

DISCRIMINATORY LAWYERS IN A DISCRIMINATORY BAR: RULE 8.4(G) OF THE MODEL RULES OF PROFESSIONAL RESPONSIBILITY

Lady Justice is blindfolded; her servants are not. Instead, because they are human, their predilections and aversions abound. A central challenge of the legal system, then, is how to manage the inevitable tension between impartial justice and biased agents. In some situations, the response is a strict rule against bias. Judges, for example, must avoid even “the appearance of impropriety.”¹ Similarly, the Model Code of Judicial Conduct prohibits membership in organizations that “practice[] invidious discrimination.”² But in other situations, bias is allowed. For example, an attorney can escape court-appointed representation when “the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”³ We doubt the ability of attorneys to advocate for people or positions they find morally repugnant, and we recognize that clients will suffer from the resulting deficient representation.⁴ More generally, attorneys need not volunteer to represent any particular client.⁵ Even though this means some clients might not receive the most skilled attorney, it also means that lawyers have considerable ability to avoid clients of whom they disapprove.

1. ABA MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR ASS’N 2011). This extends to a ban on manifesting bias and prejudice. *Id.* at r. 2.3(B).

2. *Id.* at r. 3.6(A). See generally Andrew L. Kaufman, *Judicial Correctness Meets Constitutional Correctness: Section 2C of the Code of Judicial Conduct*, 32 HOFSTRA L. REV. 1293 (2004) (discussing, and noting problems with, this rule).

3. MODEL RULES OF PROF’L RESPONSIBILITY r. 6.2(c) (AM. BAR ASS’N 2016) [hereinafter MODEL RULES].

4. But see David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1030–31 (1995) (discussing an NAACP lawyer’s representation of the Klan on a First Amendment issue).

5. MODEL RULES, *supra* note 3, at r. 6.2 cmt. 1.

The American Bar Association's most recent attempt to deal with the tension between bias and justice is Model Rule 8.4(g).⁶ The Rule bans both "harassment" and "discrimination" by lawyers against eleven protected classes. It applies to essentially every aspect of an attorney's professional life—to "conduct related to the practice of law."⁷

There are two opposing reactions to this Rule. Some argue it is needed to prevent sexual harassment, invidious discrimination, and other evils.⁸ Others criticize the Rule, claiming it will suffocate vigorous advocacy and exclude unpopular views from the legal profession.⁹

This Note ventures into that debate. Part I explores the two positions on Rule 8.4(g). Those who favor it desire to promote

6. The ABA's Model Rules of Professional Responsibility are not themselves binding on attorneys. They are nevertheless extremely influential; many states follow the ABA's guidance.

7. MODEL RULES, *supra* note 3, at r. 8.4(g). In this sense, Rule 8.4(g) is similar to the Model Code of Judicial Conduct's prohibition on judicial membership in organizations that "practice invidious discrimination." *See supra* note 2 and accompanying text.

8. *See, e.g.*, Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS (forthcoming 2017), <https://ssrn.com/abstract=2870053> [<https://perma.cc/2MRG-TJKP>]; Elizabeth Olsen, *Goodbye to 'Honeys' in Court, by Vote of American Bar Association*, N.Y. TIMES, Aug. 10, 2016, at B3; Noah Feldman, *Lawyers Can Be Zealous Without Being Nasty*, BLOOMBERG VIEW (Aug. 7, 2016 10:30 AM), <https://www.bloomberg.com/view/articles/2016-08-07/lawyers-can-be-zealous-without-being-nasty> [<http://perma.cc/EL9X-CE5J>]; The Federalist Society, *Debate: ABA Model Rule 8.4*, YOUTUBE (Mar. 4, 2017), <https://youtu.be/cOivGxOUx4g> [<https://perma.cc/Q77N-HT8L>] [hereinafter Weiner, *Debate*] (remarks from Robert Weiner).

9. *See, e.g.*, Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g): The First Amendment and "Conduct Related to the Practice of Law"*, 30 GEO. J. LEGAL ETHICS (forthcoming 2017), <https://ssrn.com/abstract=2888204> [<https://perma.cc/SJ5N-QNVL>]; Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, HERITAGE FOUND. (Oct. 6, 2016) (Legal Memo. No. 191), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf> [<https://perma.cc/ECK9-9MVZ>]; Edwin Meese III & Kelly J. Shackelford, *How the lawyers plan to stifle speech and faith*, WASH. TIMES (Aug. 17, 2016), <http://www.washingtontimes.com/news/2016/aug/17/how-the-lawyers-plan-to-stifle-speech-and-faith> [<https://perma.cc/2NFD-SE9Z>]; Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, WASH. POST (Aug. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2> [<https://perma.cc/82CF-V7V4>].

professional decorum, create an inclusive profession, and protect minority clients. Those opposed are concerned about chilling First Amendment activities and depriving clients with discriminatory views of effective representation. Part II then discusses how the Rule might be interpreted or amended so as to vindicate many of the Rule's objectives while satisfying many of the legitimate concerns about over-broad regulations. These amendments would narrow the definition of "discrimination," interpret broadly the existing protection for "legitimate advocacy," and restrict the scope of regulated activity. Finally, Part III addresses concerns that the proposed amended rule leaves too much room for discrimination. It argues that preventing harassment through informal means avoids concerns about establishing a "speech code" while still distancing the profession from discriminatory actions. At the same time, it allows the Bar to protect freedom of expression and the institutional diversity needed for meaningful discourse.

I. ARGUMENTS FOR AND AGAINST THE RULE

The debate over Rule 8.4(g) occurs on two levels. One is interpretive: how far does the Rule actually reach? That is the focus of Part I.A. The other is substantive: should the Rule reach as far as it does? Parts I.B and I.C consider substantive arguments for and against the Rule.

A. *Rule 8.4(g) is susceptible to multiple interpretations*

We begin with the interpretive debate. Rule 8.4(g) states:

It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of 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.¹⁰

10. MODEL RULES, *supra* note 3, at r. 8.4(g).

Unfortunately, the Rule itself does not define its key terms: “harassment,” “discrimination,” and “conduct related to the practice of law.” For that, one must look to the comments. Comment 3 discusses what is meant by “harassment” and “discrimination,” stating that:

[D]iscrimination 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).¹¹

Comment 4 defines “conduct related to the practice of law” to include “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.”¹²

Yet even with this commentary, substantial ambiguity remains about what the Rule actually prohibits. Under a narrow interpretation, the Rule mirrors existing non-discrimination and anti-harassment laws.¹³ For example, sexual harassment is only actionable under Title VII of the Civil Rights Act of 1964 if it is “sufficiently severe or pervasive,”¹⁴ and the Rule may simply be an internal means of preventing what existing laws

11. *Id.* at r. 8.4(g) cmt. 3. According to Comment 4, the ban on discrimination does not reach “diversity and inclusion” initiatives, so affirmative action hiring policies are allowed. *Id.* at r. 8.4(g) cmt. 4. However, this creates concerns about viewpoint discrimination. See *infra* notes 33–38 and accompanying text. It also indicates that the Rule is capacious. Otherwise, no exception for “diversity and inclusion” initiatives would be needed.

12. *Id.* at r. 8.4(g) cmt. 4.

13. For example, some of the Rule’s supporters argue that the Rule targets conduct, not speech. See Weiner, *Debate*, *supra* note 8 (beginning at 29:20). But see *infra* note 53 and accompanying text.

14. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986); see also *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); V. Blair Druhan, Note, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV. 355, 356 (2013).

already proscribe.¹⁵ Comment 3's reference to the "substantive law of antidiscrimination and anti-harassment statutes and case law"¹⁶ supports this reading. Similarly, situating the Rule in the Model Rules of Professional *Conduct*, in a provision entitled *Misconduct*, one might conclude that the Rule focuses on *conduct*, not speech.¹⁷

The narrow reading is not the only permissible one, however. Comment 3 says statutes and case law "may" guide the Rule's application—not that they "must."¹⁸ And terms like "harmful," "bias," "prejudice," "derogatory," and "demeaning" are expansive. Under a sufficiently broad reading, "bias or prejudice" could extend to mere disapproval or criticism, and "conduct related to the practice of law" could include what is said between friends over lunch in the law firm cafeteria.

Thus, the text is susceptible to multiple interpretations. Some who oppose the Rule tend to rely on a sweeping interpretation. By contrast, many who support it adhere to a narrower reading. (Of course, some could support even the most expansive reading of the Rule.) How one interprets the Rule's text influences how they view its substance. And those substantive discussions must take place—the task to which this Note now turns.

15. For example, in one jurisdiction an ethics violation had to be predicated on a criminal conviction. See Lorelei Laird, *Discrimination and harassment will be legal ethics violations under ABA model rule*, ABA J. (Aug. 8, 2016 6:36 PM), http://www.abajournal.com/news/article/house_of_delegates_strongly_agrees_to_rule_making_discrimination_and_harass [https://perma.cc/W3CG-XSSZ]. Rule 8.4(g) might simply be a more efficient means of reaching the same result by allowing the Bar to determine for itself whether wrongdoing had occurred.

16. MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 3.

17. This was a central argument raised by one of the Rule's supporters, Robert Weiner, at the Federalist Society's 2017 National Student Symposium at Columbia Law School. See Weiner, *Debate*, *supra* note 8 (beginning at 29:15).

18. In fairness, the ABA notes that Rule 8.4(g) might permit what substantive law prohibits. MYLES V. LYNK, ABA STANDING COMM. ON ETHICS AND PROF'L RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES 1, 7 (Aug. 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [https://perma.cc/3XY9-UP7R] [hereinafter LYNK REPORT]. But that is only because "substantive law . . . is not necessarily dispositive in the disciplinary context." *Id.* The mismatch can go both ways.

B. *The legal profession has a strong interest in preventing harassment and discrimination*

Substantively, there are at least three reasons for supporting Rule 8.4(g)—regardless of whether it is broad or narrow in scope. A central motivation appears to be protecting those who experience discrimination and harassment. The government already bans discrimination and harassment in some aspects of life, and “exclusion” is a cardinal sin to most in modern society. Codifying that moral judgment is quite understandable. Those who support the rule point out instances where attorneys have been sexually harassed or otherwise subject to odious discrimination.¹⁹

A second reason is that discrimination and harassment may “undermine confidence in the legal profession and the legal system.”²⁰ If attorneys make offensive remarks or treat others as inferiors, yet suffer no consequences, then those in protected classes will begin to doubt whether the legal system truly protects their interests. Just as institutions that failed to speak out against Jim Crow entrenched segregation, the Bar’s failure to address discrimination supports discrimination.²¹ Thus, if a lawyer turns away a would-be client based on race or religion, that individual would reasonably conclude that the legal system did not protect his interests.

A third reason for the Rule is that lawyers have long been viewed as a quasi-aristocracy.²² That means lawyers have obligations beyond those that apply to the broader community,

19. See, e.g., Gillers, *supra* note 8, at 5 n.21, 46–48; see also Blackman, *supra* note 9, at 4.

20. MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 3.

21. Cf. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627 (1991) (“The selection of jurors [in a civil case] represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race.”); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that enforcing racially discriminatory housing covenants was state action for Fourteenth Amendment purposes).

22. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 254–58 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000).

and they ought to model acceptable conduct.²³ Therefore, the ABA House of Delegates adopted Rule 8.4(g). It is not alone: 25 jurisdictions already have rules restricting discrimination and harassment in some fashion, even if most do not go as far as Rule 8.4(g).²⁴

C. *There are concerns about chilling First Amendment activities and legal representation*

As applied to the “harassment” aspect of the Rule, the above rationales are generally accepted. This might be because the term “harassment” conjures up legal standards about severity and pervasiveness, thus narrowing the zone of possible ambiguity. Laws against harassment have been applied, tested, and upheld over the years, so similar rules of professional responsibility ruffle few feathers.²⁵

Rule 8.4(g) is opposed so strongly, however, because of concerns about nondiscrimination. “Discrimination” is, by itself, nothing more than choosing between options.²⁶ The legal system only cares about discrimination when that choice turns on

23. See LYNK REPORT, *supra* note 18, at 1 (“Our rules of professional conduct require more than mere compliance with the law.” (quoting ABA President Paulette Brown)).

24. *Id.* at 5 n.11. Thirteen other jurisdictions have restrictions on employment in their comments. *Id.* at 6 n.12. However, most states do not go as far as the ABA. See *infra* Part II; cf. Gillers, *supra* note 8, at 13 (“Although courts in twenty-five American jurisdictions . . . have adopted anti-bias rules in some form, those rules differ widely.” (footnote omitted)).

25. I recognize that “unwelcome conduct” is a potentially broad term and that “harassment” is but a subset of “discrimination” more broadly. If harassment means more under the Rule than it does under Title VII, the concerns discussed below also apply to harassment. This is also not to say that there have never been unconstitutional applications of Title VII. See Volokh, *supra* note 9 (briefly noting one recent, possibly unconstitutional application).

26. See, e.g., *Discrimination*, 1 THE WOLTERS KLUWER BOUVIER LAW DICTIONARY: DESK EDITION 847 (2012) (“Perceiving or treating people, or things, differently from one another.”); *Discriminate*, 4 THE OXFORD ENGLISH DICTIONARY 757–58 (2d ed. 1989) (“To make or constitute a difference in or between; to distinguish, differentiate.”); *Discriminate*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 564 (2d ed. 1987) (“to make or constitute a distinction”); *Discriminate*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 648 (1981) (“distinguish between or among”); see also *Discrimination*, BLACK’S LAW DICTIONARY 566 (10th ed. 2014) (“The intellectual faculty of noting differences and similarities.”).

an impermissible basis; that is, when it is morally wrong.²⁷ So as society modifies the definition of what is morally wrong to include new behaviors, the Rule's prohibitions also change. Although this is a concern under a narrow interpretation of Rule 8.4(g), it is most prominent under the broad reading.

Consider the example of a hypothetical public interest firm (call it "Attorneys for Marriage") that disagrees with *Obergefell v. Hodges*²⁸ on both religious and constitutional grounds.²⁹ If an AFM lawyer publicly criticizes *Obergefell*, she could easily violate Rule 8.4(g). Under a broad reading of the Rule, she "manifests bias or prejudice" against the LGBTQ community when she expresses her belief that marriage should be between one man and one woman. As a practicing attorney speaking on behalf of a public interest law firm, her conduct is "related to the practice of law" (but may not, depending on the circumstances, constitute "advocacy" on a particular client's behalf).

Comment 3's statement that the attorney's words or deeds must be "harmful" does not quell these fears. Although one might read "harmful" to require an immediate victim (such as those created by a face-to-face confrontation), the text does not compel that reading. In fact, it makes little sense to require an immediate victim given that one of the Rule's purposes is protecting the profession's reputation. What is said behind closed doors might not harm the intended audience, but it has the potential to do so.³⁰ There are also more fundamental concerns about what is harmful (and who decides). Is it subjective offense, or is it an objective injury more concerned with *how* something was said, as opposed to *what* was said?³¹

27. See Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in MATTERS OF FAITH: RELIGIOUS EXPERIENCE AND LEGAL RESPONSE 194, 197 (Austin Sarat ed., 2012) ("It is not 'discrimination' that is wrong; instead, it is *wrongful* discrimination that is wrong.").

28. 135 S. Ct. 2584 (2015).

29. *Obergefell* held that under the Fourteenth Amendment, same-sex couples could not be deprived of the "fundamental right" to a civil marriage. *Id.* at 2604–05.

30. See Gillers, *supra* note 8, at 30 ("Cases have not required proof of an effect on the individual who is the target of biased or harassing conduct. Rather, they talk about the harm to the legal profession or the system or goals of justice.").

31. Professor Gillers argues that "the question should be whether the words or comments harm the justice system because they create the impression that the rule of law can be distorted by name calling grounded in identity." Gillers, *supra*

Reading the Rule this expansively creates free speech concerns of both the legal and political varieties. On the legal front, the Supreme Court has repeatedly held that rules of professional responsibility can violate the First Amendment.³² And as the Court held in *R.A.V. v. City of St. Paul*³³ and elsewhere, viewpoint discrimination is unconstitutional.³⁴ If Rule 8.4(g) is used to discipline lawyers with unpopular views, it implicates the Constitution.³⁵

The Rule's defenders might reply that *R.A.V.* stated (in dicta) that Title VII's ban on sex discrimination could be justified under the "secondary effects" doctrine.³⁶ Moreover, they might point out, several lower courts have squarely upheld nondiscrimination rules against free speech challenges.³⁷ This reply would be well-founded. To the extent Rule 8.4(g) mimics Title VII, it may well survive constitutional scrutiny. But that ignores the full weight of

note 8, at 30–31. Thus, "some comments will be mild enough that they should not be seen as harmful," but other comments will violate the Rule even if the immediate target of the comment did not object. *Id.* at 31. However, this limitation cannot be found in the plain text of Rule 8.4(g)—it is imported into the rule. *See id.* at 31 (looking at Title VII even though "the parallel is not exact" (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998))). Because the Rule's mens rea requirement is negligence, *see* MODEL RULES, *supra* note 3, at r. 8.4(g) ("knows or reasonably should know"), it is a malleable standard. This gives no real protection against expansive definitions of harm.

32. *See, e.g.,* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054 (1991) (plurality opinion) (articulating this rule); *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (invalidating a rule of judicial ethics).

33. 505 U.S. 377 (1992).

34. *Id.* at 391.

35. *See* TEX. ATT'Y GEN. OP. No. KP-0123, at 3–5 (Dec. 20, 2016) (concluding that Rule 8.4(g) is likely unconstitutional on free speech, freedom of religion, and freedom of association grounds); 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, 638 (2015) (arguing this type of rule is unconstitutional).

36. 505 U.S. at 389. The secondary effects doctrine "provides that a regulation will be treated as content-neutral and subject to intermediate scrutiny, despite its content-discriminatory form, if the primary purpose of the regulation is to control the secondary effects rather than the primary effects of speech." John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 292 (2009).

37. *See, e.g.,* *Booth v. Pasco Cnty.*, 757 F.3d 1198, 1212 (11th Cir. 2014); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534 (M.D. Fla. 1991). *But see* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) ("When laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications."); *id.* at 206–10 (discussing cases that question anti-harassment laws); Blackman, *supra* note 9, at 5 n.10 (same).

the objection. By requiring severity or pervasiveness, Title VII is more about conduct than words. Rule 8.4(g) seemingly goes beyond that, perhaps restricting the offhand comment made to a coworker or the remark muttered in presumed confidence at a law firm happy hour.³⁸ As the Rule's critics interpret things, all that is needed under the Rule is that an attorney demonstrate bias or prejudice; mere words are enough. And the lower the disciplinary bar, the closer the Constitution looms.

These First Amendment concerns exist for all lawyers, but they are especially high for "cause lawyers." Such lawyers place a high premium on "political ideology, public policy, and moral commitment," and they often represent minority interests.³⁹ Consider again the hypothetical cause lawyer from Attorneys for Marriage. She holds views that will likely be deemed biased or prejudiced. To be sure, the Rule would protect AFM's right to represent clients.⁴⁰ But lawyers do more than represent clients. They talk to coworkers, go out to dinner, hire new associates, and more. Comment 4 reflects this reality when it defines "conduct related to the practice of law" to include "interacting with . . . coworkers" and "participating in . . . social activities in connection with the practice of law."⁴¹ But regulating internal conduct at AFM (whether it be lunch conversations or hiring practices) generates freedom of association concerns.⁴²

38. See MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 4 (defining "conduct related to the practice of law" to include "interacting with . . . coworkers" and "participating in . . . social activities in connection with the practice of law"). They also admit that as-applied challenges can be raised. See Weiner, *Debate*, *supra* note 8, at (beginning at 30:45).

39. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING 3, 4 (Austin Sarat & Stuart Scheingold eds., 1998).

40. MODEL RULES, *supra* note 3, at r. 8.4(g) & cmt. 5.

41. *Id.* at r. 8.4(g) cmt. 4.

42. Imagine a law firm existed solely to represent Christians on religious liberty matters (a so-called "legal ministry"). The "legal ministry" could understandably wish to hire only Christians, an act that is arguably protected under Title VII. See 42 U.S.C. § 2000e-1(a) (2012); *cf.* *Spencer v. World Vision, Inc.*, 570 F. Supp. 2d 1279, 1283 (W.D. Wash. 2008), *aff'd*, 619 F.3d 1109 (9th Cir. 2010), and *aff'd*, 633 F.3d 723 (9th Cir. 2011). Yet under Rule 8.4(g), the group could not so limit its hiring practices because it excludes other religions. This reading is confirmed by the fact that Comment 4 protects "diversity and inclusion initiatives," which includes "implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees." MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 4. If the

The Rule's supporters will argue that 8.4(g) does not restrain "legitimate advice or advocacy." That is true. But what is "illegitimate" advocacy?⁴³ Does that refer to the issues being litigated, or the manner in which they are litigated? And who decides what is "illegitimate"? Because litigation can be a form of expression,⁴⁴ a broad reading of the Rule creates constitutional problems.

Moving beyond the legal objections, there are policy objections. Because America is a nation of 320 million people, its legal profession is a mosaic: attorneys are black and white, Muslim and Christian, male and female, gay and straight, married and single. Some came to America recently; others can trace their ancestry back to the *Mayflower*—or earlier. And as much as the ABA thinks these distinctions are morally irrelevant, many people disagree. For instance, it appears that many who criticize Rule 8.4(g) believe that sexual orientation, gender identity, and religion are morally acceptable grounds for deci-

Rule did not regulate hiring and firing, then the specific protection for affirmative action programs is superfluous.

Professor Gillers argues that lawyers could not turn away *clients* because of the client's religion or other protected category. See Gillers, *supra* note 8, at 33 (writing that Rule 8.4(g) "limits 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"); *id.* at 39 (writing that "Rule 8.4(g) would indeed restrict lawyers" who, for example, refused on religious grounds to draft a prenuptial agreement for a same-sex couple in response to a hypothetical raised by the United States Conference of Catholic Bishops). Of course, he concedes that a First Amendment defense is available. See *id.* at 37–39.

43. "Legitimate" modifies "advocacy" as well as "advice." This is because the "series-qualifier canon" instructs that unless there is "some other indication, the modifier reaches the entire enumeration." ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 147 (2012) (citing cases). For example, in interpreting the Fourth Amendment's protection "against unreasonable searches and seizures," "the adjective *unreasonable* qualif[ies] the noun *seizures* as well as the noun *searches*." *Id.* (quoting U.S. CONST. amend. IV); see also *Lockhart v. United States*, 136 S. Ct. 958, 970–72 (2016) (Kagan, J., dissenting) (discussing the series-qualifier canon). At the Federalist Society debate on the Rule, the Rule's supporter could not give a definition of "illegitimate" advocacy. See Weiner, *Debate*, *supra* note 8 (beginning at 1:06:15).

44. See *NAACP v. Button*, 371 U.S. 415, 429 (1963) (stating that for the NAACP, litigation is "a form of political expression" protected by the First Amendment); *id.* at 431 ("For [a group such as the NAACP], association for litigation may be the most effective form of political association.").

sionmaking. Those views, though controversial, are deeply held and contribute to diversity.⁴⁵

II. THREE PROPOSED AMENDMENTS

As Part I demonstrated, Rule 8.4(g) has its supporters and detractors. But because the Rule is susceptible to multiple interpretations, it is hard to know who is right. This Part therefore proposes three amendments in hopes of quelling some of the concerns while still vindicating some of the objectives.

A. *Narrowly define "harassment" and "discrimination"*

Rule 8.4(g)'s substantive standards should mirror those in existing anti-harassment and nondiscrimination laws.⁴⁶ Several states already do this by prohibiting only "unlawful" discrimination.⁴⁷ This does not mean disciplinary proceedings must come after criminal or civil proceedings; it only means the substantive standards should be the same.⁴⁸

Mirroring existing laws has several components. In part, it requires a narrow definition of what is a "harmful" word or deed. As debates about campus speech codes demonstrate, some believe that merely expressing disagreement is harmful.⁴⁹ Given our "profound national commitment" to the free exchange of ideas,⁵⁰ that cannot be the rule for lawyers. Instead, harm should be judged by an objective standard: would a reasonably sensitive individual consider it "hostile or abusive"?⁵¹

45. Of course, discrimination is often unambiguously evil. And as I argue below, certain forms of discrimination should be disciplined. An important question, though, is how severe or pervasive the discrimination must be before discipline is involved.

46. Professor Blackman makes the same suggestion. See Blackman, *supra* note 9, at 23–24.

47. See, e.g., CAL. RULES OF PROF'L CONDUCT r. 2-400(B); ILL. RULES OF PROF'L CONDUCT r. 8.4(j); N.Y. RULES OF PROF'L CONDUCT r. 8.4(g); WASH. RULES OF PROF'L CONDUCT r. 8.4(g).

48. See *Cincinnati Bar Assn. v. Young*, 731 N.E.2d 631, 638–39 (Ohio 2000).

49. See, e.g., KIRSTEN POWERS, *THE SILENCING: HOW THE LEFT IS KILLING FREE SPEECH* 14 (2015) ("Sometimes, the mere suggestion of holding a debate is cast as an offense.").

50. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

51. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environ-

Is the prohibited conduct sufficiently pervasive or severe? This approach means that what is “harmful” must look far more like physical action than “mere” words. This is because unless “mere” words are so harmful that they constitute fighting words (or some other class of unprotected speech), they are protected against content-based regulation.⁵²

In addition to avoiding many of the constitutional issues, mirroring existing laws provides attorneys with (relatively) clear guidance about what is acceptable behavior. It permits reliance on decades of precedent, thus avoiding the uncertainty that always accompanies new rules. That clarity benefits those who might otherwise discriminate against or harass others, and it also makes it easier to identify where conduct crosses the line.

This amendment would not render the Rule irrelevant. One of the reasons for the Rule is a belief that disciplinary proceedings should not depend on a court or agency’s finding of discrimination.⁵³ Narrowly defining “harassment” and “discrimination” does not compromise that goal. Moreover, the Rule holds attorneys to a higher standard than the rest of the population when it protects more classes of individuals than do many existing laws.⁵⁴

ment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.”); *see id.* at 23 (“[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance. The effect on the employee’s psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.”).

52. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 409 (1989) (citing, *inter alia*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942)) (discussing categories of unprotected speech); *cf.* Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1148 (2013) (“Hurt feelings are not legally cognizable harms. On the other hand, speech that poses a threat is beyond the ambit of free speech protections.”).

53. *See supra* note 15. Illinois, for instance, predicates professional misconduct on a finding of discrimination by “a court or administrative agency.” ILL. RULES OF PROF’L CONDUCT r. 8.4(j).

54. *See, e.g., Rotunda, supra* note 9, at 6 (“Many states have no law banning gender identification discrimination.”). This Note does not address whether Rule 8.4(g) *should* protect the eleven categories that it does. That is a discussion for an-

B. Broadly construe “legitimate advocacy”

One particularly confusing aspect of Rule 8.4(g) is its promise that it would not affect “legitimate advice or advocacy.” Under one possible interpretation, “legitimate” is a moral judgment of overall ends. For instance, Attorneys for Marriage might be considered to engage in illegitimate advocacy because it wants to undo *Obergefell*. But this reading runs contrary to the professional ideal of being permitted to represent *any* client and the goals that client might have. Thus, “legitimate” must refer to something involved in the process of advocacy, not the overall objective. Yet even then, a controversial discussion of a protected class might be relevant to the legal issue: even if that discussion is not identical to the end goal. For example, a federal prosecutor’s closing argument might criticize an accused terrorist’s religious motivations as being un-American and oppressive. More controversially, an attorney litigating an affirmative action case might invoke the widely-criticized “mismatch theory,” which says that affirmative action admits minorities to schools they are not qualified to attend.⁵⁵

At the same time, however, there are legitimate concerns about how attorneys do their jobs. For example, even though Comment 5 states that a discriminatory peremptory challenge does not automatically violate Rule 8.4(g),⁵⁶ it is easy to see why such a challenge might violate the Rule in certain cases.⁵⁷ Moreover, attacking a witness because she is black,

other day. Cf. LOUIS ARMSTRONG, *So Little Time (So Much To Do)*, on COMPLETE LOUIS ARMSTRONG DECCA SESSIONS 1935–1946 (Mosaic Records 2009) (1938).

55. Justice Scalia once referenced the “mismatch theory” in oral arguments. See Transcript of Oral Argument at 67–68, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981). He then faced a sharply negative reaction. See, e.g., Dorothy Brown, *Scalia and the misguided ‘mismatch’ theory*, CNN (Dec. 14, 2015 10:35 AM), <http://www.cnn.com/2015/12/13/opinions/brown-scalia-mismatch-theory> [<https://perma.cc/NSD8-39X6>]; Anemona Hartocollis, *Fresh Fuel in a Long Academic Debate*, N.Y. TIMES, Dec. 11, 2015, at A22.

56. MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 5.

57. See, e.g., FLA. RULES OF PROF’L CONDUCT r. 4-8.4(d); NEB. RULES OF PROF’L CONDUCT § 3-508.4(d). One possible example of an impermissible challenge is an unconstitutional one. Cf. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992). For an in-depth discussion of this issue, see Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209 (2003).

transgender, or a member of any other protected class turns the courtroom into a hostile environment.

The adjective “legitimate” is not capable of resolving this dilemma. A better approach is to follow states that seem to define legitimate advocacy almost as a matter of *relevance*: if the protected class is an issue in the case, then arguments about that class are immune from disciplinary proceedings.⁵⁸ From that baseline, I would add that irrelevant arguments are still protected if they are not sufficiently harmful and unreasonable to warrant discipline. Defining “legitimate” in this way protects witnesses (and the legal system’s overall reputation) while still permitting vigorous advocacy. Moreover, it tracks what judges already do when they enforce civility⁵⁹ and exclude irrelevant or unduly prejudicial evidence.⁶⁰

C. Restrict the scope of regulated activity

Rule 8.4(g) regulates more conduct than many state rules.⁶¹ For example, Massachusetts only governs what attorneys do when “appearing in a professional capacity before a tribunal.”⁶² Texas has a broader rule, but it still requires a “connection to an adjudicatory proceeding.”⁶³ These rules make sense as part of maintaining decorum.⁶⁴ But Rule 8.4(g) goes further when it covers “interacting with . . . coworkers,” “operating or managing a law firm or

58. See N.D. RULES OF PROF’L CONDUCT r. 8.4(f); MASS. RULES OF PROF’L CONDUCT r. 3.4(i); NEB. RULES OF PROF’L CONDUCT § 3-508.4(d); N.M. RULES OF PROF’L CONDUCT r. 16-300; *In re Thomsen*, 837 N.E.2d 1011, 1012 (Ind. 2005) (per curiam). This approach could be read into rules against appealing to bias: assuming bias is irrelevant, relevant arguments are protected. See COLO. RULES OF PROF’L CONDUCT r. 8.4(g); IDAHO RULES OF PROF’L CONDUCT r. 4.4(a)(1).

59. See, e.g., FED. R. EVID. 611(a)(3) (instructing judges to “protect witnesses [on cross-examination] from harassment or undue embarrassment”); *Paramount Comm’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 52 (Del. 1994) (considering an attorney’s “astonishing lack of professionalism and civility”).

60. See FED. R. EVID. 401–403.

61. See Blackman, *supra* note 9, at 13–15 (overviewing and categorizing state rules).

62. MASS. RULES OF PROF’L CONDUCT r. 3.4(i); see also N.M. RULES OF PROF’L CONDUCT r. 16-300.

63. TEX. RULES OF PROF’L CONDUCT r. 5.08(a); see also R.I. RULES OF PROF’L CONDUCT r. 8.4(d).

64. See, e.g., FED. R. EVID. 611(a)(3); *Paramount*, 637 A.2d at 52.

law practice; and participating in bar association, business or social activities in connection with the practice of law.”⁶⁵

This expansive scope is less problematic if harassment and discrimination are narrowly defined. But if the Rule is easily broken, then the aspects of life regulated by the Rule should be narrow.⁶⁶ Otherwise, the Rule will be worse than the problem it addresses. Biased comments do more damage to the legal profession when said in a courtroom than when said over drinks at a firm-sponsored happy hour. There may still be consequences, of course, but profession-wide concerns are not significantly implicated. And when “cause law firms” are subject to the Rule, concerns about the profession’s reputation are almost non-existent: if the firm publicly advocates for discriminatory laws, it should be irrelevant that similarly discriminatory statements are uttered inside the firm.

Similarly, Rule 8.4(g) is motivated in part by a desire to ensure that minorities know that the legal profession and the courts will safeguard minority interests. But referring to a monolithic “legal profession” lacks nuance. Legal institutions are interconnected, but an array of disconnected professionals work in that system. What one attorney says or does is not *automatically* imputed to others. Yes, imputations are sometimes warranted. This is particularly true if the court is directly involved, like when an attorney lies to a judge or breaks the law. But a lawyer who simply holds unpopular and biased beliefs does not inevitably reflect on other lawyers. Indeed, other attorneys can criticize his conduct. Assuming that discriminatory words or deeds always reflect on others fails to appreciate the subtleties of reality.

III. TWO FORMS OF DIVERSITY

Admittedly, the amendments just proposed restrict the Rule’s reach. But formal rules should not seek to prevent all

65. MODEL RULES, *supra* note 3, at r. 8.4(g) cmt. 4. A few other states have rules like Model Rule 8.4(g). *See, e.g.*, IND. RULES OF PROF’L CONDUCT r. 8.4(g); MD. RULES OF PROF’L CONDUCT r. 8.4(e); N.J. RULES OF PROF’L CONDUCT r. 8.4(g).

66. A similar point is also true. *See* Blackman, *supra* note 9, at 18 (“As speech bears a weaker and weaker connection to the delivery of legal services, the bar’s justification in regulating it becomes less and less compelling.”).

discriminatory words and deeds. Instead, the ABA should tolerate different beliefs even if it means individual lawyers will be intolerant. Moreover, the ABA is not without other options. Stated differently, there are two forms of diversity at play: *institutional* (referring to an organization's openness to intolerant and offensive views) and *interpersonal* (referring to how individual attorneys and firms interact with the public, other attorneys, and other firms). Rule 8.4(g) focuses on interpersonal diversity because it wants individual lawyers to not discriminate in various ways. It largely ignores institutional diversity because it risks excluding lawyers who disagree from the majority of the legal profession. This blend of institutional and interpersonal diversity is the wrong one, however.

If the ABA is committed to institutional diversity, it will not encourage jurisdictions to formally discipline those who disagree with certain moral judgments.⁶⁷ This matters if the ABA is to avoid becoming just another special interest group. Moreover, it is rooted in the American ideal of freedom to differ. As the Supreme Court wrote in a different context, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."⁶⁸ Put differently, a tolerant and inclusive society includes "intolerant" people. It allows individuals to make their own moral judgments. That type of diversity means lawyers should not be subject to professional discipline—up to and including disbarment—for expressing uncouth or unpopular views.

If the Rule excludes (in the name of diversity) those with unpopular views, the legal profession ironically experiences a *decrease* in diversity. This affects non-lawyers because it makes it difficult for "biased" citizens to find like-minded attorneys. This, in turn, affects the quality of representation those clients receive. As Lincoln once wrote, "when you lack interest in the case the job

67. See JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE 87 (2016) ("Tolerance is the most important civic aspiration. It means a willingness to accept genuine difference, including profound moral disagreement."); see also *supra* Part I.C.

68. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

will very likely lack skill and diligence in the performance.”⁶⁹ This truth is even more potent when the lawyer actively disagrees with the position she must advocate. Even if one believes Rule 8.4(g) is a good idea, one must recognize that it will change how lawyers and clients deal with unpopular positions.⁷⁰

Protections for institutional diversity should affect how the ABA pursues interpersonal diversity. Rule 8.4(g) tries to mandate interpersonal diversity by disciplining noncompliant lawyers, but tolerance can also be promoted through informal means. Indeed, such methods are often more effective than formal rules. Through public proclamations and education campaigns, the ABA can demonstrate the conduct it wants lawyers to embrace.⁷¹ It can file amicus briefs⁷² and start initiatives to better represent minority

69. ABRAHAM LINCOLN, *Fragment: Notes for a Law Lecture* (July 1, 1850?), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81, 82 (Roy P. Basler ed., 1953).

70. Cf. TOCQUEVILLE, *supra* note 22, at 500 (“If to save the life of a man one cuts off his arm, I understand it; but I do not want someone to assure me that he is going to show himself as adroit as if he were not one-armed.”).

71. See, e.g., ABA PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 17–40 (Apr. 2010), http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf [<https://perma.cc/S4QF-6KEJ>] (recommending diversity-enhancing steps for law schools, law firms, the government, and bar associations).

72. See, e.g., Brief of the American Bar Association as Amicus Curiae in Support of Respondents and Urging Affirmance at 1, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981) (supporting affirmative action); Brief of Amicus Curiae American Bar Association in Support of Petitioners at 1, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-571 & 14-574) (supporting same-sex marriage); Brief of Amicus Curiae The American Bar Association in Support of Respondent Edith Schlain Windsor on the Merits Question at 1, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (opposing the Defense of Marriage Act, which defined marriage as an exclusively heterosexual union); Brief of the American Bar Association as Amicus Curiae in Support of Respondents, *Christian Legal Society v. Martinez* at 1–4, 561 U.S. 661 (2010) (No. 08-1371) (supporting a nondiscrimination policy that kept a Christian student group from becoming a recognized student organization); Brief of Amicus Curiae American Bar Association in Support of Petitioners at 3, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (opposing laws against homosexual conduct); Brief of the American Bar Association as Amicus Curiae in Support of Respondent at 3, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (supporting non-discrimination laws that would require the Boy Scouts to retain a gay scoutmaster); Brief of the American Bar Association as Amicus Curiae in Support of Respondents at 2–3, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (opposing a state law that restricted the ability to prevent sexual orientation discrimination).

communities.⁷³ It can also use reasoned discussion to reinforce norms of tolerance and inclusion, resorting to formal discipline only in rare cases.⁷⁴ This approach is not moral relativism—the majority still expresses its moral commitments. But it uses persuasion and personal influence, not the rules of professional responsibility. The unpersuaded and intolerant attorney remains a member of the legal community.

IV. CONCLUSION

Lawyers come from many backgrounds and perspectives. The American tradition respects that diversity by protecting freedom of association and expression. This is in tension with the ABA's desire to represent all persons equally, prevent harmful discrimination, and exemplify morality. Model Rule 8.4(g) attempts to resolve the tension, but it goes too far in one direction and fails to appreciate institutional diversity. It also implicates the First Amendment.

The ABA should therefore amend the Rule. It should encourage states to rely on informal regulation more than formal disciplinary procedures. Finally, it should commit itself to protecting institutional diversity by not excluding those who hold unpopular views.

*Caleb C. Wolanek**

73. See, e.g., *Office of Diversity and Inclusion*, ABA, <http://www.americanbar.org/groups/diversity.html> [<https://perma.cc/BK7A-T4LQ>] (last accessed May 16, 2017).

74. That is, in the cases that violate the Rule as amended in Part II of this Note.

* J.D. 2017, Harvard Law School; B.A. 2014, Auburn University (Political Science). I am grateful to those who discussed Rule 8.4(g) with me, especially those who took the time to carefully explain why they supported it. Professor Andrew Kaufman supplied insightful feedback on earlier drafts, and Joshua Craddock and Christopher Goodnow helped refine this Note even further. Any mistakes are, of course, mine.