ABA Model Rules of Professional Responsibility
New Rule 8.4(g): Threat or Menace?
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A. The Old Model Rule

1. Old Rule 8.4

It is professional misconduct for a lawyer to:
. . . .
(d) engage in conduct that is prejudicial to the administration of justice . . . .

2. Old Rule 8.4, Comment [3]

A lawyer who, in course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's findings that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

3. ABA Rationale
- Black Letter Rule
- Diversity & Anti-Discrimination Goals: SOGI Emphasis
- For the "Public Good"
- "Twenty-five jurisdictions have not waited for the ABA to act . . . ."
- Alleged gender bias
- Cultural Shift (i.e., unrelated to clients, corrective justice, the courts, etc.)
- Scope:

"This [current] limitation fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms). The comment also does not address harassment at all, even though the judicial rules do so."

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4. The Road to Amending Rule 8.4

- Process
- Sponsors
  STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
  SECTION ON CIVIL RIGHTS AND SOCIAL JUSTICE COMMISSION ON DISABILITY RIGHTS
  DIVERSITY & INCLUSION 360 COMMISSION
  COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION
  COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY
  COMMISSION ON WOMEN IN THE PROFESSION
- Comments
- Initial Concerns

5. The Initial Response

B. The New Model Rule

1. August 2016 Revision

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.

2. August 2016 Revision – Comments

a. Comment [3] - Harassment
b. Comment [4] – "Conduct related to the practice of law . . . ."
c. Comment [5] – Peremptory challenges and social activism safe harbor

3. Major Changes

- Moved from Comment to black letter Rule
- "Prejudicial to the Administration of Justice" no longer a limiting factor
- Relationship to client representation and courtroom behavior no longer a limiting factor
- "Related to the Practice of Law"
- Addition of ethnicity, marital status, and gender identity (now 11 categories)
- New focus on "harassment" and "discrimination," not "bias and prejudice"

C. Hypotheticals

Hypothetical 1: Discrimination

Lenny Lawyer says, "I abhor the idle rich. That guy makes me sick."[1]

Hypothetical 2: Discrimination and Harassment

Lori Lawyer is approached by a homosexual couple who want her to represent them in adopting a child. Lori refuses.

Note: Rule 1.16, Rule 1.10, Rule 1.7 on "representing a client in violation of these rules."

Hypothetical 3: Chit Games & Membership in "Discriminatory" Organizations

Lawyer Chit Games is a member of a church whose pastor has said that civil recognition of same-sex marriage is "harmful to society" and that transgender restrooms "pose a threat" to "our daughters."

[1] See Rotunda article, Appendix B, below, suggests this hypothetical.

D. Threat or Menace? The Guts of the Problems with the Rule[2]

1. Model Rule 8.4(g) operates as a speech code for attorneys.

The new rule will be used to chill lawyers' expression of disfavored political, social, and religious viewpoints on various political, religious, and social issues. A rule that threatens to discipline a lawyer for his or her speech on such issues should be rejected as a detriment to freedom of speech, free exercise of religion, and freedom of political belief in a diverse society that continually births movements for justice in a variety of contexts.

Influential First Amendment scholar and editor of *The Washington Post*'s daily legal blog, *The Volokh Conspiracy*, UCLA Professor Eugene Volokh has described the new rule as a speech code for lawyers, explaining:[3]

> Or say that you're at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.
>
> Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."

The proposed rule would create a multitude of potential problems for attorneys who serve on non-profit boards, speak on panels, teach at law

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[2] The information in this section has been developed and outlined by Kim Colby, Director of CLS' Center for Law and Religious Freedom. I am using her drafts with permission.

[3] Eugene Volokh, "*A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in Law-Related Social Activities*," The Washington 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/?tid=a_inl&utm_term=.f4beacf8a086.

schools, or otherwise engage in public discussions of current political, social, and religious issues.

a. By expanding its coverage to include all "conduct related to the practice of law," the proposed Rule 8.4(g) encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment.

Proposed Rule 8.4(g) raises troubling new concerns for every attorney because it explicitly applies to all of an attorney's "conduct related to the practice of law." Comment [4] explicitly delineates the Rule's extensive reach: "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." (Emphasis supplied.)

This is a breathtaking expansion of the previous comment's scope. Predecessor Comment [3] applied only to "actions when prejudicial to the administration of justice." By deleting that qualifying phrase, the new Rule 8.4(g) also greatly expands the reach of the rule into attorneys' lives.

Indeed, the substantive question becomes, "what conduct does Rule 8.4(g) *not* reach?" Virtually everything a lawyer does is "conduct related to the practice of law." Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Most likely, the rule includes all "business or social activities in connection with the practice of law" because there is no real way to delineate between the two. So much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.

For example, activities likely to fall within the proposed Rule 8.4(g)'s scope include:

- teaching CLE courses at conferences or through webinars
- teaching law school classes as a faculty or adjunct faculty member
- publishing law review articles, blogposts, and op-eds
- providing guest lectures at law school classes
- speaking at public events
- participating in panel discussions that touch on controversial political, religious, and social viewpoints

- serving on the boards of various religious or other charitable institutions
- lending informal legal advice to non-profits
- serving at legal aid clinics
- serving political or social action organizations
- lobbying for or against various legal issues
- serving one's religious congregation
- serving one's alma mater college, if it is a religious institution of higher education
- serving religious ministries that serve prisoners, the underprivileged, the homeless, the abused, substance abusers, and other vulnerable populations
- serving fraternities or sororities
- serving political parties
- serving social justice organizations
- other pro bono work that involves advocating controversial socioeconomic, religious, or other issues

Lest these examples seem unlikely, recall that the nationally acclaimed Atlanta fire chief, Chief Kelvin Cochran, lost his job in 2014 because he published a book based on lessons he taught his Sunday school class at his church, which included his traditional religious beliefs regarding sexual conduct and marriage. In moving testimony before a congressional committee this summer, former Chief Cochran described the racial harassment he experienced in the 1980s when he joined the Shreveport Fire Department. But as he notes, he was never fired for his race. Instead, he was fired in 2014 for his religious beliefs. His testimony is a somber reminder that in America today people are losing their jobs because their religious beliefs are disfavored by some government officials.[4]

b. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their religious congregations, religious schools and colleges, and other religious ministries if proposed Rule 8.4(g) were adopted.

As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." For example, a lawyer may be asked to

[4] Chief Cochran's written statement, which was submitted to the House Committee on Oversight and Government Reform for its July 12, 2016, *Hearing on Religious Liberty and HR 2802, the First Amendment Defense Act*, can be read at https://oversight.house.gov/wp-content/uploads/2016/07/2016-07-12-Kelvin-Cochran-Testimony.pdf. His oral testimony can be watched at https://oversight.house.gov/hearing/religious-liberty-and-h-r-2802-the-first-amendment-defense-act-fada/ (beginning at 41:47 minutes).

help craft her church's policy regarding whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not be disciplined for volunteer legal work she performs for her church or her alma mater.

The rule will do immense harm to the good work that many lawyers do for religious institutions. A lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law." Because proposed Rule 8.4(g) seems to prohibit lawyers providing counsel, whether paid or volunteer, in these contexts, the rule will have a stifling and chilling effect on lawyer's free speech and free exercise of religion when serving religious congregations and institutions.

c. Attorneys' public speech on political, social, cultural, and religious topics would be subject to discipline if proposed Rule 8.4(g) were adopted.

Lawyers often are asked to speak to community groups, classes, and other audiences about current legal issues of the day. They frequently participate in panel discussions about the pros and cons of various legal questions regarding sensitive social and political issues of the day. Lawyers are asked to speak *because they are lawyers*. Of course, lawyers' speaking engagements often have a dual purpose of increasing the lawyer's visibility and creating new business opportunities.

Furthermore, "verbal conduct" includes written communication. Is a law professor or adjunct faculty member subject to discipline for a law review article that explores controversial topics, uses controversial words to make a point, or expresses unpopular viewpoints? Must lawyers forswear writing blog posts or letters to the editor because someone may file a complaint with the bar because that person perceives the speech as "manifest[ing] bias or prejudice towards others"? If so, public discourse and civil society will suffer from the ideological paralysis that proposed Rule 8.4(g) imposes on lawyers who are often at the forefront of new movements and unpopular causes.

It would also seem that all public speaking by lawyers on legal issues falls within proposed Rule 8.4(g)'s prohibition. But even if some public speaking were to fall inside the line of "conduct related to the practice of law," how is a lawyer to know which speech is safe and which will subject him to potential discipline? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of

"sexual orientation" or "gender identity" as a protected category in a nondiscrimination law being debated in the state legislature? Is a lawyer subject to discipline if she testifies before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in Model Rule 8.4(g)? Is a candidate for office subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Sadly, we live at a time when many people, including lawyers, are willing to suppress the free speech of those with whom they disagree. At a time when freedom of speech needs more breathing space, not less, proposed Rule 8.4(g) chills attorneys' speech.

d. Attorneys' membership in religious, social, or political organizations may be subject to discipline if proposed Rule 8.4(g) is adopted.

Proposed Rule 8.4(g) raises severe doubts about the ability of lawyers to participate in political, social, or religious organizations that promote traditional values regarding sexual conduct and marriage. For example, last year, the California Supreme Court adopted a disciplinary rule that prohibited all California state judges from participating in Boy Scouts because of the organization's teaching regarding sexual conduct. Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, *available at* http://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

Would proposed Rule 8.4(g) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Would it subject lawyers to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage? These are serious concerns that mitigate against adoption of proposed Rule 8.4(g).

Proposed Rule 8.4(g) raises additional concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs or that holds to the religious belief that marriage is only between a man and a woman, or numerous other religious beliefs implicated by the proposed rule's strictures.

2. Proposed Rule 8.4(g) would institutionalize viewpoint discrimination against many lawyers' public speech on current political, religious, and social issues.

As interpreted through ABA Comment [4], Proposed Rule 8.4(g) explicitly protects some viewpoints over others by allowing lawyers to "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." Because "conduct" includes "verbal conduct," the proposed rule would impermissibly favor speech that "promote[s] diversity and inclusion" over speech that does not.

But that is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens, including lawyers, to express one viewpoint on a particular subject but penalize citizens, including lawyers, for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination,"and that "[t]he 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." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Proposed Rule 8.4(g) explicitly promotes one viewpoint over others.

Even more importantly, what speech or action does or does not "promote diversity and inclusion" completely depends on the beholder's subjective beliefs. Where one person sees inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of conformity, uniformity, or orthodoxy.

Because enforcement of Rule 8.4(g) gives governmental actors unbridled discretion to determine which speech is permissible and which is impermissible, which speech "promote[s] diversity and inclusion" and which does not, the rule clearly countenances viewpoint discrimination based on governmental actors' subjective biases. Courts have recognized that giving any government official such unbridled discretion to suppress citizens' free speech is unconstitutional. *See, e.g., Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.,* 457 F.3d 376, 384 (4th Cir. 2006).

3. A troubling gap exists between protected and unprotected speech under proposed Rule 8.4(g).

Proposed Rule 8.4(g) cursorily states that it "does not preclude legitimate advice or advocacy *consistent with these rules.*" But the qualifying phrase "consistent with these rules" makes Rule 8.4(g) utterly circular. Like the

proverbial dog chasing its tail, Rule 8.4(g) protects "legitimate advice or advocacy" only if it is "consistent with" Rule 8.4(g). Speech is permitted by Rule 8.4(g) if it is permitted by Rule 8.4(g).

This circularity itself compounds the threat proposed Rule 8.4(g) poses to attorneys' freedom of speech. The epitome of an unconstitutionally vague rule, Rule 8.4 violates the Fourteenth Amendment as well as the First Amendment. Again, who decides what speech is permissible? By what standards? It is not good for the profession or for a free society for lawyers to be potentially subject to disciplinary action every time they speak or write on a topic that may cause someone to disagree and file a disciplinary complaint to silence the attorney.

E. Responding to the ABA's "25 Jurisdictions" Misdirection

The ABA argues that twenty-four states and the District of Columbia have adopted black-letter rules dealing with "bias" issues.[5] All state black-letter rules are narrower in significant ways than Model Rule 8.4(g)'s expansive scope. Examples of the differences between state black-letter rules and Model Rule 8.4(g)'s expansive scope include –

- Many states' black-letter rules apply only to *unlawful discrimination* and require that another tribunal find that an attorney has engaged in unlawful discrimination before the disciplinary process can be instigated.
- Many states limit their rules to "conduct in the course of representing a client," in contrast to Model Rule 8.4(g)'s expansive scope of "conduct related to the practice of law."
- Many states require that the misconduct be prejudicial to the administration of justice.
- Almost no state black-letter rule enumerates all eleven of the Model Rule 8.4(g)'s protected characteristics.
- No black-letter rule utilizes Model Rule 8.4(g)'s "circular non-protection" for "legitimate advocacy . . . consistent with these rules."

[5] Anti-Bias Provisions in State Rules of Professional Conduct, App. B, ABA Standing Comm. on Ethics and Professional Responsibility, Working Discussion Draft Revisions to Model Rule 8.4, Language Choices Narrative, July 16, 2015, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf. Twelve states have adopted a comment, but not a black-letter rule, while fourteen states have neither adopted a rule nor a comment addressing "bias" issues.

F. Conclusion - Where Next?[6]

It is likely that issues of discrimination and harassment are already being handled well in your state by the current rule and interpretive comments. If so, then your bar or supreme court ought to ignore the ABA overreach on Rule 8.4(g). If there are circumstances that lead to a desire to move the bias and prejudice language into the black letter rule, then drafters ought to consider the following:

1. Rather than the impossibly broad "in conduct related to the practice of law" language, substitute language from predecessor Comment [3], which applied (a) to conduct "in the course of representing a client" and (b) "when such conduct is prejudicial to the administration of justice."

2. Drafters might anchor the definitions of "discrimination" and "harassment," by adding: "The substantive law of antidiscrimination and anti-harassment statutes and case law determines the conduct to which paragraph (g) applies."

3. In addition, drafters should include the Supreme Court's definition of "harassment" to avoid violating the First Amendment by adding the following sentence: "The term 'harassment' shall be defined, in accordance with the United States Supreme Court's decision in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999), as conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice."

4. If a rule such as 8.4(g) is necessary, drafters should provide explicit protection for lawyers' freedoms of speech, assembly, expressive association, religious exercise, and press by adding: "This paragraph does not apply to speech or conduct undertaken by a lawyer because of sincerely held religious beliefs or to speech or conduct otherwise protected by the First Amendment or applicable federal or state laws."

5. An ethics rule ought not give a government actor unconstitutional unbridled discretion to determine whether advocacy is "legitimate" or not "legitimate, so drafters should modify the last sentence, as follows: "Advocacy respecting the foregoing factors does not violate this paragraph."

6. Remove the potential limiting language regarding accepting or declining a representation, by stating simply: "This paragraph does not limit the ability of a lawyer to accept, decline, or withdraw from a representation."

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[6] These are ideas to get you started. Credit again goes to Kim Colby, Director of the Center for Law and Religious Freedom, for articulating these.

Appendix A: Rules

The ABA Model Rule

Maintaining The Integrity Of The Profession
Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
(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.

Rule 8.4 Misconduct - Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice

law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] 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).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. 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.

[5] A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under

Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).

[6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Rule 1.10, Comment [3]

[3] The rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

Appendix B: Selected Commentary

Excerpt: Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*[7]

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What a strange world it is when a university's announcement that it supports free speech is major news. And what a strange world it is when the American Bar Association (ABA) decides to discipline lawyers who say something that is politically incorrect. But with political correctness all the rage, it should not be a surprise that the ABA has joined the party, even if belatedly.

At its August 2016 annual convention, held in San Francisco, the ABA approved a significant change in its Rule 8.4(g) that will affect all lawyers. Shortly before that, in June, the ABA Board of Governors had approved a major change regulating Continuing Legal Education (CLE) programs that the ABA sponsors.

The ABA has announced that lawyers may not engage in "verbal conduct" that "manifests bias" concerning a litany of protected categories. (It is still all right to make short jokes or bald jokes, but be careful about anything related to, for example, gender identity, marital status, or socioeconomic status.)

The ABA also decided that men could use the ladies' room at a law firm (no bias based on gender identity) and that it would not sponsor any CLE programs unless the panel has the proper proportion of women, gays, transgender individuals, and so forth. The ABA sponsors many CLE programs, and most states require lawyers to participate in a certain number of hours each year as a condition of keeping their licenses to practice law.

These changes show that the ABA is very much concerned with what lawyers say and who teaches them. The only thing that does not concern the ABA is diversity of thought. The language that the ABA uses to

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[7] Heritage Legal Memorandum #191 on Legal Issues, http://www.heritage.org/research/reports/2016/10/the-aba-decision-to-control-what-lawyers-say-supporting-diversity-but-not-diversity-of-thought

promote its latest foray into political correctness makes this all too clear. Moreover, what the ABA does affects all of us, even if we are not lawyers, because of its governmental power.

The ABA's Governmental Power

The ABA is a private trade association with about 400,000 lawyers as members. However, it is much more than a trade association because it also has some governmental power, which it uses to impose political correctness. That is exactly what the ABA did at its 2016 annual convention.

States give the ABA power to accredit law schools: You cannot take the bar examination in many states unless you graduate from an ABA-accredited law school.

The accreditation rules require that an accredited law school must teach the ABA Model Rules of Professional Conduct and that its students must pass a special Multistate Professional Responsibility Exam (MPRE) on those ABA rules.

The ABA lobbies state courts to adopt these rules, and many state courts almost routinely follow the ABA's lead and often approve what the ABA supports. The ABA Model Rules have a presumption of support that is lacking for any proposed change that someone might offer.

The ABA Model Rules then become real law governing how and whether lawyers can practice law. They are real law, just like the Rules of Evidence or Rules of Civil Procedure, but unlike the Rules of Evidence or Rules of Civil Procedure, the rules governing lawyers apply even when lawyers are not before a court. They govern, for example, how lawyers find business; how they deal with clients, each other, and third parties; how they handle client funds; and how they advertise, make representations to others, organize their law firms, and set fees.

Whenever the ABA changes its Model Rules, the MPRE *automatically* follows suit and changes its examination to test the new rules. It does that about one year later.

In August, the ABA House of Delegates approved a significant and controversial change in Rule 8.4, and in about a year, law students throughout the country will have to know this new rule and respond correctly on the MPRE or risk not being admitted to the bar. Even California, which has not yet adopted the format of the Model Rules (although it has adopted some of their substance), requires that anyone

seeking admission to the California bar must pass the MPRE.

The New Rule 8.4(g)

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Before this new rule, there was a rather vague comment in Rule 8.4 advising that "in the course of representing a client," a lawyer should not knowingly manifest bias based on various categories "when such actions are prejudicial to the administration of justice."

The comment was not a black-letter rule. The comments do not impose discipline; only the rules do that.

The ABA adopted this vague comment in 1998 after six years of debate and several failed attempts.

Fast-forward nearly two decades, and we see that the new rule and comment go well beyond the 1998 change. The ABA has elevated the new prohibition into a black-letter rule, added to the listing of protected categories and significantly broadening its coverage. The ABA explained that the problem with this mere comment is that:

> [It] addresses bias and prejudice only within the scope of legal representation and only when it is prejudicial to the administration of justice. [The limitation] fails to cover bias or prejudice in other professional capacities (including attorneys as advisors, counselors, and lobbyists) or other professional settings (such as law schools, corporate law departments, and employer-employee relationships within law firms).

When the ABA proposed this new rule, it did not offer any examples in its report of the failure of the old comment.

That is not why it wanted to create this new rule. The reason for the change, the ABA says, is not so modest:

> 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.

We must change the Model Rules not to protect clients, not to protect the courts and the system of justice, and not to protect the role of lawyers as officers of the court. No, the purpose is much more grandiose: to create "a cultural shift."

The ABA report explaining the reasons for this controversial change starts by quoting then-ABA President Paulette Brown, who boastfully tells us that lawyers are "responsible for making our society better," and because of our "power," we "are the standard by [*sic*] which all should aspire."

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Consider "socioeconomic status," one of the protected categories. Rule 8.4, Comment 4 makes clear that it covers any "bar association, business or social activities in connection with the practice of law." The rule covers any "law firm dinners and other nominally social events" at which lawyers are present because they are lawyers.

If one lawyer tells another, at the water cooler or a bar association meeting on tax reform, "I abhor the idle rich. We should raise capital gains taxes," he has just violated the ABA rule by manifesting bias based on socioeconomic status.

If the other lawyer responds, "You're just saying that because you're a short, fat, hillbilly, neo-Nazi," he's in the clear, because those epithets are not in the sacred litany. Of course, that cannot be what the ABA means, because it is always in good taste to attack the rich. Yet that is what the rule says.

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The new list includes gender identity, marital status, and socioeconomic status. It also includes social activities at which no coworkers are present. Even "a solo practitioner could face discipline because something that he said at a law-related function offended someone employed by another law firm."

At another bar meeting dealing with proposals to curb police excessiveness, assume that one lawyer says, "Black lives matter." Another responds, "Blue lives [i.e., police] matter, and we should be more concerned about black-on-black crime." A third says, "All lives matter." Finally, another lawyer says (perhaps for comic relief), "To make a proper martini, olives matter." The first lawyer is in the clear; all of the others risk discipline.

Even when a court does not enforce this rule by disbarring or otherwise disciplining the lawyer, the effect will still be to chill lawyers' speech, because good lawyers do not want to face any nonfrivolous accusation

that they are violating the rules. The ABA as well as state and local bar associations routinely issue ethics opinions advising lawyers what to do or avoid, and most lawyers follow this advice.

Consider this example. The St. Thomas More Society is an organization of "Catholic lawyers and judges" who strengthen their "faith through education, fellowship, and prayer."

Therefore, since Rule 8.4(g) covers any "law firm dinners and other nominally social events" at which lawyers are present because they are lawyers, any St. Thomas More Society event, including a Red Mass, CLE program, or similar event, would be subject to the rule. Assume further that at a St. Thomas More–sponsored CLE program, some (and perhaps all) of the lawyers on a panel discuss and object to the Supreme Court's gay marriage rulings. The state bar may draft an ethics opinion advising that lawyers risk violating Rule 8.4(g) if they belong to a law-related organization that is not "inclusive" and opposes gay marriage.

As a result, many lawyers may decide that it is better to be safe than sorry, better to leave the St. Thomas More Society than to ignore the ethics opinion and risk a battle. If they belong to an organization that opposes gay marriage, they can face problems. If they belong to one that favors gay marriage, then they are home free.

Judges, law professors, and lawyers (even if they are not Catholic) often attend the Red Mass. That simple action raises issues because the Catholic Church, like many other churches, does not recognize gay marriage. Like many other religious organizations, it does not embrace the right to abortion found in U.S. Supreme Court decisions. It limits its priesthood to males. All of those religious practices raise questions under the new, vaguely worded Rule 8.4(g).

Consider another example involving marriage. ABA Rule 2.1 provides that the lawyer must offer candid advice and may refer to "moral" considerations. What if the lawyer's conscientious view of what is "moral" conflicts with the "cultural shift" that Rule 8.4(g) seeks to impose?

For example, assume that the client (worried about a "palimony" suit) tells the lawyer that he would like to create a prenuptial agreement with the woman he does not intend to marry. Absent the new Rule 8.4(g), the lawyer can advise the individual that he might be taking advantage of the woman, that it might not be right to live with the woman, use her, and then drop her without fear of financial consequences. Indeed, the lawyer can say that he or she refuses to draft palimony prenuptials.

But what is the law after Rule 8.4(g)? That rule says that a lawyer is subject to discipline if he or she discriminates in speech or conduct related to the practice of law (drafting the palimony papers) based on "marital status" (the lawyer does not normally like to draft palimony prenuptials). What if the person who refuses to draft the palimony papers objects on religious grounds? The prospective client can walk next door and hire another lawyer, but the ABA's proposed rule says that this may not be good enough. The bar may discipline the first lawyer, who exercised his or her religious objections to participating in palimony prenuptials. What if the lawyer objects to drafting palimony papers on nonreligious but moral grounds: It treats women like sex objects? The result is the same: The bar may discipline the lawyer because of the "need for a cultural shift" in the United States.

It is true that the new Rule 8.4(g) says that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16," but Comment 5 to Rule 8.4 appears to interpret this right to refuse representation narrowly. It says that the lawyer does not violate Rule 8.4(g) "by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law."

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Or consider "gender identity," another category that Rule 8.4(g) protects. Assume that a law firm does not hire a job applicant who seeks a position as a messenger. The firm's decision to hire or terminate messengers is conduct related to "operation and management of a law firm or law practice."

The disgruntled messenger may complain to the disciplinary authorities that he is transgender and the firm did not hire him because of that. If the disgruntled applicant identifies with the opposite sex (or claims to), he or she can argue that it is evidence of the law firm's bias that its restrooms discriminate based on "gender identity."

The law firm may claim that it did not know the disgruntled applicant is transgender. That is an issue on the merits, and its assertion does not preclude a full hearing. Rule 8.4(g) does say that the lawyer must know "or reasonably should know" that his "verbal conduct" is harassment or discrimination, but that requirement is easily met. Lawyers "reasonably should know" that the federal government now contends that preventing someone from using the restroom they prefer to use is discrimination based on gender identity.

The lawyer hauled before the state's discipline board will find that it is not like a court: It does not typically open its proceedings to the public, it follows relaxed rules of evidence, and there is no jury. For the law firm, it is simpler and safer to avoid all of these problems by removing the restroom signs that protect the privacy of men and women.

Problems extend beyond the weak procedural protections of state disciplinary authorities. The risk to the law firm also includes civil liability, because the disgruntled employee may sue. That could be expected to happen here, because courts often imply causes of action from violation of the Rules of Professional Conduct. The law firm will face expensive discovery, a gauntlet of motions, and possibly years of litigation and a trial—particularly if the disgruntled applicant files a class action.

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The new ABA rule specifically approves of reverse discrimination. Assume, for example, that two young lawyers (or two photocopiers) apply for one job. The lawyer making the hiring decision says that Applicant No. 1 is better than Applicant No. 2. However, Applicant No. 2 says that he is gay or transgender. The lawyer tells the two applicants, "I'm going with Applicant No. 2 because you are gay. Sorry, Applicant No. 1; you are a bit better, but I already have enough heterosexual lawyers and photocopiers."

The rules are clear that the lawyer saying this, who is discriminating based on sexual orientation or gender identification, does not violate Rule 8.4(g). Comment 4 gives the lawyer a safe harbor: "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."

Lawyers can discriminate, by words or conduct, against people because they are in a traditional marriage or because they are white, because "new Comment [4] to Rule 8.4 makes clear that paragraph (g) does not prohibit conduct undertaken by lawyers to promote diversity."

The ABA rule is not about forbidding discrimination based on sex or marital status; it is about punishing those who say or do things that do not support the ABA's particular view of sex discrimination or marriage.

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