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ABA Model Rule 8.4(g): An Exercise in Coercing Virtue?

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In August 2016, at its annual convention, which was held in San Francisco, California the American Bar Association (ABA) approved a revision to Rule 8.4(g) of its Model Rules of Professional Conduct.¹ That new rule is not self-executing. Instead, it will have to be submitted to the licensing authorities in the states.

To date, only Vermont has adopted the new rule.² A number of states, including Arizona, Idaho, Louisiana, Montana, Nevada, South Carolina, Tennessee, and Texas have rejected proposals to adopt the rule in their respective states.³ Several other states are considering its adoption. So, it's not off to a roaring start.

There are good reasons for the remaining states to look skeptically at the proposed rule. In this Article, I first introduce the ABA and point out why it embarked on this enterprise. Then, I explain the wide-ranging scope of the proposed new rule. The new rule represents a significant expansion in the scope of potential disciplinary authority and exposure. I then point to the First Amendment problems it raises. Finally, I explain how it presents problems for the disciplinary authorities.

I. THE ABA AND ITS ROLE

A. The ABA as Professional Regulator

At the outset we should keep in mind that the proposed rule is the product of the ABA, which represents only a small subset of the profession. In August 2018, Roy Strom reported that the

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¹ See generally Samson Habte, *ABA Delegates Overwhelmingly Approve Anti-Bias Rule*, BLOOMBERG (Aug. 10, 2016), <https://www.bna.com/aba-delegates-overwhelmingly-n73014446149/> [http://perma.cc/W46N-XREW].

² See *States split on new ABA Model Rule limiting harassing or discriminatory conduct*, ABA J., http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct/news/article/does_a_diverse_bench_really_matter/?icn=sidebar&ici=text [http://perma.cc/38AP-RM3D] [hereinafter *States Split on new ABA Model Rule*].

³ See *id.*

ABA had fewer than 200,000 dues-paying members and an estimated 400,000 total members.⁴ That's out of an estimated 1.3 million lawyers in the United States.⁵ To boost membership, the ABA has adopted "a simpler and less-expensive schedule of membership fees in an effort to revitalize the association's long-declining membership rates."⁶ If the plan works, it will have 268,812 paying members in 2024, instead of the expected 155,766.⁷ Either way, though, its membership will still be far less than a majority of the total number of lawyers in the United States.

That said, the ABA represents an outsized player in the legal world. As the late Professor Ron Rotunda observed, the ABA "is more than a trade association. It also has some governmental power, which makes its latest foray into political correctness of more than passing interest."⁸ It periodically, as here, considers and proposes changes in the ethical constraints on lawyers. In addition, the ABA's influence over federal judicial nominations waxes and wanes with changes in administrations.⁹

Moreover, the ABA has been given the power to accredit law schools. Those law schools must teach the ABA Model Rules of Professional Responsibility, and their students must pass a Multistate Professional Responsibility Exam, which incorporates those Rules, to be licensed.¹⁰ As a result, it is entirely possible that Rule 8.4(g) will appear on the test even if it has not been adopted by a particular state.

The proposed rule is an exercise in professional regulation. Professor Rotunda explained that, whenever lawyers draft rules to govern the practice of law, "[w]hatever advantage we lawyers have with intimate knowledge of the subject matter—the practice of law—we must counterbalance with the self-interest inherent when lawyers draft rules governing their own behavior."¹¹

⁴ Roy Strom, *ABA to Slash Dues Amid Membership Drop*, AM. LAW. (Aug. 6, 2018, 4:03 PM), <https://www.law.com/americanlawyer/2018/08/06/aba-to-slash-dues-amid-membership-drop/?slreturn=20181012120933> [<http://perma.cc/YMQ3-MDAM>].

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Ron Rotunda, *The ABA Overrides the First Amendment*, WALL ST. J. (Aug. 16, 2016, 7:00 PM), <https://www.wsj.com/articles/the-aba-overrides-the-first-amendment-1471388418>.

⁹ The significance of the ABA's "well qualified" rating for judicial nominees, which Senate Minority Leader Chuck Schumer has called the "gold standard by which judicial candidates are judged," also gets inconsistent treatment. See Ed Whelan, *Schumer Smears Judicial Nominee Thomas Farr*, NAT'L REV. (Nov. 27, 2018, 10:21 AM), www.nationalreview.com/bench-memos/schumer-smears-judicial-nominee-thomas-farr [<http://perma.cc/7UHT-2Q5F>].

¹⁰ Ronald D. Rotunda, *Legal Memorandum: The ABA Decision to Control What Lawyers Say: Supporting "Diversity" but not Diversity of Thought*, HERITAGE FOUND., Oct. 6, 2016, at A4, <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf> [<http://perma.cc/GMU2-2892>].

¹¹ Ronald D. Rotunda, *Applying the Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, 42 HOFSTRA L. REV. 175, 176 (2013).

The ABA's inherent self-interest is, moreover, more likely to favor the interests of large law firms, not solo or small firms.¹²

One might think that lawyers who combine an "intimate knowledge of the subject matter" with experience in drafting documents and rules would avoid ambiguity and speak with clarity. That is not the case with Model Rule 8.4(g) and its Comments. Two practitioners concluded that the Model Rule "is riddled with unanswered questions, including but not limited to . . . the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanction should apply to a violation; as well as due process and First Amendment free expression infirmities."¹³ For example, to what extent does the rule's coverage of "conduct related to the practice of law" reach a bumper sticker on a lawyer's car driven to and from depositions or court hearings, or a Washington Redskins t-shirt worn at a bar-sponsored 5K?¹⁴

B. The ABA's Reasons for Adopting Model Rule 8.4(g)

The ABA advanced a variety of reasons for adopting Model Rule 8.4(g).¹⁵ Some of the mandarins sought to turn lawyers into societal leaders and burnish the reputation of lawyers generally. Others saw the need for a rule that would deter sexual harassment that occurred outside the range of the administration of justice.

For her part, past ABA President Paulette Brown said that lawyers are "responsible for making our society better" and that because of lawyers' "power," lawyers should be "the standard by which all should aspire."¹⁶ In a similar way, representatives from the Oregon New Lawyers Division of the ABA's Young Lawyers Division proposed a resolution which pointed to "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, marital status, or disability, to be captured in the rules of professional conduct."¹⁷ In short, lawyers are supposed to lead, and the ethical rules should make us do it.

¹² See Steven Chung, *The ABA Is Losing Money Because It Does Not Provide Value To Small Firms*, ABOVE L. (May 7, 2018, 9:57 AM), <https://abovethelaw.com/2018/03/the-aba-is-losing-money-because-it-does-not-provide-value-to-small-firms> [<http://perma.cc/8RP5-H6UA>].

¹³ Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201, 257 (2017).

¹⁴ See John J. Park, *More on the ABA's Threat to Free Speech*, FEDERALIST SOC'Y (June 19, 2017), <https://fedsoc.org/commentary/blog-posts/more-on-the-aba-s-threat-to-free-speech> [<http://perma.cc/8L5W-7UML>].

¹⁵ See *States split on new ABA Model Rule*, *supra* note 2.

¹⁶ Rotunda, *supra* note 8.

¹⁷ ABA Standing Comm. on Ethics and Prof'l Responsibility, Memorandum on Draft Proposal to Amend Model Rule 8.4 at 2 (Dec. 22, 2015), <http://www.americanbar.org/content/>

At a 2016 hearing, though, “several witnesses expressed their concerns about sexual harassment that occurs during the practice of law, and in particular at after-hours social functions.”¹⁸

The ABA’s report, justifying the final version of Rule 8.4(g), cited the “substantial anecdotal information” provided to the Standing Committee of “sexual harassment” at “activities such as firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm or in connection with the practice of law.”¹⁹

The general effect was to broaden the reach of the new rule from conduct “prejudicial to the administration of justice” to “conduct related to the practice of law.”²⁰

The Standing Committee summed it up this way, suggesting that the need for the new rule “transcends the Model Rules of Professional Conduct.”²¹ That is true whether “such conduct is or is not common in our [legal] profession.”²² It explained, “It is time that harassment and discriminatory conduct by a lawyer based on race, religion, sex, disability, LGBTQ status or other factors, be considered professional misconduct when such conduct is related to the practice of law.”²³ In sum:

[T]he public has a right to know that as a largely self-governing profession we hold ourselves to normative standards of conduct in all our professional activities, in furtherance of the public’s interest in respect for the rule of law and for those who interpret and apply the law, the legal profession.²⁴

We are often reminded how remarkable it is that the ABA believes itself entitled to speak for all lawyers, especially given the relatively small number of lawyers who are actually members. Model Rule 8.4(g) is just another iteration of that tendency. Its desire to bind them all to its self-improvement regime is breathtaking.

dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2_015.authcheckdam.pdf [http://perma.cc/M8NV-MNFZ] [hereinafter Language Choice Memo] (emphasis added); *see also* Rotunda, *supra* note 10, at A3 (“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.’”).

¹⁸ *See* Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 244 (2017).

¹⁹ *Id.*

²⁰ *Id.* at 251.

²¹ Language Choice Memo, *supra* note 17, at 7.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

II. PROPOSED NEW MODEL RULE 8.4(G)

Under amended Model Rule 8.4(g), it would be misconduct for a lawyer to engage in conduct that he or she “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.”²⁵ The covered conduct can be either “verbal or physical conduct,” including “unwelcome verbal or physical conduct of a sexual nature.”²⁶

The text of the proposed rule alone represents a massive expansion in the scope of disciplinary authority. Model Rule 8.4(d) currently provides, “it is professional misconduct for a lawyer to engage in conduct that is ‘prejudicial to the administration of justice.’”²⁷ Comment 3 to Model Rule 8.4 was added in 1998.²⁸ It states that a lawyer who, “*in the course of representing a client, . . . knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status . . .*” violates the rule when such actions are “*prejudicial to the administration of justice.*”²⁹

Significantly, the comment did not impose discipline; only the rules did. In 2015, the ABA observed that adding the comment “was a compromise result reached after six years of proposals and counterproposals.”³⁰ It explained, though, “[b]y addressing this issue in a comment . . . the compromise did not make manifestations of bias or prejudice such as discrimination or harassment a separate and direct violation of the Model Rules.”³¹

The new rule creates a violation in circumstances in which the old rule did not. It starts by adding characteristics to the previous list of eight. The new rule’s text expressly covers eleven separate characteristics to be protected from demeaning or derogatory speech.³² That’s three more than old Comment 3, with the addition of ethnicity, gender identity, and marital status.³³ The ABA said

²⁵ MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018).

²⁶ *Id.* at r. 8.4(g) cmt. 3.

²⁷ See Language Choice Memo, *supra* note 17, at 2.

²⁸ See Handel Destinvil, *ABA Committee Proposes New Model Rule of Professional Conduct*, AM. BAR ASS’N (Jan. 17, 2016), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2016/aba-committee-proposes-new-model-rule-professional-conduct/> [<http://perma.cc/3UQ6-SYNK>].

²⁹ Language Choice Memo, *supra* note 17, at 2 (emphasis added).

³⁰ *Id.* at 1.

³¹ *Id.*

³² *Id.* at 2.

³³ See *id.* at 2–3; see also *id.* at 5 (“‘Gender identity’ is relevant as a new social awareness of the individuality of gender has changed the traditional binary concept of sexuality.”).

that the “additional categories reflect current concerns regarding discriminatory practices.”³⁴

New Comment 3 expands the definition of “harassment” to include “derogatory or demeaning verbal . . . conduct.”³⁵ That means that, as Josh Blackman notes, the rule’s scope is not limited to sexual harassment, but reaches derogatory or demeaning speech touching on any of the protected classes.³⁶ That said, “speech that satisfies *any* of these definitions is entirely protected by the First Amendment”³⁷

Comment 3 does state, “[t]he substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).”³⁸ That part of the Comment is not entirely clear. If the substantive law does apply, the speech at issue should have to be sufficiently “severe or pervasive” to constitute an “abusive working environment” before it can be the basis for discipline.³⁹ If it “may” (or “may not”) apply, then what happens with a single remark that is perceived to be “harassing?”

“Conduct related to the practice of law” also has an expansive reach. Comment 4 states, in part:

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.⁴⁰

The representation of clients and a lawyer’s interactions with witnesses, court personnel, other lawyers, and others fit neatly into conduct that might be prejudicial to the administration of justice. “Conduct related to the practice of law” reaches far more broadly to cover a lawyer’s “bar association, business or social activities.” The new rule could be applied to speech at dinners hosted by bar associations or similar legal groups, teaching at law schools, and a lawyer’s speaking “at career day at his or her child’s Catholic school about the role of faith in the practice of law.”⁴¹ “The important question is not whether a [listener’s] reaction is ‘reasonable,’ but

³⁴ *Id.* at 4.

³⁵ MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2018).

³⁶ Blackman, *supra* note 18, at 244–46.

³⁷ *Id.* at 245 (emphasis in original).

³⁸ MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2018).

³⁹ Blackman, *supra* note 18, at 245 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998)).

⁴⁰ MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS’N 2018).

⁴¹ Blackman, *supra* note 18, at 247–48.

whether a [speaker] should ‘reasonably’ know a [listener] will be triggered by disrespectful speech.”⁴²

Of course, the ABA’s mandarins made sure to protect their own. Comment 4 states, in part, “[l]awyers 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.”⁴³ Josh Blackman notes, “[t]his comment amounts to an unconstitutional form of viewpoint discrimination.”⁴⁴ It “explicitly sanctions one perspective” on the divisive issue of affirmative action, while exposing the other side to potential discipline.⁴⁵

III. PROPOSED MODEL RULE 8.4(G) AND THE FIRST AMENDMENT

In recent years, offended observers have pursued a variety of claims directed at clothing they have found offensive. In 2015, a federal judge upheld the revocation of the Washington Redskins’ trademark by the U.S. Patent and Trademark Office’s Trademark Trial and Appeal Board, which concluded that the trademark was disparaging to Native Americans.⁴⁶ In 2016, the U.S. Equal Employment Opportunity Commission remanded a claim that the wearing of a cap bearing the Gadsden Flag insignia (“Don’t Tread on Me”) in a workplace for consideration of whether that made for a racially discriminatory work environment.⁴⁷

Events like those prompt consideration of whether Model Rule 8.4(g) would reach the wearing of a Washington Redskins championship t-shirt at a bar-sponsored 5K run. What about a lawyer with Gadsden Flag license plates, which Virginia will issue, or a Gadsden Flag bumper sticker on his or her car? If driven to a bar convention or work, would that make the lawyer’s actions “conduct related to the practice of law”?

Certainly, one might think that the First Amendment would have a bearing on the propriety of enforcing Model Rule 8.4(g) in

⁴² *Id.* at 248.

⁴³ MODEL RULES OF PROF’L CONDUCT, r. 8.4(g) cmt. 4 (AM. BAR ASS’N 2018).

⁴⁴ Blackman, *supra* note 18, at 259.

⁴⁵ *Id.*

⁴⁶ In 2018, after the Supreme Court issued its decision in *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Fourth Circuit vacated the order to revoke the trademark. See Erik Brady, *Appeals Court Vacates Decisions that Canceled Redskins Trademark Registrations*, USA TODAY (Jan. 18, 2018, 8:58 PM), <http://www.usatoday.com/story/sports/nfl/2018/01/18/appeals-court-vacates-decisions-canceled-redskins-trademark-registrations/1046758001/> [<http://perma.cc/6UUY-78EF>].

⁴⁷ See Eugene Volokh, *Wearing ‘Don’t Tread on Me’ insignia could be punishable racial harassment*, WASH. POST (Aug. 3, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/03/wearing-dont-tread-on-me-insignia-could-be-punishable-racial-harassment/?utm_term=.10ab86ecdafa6 [<http://perma.cc/QUM9-EBKD>].

those cases, among others involving speech. But, “[t]he most striking aspect of the adoption of Model Rule 8.4(g) is how little awareness the ABA expressed about the boundless scope of prohibited speech.”⁴⁸

An earlier draft of Comment 3 from December 2015 “stressed that the rule ‘does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment.’”⁴⁹ It also recognized a “private sphere” in which “personal opinion . . . religious expression, and political speech” would receive First Amendment protection.⁵⁰

At the February 2016 hearing, however, a former ABA president complained that allowing for First Amendment protection of some speech would make it very difficult to enforce the rule because such protection would “take away” from its purpose.⁵¹ In the end, her “position prevailed, and the proviso was *removed* in the second draft.”⁵² Josh Blackman observes, “[n]either the final rule, nor the comments, nor the ratified report, makes any reference to the First Amendment. This regrettable omission was deliberate.”⁵³

Contrary to that record, though, the First Amendment protects speech even when it is unpopular, harmful, derogatory, or demeaning. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁵⁴ The First Amendment protects offensive, disagreeable, and even hurtful speech.⁵⁵

Just last term, in *Minnesota Voters Alliance v. Mansky*,⁵⁶ the Court found a Minnesota law banning the wearing of political apparel at the polling place facially unconstitutional. The apparel in question was a t-shirt bearing the Tea Party logo and the words “Don’t Tread on Me” and a button saying “Please I.D. Me.”⁵⁷ Even though Minnesota had a permissible objective in limiting distractions in the polling place, its law swept too broadly and indeterminably to be constitutionally applied.⁵⁸ If Minnesota cannot

⁴⁸ Blackman, *supra* note 18, at 248.

⁴⁹ *Id.* (citing ABA Standing Comm. on Ethics & Prof'l Responsibility, Notice of Public Hearing 14 (2015)).

⁵⁰ *Id.* at 248–49.

⁵¹ *Id.* at 249 (quoting former ABA President Laurel Bellows).

⁵² *Id.* at 250 (emphasis in original).

⁵³ *Id.*

⁵⁴ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

⁵⁵ *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 458 (2011); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis.*, 774 F. Supp. 1163, 1169 (E.D. Wis. 1991).

⁵⁶ 138 S. Ct. 1876, 1891–92 (2018).

⁵⁷ *Id.* at 1884.

⁵⁸ *Id.* at 1880, 1888.

regulate political speech in polling places, the ABA should not be able to regulate it in activities related to the practice of law.

More generally, Josh Blackman and others have pointed to the Court's decision in *National Institute of Family and Life Advocates v. Becerra (NIFLA)*,⁵⁹ as authority for concluding that Model Rule 8.4(g) is unconstitutional.⁶⁰ In comments submitted to the Disciplinary Board of the Supreme Court of Pennsylvania, Professor Blackman argued that, even as modified by Pennsylvania, Model Rule 8.4(g) "raise[d] constitutional concerns" that were "highlighted" by *NIFLA*.⁶¹ In its comment letter of July 17, 2018, urging the Disciplinary Board of the Supreme Court of Pennsylvania not to adopt that modified version of Model Rule 8.4(g), the Christian Legal Society pointed to both *NIFLA* and *Matal v. Tam*.⁶²

In *NIFLA*, the Court held that challengers who contended that a California law requiring licensed and unlicensed pregnancy-related clinics to make specified disclosures violated the First Amendment were likely to prevail on their challenges.⁶³ It reversed the Ninth Circuit decision affirming the denial of injunctive relief.⁶⁴ The law required the licensed clinics to display messages concerning the availability of public funding for abortions, a practice that those clinics opposed.⁶⁵

The Court determined that the California law was a content-based regulation of speech because it "compel[led] individuals to speak a particular message . . . 'alter[ing] the content of their speech.'"⁶⁶ It rejected the contention that the clinics' speech was entitled to less than strict scrutiny because professional speech was involved.⁶⁷ While professional speech and conduct may be regulated in some circumstances, neither of those circumstances was present.⁶⁸ First, to the extent that "more deferential review"

⁵⁹ 138 S. Ct. 2361 (2018).

⁶⁰ See, e.g., Letter from Josh Blackman, Assoc. Professor, S. Tex. Coll. of Law Hous., to Office of the Sec'y, The Disciplinary Bd. of the Supreme Court of Pa. (July 13, 2018), https://www.christianlegalsociety.org/sites/default/files/site_files/Letter-Pennsylvania-Blackman.pdf [http://perma.cc/E6RP-MGU3].

⁶¹ See *id.*

⁶² See Letter from David Nammo, CEO & Exec. Dir. Christian Legal Soc'y, to Office of the Sec'y, The Disciplinary Bd. of the Supreme Court of Pa. (July 17, 2018), https://www.christianlegalsociety.org/sites/default/files/site_files/Christian%20Legal%20Society%20PA%20Comment%20Letter%20Submitted.pdf [http://perma.cc/WA9S-TGQU].

⁶³ *NIFLA*, 138 S. Ct. at 2378.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2368.

⁶⁶ *Id.* at 2371 (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

⁶⁷ *Id.* at 2371–72.

⁶⁸ *Id.* at 2372.

may be applied “to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech,’” the required notices did not relate to the services the clinics provided, but to “state-sponsored services—including abortion”⁶⁹ Second, to the extent professional conduct incidentally burdens speech can be regulated, the law regulated “speech as speech.”⁷⁰

Accordingly, the California law was subjected to strict scrutiny as a content-based regulation of speech.⁷¹ The Court noted that, as for the regulation of licensed clinics and the desire to educate low-income women, the required notice was “wildly underinclusive.”⁷² As for the unlicensed clinics, any justification offered by California was nothing more than “purely hypothetical.”⁷³

In a concurring opinion, Justice Kennedy, joined by Chief Justice Roberts and Justices Alito and Gorsuch, saw “viewpoint discrimination [as] inherent in the design and structure” of the California law.⁷⁴ Justice Kennedy characterized the law as “a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression.”⁷⁵

NIFLA’s treatment of professional speech is particularly important. As the Court notes, “[p]rofessionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields.”⁷⁶ For example, in a way that touches on the hot rail of marital status, “lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce”⁷⁷ Restricting the range of lawyer speech denies access to the test of the market, which the Court sees as “[t]he best test of truth.”⁷⁸

Matal v. Tam may well have put another nail in the coffin bearing this line of attack.⁷⁹ In *Matal*, the Court resoundingly

⁶⁹ *Id.* (emphasis in original).

⁷⁰ *Id.* at 2372, 2374.

⁷¹ *Id.* at 2366.

⁷² *Id.* at 2375.

⁷³ *Id.* at 2377.

⁷⁴ *Id.* at 2379 (Kennedy, J., concurring).

⁷⁵ *Id.* (Kennedy, J., concurring).

⁷⁶ *Id.* at 2374–75.

⁷⁷ *Id.* at 2375. Or, as Josh Blackman proposes, “A speaker remarks over dinner that unmarried attorneys are better candidates for law firms because they will be able to dedicate more time to the practice.” Blackman, *supra* note 18, at 246. Put simply, there is a myriad of ways to run afoul of Model Rule 8.4(g).

⁷⁸ See *NIFLA*, 138 S. Ct. at 2375 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919)).

⁷⁹ See *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017).

concluded that 15 U.S.C. § 1052(a), which prohibits the “registration of trademarks that may ‘disparage . . . or . . . bring into contemp[t] or disrepute’ any ‘persons, living or dead.’ . . . violates the Free Speech Clause of the First Amendment.”⁸⁰ The U.S. Patent and Trademark Office relied on that statute in denying a trademark application for an Asian-American band named the “Slants” because of the offensive nature of the band’s name.⁸¹

Announcing the judgment of the Court, Justice Alito wrote, the statute “offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend.”⁸² Joined by Chief Justice Roberts and Justices Thomas and Breyer, Justice Alito rejected the contention that the ban was narrowly tailored, noting that it also reached trademarks like “Down with racists,” for example.⁸³ Viewed in that light, the disparagement clause could not be “an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.”⁸⁴ Accordingly, Justice Alito concluded that the disparagement clause was unconstitutional.⁸⁵

Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in part and concurred in the judgment.⁸⁶ Justice Kennedy wrote separately to “explain[] in greater detail why the First Amendment’s protections against viewpoint discrimination apply to the trademark here.”⁸⁷ In that regard, “[t]he test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.”⁸⁸

In that regard, “[t]he Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker’s audience.”⁸⁹ Justice Kennedy explained, “[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate. The danger is all the greater if the ideas or perspectives are ones a particular audience might think offensive”⁹⁰ Put simply,

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 1765.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

⁸⁸ *Id.* at 1766.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1767.

“a speech burden based on audience reactions is simply government hostility and intervention in a different guise.”⁹¹

That is precisely what Model Rule 8.4(g) contemplates: Measuring the propriety of speech by the reaction of individuals listening to or observing it. Someone offended by a discussion of “mismatch” theory that includes a suggestion that affirmative action in higher education should be banned because it can hurt minority students by placing them in an educational setting where their chances of success are lower than they might be at a different institution, can complain that the speaker said something demeaning on the basis of race.⁹² Model Rule 8.4(g) is a recipe for viewpoint discrimination.

Finally, the wide reach of Model Rule 8.4(g), both as to its live-wire subject areas and as to the range of activities covered, will inevitably chill both speech and association. For example, Professor Rotunda points to the St. Thomas More Society, “an organization of ‘Catholic lawyers and judges’ who strengthen their ‘faith through education, fellowship and prayer.’”⁹³ Any St. Thomas More Society event, like the Annual Red Mass or a Continuing Legal Education (CLE) program, would fit within the definition of “conduct related to the practice of law.” Discussion of issues like gay marriage that does not include both sides may lead a state bar to conclude that Society membership violates Model Rule 8.4(g) because it opposes gay marriage and is not “inclusive.”⁹⁴

Professor Rotunda notes that, if a state bar opined that membership in the St. Thomas More Society could violate Model Rule 8.4(g), “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.”⁹⁵ Professor Rotunda also saw the potential for viewpoint discrimination: If a lawyer belongs to an organization that opposes gay marriage, he or she “can face problems,” but belonging to an organization that favors gay marriage brings the lawyer “home free.”⁹⁶

⁹¹ *Id.*

⁹² See Blackman, *supra* note 18, at 246.

⁹³ Rotunda, *supra* note 10, at 4 (citing ST. THOMAS MORE SOC'Y OF ORANGE COUNTY, <http://www.stthomasmore.net> [<http://perma.cc/M7FK-VU2T>]).

⁹⁴ *Id.* at 5.

⁹⁵ *Id.*

⁹⁶ *Id.*

IV. PROPOSED MODEL RULE 8.4(G) AND THE REGULATORS

A. The Regulatory Difficulty

Vesting discretion in the hands of bar regulators and trusting to their judgment is no solution. Regulators in some state bars have day jobs, so it makes little sense to load more on them. If adopted, Model Rule 8.4(g) would do precisely that because of its broad reach. Moreover, regulatory bodies are capable of disappointing the trust placed in them.

But, trusting the discretion of regulators is precisely what the ABA wants us to do. At the Federalist Society's 2016 National Lawyers Convention, Professor Deborah Rhode defended Model Rule 8.4(g) in a debate with Professor Eugene Volokh.⁹⁷ She asserted that, because local disciplinary bodies "don't have enough resources to go after people who steal from their clients' trust fund accounts," there is little likelihood of their vigorously enforcing limitations on speech.⁹⁸ She acknowledged that anyone offended by a remark made in connection with the practice of law might make a complaint, but suggested that such complaints would go nowhere because "we as a profession, I think, have the capacity to deal with occasional abuses."⁹⁹

The problem is more complex than Professor Rhode gives it credit. The bar disciplinary bodies have no principled way of dismissing a complaint that arises from a statement that addresses one of the eleven live-wire categories in a way that offends someone. They will have to call for a response from the speaker.

On December 17, 2017, the Disciplinary Board of the Supreme Court of Pennsylvania echoed one of Professor Rhode's observations: It noted that the "breadth" of the proposed rule "will pose difficulties for already resource-strapped disciplinary authorities."¹⁰⁰ It noted, "the rule subjects to discipline not only a lawyer who knowingly engages in harassment or discrimination, but also a lawyer who negligently utters a derogatory or demeaning comment."¹⁰¹ Even if no discipline is imposed, the process will be the punishment.

⁹⁷ Federalist Soc'y, *Ninth Annual Rosenkranz Debate: Hostile Environment Law and the First Amendment*, YOUTUBE (Nov. 20, 2016), <https://www.youtube.com/watch?v=MYsNkMw32Eg&t=5s> [http://perma.cc/7Y32-HPG7].

⁹⁸ *Id.*

⁹⁹ *Id.*; see also *id.* ("I don't think we'd see a lot of toleration for those aberrant complaints.")

¹⁰⁰ *Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct*, 46 PA. BULLETIN 7519 (Dec. 3, 2016), <http://www.pabulletin.com/secure/data/vol46/46-49/2062.html> [http://perma.cc/X2ZC-79PH].

¹⁰¹ *Id.*

Professor Rotunda illustrated the problem for bar regulatory authorities with a hypothetical:

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.¹⁰²

Conversely, a lawyer at the firm coffee pot might tell another, “low income individuals who receive public assistance should be subjected to mandatory drug testing.” As Josh Blackman explains, that statement, which might be seen by an observer as unfairly provocative, could result in discipline because the speaker “‘reasonably should know’ that someone at the event could find the remarks disparaging” toward those of lower socioeconomic status.¹⁰³

When, as noted above, the bar disciplinary authorities call for an explanation, the lawyer enters into an administrative process that lacks some of the constitutional protection one gets in court. The disciplinary boards “do[] not typically open [their] proceedings to the public, [they] follow[] relaxed rules of evidence, and there is no jury.”¹⁰⁴ As with the St. Thomas More Society and its membership, lawyers will prefer to hold their tongues and have their speech chilled than visit with the bar disciplinary authorities.

B. An Invitation to Viewpoint Discrimination

Both scenarios present bar regulatory authorities with a claim that presents a violation on its face. There is no principled way of dismissing those claims even though the comments are plainly protected by the First Amendment. They will have to ask for a response. That response will require the regulators to make finely honed discretionary judgments. That said, vesting disciplinary authorities with discretion is an invitation to engage in viewpoint discrimination. Two recent examples of the consideration shown by regulatory bodies, however, show both hostility to conservative messaging and the absence of viewpoint neutrality.

First, the Colorado Civil Rights Commission’s treatment of Jack Phillips displayed blatant hostility toward his views, as the Court found in *Masterpiece Cakeshop, Ltd. v. Colorado Civil*

¹⁰² Rotunda, *supra* note 10, at 4.

¹⁰³ Blackman, *supra* note 18, at 246.

¹⁰⁴ Rotunda, *supra* note 10, at 6.

*Rights Comm'n.*¹⁰⁵ As the Supreme Court noted, Jack Phillips was entitled to “neutral and respectful consideration of his claims in all the circumstances of the case,” but he didn’t get it from the Commission.¹⁰⁶ One commissioner asserted, “[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust”¹⁰⁷ The Court noted that such a comparison was “inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.”¹⁰⁸

The same commissioner also described Jack Phillips’ invocation of his religious beliefs as “one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”¹⁰⁹ The Court explained, “[t]o describe a man’s faith as ‘one of the most despicable pieces of rhetoric that people can use’ is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.”¹¹⁰

In addition, the Commission and the Colorado Court of Appeals treated Jack Phillips differently from other bakers who refused to prepare a cake bearing a message that disapproved of same-sex marriage.¹¹¹ Three other bakers were found to have acted within their rights by declining to create those cakes.¹¹² The Colorado Court of Appeals concluded that the other bakeries did not discriminate because their action was based on “the offensive nature of the requested message.”¹¹³

The Court found the distinction lacking. As it observed, a “principled rationale for the difference in treatment . . . cannot be based on the government’s own assessment of offensiveness.”¹¹⁴ The Court concluded, “[t]he Colorado court’s attempt to account for the difference in treatment elevates one view of what is

¹⁰⁵ See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1720.

¹¹² *Id.*

¹¹³ *Id.* at 1731 (quoting *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 282 n.8 (Colo. App. 2015)).

¹¹⁴ *Id.*

offensive over another and itself sends a signal of official disapproval of Jack Phillips' religious beliefs."¹¹⁵

Put simply, although the Court did not put it this way, the Commission and the Colorado Court of Appeals were engaged in viewpoint discrimination. They were punishing a message they did not agree with and giving a contrary message, with which they did agree, a free pass.

Second, the Ohio Elections Commission found itself in the position of judging the truth of political advertisements regarding the Affordable Care Act statute. The Susan B. Anthony List (SBA List) criticized Steve Driehaus (D-OH), asserting that, by voting for the Act, he voted for a bill that included taxpayer-funded abortion.¹¹⁶ Driehaus disagreed, arguing that because the Act calls for insurers to collect a separate payment, segregate those funds, and use only those segregated funds to pay for abortions, the Act doesn't fund abortions.¹¹⁷ SBA List viewed the segregation rule as an accounting gimmick given the fungibility of money. Both parties essentially pointed to the same statutory provisions and drew contrary inferences from them.

Driehaus complained that the SBA List violated an Ohio law that makes it a criminal offense to make a knowingly or recklessly "false" statement about a candidate for office or a ballot initiative.¹¹⁸ By a 2-1 vote on partisan lines, the Ohio Elections Commission found probable cause to proceed.¹¹⁹

The Court unanimously held that SBA List did not have to wait for the conclusion of proceedings before the Ohio Elections Commission to challenge the constitutionality of the Ohio law.¹²⁰ On remand, the District Court found the Ohio law unconstitutional and permanently enjoined its enforcement.¹²¹ It observed, "the answer to false statements in politics is not to force silence, but to encourage truthful speech in response, and to let the voters, not the Government, decide what the political truth is."¹²²

In short, neither the Colorado Human Rights Commission nor the Ohio Elections Commission proved able to stay away

¹¹⁵ *Id.*

¹¹⁶ *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 154 (2014).

¹¹⁷ *See* George F. Will, *George Will: Campaign speech case is regulatory overkill*, WASH. POST (Apr. 18, 2014), https://www.washingtonpost.com/opinions/george-will-campaign-speech-case-is-regulatory-overkill/2014/04/18/39413958-c652-11e3-bf7a-be01a9b69cf1_story.html?utm_term=.ac7d08a0551d [http://perma.cc/GT3S-MAVJ].

¹¹⁸ *Susan B. Anthony List*, 573 U.S. at 153.

¹¹⁹ *Id.* at 154.

¹²⁰ *Id.* at 151–52.

¹²¹ *See* Susan B. Anthony List v. Ohio Elections Comm'n, 45 F. Supp. 3d 765, 770 (S.D. Ohio 2014).

¹²² *Id.*

from indulging their approval of one side and distaste for the other. Model Rule 8.4(g) presents bar disciplinary authorities with the opportunity to do precisely the same thing, and our hope must be that they will be otherwise too busy to do so.

V. CONCLUSION

Model Rule 8.4(g) has been rejected in eight of the nine states that have acted on a motion to adopt it.¹²³ Those rejections rest on sound legal and prudential grounds that should be persuasive to any other state considering its adoption.

As noted above, the ABA's membership is one-third or less than the total number of lawyers in the United States. If the ABA believes that Model Rule 8.4(g) is such a good idea, it should apply it to its members as a test before inflicting it on the rest of us.

¹²³ See Scott Flaherty, *More States Reject ABA Anti-Bias Ethics Rule*, AM. LAWYER (Sep. 25, 2018, 3:24 PM), <https://www.law.com/americanlawyer/2018/09/25/more-states-reject-aba-anti-bias-ethics-rule/?slreturn=20190220220613> [<http://perma.cc/QE79-MNXJ>].

