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RECKLESS ABANDON: THE SHADOW OF MODEL RULE 8.4(G) AND A PATH FORWARD

MARGARET TARKINGTON[†]

INTRODUCTION

In August 2016, the American Bar Association’s (“ABA”) Board of Governors approved Model Rule of Professional Conduct (“MRPC”) 8.4(g) as a model for state adoption. The Rule makes it professional misconduct for a lawyer to engage in “harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.”¹ Curbing harassment and discrimination is a critically important goal. However, the actual Rule as promulgated reaches far beyond prohibiting sexual harassment and unlawful discrimination. Instead the comments to the Rule define discrimination and harassment broadly to prohibit speech² that “manifests bias or prejudice” or is “derogatory or demeaning” on the aforementioned bases.³ Swept within the Rule’s apparent reach is speech regarding many of

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¹ MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

² The Model Rule uses the term “verbal . . . conduct”—but verbal conduct is speech. *See id.*, cmt. 3.

³ *Id.*

“the major public issues of our time” that divide our country.⁴ Further, the Rule expressly applies to settings such as Continuing Legal Education (“CLE”) courses, bar functions, and social activities in connection with the practice of law;⁵ indeed the ABA’s Report indicates it was intended to reach “lobbyists” and “settings [] such as law schools.”⁶

Despite public and scholarly criticism of the Rule voicing concerns that it will work to undermine lawyers’ First Amendment rights,⁷ the Rule itself is likely to have very little actual effect on lawyers’ rights—precisely because many states are declining to adopt it, some due to opinions from their respective attorneys general that the Rule unconstitutionally infringes on lawyers’ First Amendment rights.⁸ Since its approval in 2016 only two states, Vermont and New Mexico, have adopted Rule 8.4(g) as promulgated by the ABA.⁹ Maine and

⁴ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964). See also MARGARET TARKINGTON, VOICE OF JUSTICE: RECLAIMING THE FIRST AMENDMENT RIGHTS OF LAWYERS 259–60 (2018) (describing how Model Rule 8.4(g) covers speech regarding public issues).

⁵ MODEL RULES OF PRO. CONDUCT r. 8.4(g) & cmt. 4 (AM. BAR ASS’N 2016) (“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 added)).

⁶ Myles V. Lynk, *Report to the House of Delegates*, 2016 A.B.A. STANDING COMM. ON ETHICS & PRO. RESP. 2 [hereinafter ABA REPORT 109].

⁷ See, e.g., Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express ‘Bias,’ Including in Law-Related Social Activities*, WASH. POST: VOLOKH CONSPIRACY (Aug. 10, 2016, 8:53 AM), <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/>; David French, *A Speech Code for Lawyers*, NAT’L REV.: LAW AND THE COURTS (Aug. 11, 2016, 7:46 PM), <https://www.nationalreview.com/2016/08/free-speech-lawyers-american-bar-association-model-rules-professional-conduct/> [<https://perma.cc/YML2-GBL2>]; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 258 (2017); 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 PRO. 201, 249 (2017); Keith Swisher & Eugene Volokh, *Point-Counterpoint: A Speech Code for Lawyers?*, 101 JUDICATURE 70, 74 (2017) (statement of Eugene Volokh); George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y 135, 135 (2018); Jack Park, *ABA Model Rule 8.4(g): An Exercise in Coercing Virtue?*, 22 CHAP. L. REV. 267, 274 (2019).

⁸ See *infra* note 119 and accompanying text.

⁹ VT. RULES OF PRO. CONDUCT r. 8.4(g) (2017); N.M. RULES OF PRO. CONDUCT r. 16-804(G) (2019).

New Hampshire adopted comparable rules in 2019, but both states made substantial and important changes to the Rule—including discarding entirely the ABA’s definition of discrimination—to protect lawyers’ First Amendment rights.¹⁰

Despite the overarching trend of states in rejecting Model Rule 8.4(g) in view of its potential infringement on lawyers’ First Amendment rights, there is a perilous and lasting threat to those rights that has arisen as a byproduct of the ABA’s promulgation of 8.4(g). The Model Rule has cast an ominous shadow on legal scholarship and commentary addressing the recognition and protection of lawyers’ First Amendment rights. This shadow of Model Rule 8.4(g) is far more likely to undermine lawyers’ rights in the long run than the Rule itself. Indeed, the shadow has nothing to do with interpretations, enforcement, or adoption of Model Rule 8.4(g). It has nothing to do with discrimination or harassment or with either prohibiting or protecting offensive speech. Instead, the shadow is the generation of legal scholarship and commentary that discards altogether the First Amendment rights of lawyers to shore up the purported constitutionality of Model Rule 8.4(g).

The abandonment of lawyers’ First Amendment rights in prominent scholarship and Formal Ethics Opinions from the ABA promises to have far reaching consequences in a manifold of disciplinary contexts where attorneys rely on the protective shield of the First Amendment to avoid discipline for speech, association, assembly, or petitioning. Nearly all the work lawyers do falls within the ambit of the First Amendment. While this fact seemingly complicates the recognition of lawyers’ First Amendment rights,¹¹ protecting those rights is essential to protecting the system of justice and the role of the lawyer therein.

Defenders of the current Model Rule 8.4(g) appear oblivious to the value of the First Amendment in protecting lawyers from regulation promulgated by the ABA or enforced by state bars and judiciaries. Yet political wheels turn and political power changes hands. It is incredibly short-sighted to advocate for abandoning First Amendment protection for lawyers on the theory that we can just trust regulators. Our experiences over the past

¹⁰ See ME. RULES OF PRO. CONDUCT r. 8.4(g) (2019); N.H. RULES OF PRO. CONDUCT r. 8.4(g) & Sup. Ct. cmt. (2019).

¹¹ See Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 694–95 (1997); TARKINGTON, *supra* note 4, at 20.

century—through the civil rights movement, the labor movement, two Red scares, post-9/11 fear of terrorism, and anti-immigration policies¹²—work together to demonstrate the profound importance of protecting *lawyers'* First Amendment rights. It is only through *lawyer* speech, association with clients, and petitioning that the judicial power is invoked, and that client life, liberty, and property are protected. If regulators can silence the voice of lawyers, they can silence justice itself.

If the only available options were to either throw out Model Rule 8.4(g) or to throw out the First Amendment, the right answer under our system of government is clear. The First Amendment stays. But those are not the only options. Maine's and New Hampshire's significant alterations of the Rule demonstrate that drafting a constitutionally sound antidiscrimination rule is attainable. By pushing for adoption of Model Rule 8.4(g), the ABA and its defenders are stoking a culture war and forcing people to choose sides in a false dichotomy between antidiscrimination and the First Amendment. Proponents of antiharassment and antidiscrimination should stop defending Model Rule 8.4(g) as promulgated. Instead, the ABA needs to recall Rule 8.4(g) and promulgate a new rule that is constitutionally sound. Yet rather than take this path, in July 2020, the ABA potentially escalated matters by issuing a Formal Ethics Opinion that doubled-down on the validity of the promulgated Model Rule 8.4(g), citing to the tragic murder of George Floyd and the “unprecedented social awareness generated by it[,]” and asserting that “[e]nforcement of Rule 8.4(g) is . . . critical.”¹³

The fact that many states already have some antidiscrimination language in their existing rules of professional conduct indicates that states do not object to the principles of equality underlying Model Rule 8.4(g).¹⁴ Rather, it is the overbreadth of Model Rule 8.4(g) and its encroachment into protected speech and advocacy that is preventing the Rule from having traction among the states. If the ABA and supporters of

¹² See *infra* notes 27–29, 91–94 and accompanying text.

¹³ ABA Comm. on Ethics & Pro. Resp., Formal Op. 493, at 1 & n.3 (2020) [hereinafter ABA Op. 493].

¹⁴ See Kristine A. Kubes, Cara D. Davis & Mary E. Schwind, *The Evolution of Model Rule 8.4 (g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, A.B.A. (Mar. 12, 2019), www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/ [https://perma.cc/4CWM-R4P6].

the Rule would simply own the constitutional deficiencies of Model Rule 8.4(g) and amend it to fix those deficiencies, the rule would be far more likely to be adopted—and more likely to stay law after adoption. Promulgation of a constitutionally sound, amended rule would in turn work to undermine harassment and discrimination in adoptive states. Meanwhile the current Rule—due to its lack of traction—does not actually work to curb harassment or discrimination, but merely works to inflame the culture war, dividing liberals and conservatives by forcing people to choose sides in an unnecessary battle of antidiscrimination versus the First Amendment.

Legal scholarship and caselaw as to lawyers' First Amendment rights have long since been a morass with competing views as to the appropriate scope of lawyers' First Amendment rights. But, as overviewed in Part I, scholarship resoundingly rejected the constitutional conditions approach, which holds that attorneys waive their constitutional rights as a condition of the privilege of practicing law.¹⁵ However, as detailed in Part II, since the promulgation of Model Rule 8.4(g), a growing number of scholars and Formal Opinions from the ABA embrace the constitutional conditions approach or otherwise deny lawyers recourse through the First Amendment.¹⁶ This rejection of the First Amendment in the shadow of defending Model Rule 8.4(g) has dire potential consequences in many contexts—as the First Amendment at its core protects the lawyer's role in the system of justice and cannot be discarded without undermining justice itself, as shown in Part III.¹⁷ But, as discussed in Part IV, the *Scylla* and *Charybdis* alternatives of either rejecting the First Amendment or rejecting antidiscrimination is a false dichotomy—and the ABA and proponents of antidiscrimination would further their cause far more effectively and constitutionally by simply amending and proposing a new Model Rule rather than inflaming an unnecessary culture war.¹⁸

I. LEGAL SCHOLARSHIP REGARDING LAWYERS' FIRST AMENDMENT RIGHTS PRIOR TO MODEL RULE 8.4(G)

While the legal landscape regarding lawyers' First Amendment rights has long been a morass, the Supreme Court of

¹⁵ See *infra* notes 21–30 and accompanying text.

¹⁶ See *infra* notes 47–51, 64–77 and accompanying text.

¹⁷ See *infra* Part III.

¹⁸ See *infra* Part IV.

the United States has recognized these rights since at least the 1950s, and scholarship largely followed suit.

In the early twentieth century, before the incorporation of the First Amendment against the states, the constitutional conditions approach was the primary view. As Justice Cardozo stated: "Membership in the [B]ar is a privilege burdened with conditions."¹⁹ In other words, lawyers surrender their First Amendment rights as a condition of obtaining the privilege to practice law. The theory is often tied to the lawyer's oath. Justice Rehnquist appeared to adopt this approach in his non-majority *Gentile* opinion:

When petitioner was admitted to practice law before the Nevada courts, the oath which he took recited that "I will support, abide by and follow the Rules of Professional Conduct as are now or may hereafter be adopted by the Supreme Court . . ." The First Amendment does not excuse him from that obligation, nor should it forbid the discipline imposed upon him by the Supreme Court of Nevada.²⁰

Despite Rehnquist's apparent endorsement, the constitutional conditions approach has largely been rejected in legal scholarship prior to the promulgation of Model Rule 8.4(g). The disappearance of this view was provoked by both the rejection of constitutional conditions theory in other contexts,²¹ and the fact that the Supreme Court repeatedly recognized lawyers' First Amendment rights during the second Red Scare and in the civil rights movements. In a series of cases dealing with state bars that excluded from membership applicants who were formerly members of the Communist Party, or who refused to answer questions in that regard, the Supreme Court ultimately vindicated lawyers' rights²²—expressly rejecting the constitutional conditions approach in *Schwartz v. Board of Bar Examiners of the State of New Mexico*, where the Court declared

¹⁹ *In re Rouss*, 221 N.Y. 81, 84 (N.Y. 1917).

²⁰ See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1081 (1991) (Rehnquist, C.J.) (citation omitted).

²¹ Outside of the attorney speech context, this doctrine is stated in the reverse as "unconstitutional conditions" and "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

²² See *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 274 (1957); *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 246–47 (1957).

that “[c]ertainly the practice of law is *not* a matter of the State’s grace.”²³

Similarly, after *Brown v. Board of Education*,²⁴ several southern states attempted to shut down the National Association for the Advancement of Colored People’s (“NAACP”) desegregation campaign by redefining prohibited solicitation to forbid lawyers from speaking to the affected citizens and offering representation. In *NAACP v. Button*—a case epitomizing the importance of lawyers’ First Amendment rights to the integrity of our justice system—the Supreme Court invalidated state regulations on lawyers and explicitly recognized lawyers’ First Amendment rights to association, expression, and petition—even in the context of practicing law.²⁵ Indeed, the Supreme Court has invalidated regulations on lawyers as infringing on lawyers’ First Amendment rights in numerous cases, including *Schwartz*, *Konigsberg*, *Button*, *Garrison*, *Bates*, *In re Primus*, *In re R.M.J.*, *Zauderer*, *Shapero*, *Gentile*, *Velazquez*, and *Republican Party of Minnesota*.²⁶

In light of this caselaw—and the manifest importance of protecting lawyers’ First Amendment rights as revealed in the contexts of punishing lawyers during national Red Scares²⁷ and in the civil rights²⁸ and labor movements²⁹—the constitutional conditions theory was overarchingly rejected by legal academia. Nevertheless, in some state and federal caselaw there exists one narrow context through which the constitutional conditions theory managed to remain viable even into the twenty-first century—and that was in the context of punishing lawyer derogation of the judiciary.³⁰

²³ *Schwartz*, 353 U.S. at 238 n.5 (emphasis added).

²⁴ 347 U.S. 483 (1954).

²⁵ 371 U.S. 415, 428–29 (1963).

²⁶ See *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548–49 (2001); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1057–58 (1991); *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 479 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647–49 (1985); *In re R.M.J.*, 455 U.S. 191, 206–07 (1982); *In re Primus*, 436 U.S. 412, 439 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977); *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964); *Button*, 371 U.S. at 444; *Konigsberg*, 353 U.S. at 273; *Schwartz*, 353 U.S. at 246–47.

²⁷ See, e.g., *Konigsberg*, 353 U.S. at 273–74; *Schwartz*, 353 U.S. at 246.

²⁸ See, e.g., *Button*, 371 U.S. at 442.

²⁹ See, e.g., Catherine L. Fisk, *Labor Lawyers and the Ideals of the Mid-Century Legal Profession 2–3* (2019) (unpublished manuscript) (on file with author).

³⁰ See Margaret Tarkington, *Throwing Out the Baby: The ABA’s Subversion of Lawyer First Amendment Rights*, 24 *Texas Rev. L. & Pol.* 41, 67–68 (2019).

Legal scholarship has explored other methods to understand lawyers' First Amendment rights. A number of scholars endorsed various versions of the categorical approach—contending that lawyers had limited, if any, First Amendment rights when engaged in the practice of law but had full First Amendment rights outside of their law practice. Scholars often came to this conclusion by analogizing attorney First Amendment rights to other areas of limited First Amendment protection. For example, Kathleen Sullivan, W. Bradley Wendel, and Terri Day analogized attorney speech to the limited protections for public employee speech, government forum speech, and government-funded speech.³¹ Working from these analogies, Kathleen Sullivan concluded that the Supreme Court's case law could be understood as providing normal First Amendment protection when attorneys are speaking “as participants in ordinary public or commercial discourse on a par with other speakers in those realms,” but that their free speech rights are limited—or perhaps lost—when attorneys are speaking in their role of attorney as “officers of the court” or “delegates of state power.”³²

Other scholars, including Erwin Chemerinsky,³³ Renee Newman Knake,³⁴ Carol Rice Andrews,³⁵ Monroe Freedman and Janet Starwood,³⁶ argued that regular First Amendment doctrines applied to lawyer regulation and discipline. This approach is supported by a number of Supreme Court cases when the Court applies normal First Amendment principles to lawyer

³¹ See Terri R. Day, *Speak No Evil: Legal Ethics v. the First Amendment*, 32 J. LEGAL PRO. 161, 187–90 (2008) (analogizing attorney speech to public employee speech); Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 585–87 (1998) (analogizing attorney speech to public employees, government-funded speech, and speech in a non-public forum); W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 375–81 (2001) (same).

³² Sullivan, *supra* note 31, at 569, 584.

³³ Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L. J. 859, 863–67 (1998).

³⁴ See Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82 FORDHAM L. REV. 2843, 2844–45 (2014).

³⁵ Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 690 (1999); Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665, 776–78 (2000).

³⁶ Monroe H. Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607, 617 (1977).

regulation. For example, in the advertising context, the Supreme Court has applied the *Central Hudson* commercial speech line of cases to attorney regulation of advertising.³⁷ Although the state interests and the regulations themselves may involve interests specific to attorneys, the analysis the Court used to test the constitutionality of the restriction, along with the level of scrutiny employed, are the same as that used for regulation of any other service provider or regulated industry. Further, in both *Republican Party of Minnesota v. White*³⁸ and *Williams-Yulee v. Florida Bar*³⁹ the Court applied strict scrutiny—the normal level for restrictions on political speech—in analyzing the constitutionality of restrictions on speech of judicial candidates.

More broadly, in its June 2018 opinion, *National Institute of Family and Life Advocates v. Becerra*, the Supreme Court flatly rejected the argument that “professional speech”—speech made by professionals while acting as professionals—was subject to a lower level of scrutiny than exists under normal First Amendment doctrines.⁴⁰ The Court, albeit by a 5–4 majority, explained that its prior precedents had “not recognized ‘professional speech’ as a separate category of speech” subject to lower scrutiny and that “[s]peech is not unprotected merely because it is uttered by ‘professionals.’”⁴¹ Consequently, the Court applied strict scrutiny, employing “ordinary First Amendment principles” governing content-based regulations.⁴² Although the *Becerra* opinion dealt with regulations in the medical profession, the Court relied heavily on cases dealing with attorney First Amendment rights.⁴³

As I have previously contended, the use of normal First Amendment doctrines for analyzing lawyer regulations has its

³⁷ See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995); *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637–44 (1985); *In re R.M.J.*, 455 U.S. 191, 203–06 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 365 (1977).

³⁸ 536 U.S. 765, 775 (2002).

³⁹ 575 U.S. 433, 442–44 (2015).

⁴⁰ 138 S.Ct. 2361, 2371–72 (2018).

⁴¹ *Id.*

⁴² *Id.* at 2375.

⁴³ See, e.g., *id.* at 2372–74 (discussing and citing to cases adjudicating the First Amendment rights of lawyers, including *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), *Milavetz, Gallop & Milavetz v. United States*, 559 U.S. 229 (2010), *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978), *NAACP v. Button*, 371 U.S. 415 (1963), *In re Primus*, 436 U.S. 412 (1978), and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)).

limitations because those doctrines are not attuned to protecting the integrity of the justice system. They do not accurately identify either what speech must be protected so lawyers can fulfill their role in the justice system or what speech can, or should, be forbidden to protect the proper functioning of the justice system.⁴⁴

Consequently, I have advocated the access to justice theory, which attunes the First Amendment rights of lawyers to the role of the lawyer in the justice system.⁴⁵ This approach does not result in a forfeiture of lawyers' First Amendment rights either entirely, as in the constitutional conditions approach, or in the practice of law, as in the categorical approach. Instead, under the access to justice theory, the core of attorney First Amendment rights is the protection of attorney speech, association, and petitioning that provides access to law and to legal processes—thus protecting the work of lawyers—paid or not, transactional or litigation, or civil, administrative, or criminal—that serves to invoke or avoid the power of government in securing individual or collective life, liberty, or property. The First Amendment also protects the attorney's role in enabling and invoking judicial and administrative power as lawyers institute cases and controversies before such bodies. The First Amendment protects the ability of the lawyer to play a major role in checking governmental power, as well as institutional and economic power.

The access to justice theory also recognizes that there are restrictions on attorney speech that are essential to preserve the integrity of the justice system and the role of the lawyer therein. Thus, the First Amendment does not protect from discipline attorney speech that would frustrate or undermine the integrity of court processes, the constitutional and legal rights of case

⁴⁴ Frederick Schauer relies on this fact in arguing that the “speech of law” should thus properly remain “unencumbered by either the doctrine or the discourse of the First Amendment.” Schauer, *supra* note 11, at 691. Although Schauer correctly diagnoses one of the puzzles surrounding recognition of attorney First Amendment rights—that nearly all regulations on attorneys can be couched as regulations on attorney speech—his solution is misplaced. Simply by attuning lawyers' First Amendment rights to their role in the justice system, the legitimate concerns that Schauer raises—of either the invalidation of regulations essential to justice or dilution of the First Amendment itself—can be avoided. See TARKINGTON, *supra* note 4, at 19–22, 26.

⁴⁵ Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 36, 42–44 (2011); TARKINGTON, *supra* note 4, at 90–92.

participants (including the right to jury trial, the presumption of innocence, the right to counsel), or the core fiduciary duties owed to clients.⁴⁶

II. LEGAL SCHOLARSHIP AND COMMENTARY IN THE SHADOW OF MODEL RULE 8.4(G)

Although the constitutional conditions theory long ago lost its sway in legal academia, it has enjoyed a recent resurgence since the promulgation of Model Rule 8.4(g). This resurgence begins with the Standing Committee that drafted and adopted Model Rule 8.4(g). Myles Lynk, the Chair of that Committee, explained to the Committee that “lawyers have always been subject to ethics rules that impinge on what *otherwise* would be their First [sic] Amendment rights.”⁴⁷ Lynk then listed examples, such as rules regarding confidentiality and pretrial publicity, and concluded that, consequently, the Rule “does not violate a lawyer’s First Amendment rights.”⁴⁸ It appears from Lynk’s summation, that lawyers, as a condition of obtaining their license to practice law, have renounced their First Amendment objections to rules of professional conduct.

Other advocates of Model Rule 8.4(g) have followed suit. Stephen Gillers in his article offering to be “A Guide for State Courts Considering Model Rule 8.4(g),” addresses and dismisses the First Amendment concerns raised by Rule 8.4(g) by simply arguing that “we should recognize that even today the *Model Rules* contain provisions limiting speech,” providing similar examples to those offered by Lynk.⁴⁹ Purportedly, the existence of any other rules that appear to limit lawyer speech demonstrates that lawyers lack First Amendment protection against the Model Rules, including Model Rule 8.4(g) as promulgated. Similarly, L. Ali Khan contends that Model Rule

⁴⁶ See generally TARKINGTON, *supra* note 4, chs. 5–14 (explaining the contours of the access to justice theory both generally and as applied in specific contexts, including association with clients, client counseling, invoking law and legal processes, impugning judicial integrity, securing constitutional criminal protections, pretrial publicity, and attorney civility, harassment and discrimination).

⁴⁷ Halaby & Long, *supra* note 7, at 250 (emphasis added) (excerpting First Amendment analysis of the proposed rule presented by Myles Lynk to the Committee).

⁴⁸ *Id.*

⁴⁹ 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, 234–35 (2017).

8.4(g) does not “diminish” First Amendment rights of speech, religion, and association any more than other rules, explaining that “[i]t is a well-established rule in American jurisprudence that lawyers surrender some (not all) of their First Amendment rights when they choose to practice law.”⁵⁰ And although Khan indicates that there is some limit on the bar’s power to regulate by saying that “not all” First Amendment rights are surrendered, he does not explain what rights are surrendered and what rights are not or what a principled basis would be for knowing which rights are effected.

Dennis Rendleman embraces the constitutional conditions approach directly, stating that “[l]awyers do, indeed, agree to limit the exercise of some First Amendment rights for the privilege of practicing law.”⁵¹ Like Link, Gillers, and Kahn, Rendleman lists other rules of professional conduct that regulate lawyer speech as proof of his point, and concludes: “These are just a few examples of restrictions on a lawyer’s First Amendment ‘rights’ when practicing law.”⁵² The use of ironic quotation marks around the word “rights” underscores Rendleman’s position that lawyers simply lack First Amendment rights vis-à-vis professional regulation.

Robert Weiner argued that to the extent Rule 8.4(g) covers speech,⁵³ it does not violate the First Amendment because the speech regulated falls into one of three categories. The first category is speech made in the lawyer’s capacity as a lawyer. Weiner calls such speech a “relatively safe harbor for regulation” as “there can be no legitimate dispute that it is appropriate to regulate some speech occurring in court proceedings and in the context of representing a client.”⁵⁴ Weiner does not elaborate on the contours of what “some speech” is subject to regulation and what speech is not, but as he considers that context a “safe

⁵⁰ L. Ali Khan, *Disciplining Lawyers for Harassment and Discrimination: A Time for Change*, JURIST (July 11, 2017, 01:22:49 PM), <https://www.jurist.org/commentary/2017/07/ali-kahn-aba-rule-change/> [https://perma.cc/4ZCN-MTZR].

⁵¹ Dennis Rendleman, *The Crusade Against Model Rule 8.4(g)*, A.B.A.: YOURABA (Oct. 2018), <https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/> [https://perma.cc/6HAQ-QPFL].

⁵² *Id.*

⁵³ He argues that it primarily regulates conduct. Robert N. Weiner, “*Nothing to See Here*”: *Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J.L. & PUB. POL’Y 125, 125, 130 (2018).

⁵⁴ *Id.* at 130.

harbor for regulation,” he pretty much provides carte blanche for regulation of lawyers in the practice of law. His second category is a slice of—again—“some speech” that regulators can constitutionally prohibit even though it is outside of the context of lawyering, “such as speech in furtherance of a fraud.”⁵⁵ Again, he provides no principle limiting or explaining the scope of this alleged area of permissible restriction of lawyer speech. Weiner then contends that the third category of speech affected by Model Rule 8.4(g) is basically what is left over from the other two categories—“a thin sliver . . . constituting speech beyond what is indisputably subject to regulation.”⁵⁶ Weiner contends that this sliver is so small compared to what the bar “indisputably” can regulate that it is essentially inconsequential.⁵⁷ Basically, the bar does not quite have plenary power to regulate attorney speech—but nearly so.

Rebecca Aviel makes similar arguments, noting the allegedly “many free speech rights that attorneys yield to obtain and keep their law licenses.”⁵⁸ She concludes that state bars can determine whether or not they want to prioritize “free speech value[s],” but that protecting lawyer free speech is not “a compulsory obligation” on the state bar “imposed by the First Amendment.”⁵⁹

Claudia Haupt argues that lawyers, as members of a professional “knowledge community,” should have the same free speech rights as any other citizen when acting as a private person.⁶⁰ But for speech within one’s profession, she argues that the First Amendment forbids *state interference* with the professional knowledge community’s ability to communicate their professional insights.⁶¹ However, Haupt argues that “the First Amendment is *not* a roadblock to regulation of *professionals’ speech by the profession*.”⁶² Under her theory, as a member of a

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 37 (2018).

⁵⁹ *Id.* at 39.

⁶⁰ Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1255 (2016) (“When professionals” are speaking as “ordinary citizens,” they “enjoy ordinary First Amendment protection.”) (footnote omitted).

⁶¹ *Id.* at 1297, 1303.

⁶² Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, 19 U. PA. J. CONST. L. 1, 21 (2017) (emphasis added),

professional knowledge community, one agrees to, and thus waives rights against, regulations imposed by that community in an exercise of self-regulation. Basically, “[m]embership in the bar is a privilege burdened with conditions”⁶³—as long as those conditions are prescribed by the bar.

In addition to the above scholarship, the ABA’s Standing Committee on Ethics and Professional Responsibility has issued two formal opinions that embrace a constitutional conditions approach. In March 2018, the ABA issued Formal Opinion 480, which addresses attorney First Amendment rights in the context of the duty of confidentiality. Written in the shadow of the 8.4(g) battle, the ABA appears to endorse a conflation of the constitutional conditions theory and the categorical approach. Excluding extensive footnotes, the First Amendment analysis in Opinion 480 is found primarily in this passage:

Here lawyer speech relates to First Amendment speech. Although the First Amendment to the United States Constitution guarantees individuals’ right to free speech, *this right is not without bounds. Lawyers’ professional conduct may be constitutionally constrained by various professional regulatory standards as embodied in the Model Rules, or similar state analogs.* For example, *when a lawyer acts in a representative capacity, courts often conclude that the lawyer’s free speech rights are limited.*⁶⁴

It is important to unpack the astounding breadth of the assertion of power made in Opinion 480. The ABA states that lawyers’ First Amendment rights are “not without bounds.”⁶⁵ And what are those bounds? The ABA responds that “[l]awyers’ professional conduct *may be constitutionally constrained* by various professional regulatory standards *as embodied in the Model Rules, or similar state analogs.*”⁶⁶ There is no apparent limitation—a lawyer’s professional conduct just is “constitutionally constrained” by regulatory standards adopted by the ABA or the states.⁶⁷ In Opinion 480, the ABA attempts to

https://www.pennjournalconlaw.com/uploads/4/7/7/5/47752841/haupt_final.pdf
[<https://perma.cc/U42B-84U7>].

⁶³ *In re Rouss*, 221 N.Y. 81, 84 (N.Y. 1917).

⁶⁴ ABA Comm. on Ethics & Pro. Resp., Formal Op. 480, at 4 (2018) [hereinafter ABA Op. 480] (emphasis added).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

assert for itself and the states the ability to regulate lawyers free of constitutional constraint.⁶⁸

Additionally, Opinion 480's footnotes directly embrace the constitutional conditions theory by quoting caselaw in the one niche where that theory is still sometimes espoused: cases punishing lawyers for derogation of the judiciary.⁶⁹ I have researched, written about, and consulted in this particular niche for over a decade,⁷⁰ and this body of caselaw is an affront to the basic purposes underlying the First Amendment.⁷¹ Yet, post

⁶⁸ A full analysis of ABA Opinion 480 is beyond the scope of this paper, but can be found in Tarkington, *supra* note 30, at 60–74.

⁶⁹ The first case cited in the footnotes of this section of Opinion 480 is *In re Snyder*, 472 U.S. 634, 643–47 (1985), in which the Supreme Court did not reach the constitutional issue because it reversed as inappropriate under federal law the extreme suspension sanction for criticizing the judiciary in a letter to the court. ABA Op. 480, *supra* note 64, at 4 n.18. The other cases quoted or cited are U.S. Dist. Court E. Dist. of Wash. v. Sandlin, 12 F.3d 861 (9th Cir. 1993), *In re Shearin*, 765 A.2d 930 (Del. 2000), Ky. Bar Ass'n v. Blum, 404 S.W.3d 841 (Ky. 2013), and State *ex rel.* Neb. State Bar Ass'n v. Michaelis, 316 N.W.2d 46 (Neb. 1982). *Id.* at 4 n.18. The Opinion's reliance on the Ninth Circuit's *Sandlin* decision appears disingenuous, given that *Sandlin* was later superseded by the highly influential decision, Standing Comm. on Discipline of the U.S. Dist. Court for Cent. Dist. of Cal. v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995), which recognized that lawyers do have some level of First Amendment rights to criticize the judiciary and thus disciplinary authorities have the burden to prove falsity and cannot punish statements of opinion. *See id.* at 4 n.18. Yet Opinion 480 fails to cite to *Yagman*—despite its major alteration of *Sandlin* and its prominence in the caselaw surrounding impugning judicial integrity. *See id.* at 4 n.18; *Yagman*, 55 F.3d at 1437–38.

⁷⁰ *See* TARKINGTON, *supra* note 4, at 150–52; Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 364 (2010); Margaret Tarkington, *Attorney Speech and the Right to an Impartial Adjudicator*, 30 REV. LITIG. 849, 864 (2011); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1569–70 (2009) [hereinafter Tarkington, *The Truth Be Damned*]. Additionally, I have served as an expert or consultant on several disciplinary proceedings regarding an attorney's right to impugn judicial integrity in various states.

⁷¹ A full discussion of the constitutional defects in these cases is beyond the scope of this paper. But in summary, as I have previously shown, the constitutional conditions theory is used in these cases to justify a prophylactic viewpoint-discriminatory prohibition on speech regarding the qualifications of—often elected—public officials. These cases fly in the face of the core purposes and doctrines of the First Amendment—and directly contravene *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964), as well as *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), written in the very context of attorney speech derogating the judiciary—are antithetical to democracy by enforcing public ignorance regarding judicial deficiencies, and work to undermine the actual integrity of the judiciary. *See, e.g.*, Tarkington, *The Truth Be Damned*, *supra* note 70, at 1600; TARKINGTON, *supra* note 4, at 158.

Model Rule 8.4(g), these cases are discovered and embraced by the ABA rather than receiving the condemnation they deserve.

For example, the ABA quotes a 1982 Nebraska case for the following proposition:

A layman may, perhaps, *pursue his theories of free speech or political activities* until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. *A member of the bar can, and will, be stopped at the point where he infringes our Canons of Ethics.*⁷²

In this formulation, the First Amendment does not limit in any way the power of the ABA or state regulators. Apparently, as to “free speech or political activities,” a lawyer just “can, and will, be stopped” whenever regulators so require by promulgating a rule of professional conduct that forbids such speech or activities. The ABA similarly cites a 2000 Delaware opinion for the proposition that “lawyers’ constitutional free speech rights *are qualified* by their ethical duties.”⁷³ Again, the ABA is asserting that lawyer First Amendment rights just “are qualified” by whatever “ethical duties” the ABA or the bar may impose.

In July 2020, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 493, directly addressing “Model Rule 8.4(g): Purpose, Scope, and Application.”⁷⁴ As with Opinion 480, the section titled “Rule 8.4(g) and the First Amendment” begins by stating that “[t]he Committee does not address constitutional issues.”⁷⁵ Nevertheless, the Committee then again quotes cases arising in the context of speech impugning judicial integrity that embrace the constitutional conditions approach.⁷⁶ For example, the Committee quotes the Kentucky Supreme Court for the proposition that “*regulation of lawyer speech ‘is appropriate* in order to maintain the public confidence and credibility of the

⁷² ABA Op. 480, *supra* note 64, at 4 n.18 (emphasis added) (quoting *State ex rel. Neb. State Bar Ass’n v. Michaelis*, 316 N.W.2d 46, 53 (Neb. 1982)).

⁷³ *Id.* (emphasis added) (quoting *In re Shearin*, 765 A.2d 930, 938 (Del. 2000)).

⁷⁴ ABA Op. 493, *supra* note 13, at 1.

⁷⁵ *Id.* at 9.

⁷⁶ *See id.* at 9 nn.48 & 49, 10 n.52 (relying on *Ky. Bar Ass’n v. Blum*, 404 S.W.3d 841, 855 (Ky. 2013), *In re Snyder*, 472 U.S. 634, 644–45 (1985), *In re Sandlin*, 12 F.3d 861, 866 (9th Cir. 1993), and *In re Holtzman*, 78 N.Y.2d 184, 190–91 (N.Y. 1991)—all of which arise out of the context of lawyer discipline for speech that impugns judicial integrity).

judiciary and *as a condition of “[t]he license granted by the court.”*⁷⁷

Conspicuously absent from either Opinion 480 or Opinion 493 is any mention of the dozen U.S. Supreme Court cases⁷⁸ that struck down punishment or prohibitions on lawyers as violative of their First Amendment rights. Instead, *In re Snyder*⁷⁹ is relied on in both opinions and is the only U.S. Supreme Court decision regarding lawyer First Amendment rights cited in either opinion.⁸⁰ And while *Snyder* is a case that arises in the niche of punishing lawyers for impugning judicial integrity, it is also a case where the Supreme Court did not even reach the First Amendment issue raised, but reversed the suspension of the lawyer on the nonconstitutional grounds of whether suspension was warranted under federal law standards governing lawyer discipline.⁸¹ Nevertheless, in Opinion 493, the Standing Committee quotes *Snyder* dicta and expressly states that the *Snyder* Court was purportedly “addressing the *constitutional authority* of a court of appeals to discipline a lawyer for ‘conduct unbecoming a member of the bar of the court.’”⁸² Yet, in fact, the *Snyder* Court “avoid[ed] constitutional issues” and maintained that “there [wa]s no occasion to reach petitioner’s constitutional claims.”⁸³

In addition to relying on the *Snyder* dicta and the constitutional conditions theory as espoused by the Kentucky Supreme Court when disciplining lawyers for criticizing the judiciary, Opinion 493 focuses its First Amendment analysis on arguing that the concepts of unconstitutionality on the grounds of vagueness and overbreadth do not really apply—or apply with significantly less force—in the context of regulating lawyer speech.⁸⁴ Again, the loss of these constitutional protections against vague or overbroad laws are seemingly justified as a matter-of-fact consequence or condition of joining the legal profession.⁸⁵ Nevertheless, conspicuously absent from the Opinion’s discussion is any citation to or discussion of the

⁷⁷ *Id.* at 9 (quoting *Blum*, 404 S.W.3d at 855) (emphasis added).

⁷⁸ See *supra* note 26 and accompanying text.

⁷⁹ *Snyder*, 472 U.S. at 642–43.

⁸⁰ ABA Op. 480, *supra* note 64, at 4 n.18.

⁸¹ *Snyder*, 472 U.S. at 642–43.

⁸² ABA Op. 493, *supra* note 13, at 9 (emphasis added).

⁸³ 472 U.S. at 642–43.

⁸⁴ ABA Op. 493, *supra* note 13, at 9–11.

⁸⁵ *Id.* at 10–11.

Supreme Court's decision in *Gentile v. State Bar of Nevada*, which struck down Nevada's rule of professional conduct regarding pretrial publicity as being unconstitutionally vague.⁸⁶

Prior to Model Rule 8.4(g), legal academia overwhelmingly rejected the constitutional conditions approach whereby lawyers allegedly waived their First Amendment rights in exchange for the privilege of practicing law as apparent from the writings of Wendel, Sullivan, Day, Andrews, Chemerinsky, Freedman and Starwood, Knake, Margulies, and myself.⁸⁷ Yet now we have Lynk, Gillers, Kahn, Rendleman, Aviel, Haupt, and Weiner writing articles and the ABA issuing formal opinions apparently embracing that basic premise and abandoning lawyers' First Amendment rights as a limit on regulation by the state bar or promulgated by the ABA. These defenders of Model Rule 8.4(g) additionally argue that the concerns that Model Rule 8.4(g) will chill lawyer speech or advocacy or will be enforced against unpopular people and viewpoints are merely hypothesized, unrealistic parades of horrors.⁸⁸ But ironically, these defenders' own articles and arguments create a foundation for the most frightening horrible imaginable as a consequence of this Model Rule—abandoning the First Amendment rights of lawyers as a restraint on professional regulation.

Moreover, the theory promoted by these scholars is not limited to Model Rule 8.4(g) or to harassment or discrimination—even though their arguments are made about that Rule or in its shadow. If state bars are free to disregard the First Amendment for this Rule, how can it be resurrected for other contexts? If lawyers have waived their First Amendment rights as to regulation by state bars or as promulgated by the ABA, then those rights are *waived* and state bars can promulgate other regulations and impose punishment without regard to the First Amendment. Stripped of the prodiversity and antidiscrimination

⁸⁶ 501 U.S. 1030, 1048 (1991).

⁸⁷ See Wendel, *supra* note 31, at 375–81; Sullivan, *supra* note 31, at 585–87; Day, *supra* note 31, at 187–90; Andrews, *Motive Restrictions on Court Access*, *supra* note 35, at 771; Chemerinsky, *supra* note 33, at 863–67; Freedman & Starwood, *supra* note 36, at 617; Knake, *supra* note 34, at 2844–46; Peter Margulies, *Advocacy as a Race to the Bottom: Rethinking Limits on Lawyers' Free Speech*, 43 U. MEM. L. REV. 319, 324 (2012); *supra* note 70 and accompanying text.

⁸⁸ See, e.g., Weiner, *supra* note 53, at 125 (“[T]he hypothetical horrors that critics have paraded are remote and implausible.”); Rendleman, *supra* note 51 (stating that arguments against Model Rule 8.4(g) are “fantasies of creative commentators”).

context, what these commentators and the ABA in its formal opinions are advocating is simply a power grab—the alleged power of state bars and the ABA to regulate lawyers free of constitutional constraint.

I do not doubt the good faith of defenders of Model Rule 8.4(g)—promoting inclusion and curbing harassment and discrimination are imperative goals. And, as Opinion 493 contended, the murder of George Floyd and the protests and social awareness that followed it demonstrate the critical need to address and overcome discrimination.⁸⁹ But those goals can and must be pursued through constitutional measures. As Alexander Meiklejohn expounded during the second Red Scare, the regulator’s power to prevent evils is not plenary—if the First Amendment “means anything, it means that certain substantive evils which, in principle, [regulators have] a right to prevent, must be endured *if the only way of avoiding them is by the abridging of that freedom of speech* upon which the entire structure of our free institutions rests.”⁹⁰

Political power changes hands, the composition of state bars varies, and state bar regulators have prosecutorial discretionary power in enforcing lawyer regulation. What bases seem “justified” for making an exception today can be used as an exception in a different context or by a different empowered political faction tomorrow. Our own history demonstrates this tragic path. The denial of lawyers’ First Amendment rights has been employed to undermine both the civil rights movement and the labor movement.⁹¹ It has been used to punish lawyer criticism of the judiciary.⁹² It was used by the ABA in 1950 to promulgate a rule requiring lawyers to take an anticommunism loyalty oath.⁹³ It was used more recently to prohibit humanitarian groups from providing advice to alleged terrorists about their rights under international law.⁹⁴ The ABA’s recent

⁸⁹ ABA Op. 493, *supra* note 13, at 1 n.3.

⁹⁰ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 48 (1948) (emphasis added).

⁹¹ *See generally* NAACP v. Button, 371 U.S. 415, 437 (1963); *see also* Fisk, *supra* note 29 (detailing punishment of labor lawyers).

⁹² *See generally* Tarkington, *The Truth Be Damned*, *supra* note 70; *see also* TARKINGTON, *supra* note 4, at 149–54.

⁹³ Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When Is It Necessary and Who Should Decide?*, 30 *CARDOZO L. REV.* 1843, 1848, 1856–57 (2009); *The Lawyer’s Loyalty Oath*, 37 *A.B.A. J.* 128, 128 (1951).

⁹⁴ *See generally* Holder v. Humanitarian Law Project, 561 U.S. 1, 36–37 (2010).

formal opinions and the growing body of post-Model Rule 8.4(g) scholarship renouncing lawyers' First Amendment rights can, and probably will, be cited by bar counsel in disciplinary proceedings against lawyers who argue that their speech, association, or petitioning falls within the First Amendment's protective shield.

It is incredibly foolish—even reckless—to jettison the First Amendment to make way for any piece of regulation, no matter how important the goal of that regulation may seem. Ends do not justify such means, rather the means employed redefine the ultimate ends achieved. One cannot employ the means of undermining core principles of liberty—the First Amendment—without reaping the ends of liberty undermined. In the face of the ABA's 1950 lawyer loyalty oaths, Zechariah Chafee chastised regulators for undermining liberty “in the very process of purporting to defend” it.⁹⁵ As Justice Brandeis maintained, liberty must be pursued as both our means and our end.⁹⁶

Importantly, the renunciation of lawyers' First Amendment rights by defenders of Model Rule 8.4(g) is not only reckless, it is also entirely unnecessary. As will be discussed in Part IV, a constitutionally sound rule for prohibiting unlawful harassment and discrimination is attainable. Neither the ABA nor the states need to cut down the First Amendment to appropriately curb lawyer discrimination and harassment.

III. LAWYER FIRST AMENDMENT RIGHTS ARE ESSENTIAL TO THE SYSTEM OF JUSTICE AND CANNOT BE ABANDONED

First and emphatically, neither the constitutional conditions theory nor the categorical approach are the law. The Supreme Court has held that lawyers have enforceable First Amendment Rights—even as to regulations created by the state bar and even

⁹⁵ ZECHARIAH CHAFEE, JR., *THE BLESSINGS OF LIBERTY* 156 (1956). Chafee eloquently explained:

The only way to preserve “the existence of free American institutions” is *to make free institutions a living force*. To ignore them in the very process of purporting to defend them, as frightened men urge, will leave us little worth defending. We must choose between freedom and fear—we cannot have both.

Id. (emphasis added).

⁹⁶ “Those who won our independence believed that the final end of the state was to make men free to develop their faculties . . . They valued liberty both as an end and as a means.” *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

in the context of lawyering.⁹⁷ And the Supreme Court has been correct in so holding. Lawyer First Amendment rights are key to the protection of the justice system itself—a point previously discussed at length and summarized here.⁹⁸

Attorneys play a key role in the proper functioning of our system of justice. Their speech, association, and petitioning are essential to the protection of client rights. The First Amendment rights of lawyers protect the attorney-client relationship—the defining attribute of nearly all lawyering—and the core fiduciary duties owed to the client. For example, the First Amendment protects the right of the attorney to associate with the client, to counsel with the client and render candid advice, to invoke the protections of the law on behalf of the client through speech, and to advocate for the client through speech and by petitioning for redress. The Supreme Court recognized these core attributes of attorneys' First Amendment rights in its seminal case, *NAACP v. Button*.⁹⁹

In *Button*, several of the southern states in resistance to *Brown v. Board of Education*,¹⁰⁰ amended their professional conduct rules by redefining solicitation to prohibit the activities of the NAACP in obtaining clients and instigating desegregation lawsuits on their behalf.¹⁰¹ The Virginia Supreme Court had held that the NAACP's activities of holding meetings with parents of school children, advising them of their legal rights, offering to represent them, and then instigating desegregation litigation were prohibited by the redefined prohibition on solicitation and that the First Amendment did not offer them recourse.¹⁰² The Supreme Court reversed, holding that the statute as construed by the Virginia Supreme Court unconstitutionally violated the First Amendment rights of "speech, petition, [and] assembly" of both the attorneys and their clients, specifically recognizing attorneys' rights to engage in "political expression and association" by associating with these clients, advising them of their rights, and then petitioning the government for redress on their behalf.¹⁰³ Virginia, along with other Southern states, had

⁹⁷ See *supra* note 26 and accompanying text.

⁹⁸ See TARKINGTON, *supra* note 4, at 14.

⁹⁹ 371 U.S. 415, 428–29, 434, 437 (1963).

¹⁰⁰ 347 U.S. 483 (1954).

¹⁰¹ See *Button*, 371 U.S. at 445–46 (Douglas, J., concurring).

¹⁰² *NAACP v. Harrison*, 116 S.E.2d 55, 72 (Va. 1960).

¹⁰³ *Button*, 371 U.S. at 430–31.

only technically regulated attorney speech—but that restriction on attorney speech had the—intended—effect of undermining the rights of African Americans and foreclosing their ability to either know of or attain their constitutional rights to desegregation.¹⁰⁴

The attorney's right to associate with clients, advise them, and petition on their behalf is essential to the proper vindication of legal rights and of due process, particularly for minority or unpopular groups. Protecting lawyers' First Amendment rights works to protect individual and collective life, liberty and property. As *Button* illustrates, government entities and regulators, if free to regulate without the constraint of the First Amendment, could infringe the constitutional rights of disfavored or unpopular groups simply by creating regulation on lawyer speech and association.

Lawyer First Amendment rights are also essential to the checking of government and institutional power. As Vincent Blasi established, the “checking value” of free speech was a primary rationale underlying the creation of the First Amendment.¹⁰⁵ The checking value is “the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials.”¹⁰⁶ As a nation, we constantly rely on lawyers to perform this checking function—to bring lawsuits that challenge the use of governmental power. The amount of power checking performed by attorneys is immense. It occurs in lawsuits checking government power of local school boards all the way up to the U.S. President. Even outside the governmental context, we rely on lawyers to check institutional and economic power, for example, through lawsuits for protection of consumers, employers, shareholders, and the environment. While lawyers also represent the empowered, as lawyers work for money, they do play a major role in our governmental structure by checking the use and misuse of power when they represent those who are harmed and petition on their behalf for redress of grievances. Historically, laws that undermine lawyers' First Amendment rights have negatively affected or have been aimed at unpopular contingencies—including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal

¹⁰⁴ *Id.* at 435–36; see also *id.* at 445–46 (Douglas, J., concurring).

¹⁰⁵ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

¹⁰⁶ *Id.*

defendants.¹⁰⁷ Checking power is a primary rationale underlying the creation of the First Amendment and influencing its interpretation—and it is a primary rationale for carefully safeguarding the First Amendment rights of lawyers.¹⁰⁸

Lawyers' First Amendment rights do not solely protect client rights but are essential to the invocation of judicial power in our system of justice. The judicial power is specifically limited to cases and controversies brought before the judiciary.¹⁰⁹ If there is no case or controversy filed before it, the judiciary is powerless to act—no matter how egregious or important the underlying issue appears to be.¹¹⁰ It is through attorneys that cases and controversies are brought before the judiciary, enabling the exercise of the judicial power. Although individuals in theory can proceed *pro se*, entities cannot,¹¹¹ there is no question that the effective invocation of the judicial power is accomplished by attorneys. If lawyers cannot associate with clients and bring cases before the judiciary, the judiciary is utterly powerless to act. The lawyer's ability to enable the judicial power is as essential to our justice system as is the judiciary itself.

In *Legal Services Corporation v. Velazquez*, the Supreme Court correctly recognized that the protection of lawyers' First Amendment rights is directly related to the proper functioning of the judicial power.¹¹² Thus in that case, where lawyers for the

¹⁰⁷ See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 7–8 (2010) (attorneys wishing to represent designated foreign terrorist organizations); *Milavetz, Gallop & Milavetz v. United States*, 559 U.S. 229, 233–34 (2010) (attorneys representing debtors); *Garcetti v. Ceballos*, 547 U.S. 410, 414–15 (2006) (prosecutor who provided exculpatory materials to criminal defendant); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536–37 (2001) (attorneys representing welfare recipients); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033 (1991) (criminal defense attorney); *In re Primus*, 436 U.S. 412, 415–17 (1978) (attorney representing woman sterilized as condition of receiving welfare benefits); *Button*, 371 U.S. at 417–18 (NAACP attorneys instigating desegregation lawsuits); *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 253 (1957) (law school graduate who was denied admission to the bar for allegedly having communist ties or sympathies); *Schwartz v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 234–35 (1957) (same).

¹⁰⁸ Tarkington, *supra* note 30, at 55.

¹⁰⁹ U.S. CONST. Art. III § 2, cl. 1.

¹¹⁰ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 557–59, 565–67 (1992) (rejecting a challenge to regulations that would have narrowed the scope of endangered species protections on grounds of standing).

¹¹¹ See, e.g., *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201–02 (1993) (“It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel.”) (citing *Osborn v. President, Dirs. & Co. of Bank*, 22 U.S. (9 Wheat.) 738, 829 (1824).

¹¹² 531 U.S. at 545–46.

Legal Services Corporation had been prohibited by Congress from challenging the validity of welfare laws when representing welfare recipients, the Supreme Court vindicated the lawyers' First Amendment rights to bring all colorable arguments "necessary for proper resolution of the case."¹¹³ The Court held that "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts," the regulations "prohibit[] speech and expression upon which courts must depend for the proper exercise of the judicial power."¹¹⁴

Given the critical importance of lawyers' First Amendment rights to the proper functioning of the justice system, commentators and the ABA are reckless to toss out lawyer First Amendment rights to shore up the constitutionality of Model Rule 8.4(g).

IV. FALSE DICHOTOMY: AMEND MODEL RULE 8.4(G) AND STOP STOKING THE CULTURE WAR

Because the First Amendment rights of lawyers are essential to protecting the integrity of the justice system, they cannot be abandoned. If we had to choose between the First Amendment and curbing discrimination and harassment, the First Amendment should stay. But we do not have to make that choice. The recent passage of modified versions of 8.4(g) by Maine and New Hampshire both make great strides in the creation of antidiscrimination rules that are constitutionally sound. As I have previously stated, the constitutionality of civility, antidiscrimination, and antiharassment rules depends entirely on the specific rule—on precisely what speech, association or petitioning is suppressed and the extent of the rule's reach.¹¹⁵ As the Supreme Court admonished in *Button*, "[b]road prophylactic rules in the area of free expression are suspect. *Precision of regulation* must be the touchstone in an area so closely touching our most precious freedoms."¹¹⁶

And that is the problem with Model Rule 8.4(g)—its breadth. The Rule as promulgated reaches far beyond sexual harassment or unlawful discrimination. Since its promulgation, Vermont and New Mexico are the only states to adopt the Rule as

¹¹³ *Id.* at 545.

¹¹⁴ *Id.* (emphasis added).

¹¹⁵ TARKINGTON, *supra* note 4, at 245.

¹¹⁶ NAACP v. Button, 371 U.S. 415, 438 (1963) (emphasis added) (citations omitted).

promulgated.¹¹⁷ Pennsylvania adopted a slightly modified version of the rule in 2020, only to have the Eastern District of Pennsylvania find that the rule constituted “viewpoint-based discrimination in violation of the First Amendment” and enjoined the rule pending a complete constitutional challenge.¹¹⁸ Additionally, the Attorney Generals of Texas, South Carolina, Louisiana, and Tennessee have all written opinions that Rule 8.4(g) is unconstitutional as violating attorneys’ rights to freedom of speech, association, and religion.¹¹⁹ Arizona, Idaho, Illinois, Louisiana, Minnesota, Montana, Nevada, South Carolina, and Tennessee have all formally rejected the Rule,¹²⁰ with the Montana legislature taking the exceptional step of intervening and passing a resolution declaring that the Montana Supreme Court lacked the authority to enact such a rule regulating lawyers.¹²¹

But Model Rule 8.4(g) certainly could be narrowed to be constitutionally sound. Indeed, Maine and New Hampshire recently adopted versions of the rule that resolve the main objections to Model Rule 8.4(g). Notably, the constitutional

¹¹⁷ VT. RULES OF PRO. CONDUCT r. 8.4(g) (2017); N.M. RULES OF PRO. CONDUCT r. 16-804(G) (2019). Maine, Missouri, New Hampshire, and Pennsylvania have each adopted variations of Model Rule 8.4(g). See N.H. RULES OF PRO. CONDUCT r. 8.4(g) (2019); ME. RULES OF PRO. CONDUCT r. 8.4(g) (2019); MO. RULES OF PRO. CONDUCT r. 4-8.4(g) (2019); PA. RULES OF PRO. CONDUCT r. 8.4(g) (2020). As discussed below, Maine’s and New Hampshire’s respective variations of the rule resolve many of the First Amendment issues.

¹¹⁸ See PA. RULES OF PRO. CONDUCT r. 8.4(g) (2020); *Greenberg v. Haggerty*, Civ. Action No. 20-3822, 2020 WL 7227251, at *13 (E.D. Pa. Dec. 7, 2020) (granting a preliminary injunction and finding a likelihood of success on the merits of the constitutional challenge, finding in part that “Rule 8.4(g) and Comments 3 and 4, are viewpoint-based discrimination in violation of the First Amendment.”).

¹¹⁹ See Tenn. Att’y Gen., Op. No. 18-11, at 5 (Mar. 16, 2018); La. Att’y Gen., Op. No. 17-0114, at 2 (Sept. 8, 2017); S.C. Att’y Gen., Op. Letter (May 1, 2017); Tex. Att’y Gen., Op. No. KP-0123 (Dec. 20, 2016).

¹²⁰ See POLICY IMPLEMENTATION COMM., AM. BAR ASS’N, JURISDICTIONAL ADOPTION OF RULE 8.4(G) OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT (Oct. 8, 2019) [hereinafter JURISDICTIONAL ADOPTION OF RULE 8.4(G)], www.americanbar.org/content/dam/aba/administrative/professional_responsibility/c_hart_adapt_8_4_g.authcheckdam.pdf [<https://perma.cc/GML6-82UK>]; Daniel A. Horwitz, *Tennessee Supreme Court Denies Proposed Rule Change Attempting to Police Discrimination and Harassment*, SUP. CT. OF TENN. BLOG (April 23, 2018), <https://scotblog.org/category/rules-of-professional-conduct/> [<https://perma.cc/Y7LY-QC6Y>].

¹²¹ See S.J. Res. 15, 65th Leg., Reg. Sess. (Mont. 2017); Lorelei Laird, *Montana Legislature Says ABA Model Rule on Discrimination and Harassment Violates First Amendment*, ABA JOURNAL (Apr. 13, 2017, 4:58 PM), www.abajournal.com/news/article/montana_legislature_says_aba_model_rule_on_discrimination_and_harassment_vi. [<https://perma.cc/3YN4-ZRHA>].

problems with Model Rule 8.4(g) arise primarily from the comments. Even Rebecca Aviel, while rejecting First Amendment constraints and defending the Rule on the whole, admits that the comments, if taken at face value—which they should be as the ABA promulgated them as part of the Rule—are constitutionally problematic.¹²² Specifically, the comments broadly define prohibited discrimination as “harmful *verbal* or physical conduct that *manifests bias or prejudice* towards others” and define prohibited harassment to include “*derogatory or demeaning verbal* or physical conduct.”¹²³ Of course, “verbal conduct” is simply speech. Moreover, the reach of 8.4(g) extends to “[c]onduct related to the practice of law,” which the comments define to include not only the practice of law and managing a law business, but also “participating in bar association, business or social activities in connection with the practice of law.”¹²⁴ Thus the Rule would apply at CLEs, bar dinners and events, and the ABA’s official report on the rule indicated it would even reach into “lobby[ing]” and “law schools.”¹²⁵

By broadly prohibiting speech “that manifests bias or prejudice” or that is “derogatory or demeaning” on the bases of “race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status”—specifically at CLEs and bar functions, and perhaps even in law schools and lobbying—the rule could easily be interpreted as foreclosing “uninhibited, robust, and wide-open” debate and discussion on many of the “the major public issues of our time.”¹²⁶ The Model Rule’s comments are written so broadly as to include within the scope of its prohibitions political speech supporting traditional marriage, gender identity issues, including bathroom and locker room usage, homosexual and single parent adoptions and surrogacies, birth control and abortion, terrorism, immigration, and refugee assistance—to name only a few. These are issues of importance to millions of Americans that divide our country and that drive citizens to vote for particular parties or candidates. Importantly,

¹²² Aviel, *supra* note 58, at 50–55.

¹²³ MODEL RULES OF PRO. CONDUCT r. 8.4(g) & cmt. 3 (AM. BAR ASS’N 2016) (emphasis added).

¹²⁴ *Id.*, cmt. 4.

¹²⁵ See ABA REPORT 109, *supra* note 6, at 2.

¹²⁶ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–71 (1964); MODEL RULES OF PRO. CONDUCT r. 8.4(g) & cmt. 3 (AM. BAR ASS’N 2016).

Rule 8.4(g) tends to cut out expression on only one side of a given debate. Views expressing conservative or traditional views are chilled or foreclosed because they may be interpreted as “manifest[ing] bias or prejudice” or being “derogatory or demeaning,” while expression of liberal views are not similarly chilled.¹²⁷ In fact, the comments even expressly provide exceptions to allow for liberal prodiversity positions, including allowing lawyers to “engage in conduct undertaken to promote diversity and inclusion without violating this Rule” such as “recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations”¹²⁸ and also expressly allowing lawyers to “limit[] the lawyer’s practice to members of underserved populations.”¹²⁹

Ultimately, these hot-button political issues will be resolved by laws, regulations, and policies, which will be determined and enforced through legislation, court cases, and executive action—all of which is entirely dependent on lawyers. It is lawyers who will draft policies, litigate cases, write legislation, and execute the law. To cut lawyers on one side of these issues out of the conversation undermines the role of the lawyer in the system of justice. Lawyers are the very people who have the knowledge, skills, and ability to articulate and implement legal policies, accommodations, and options—as well as to air and evaluate grievances and to propose legal remedies. Silencing lawyers from expressing their opinions on these issues—especially to other lawyers at law-related functions, CLEs, law school presentations, and conferences—will forestall the wheels of political change; it will silence much-needed conversation and accommodation across the aisle of political divide. The broad reach of Rule 8.4(g) constitutes viewpoint discrimination of political speech on the great issues of our times against the very people who are necessary to consider and implement political change.¹³⁰

In its July 2020 Formal Opinion 493, the ABA’s Standing Committee on Ethics and Professional Responsibility stated in its introduction and conclusion that Rule 8.4(g) “does not prevent a lawyer from freely expressing opinions and ideas on matters of

¹²⁷ MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2016).

¹²⁸ *Id.*, cmt. 4.

¹²⁹ *Id.*, cmt. 5.

¹³⁰ See TARKINGTON, *supra* note 4, at ch. 14, for a full analysis of the constitutional issues surrounding Model Rule 8.4(g) and the permissible scope of antidiscrimination and antiharassment lawyer regulation.

public concern.”¹³¹ While that interpretation of 8.4(g) is greatly appreciated, the fact of the matter is that the Rule as written readily includes such speech within its prohibitions, which is why such a statement was necessary. Unfortunately, while this statement is repeated twice in Formal Opinion 493, there is absolutely no analysis of the issue—just a matter of fact conclusory statement without any examination or principled interpretation of the text of the Rule that would reach that result.¹³² Indeed, the most likely explanation for a lack of textual analysis of the Rule to show that it does not reach such speech is that any objective textual analysis of the Rule would demonstrate that, as written, the Rule clearly encompasses such speech within its prohibitions. Rather than simply making a one sentence conclusory statement in Opinion 493 that expression of political speech is protected—without making any changes at all to the actual Rule or its breadth—it would be far better and more effective for the ABA to amend and narrow the text of the Rule itself so that the prohibitions therein do not on their face encompass such speech.

Importantly, the inclusion of this one sentence asserting that the Rule does not prohibit expressions of opinions and ideas on matters of public concern added to an ABA Ethics Opinion does not have the force of law—at best, it could be cited as persuasive authority in a jurisdiction adopting Model Rule 8.4(g). Yet the text of the Rule, once adopted by a jurisdiction, does have the force of law, and that text as promulgated includes within its reach speech on the major issues of our day. If the ABA wants to ensure that Rule 8.4(g) should not reach lawyers who are “freely expressing opinions and ideas on matters of public concern,” then they need to change the text of the rule so that it does not reach such speech, or at the very least amend Rule 8.4(g) so that this proviso is expressly included in the rule proper.¹³³ Moreover, this is not the only constitutional deficiency with the Rule that needs amendment, as explored below.

Indeed, the overarching point of this Article is that the fact that Model Rule 8.4(g) as promulgated is unconstitutional does not mean that we have to choose between the First Amendment and antidiscrimination. We do not. Instead, Rule 8.4(g) needs to be amended and the constitutional deficiencies in the Rule itself

¹³¹ ABA Op. 493, *supra* note 13, at 1, 14.

¹³² *Id.*

¹³³ *Id.* at 1.

need to be fixed. Maine's May 2019 and New Hampshire's July 2019 adoptions of revised versions of Model Rule 8.4(g) demonstrate that drafting a constitutionally sound antidiscrimination rule is attainable. Moreover, the fact that states have previously enacted antidiscrimination rules demonstrates that states are not averse to enacting such rules, should a constitutionally sound one be promulgated. Model Rule 8.4(g)'s lack of traction is due to its overbreadth. Again, "[b]road prophylactic rules," such as the promulgated Model Rule 8.4(g), "are suspect" in the realm of First Amendment rights; instead, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms."¹³⁴

A. *Examining the Maine and New Hampshire Rules*

The passage of Maine's Rule of Professional Conduct 8.4(g) in May 2019 was heralded by defenders of Model Rule 8.4(g) as a vindication of the Model Rule. Indeed, Ten Stallings wrote in *Legal Ethics in Motion* that the Maine rule was "almost identical" to the Model Rule,¹³⁵ and the *ABA Journal* headlined, "Second State Adopts ABA Model Rule Barring Discrimination and Harassment by Lawyers," claiming that the Maine Rule only "differs slightly from the ABA model rule."¹³⁶

But Maine's reworking of the rule—like New Hampshire's—is a major revamp and adjustment, carefully tailored to avoid encroaching on lawyer First Amendment rights. The passage of these rules should be seen as a victory for the *First Amendment* and a refutation of Model Rule 8.4(g) as promulgated. The Maine and New Hampshire Rules do not bolster the purported constitutionality of Model Rule 8.4(g). Instead, their alterations of the Model Rule reveal many of the most glaring ways in which the Model Rule infringes on lawyer First Amendment rights.

¹³⁴ NAACP v. Button, 371 U.S. 415, 438 (1963).

¹³⁵ Ten Stallings, *Maine Adopts 8.4(g), But Controversy Continues*, LEGAL ETHICS IN MOTION, (July 30, 2019), <https://www.legaethicsinmotion.com/2019/07/maine-adopts-8-4-g-but-controversy-continues/> [<https://perma.cc/GAD6-F2DY>].

¹³⁶ Debra Cassens Weiss, *Second State Adopts ABA Model Rule Barring Discrimination and Harassment by Lawyers*, A.B.A. J. (June 13, 2019, 11:39 AM), <http://www.abajournal.com/news/article/second-state-adopts-aba-model-rule-barring-discrimination-by-lawyers> [<https://perma.cc/7PBF-ALSH>]. Weiss did note a few of the differences between the Maine Rule and the ABA Model Rule in the article—specifically that the "Maine ethics rule does not bar discrimination based on marital and socio-economic status" and "does not define law practice to include bar, business and social activities." *Id.*

Perhaps most importantly, the Maine and New Hampshire rules can serve as “model rules” that other states, and the ABA, could emulate as a demonstration that the First Amendment and antidiscrimination are not mutually exclusive.

1. Removing Socioeconomic Status

The first notable difference between Maine's Rule and the Model Rule is Maine's removal of socioeconomic status and marital status from the list of prohibited bases of discrimination and harassment. Similarly, the New Hampshire rule omits socioeconomic status.

Yet under Model Rule 8.4(g) and its comments, a lawyer is prohibited from speech and conduct that “manifests bias or prejudice” or is “derogatory or demeaning” on the basis of socioeconomic status.¹³⁷ Ronald Rotunda noted that under this provision a lawyer could apparently engage in misconduct by decrying the idleness or greed of the upper one percent.¹³⁸ He concludes, somewhat tongue in cheek, that while “we all should be able to attack the upper 1%,” unfortunately, “the ABA didn't write the rule that way.”¹³⁹

More seriously, Eugene Volokh explored the potential problems of a rule that forbids all speech and conduct that “manifests bias or prejudice” on the basis of socioeconomic status—including, as the Rule does, in “operating or managing a law firm or law practice.”¹⁴⁰ Volokh points out that the Model Rule does not define socioeconomic status and states that “the one definition” he is familiar with is an interpretation of “a similar ban on socioeconomic status discrimination in the Sentencing Guidelines,” which defines it as “an individual's

¹³⁷ MODEL RULES OF PRO. CONDUCT r. 8.4(g) & cmt. 3 (AM. BAR ASS'N 2016).

¹³⁸ Convention, *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, 31 REGENT U. L. REV. 31, 43 (2018) (comments of Ronald Rotunda) (“You are standing on a water cooler and say, ‘I hate the idle rich.’ You're expressing discrimination based on socioeconomic status. Now, I know, we all should be able to attack the upper 1%, but the ABA didn't write the rule that way.”).

¹³⁹ *Id.*

¹⁴⁰ MODEL RULES OF PRO. CONDUCT r. 8.4(g) & cmts. 3–4 (AM. BAR ASS'N 2016); see also Eugene Volokh, *Banning Lawyers from Discriminating Based on ‘Socioeconomic Status’ in Choosing Partners, Employees or Experts?*, WASH. POST: VOLOKH CONSPIRACY (May 5, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/banning-lawyers-from-discriminating-based-on-socioeconomic-status-in-choosing-partners-employees-or-experts-2/>.

status in society as determined by objective criteria such as education, income, and employment.”¹⁴¹

Moreover, he cites cases from the Fifth and Fourth Circuits that include discrimination on the basis of “wealth as an element of socioeconomic status.”¹⁴² Volokh notes that under a literal reading of Model Rule 8.4(g), violations could include such things as “preferring more-educated employees,” “preferring employees who went to . . . Ivy League schools,” “contracting with expert witnesses and expert consultants who are especially well-educated,” “preferring a wealthier would-be partner over a poorer one,” or even “preferring lower-socioeconomic-status employees” to give them a hand up.¹⁴³

The problem that both Rotunda and Volokh identify is that the Model Rule’s prohibition on discrimination on the basis of socioeconomic status either (1) cannot be taken literally, or (2) if taken literally, would forbid social commentary and employment practices that clearly should neither be prohibited nor be a basis for discipline. Indeed, the examples Volokh describes as potentially prohibited are, in fact, wise and productive employment and litigation practices. While it is tempting to dismiss such criticism by claiming that state bars would never subject such actions to discipline, the problem is that a straight reading of the Model Rule and its comments in fact prohibits these practices. Thus, the Model Rule opens the way for arbitrary interpretation and enforcement, as well as to self-censorship because “[t]he threat of sanctions may deter” activities and speech “almost as potently as the actual application of sanctions.”¹⁴⁴ This is precisely why overbroad rules are constitutionally problematic. Both the Maine and New Hampshire Rules wisely avoided this particular quagmire by simply omitting socioeconomic status as one of the prohibited bases of discrimination.¹⁴⁵

¹⁴¹ Volokh, *supra* note 140 (emphasis added) (quoting *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991)).

¹⁴² *Id.* (citing *United States v. Peltier*, 505 F.3d 389, 393 & n.14 (5th Cir. 2007), *abrogated on other grounds by* *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020), and *United States v. Graham*, 946 F.2d 19, 21 (4th Cir. 1991)).

¹⁴³ *Id.*

¹⁴⁴ *NAACP v. Button*, 371 U.S. 415, 433 (1963).

¹⁴⁵ Notably, the ABA’s recent Formal Opinion 493 does not address the issues surrounding including socioeconomic class in the rule.

2. Redefining Prohibited Discrimination

The major and most imperative change made in both the Maine and New Hampshire Rules was to entirely scrap the Model Rule's definition of discrimination. Instead of broadly defining discrimination to include all harmful speech and conduct that "manifests bias or prejudice" on one of the enumerated bases,¹⁴⁶ the Maine Rule started from scratch, enacting this definition of discrimination into the Rule proper:

"Discrimination" on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or gender identity as used in this section means conduct or *communication* that a lawyer knows or reasonably should know manifests an intention: to treat a person as inferior based on one or more of the characteristics listed in this paragraph; to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics; or to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics.¹⁴⁷

There are several important changes in that redefinition of discrimination from the Model Rule. First, the Rule prohibits "communication" rather than "verbal conduct."¹⁴⁸ While speech is generally communication, as people speak to communicate, the word communication implies that the prohibited discrimination or harassment is aimed or directed at an individual. Such a construction is reinforced by the rest of the definition of "discrimination." Notably, while the Model Rule prohibits speech that "manifests bias or prejudice,"¹⁴⁹ Maine's rule instead requires that the "communication" must "manifest[] *an intention*" to *do* one of three things: (1) "to treat a person as inferior based on one or more of the characteristics listed in this paragraph;" or (2) "to disregard relevant considerations of individual characteristics or merit because of one or more of the listed characteristics;" or (3) "to cause or attempt to cause interference with the fair administration of justice based on one or more of the listed characteristics."¹⁵⁰

¹⁴⁶ MODEL RULES OF PRO. CONDUCT r. 8.4(g) & cmt. 3 (AM. BAR ASS'N 2016).

¹⁴⁷ ME. RULES OF PRO. CONDUCT r. 8.4(g)(1) (2019) (emphasis added).

¹⁴⁸ See ME. RULES OF PRO. CONDUCT r. 8.4(g)(1) (2019) (emphasis added); MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2016).

¹⁴⁹ MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS'N 2016).

¹⁵⁰ ME. RULES OF PRO. CONDUCT r. 8.4(g)(1) (2019) (emphasis added).

Unlike the Model Rule's definition, which readily can be construed to prohibit speech in favor of traditional marriage, because it could be viewed as "manifest[ing] bias" on the basis of sexual orientation, or other conservative political speech, commentary, or advocacy, the Maine Rule would require significant contortion to be construed to prohibit such commentary.¹⁵¹ Further, the Model Rule does not require that the bias or prejudice be aimed at a specific person or individual—if the speech "manifests bias or prejudice" in the abstract on one of the prohibited bases, it falls within the Model Rule comment's definition.¹⁵² That aspect of the Rule is precisely what made the Model Rule susceptible to concerns that it could easily be interpreted to foreclose discussions on hot-button political topics at CLEs and other law-related functions. For example, David French—a lawyer and a columnist for the *National Review*—wrote a column objecting to Model Rule 8.4(g), explaining that he expresses opinions at law-related functions, including CLEs and law school panels, that seemed to clearly fall within the ambit of the Model Rule's prohibitions¹⁵³—such as his view "that men cannot become women," that "same-sex marriage is not protected by the Constitution" and is "not truly a marriage," and that "violent jihad is deeply imprinted in the DNA of Islam."¹⁵⁴ While French's views seem to fall squarely within the Model Rule's prohibition on speech that "manifests bias or prejudice" on the bases of sexual orientation, gender identity, and religion, it is far harder to fit them into the prohibitions of the Maine Rule, because the expression of these opinions are not aimed at any specific individual and they do not express any intention to actually "treat a person as inferior" or "disregard relevant considerations of individual characteristics or merit" or "cause or attempt to cause interference with the fair administration of justice" as required by the Maine Rule's definition of discrimination.¹⁵⁵ Even Rebecca Aviel, a defender of the Model Rule, was concerned that the Model Rule could be interpreted to foreclose political speech and prohibit or punish the expression of

¹⁵¹ See Volokh, *supra* note 7; see also ME. RULES OF PRO. CONDUCT r. 8.4(g) (2019); MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS'N 2016).

¹⁵² Volokh, *supra* note 7; MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS'N 2016).

¹⁵³ French, *supra* note 7.

¹⁵⁴ *Id.*

¹⁵⁵ ME. RULES OF PRO. CONDUCT r. 8.4(g)(1) (2019).

“biased” or “prejudiced” views or opinions, because it did not require that the prohibited discrimination or harassment be aimed at a specific individual.¹⁵⁶

But the Maine Rule did not stop at redefining discrimination so as to avoid including within its definition expression of viewpoints on political or traditional moral issues. Its final sentence emphasizes that “advocacy of policy positions or changes in the law *are not regulated* by Rule 8.4(g).”¹⁵⁷

The Maine Rule also specifically defines harassment. Its definition of harassment is not as narrowly tailored as its definition of discrimination and perhaps could be improved.¹⁵⁸ But its definition of harassment is narrower than the Model Rule. The Maine Rule defines harassment as “derogatory or demeaning conduct or communication and includes, but is not limited to, unwelcome sexual advances, or other conduct or communication unwelcome due to its implicit or explicit sexual content.”¹⁵⁹ This definition is more similar to Model Rule 8.4(g)’s definition of harassment as “sexual harassment and derogatory or demeaning verbal or physical conduct.”¹⁶⁰

Notably, the Maine Rule again uses the term “communication,” arguably indicating that the prohibited derogatory or demeaning speech has to be directed at a specific

¹⁵⁶ Aviel, *supra* note 58, at 55–61.

¹⁵⁷ ME. RULES OF PRO. CONDUCT r. 8.4(g)(4) (2019) (emphasis added). Again, while Formal Opinion 493 stated that the Rule does not prohibit lawyers from “freely expressing opinions and ideas on matters of public concern,” such a proviso should be added to the rule proper in addition to redefining what constitutes discrimination and harassment so that the prohibitions expressed in the Model Rule itself, which is what will have the force of law when adopted by a state, will not encompass such speech. *See* ABA Op. 493, *supra* note 13, at 1.

¹⁵⁸ Josh Blackman argued that the Maine Rule—while “alleviat[ing] some” of his First Amendment concerns—should be rejected primarily because of its definition of harassment as derogatory and “demeaning conduct,” which he argued “can still sweep in a wide range of constitutionally protected speech.” Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. U. L. REV. 629, 633 (2019). Perhaps it would be preferable for a state to add in the definition of harassment that for solely speech to count as harassment it must be either severe or pervasive to mirror federal antiharassment law. However, given the structure of the Maine Rule and its express statement that “advocacy of policy positions or changes in the law are not regulated by Rule 8.4(g),” it is doubtful that someone arguing for conservative or traditional political or policy viewpoints could be found to have engaged in harassment—even if some others thought such views or positions to be derogatory or demeaning. ME. RULES OF PRO. CONDUCT r. 8.4(g)(4) (2019).

¹⁵⁹ ME. RULES OF PRO. CONDUCT r. 8.4(g)(2) (2019).

¹⁶⁰ MODEL RULES OF PRO. CONDUCT r. 8.4(g) & cmt. 3 (AM. BAR ASS’N 2016).

person.¹⁶¹ Moreover, the sentence structure of the Maine Rule places sexual harassment not as a separately prohibited category of harassment, as in the Model Rule, but as the quintessential example of what constitutes derogatory or demeaning conduct and communication. This structure shores up an interpretation that punishable communications have to be directed at a specific individual, as with sexual harassment, rather than just being—as defined in the Model Rule—an expression that is “derogatory or demeaning” to a particular class of persons.¹⁶² And again, the Maine Rule clarifies overarchingly that “advocacy of policy positions” is simply “not regulated by Rule 8.4(g),”¹⁶³ making it unlikely that someone expressing conservative political or policy viewpoints could be found to have engaged in harassment—even if others might think such views or positions are derogatory or demeaning.

Using a different tack than Maine, New Hampshire modified the overarching prohibition of the rule rather than specifically modifying the definitions of “discrimination” and “harassment”—but did so to a similar effect. New Hampshire Rule 8.4(g) forbids lawyers from:

[T]ak[ing] any action, while acting as a lawyer . . . if the lawyer knows or it is obvious that the action has the primary purpose to embarrass, harass or burden another person, including conduct motivated by animus against the other person based upon the other person’s race, sex, religion, national origin, ethnicity, physical or mental disability, age, sexual orientation, marital status or gender identity.¹⁶⁴

¹⁶¹ ME. RULES OF PRO. CONDUCT r. 8.4(g) (2019).

¹⁶² MODEL RULES OF PRO. CONDUCT r. 8.4(g) & cmt. 3 (AM. BAR ASS’N 2016). Formal Opinion 493 repeatedly emphasized that harassment is generally understood as conduct that “is aggressively invasive, pressuring, or intimidating.” See ABA Op. 493, *supra* note 13, at 7. Nevertheless, if this is what the ABA understands should constitute harassment under Model Rule 8.4(g), then harassment under that rule should actually be defined that way in the text of the rule itself instead of being defined as “derogatory or demeaning” speech and conduct. MODEL RULES OF PRO. CONDUCT r. 8.4(g) & cmt. 3 (AM. BAR ASS’N 2016). But the Formal Opinion’s assertion that “harassment” under Model Rule 8.4(g) is actually intended to cover “aggressively invasive, pressuring, or intimidating” speech or conduct is somewhat undercut by the Formal Opinion’s repeated assertions that violations of Rule 8.4(g) do not require a showing that conduct or speech is “severe or pervasive,” but could include even a “single instance of a lawyer making a derogatory sexual comment.” See ABA Op. 493, *supra* note 13, at 1, 4, 7.

¹⁶³ ME. RULES OF PRO. CONDUCT r. 8.4(g)(4) (2019).

¹⁶⁴ N.H. RULES OF PRO. CONDUCT r. 8.4(g) (2019) (emphasis added).

Notably, the New Hampshire Rule is limited to “tak[ing] any *action*”—and does not even specifically prohibit mere speech.¹⁶⁵ While an “action” could certainly include speech, New Hampshire’s Rule is further limited to those actions that have “the primary purpose to embarrass, harass or burden another person, including conduct motivated by animus.”¹⁶⁶ Additionally, a comment added to the Rule by the New Hampshire Supreme Court clarifies that “[t]he rule *does not prohibit conduct that lacks this primary purpose*, even if the conduct incidentally produces, or has the effect or impact of producing, the described result.”¹⁶⁷

Again, as with the Maine Rule, it is far harder to argue that the New Hampshire Rule could be interpreted to forbid political commentary supporting conservative and far right views, such as those expressed by David French noted above. Political debate and commentary regarding traditional marriage, gender identity, or immigration does not have as its “*primary purpose* to embarrass, harass, or burden *another person*.”¹⁶⁸ The New Hampshire Rule thus requires an identifiable specific victim of the action taken—addressing the deficiency in the Model Rule identified by Rebecca Aviel.¹⁶⁹ The requirement of an identifiable individual victim is underscored by the New Hampshire Supreme Court’s comment that incidental effects and impacts are insufficient—rather, the lawyer’s action must have, and thus the state bar must prove as an element of discipline, the “primary purpose of embarrassing, harassing, or burdening *another person*.”¹⁷⁰

Not stopping there, the New Hampshire Rule further includes a First Amendment proviso—something that the ABA included in earlier drafts of Rule 8.4(g), but omitted in the final promulgated rule.¹⁷¹ The New Hampshire Rule clarifies that the

¹⁶⁵ *Id.* (emphasis added).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*, Sup. Ct. cmt. (emphasis added).

¹⁶⁸ *Id.*, 8.4(g) (emphasis added).

¹⁶⁹ See Aviel, *supra* note 58, at 55–61.

¹⁷⁰ N.H. RULES OF PRO. CONDUCT r. 8.4(g), Sup. Ct. cmt. (2019) (emphasis added).

¹⁷¹ Josh Blackman reviews the legislative history of Model Rule 8.4(g) and explains that at the February 2016 meeting, Laurel Bellows, a prior ABA president, urged dropping the proviso because “[w]e know the constitution governs.” Blackman, *supra* note 7, at 249 (quoting A.B.A. *Midyear Meeting: Public Hearing Before the A.B.A House of Delegates*, A.B.A H.D. 17 (2016) (statement of Laurel Bellows, former President, ABA)). Unfortunately, when actually adopting the rule, the Committee did

Rule does not “preclude a lawyer from engaging in conduct or speech or from maintaining associations that are constitutionally protected, including advocacy on matters of public policy, the exercise of religion, or a lawyer’s right to advocate for a client.”¹⁷² Thus, even were one to contort the first part of the Rule to prohibit political advocacy on public issues or to undermine lawyers’ religious or associational rights, the New Hampshire Rule expressly recognizes the existence and protection of such rights, asserting that they are not undermined or affected by the Rule.

3. Narrowing the Scope of “Related to the Practice of Law”

Another major problem with the breadth of Model Rule 8.4(g) is the scope of its application. Again, take French’s example that Model Rule 8.4(g) forbids his commentary about Islam, gender identity, or traditional marriage at CLEs or law school functions. Yet, such commentary could not fall within Maine’s Rule 8.4(g) because that rule narrowly defines “[r]elated to the practice of law” to mean “occurring *in the course of representing clients*; interacting with witnesses, coworkers, court personnel, lawyers, and others *while engaged in the practice of law*; or operating or managing a law firm or law practice.”¹⁷³ Thus the Maine Rule, like nearly all of the antidiscrimination rules previously enacted by state bars, does not attempt to reach outside the actual practice of law and into CLEs, social functions, law school panels, lobbying, etc. The Model Rule comments expansively define “conduct related to the practice of law” to include “participating in bar association, business or social activities in connection with the practice of law”¹⁷⁴ with the ABA’s Report indicating the Rule would additionally reach “lobbyists” and “settings [] such as law schools.”¹⁷⁵

not reaffirm—and the defenders of the Model Rule have not reaffirmed—that the First Amendment rights of lawyers “govern.” Instead, Myles Lynk advanced to the Committee a constitutional conditions theory indicating that lawyers simply lack First Amendment rights as to certain lawyer regulation and would lack such rights vis-à-vis this Rule. *See supra* notes 47–48 and accompanying text. As shown above, the defenders of the Model Rule similarly discard the First Amendment rights of lawyers rather than insisting that the Constitution governs and forbids infringement of such rights by the rule or interpretation thereof. *See supra* Part II.

¹⁷² N.H. RULES OF PRO. CONDUCT r. 8.4(g) (2019).

¹⁷³ ME. RULES OF PRO. CONDUCT r. 8.4(g)(3) (2019) (emphasis added).

¹⁷⁴ MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 4 (AM. BAR ASS’N 2016).

¹⁷⁵ ABA REPORT 109, *supra* note 6, at 2. The ABA’s Report and the legislative history indicates that this expansion was intended to capture sexual harassment at

Indeed, it was this extension of Model Rule 8.4(g)—to contexts outside the actual practice of law—that made way for the Montana legislatures' primary argument that Rule 8.4(g) is unconstitutional. The Montana legislature explained that its supreme court is given the power to regulate the practice of law and to determine if lawyers are fit to practice but does not have the power to impose general rules governing conduct or speech outside of law practice. The Montana legislature considered this aspect of the Model Rule as usurping legislative power to govern citizen conduct outside of law practice.¹⁷⁶ The Maine Rule wisely avoids this minefield entirely by limiting its scope to the practice of law or operation/management of a law firm.

4. Eliminating Liberal-Leaning Pro-Diversity Exceptions

Model Rule 8.4(g) specifically authorizes pro-diversity exceptions to its rule, such as allowing lawyers to “engage in conduct undertaken to promote diversity and inclusion without violating this Rule”¹⁷⁷ and expressly allowing lawyers to “limit[] the lawyer’s practice to members of underserved populations.”¹⁷⁸

Neither the Maine Rule nor the New Hampshire Rule contain any pro-diversity or liberal-leaning carve outs—avoiding the culture war of Model Rule 8.4(g). And why should there be exceptions to manifesting bias and prejudice for liberals to promote their pet ideas, but not for conservatives? The inclusion of liberal-leaning exceptions undermined Model Rule 8.4(g)’s traction with states as plausibly politically neutral. The New Hampshire Rule, as noted, includes a First Amendment proviso protecting all lawyers’ First Amendment rights—not just those on the left.¹⁷⁹ Further, the Maine Rule correctly carves out, and

dinner events, CLEs, etc. *Id.* at 11 (“[C]onduct related to the practice of law includes activities such as law 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 their practice of law. [The Committee] was presented with substantial anecdotal information that sexual harassment takes place at such events.”); *see also* Blackman, *supra* note 7, at 244. But if a jurisdiction wants to stop sexual harassment in such contexts, then the jurisdiction should narrowly define the prohibition as covering sexual harassment in those contexts and not as prohibiting all speech that “manifests bias or prejudice” or is “derogatory or demeaning.” MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2016); Blackman, *supra* note 7, at 245.

¹⁷⁶ See S.J. Res. 15, 65th Leg., Reg. Sess. (Mont. 2017).

¹⁷⁷ MODEL RULES OF PRO. CONDUCT r. 8.4(g) & cmt. 4 (AM. BAR ASS’N 2016).

¹⁷⁸ *Id.*, cmt. 5.

¹⁷⁹ N.H. RULES OF PRO. CONDUCT r. 8.4(g) (2019).

protects, all cause lawyering, and not just that done on behalf of “underserved populations.” The Maine Rule states: “[L]imiting one’s practice to particular clients or types of clients” is “*not regulated* by Rule 8.4(g).”¹⁸⁰

As I previously argued, cause lawyering—limiting a lawyer’s practice to a specific set of legal issues, clientele, or populations—has a long and beneficial history in the United States system of justice.¹⁸¹ While some cause lawyering falls within the Model Rule’s carve out for limiting one’s practice to “underserved populations,” other cause lawyering, like protecting fathers’ rights or advocating for women, does not.

Association with a specific clientele or type of client is essential to the successful political advocacy of lawyers devoted to using their license to protect the rights of a particular class of persons, or to secure specific social or political change. Concomitantly, the client cannot effectively invoke judicial power without the aid of the lawyer. Attorneys have First Amendment rights to associate with specific clients, to speak with them and on their behalf, and to petition on their behalf—and thus to pursue and achieve the political ends of both the attorney and client. Such focused association and advocacy falls within core lawyer First Amendment rights under the access to justice theory because it is an essential component of both the attorney’s and the client’s ability to invoke or avoid government power in a manner that will protect the rights and interests of a specific group or cause.

In fact, cause lawyering was expressly recognized as being protected by the lawyer’s core First Amendment rights to association, political expression, and petitioning in *NAACP v. Button* itself.¹⁸² These rights are not limited to representing “underserved populations,” as Model Rule 8.4(g) attempts to confine them. The *Button* court emphasized that the fact that the NAACP was “engaged in activities of expression and association on behalf of the rights of [African-American] children” was “constitutionally *irrelevant* to the ground of our decision.”¹⁸³ Instead, the court expressly held that lawyers representing the opposite viewpoints would be equally protected in their First Amendment rights of expression, association, and petition: “The

¹⁸⁰ ME. RULES OF PRO. CONDUCT r. 8.4(g)(4) (2019) (emphasis added).

¹⁸¹ See TARKINGTON, *supra* note 4, at 272–75.

¹⁸² NAACP v. Button, 371 U.S. 415, 438–39 (1963).

¹⁸³ *Id.* at 444 (emphasis added).

course of our decisions in the First Amendment area makes plain that its protections would apply *as fully* to those who would arouse our society against the objectives” of the NAACP.¹⁸⁴ The Maine Rule correctly allows all private lawyers—along with the full breadth of the political spectrum—their constitutional political freedom to focus their practice to a particular cause or clientele.

5. Clarifying Freedom to Decline

The Maine Rule also straightforwardly states that “[d]eclining representation” is “not regulated by Rule 8.4(g).”¹⁸⁵ Model Rule 8.4(g) was rather muddled on this issue. On the one hand, Model Rule 8.4(g) expressly states that it “does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16.”¹⁸⁶ Yet, on the other hand, comment 5 indicates that the rule only allows lawyers to limit their practices to a specific clientele if that clientele is an “underserved population[].”¹⁸⁷ Moreover, while Rule 1.16 fully addresses when a lawyer is both required or permitted to withdraw from an ongoing representation, the Rule simply does not address when a lawyer is permitted to decline a case at the outset.¹⁸⁸

Historically, private lawyers have been absolutely free to decline any representation they wish to reject for any or no reason, and the ABA’s Report states that Rule 8.4(g) “does *not* change the circumstances under which a lawyer may accept, decline or withdraw from a representation.”¹⁸⁹ The Report thus indicates that even under Model Rule 8.4(g), lawyers retain their complete autonomy to decline cases.

Nevertheless, Stephen Gillers—a leading defender of Rule 8.4(g)—reads comment 5 to create a limitation on declination through negative implication. Comment 5 states that “[a] lawyer *does not* violate paragraph (g) . . . by *limiting the lawyer’s practice* to members of underserved populations in accordance with these Rules and other law,” which Gillers interprets to mean that lawyers are in violation of the Rule if they decline

¹⁸⁴ *Id.* (emphasis added).

¹⁸⁵ ME. RULES OF PRO. CONDUCT r. 8.4(g)(4) (2019).

¹⁸⁶ MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016).

¹⁸⁷ *Id.*, cmt. 5.

¹⁸⁸ MODEL RULES OF PRO. CONDUCT r. 1.16. (AM. BAR ASS’N 2016).

¹⁸⁹ ABA REPORT 109, *supra* note 6, at 8 (emphasis added).

representations on one of the enumerated bases unless limiting their practice to an “underserved population[.]”¹⁹⁰ Similarly, Ronald Rotunda expressed his concern that the Rule was unclear about lawyers’ freedom to decline cases—since it allows for declinations “in accordance with Rule 1.16”—a rule that simply does not address declination at all.¹⁹¹

Whatever one thinks about the private lawyer’s historic right to decline cases for any or no reason, the Maine Rule is certainly an improvement over Model Rule 8.4(g) in clarity on the issue. Given that both defenders, like Gillers, and detractors, like Rotunda, amplify the Rule’s inherent ambiguity surrounding permissible declinations, attorneys and regulators will similarly be unsure of the Rule’s scope, which may lead to inequitable or selective enforcement. Maine avoids the foray entirely; declination is simply not regulated by Maine’s Rule. Moreover, consistent with both lawyer and client First Amendment rights expounded in *Button*, Maine’s Rule correctly protects all cause lawyering and not solely that which assists underserved populations.

As I have explained elsewhere,¹⁹² Model Rule 8.4(g) redefines professional discipline for all attorneys in both private and government practice. But a different constitutional balance exists for those who are publicly employed than for private attorneys.¹⁹³ Publicly-employed attorneys, such as prosecutors and judges, can—and should—be prohibited from declining to represent or otherwise assist people based on their race, sex, gender, gender identity, sexual orientation, religion, etc. That is precisely because by accepting public employment or office, they have already selected the one client that they actually represent: the government. As the agent and fiduciary of the government itself, the attorney must act impartially and provide justice to all—without bias. As the Supreme Court famously explained in

¹⁹⁰ MODEL RULES OF PRO. CONDUCT r. 8.4(g) cmt. 5 (AM. BAR ASS’N 2016) (emphasis added). In a similar vein, comment 4 expressly allows lawyers to “engage in conduct undertaken to promote diversity and inclusion without violating this Rule.” *Id.*, cmt. 4.

¹⁹¹ *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, *supra* note 138, at 40 n.66 (statement of Ronald Rotunda) (citing MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2016)).

¹⁹² See TARKINGTON, *supra* note 4, at 275–76.

¹⁹³ Formal Opinion 493 conflates this problem. In shoring up the legitimacy of Model Rule 8.4(g), the Opinion cites to the rules governing judges, prosecutors, and other publicly-employed attorneys. See ABA Op. 493, *supra* note 13, at 3 nn.7–8.

Berger v. United States, the publicly-employed lawyer represents a sovereign whose “obligation to govern impartially is as compelling as its obligation to govern at all.”¹⁹⁴ Nevertheless, the private lawyer is not under the same obligation as the public lawyer to act impartially. Instead, private lawyers are hired precisely to be partial in their commitment to their client’s cause.

6. Providing Interpretive Guidance

Finally, although not in Maine’s Rule itself, a “Guidance” note accompanies the passage of Maine’s 8.4(g) to explain that the Rule is not to be used to punish minor and unintentional conduct. It explains that “the extent of enforcement or initiation of formal disciplinary proceedings will depend *on the level of intentionality and seriousness* of the reported violation.”¹⁹⁵ Further, the court emphasizes:

Response to complaints and disciplinary actions initiated under the new Rule 8.4(g), as with disciplinary actions under the present Maine Rules of Professional Conduct, will be subject to similar *reasonable and measured enforcement choices*, particularly as experience with the new Rule and Continuing Legal Education programs promote better understanding within the Maine legal community of ethical obligations to achieve compliance with the Rule.¹⁹⁶

In like manner, the New Hampshire Rule includes a Supreme Court comment emphasizing that “[t]he rule *requires* that the proscribed action be taken with the primary purpose of embarrassing, harassing or burdening another person” and “does not prohibit conduct that lacks this primary purpose, *even if* the conduct incidentally produces, or has the effect or impact of producing, the described result.”¹⁹⁷

Certainly, protection of First Amendment rights is not to be left to the “good graces” of any regulators. Unconstitutionally broad regulations are not rendered constitutionally sound simply by arguing that regulators can be trusted to exercise restraint in enforcement.¹⁹⁸ Nevertheless, the Guidance section

¹⁹⁴ 295 U.S. 78, 88 (1935).

¹⁹⁵ ME. RULES OF PRO. CONDUCT r. 8.4 guidance (2019) (emphasis added).

¹⁹⁶ *Id.* (emphasis added).

¹⁹⁷ N.H. RULES OF PRO. CONDUCT r. 8.4(g) Sup. Ct. cmt. (2019) (emphasis added).

¹⁹⁸ *See, e.g.,* Greenberg v. Haggerty, Civ. Action No. 20-3822, 2020 WL 7227251, at *8 (E.D. Pa. Dec. 7, 2020) (“Defendants effectively ask Plaintiff to trust them not to regulate and discipline his offensive speech even though they have given

accompanying the Maine Rule is a reminder to both attorneys and those in the state disciplinary commission that enforcement should be reasonable and measured, taking into account the offender's intentionality and the seriousness of the conduct or communication. In the context of workplace harassment, harassing speech, as opposed to physical contact, must be "severe or pervasive" such that it creates a hostile work environment. As the U.S. Supreme Court explained regarding verbal workplace harassment in *Faragher v. City of Boca Raton*, "[a] recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to" actionable harassment or discrimination.¹⁹⁹ Although the Maine Rule does not expressly impose a "severe or pervasive" requirement, it does expressly and substantially limit what can constitute discriminatory speech, and further indicates in the Guidance section that "the extent of enforcement or initiation of formal disciplinary proceedings" is dependent on both seriousness—severity—and intentionality.²⁰⁰

B. The Significance of Preexisting State Antidiscrimination Rules

Commentators who favor Model Rule 8.4(g) often point to the preexisting state antidiscrimination rules or comments as demonstrating that Model Rule 8.4(g) is, and must be, constitutionally sound. But, the existence of such rules actually highlights the constitutional deficiencies of Model Rule 8.4(g) rather than demonstrates its constitutionality.

Initially, the major problem with the argument that Model Rule 8.4(g) is validated by pre-existing state rules is that they simply are not comparable in substance or scope. Gillers himself recognizes and catalogs the significant differences between Model Rule 8.4(g) and the existing antidiscrimination rules found in

themselves the authority to do so. So, despite asking Plaintiff to trust them, there remains the constant threat that the Rule will be engaged as the plain language of it says it will be engaged.”)

¹⁹⁹ 524 U.S. 775, 787–88 (1998) (citations omitted); see also Blackman, *supra* note 7, at 245 & n.16 (quoting *Faragher*, 524 U.S. at 787–88). Notably, ABA Formal Opinion 493 expressly disavows a “severe or pervasive” standard, repeatedly asserting that a single epithet, derogatory sexual comment, etc., can violate Model Rule 8.4(g) even though it would not violate federal antidiscrimination laws. See ABA Op. 493, *supra* note 13, at 1, 4, 8.

²⁰⁰ ME. RULES OF PRO. CONDUCT r. 8.4 guidance (2019).

various states.²⁰¹ These differences include, for example, that most of the pre-existing rules “contain the nexus ‘in the course of representing a client’ or its equivalent” and “tie the forbidden conduct to a lawyer’s work in connection with the ‘administration of justice’ or, more specifically, to a matter before a tribunal.”²⁰² He further notes:

Six jurisdictions’ rules require that forbidden conduct be done “knowingly,” “intentionally,” or “willfully.” Four jurisdictions limit the scope of their rules to conduct that violates federal or state anti-discrimination laws Only four jurisdictions use the word “harass” or variations in their rules. [And,] [i]n twelve states, anti-bias language appears in a comment only²⁰³

In other words, the existing antidiscrimination rules are simply not analogous to the Model Rule. Further, the fact that a narrowly tailored rule is constitutional does not make all other rules addressing that same subject matter constitutional, regardless of scope or breadth. Again, as explained in *Button*, “[p]recision of regulation must be the touchstone,” while “[b]road prophylactic rules in the area of free expression are suspect.”²⁰⁴ Whether a given rule is constitutionally sound depends entirely on the precise prohibitions and scope of that specific rule. Overall, the pre-existing state rules are far more circumscribed than Model Rule 8.4(g). Some are limited in scope to bias occurring before a court or when representing a client, many are limited by requiring that discrimination be willful or knowing, and others require that the conduct violate federal or state antidiscrimination laws. Thus, the lack of constitutional objections to these rules tells us nothing about the constitutionality of Model Rule 8.4(g) because Model Rule 8.4(g) contains none of these narrowing attributes.

Nevertheless, the existence of these state antidiscrimination rules and comments does have significance in the debate surrounding Model Rule 8.4(g). Notably, only two states, Vermont and New Mexico, have adopted Model Rule 8.4(g) as promulgated, and a substantial contingent have rejected it.²⁰⁵ In the four years since its promulgation, the Model Rule has had

²⁰¹ Gillers, *supra* note 49, at 208–09.

²⁰² *Id.* at 208.

²⁰³ *Id.* (footnotes omitted).

²⁰⁴ NAACP v. Button, 371 U.S. 415, 438 (1963) (emphasis added).

²⁰⁵ VT. RULES OF PRO. CONDUCT r. 8.4(g) (2017); N.M. RULES OF PRO. CONDUCT r. 16-804(G) (2019); JURISDICTIONAL ADOPTION OF RULE 8.4(G), *supra* note 120.

very little traction. But the fact that a significant contingent of states have existing antidiscrimination and antiharassment rules demonstrates that state bars and judiciaries are not opposed to passing such measures. Indeed, the existence of these rules in so many states condemns Model Rule 8.4(g) more than it validates it. States are rejecting Model Rule 8.4(g) not because they are oblivious to the problems of harassment and discrimination or opposed to equality and diversity. They are rejecting it because a fair reading of the Rule as promulgated by the ABA encroaches into the First Amendment rights of lawyers. Even if not enforced, a state should not pass Model Rule 8.4(g) for “symbolic” purposes because lawyers will still be chilled by the breadth of rule. As the *Button* court explained in the context of prohibitions on attorney speech, association, and petitioning: “The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.”²⁰⁶ Moreover, as emphasized in its Formal Opinion 493, the ABA is not proffering Model Rule 8.4(g) to the states as a symbolic or aspirational rule; instead, Opinion 493 asserts that “[e]nforcement of Rule 8.4(g) is . . . critical”²⁰⁷

The other significant point to be made from these rules and comments is that constitutionally sound and appropriately limited antidiscrimination and antiharassment rules can and have been drafted in a number of states. Like Maine’s and New Hampshire’s recent 8.4(g) rules, these provisions in the aggregate show that regulators need not make a Scylla and Charybdis choice between anti-harassment/discrimination and the First Amendment but can draft appropriately tailored and constitutionally sound rules.

C. *The Path Forward*

So, what should be done? First, defenders of Model Rule 8.4(g) should stop defending this rule—especially if the defense includes an abdication or denial of lawyers’ First Amendment rights. Lawyers have protectable First Amendment rights. It is a fact, supported by over a dozen U.S. Supreme Court cases striking down regulation or punishment of lawyers as violative of their First Amendment rights.²⁰⁸ To these defenders I implore:

²⁰⁶ NAACP v. Button, 371 U.S. 415, 433 (1963).

²⁰⁷ ABA Op. 493, *supra* note 13, at 1.

²⁰⁸ See *supra* note 26 and accompanying text.

Do not betray the civil rights, antiwar, labor union, communist-sympathetic and other unpopular-for-their-time lawyers who went before you and established by both word and deed that lawyers have and need First Amendment rights, including, specifically, protection from regulation and disbarment by the state bar and judiciary.

Second, instead of defending Model Rule 8.4(g) as promulgated, why cannot the ABA simply own that it drafted a rule that, while very well intentioned, has been interpreted or understood by numerous states reviewing it to exceed the constitutional limits of lawyer regulation? ABA Formal Opinion 493 does very little to help in this regard—it contains only one helpful sentence asserting that “[t]he Rule does not prevent a lawyer from . . . expressing opinions and ideas on matters of public concern.”²⁰⁹ The Opinion does nothing to change the extremely broad and constitutionally problematic text of the Rule—let alone the other deficiencies noted above that are addressed by the Maine and New Hampshire rules. In fact, the Opinion is largely devoted to insisting on the legitimacy of the Rule as promulgated—by justifying the modern need to curb lawyer discrimination and harassment to “maintain[] the public’s confidence in the impartiality of the legal system,”²¹⁰ and by asserting that there are no constitutional problems with the rule, in part by denying lawyer access to the First Amendment by asserting the constitutional conditions approach and by contending at length that lawyers can be subjected to vague and overbroad laws.²¹¹ Doubling down instead of fixing the constitutional deficiencies is not the appropriate path and will continue to widen the cultural divide rather than build a path forward. The path forward is clear. The ABA should redraft a Model Rule that has the limitations exemplified by Maine’s or New Hampshire’s rules, outlined above, or otherwise narrow Model Rule 8.4(g) so that it is constitutionally sound.

Such a path forward would not just be “eating humble pie”—it is the only way to effectively reach the ABA’s goal of curbing harassment and discrimination. No matter the good intentions of those involved in drafting 8.4(g), the Rule has significant constitutional defects. These defects have kept the rule from being enacted in jurisdictions—and even leading one state to

²⁰⁹ ABA Op. 493, *supra* note 13, at 1.

²¹⁰ *Id.* at 1; *see also id.* at 1–5.

²¹¹ *See id.* at 9–11.

legislatively foreclose its enactment and to the Eastern District of Pennsylvania to temporarily enjoin the Pennsylvania rule pending a constitutional challenge. In turn, because of its lack of traction and susceptibility to constitutional challenge, the Model Rule in large part fails to do anything to effectively curb lawyer discrimination or harassment.

But it is not just that Model Rule 8.4(g) fails to produce beneficial results due to its lack of traction; it instead has brought about significant detrimental byproducts. The first, as expounded fully above, is the abandoning of lawyer First Amendment rights by defenders of the Rule—a reckless course that can easily work to undermine these essential rights in other disciplinary and regulatory contexts. And second, precisely because Model Rule 8.4(g) can readily be interpreted to foreclose or punish political speech on controversial hot-button issues—with foreclosure leaned heavily towards speech in favor of conservative and traditional views—the continued defense of the rule by the ABA and others only serves to stoke the culture war. Because of the Rule’s lack of traction, the defense of the Rule does not promote diversity or equality—it does not curb harassment or discrimination. It only stirs the pot, agitates, and widens the already too-wide divide between liberals and conservatives in this country. Both sides become heated in a showdown between diversity and the First Amendment, with each side feeding off righteous indignation for the value they selected in this false dichotomy.

But a narrower rule, one like Maine’s or New Hampshire’s that could not be readily construed to reach into political speech or expressions of conservative or traditional policy viewpoints, would actually be far more likely to be adopted by states—many of which have previously enacted similar rules or comments. A narrower rule would be far more likely to remain law after enactment, instead of being challenged or enjoined as unconstitutional, and—most importantly for defenders of Model Rule 8.4(g)—it would therefore actually work to curb harassment and discrimination.

CONCLUSION

The false dichotomy created by the ABA’s Model Rule 8.4(g) has compelled people to choose sides in a clash between antidiscrimination and the First Amendment. In a new body of scholarship, defenders of the Rule have revived the constitutional

conditions theory to their aid—renouncing lawyer First Amendment rights as a protection against professional regulation. Thus, the ominous shadow cast by Rule 8.4(g) is nothing less than the surrender of lawyer First Amendment rights. How far will this shadow reach? To what other regulatory and disciplinary contexts? To justify the promulgation of what other regulations, prohibitions, and punishments? Once the First Amendment is discarded as a roadblock to professional regulation and punishment, what happens when political power changes hands? Can lawyers just trust state bars to govern fairly once they are freed from constitutional constraint? Can lawyers trust them not to take aim at the unpopular? Given our long national history of punishing and disbaring lawyers who took unpopular stances, held unpopular views, or represented the unpopular²¹²—“trust” cannot be the answer.

Yet, rest assured that this body of scholarship, written to shore up the alleged constitutionality of Model Rule 8.4(g), will be employed to justify punishment or regulation in other contexts. It can be used whenever lawyers argue that they are being disciplined in violation of their First Amendment rights of speech, association, or petitioning—which inevitably will occur when what the lawyer is saying, with whom the lawyer associates, as clients, or when the cause for which the lawyer is petitioning is unpopular. That is because, as Zechariah Chafee observed, the First Amendment is really only necessary to protect “unpopular sentiments or persons” because the powers-that-be naturally protect the popular.²¹³ Further, the extent of lawyers’ “rights” will become entirely dependent on the political views of whichever parties or persons happen to be in political control—both at the local state bar level as well as at the national ABA level. Again, as Chafee explained, “once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true.”²¹⁴

It is nothing short of reckless to abandon the First Amendment rights of lawyers. Such a renunciation has far-reaching effects. The shadow looms large—far beyond undermining the individual lawyer’s personal exercise of constitutional rights. That is because “the First Amendment

²¹² See, e.g., *supra* notes 27–29, 91–94 and accompanying text.

²¹³ ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 3 (1920).

²¹⁴ *Id.* at 34.

rights of lawyers, when properly defined, protect the integrity of the justice system itself.”²¹⁵ It is through lawyer speech, association, and petitioning that individuals and associations throughout the nation are able to invoke and avoid government power in protection of their life, liberty, and property. It is through lawyers exercising these First Amendment rights that the judicial power is invoked, and thus enabled to redress grievances and secure legal rights.²¹⁶ It is through lawyer speech, association, and petitioning that political, economic, and institutional power can be checked.²¹⁷ It is reckless to abandon the First Amendment rights of lawyers precisely because the structure of our justice system depends on the exercise of those rights.²¹⁸

²¹⁵ TARKINGTON, *supra* note 4, at 1.

²¹⁶ “An informed, independent judiciary presumes an informed, independent bar.” *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001).

²¹⁷ *See supra* Part III.

²¹⁸ *Cf.* MEIKLEJOHN, *supra* note 90, at 48 (explaining that if the First Amendment “means anything, it means that certain substantive evils which, in principle, [regulators have] a right to prevent, must be endured if the only way of avoiding them is by the abridging of that freedom of speech upon which the entire structure of our free institutions rests”).