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# The Tensions Between Regulation of the Legal Profession and Protection of the First Amendment Rights of Lawyers and Judges: A Tribute to Ronald Rotunda

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## I. INTRODUCTION

This Article is dedicated to the memory of my departed friend and colleague Ron Rotunda. When I later transition to substantive legal analysis, I will use the respectfully professional appellation “Professor Rotunda.” In this personal opening reflection, however, he will just be Ron.

Early on in my career as a law professor, I was on the faculty with Ron at the University of Illinois College of Law. Ron and his close friend and life-long co-author, John Nowak, were my friends and my mentors. Ron was a Renaissance Man, with wide-ranging intellectual and cultural interests. I will never forget dinners at his home, where I learned as much about fine wine and food, international travel, and outer-space as I did about legal ethics and constitutional law. I have seared in my mind’s eye viewing planets through the high-powered telescope Ron had mounted in his backyard, unveiling his passion as a dedicated astronomer. Ron taught me to see the stars and to reach for them.

In this Article, I reflect on the intersection of Ron’s two greatest scholarly passions: legal ethics and constitutional law. More specifically, I focus on the tensions that Ron explored between the regulation of the legal profession and the Free Speech Clause of the First Amendment. In 1995, Ron wrote an article entitled *Racist Speech and Lawyer Discipline*.<sup>1</sup> In the article, Ron argued against the adoption of a proposal to change Rule 8.4 of the American Bar Association (ABA) Model Rules of Professional Responsibility. The proposed change would “make a lawyer subject to discipline for engaging in speech that indicates racial, or sexual, or other bias.”<sup>2</sup> Ron argued passionately that the proposed change would be an affront to the free speech values

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<sup>1</sup> Ronald D. Rotunda, *Racist Speech and Lawyer Discipline*, 6 PROF. LAW. 1, 1 (1995).

<sup>2</sup> *Id.*

of the First Amendment.<sup>3</sup>

Twenty-one years later, in August of 2016, the ABA adopted a new section 8.4(g) to the Model Rules, which provides that 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.”<sup>4</sup>

In the summer of 2018, the United States Supreme Court decided *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*).<sup>5</sup> In *NIFLA*, the Court struck down provisions of a California law requiring that pro-life pregnancy centers counsel clients on the availability of abortion services.<sup>6</sup> On the surface, the Supreme Court’s *NIFLA* pregnancy counseling decision and ABA Model Rule 8.4(g) might seem unrelated, but they are linked. California attempted to defend its abortion counseling law as a valid regulation of “professional speech.”<sup>7</sup> To the extent that ABA Model Rule 8.4(g) applies to the *speech* of lawyers, its proponents might proffer the same defense. Rule 8.4(g), it may be claimed, regulates only professional conduct. To the extent that the regulation of the professional conduct of lawyers incidentally implicates a lawyer’s speech, the argument continues that regulation of “professional speech” should have little, if any, First Amendment protection.

My friend Ron—Professor Rotunda—would never have countenanced this argument. In this personal tribute to Ron, I offer my thoughts on why I think the great Professor Rotunda was right. By the same token, Rule 8.4(g), as it was finally passed, was by no means a brazen effort to restrict politically incorrect speech. On its face, it targets only conduct, and even then, only conduct that would constitute “harassment” or “discrimination” to boot.<sup>8</sup> Professor Rotunda’s early attacks at more sweeping proposals may actually have accomplished their purpose by narrowing the compass of what the ABA finally enacted. In this Article, I explore these conundrums in honor of my friend and colleague’s memory, and his towering contributions to the legal profession and the ongoing interpretation of the Constitution of the United States.

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<sup>3</sup> *Id.*

<sup>4</sup> MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

<sup>5</sup> *See generally* 138 S. Ct. 2361 (2018).

<sup>6</sup> *Id.* at 2370.

<sup>7</sup> *Id.* at 2371.

<sup>8</sup> *See* MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

## II. ABA MODEL RULE 8.4(G)

The text of ABA Model Rule 8.4(g), as passed by the ABA House of Delegates in August of 2016, was the product of an evolutionary process that began in the mid-1990s when Professor Rotunda first voiced his opposition. The original proposals were advances on what was once Comment 3 to Model Rule 8.4(d). That former Comment 3 read:

A lawyer who, in the 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 finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.<sup>9</sup>

This Comment plainly encompassed expression, as it openly referred to “words or conduct.”<sup>10</sup> It was tempered, however, by the requirement that the actions be “prejudicial to the administration of justice.”<sup>11</sup>

The provision that would become Rule 8.4(g), when adopted at the 2016 annual meeting in San Francisco, began to gain traction in 2014 through what was known as “Resolution 109.”<sup>12</sup> The resolution went through numerous revisions and iterations before the version ultimately enacted was passed. That version provides in its entirety that it is 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.<sup>13</sup>

The intended scope of Rule 8.4(g) is slightly amplified by Comment 4, which provides some additional definition to the phrase “conduct related to the practice of law,” by reciting:

Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and

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<sup>9</sup> MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 1992).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Annual Meeting 2016: ABA amends Model Rules to add anti-discrimination, anti-harassment provision*, AM. BAR ASS'N (Aug. 8, 2018), [https://www.americanbar.org/news/abanews/aba-news-archives/2016/08/annual\\_meeting\\_20161/](https://www.americanbar.org/news/abanews/aba-news-archives/2016/08/annual_meeting_20161/) [http://perma.cc/YMU3-YYT].

<sup>13</sup> MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016).

others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.<sup>14</sup>

Taken in combination, the text of Rule 8.4(g) and the accompanying Comment 4 present some ambiguity as to whether the Rule regulates the speech of lawyers. Rule 8.4(g) is phrased as only engaging in “conduct” that is “related to the practice of law” which would constitute “harassment or discrimination.”<sup>15</sup> The text of the Rule assiduously avoids reference to speech. Unlike old Comment 3, it avoids use of the phrase “manifests by words.”

Yet, the practice of law is almost entirely accomplished through the use of language. Doctors operate on the human body probing the organs, performing surgeries, and prescribing medications. Doctors also use speech to counsel and communicate to patients. The practice of medicine, however, is at least in equal parts physical and expressive. The practice of law, however, is almost entirely expressive. To regulate the “conduct” of lawyers is almost entirely to regulate what lawyers say. There are, of course, non-expressive aspects to the regulation of professional conduct. Rules relating to conflicts of interest, for example, concern transactions and relationships more than speech—though even those rules often implicate expression, as when they implicate obligations of disclosure or confidentiality.<sup>16</sup>

Even so, a large part of law practice is expressive, and a large part of the rules governing professional responsibility inevitably involve expression. Thus, “conduct” related to the practice of law that would amount to harassment or discrimination still *could* easily encompass expressive activity arguably falling within the protective ambit of the First Amendment. Comment 4 plainly suggests that this is so by describing the “conduct” prohibited as extending to “participating in bar association, business or social activities in connection with the practice of law.”<sup>17</sup> Rule 8.4(g)’s potential tensions with the First Amendment are further intensified by the curious final sentence to Comment 4, which has troubling colorations of viewpoint discrimination. Lawyers are expressly allowed to “promote diversity and inclusion” by, for example, “implementing initiatives aimed at

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<sup>14</sup> *Id.* at cmt. 4.

<sup>15</sup> *Id.*

<sup>16</sup> *See, e.g.*, MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 1992).

<sup>17</sup> MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS’N 2016).

recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.”<sup>18</sup> This safe-harbor for what lawyers *can* do plainly envisions expressive activity that promotes progressive pro-diversity provisions, suggesting that what lawyers *cannot* do is engage in similarly expressive activity promoting an anti-inclusive or anti-diversity end.

### III. PROFESSOR ROTUNDA’S CRITIQUE

Professor Rotunda’s attack on the insipient emerging proposals to modify Rule 8.4 that surfaced in the 1990s *assumed* that the proposals were intended to curb the expression of lawyers *as lawyers* in a manner that would *not* be permitted under the First Amendment for non-lawyers. This led Professor Rotunda to frame his analysis by asking what additional purchase on the regulation of speech was gained by governmental authorities engaged in the conduct of regulating the legal profession.<sup>19</sup> From this starting point, he divined a critical divide separating those rules of professional responsibility that are *functionally* related to the practice of law and those that are not:

The anti-speech proposals before the ABA are bad policy for another reason. For many years the ABA has fought to limit discipline of lawyers to matters that are functionally related to the practice of law. There are a lot of things that are bad (or that large segments of our population think are bad) but that do not preclude one from practicing law. Rule 8.4(b) does *not* provide that it is professional misconduct to engage in any “criminal act”; rather, it is only misconduct to engage in a criminal act “that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”

In the old days, many states were disciplining lawyers for adultery or fornication. While most people do not approve of adultery, that does not mean that one should discipline a lawyer for engaging in it. The official Comment to Rule 8.4 states that offenses “of personal morality, such as adultery and comparable offenses” do not relate to the fitness to practice 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.”<sup>20</sup>

In a manner characteristic of his qualities as a Renaissance Man, Professor Rotunda concluded his attack on the nascent version of Rule 8.4(g) by invoking classical conceptions of freedom of speech.<sup>21</sup> Professor Rotunda observed that “[i]n ancient Athens, the cradle of democracy, the Greeks widely believed that their

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<sup>18</sup> *Id.*

<sup>19</sup> *See* Rotunda, *supra* note 1.

<sup>20</sup> *Id.* at 4 (emphasis in original) (internal citation omitted).

<sup>21</sup> *Id.* at 6.

freedom of speech made their armies more brave.”<sup>22</sup> Professor Rotunda invoked the history of Herodotus, who boasted that the Athenians could win victories over the more numerous Persians because the Athenians fought not as slaves but as free people respecting free speech.<sup>23</sup> So too, in his play *The Persian*, Aeschylus touted the victory of the Greeks because: “Of no man are they the slaves or subjects.”<sup>24</sup> Quoting I.F. Stone, Professor Rotunda concluded: “For Aeschylus, and for the Athenians, it was not just a victory of Greeks over Persians but of free men over ‘slaves.’ The victors at Salamis were men elevated and inspired by the freedom to speak their minds and govern themselves.”<sup>25</sup> Admonishing the ABA to not forget these ancient truths, Professor Rotunda urged the ABA to resist, even in a spirit of compromise, lending “any support to those who would discipline lawyers (or anyone else) for what they say or think, even when we know that what they say or think is abhorrent and offensive.”<sup>26</sup>

#### IV. THE RISE AND FALL OF THE PROFESSIONAL SPEECH DOCTRINE

The “professional speech doctrine” developed momentum through a series of decisions by various federal circuits from 2013 through 2016. The courts posited that the regulation of the speech of professionals, incident to the regulation of a profession should be analyzed under some level of reduced First Amendment scrutiny.<sup>27</sup> In *Pickup v. Brown*, the Ninth Circuit invoked the professional speech doctrine to uphold a California law forbidding such sexual orientation change efforts for minors, applying simple rational basis review.<sup>28</sup> The same year, the Third Circuit invoked the professional speech doctrine to uphold a similar law in *King v. Governor of New Jersey*.<sup>29</sup> Moreover, the Fourth Circuit invoked the professional speech doctrine to sustain regulation of the speech of fortune tellers in *Moore-King v. County of Chesterfield*.<sup>30</sup>

The incipient professional speech doctrine drew significant commentary and mixed reviews.<sup>31</sup> I was an opponent of the

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (quoting 2 AESCHYLUS, PLAYS (H. Weir Smyth, trans., 1922)).

<sup>25</sup> *Id.* (quoting I.F. STONE, THE TRIAL OF SOCRATES 51 (1988)).

<sup>26</sup> *Id.*

<sup>27</sup> See generally David L. Hudson Jr., *The Professional Speech Doctrine*, FIRST AMEND. ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1551/professional-speech-doctrine> [http://perma.cc/z82E-LNGR].

<sup>28</sup> See 740 F.3d 1208, 1222 (9th Cir. 2014).

<sup>29</sup> See 767 F.3d 216, 224 (3d Cir. 2014).

<sup>30</sup> 708 F.3d 560, 569–70 (4th Cir. 2013).

<sup>31</sup> See generally Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681 (2016); Claudia E. Haupt, *Professional Speech*, 125

recognition of the professional speech doctrine. My critique of the doctrine sounded themes parallel to those invoked by Professor Rotunda in his early admonitions against the initial proposals to enact changes to Rule 8.4. Modern First Amendment doctrine is rooted in faith in the marketplace.<sup>32</sup> Overreaching by government, not overreaching by lawyers, doctors, or fortune tellers, is the primary concern of the First Amendment.<sup>33</sup> Instead of inventing a special level of reduced scrutiny for the regulation of speech by professionals, I argued courts should engage in the rigorous strict scrutiny test in analyzing content-based regulation of professional speech.<sup>34</sup> Application of strict scrutiny will sort the chaff from the wheat, resulting in the striking down of paternalistic regulations that deserve to be struck down, and the upholding of regulations that deserve to be upheld.

Somewhat to my surprise, the Supreme Court of the United States effectively killed the professional speech doctrine earlier and more emphatically than I ever might have imagined. The professional speech doctrine crashed and burned in *NIFLA*.<sup>35</sup> *NIFLA* posed a challenge to the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the “FACT Act”).<sup>36</sup> The California law was enacted to regulate crisis pregnancy centers—pro-life centers that offer pregnancy-related services.<sup>37</sup> The FACT Act required licensed clinics that primarily serve pregnant women to advise those women that California provides free or low-cost services, including abortions, and give them a phone number to call.<sup>38</sup> The FACT Act’s stated purpose was to make sure that state residents know their rights and what healthcare services are available to them.<sup>39</sup> Unlicensed clinics must notify women that California had not licensed the clinics to provide medical services, to ensure that pregnant women know when they are receiving healthcare from licensed professionals.<sup>40</sup>

In striking down the California provisions, the Court observed that the “Court has not recognized ‘professional speech’

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YALE L.J. 1238, 1241 (2016); Jacob M. Victor, Note, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 YALE L.J. 1532, 1537 (2014).

<sup>32</sup> Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 112 (2016).

<sup>33</sup> *Id.*

<sup>34</sup> *See id.*

<sup>35</sup> *See generally* 138 S. Ct. 2361 (2018).

<sup>36</sup> *Id.* at 2368; *see also* CAL. HEALTH & SAFETY CODE § 123470 (West 2018).

<sup>37</sup> *NIFLA*, 138 S. Ct. at 2368.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2369.

<sup>40</sup> *Id.* at 2370.



as a separate category of speech.”<sup>41</sup> The Court distinguished two areas of existing First Amendment law in which it had previously recognized that standards lower than strict scrutiny applied to the speech of professionals was appropriate.<sup>42</sup>

The intermediate scrutiny “commercial speech” standard applied to the commercial speech of professionals, such as advertising.<sup>43</sup> The commercial speech standard was limited, however, to requiring disclosure, at times, of factual *noncontroversial* information: “First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’”<sup>44</sup> But rules governing disclosure in commercial speech contexts, under the leading lawyer advertising commercial speech decision involving disclosures, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,<sup>45</sup> the Court held, were not applicable to the sort of disclosures California sought to impose on the clinics under the guise of the professional speech doctrine.<sup>46</sup> The speech California sought to force the clinics to speak had nothing to do with the clinics’ services or products, but were entirely the state-sponsored message of California.<sup>47</sup>

The Court in *NIFLA* also rejected the argument that the California provisions could be upheld as regulation of professional conduct that “incidentally involves speech,” of the sort approved in *Planned Parenthood v. Casey*.<sup>48</sup> Professional ethical standards, or suits for professional malpractice, for example, have traditionally been regarded as regulating professional conduct, though that conduct may involve speaking.<sup>49</sup> “While drawing the line between speech and conduct can be difficult, this Court’s precedents have long drawn it.”<sup>50</sup>

“Outside of the two contexts discussed above—disclosures

<sup>41</sup> *Id.* at 2371.

<sup>42</sup> *Id.* at 2372.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (first citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); then citing *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); and then citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)).

<sup>45</sup> *See Zauderer*, 471 U.S. at 651.

<sup>46</sup> *NIFLA*, 138 S. Ct. at 2372.

<sup>47</sup> *See id.* (“The *Zauderer* standard does not apply here. Most obviously, the licensed notice is not limited to ‘purely factual and uncontroversial information about the terms under which . . . services will be available.’ The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state-sponsored services*—including abortion, anything but an ‘uncontroversial’ topic. Accordingly, *Zauderer* has no application here.” (emphasis in original) (internal citations omitted)).

<sup>48</sup> *Id.*

<sup>49</sup> *See id.* at 2373.

<sup>50</sup> *Id.*

under *Zauderer* and professional conduct—this Court’s precedents have long protected the First Amendment rights of professionals,” the Court observed.<sup>51</sup> For example, the Court “has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, professional fundraisers, and organizations that provided specialized advice about international law.”<sup>52</sup>

The Court had sound reasons for driving a stake through the heart of the professional speech doctrine. “The dangers associated with content-based regulations of speech are also present in the context of professional speech.”<sup>53</sup> As with other kinds of speech, the Court reasoned, regulating the content of professionals’ speech poses the inherent risk that the government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.<sup>54</sup> Indeed, throughout history, governments have manipulated the speech of professionals “to increase state power and suppress minorities.”<sup>55</sup> This skews the operation of the marketplace of ideas:

Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform.<sup>56</sup>

The Court noted that, among other things, the reach of the professional speech doctrine was almost limitless, given the difficulty of defining what would or would not qualify as

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<sup>51</sup> *Id.* at 2374.

<sup>52</sup> *Id.* (internal citations omitted).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* For example:

[D]uring the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the “health of the Volk” than to the health of individual patients. Recently, Nicolae Ceausescu’s strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS.

*Id.* (quoting Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 201–02 (1994) (footnotes omitted)).

<sup>56</sup> *Id.* at 2374–75.

“professional.”<sup>57</sup> Indeed, the professional speech doctrine had the capacity to turn fundamental First Amendment assumptions upside down. For carried to its logical end, all the government would be required to do is create licensure rules for any particular occupation and then seek to reduce the freedom of members of that occupation to speak by treating the regulation as mere regulation of professional speech.<sup>58</sup> States do not get to choose the level of scrutiny a regulation will receive under the First Amendment; it is the First Amendment that chooses the level of scrutiny applied to a regulation by the States.<sup>59</sup>

The Court in *NIFLA* did not foreclose the slim possibility that in some future scenario there might be a case for reduced scrutiny of the regulation of professionals:

In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny. California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it.<sup>60</sup>

This modest hedge, however, was nothing more, in my view, than recognition that there undoubtedly *are* situations, as Professor Rotunda’s article acknowledged,<sup>61</sup> when palpable government interests related to the functional health of the administration of justice and the conduct of lawyers will not run afoul of the First Amendment. In the closing section of this Article, I elaborate on what I believe Professor Rotunda had in mind, and what the Supreme Court in *NIFLA* had in mind, and how those minds are well-met, forming a coherent theory of what sorts of regulation of the speech of lawyers the Constitution does and does not permit.

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<sup>57</sup> *Id.* (citing Smolla, *supra* note 32).

<sup>58</sup> *Id.* at 2375 (“All that is required to make something a ‘profession,’ according to these courts, is that it involves personalized services and requires a professional license from the State. But that gives the States unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement.”).

<sup>59</sup> *Id.* (“States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose ‘invidious discrimination of disfavored subjects.’” (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423–24, n.19 (1993))); *see also* *Riley v. Nat’l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (“[S]tate labels cannot be dispositive of [the] degree of First Amendment protection.” (citing *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975))).

<sup>60</sup> 138 S. Ct. at 2375.

<sup>61</sup> *See, e.g.*, Rotunda, *supra* note 1, at 6.

## V. EXPLORING THE CONSTITUTIONAL LIMITS

If the power of government to regulate the speech of lawyers and judges is considered on a spectrum, the government's power will surely be at its apex when the regulation is directly connected to the management of the administration of justice. Speech by lawyers and judges inside a courtroom is the quintessential example. In *Sacher v. United States*, the Supreme Court sustained the power of courts to use their contempt authority to sanction a lawyer for his expression within a courtroom.<sup>62</sup> The Court invoked solid, functional rationales for its ruling, noting that “[t]he nature of the [lawyer’s] deportment was not such as merely to offend personal sensitivities of the judge, but it prejudiced the expeditious, orderly and dispassionate conduct of the trial.”<sup>63</sup>

When a lawyer speaks outside a courtroom on a matter pending inside a courtroom, the constitutional protection for the speech remains high, though the government is permitted, under the rule of *Gentile v. State Bar of Nevada*,<sup>64</sup> to limit the extrajudicial speech of a lawyer participating in an ongoing proceeding when the lawyer knows or reasonably should know that the speech will “hav[e] a substantial likelihood of materially prejudicing that [adjudicative] proceeding.”<sup>65</sup>

At the opposite end of the spectrum are efforts by the government to use the leverage of licensing attorneys to exact requirements that attorneys not take disfavored positions on public issues *not* directly germane to the practice law. The First Amendment would surely be violated by a sweeping regulation prohibiting an attorney from engaging in racist speech, or joining a racist organization, in situations in which the speech or the membership bear no connection to the practice of law.

As reprehensible as racist speech and membership in racist organizations were to Professor Rotunda—and are to

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<sup>62</sup> 343 U.S. 1, 4–5 (1952).

<sup>63</sup> *Id.* at 5.

<sup>64</sup> 501 U.S. 1030 (1991).

<sup>65</sup> *Id.* at 1076. (“The regulation of attorneys’ speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys’ comments until after the trial.”). While this rule comes from the *dissenting* opinion of Chief Justice Rehnquist, on this issue the Chief Justice spoke for the Court. *Id.* at 1032, 1076. Chief Justice Rehnquist delivered the opinion of the Court joined by Justices White, O’Connor, Scalia, and Souter, upholding the general “substantial likelihood of material prejudice” standard. *Id.* at 1032, 1063 (“We conclude that the ‘substantial likelihood of material prejudice’ standard applied by Nevada and most other States satisfies the First Amendment.”). The Court nonetheless struck down Nevada’s unusual interpretation and application of the rule, holding it was unconstitutionally vague, in an opinion written by Justice Kennedy, and joined by Justices Marshall, Blackmun, Stevens, and O’Connor. *Id.* at 1048.

me—Americans, including lawyers, have a right to be racist and associate with other racists. Professor Rotunda’s position was crystalline in its clarity:

First, let me make clear that I do not support lawyers who engage in racial or sexual discrimination. Nor do I think that lawyers should tell racist, ethnic, sexist, or other similar jokes. We should not laugh at such jokes, or otherwise indicate support of such speech. We can indicate, by our speech, that we do not approve of such discriminatory speech. The best weapon against the speech we do not like is more speech, not enforced silence.

It is one thing for us to disapprove of such speech, and it is another matter if we seek to use the authority of the state to punish such speech. The latter violates the First Amendment.<sup>66</sup>

For my part, I served as lead counsel, writing the briefs and presenting argument in the Supreme Court in *Virginia v. Black*,<sup>67</sup> in which my clients included a leader of the Ku Klux Klan, a dedicated white supremacist, who had led a cross-burning ceremony as part of a traditional Klan ritual.<sup>68</sup> I was able to draw a distinction between my revulsion for his beliefs and my own belief in the First Amendment.

Where on the spectrum does the new ABA Model Rule 8.4(g) fall? Consider, as part of the mix, a somewhat parallel provision in Rule 2.3(B) of the American Bar Association Model Code of Judicial Conduct:

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.<sup>69</sup>

Rule 2.3(B) is in some respects ostensibly broader than Rule 8.4(g). Rule 2.3(B) prohibits “*words or conduct*,”<sup>70</sup> whereas Rule 8.4(g) requires that the lawyer “*engage in conduct*.”<sup>71</sup> Rule 2.3(B) reaches “words” that “manifest bias or prejudice.”<sup>72</sup> Thus, for a judge to express himself or herself in words that manifest prejudice is prohibited. In contrast, Rule 8.4(g) requires that the conduct prohibited “*is harassment or discrimination*.”<sup>73</sup> On the other hand,

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<sup>66</sup> Rotunda, *supra* note 1, at 1.

<sup>67</sup> 538 U.S. 343 (2003).

<sup>68</sup> *Id.* at 347.

<sup>69</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.3(B) (AM. BAR ASS’N 2014).

<sup>70</sup> *See id.*

<sup>71</sup> *See* MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

<sup>72</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.3(B) (AM. BAR ASS’N 2014).

<sup>73</sup> MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

in one respect, Rule 2.3(B) is arguably more tightly confined than Rule 8.4(g). Rule 2.3(B) is limited to what a judge does “in the performance of judicial duties.”<sup>74</sup> Rule 8.4(g) refers to “conduct related to the practice of law,” a concept that might be deemed more expansive than actual *performance* of the practice of law. Comment 4, as previously noted, suggests the potentially expansive reach of the prohibition, describing it as reaching actions by lawyers “participating in bar association, business or social activities in connection with the practice of law.”<sup>75</sup>

A narrow reading of Rule 8.4(g) would limit its reach to conduct in the practice of law constituting “harassment” or “discrimination” of the sort that would be illegal and unprotected by the Constitution, under federal, state, and local civil rights laws. If that is all that Rule 8.4(g) prohibits, then the hubbub over it is much ado about nothing. But it is not at all plain that Rule 8.4(g) is so limited. The scholarly commentary on the issue is divided.<sup>76</sup> A particularly thoughtful and balanced exploration of the issues by Professor Rebecca Aviel canvasses the history, text, and commentary of the Rule, yet concludes somewhat inconclusively, describing sensibilities about the Rule as a cultural work-in-progress.<sup>77</sup> Professor Aviel argues that “Rule 8.4(g) is a project to reshape the norms of the legal profession so that discrimination and harassment come to be seen as similarly grievous as misrepresentation and dishonesty.”<sup>78</sup> Professor Aviel admits this is an ambitious project, but ends with the optimistic exhortation that “with a bit more work we can make sure it is not an unconstitutional one.”<sup>79</sup>

Individual states, of course, must make their own choices as to whether to adopt language suggested by ABA Model Rule

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<sup>74</sup> MODEL CODE OF JUDICIAL CONDUCT r. 2.3(B) (AM. BAR ASS’N 2014).

<sup>75</sup> See MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS’N 2016).

<sup>76</sup> See Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 216 (2017) (“The claim that ‘harassment’ is unfairly vague, perhaps fatally so, ignores some powerful contrary arguments.”); 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 241, 257 (2017) (“Because no jurisdiction has ever attempted to enforce a speech code over social activities merely ‘connected with the practice of law,’ there are no precedents to turn to in order to assess such a regime’s constitutionality. (Professor Gillers fails to acknowledge this gap in his otherwise thorough analysis.) While discrimination and sexual harassment do have established bodies of case law that can be referred to, longstanding ethics rules do not penalize harassment by itself in the context of private speech at various social functions. In such fora, the government’s interest is at its nadir, and tailoring must be extremely narrow to survive judicial scrutiny.” (footnote omitted)).

<sup>77</sup> See Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 55 (2018).

<sup>78</sup> *Id.* at 76.

<sup>79</sup> *Id.*

8.4(g), and if so, whether to modify the Rule to bring it more clearly into conformity with First Amendment norms. There are numerous steps that can be taken to tighten the scope of the Rule, and in so tightening, reduce tensions with the First Amendment.

One step is to include limiting language that would clarify that *only* conduct, including conduct effectuated through the use of language, that would constitute harassment or discrimination as defined under such civil rights laws as Title VII of the Civil Rights Act of 1964 are prohibited by the Rule. The leading Supreme Court case defining the contours of hostile work environment claims under Title VII should be understood as also establishing the permissible limitations on what constitutes “harassment” for the purpose of the regulation of the conduct of lawyers. In *Harris v. Forklift Systems, Inc.*,<sup>80</sup> the Court explained:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment — an environment that a reasonable person would find hostile or abusive — is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation. But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality.<sup>81</sup>

The Supreme Court has never taken a deep dive into an explanation of exactly why expression that would be protected by the First Amendment in the general marketplace might nonetheless be proscribable in the workplace. There are, however, cogent justifications.

First, speech that might be dismissed as constitutionally protected hate speech in the general marketplace takes on a different pallor within the workplace environment. An employee who sues under Title VII and recovers is clearly not engaged in an attempt to recover for mere distress caused by the content of a speaker’s message. The employee, instead, is invoking a legal remedy for abridgment of a legally vested interest: The interest Title VII grants all employees in freedom from discrimination in the

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<sup>80</sup> 510 U.S. 17 (1993).

<sup>81</sup> *Id.* at 21–22.

workplace. More than mere offense in reaction to the message is in play. There is a more palpable disruption of a legal relationship protected by law: The relationship of an employee to an employer that is guaranteed to be free from prohibited discrimination.

Second, there are captive audience and coercion elements implicated in the workplace. The classic response to exposure to offensive speech in the general marketplace is that the offended viewer should look the other way.<sup>82</sup> “The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, ‘we are inescapably captive audiences for many purposes.’”<sup>83</sup> Now more than ever, we are constantly bombarded with speech that we deem false, coarse, and offensive. Would that it was not so, but this is the world we live in. “Much that we encounter offends our esthetic, if not our political and moral, sensibilities.”<sup>84</sup> It comes down largely to an issue of who “decide[s].”<sup>85</sup> Modern First Amendment orthodoxy, which Professor Rotunda deeply embraced, is that the “who” ought not be the government. In this deep belief, I believe he was right. He was surely right in the estimation of the Supreme Court, because the Court proclaimed, “the Constitution does not permit [the] government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”<sup>86</sup> Yes, we are all subjected, all of the time, to messages that offend us. But the constitutional presumption is that, as adults, we avoid what bothers us by looking away, or dealing with it and responding.<sup>87</sup>

A second step is to abandon efforts to regulate the conduct of lawyers with regard to biased speech in bar association, business, or social activities related to the practice of law. In these settings, there is great danger that bar authorities, wielding the force of the state, would be invited to investigate and potentially punish boorish, unsavory, and offensive comments that would turn off many, if not most, lawyers of goodwill and restrained judgment said in intemperate moments at a conference or a cocktail party. Our profession has plenty of informal social, cultural, and peer-pressure levers to exert as a counter to such expression. To render such expression grounds for professional discipline, however, comes dangerously close to imposing a culture of

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<sup>82</sup> *Erznoznik v. Jacksonville*, 422 U.S. 205, 211 (1975).

<sup>83</sup> *Id.* at 210 (quoting *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 736 (1970)).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 210–11 (“Rather, . . . the burden normally falls upon the viewer to ‘avoid further bombardment of [his] sensibilities simply by averting [his] eyes.’” (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971))).



orthodoxy and decorum that may align with the highest aspirations of the profession, but cannot be squared with the values of free speech in an open society. As I have argued elsewhere, much of modern First Amendment law is most easily understood as an exercise in boundary disputes. In the general marketplace, we extend robust protection to even the most offensive opinions. Unless the speech meets the rigorous First Amendment standards defining incitement to violence, a true threat, or defamation, to use common examples, the Constitution protects it. In certain “carve outs” from the general marketplace, such as the workplace, speech that would be protected in the general marketplace may become proscribable. The standard in *Harris* defining hostile work environments, for example, would render actionable under Title VII language that which could not be penalized off-duty in a public park.<sup>88</sup> The looseness of current ABA Model Rule 8.4(g), particularly as expanded by Comment 4, seems to disregard this fundamental constitutional divide.

## VI. CONCLUSION

My friend Ron Rotunda was a scholar, teacher, and advocate driven by deep conviction and powerful passions. Perhaps that is why he was so solicitous of freedom of speech, and so cautious about equating attitudes and sentiments he deemed unsavory as punishable violations of legally binding ethical rules. I am thankful to the *Chapman Law Review* for the opportunity to offer this brief reflection on the personality and principles of Ron Rotunda, whose passions and thoughts made this world a better place.

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<sup>88</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).