis of religion.” St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules.<sup>186</sup>

Rule 8.4(g) makes the same kind of viewpoint distinctions as the ordinance invalidated in *R.A.V.*

Rule 8.4(g) is even perverse in that in some ways it treats mere speech more harshly than conduct directly affecting individuals. The rule provides: “This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.”<sup>187</sup> Thus a lawyer who simply refuses to represent members of a covered group may not violate the rule.<sup>188</sup> However, a lawyer who announces “I will represent everyone equally, although I don’t like” a protected group, would violate the rule. Thus, in addition to its other flaws, the rule invites dissembling.

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<sup>186</sup> 505 U.S. at x.

<sup>187</sup> MODEL RULES PROF’L CONDUCT R. 8.4(g) (2016).

<sup>188</sup> The freedom of lawyers to choose their clients is unclear under Rule 8.4(g). Traditionally, lawyers have been free to reject a client for any reason. *See* CHARLES WOLFRAM, MODERN LEGAL ETHICS § 10.2.2 (1986); Brenda Jones Quick, *Regulating a Lawyer’s Discriminatory Conduct: Constitutional Limitations*, 21 OHIO N.U.L. REV. 897, 902 (1995). However, the Model Rules do not expressly recognize this freedom. The most relevant statement is a comment that says “A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.” MODEL RULES PROF’L CONDUCT R. 6.2, cmt. 1 (2003). However, Rule 6.2 itself refers only to “avoid[ing] appointment by a tribunal to represent a person,” not to declining a request for representation by a potential client.

Rule 8.4(g) refers to Rule 1.16, but paragraph (a) of that rule says only “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client.” Paragraph (b) says “a lawyer may withdraw from representing a client if: . . . (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”

Neither Rule 1.16 nor Rule 6.2 covers a refusal to represent a client because, *e.g.*, of his or her gender identity or socioeconomic status or because the client is a racist. Neither seems to allow a lawyer to discriminate on the basis of socioeconomic status by representing only the poor unless this were allowed as “conduct undertaken to promote diversity and inclusion.” MODEL RULES PROF’L CONDUCT R. 8.4, cmt. 4 (2016). Neither seems to protect, for example, a domestic relations lawyer who wants to represent only women because she feels that the law treats women unfairly. *See Attorney Association: Balancing Autonomy and Anti-Discrimination*, 40 J. LEGAL PROFESSION 271 (2016). One state has already forbidden such practices. *See Nathanson v. MCAD*, WL 199901657 (Ma. 2003). Thus, the effect of Rule 8.4(g) on the freedom of lawyers to reject clients is unclear. Professor Gillers believes that the rule does “limit. . . a lawyer’s right to decline or withdraw from a representation . . . where the lawyer’s reason is the client’s membership in a protected group . . . .” Gillers, *supra* note 7, at [39].

In its politically discriminatory selectivity Rule 8.4(g) resembles the college speech codes that are now widespread.<sup>189</sup> Like the ABA, colleges claim that they are special communities with a compelling need to curb discriminatory, demeaning, intimidating, or hostile speech.<sup>190</sup> Not a single one of these codes has survived constitutional challenge at a public institution.<sup>191</sup>

Any claim that 8.4(g) is intended simply to achieve civility is false, as Professor Charles Fried has shown such claims to be for college speech codes:

The benign claim that the regulations simply seek to produce a more courteous community is denied by the fact that not all breaches of courtesy fall under the ban . . . . [T]he ban is an exercise of power, it shows who is boss. Thus, the holders of noxious ideas are suppressed and the rest of the community is impressed and intimidated by this display of political might.<sup>192</sup>

In *R.A.V. v. the City of St. Paul* asserted that

a general “fighting words” law would not meet the city’s needs because only a content-specific measure can communicate to minority groups that the “group hatred” aspect of such speech “is not condoned by the majority.” The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.<sup>193</sup>

Because of the politically-motivated selectivity of Rule 8.4(g), it is not enough to show that a lawyer has manifested discrimination, harassment, bias, or prejudice. One must also show an improper *basis* for this conduct. In other words, one must show motive. This requirement makes the scope of the rule even more mysterious and even more subject to political abuse.<sup>194</sup>

An instructive contrast is offered by Section 2.3 of Code of Judicial Conduct, which forbids judges “by word or conduct [to] manifest bias or prejudice, or engage in harassment,

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<sup>189</sup> In 2016 the Foundation for Individual Rights in Education found that nearly half of 440 major colleges it surveyed had “at least one policy both clearly and substantially restricting freedom of speech, or that bars public access to its speech-related policies by requiring a university login and password for access.” Only twenty-two (5%) had “policies [that] do not seriously threaten campus expression,” Fdn. for Indiv. Rights in Educ., *Spotlight on Speech Codes: 2016*, available at <https://www.thefire.org/spotlight-on-speech-codes-2016>.

<sup>190</sup> See, e.g., *UWM Post, Inc. v. Board of Regents of Univ. of Wis. System*, 774 F. Supp. 1163 (E.D. Wis. 1991).

<sup>191</sup> See *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); *UWM Post, Inc. v. Board of Regents of Univ. of Wis. System*, 774 F. Supp. 1163 (E.D. Wis. 1991); *Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989).

<sup>192</sup> Charles Fried, *A New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 246 (1992).

<sup>193</sup> *Id.* at 3xx.

<sup>194</sup> See *supra* notes 90-111, 157 and accompanying text.

including, but not limited to, bias or prejudice bias based upon race, sex, . . . political affiliation.”<sup>195</sup> It further provides that its “restrictions . . . do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.”<sup>196</sup>

Unlike Rule 8.4(g), Section 2.3 expressly forbids bias, prejudice, or harassment based on political affiliation. If the purpose of 8.4(g) is to cultivate civility by making certain conduct “unacceptable” and to tell the public “who we are,” why does it omit this factor? The breadth of the phrase “including, but not limited to” in Section 2.3 is troubling given the vagueness of the concept of bias, but at least that rule is not expressly limited to certain politically correct concerns.

The exception for “conduct undertaken to promote diversity and inclusion”<sup>197</sup> in 8.4(g) also constitutes viewpoint discrimination. Statements favoring racial preferences for certain minorities would be permitted, while statements opposing racial preferences might not be.<sup>198</sup> Further, the rule makes an exception only for certain kinds of diversity and inclusion, although it is not entirely clear which those are.<sup>199</sup>

Again, Professor Gillers says that “The Rule tells the public who we are.”<sup>200</sup> Of course, a bar association may proclaim that it dislikes certain kinds of speech. However, it cannot impose its dislikes on lawyers through disciplinary rules.

*3. The Potential for Discriminatory Enforcement.* It is hard to imagine a greater “risk of discriminatory enforcement” than Rule 8.4(g). Its supporters expressly designed it to effect a “cultural shift.”<sup>201</sup> Its list of protected categories reflects a political agenda that is not shared by many people or by the law of many states. It bars discrimination on the basis of non-conforming gender behavior, for example, but not on the basis of other kinds of behavior, like smoking, gambling, or eating meat.

Rule 8.4(g) authorizes “conduct undertaken to promote diversity and inclusion” but not conduct (including speech) to oppose them. Further, the rule does not say what *kind* of diversity and inclusion is authorized. In universities and other institutions, these terms typically apply to some underrepresented groups but not others. For example, there are no diversity programs to

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<sup>195</sup> CODE OF JUDICIAL CONDUCT § 2.3(B).

<sup>196</sup> *Id.*, § 2.3(D).

<sup>197</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. [4] (2016).

<sup>198</sup> Consider, e.g., the controversy over Justice Scalia’s comments during oral argument in *Fisher v. Univ. of Texas, Austin*. See *supra* note 71 and accompanying text. See also Blackman, *supra* note 19, at x.

<sup>199</sup> See *supra* note 111 and *infra* note 202 and accompanying text.

<sup>200</sup> Gillers, *supra* note 7, at x.

<sup>201</sup> See *supra* note 28 and accompanying text.



promote inclusion of conservative scholars on university faculties.<sup>202</sup> Politically “discriminatory enforcement” is not just a likely side effect of Rule 8.4(g) but its very purpose.

Although Rule 8.4(g) was adopted to advance the political agenda of the left, in some cases this plan could backfire. The Rules of Professional Conduct are enforced by 51 diverse jurisdictions, some of which may not share the leftist agenda and could brandish the rule against progressives who make statements that conservatives do not consider well-reasoned. Hate-crime laws have often been applied to minorities who committed crimes against whites. The same could be true with Rule 8.4(g). Black lawyers are more likely than white lawyers to raise issues of race. Statements like “white people don’t understand” something or “whites are not willing to come to grips with race” could be deemed statements of bias with respect to race.

Consider *In re Sawyer*,<sup>203</sup> where lawyers were sanctioned for protesting their clients’ prosecution under the Smith Act, which, *inter alia*, required registration of Communists.<sup>204</sup> Consider also *Standing Committee v. Yagman*,<sup>205</sup> where a civil rights lawyer was found to have hindered the administration of justice by excessive criticism of a judge whom he called, *inter alia*, “a right-wing fanatic.”<sup>206</sup> The federal court of appeals overturned the finding because the lawyer’s criticisms were protected by the First Amendment. This case did not involve a category protected under Rule 8.4(g), but it shows that the First Amendment is not a refuge for conservatives only.

Rule 8.4(g) could also backfire because it could be used by wealthier parties to harass poorer adversaries.<sup>207</sup> Consider a sole practitioner who represents tenants in housing disputes. Owners who consider this lawyer an annoyance could monitor her behavior, including statements at public events where she speaks as a lawyer. If she says “Owners are greedy rich people,” she can be charged with bias on the basis of socioeconomic status in violation of the rule. Even if she is ultimately exonerated, the cost in time and money of defending herself might force her to curb her advocacy. And, of course, she might not be exonerated.

**D. The Special Status of Lawyers and the Case of Rule 8.4(g).** Defenders of the rule argue that different standards apply to lawyers.<sup>208</sup> A government license is required to practice

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<sup>202</sup> [Cites]

<sup>203</sup> See *infra* notes 223-27 and accompanying text.

<sup>204</sup> See *Noto v. United States*, 367 U.S. 290 (1961); and *Scales v. United States*, 367 U.S. 203 (1961), for discussions of the content and constitutionality of the Smith Act.

<sup>205</sup> 55 F.3d 1430 (9th Cir. 1995).

<sup>206</sup> *Id.* at 1433-34. See also *Mississippi Bar v. Lumumba*, 912 So. 2d 871, 8xx (2005), where a lawyer was suspended from practice despite the argument in an amicus curiae brief by the (liberal) Constitutional for Constitutional Rights that the lawyer’s criticisms of a judge were protected by the First Amendment.

<sup>207</sup> See *supra* notes 136-42 and accompanying text.

<sup>208</sup> See *Gillers*, *supra* note 7, at x; *Haupt*, *supra* note 116, at x.

law, but the Supreme Court has held that “the Government ‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.’”<sup>209</sup> The Court has indicated that in general the state may not condition the issuance of licenses on restrictions of the licensee’s freedom of speech.<sup>210</sup> Certainly the bar may forbid conduct (including speech) that interferes with the administration of justice, but there is no authority for it to impose any broader restrictions of speech.<sup>211</sup>

Moreover, even rules presented as protecting the administration of justice are not immune from First Amendment review. States have long regulated solicitation by attorneys, and still do.<sup>212</sup> Nonetheless, in *NAACP v. Button*<sup>213</sup> the Court struck down the application of a statute forbidding “improper solicitation” by attorneys to prohibit litigation-related speech by the National Association for the Advancement of Colored People. The Court said: “it is no answer to the constitutional claims asserted by the petitioner to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.”<sup>214</sup> *A fortiori*, Rule 8.4(g), which regulates speech of a kind that has never previously been regulated, must be unconstitutional.

In *Gentile v. State Bar of Nevada*<sup>215</sup> a lawyer was charged with making public statements that would prejudice the pending trial of his client. He argued that the applicable term “substantial likelihood of material prejudice” was unconstitutionally broad. The majority rejected this claim only because the term’s drafters “apparently thought” that this formulation “approximated the clear and present danger test.”<sup>216</sup>

The Court stressed the special status of a lawyer in litigation: “[T]he speech of lawyers *representing clients in pending cases* may be regulated under a less demanding standard than that established for regulation of the press . . . .”<sup>217</sup> The Court quoted a prior lawyer discipline case:

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<sup>209</sup> *Matal v. Tam*, 137 S. Ct. 1744, x (2017) (slip op. at 18) (quoting *Agency for Int’l Development v. Alliance for Open Society Int’l, Inc.*, 570 U.S. x (2013) (slip op., at 8) (some internal quotation marks omitted)).

<sup>210</sup> *Id.*, slip op., at 20.

<sup>211</sup> *See Keiser, supra* note 15, at 632-33.

<sup>212</sup> *See* MODEL RULES PROF’L CONDUCT R. 7.1-7.4 (2017).

<sup>213</sup> 371 U.S. 415 (1963).

<sup>214</sup> *Id.* at 438-39. The justifications offered by the state for the law in *Button* were not flimsy; they were strong enough to persuade three justices to uphold the law. *See id.* at 448 (Harlan, J., dissenting). *See also In re Primus*, 436 U.S. 412 (1978) (holding that solicitation of prospective litigants by a nonprofit organization that undertook litigation as a form of political expression and political association constituted expressive and associational conduct entitled to First Amendment protection).

<sup>215</sup> 501 U.S. 1030, 1031 (1991).

<sup>216</sup> *Id.* at 10xx.

<sup>217</sup> *Id.* at 10xx (emphasis added). Four justices concurring in the result were even more emphatic. They said that the reach of the bar’s prohibitions must be “nor greater than is necessary or essential to the

“[The lawyer] as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the [court] in another quite different capacity, also. As a lawyer he was ‘an officer of the court, and, like the court itself, an instrument . . . of justice . . . .’”<sup>218</sup>

Nonetheless, the Court struck down the sanctions imposed on Gentile because the applicable rule was vague. It provided that a lawyer “may state without elaboration . . . the general nature of the . . . defense.”<sup>219</sup> The Court said the rule “provides insufficient guidance because ‘general’ and ‘elaboration’ are both classic terms of degree. In the context before us, these terms have no settled usage or tradition of interpretation in law. The lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.”<sup>220</sup>

As suggested in *Gentile*, a rule vague on its face may be clarified by judicial or administrative interpretation, and this has saved some disciplinary rules,<sup>221</sup> but not others. The term “offensive personality” was long part of the disciplinary code of California and some other states and had been applied in many cases, but the court in *United States v. Wunsch* held it could find no “single controlling decision—much less a clear line of authority”—that limited the scope of the rule.<sup>222</sup> The terms “bias” and “discrimination” for Rule 8.4(g) likewise have no established meaning in the law, at least as applied to pure speech.

In *In re Sawyer*<sup>223</sup> a lawyer was sanctioned for making a public speech which the disciplinary body found to have impugned the integrity of a judge. The Supreme Court reversed. Justice Brennan said that “lawyers are free to criticize the state of the law.”<sup>224</sup> The Bar Association argued that Sawyer was subject to a stricter standard than other lawyers because she was involved in the case that gave rise to her criticisms.<sup>225</sup> The Court rejected that argument:

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protection of the particular governmental interest involved.” 501 U.S. at 10xx (Kennedy, J., *quoting* *Seattle Times Co. v. Rinehart*, 467 U.S. 20, 32 (1984)).

<sup>218</sup> *Id.* at 10xx (quoting *In re Cohen*, 166 N.E. 2d 672, 675 (1960)).

<sup>219</sup> *Id.* at 10xx.

<sup>220</sup> *Id.* at 10xx.

<sup>221</sup> *See also* *United States v. Hearst*, 638 F.2d 1190, 1197 (9th Cir. 1980) (upholding prohibition on “conduct unbecoming a member of the bar” because the phrase “refers to the legal profession ‘code of behavior’ and ‘lore,’ of which all attorneys are charged with knowledge”), *cert. denied*, 451 U.S. 938 (1981); *In re Beaver*, 181 Wis.2d 12, 510 N.W.2d 129, 133 (1994) (upholding state rule against “offensive personality” in part because of its statutory context and the knowledge of ethical standards imputed to lawyers).

<sup>222</sup> 84 F.3d at 111x.

<sup>223</sup> 360 U.S. 622 (1959).

<sup>224</sup> *Id.* at 631. The opinion added: “And, needless to say, a lawyer may criticize the law enforcement agencies of the Government, and the prosecution, even to the extent of suggesting wrongdoing on their part, without by that token impugning the judiciary.” *Id.* at 632.

<sup>225</sup> *Id.* at 635-36.

A lawyer does not acquire any license to do these things by not being presently engaged in a case. They are equally serious whether he currently is engaged in litigation before the judge or not. We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, other than that they might tend to obstruct the administration of justice.<sup>226</sup>

While she could not make statements that impugned the judge, she “remained equally free [with lawyers not involved in the case] to make critical statements that did not cross that line.”<sup>227</sup>

In *In re Snyder*<sup>228</sup> a lawyer sent a court a letter criticizing its meager pay for lawyers representing indigent clients. The court suspended the lawyer, finding that his letter was “totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts.”<sup>229</sup> The Supreme Court reversed *unanimously*. It acknowledged that a lawyer’s license “requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of Justice”<sup>230</sup> and that “petitioner concedes that the tone of his letter was “harsh, and, indeed it can be read as ill-mannered.”<sup>231</sup> However, the Court held that “a single incident of rudeness or lack of professional courtesy--in this context--does not support a finding of contemptuous or contumacious conduct.”<sup>232</sup>

*Gentile* shows that even rules restricting the speech of lawyers in litigation must be clear and precise. *Sawyer* and *Snyder* show further that even rules designed to protect the administration of justice must be narrow enough to allow criticism, even if it is “harsh” or “ill-mannered.”

Ironically, one organization that agrees that “professional speech” is entitled to full First Amendment protection is – the American Bar Association! In a 2016 Amicus Curia brief supporting doctors challenging a Florida statute that, *inter alia*, forbade doctors to ask patients about guns, the ABA argued: “[T]he Supreme Court has never recognized ‘professional speech’

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<sup>226</sup> *Id.* at 636.

<sup>227</sup> *Id.* The concurring opinion of Justice Stewart indicates a similar attitude. He said that the sanctions imposed on the attorney could stand “if it had been charged or if it had been found that the petitioner attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial. . . . But that was not the charge here, and it is not the ground upon which the petitioner has been disciplined.” *Id.* at 647 (Stewart, J., concurring). The dissent disagreed with the majority only over the scope of the record that should be reviewed. As to lawyers’ freedom of speech it said: “Of course, a lawyer is a person, and he too has a constitutional freedom of utterance, and may exercise it to castigate courts and their administration of justice.” *Id.* at 666 (Frankfurter, J., dissenting).

<sup>228</sup> 472 U.S. 634 (1985).

<sup>229</sup> *Id.* at 637.

<sup>230</sup> *Id.* at 644-45.

<sup>231</sup> *Id.* at 646.

<sup>232</sup> *Id.* at 647.

as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created.”<sup>233</sup> The ABA’s position was upheld by a solid majority of the 11th Circuit *en banc*.<sup>234</sup>

Lower court decisions on discipline of lawyers for their speech are rare, but do offer some additional guidance. In *United States v. Wunsch*<sup>235</sup> the court found that a letter written by a lawyer to a female prosecutor “impugns ‘female lawyers’ and reveals a patently sexist attitude.”<sup>236</sup> However, the court annulled the sanctions imposed because the state law requiring lawyers to “abstain from offensive personality” was both unconstitutionally vague and unconstitutionally overbroad.<sup>237</sup>

Professor Gillers says that “Rule 8.4(g) and its comments are substantially more specific”<sup>238</sup> than the rule in *Wunsch*, but the reverse seems true. Even if “bias or prejudice” covers only *unreasoned* opinions, there is wide dispute about what opinions are unreasoned. The ABA Report supporting Rule 8.4(g) cites several cases that upheld state disciplinary rules against vagueness challenges.<sup>239</sup> However, none of these cases involved a term at all similar to the phrase “verbal or physical conduct that manifests bias or prejudice towards others” in comment 3 and none involved conduct outside the practice of law.

Other factors make *Wunsch* even more damning to 8.4(g). The lawyer there sent a female prosecutor a letter saying: “MALE LAWYERS PLAY BY THE RULES, DISCOVER TRUTH AND RESTORE ORDER. FEMALE LAWYERS ARE OUTSIDE THE LAW, CLOUD TRUTH AND DESTROY ORDER.”<sup>240</sup> The statement was a deliberate insult directed at a specific attorney who was involved in a case with the offender, so it clearly involved the practice of law, and the abuse of another attorney in litigation could easily be seen as prejudicial to the administration of justice. Nonetheless, the court reversed the imposition of sanctions.

In *Standing Committee v. Yagman* a lawyer was suspended by the District Court for impugning the integrity of a judge and interfering with the administration of justice.<sup>241</sup> The Ninth

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<sup>233</sup> *En Banc* Amicus Brief of American Bar Ass’n as *Amicus Curiae*, *Wollschlaeger v. Governor, State of Florida* (Apr. 27, 2016), at [https://www.americanbar.org/content/dam/aba/administrative/amicus/Filed%20ABA%20-%20Wollschlaeger%20-%20En%20Banc%20Brief%20as%20Amicus%20Curiae%20\(as-filed\).authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/amicus/Filed%20ABA%20-%20Wollschlaeger%20-%20En%20Banc%20Brief%20as%20Amicus%20Curiae%20(as-filed).authcheckdam.pdf).

<sup>234</sup> *Wollschlaeger v. Governor, State of Florida*, x F.3d x (Feb. 26, 2017) (*en banc*).

<sup>235</sup> 84 F.3d 1110 (9th Cir. 1996).

<sup>236</sup> *Id.* at 1116.

<sup>237</sup> *Id.* at 1112.

<sup>238</sup> Gillers, *supra* note 7, at [43 n. 158].

<sup>239</sup> Report of the Standing Committee on Ethics and Professional Responsibility 9 & n.9 (Aug. 2016).

<sup>240</sup> 84 F.3d at 111x (*solid capitals in original*).

<sup>241</sup> 856 F. Supp. 1395 (C.D. Cal. 1994).

Circuit reversed.<sup>242</sup> It stressed that the First Amendment requires speech curbs to be narrowly defined. Statements criticizing a judge “may not be punished unless they are capable of being proved true or false” and only if they can “reasonably be interpreted as stating actual facts about their target.”<sup>243</sup> The court held that the statements by Yagman did not satisfy this standard.

The District Court also found that Yagman had “interfere[d] with the administration of justice.”<sup>244</sup> Citing *Gentile*, the Ninth Circuit recognized that “speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice.”<sup>245</sup> It then said:

Given the significant burden this rule places on otherwise protected speech, however, the Court has held that prejudice to the administration of justice must be highly likely before speech may be punished. . . . Statements may be punished only if they “constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.”<sup>246</sup>

Citing *Gentile*, the court said that a lower standard—“a ‘substantial likelihood’ of materially prejudicing the fairness of the proceeding”—applies to lawyers making out-of-court statements only in pending cases.<sup>247</sup> It continued:

The special considerations identified by *Gentile* are of limited concern when no case is pending before the court. . . . We conclude, therefore, that lawyers’ statements unrelated to a matter pending before the court may be sanctioned only if they pose a clear and present danger to the administration of justice.<sup>248</sup>

Some courts have adopted a less demanding standard, but only for conduct alleged to prejudice the administration of justice.<sup>249</sup>

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<sup>242</sup> 55 F.3d 1430 (9th Cir. 1995).

<sup>243</sup> 55 F.3d at 1438.

<sup>244</sup> *Id.* at 1442.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*, citing *Craig v. Harney*, 331 U.S. 367, 376 (1947). *See also In re Kendall*, 712 F.3d 814, 58 V.I. 718 (3d Cir. 2013) (holding that “the First Amendment protects a sitting judge from being criminally punished for his opinion unless that opinion presents a clear and present danger of prejudicing ongoing proceedings”); *United States v. Sutton*, 2007 U.S. Dist. LEXIS 63167, 2007 WL 2462176 (D. Az. 2007) (holding a disciplinary rule unconstitutional because it required only conduct with “a reasonable likelihood that [it] will . . . prejudice the due administration of justice” rather than a *substantial* likelihood of *material* prejudice).

<sup>247</sup> 55 F.3d at 1442, citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991).

<sup>248</sup> 55 F.3d at 1443.

<sup>249</sup> *See Matter of Palmisano*, 70 F.3d. 483, 487 (7th Cir.1995) (calling *Yagman* inconsistent with United States Supreme Court and Seventh Circuit precedent); *In re Wischart*, 281 A.D.2d 23, 31, 721 N.Y.S.2d

Rule 8.4(g) does not even pretend to such a rigorous standard. As noted,<sup>250</sup> Comment 3 simply pronounces *ex cathedra* that actions that violate the rule “undermine confidence in the legal profession and the legal system.”<sup>251</sup> The rule does not even require an allegation that conduct had any impact, much less an “imminent . . . threat” to the administration of justice.<sup>252</sup> Professor Gillers offers two justifications for the rule. First, it “tells the bar as a whole that its licensing authority deems the behavior the rule describes as unacceptable.”<sup>253</sup> “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.”<sup>254</sup>

A bar organization has its own freedom of speech and can take positions, even if they are controversial, but it cannot muzzle lawyers. “A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”<sup>255</sup> As the court said in *Yagman*: “Much speech of public importance . . . would be chilled if the [substantial likelihood of material prejudice] rule in *Gentile* were extended beyond the confines of a pending matter.”<sup>256</sup> 8.4(g) is even more problematic since it does not even require proof of a “substantial likelihood of material prejudice.”

Professor Gillers defends the application of Rule 8.4(g) beyond protection of the administration of justice: “Why should identical biased words or conduct be forbidden in litigation but allowed in all other work lawyers do?”<sup>257</sup> Case law gives the answer: Except as necessary to protect the administration of justice, lawyers have the same free speech rights as anyone else. There is no hint in the cases that the bar may forbid speech simply because it believes that it “manifests bias” or will “undermine confidence in the legal profession and the legal system,”<sup>258</sup> much less that the bar may forbid speech in order to impose a “cultural shift in

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356 (2001) (rejecting *Yagman*; attorney's false, scandalous attacks not protected under First Amendment); *In re Shearin*, 765 A.2d 930, 938 (Del. 2000) (calling *Yagman* inconsistent with Delaware court's holdings on lawyer speech).

<sup>250</sup> See *supra* notes 24-26 and accompanying text.

<sup>251</sup> MODEL RULES PROF'L CONDUCT R. 8, cmt. 3 (2016).

<sup>252</sup> *Craig v. Harney*, 331 U.S. 367, 376 (1947).

<sup>253</sup> Gillers, *supra* note 7, at x.

<sup>254</sup> *Id.* at [6].

<sup>255</sup> *Reed v. Town of Gilbert*, x S. Ct. x, x slip op. at 8 (2015), quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

<sup>256</sup> 55 F.3d at 1443.

<sup>257</sup> Gillers, *supra* note 7, at [27].

<sup>258</sup> MODEL RULES PROF'L CONDUCT R. 8.4, cmt. 3 (2016).

understanding the inherent integrity of people.”<sup>259</sup> A general desire to make lawyers moral does not override these principles.<sup>260</sup>

The constitutional infirmities of Rule 8.4(g) are deepened by the failure of the ABA to point to any existing problems that the rule would solve. In *Edenfield v. Fane*, for example, the Supreme Court struck down an anti-solicitation regulation for CPAs in part because the State Board of Accountancy had not presented any “studies that suggest personal solicitation of prospective business clients by CPAs creates the dangers . . . that the Board claim[ed] to fear,” and had not provided “any anecdotal evidence . . . that validate[d] the Board’s [interests].”<sup>261</sup>

The legislative history of Rule 8.4(g) does not supply the specificity that might save it from unconstitutional vagueness and overbreadth; on the contrary, it reveals a cavalier disregard of the vagueness problem. The words “bias or prejudice” appeared in comment 2 to the old Rule 8.4.<sup>262</sup> The drafters used the words “harassment or discrimination” in new Rule 8.4(g) for the sake of specificity, because a considerable body of law under Title VII and other anti-discrimination statutes and regulations already defines those words.<sup>263</sup> The Chair of the Committee, Myles Link, rejected an earlier draft, saying that its “‘bias or prejudice’ language is ‘amorphous’ and ‘squishy.’”<sup>264</sup>

However, while the final rule itself bars “harassment or discrimination,” new Comment 3 says that harassment or discrimination “includes harmful verbal or physical conduct that manifests bias or prejudice toward others.” Thus the rule also bars other conduct, but gives no hint what that conduct might be. The Comment brings back the very language that Mr. Link rejected as “amorphous” and “squishy” and compounds the vagueness by indicating that other—but unspecified—conduct is also barred. The Comment adds that “The substantive law of antidiscrimination and anti-harassment statutes and case law *may guide* application of paragraph (g),”<sup>265</sup> rather than saying that they *apply to* paragraph (g). Thus any precision in the words “harassment or discrimination” in the rule itself is destroyed by Comment 3.

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<sup>259</sup> See *supra* note 28 and accompanying text. By contrast, the Court upheld a direct mail-solicitation regulation for lawyers where a lengthy study showed the need for the rule. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626–27 (1995).

<sup>260</sup> See *In re Roots*, 762 A.2d 1161, 1169 (R.I. 2000) (“Government censorship can be no more reconciled with our national constitutional standard of freedom of speech and press when done in the guise of morality than if it should be attempted directly.”).

<sup>261</sup> 507 U.S. 761, 771 (1993).

<sup>262</sup> MODEL RULES OF PROF’L CONDUCT R. 8, cmt. 3 (1998).

<sup>263</sup> ABA/BNA Lawyers’ Manual on Professional Conduct, Speakers Explore What Proposed ABA Anti-Bias Rule Really Means (Feb. 24, 2016) (reporting comments of Myles Link) [hereinafter *Speakers Explore*].

<sup>264</sup> *Id.*

<sup>265</sup> MODEL RULES PROF’L CONDUCT R. 8.4, cmt. 3 (2016) (emphasis added).



The comments to the rule also exacerbate its vagueness in other ways. Comment 3 states the justification for the rule: “Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system.”<sup>266</sup> If this means that the rule is violated only when specific conduct has such an effect, how could an attorney discussing the law know whether she might be accused of “undermin[ing] confidence in the legal profession [or] the legal system”? More likely, however, the comment indicates a conclusive presumption of harm so that no proof of specific harm is required in individual cases.<sup>267</sup> This flouts the First Amendment principle that curbs on speech require “narrow specificity.”<sup>268</sup>

The Ethics Committee said the new rule was intended to impose a “cultural shift in understanding the inherent integrity of people.”<sup>269</sup> This phrase, too, compounds the vagueness problem. What does that phrase mean? When does speech betray a *mis*understanding of “the integrity of people”?<sup>270</sup> The First Amendment does not require citizens to curb their speech lest they guess wrong about the meaning of such a cryptic term.<sup>271</sup>

The term “harassment” is also troubling. Comment 3 says: “Harassment *includes* sexual harassment and derogatory or demeaning verbal or physical conduct.”<sup>272</sup> Thus “harassment” clearly is not limited to sexual harassment. The comment also shows that the limitation of sexual harassment in federal law to conduct that is “severe or pervasive”<sup>273</sup> does not necessarily apply to Rule 8.4(g). When is conduct “derogatory or demeaning” and when is it merely impolite? Once again, the rule is hopelessly vague.

It is also far too broad. It is often a lawyer’s duty to engage in “derogatory or demeaning verbal or physical conduct,” as when a lawyer at trial tries to impeach the honesty of an opposing witness. Supreme Court justices have often made “derogatory or demeaning” comments in Court opinions and elsewhere.<sup>274</sup> Debates over legal issues often include “derogatory or demeaning”

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<sup>266</sup> MODEL RULES PROF’L CONDUCT R. 8.4, cmt. 3 (2016).

<sup>267</sup> See *supra* notes 117-35 and accompanying text.

<sup>268</sup> N.A.A.C.P. v. Button, 371 U.S. 415, 432-33 (1963).

<sup>269</sup> See *supra* note 28 and accompanying text.

<sup>270</sup> It has also been noted that Rule 8.4(g) may make it harder to settle employment disputes before the Equal Employment Opportunity Commission because settlements of those cases typically include any and all controversies between the parties, and it would not be ethical for a lawyer to obtain an agreement by the complainant to drop a disciplinary complaint. See *Speakers Explore*, *supra* note 263.

<sup>271</sup> See *supra* notes 150-57 and accompanying text.

<sup>272</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. 3 (2016) (emphasis added).

<sup>273</sup> See *supra* note 40 and accompanying text.

<sup>274</sup> For example, Justice Ruth Ginsburg called Donald Trump a “fake.” See Michael D. Shear, *Ruth Bader Ginsburg Apologizes for Criticizing Donald Trump*, N.Y. TIMES, July 14, 2016, at x. See also Eddie Rodriguez, *5 Awesomely Sarcastic Supreme Court Decisions*, CRACKED (Apr. 22, 2011), available at [http://www.cracked.com/article\\_19147\\_5-awesomely-sarcastic-supreme-court-decisions.html](http://www.cracked.com/article_19147_5-awesomely-sarcastic-supreme-court-decisions.html).

comments. The Supreme Court has often exonerated speech that clearly was “derogatory or demeaning.”<sup>275</sup>

The new rule says that it “does not preclude legitimate advice or advocacy consistent with these Rules.” The proviso raises two questions. First, what is “advice or advocacy”? The phrase comes from former comment 3 to Rule 8.4(d), which applied to lawyers only “in the course of representing a client.”<sup>276</sup> Thus it is not clear that “legitimate advice or advocacy” includes other activities, such statements at a bar event, CLE program, or law school class.

And what advice or advocacy is legitimate? There seem to be no cases construing that term in the former comment.<sup>277</sup> The Ethics Committee’s 2015 proposal provided: “Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation.”<sup>278</sup> The Committee added that this proviso “is a clearer standard than ‘legitimate advocacy’ for disciplinary counsel and state courts to apply, as it incorporates concepts already known in the law—‘material’ and ‘relevant.’”<sup>279</sup> Thus, the ABA’s decision to omit this phrase and to revert to the “legitimate advocacy” phrase seems to be a deliberate choice to be vague.

When is it “legitimate” to manifest “bias or prejudice”? By definition, a biased or prejudiced statement is unreasoned. Perhaps the “legitimate advocacy” proviso is a null set because it is *never* legitimate to make an unreasoned statement. Professor Haupt claims: “The terms ‘advice’ and ‘advocacy’ presuppose a basis in legal doctrine, that is, the shared methodology of the profession, rather than exogenous factors such as the religious, political, or philosophical beliefs of the professional.”<sup>280</sup> Really? To begin with, this concept of “legitimate advice or advocacy” does not at all mirror the language of Rule 8.4(g).<sup>281</sup> Moreover, many prominent lawyers have viewed their role as not just technicians of positive law, but as wise

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<sup>275</sup> See *supra* notes 162-67 and accompanying text.

<sup>276</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. 3 (2014).

<sup>277</sup> “Legitimate advocacy respecting the foregoing factors [race, sex, etc.] does not violate paragraph (d).” Rule 8.4, comment 3 (2014).

<sup>278</sup> *Standing Committee, Draft Proposal, supra* note 28, at 2.

<sup>279</sup> *Id.* at 5.

<sup>280</sup> Haupt, *supra* note 116, at [20]. She also says that “the client’s expectation will be that advice will be rendered based on the insights of the legal profession” rather than on “exogenous factors.” *Id.* However, she provides no evidence that this is true of all clients.

<sup>281</sup> The rule makes no mention of political or philosophical views. Moreover, the rule addresses “conduct . . . that is harassment or discrimination,” not the bases for the lawyer’s advice or advocacy. A lawyer who advises a client that she has a legal right to fire a particular employee but that it would be a sin to do so has based advice on religious belief but has not committed “discrimination on the basis of . . . religion” or in any other way violated the rule.

counselors advising their clients on ethics and prudence as well as the law.<sup>282</sup> This could include what Professor Haupt dismisses as “exogenous factors such as the religious, political, or philosophical beliefs of the professional.” Professor Haupt’s claim underscores the uncertain meaning of “legitimate advice or advocacy.” Again, a lawyer can only guess how a tribunal might apply this proviso in a given case.

Even if the “legitimate advocacy” proviso were clear and broad, it would probably not save Rule 8.4(g). The First Amendment protects even speech that is “outrageous.”<sup>283</sup> The bar may curb speech to prevent prejudice to the administration of justice, but outside that sphere lawyers should be as free to speak as anyone else—whether the bar considers their speech “legitimate advocacy” or not.<sup>284</sup>

The extreme breadth and vagueness of the rule are exacerbated by the low “reasonably should know” standard of culpability and the “quasi-criminal” nature of the possible penalties.<sup>285</sup> To protect speech, the Supreme Court has imposed an “actual malice” requirement on defamation laws, even for civil liability.<sup>286</sup>

For “quasi-criminal” penalties like disciplinary sanctions, a high degree of culpability is particularly important. In *Virginia v. Black*<sup>287</sup> the Court struck down a statute that made the burning of a cross “*prima facie* evidence of an intent to intimidate a person or group of persons.”<sup>288</sup> Thus the statute placed on the defendant a “burden of producing evidence tending to rebut the presumption” of an intent to intimidate,<sup>289</sup> even though the burden remained on the state to prove that intent.<sup>290</sup> The Court held that “a State, consistent with the First Amendment, may ban cross burning” only if it is “carried out with the intent to intimidate.”<sup>291</sup>

By contrast, Rule 8.4(g) could impose of “quasi-criminal” penalties for speech (including speech on political issues) even if it were admitted that the accused honestly believed that her statements did not discriminate if, in the subsequent opinion of the members of the tribunal, the

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<sup>282</sup> See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2-3 (1993) asserting that lawyers were once valued for offering prudence and practical solutions, but are now viewed as merely sources of technical knowledge).

<sup>283</sup> See *supra* notes 143-71 and accompanying text.

<sup>284</sup> See *supra* notes 209-61 and accompanying text.

<sup>285</sup> See *supra* notes 51-58 and accompanying text.

<sup>286</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>287</sup> 538 U.S. 343 (2003).

<sup>288</sup> Va. Code Ann. § 18.2-423 (1996).

<sup>289</sup> 538 U.S. at 395 (Thomas, J., dissenting, quoting *Martin v. Phillips*, 369 S.E. 2d 397, 399 (1988)).

<sup>290</sup> 538 U.S. at 352.

<sup>291</sup> 538 U.S. at 347.

statements were discriminatory. That standard clearly violated the principles laid down in cases like *Virginia v. Black*. It “would create an unacceptable risk of the suppression of ideas.”<sup>292</sup>

Some supporters of Rule 8.4(g) analogize to the ABA’s Code of Judicial Conduct,<sup>293</sup> which provides: “A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . .”; and “A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice” on enumerated bases.<sup>294</sup> There are two problems with the analogy. First, the code for judges is limited to “the performance of judicial duties” and “proceedings before the court.” It does not encompass law-related debates, bar gatherings, law school classes, and other activities covered by Rule 8.4(g).

Second, the role of judges in the legal system differs greatly from that of lawyers. Judges must be impartial; lawyers are expected to be zealous, partisan advocates. Note that the judicial code includes “political affiliation” among the prohibited bases of “bias or prejudice;” Rule 8.4(g) does not. It undermines the administration of justice if a judge favors a political party, even outside “the performance of judicial duties.” It does not undermine justice if a lawyer favors a political party at a public debate or bar event, or in her law office. The rules for judges are stricter because their duties are stricter.

Professor Haupt sees no problem with applying Rule 8.4(g) to presentations in a CLE program. She posits a speaker who has “articulated the arguments expressed in” dissents of Supreme Court justices.<sup>295</sup> Such statements satisfy the rule because they “would be squarely based on legal doctrine.”<sup>296</sup> Personal opinions may be restricted because the “primary purpose [of CLE programs] is not for an individual lawyer to speak his own mind.”<sup>297</sup> This is a troubling claim. First, dissents by justices are just dissents; they are not the law any more than anyone else’s opinions. And what if a lawyer quotes a dissent and then adds “I agree”? Or gives additional reasons for agreeing with a dissent. If a lawyer may reiterate a dissenting opinion, why should any other speech that is not otherwise illegal be barred by Rule 8.4(g)?

More important, CLE programs are not limited to technical exegeses. It is often an important part of CLE programs “for an individual lawyer to speak his own mind.” Does Professor Haupt believe that a lawyer who does this is unprofessional and may be punished if, in the opinion of a disciplinary tribunal, a statement “manifests bias or prejudice”? If so, then the fears of critics of the rule are fully justified.

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<sup>292</sup> *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 855 n. 13 (1984) (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 797 (1984)).

<sup>293</sup> See Gillers, *supra* note x, at [15-16].

<sup>294</sup> MODEL CODE JUD’L CONDUCT R. 2.3 (B-C) (2007).

<sup>295</sup> Haupt, *supra* note 116, at [17].

<sup>296</sup> *Id.* at [17].

<sup>297</sup> *Id.* at [17].

Free speech is important not only to the speaker but also to listeners.<sup>298</sup> In *Gentile* Justice Kennedy noted: “To the extent the press and public rely upon attorneys for information because attorneys are well-informed, this may prove the value to the public of speech by members of the bar.”<sup>299</sup> A lawyer speaking in a CLE program or law school—indeed, anywhere—may convince listeners because the lawyer may have some expertise that listeners lack and may have given the topic more study and thought than listeners had. To silence the speaker by threat of professional punishment denies the rights of listeners who may find her statements entirely persuasive.

Professor Gillers argues that any First Amendment issues raised by Rule 8.4(g) can be handled in case-by-case litigation.<sup>300</sup> Dean Deborah Rhode also argues that we can trust disciplinary committees and courts not to apply the rule to protected speech.<sup>301</sup> This is not how the First Amendment works. Those subject to speech restrictions are entitled to know *in advance* what the boundaries are; they cannot be forced into case-by-case Russian roulette in which a wrong guess about the scope of a rule can destroy one’s career.<sup>302</sup>

An earlier draft of comment 3 said the rule “does not apply to . . . conduct protected by the First Amendment.”<sup>303</sup> Since this statement merely acknowledged the existence of the supreme law of the land, it should not have saved the rule from its unconstitutional breadth and vagueness. However, even this concession was dropped in the final comment. Professor Gillers argues that such a comment is unnecessary because “[a]ny lawyer charged with violating Rule 8.4(g) remains free to argue that as applied to his or her conduct the rule is constitutional. They [*sic*] will be able to do that whether or not the rule says, for example, ‘subject to the First Amendment.’”<sup>304</sup> Gillers is right here; if a rule is constitutionally defective, adding “subject to the First Amendment” will not save it. Again, citizens are not obliged to play case-law roulette; in order not to “chill” protected speech, a law must be clear and precise about what is forbidden.<sup>305</sup> Rule 8.4(g) is not.

**E. The End of Free Speech?** Perhaps proponents of Rule 8.4(g) do not intend to comply with First Amendment precedent; perhaps they intend to initiate a “cultural shift” in the meaning of the First Amendment and of the role of free speech in our society. It may once have been

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<sup>298</sup> See *Board of Educ. v. Pico*, 457 U.S. 853, 866-69 (1982) (plurality opinion) (citing a First Amendment “right to receive ideas”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“the Constitution protects the right to receive information and ideas”).

<sup>299</sup> 501 U.S. at 10xx (Kennedy, J., concurring in the result).

<sup>300</sup> See Gillers, *supra* note 7, at x.

<sup>301</sup> See <https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s>.

<sup>302</sup> See *supra* notes 150-57 and accompanying text.

<sup>303</sup> *Standing Committee, Draft Proposal*, *supra* note 28, at 2.

<sup>304</sup> Gillers, *supra* note 7, at [38].

<sup>305</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972). See also *supra* notes 150-57 and accompanying text.

axiomatic that free speech protected not only thoughts we like but also “the thought we hate.”<sup>306</sup> Being offended by the speech of others was once considered a small price for vigorous debate in a democracy. The political right strived to muzzle speech; the left struggled to keep it free. Now the left seeks to throttle speech, as in college speech codes<sup>307</sup> and cases like *R.A.V.*<sup>308</sup> Proponents of the rule cite the special role of lawyers, but they acknowledge no value in free speech for lawyers or anyone else. The speech code imposed by 8.4(g) may not be the end goal but merely one more step in the campaign to end free speech and to substitute a standard of partisan political correctness for what any American is allowed to say.

## V. Should the Bar Dictate Employment Law and What Clients Lawyers May Reject?

To “discriminate” means to choose. In a free society, individuals are generally allowed to make their own choices; in authoritarian societies, government restricts freedom by dictating how citizens must behave in a wide range of situations. In a free society, government restricts liberty and mandates behavior only when there are compelling reasons to do so and restrictions on freedom do not trammel on important rights of conscience. In America today the federal, state, and local governments restrict choices on some bases and not others.

Should the legal profession restrict the freedom of choice of lawyers when our governments choose not to? Some argue that the “special responsibilities and ethical duties of lawyers to clients, the public, and the legal profession” require that they “be held to higher ethical standards.”<sup>309</sup> These higher standards are called “essential to maintain the integrity of the legal profession and those who represent it.”<sup>310</sup> This is certainly true with respect to activities of lawyers that could deceive clients or impair the administration of justice, but it does not seem that special employment rules are necessary to “maintain the integrity of the legal profession.”

Consider one effect of rule 8.4(g): it abolishes mandatory age-based retirement policies for law firm partners. The Age Discrimination in Employment Act exempts partners from the general prohibition on such policies.<sup>311</sup> Rule 8.4(g) forbids discrimination based on age and makes *no* exception for mandatory-retirement policies for partners. The Committee Report supporting the rule notes that the ABA had previously adopted a recommendation against age

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<sup>306</sup> See *supra* note 165 and accompanying text.

<sup>307</sup> See *supra* note 189 and accompanying text.

<sup>308</sup> See *supra* notes 175-76 and accompanying text.

<sup>309</sup> Nicole Lancia, *New Rule, New York: A Bifocal Approach to Discipline and Discrimination*, 22 GEO. J. LEGAL ETHICS 949, 949-50 (2009).

<sup>310</sup> *Id.* at 950.

<sup>311</sup> Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621; Age Discrimination in Employment Act Amendments of 1978, 29 U.S.C. §§ 624 & 631(a).

limits for partners,<sup>312</sup> but it seems that no state has made this position a binding rule. The Committee's reference to the prior ABA action shows that it recognized the issue, but it said nothing about moving from a recommendation to a mandate.<sup>313</sup>

Rule 8.4(g) also forbids discrimination on the basis of "marital status." This is even more remarkable. Hundreds of laws make distinctions based on marital status, as the Supreme Court noted in its same-sex marriage decision.<sup>314</sup> Health insurance plans, for example, often include the insured's spouse. A law firm with such a plan discriminates on the basis of marital status, which would violate the rule. There seems to have been no discussion of this major consequence of the new rule. If those involved were simply unaware of this effect, they were incredibly careless.

The rule forbids discrimination on many other bases—such as sexual orientation, gender identity, and socioeconomic status—that are not illegal in many states. As noted,<sup>315</sup> the expansion of Rule 8.4 to conduct that is merely related to the practice of law and does not interfere with the administration of justice raises many novel questions for the employment practices of lawyers regarding these bases, such as whether a firm can hire associates only from top-tier law firms.<sup>316</sup>

Suppose, for example, that a state bar imposes religious hiring quotas on law firms in order to remedy religious discrimination. Whatever one thinks of such policies, it should be legislatures and not bar associations that decide whether to impose them.<sup>317</sup> Once the bar arrogates authority to impose labor law for lawyers, where should it stop? If it bars discrimination on the basis of non-conforming gender behavior, should it bar discrimination on the basis of gambling, smoking, or carnivorousness/vegetarianism? Should it dictate minimum (or maximum) compensation for lawyers? For non-lawyer employees of law firms? Maximum hours? Time-and-a-half for working nights or weekends? Again, the function of disciplinary rules is to protect the integrity of the justice system. They should not be used to comprehensively regulate the lives and practices of lawyers.

Admission to the bar is not a privilege that a bar association may subject to conditions unnecessary to protect clients and the administration of justice; until now, professional rules have respected that limitation. To go further inevitably courts strife. In our diverse society, people

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<sup>312</sup> Report of the Standing Committee on Ethics and Professional Responsibility 11 (Aug. 2016). The recommendation is contained in Resolution 10A of the ABA House of Delegates (Aug. 2007).

<sup>313</sup> The question of whether the new rule would prohibit age-based mandatory retirement policies was also raised by a question at a panel discussion in San Diego on February 5, 2016. A report of that event said that this was one of the questions to which no one had a clear answer. *See Speakers Explore, supra* note 263.

<sup>314</sup> *Obergefell v. Hodges*, x U.S. x (2016)

<sup>315</sup> *See supra* notes 45-50 and accompanying text.

<sup>316</sup> This might be deemed discrimination on the basis of socioeconomic status. *See supra* note 188 and accompanying text.

<sup>317</sup> *See Volokh, Speech Code, supra* note 73, at 71, 72.

have very different opinions about proper behavior. It is inappropriate for a bar association to dictate propriety in matters where democratic processes have left people free to make their own choices. The imposition of restrictions is especially threatening to minorities that may have values different from those of those who control the bar.

It is said that “Public confidence in the legal system follows from its general trust [and] its belief that all have equal access to justice in the legal system, free from discrimination by those who represent them.”<sup>318</sup> However, Rule 8.4 specifically permits race discrimination in favor of certain groups.<sup>319</sup> Moreover, the quoted statement refers only to discrimination against clients, and even for that claim no evidence is offered to support it. Lawyers are permitted to discriminate in employment in many ways, including discrimination “to promote diversity” and rejection of clients of whose positions the lawyer does not approve.<sup>320</sup> Rule 8.4(g) does not purport to change this. Rather, it is a highly selective and politically partisan ban on certain kinds of speech and behavior. No evidence has been offered that this rule is needed to protect “[p]ublic confidence in the legal system,” and it seems highly unlikely that the rule is necessary to that purpose or that it would even improve public confidence.

## VI. How Did This Happen, and What Should Be Done?

How could the august ABA have approved such a blatantly unconstitutional stricture? It would be comforting to ascribe the act to extraordinary carelessness, but that explanation is implausible. The defects of the rule are too obvious and the lawyers involved in the rule’s creation were too skilled and had too many warnings to have been unaware; they surely knew what they were doing. The ABA’s action, then, was political, even at the cost of flouting the Constitution.<sup>321</sup> Apparently those behind Rule 8.4(g) oppose free speech for the politically incorrect and they hope that the prestige of the ABA would help to persuade first state courts and then the Supreme Court to gut the established constitutional principles protecting speech.

The ABA’s action demonstrates once again how extremely politically partisan the ABA has become. In recent decades the ABA has increasingly taken partisan positions on many issues having nothing to do with the administration of justice or the professional conduct of lawyers.<sup>322</sup> What can be done about this? This is a vital question that demands more attention than it can be given here, but a few comments will be offered.

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<sup>318</sup> *Id.* at 959.

<sup>319</sup> MODEL RULES PROF’L CONDUCT R. 8, cmt. 4 (2016), quoted *supra* at note 45.

<sup>320</sup> See *supra* notes 103-05, 111 and accompanying text.

<sup>321</sup> See Herbert W. Titus & William J. Olson, “PC” Politics Drove ABA’s Proposed Rules Changes, NAT’L L.J., Aug. 8, 2016.

<sup>322</sup> See, e.g., Philip Hager, *Lawyers Quit ABA Over Abortion Stand*, L.A. TIMES, Nov. 4, 1992 (reporting resignation of over 3,000 lawyers who believed that “the abortion rights resolution and other positions have undermined the association’s traditional role as the nonpartisan voice of the profession”).



The ABA enjoys quasi-official status. It has the power to accredit law schools for important purposes and it plays an official role in the vetting of nominees for federal judgeships.<sup>323</sup> This privileged status is premised on the ABA's being a politically neutral umbrella organization representing the diversity of American lawyers. That premise is false. The ABA should be recognized for what it is; an ideologically driven interest group. The ABA's privileged status should be revoked. If that is not possible, at least other organizations should be given equal status with the ABA. For example, the Federalist Society could be given the same power to accredit law schools that the ABA now possesses alone.

## VII. Conclusion

ABA Model Rule 8.4(g) violates the First Amendment. It also regulates conduct by lawyers that does not interfere with the administration of justice or injure clients, which is not an appropriate function of the bar. Since the ABA will not repeal this rule any time soon, the next best solution is for lawyers to oppose it and prevent its adoption by the states. Where the rule is adopted, courts should pronounce it unconstitutional on its face.

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<sup>323</sup> “Under Title 34, Chapter VI, §602 of the Code of Federal Regulations, the Council and the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar are recognized by the United States Department of Education (DOE) as the accrediting agency for programs that lead to the J.D. degree.” Am. Bar Ass’n, *The Law School Accreditation Process*, at [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2016\\_accreditation\\_brochure\\_final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2016_accreditation_brochure_final.authcheckdam.pdf). Also, the ABA’s Standing Committee on the Federal Judiciary has since 1953 evaluated the professional competence, integrity and judicial temperament” of federal judicial nominees. Am. Bar Ass’n, *Standing Committee on the Federal Judiciary: What It Is and How It Works* (2009), at [https://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal\\_judiciary09.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/scfedjud/federal_judiciary09.authcheckdam.pdf).