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## Ethical Issues with Lawyers Openly Carrying Firearms

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# ESSAY

*Dru Stevenson*

## Ethical Issues with Lawyers Openly Carrying Firearms

**Abstract.** Ethical concerns arise when lawyers openly carry firearms to adversarial meetings related to representation, such as depositions and settlement negotiations. Visible firearms introduce an element of intimidation, or at least the potential for misunderstandings and escalation of conflicts. The adverse effects of openly carried firearms can impact opposing parties, opposing counsel, the lawyer’s potential clients, witnesses, and even judges and jurors encountered outside the courtroom. The ABA’s Model Rules of Professional Conduct in their current form include provisions that could be applicable, such as rules against coercion and intimidation, but there is no explicit reference to firearms. Several reported incidents with lawyers and firearms have occurred in recent years, and as states liberalize their “open carry” laws, as well as laws about guns in and around courthouses, the issue will arise with increasing frequency. The time has come for an express ethical prohibition of lawyers openly carrying firearms, at least in adversarial contexts. Such a rule could take the form of an amended subsection to the Model Rules, an addition to the official Comment to the Rules, or even in a formal ethics opinion from the ABA. The ABA has already adopted a well-reasoned and well-supported Resolution urging states to prohibit firearms from courthouses, and it should follow this with ethical guidance for attorneys. In addition, state ethics committees should promulgate similar rules, or issue ethics opinions, discouraging or prohibiting lawyers from openly carrying firearms in adversarial settings. *Winner of the Claude E. Ducloux Prize for Excellence in Legal Ethics Scholarship.*

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A lawyer in Las Vegas was taking a deposition in 2018, and the exchange grew heated.<sup>1</sup> The lawyer became angry and began insulting the deponent and his counsel, peppering his verbal jabs with profanity and vulgarities.<sup>2</sup> Nothing about this scenario so far would be remarkable—depositions can be acrimonious, and sometimes lawyers become angry and use foul language. What made this situation remarkable was that the lawyer was wearing a handgun in a side holster, and at one point, he pulled open his suit jacket to make the gun more visible and asked the deponent if he was “ready for it.”<sup>3</sup> The deponent and his counsel rushed from the room and headed directly to their car.<sup>4</sup> As they were leaving the parking lot, the lawyer caught up to them, still yelling angrily, and pounded on their car with his fists as they drove away.<sup>5</sup> The lawyer later told a reporter that he openly carries a handgun every day, everywhere he goes.<sup>6</sup>

On a hot summer day in 2006, a police officer was sitting in his patrol car in Springfield, Massachusetts, with a view of the entrance to the local courthouse.<sup>7</sup> He was surprised to observe a man in a suit wearing a sidearm in a holster approach the entrance to the court; alarmed bystanders and passersby signaled to the officer in the car.<sup>8</sup> The officer stepped out of his patrol car and approached the man to question him.<sup>9</sup> The man with the gun claimed he had a permit to carry the weapon and produced his license, which also indicated he was an attorney.<sup>10</sup> His suit jacket was open because of the

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1. See *In re Discipline of Pengilly*, No. 74316, 2018 WL 4297851, at \*1 (Nev. Sept. 7, 2018) (describing Pengilly’s behavior during the deposition); Debra Cassens Weiss, *Lawyer Is Suspended for Flashing Gun at Deposition, Other ‘Appalling’ Behavior*, A.B.A. J. (Sept. 13, 2018, 6:10 AM), [http://www.abajournal.com/news/article/lawyer\\_is\\_suspended\\_for\\_flashing\\_gun\\_at\\_deposition\\_of\\_her\\_appalling\\_behavior](http://www.abajournal.com/news/article/lawyer_is_suspended_for_flashing_gun_at_deposition_of_her_appalling_behavior) [<https://perma.cc/8D8X-JHST>] (“A Las Vegas lawyer has been suspended from practice for six months and a day for deposition misconduct that included flashing a gun and calling his litigation opponent derogatory names.”).

2. *Pengilly*, 2018 WL 4297851, at \*1.

3. *Id.*

4. David Ferrara, *Las Vegas Lawyer Accused of Wielding Handgun During Deposition*, LAS VEGAS REV. J. (Oct. 5, 2016, 6:13 PM), <https://www.reviewjournal.com/crime/las-vegas-lawyer-accused-of-wielding-handgun-during-deposition/> [<https://perma.cc/JG2C-7UAG>].

5. *Id.*

6. Weiss, *supra* note 1.

7. *Schubert v. City of Springfield*, 589 F.3d 496, 499 (1st Cir. 2009).

8. *Id.*

9. See *id.* (“On Schubert’s account of the events, once Stern noticed Schubert’s partially concealed weapon, the officer leaped from his cruiser in a ‘dynamic and explosive’ manner . . . . The officer ordered Schubert to stop and put his hands in the air. Schubert complied. When asked if he had a weapon, Schubert responded that he did and that he had a license to carry.”).

10. *Id.* at 500.

temperature, though this resulted in the gun being visible to everyone nearby.<sup>11</sup> Calling a dispatcher to verify the gun permit took several minutes, so the officer had the lawyer sit in the back of the patrol car while they waited.<sup>12</sup> The lawyer was on his way within ten minutes, but he was irate about what had occurred, so he sued the officer and the city.<sup>13</sup> The lawsuit was unsuccessful.<sup>14</sup>

Most states have liberalized their “concealed carry” laws in recent years,<sup>15</sup> and some have loosened restrictions on openly carrying firearms as well<sup>16</sup>—many states already permitted open carry.<sup>17</sup> In addition, most states have

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11. *Id.* at 499.

12. *Id.* at 500.

13. *Id.*

14. *See id.* at 500, 504 (ruling in favor of Stern and dismissing the federal and state claims against the City); Tim Hull, *Gun-Toting Attorney Loses Civil Rights Appeal*, COURTHOUSE NEWS SERV. (Dec. 29, 2009), <https://www.courthousenews.com/gun-toting-attorney-loses-civil-rights-appeal/> [<https://perma.cc/2UKG-SA3U>] (“A police officer did not violate a Massachusetts attorney’s civil rights by stopping the lawyer in a high-crime area near a courthouse for carrying a holstered gun, the 1st Circuit ruled.”).

15. *See* Carl T. Bogus, *The Hard, Simple Truth About Gun Control*, in GUNS IN LAW 88, 92–93 (Austin Sarat, et al., eds., 2019) (describing the trends in concealed carry and open carry laws); Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 WASH. L. REV. 1675, 1690 (2018) (“[A]s of 2015, every state and the District of Columbia allow the public concealed carry of firearms.”); Hannah E. Shearer, *Jeopardizing “Their Communities, Their Safety, and Their Lives”: Forced Concealed Carry Reciprocity’s Threat to Federalism*, 45 HASTINGS CONST. L.Q. 429, 431–33 (2018) (discussing state variations in concealed carry permit requirements); Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253, 264 (2018) (discussing the trend in state law).

16. *See* Lance Duroni, *Out of the Home and in Plain Sight: Our Evolving Second Amendment and Open Carry in Wisconsin*, 102 MARQ. L. REV. 1305, 1306–07 (2019) (detailing how Wisconsin only denies concealed carry permits in limited circumstances); Mary Beth Chappell Lyles, *The Open Carry Library: Navigating Gun Policies in the Age of Open Carry Laws and Mass Shootings*, AM. ASS’N L. LIBRS. 31, Feb 2015, <https://www.aallnet.org/wp-content/uploads/2017/12/Vol-19-No-4-open-carry.pdf> [<https://perma.cc/TRF4-JW5M>] (mentioning changes in several state laws that resulted in more patrons openly carrying guns into public libraries). In 2015, Texas changed its laws to permit open carry with licensing, as well as openly carrying firearms on college campuses. Tex. H.B. 910, 84th Leg., R.S. (2015); *see* TEX. GOV’T CODE ANN. § 411.2031 (providing that a “license holder may carry a concealed handgun” while on a college campus); TEX. PENAL CODE ANN. § 46.03 (providing a person may possess a concealed handgun on school grounds); Karen L. Hart, *What Texas Property Owners Need to Know About Open Carry*, 14 REAL EST. CONDEMNATION & TR. LITIG. COMMITTEE 4, 5–6, (2016) (describing the changes to Texas law with the passage of H.B. 910). Similarly, in 2013 Arkansas amended its laws permitting openly carrying firearms in public. 2013 Ark. Laws Act 746 (H.B. 1700); ARK. CODE ANN. § 5-73-120(a) (West 2015); *see* J. Harrison Berry, *Arkansas Open Carry: Understanding Law Enforcement’s Legal Capability Under a Difficult Statute*, 70 ARK. L. REV. 139, 139–40 (2017) (describing how Arkansas’s new open carry law legalizes open carry of a firearm so long as the person possessing the firearm does not intend to unlawfully use the gun as a weapon against another).

17. Bogus, *supra* note 15, at 91. Bogus reports that five states prohibit openly carrying firearms in public, and of the remaining states, about one-third require some kind of license or permit for open

passed preemption laws to prevent urban areas from having local ordinances that restrict carrying guns in public.<sup>18</sup> These legal changes have both resulted from and contributed to a more open and expressive gun culture in the United States.<sup>19</sup> More people can, and do, carry firearms than before, whether concealed or openly.<sup>20</sup> Some lawyers have started to carry firearms as well, and some carry them openly. As more lawyers do so, there will be more incidents like the two stories above, as well as more occasions when lawyers absent-mindedly try to pass through courthouse security screening with a briefcase that contains a gun.<sup>21</sup> There is a parallel trend for states to repeal their longstanding bans on guns in government buildings, including courthouses, so those with concealed carry permits can bring guns into court buildings, and in some states, openly carrying firearms is now

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carry, while the remaining two-thirds do not. *Id.*; cf. Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1490 (2014) (arguing from historical sources that “the right to carry weapons that is guaranteed by the Second Amendment is the right to carry weapons openly.”).

18. See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1999 (2018) (indicating forty-five states have passed laws that preempted local attempts at firearm regulation); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 133 (2013) (noting how preemption prevents local gun regulations); *Preemption of Local Laws*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/> [<https://perma.cc/9897-DDA3>] (indicating state preemption has “removed authority from local governments to regulate guns and ammunition”); *Preemption: State by State*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/state-law/50-state-summaries/preemption-state-by-state/> [<https://perma.cc/PUG9-337K>] (outlining each state’s preemption laws). In 2006, Kristin Goss stated there were forty-five states with partial or full preemption. KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 164 (2006). For further discussion, see PHILIP J. COOK & KRISTIN A. GOSS, *THE GUN DEBATE: WHAT EVERYONE NEEDS TO KNOW* 108–09 (2014) (discussing a ban on the sale and possession of handguns in Morton Grove, which led to an increase in state preemption laws).

19. See Bogus, *supra* note 15, at 91 (describing the open carry movement and the mission of the online community at OpenCarry.org).

20. See *id.* at 93 (showing an increase from 2.7 million to 11.1 million Americans having concealed carry permits from 1999 to 2014).

21. See Catherine D. Perry, *Lessons Learned As a New Chief Judge*, 38 LITIG. 14, 15 (2011) (“Court security metal detectors reveal a gun in the briefcase of a lawyer hurrying to court for a sanctions hearing.”); David Hanners, *Minnesota Supreme Court Sides with Lawyer in Briefcase Gun Case*, TWINCITIES.COM (July 10, 2012, 11:01 PM), <https://www.twincities.com/2012/07/10/minnesota-supreme-court-sides-with-lawyer-in-briefcase-gun-case> [<https://perma.cc/AAW3-G9ET>] (describing when an attorney had a loaded revolver in his briefcase when he went through courtroom security); Joe Patrice, *Lawyer Brings Loaded Gun to Courthouse . . . That Was Probably A Mistake*, ABOVE L. (June 24, 2019, 12:45 PM), <https://abovethelaw.com/2019/06/lawyer-brings-loaded-gun-to-courthouse-that-was-probably-a-mistake/> [<https://perma.cc/M9P8-946M>] (describing a situation where an attorney was stopped by courthouse security because he had a loaded gun in his bag).

permissible in courthouses, though usually not inside courtrooms.<sup>22</sup> In states where open carry is permissible in courthouses, it simply expands the number of scenarios and locations where lawyers wearing firearms will encounter opposing parties, opposing counsel, witnesses, judges, and jurors. The fact that others in the courthouse might have guns will motivate some lawyers to bring their guns, too.

This Essay focuses primarily on situations like the first scenario—lawyers who openly carry firearms to adversarial meetings outside a courthouse, such as depositions, settlement conferences, and business negotiations, as well as informal interviews with witnesses and meetings with clients. The lawyer who brought a gun to the deposition and threatened to use it faced a six-month-and-one-day suspension from the Nevada State Bar disciplinary authority.<sup>23</sup> The state bar, and the court that affirmed the decision, correctly identified the lawyer’s conduct as an unethical intimidation tactic.<sup>24</sup> As open carry becomes more prevalent,<sup>25</sup> and lawyers join in, these scenarios will inevitably become more frequent. It is time for state ethics commissions, and the American Bar Association, to provide more guidance for attorneys and disciplinary authorities about the ethical boundaries of openly carrying firearms to these law-related encounters. The second type of scenario described above is also relevant to the professional conduct of lawyers, even if it is less troubling. Even outside of the meeting context, that is, where we can remove the concern about specific individuals (the other party or opposing counsel) feeling intimidated by an openly-displayed firearm,<sup>26</sup> a lawyer’s professionalism in public places reflects on the legal profession in that area and the public’s trust in the legal system. While there is a strong argument that lawyers should not openly carry firearms in any

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22. Jacob Gersham, *New Battlefield Over Gun Rights: The Courthouse Itself*, WALL STREET J. (July 9, 2017, 5:13 PM), <https://www.wsj.com/articles/new-battlefield-over-gun-rights-the-courthouse-itself-1499634821> [https://perma.cc/3U29-NAVW].

23. *In re Discipline of Pengilly*, No. 74316, 2018 WL 4297851, at \*1 (Nev. Sept. 7, 2018).

24. *See id.* (finding the attorney “acted knowingly as he was consciously aware of his conduct and knew his behavior was inappropriate”).

25. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1521 (2009) (“There is indeed an ‘open carry movement’ of people who deliberately wear guns openly, as a means of trying to normalize such behavior and of making a statement in favor of gun possession.”).

26. *See* Philip J. Cook, *The Great American Gun War: Notes from Four Decades in the Trenches*, 42 CRIME & JUST. 19, 33–34 (2013) (“Because guns provide the power to kill quickly, at a distance, and without much skill or strength, they also provide the power to intimidate other people and gain control of a violent situation without an actual attack.”); Meltzer, *supra* note 17, at 1520 (explaining how open carry likely intimidates people around the carrier).

work-related or representation-related context, the most urgent need for a rule is in the situation of adversarial meetings, such as depositions and negotiations.

Openly carrying a firearm to a meeting with an opposing party or counsel presents a host of ethical concerns, in either a litigation or transactional context. The first is the obvious intimidation effect, especially when those on the other side are unarmed, as they normally would be.<sup>27</sup> Open carry “intimidates those around the carrier and makes the carrier appear unreasonable to many.”<sup>28</sup> Many of us find an openly-displayed gun at least somewhat frightening or threatening, especially in contexts where it is a surprise.<sup>29</sup> It is less jarring to see a police officer or security guard wearing a holstered sidearm than a briefcase-toting attorney, both due to familiarity and due to widely-shared assumptions about training, duties, and accountability of peace officers. How should the other parties interpret the presence of the gun? That the lawyer is anticipating trouble or violence? Or that the lawyer has pre-committed to killing someone if it seems necessary and justified? Or merely that the lawyer wants to convey a don’t-mess-with-me image or public persona? “Gun advocates value their weapons on precisely this account: the gun on my hip says ‘don’t mess with me.’ But it also tells the other party that this person is not of a mind to negotiate.”<sup>30</sup> As Eugene Volokh observed:

To be sure, any discussion of open carry rights has a certain air of unreality. In many places, carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police. Most people are aware that many neighbors own guns, and even that many people are licensed to carry concealed guns and many others carry them illegally, but this abstract knowledge doesn’t cause much worry. But when a gun is visible, it occupies people’s attention in a way that statistical realities do not.<sup>31</sup>

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27. See Aaron Bartula & Kendra Bowen, *University and College Officials’ Perceptions of Open Carry on College Campus*, JUST. POL’Y J., Fall 2015, at 3 (stating the number of households with guns had decreased over the decades).

28. Meltzer, *supra* note 17, at 1520.

29. See Lacey N. Wallace, *Implied Threat or Part of the Scenery: Americans’ Perceptions of Open Carry*, 22 J. RISK RES. 817, 827 (2019) (determining people felt more comfortable around those who open carry on a normal day, so long as the carrier was not a stranger).

30. FIRMIN DEBRABANDER, DO GUNS MAKE US FREE?: DEMOCRACY AND THE ARMED SOCIETY 154 (2015).

31. Volokh, *supra* note 25, at 1521.



The second problem is the escalation effect, which can take two forms. Displaying a lethal weapon at an entirely conversational meeting inevitably alters the tone or mood of the meeting, even if the others do not necessarily feel threatened.<sup>32</sup> A gun carrier may misperceive a threat and shoot unnecessarily,<sup>33</sup> or may misperceive the danger or lethality in firing at an opponent.<sup>34</sup> People get it wrong very frequently, with tragic consequences.<sup>35</sup> Openly carrying a firearm to a deposition or settlement negotiation unnecessarily raises the tension in a conversation that is already inherently adversarial and often involves disagreements and arguments. Nonlawyers present at such events often find the proceedings stressful, even without bringing guns into the equation. A gun can easily have a chilling effect on conversations, arguments, and free expression.<sup>36</sup> Open carry is disproportionately a white male phenomenon (by a wide margin), and visibly carrying a firearm exacerbates the thorny issues with power dynamics that already overshadow such meetings, especially the power dynamics involving

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32. See DEBRABANDER, *supra* note 30, at 154 (describing the way firearms escalate violence in interpersonal disputes and send a menacing, non-negotiable message to others).

33. See Mack v. State, 428 P.3d 326, 327–28 (Okla. Crim. App. 2018) (stating a defendant shot and killed a man because he mistakenly thought the victim was armed); Braughton v. State, 569 S.W.3d 592, 595, 603, 617 (Tex. Crim. App. 2019) (stating the defendant shot an unarmed attacker who was arguing with and hitting his father in front of their house); see also People v. Bennett, 96 N.E.3d 74, 83 (Ill. App. Ct. 2017) (stating the defendant no longer faced danger of imminent harm when he shot and killed victim, negating defendant’s self-defense claim); People v. Williams, 87 N.E.3d 353, 360 (Ill. App. Ct. 2017) (indicating the defendant’s mistaken belief of being in danger negated self-defense claim).

34. See State v. Fitts, 803 S.E.2d 654, 658 (N.C. Ct. App. 2017) (recognizing defendant did not intend to kill the victim).

35. See Savage v. State, 166 A.3d 183, 185 (Md. 2017) (describing how the defendant accidentally shot and killed the victim when he was firing at someone else).

36. See Darrell A.H. Miller, *Guns As Smt: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1309–10 (2009) (observing that a publicly-visible firearm “has the effect of chilling or distorting the essential channels of a democracy—public deliberation and interchange”); Luke Morgan, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175, 215 (2018) (arguing that openly-worn firearms chill free speech and debate); John Feinblatt, *Ban the Open Carry of Firearms*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/opinion/open-carry-charlottesville.html> [https://perma.cc/SNW9-538F] (focusing on how allowing open carry at public protests likely leads to terror for bystanders); David Frum, *The Chilling Effects of Openly Displayed Firearms*, ATLANTIC (Aug. 16, 2017), <https://www.theatlantic.com/politics/archive/2017/08/open-carry-laws-mean-charlottesville-could-have-been-graver/537087/> [https://perma.cc/ZK6C-QSG6] (pointing out that while black men have been killed for legally carrying guns, white men in Charlottesville were successfully able to “play[] vigilante” and “sen[d] a chilling message of warning to lawful protesters”).

race,<sup>37</sup> gender,<sup>38</sup> physical or mental impairments, immigration status, and poverty. To the extent that the lawyer already occupies a position of power or dominance in many such meetings, wearing a gun merely reinforces the unhealthy or unfair power dynamics.<sup>39</sup> Disadvantaged persons are often aware they face unequal outcomes in our legal system, and when the visible firearm makes them think through scenarios where the lawyer might draw or use it while they are present, the legal aftermath must appear daunting. Of course, the ultimate escalation concern is that someone will lose his or her temper when an adversarial discussion turns acrimonious, and the person will draw or even fire the weapon in a fit of rage. This could be the lawyer, for lawyers are not immune from becoming enraged,<sup>40</sup> or someone else present, such as a client or witness, who grabs the easily accessible gun from the lawyer's holster and uses it. Such scenarios would be rare but not unthinkable.<sup>41</sup> "Brandishing a weapon in the heat of an argument elevates the dispute to another level. It is a definitive, and ominous warning that peaceful negotiation and persuasion may be beyond reach."<sup>42</sup>

A subtler form of escalation is the multiplication of guns brought to such meetings. When the author has presented the topic of lawyers openly carrying firearms to depositions as a discussion question in Professional Responsibility courses, one common response from libertarian students is that anyone who feels intimidated "should just bring their own gun." One hopes that most lawyers would not respond this way, but some would, and some clients would too. If anyone else is carrying a firearm, they feel the need to carry a firearm as well (for self-defense, or to level the field), and

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37. See Wallace, *supra* note 29, at 825 (finding people of color felt less safe around people carrying guns than white people).

38. See, e.g., Jennifer Carlson, *Mourning Mayberry: Guns, Masculinity, and Socioeconomic Decline*, 29 GENDER & SOC'Y 386, 389 (2015) ("As a form of hegemonic masculinity, masculine protectionism shapes contemporary American gun politics.").

39. See DEBRABANDER, *supra* note 30, at 186 ("This is the real selling point of guns: they give an individual an *advantage* over others."); see also *McDonald v. City of Chicago*, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting) ("Your interest in keeping and bearing a certain firearm may diminish *my* interest in being and feeling safe from armed violence.").

40. See Iowa Supreme Court Att'y Disciplinary Bd. v. Blessum, 861 N.W.2d 575, 578 (Iowa 2015) (regarding a lawyer who assaulted his client); *In re* Disciplinary Proceeding Against Perez-Pena, 168 P.3d 408, 410–11 (Wash. 2007) (en banc) (discussing a lawyer who assaulted a client during an argument); Lawyer Disciplinary Bd. v. Robinson, 736 S.E.2d 18, 21 (W. Va. 2012) (regarding a lawyer who beat his client with a baseball bat).

41. See, e.g., Rowell v. Wimberly, 312 So. 2d 369, 370 (La. Ct. App. 1975) (describing how an attorney shot his client's father-in-law in the knee at a confrontational meeting at the client's residence).

42. DEBRABANDER, *supra* note 30, at 154.

maybe even a more intimidating firearm (larger, more powerful, or with a larger-capacity magazine), more firearms, or a more visible firearm.<sup>43</sup> As the number of guns present at such adversarial meetings multiplies, the potential for problems increases exponentially. Even apart from the problem of the other side reciprocating, retaliating, or ratcheting up, open carry escalates gun problems by normalizing the ubiquity of firearms in previously nonviolent situations.<sup>44</sup>

A response from state ethics committees or the ABA could take one of three forms, with different levels of seriousness. At the least, a formal ethics opinion could expressly declare that openly carrying firearms to adversarial meetings with other parties—such as depositions and settlement negotiations—is improper conduct for an attorney and violates existing rules such as ABA Model Rule 8.4. This is what the Nevada disciplinary authority and court held.<sup>45</sup> A more serious approach to this issue would be to add a section (a few sentences) to the ABA's official Comment to Model Rule 8.4, stating that the Rule applies to openly carrying firearms. Ideally, the strongest response would be the adoption of a Rule provision by the ABA addressing the issue, but this takes the most time and is the most difficult to achieve.

Of course, lawyers also may not act in violation of the rules of professionalism through the conduct of another, including their clients, employees, contractors, and interns. Several provisions of the Model Rules expressly prohibit vicarious or directed violations, including Rule 8.4. Thus, there is a secondary and unavoidable issue here regarding clients and other agents or employees of the attorney, including support staff, investigators, and witnesses, who openly carry firearms to adversarial law-related meetings. This Essay, therefore, argues that lawyers have an ethical duty to discourage, if not prevent, persons they bring to a deposition or negotiation from openly wearing sidearms or rifles. At the least, it should be improper

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43. *Id.* at 186.

44. *See id.* (explaining the presumption of people who wield guns against others is that their opponent is either not armed or not as well armed as they are). This is the mirror-image of the de-escalation effect described by other commentators when discussing gun regulations. *See* Alfred Blumstein, *Violence Certainly Is the Problem—And Especially with Hand Guns*, 69 U. COLO. L. REV. 945, 966 (1998) (“To the extent that the general level of carrying guns was diminished, that reduced the incentive for others to carry guns, and so a reverse of the escalation process could have been set in motion.”).

45. *In re* Discipline of Pengilly, No. 74316, 2018 WL 4297851, at \*1 (Nev. Sept. 7, 2018) (finding an attorney violated the state equivalent of ABA Model Rule 8.4 when he brandished his gun in front of opposing counsel and opposing counsel's client).

for an attorney to encourage or direct a client, employee, or other agent to bring weapons to such a meeting.

An ethical rule prohibiting lawyers from openly carrying firearms to adversarial meetings does not significantly infringe on the lawyer's Second Amendment rights. Lawyers would still be able to own firearms for self-defense, the core concern in *District of Columbia v. Heller*,<sup>46</sup> they could still openly carry firearms outside of these situations related to legal representation,<sup>47</sup> and they would even still be free to have concealed firearms at these encounters because a concealed weapon would not pose the same risks of intimidation and escalation.<sup>48</sup> Most ethical rules governing lawyer conduct place moderate limitations on lawyer speech, association, or right to contract, and courts have upheld many disciplinary rules and licensing requirements in the face of constitutional challenges. A rule against lawyers openly carrying firearms to certain types of meetings does not infringe on Second Amendment rights any more than duties of confidentiality or disclosure infringe on free expression rights.

The discussion below proceeds in three parts. Following this introduction, Part I sets forth the argument that openly carrying a firearm, at least to adversarial law-related meetings, violates existing provisions of the Model Rules of Professional Conduct. Moreover, Part I argues that given the growing popularity of open carry and its symbolic allure for the carriers, an express prohibition for lawyers is necessary, whether in the form of ethics opinions, an amendment to the Model Rules of Professional Conduct Comments, or a new, amended Model Rule provision. Part II attempts to answer, or rebut, the Second Amendment objections that may arise against such a rule, fleshing out the points made in the foregoing paragraph. Following the constitutional discussion, Part III connects the proposed rule to other statutes that prohibit or punish, the carrying of firearms in some other context, such as drug trafficking. Making the point is that our legal system has long-established rules, and well-developed policy rationales, for discouraging the open display of weapons in certain contexts. A brief conclusion will summarize the main arguments and suggest some further areas for ethical inquiry regarding lawyers' use or carrying of firearms.

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46. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

47. *See id.* at 605–06 (discussing the legal analysis of the Second Amendment protecting individual rights to bear arms “as necessary for self-defense”).

48. *See* Volokh, *supra* note 25, at 1521–23 (discussing people's ability to defend themselves through concealed carry and how concealed carry is more respectful to others).

I. OPENLY CARRYING A FIREARM VIOLATES EXISTING RULES  
OF LEGAL ETHICS

A. “Open Carry” and the Model Rules of Professional Conduct

The Model Rules of Professional Conduct (MRPC) is a set of non-binding rules adopted by the ABA in 1983, which the ABA has amended several times since.<sup>49</sup> Though each state enacts its own ethics laws, forty-nine states have adopted the MRPC in whole or in part.<sup>50</sup> The MRPC requirements and principles provide a baseline standard for ethical conduct for lawyers. One fundamental consideration underlying the rules in the MRPC is the proposition that “legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”<sup>51</sup> To that end, attorneys have a duty to uphold the legal process and “to avoid conduct that undermines the integrity of the adjudicative process.”<sup>52</sup> Attorneys are also obliged to maintain “a professional, courteous and civil attitude toward all persons involved in the legal system.”<sup>53</sup> These duties, as well as several specific rules, prohibit attorneys from engaging in activity that can be interpreted as coercive, harassing, or otherwise unprofessional.

The existing provisions of the ABA’s Model Rules prohibit intimidation tactics, threats of violence, and other overbearing behavior by attorneys.<sup>54</sup> The easiest to apply is Model Rule 8.4(d),<sup>55</sup> which prohibits conduct prejudicial to the administration of justice. This is a provision disciplinary

49. *Model Rules of Professional Conduct: About the Model Rules*, AM. BAR ASS’N, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/) [https://perma.cc/7UBE-GUTR].

50. Han Ding, *Bargaining in the Shadow of Cameras: Videotaping Negotiations to Enforce Model Rules of Professional Conduct*, 32 OHIO ST. J. ON DISP. RESOL. 325, 326 (2017); see Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 101 n.24 (2011) (noting every state except California bases its lawyer ethical-disciplinary code on the Model Rules).

51. MODEL RULES OF PROF’L CONDUCT ¶ pmb1. 6 (AM. BAR ASS’N 2020).

52. *Id.* r. 3.3 cmt. 2.

53. *Id.* ¶ pmb1. 9.

54. For an excellent discussion, see Allen K. Harris, *Increasing Ethics, Professionalism and Civility: Key to Preserving the American Common Law and Adversarial Systems*, 2005 PROF. LAW. 91, 97 (2005) (noting how many younger lawyers are “subjected to the stress of sexist, racist, ethnic and other insulting tactics by opportunistic, unprincipled and overly aggressive lawyers who seek to gain an edge by the use of intimidation tactics”).

55. MODEL RULE OF PROF’L CONDUCT r. 8.4(d) (classifying “engag[ing] in conduct that is prejudicial to the administration of justice” as an ethics violation).

boards often apply to abusive behavior toward others.<sup>56</sup> Rule 8.4(d) also covers coercive, abusive, or inappropriate behavior toward opposing parties, opposing counsel, and witnesses.<sup>57</sup> Threatening, intimidating, or otherwise abusive behavior toward clients also violates Rule 8.4(d).<sup>58</sup> Rule 8.4(d), therefore, is the provision that most easily applies to lawyers who display firearms while representing clients in adversarial settings as a show of dominance, or to show that they are indomitable (a difference that may matter in the mind of the gun carrier, but not in the minds of observers).

Other sections of Rule 8.4 can come into play, depending on whether a lawyer in an adversarial setting merely wears the gun visibly, verbally

56. See *Chief Disciplinary Counsel v. Rozbicki*, 167 A.3d 351, 361 (Conn. 2017) (finding a Rule 8.4(d) violation where a lawyer repeated unfounded attacks on the integrity of certain judges in court filings and oral arguments); *Fla. Bar v. Ratiner*, 238 So. 3d 117, 122 (Fla. 2018) (finding a Rule 8.4(d) violation where a lawyer kicked opposing counsel's table and disrupted proceedings); *In re Clothier*, 344 P.3d 370, 375–76 (Kan. 2015) (per curiam) (finding a Rule 8.4(d) violation where a lawyer accused opposing counsel of dishonesty, spoke threateningly to other attorneys, and engaged in threatening conduct in the presence of the judge's administrative assistant); *In re Small*, 294 P.3d 1165, 1180 (Kan. 2013) (per curiam) (finding a Rule 8.4(d) violation where a lawyer threatened and intimidated opposing counsel, a judge, a former client, and people from the disciplinary tribunal); *In re DeJean*, 264 So. 3d 424, 425–29 (La. 2019) (per curiam) (finding a violation of Rules 8.4(b) and (d) where a lawyer exchanged words with the district attorney, physically confronted him and “chest bumped” him); *Att’y Grievance Comm’n v. Mixer*, 109 A.3d 1, 67–68 (Md. 2015) (stating that, among other ethical violations, a Rule 8.4(d) violation occurred where a lawyer acted abusively toward colleagues, and, unrelated to case proceedings, tried to use individuals' private medical records “purely to harass members of the public”); *In re Disciplinary Action Against Torgerson*, 870 N.W.2d 602, 607 (Minn. 2015) (per curiam) (finding a Rule 8.4(d) violation where a lawyer shouted at court staff); *N.C. State Bar v. Foster*, 808 S.E.2d 920, 924–25 (N.C. Ct. App. 2017) (finding a Rule 8.4(d) violation where an attorney addressed a magistrate judge with vulgarities and insults).

57. See *In re Fletcher*, 424 F.3d 783, 788, 790–91 (8th Cir. 2005) (finding a lawyer violated Rule 8.4(d) by trying “to harass, humiliate and intimidate deponents and their counsel” by, among other things, grossly mischaracterizing deponents' statements and taking statements out of context); *Fla. Bar v. Adams*, 198 So. 3d 593, 619–20 (Fla. 2016) (per curiam) (finding a Rule 8.4(d) violation by lawyers who surreptitiously orchestrated a DUI arrest of opposing counsel); *In re Moore*, 665 N.E.2d 40, 41–42 (Ind. 1996) (per curiam) (finding conduct was prejudicial to the administration of justice when a lawyer “struck opposing counsel”); *In re Greenburg*, 9 So. 3d 802, 806–07 (La. 2009) (per curiam) (finding a Rule 8.4(d) violation where lawyers hurled obscenities at each other in open court); *In re Eisenstein*, 485 S.W.3d 759, 761–63 (Mo. 2016) (en banc) (finding a Rule 8.4(d) violation when a lawyer sent opposing counsel an email saying, “Be careful what you say. I’m not someone you really want to make a lifelong enemy of, even though you are off to a pretty good start.”).

58. See *In re Freeman*, 835 N.E.2d 494, 498 (Ind. 2005) (determining Rule 8.4(d) was violated when a lawyer replied to a disgruntled former client's demand for a refund by threatening to “make trouble” for the former client); *Att’y Grievance Comm’n of Md. v. Basinger*, 109 A.3d 1165, 1170 (Md. 2015) (holding a violation of Rule 8.4(d) where a lawyer sent a client vulgar, insulting letters); *State ex rel. Okla. Bar Ass’n v. Moody*, 394 P.3d 223, 225–27 (Okla. 2017) (finding a Rule 8.4(d) violation where a lawyer left threatening voicemails for a client who refused to pay legal fees).

threatens to use it, or draws the weapon to brandish it. For example, Rule 8.4(b) subjects a lawyer to discipline for committing “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects,”<sup>59</sup> and the related Comment leads the list of examples with “[o]ffenses involving violence.”<sup>60</sup> A number of lawyer disbarment and suspension cases involve firearm convictions, and the courts or attorney disciplinary authorities consistently highlight the firearm component of the illegal act that led to the criminal conviction.<sup>61</sup> Of course, convictions for most firearm-related crimes already come well within the ambit of Rule 8.4(b), so no amendment to the rules or clarification in the comment or ethics opinions would be necessary to cover

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59. MODEL RULES OF PROF'L CONDUCT r. 8.4(b) (AM. BAR ASS'N 2020).

60. *Id.* r. 8.4(b) cmt. 2.

61. *See* *People v. Hook*, 91 P.3d 1070, 1073–75 (Colo. 2004) (issuing a three-year suspension under both Rule 8.4(b) and (d) for a lawyer who pled guilty to misdemeanors after he fired shots into a bar where the bartender refused him service due to his intoxication); *In re Runyon*, 491 N.E.2d 189, 190 (Ind. 1986) (disbarring a lawyer after he was convicted of possessing unregistered machine guns and silencers, forcing his way into his ex-wife’s apartment, beating her with a club, and holding her at gunpoint); *In re Stephens*, 955 So. 2d 140, 143, 145 (La. 2007) (disbarring a lawyer after a jury convicted him of robbing three banks at gunpoint); *In re Martin*, 888 So. 2d 178, 181–82 (La. 2004) (taking disciplinary action under Rule 8.4(b) after a lawyer’s felony conviction for having a stand-off with and discharging a pistol at police); *In re Disciplinary Action Against Light*, 765 N.W.2d 536, 539 (N.D. 2009) (disbarring a lawyer after he was convicted of pointing a handgun, while intoxicated, at a police officer during a traffic stop); *In re Lewis*, 554 N.Y.S.2d 68, 69 (N.Y. App. Div. 1990) (handing down a two-year suspension to a lawyer who pled guilty to firing a gun into another person’s apartment); *Disciplinary Counsel v. Howard*, 914 N.E.2d 377, 381 (Ohio 2009) (issuing a two-year suspension for a lawyer convicted of discharging a firearm toward a police officer); *Disciplinary Counsel v. LoDico*, 888 N.E.2d 1097, 1099 (Ohio 2008) (rendering an indefinite suspension after a lawyer was convicted of pointing a firearm at several bar patrons); *State ex rel. Okla. Bar Ass’n v. Hastings*, 395 P.3d 552, 553 (Okla. 2017) (finding a Rule 8.4(b) violation where a lawyer “pointed a gun at his ex-wife and threatened her life”); *State ex rel. Okla. Bar Ass’n v. Conrady*, 275 P.3d 133, 135 (Okla. 2012) (stating a lawyer broke into his ex-girlfriend’s home and shot rounds throughout the dwelling and then fired rounds into her parked vehicle); *State ex rel. Okla. Bar Ass’n v. Badger*, 912 P.2d 312, 314–15 (Okla. 1995) (issuing a six-month suspension under Rule 8.4 for a lawyer’s illegal purchase and possession of machine guns); *In re McMaster*, 795 S.E.2d 853, 855 (S.C. 2017) (issuing a three-year suspension under Rule 8.4(b) for a lawyer who pled guilty to unlawfully carrying a pistol while intoxicated); *In re Cooper*, 725 S.E.2d 491, 493 (S.C. 2012) (providing lawyer faced charges that included pointing gun at his son’s girlfriend during argument); *In re Ervin*, 694 S.E.2d 6, 9 (S.C. 2010) (suspending a lawyer after pleading guilty to pointing a firearm at another car during road rage incident); *In re Patrick*, 702 S.E.2d 566, 567 (S.C. 2010) (disbarring a lawyer convicted of assault with a weapon); *Lawyer Disciplinary Bd. v. Santa Barbara*, 749 S.E.2d 633, 641 (W. Va. 2013) (rendering a three-month suspension under Rules 8.4(b) and (d) for a lawyer who brandished a handgun while confronting a group of people); *In re Disciplinary Proceedings Against Schuh*, 730 N.W.2d 152, 154 (Wis. 2007) (finding a Rule 8.4(b) violation for a lawyer convicted of knowingly possessing a firearm in furtherance of a drug trafficking crime).

most of these cases. Even so, some cases indicate uncertainty at the margins, which warrant clarification in this area from the ABA and state ethics panels. The cases, taken together, suggest that armed lawyers at times exercise the same type of poor judgment with firearms that nonlawyers do. On the one hand, some states have disciplined lawyers for illegal firearm activities that ultimately did not lead to criminal charges or convictions, as in the case of *Iowa Supreme Court Att'y Disciplinary Bd. v. Barry*,<sup>62</sup> in which a county attorney used forfeited and seized guns and ammunition from the sheriffs' evidence lockup for shooting practice (state law required such firearms go to the attorney general for disposition or destruction), in addition to some financial misconduct.<sup>63</sup> Similarly, in *People v. Senn*,<sup>64</sup> a lawyer discharged a pistol over his wife's head to frighten her and threatened to kill her during a drunken argument; criminal charges were eventually dropped, but the judiciary nonetheless imposed a public censure (reprimand).<sup>65</sup> On the other hand, some courts have refused to find a violation of Rule 8.4(b), even where there *was* a felony conviction for a firearm offense if the crime did not seem to reflect on the lawyer's truthfulness or integrity; however, the decisions are inconsistent. For example, in *Iowa Supreme Court Att'y Disciplinary Bd. v. Keele*,<sup>66</sup> the lawyer received a plea-bargained deferred judgment in a first-time drug offense, but a felony conviction for possessing a firearm while being an unlawful user of or addicted to controlled substances, a violation of federal law.<sup>67</sup> Attorney Keele legally agreed to take and store a firearm for the benefit of his client and stored it unloaded in an empty closet before his struggles with addiction began.<sup>68</sup> The state disciplinary authority imposed a public reprimand on Keele for his drug arrest.<sup>69</sup> On the federal felony charge of being a drug user in possession of a firearm, however, a jury convicted Keele, and the judge—after an unsuccessful appeal to the Eighth Circuit—sentenced him to three years' probation.<sup>70</sup> The state disciplinary authority then sought to impose a nine-month suspension of Keele's law license for violating

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62. *Iowa Supreme Court Att'y Disciplinary Bd. v. Barry*, 762 N.W.2d 129 (Iowa 2009).

63. *See id.* at 138 (holding attorney acted adversely to the practice of law by improperly using firearms forfeited to the state).

64. *People v. Senn*, 824 P.2d 822 (Colo. 1992) (en banc).

65. *Id.* at 823.

66. *Iowa Supreme Court Att'y Disciplinary Bd. v. Keele*, 795 N.W.2d 507 (Iowa 2011).

67. *Id.* at 510.

68. *Id.*

69. *Id.*

70. *Id.* at 510–11.



Rules 8.4(b) and (d), but the Iowa Supreme Court rejected this recommendation and dismissed the grievance, finding that his conduct (lapsing into drug abuse while he happened to be storing a client's firearm in a locked closet) did not adversely reflect on his fitness to practice law.<sup>71</sup> Of course, the facts in Keele's case are unusual.

More typical are the circumstances in *In re Funk*,<sup>72</sup> which resulted in disbarment. Funk pled guilty to charges of possession of marijuana and felony possession of firearms by an unlawful drug user.<sup>73</sup> Funk did not respond to the state disciplinary board's inquiries or appear in the proceedings, and the board recommended disbarment, which the Delaware Supreme Court accepted and ordered.<sup>74</sup>

Model Rule 8.4(e) prohibits a lawyer from implying "an ability . . . to achieve results by means that violate the Rules of Professional Conduct or other law."<sup>75</sup> To the extent that the lawyer's visible firearm, or the lawyer's verbal references to it, imply or hint that the lawyer is willing to use violence, even as a last resort, but at the boundary of legality, this provision would seemingly apply.

The newest provision in Rule 8.4 is subsection (g), amended in 2016 with content that was previously in the Rule Comment, forbids harassment and discrimination by lawyers.<sup>76</sup> Comment 4 applies this provision not only to the lawyer's clients, but to interactions with "witnesses, coworkers, court personnel, and others while engaged in the practice of law[.]"<sup>77</sup> Given the history of interracial firearm violence in our country, and the shocking prevalence of gun violence in domestic violence cases, this Rule could apply to a lawyer openly carrying a gun to an adversarial encounter with a person

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71. *Id.* at 511, 515.

72. *In re Funk*, 742 A.2d 851 (Del. 1999).

73. *Id.* at 853.

74. *Id.* at 854–55.

75. MODEL RULES OF PROF'L CONDUCT r. 8.4(e) (AM. BAR ASS'N 2020); see *In re Johnson*, 74 N.E.3d 550, 553–54 (Ind. 2017) (finding a violation of Rule 8.4(e) where a public defender suggested to his ex-girlfriend that he could influence her probation officer and judge in the criminal case against her); *In re Dickson*, 968 So. 2d 136, 139–42 (La. 2007) (finding a violation of Rule 8.4(e) when a lawyer asked a client for money to pay off the judge and district attorney); *In re Disciplinary Action Against Andrade*, 736 N.W.2d 603, 604–05 (Minn. 2007) (holding as a violation of Rule 8.4(e) where a lawyer told his client he needed money to bribe police officials); *State ex rel. Okla. Bar Ass'n v. Moon*, 295 P.3d 1, 9 (Okla. 2012) (holding a violation of Rule 8.4(e) where lawyer arrested for a DWI "invoked the names of respected members of the legal community in an attempt to avoid prosecution and gain favorable treatment").

76. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020).

77. *Id.* r. 8.4 cmt. 4.

of color, depending on the context, and should apply if the lawyer brings a gun to a meeting with a woman known by the lawyer to be the victim of traumatic firearm threats or shootings in a domestic violence situation.

In addition, Model Rule 3.5(d) prohibits lawyers from engaging in “conduct intended to disrupt a tribunal,”<sup>78</sup> and Comment 5 says that this provision applies to depositions.<sup>79</sup> To the extent that the presence of the gun is foreseeably disruptive, that is, likely to distract and upset other parties, creates a chilling effect on the deposition, or prompts others to leave the meeting, Rule 3.5(d) should be applicable. “Guns by their very nature cut off communication, or indicate that its end is near.”<sup>80</sup> Permitting even the appearance of such impropriety would be contrary to one of the core purposes of the MRPC: maintaining the public’s confidence in the rule of law and the justice system. Comment 4 to Rule 3.5 states, “[r]efraining from abusive or obstreperous conduct is a corollary of the advocate’s right to speak on behalf of litigants.”<sup>81</sup>

Another relevant provision could be Model Rule 4.4, which prohibits lawyers from using “means that have no substantial purpose other than to . . . burden a third person, or use methods of obtaining evidence that violate the rights of such a person.”<sup>82</sup> If a lawyer openly carries a firearm to depositions or settlement meetings as a way of signaling dominance or intimidating others into acquiescence, such as agreeing to demands or divulging material information, the lawyer is burdening the person and arguably infringing on legal rights. Rule 4.4 applies not only to opposing parties and their counsel, but to other third parties—such as witnesses, investigators, and rival businesses of the client.<sup>83</sup>

Similarly, other Model Rules requiring lawyers to respect the rights of third parties, such as Rules 3.4(f) (pertaining to potential witnesses)<sup>84</sup> and Rule 4.3 (dealing with unrepresented persons),<sup>85</sup> could be relevant if the lawyer’s firearm functions as an intimidation tactic against witnesses, potential parties, and so on. Rule 3.4(f) prohibits lawyers from requesting a

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78. *Id.* r. 3.5(d).

79. *Id.* r. 3.5 cmt. 5.

80. DEBRABANDER, *supra* note 30, at 178.

81. MODEL RULES OF PROF’L CONDUCT r. 3.5 cmt. 4 (AM. BAR ASS’N 2020).

82. *Id.* r. 4.4.

83. *Id.*

84. *See id.* r. 3.4(f) (stating a lawyer shall not request a witness to withhold information).

85. *See id.* r. 4.3 (listing conduct an attorney shall refrain from engaging in towards unrepresented persons).

person other than their client to refrain from voluntarily giving relevant information to another party, with a few narrow exceptions. The rule's primary purpose is the protection of the third party's interests. The intimidating nature of a visible weapon changes the balance of power and the implication of the request. When an armed attorney asks an individual to "keep quiet," the request smacks of improper influence. Rule 4.3 is, on its face, less applicable—the wording focuses only on the potential for unrepresented opposing parties to misunderstand the lawyer's loyalties.<sup>86</sup> Even so, the values that undergird Rule 4.3—"the possibility that the lawyer will compromise the unrepresented person's interests"<sup>87</sup>—would warrant special concerns about lawyers wearing firearms to intimidate unrepresented opposing parties. If the individual had their lawyer present, their lawyer might raise an objection to the presence of a visible firearm. In contrast, an unrepresented individual is more likely to acquiesce to the compromising of her rights.

More attenuated, but not completely unthinkable, is the problem of lawyers interacting with potential clients, Model Rules 7.3<sup>88</sup> and 1.18,<sup>89</sup> where the lawyer's openly carried firearm could affect a client who is trying to negotiate over the lawyer's fees, consent to a conflict of interest, litigation financing, the scope of the representation, or the allocation of authority between the lawyer and the client in the contemplated representation. Rule 7.3 prohibits attorneys from using coercion or harassment to solicit employment.<sup>90</sup> The comments to the Rule state that live, person-to-person solicitation is not appropriate when the targeted individual "may be especially vulnerable to coercion or duress."<sup>91</sup> The presence of a visible firearm during solicitations could be inherently coercive. Any person is particularly vulnerable to coercion or duress when faced with an openly armed individual, even if the armed party is a lawyer.

The Nevada lawyer who brought a gun to the deposition in the story above was James Pengilly, and the Southern Nevada Disciplinary Board suspended his license to practice for six months and a day, which the

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86. *See id.* ("When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.").

87. *Id.* r. 4.3 cmt. 2.

88. *See id.* r. 7.3 (listing rules for solicitation of clients).

89. *See id.* r. 1.18 (listing duties owed to prospective client).

90. *Id.* r. 7.3.

91. *Id.* r. 7.3 cmt. 6.

Nevada Supreme Court affirmed.<sup>92</sup> The specific rule violated was Nevada Rule of Professional Conduct 8.4(d),<sup>93</sup> which is identical to the ABA's Model Rule 8.4(d) (conduct prejudicial to the administration of justice). Pengilly's threatening display of his firearm (even if it remained in the holster), was disruptive to the proceeding because the unfinished deposition ended abruptly, and necessitated a protective order from the discovery commissioner, both of which imposed delays on the case.<sup>94</sup> Despite Pengilly's contention that his sanction was too severe, the Nevada Supreme Court held that suspension was the "baseline sanction" because of the gun: "Further, there was the potential for serious injury to every one present—the deponent, his attorney, the court reporter, Pengilly's office staff, and even Pengilly himself—because a deadly weapon was involved."<sup>95</sup> Throughout the incident, the court reporter continued recording the conversation, and the transcript reveals opposing counsel's fear through statements such as, "Hey, hey, hey, I don't want to get shot," and, "What are you doing now? If you pull the gun, I'm going to call the police."<sup>96</sup>

An even more disturbing incident with a gun occurred at a deposition in Louisiana. As the deposition mired in an argument, one lawyer menacingly suggested to the other that they "step outside," prompting the other, Nicholas Estiverne, to leave and return a few minutes later pointing a handgun at the first lawyer.<sup>97</sup> The state disciplinary authorities concluded that Estiverne had violated Rules 8.4(a), (b), (c), and (d), as well as Rule 4.4 (all of which track the ABA Model Rules verbiage and numbering), and applied a year-and-one-day suspension.<sup>98</sup> In this case, however, the attorney attended the deposition unarmed and only retrieved his weapon after the deposition prematurely ended due to a dispute between himself and opposing counsel.<sup>99</sup>

In 2015, a California appellate court upheld terminating sanctions against a lawyer who brandished pepper spray and a stun gun at a deposition,

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92. *In re* Discipline of Pengilly, No. 74316, 2018 WL 4297851, at \*2 (Nev. Sept. 7, 2018).

93. NEV. RULES OF PROF'L CONDUCT r. 8.4(d) (2019).

94. Pengilly, 2018 WL 4297851, at \*2.

95. *Id.*

96. Debra Cassens Weiss, *Lawyer Denies Brandishing His Gun During a Deposition; Court Reporter Kept Typing in Tense Situation*, A.B.A. J. (Oct. 6, 2016, 11:06 AM), [http://www.abajournal.com/news/article/motion\\_claims\\_lawyer\\_pulled\\_out\\_a\\_gun\\_during\\_deposition\\_court\\_reporter\\_cont](http://www.abajournal.com/news/article/motion_claims_lawyer_pulled_out_a_gun_during_deposition_court_reporter_cont) [https://perma.cc/A8BP-6APF].

97. *In re* Estiverne, 741 So. 2d 649, 650 (La. 1999).

98. *Id.* at 653–54.

99. *Id.*

threatening to use both on opposing counsel, and then discharged the stun gun near opposing counsel's face, narrowly missing him.<sup>100</sup> The state bar eventually disbarred the lawyer.<sup>101</sup>

Even where the proceeding is not acrimonious, participants still perceive the presence of a gun as a threat. One attorney's website recounted an experience where his client, after observing the deponent's concealed gun, cautioned the attorney about it before the attorney "destroy[ed]" the deponent too effectively.<sup>102</sup> Upon realizing the deponent was, in fact, armed, the attorney refused to continue until the deponent removed his gun from the room; the attorney saw no other reason for the gun's presence except as a means of intimidation.<sup>103</sup> The deponent removed his gun only after justifications and threats failed. Another attorney's article recounted an incident where his client refused to continue a deposition upon viewing opposing counsel's gun because "he was deathly afraid of guns."<sup>104</sup>

How people perceive guns in the context of interactions with attorneys may depend in part on how they perceive the circumstances that necessitate an attorney's presence.<sup>105</sup> For example, socioeconomic groups have different perceptions of the criminal justice institution and their interactions with it; many members of disadvantaged groups already view the system as unfair or unreliable. The latest Gallup Poll on institutional confidence indicates that the citizenry overall has little confidence in the criminal justice system, with 34% having "very little" confidence in the system and only 10% having a "great deal" of confidence.<sup>106</sup> The moderate responses between these extremes substantially favored the negative end of the confidence spectrum.<sup>107</sup> Oddly, polls suggest that Americans feel more

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100. Crawford v. JPMorgan Chase Bank, N.A., 195 Cal. Rptr. 3d 868, 870 (Cal. Ct. App. 2015).

101. Crawford v. JPMorgan Chase Bank, N.A., ETHICS QUART., Jan. 2016, at 5–6.

102. William C. Sussman, *Gun at Mediation*, MEDIATOR MAN (Sept. 27, 2015), <https://www.mediatorman.com/gun-at-mediation/> [<https://perma.cc/2D5P-R4EY>].

103. *Id.*

104. Michael A. Geibelson, *Congratulations on Passing the Bar Exam*, L.A. LAW., Fall 2006, at 1.

105. See Daniel Horwitz, *Open-Carry: Open-Conversation or Open-Threat?*, 15 FIRST AMEND. L. REV. 96, 117 (2016) ("Guns cannot convey speech without an action by an individual, but any time an individual openly displays a gun, intentional or not, the message is clear: that individual now has the power to kill.")

106. *Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/W6NZ-Q73Z>].

107. See *id.* (showing 40% of Americans have "some" confidence in the criminal justice system as compared to a meager 14% that have "quite a lot" of confidence).

confidence in policing institutions than in the criminal justice system.<sup>108</sup>

Furthermore, a majority of Americans feel the criminal justice system manifests unfairness; for example, 87% of black adults believe that black individuals are treated less fairly by the criminal justice system than white individuals, and 61% of white adults concur.<sup>109</sup> Adversarial proceedings suffer from a perception of unfairness that undermines the social and political legitimacy of our legal institutions.<sup>110</sup> Even individual perceptions of criminality contain implicit biases that can work insidiously in the background of legal presumptions of guilt or innocence.<sup>111</sup> All of these perceptions bear on how individuals view and interact with the system, and how the people who comprise the system view and interact with those who are subject to the system.<sup>112</sup>

Against this background, individual interactions with the criminal justice system or its subjects never begin with a clean slate. Even apart from a general lack of confidence, an individual may expect unfair treatment or enter the justice process with feelings of victimization and/or vulnerability.<sup>113</sup> Individuals may perceive prosecutors as the institution,

108. *See id.* (reflecting 24% to 31% of Americans in each of the high, moderately high, and moderate confidence responses but 16% of Americans have “very little” confidence in the police).

109. Juliana Menasce Horowitz et al., *Race in America 2019*, PEW RES. CTR. (Apr. 9, 2019), <https://www.pewsocialtrends.org/2019/04/09/race-in-america-2019/#majorities-of-black-and-white-adults-say-blacks-are-treated-less-fairly-than-whites-in-dealing-with-police-and-by-the-criminal-justice-system> [<https://perma.cc/QDG5-BQM7>].

110. Katherine J. Rosich, *Race, Ethnicity, and the Criminal Justice System*, AM. SOCIOLOGICAL ASS'N, Sept. 2007, at 1, 2, <https://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf> [<https://perma.cc/YQ7C-8A8N>].

111. *See, e.g.*, Comm. on Law and Justice, *The Criminal Justice System and Social Exclusion: Race, Ethnicity, and Gender*, NAT'L ACADEMIES SCI., ENGINEERING, MED., at 1, 3 (Sept. 2018), <https://www.nap.edu/read/25247/chapter/1#3> [<https://perma.cc/DF35-DSPB>] (“[W]hite survey respondents overestimate the proportion of crime committed by African Americans by 20 to 30% and suggest harsher punishments when a crime is perceived to be a ‘black crime.’”).

112. *See* Tim Hallett & Marc J. Ventresca, *Inhabited Institutions: Social Interactions and Organizational Forms in Gouldner's Patterns of Industrial Bureaucracy*, 35 *THEORY & SOC'Y* 213, 213–15 (2006) (“[Institutions] are composed of people who act, at times in concert and at times in conflict, within the confines of an immediate working context, and within a larger environment.”).

113. The ABA Model Rules of Professional Conduct already address attorney conduct in the context of client vulnerability, including 1.8(j) prohibiting “sexual relations with a client” absent a preexisting, consensual sexual relationship, and 1.8(a) requiring additional protections in business transactions with clients. Client vulnerability is at the core of these rules. *See* Michael E. McCabe, Jr., *Attorney–Client Sex: A Bad Idea That's Also Unethical*, MCCABE L. (Mar. 6, 2019), <https://www.ipethicslaw.com/attorney-client-sex-a-bad-idea-thats-also-unethical/> [<https://perma.cc/92W5-SEPT>] (“The traditional ethics-based rationales behind the regulation is a realization that sex is not about sex—it is about power. Or more precisely, an imbalance of power.”); *Texas Lawyers Divided Over ‘Sex with Clients’*

with all of its negative perceptions, rather than as individuals.<sup>114</sup> On the other side of the interaction, a party may unwittingly harbor biases that affect perceptions of the defendant and his criminality.<sup>115</sup>

### B. *The Problems with Self-Defense*

Attorney Pengilly, who wore his sidearm to a deposition, claimed that he openly carries a gun for self-defense.<sup>116</sup> Indeed, many attorneys have concerns about their safety. In 2018, the *ABA Journal* reported that 88.7% of attorneys surveyed claimed that they had received threats at some point,<sup>117</sup> and almost 20% had been in the last year.<sup>118</sup> A much smaller percentage—6.4%—had, in fact, been victims of assaults.<sup>119</sup> Unsurprisingly, family law practitioners were more likely to report receiving threats or report that actual assaults had occurred.<sup>120</sup> Threats and assaults occurred most frequently (by far) at the lawyer’s office, with the courthouse being the second-most-likely location.<sup>121</sup> While most lawyers report threats or assaults primarily from their clients, family lawyers report the majority of

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Rule, DALL. MORNING NEWS (Oct. 4, 2010, 1:33 AM), <https://www.dallasnews.com/news/texas/2010/10/04/20101003-Texas-lawyers-divided-over-sex-4374> [<https://perma.cc/DQW9-4H5D>] (explaining lawyers can manipulate vulnerable clients into sexual acts).

114. The ABA already concerns itself with the perceptions of prosecutors and the criminal justice system, as reflected in recent opinions monitoring such issues and reiterating the values contained in the Model Rules. See *ABA Issues New Guidance for Prosecutors Negotiating Misdemeanor Plea Agreements*, A.B.A. (May 9, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/05/aba-issues-new-guidance-for-prosecutors-negotiating-misdemeanor/> [<https://perma.cc/68AS-LCZ5>] (“[E]vidence that . . . methods of negotiating plea bargains have been used in some jurisdictions that are inconsistent with the duties set forth in the Rules of Professional Conduct.”); Dennis Rendleman, “*There Must Be a Pony in There Somewhere*” – *New ABA Formal Ethics Opinion 486*, A.B.A. (June 2019), <https://www.americanbar.org/news/abanews/publications/youraba/2019/june-2019/formal-ethics-opinion-486/> [<https://perma.cc/3RXK-KABT>] (noting concerns about prosecutors in misdemeanor cases, who often have burdensome caseloads, and whose actions can be “detrimental to the accused and the public”).

115. See *Schubert v. City of Springfield*, 589 F.3d 496, 499 (1st Cir. 2009) (discussing how a police officer stopped a prominent attorney who was concealing a weapon despite having a concealed carry permit).

116. See Weiss, *supra* note 1 (quoting Pengilly after the incident).

117. Lorelei Laird, *The Job Is Killing Them: Family Lawyers Experience Threats, Violence*, A.B.A. J. (Sept. 1, 2018, 1:10 AM), [http://www.abajournal.com/magazine/article/the\\_job\\_is\\_killing\\_them\\_family\\_lawyers\\_experience\\_threats\\_violence](http://www.abajournal.com/magazine/article/the_job_is_killing_them_family_lawyers_experience_threats_violence) [<https://perma.cc/Y22K-NTM8>].

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

these verbal affronts and physical attacks to come from opposing parties.<sup>122</sup> Allen Bailey, a solo practitioner in Anchorage, Alaska, and the ABA Section of Family Law's liaison to the Commission on Domestic & Sexual Violence, reports that he "keeps a gun in his desk because of a former client's ex-husband who he suspects stalked him."<sup>123</sup> At the same time, Bailey recommends that other attorneys keep their firearms securely in a desk drawer, "because carrying it could escalate a situation."<sup>124</sup> Bailey acknowledges that actual violence against lawyers is "not a weekly or monthly or annual occurrence."<sup>125</sup> In proposing an ethical rule preventing lawyers from openly carry firearms to adversarial meetings, it is necessary to anticipate, and attempt to answer, the objection that lawyers need guns to defend themselves.<sup>126</sup>

### 1. Overestimating the Usefulness of Carrying a Gun

Lawyers who openly carry firearms to defend themselves may be grossly overestimating not only the likelihood of an assault, but also the likelihood that their gun will save them from harm.<sup>127</sup> Circumstances would have to be just right: an attacker without a gun must be several paces away in order for the defender to have time to draw his weapon and fire preemptively. Additionally, an attacker who fires a gun from behind, or seclusion, can easily subdue someone before the victim can fire a defensive shot. Self-defense requires not only the right weapon and the skill to use it swiftly and accurately, but also plenty of good luck—a clear shot at the right second, or the chance to hold a would-be assailant at gunpoint before injuring the would-be target while summoning law enforcement to the scene. Open carriers may contend that their visible firearm deters would-be assailants so that an actual gunfight never occurs. However, this contention rests on

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122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Admittedly, some who openly carry firearms insist they are doing so for expressive purposes rather than for self-defense. See Bogus, *supra* note 15, at 91 ("An organization named OpenCarry.org is dedicated to trying to make open carry socially acceptable by encouraging gun owners to carry guns openly more often."); Horwitz, *supra* note 105, at 114–15 (suggesting openly carrying a gun at an anti-gun control rally is expressive conduct); Volokh, *supra* note 25, at 1521 ("There is indeed an 'open carry movement' of people who deliberately wear guns openly, as a means of trying to normalize such behavior and of making a statement in favor of gun possession.").

127. See Wolfgang Stroebe et al., *Is It a Dangerous World Out There? The Motivational Bases of American Gun Ownership*, 43 PERSONALITY & SOC. PSYCH. BULL. 1071, 1072 (2017) ("[T]here is no clear case that gun ownership corresponds with objective risk of attack.").



layers of dubious assumptions about how deterrence works subjectively in the minds of those bent on violence. An assailant who can strike from behind or seclusion, who has the advantage of surprise, or who is simply overconfident, is unlikely to restrain a violent impulse merely because the lawyer wears a holstered sidearm. Instead, the chances that a lawyer's visible firearm will escalate a situation from verbal menacing, shoves, or punches into a gunfight must offset the chances that the lawyer's gun will somehow keep the lawyer safe.

Defensive gun use is at the core of the tradeoffs with gun prevalence.<sup>128</sup> Wildly disparate statistics, depending on who is talking, characterize the issue of defensive gun use—that is, how often gun owners, in fact, use their weapons in self-defense.<sup>129</sup> Empirical data that could garner a scholarly consensus has proved elusive up to now, as researchers disagree about how often gun owners use their weapons to stop a crime or defend themselves.<sup>130</sup> Some frequently cited statistics come from older, methodologically flawed surveys of crime victims (representing a narrow selection of crimes), or gun owners themselves, relying on respondents' own opinions about how often their guns have prevented a crime.<sup>131</sup> In 2018, RAND researchers concluded that the true number of defensive gun use incidents per year is simply unknown, as is the comparative effectiveness of guns versus other preventative or defensive measures against crime.<sup>132</sup> Other factors also distort results in these studies, such as whether a would-be assailant also had a firearm (guns are presumably most effective at thwarting unarmed assailants), and whether the set of situations in which an armed victim has a chance to draw or brandish her firearm merely reflect

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128. See JOSEPH BLOCHER & DARRELL A. H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 152–54 (2018) (distinguishing the *Heller* Court's use of self-defense in the context of the Second Amendment); COOK & GOSS, *supra* note 18, at 19 (examining interactions that lead to defensive gun uses within society).

129. RAND CORP., *THE SCIENCE OF GUN POLICY* 8–9 (2018) (ebook); David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1431 (1997); see David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 VIOLENCE & VICTIMS 257, 269–70 (2000) (discussing the disparities between three surveys that examined “offensive and defensive gun use”).

130. See RAND CORP., *supra* note 129, at 275–80 (describing the widely ranging estimates and the methodologies used in each published study, most or all of which depend on self-reporting in surveys).

131. See *id.* (measuring gun use and conflicting literature); DAVID HEMENWAY, *PRIVATE GUNS, PUBLIC HEALTH* 66–69 (2d ed. 2017) (reviewing the leading work in crime surveys).

132. RAND CORP., *supra* note 129, at 273.

other advantageous circumstantial factors, such as advance warning of the intended assault, or bystanders distracting an attacker.<sup>133</sup> Empirical evidence suggests that self-defense with weapons other than firearms occurs far more often than defensive gun use; for example, there are more reported uses of baseball bats in successful self-defense than guns.<sup>134</sup>

An oft-repeated assertion is that guns save lives millions of times per year, thwarting would-be assaults and murders.<sup>135</sup> This unfounded claim appears to have originated with an article published in the 1990s by pro-gun researchers Gary Kleck and Marc Getz, that reported a survey they had done of 5,000 individuals, asking them if they had recently used a gun in self-defense.<sup>136</sup> Kleck and Getz then extrapolated from their sample to the rest of the United States population, concluding that citizens used guns to defend themselves more than two million times per year.<sup>137</sup> Subsequent researchers and leading institutions thoroughly debunked their numbers, but the claim had already become gospel in pro-gun circles and continues to be a tenet to this day.<sup>138</sup> As many subsequent researchers have observed, their numbers could not possibly be correct, because the numbers they report, say for example guns thwarting burglaries, do not mathematically correspond with the number of reported burglaries or attempted burglaries.<sup>139</sup> Current data is available on the Gun Violence Archive,<sup>140</sup> which aggregates daily published police reports from thousands of sources. The Gun Violence Archive reports indicate that reported defensive gun use

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133. *See id.* at 283–84 (comparing the odds of being shot under different circumstances); COOK & GOSS, *supra* note 18, at 17–20 (questioning whether guns are an effective method of self-protection); *see also* State v. Scott, 819 S.E.2d 116, 120 (S.C. 2018) (recognizing reasonable mistake can justify lethal force for self-defense).

134. HEMENWAY, *supra* note 131, at 77.

135. *See* Evan DeFilippis & Devin Hughes, *The Myth Behind Defensive Gun Ownership*, POLITICO (Jan. 14, 2015), <https://www.politico.com/magazine/story/2015/01/defensive-gun-ownership-myth-114262> [<https://perma.cc/HJJ2-H7RA>] (“Despite having nearly no academic support in public health literature, this myth is the single largest motivation behind gun ownership.”).

136. *See* HUGH LAFOLLETTE, IN DEFENSE OF GUN CONTROL 104, 137–44 (2018) (detailing an up-to-date overview of this argument’s origin).

137. *See id.* at 139–41 (describing the corpus of the Kleck–Getz research).

138. *See id.* at 168–78 (providing a comprehensive analysis of the problems with the Kleck–Getz studies). At the time of this writing, LaFollette offers perhaps the most up-to-date discussion and repudiation of the Kleck–Getz numbers.

139. *See* DeFilippis & Hughes, *supra* note 135 (“[T]he 845,000 statistic . . . is simply mathematically impossible.”).

140. *See* Gun Violence Archive: Charts and Maps, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/> [<https://perma.cc/ZZ3Y-MP83>] (reporting 4,131 deaths for the year resulting from guns as of February 8, 2020).

occurred nationwide just under 1,400 times in 2015, 2,000 times in 2016, 2,100 in 2017, and 1,900 times in 2018.<sup>141</sup> Of course, gun owners do not report every incident of defensive gun use to the police, but even Kleck himself maintains that they do at least half the time,<sup>142</sup> so even doubling the numbers reported by the Gun Violence Archive would still only yield 3,200–4,200 incidents of guns helping with self-defense per year—a tiny fraction of the millions of times per year claimed by gun enthusiasts, and a small number compared to the gun crimes and gun accidents.<sup>143</sup> As John Donahue and his co-authors recently noted:

Even with the enormous stock of guns in the United States, the vast majority of the time that someone is threatened with violent crime no gun will be wielded defensively. A five-year study of such violent victimizations in the United States found that victims reported failing to defend or to threaten the criminal with a gun 99.2 percent of the time—this in a country with 300 million guns in civilian hands. Adding 16 million permit holders who often dwell in low-crime areas may not yield many opportunities for effective defensive use for the roughly 1 percent of Americans who experience a violent crime in a given year, especially since criminals can attack in ways that preempt defensive measures.<sup>144</sup>

## 2. The Moral Hazard Problem

Openly carrying a gun for self-defense, in anticipation and preparation for potential future scenarios, is different from defending oneself spontaneously as a reaction when attacked. Arming oneself creates moral hazard problems.<sup>145</sup> Emboldened by the sense of security the firearm

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141. *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE, <https://www.gunviolencearchive.org/past-tolls> [<https://perma.cc/76A6-AN76>].

142. See DeFilippis & Hughes, *supra* note 135 (indicating the flaws in the currently available statistics).

143. Other commentators have questioned the validity of self-defense on philosophical or moral grounds. See, e.g., Janine Young Kim, *The Rhetoric of Self-Defense*, 13 BERKELEY J. CRIM. L. 261, 263 (2008) (“[T]he moral righteousness of self-defense is probably overstated and does not survive sustained scrutiny, especially in light of the law’s failure to explicate motive. These uncertainties naturally lead to problems in the legal understanding of self-defense, which necessarily remains vague as to the descriptive and moral bases of the concept.”).

144. John J. Donahue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. EMPIRICAL LEGAL STUD. 198, 202 (2019) (citation omitted).

145. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 5, 54 (4th ed. 2004) (explaining moral hazard from an insurance or risk management perspective).

provides, a person is less risk-averse than they would otherwise be.<sup>146</sup> “Moral hazard” simply describes the everyday phenomenon where people who have taken measures to reduce some risk, or have insured against it, later offset this benefit by engaging in riskier behavior. A person carrying a firearm may feel more confident about engaging in such activities as high-crime neighborhoods for dining, shopping, socializing, taking a shortcut, and so on, so the likelihood of encountering a criminal is higher.<sup>147</sup> Guns can give their owner a false sense of security.<sup>148</sup> “The fact that you have a gun may mean that you do things you shouldn’t be doing: you take chances you shouldn’t otherwise take; you go to places where it’s really not safe, but you feel safe.”<sup>149</sup>

Guns make people feel empowered, but in a toxic way.<sup>150</sup> In the 1960s, Berkowitz and LePage conducted a famous study documenting the “weapons effect”—study participants who were in a room where guns were lying around exhibited more aggressiveness and cruelty toward others.<sup>151</sup> A 2004 study showed that drivers who had a gun in their car were more likely to make obscene gestures at other drivers or follow other vehicles too closely.<sup>152</sup> More recently, researchers at Notre Dame University demonstrated that holding a gun—even a toy gun during the experiment—

146. See Nicholas Moeller, *The Second Amendment Beyond the Doorstep: Concealed Carry Post-Heller*, 2014 U. ILL. L. REV. 1401, 1421 (2014) (“The self-defense argument also presents a substantial moral hazard problem. Those with weapons may overestimate the self-defense value of their weapons and behave in riskier ways.” (citation omitted) (citing Beau A. Hill, *Go Ahead, Make My Day: Revisiting Michigan’s Concealed Weapons Law*, 76 U. DET. MERCY L. REV. 67, 74 (1998))).

147. See *id.* (“The overstated belief in their safety may cause concealed carriers to place themselves in more dangerous situations and actually increase the rate of violent conflicts.”).

148. See *id.* (“For example, a gun owner chooses to walk down an unlit alley knowing he or she has a gun for protection. The gun owner then runs into a robber that he or she never would have met had they stayed on the well-lit street.”).

149. Melinda Wenner Moyer, *More Guns Do Not Stop More Crimes, Evidence Shows*, SCI. AM. (Oct. 1, 2017), <https://www.scientificamerican.com/article/more-guns-do-not-stop-more-crimes-evidence-shows/> [<https://perma.cc/GS84-8R8T>] (quoting David Hemenway, director of the Harvard Injury Control Research Center).

150. See Brad J. Bushman, *The “Weapons Effect”*, PSYCHOL. TODAY (Jan. 18, 2013), <https://www.psychologytoday.com/us/blog/get-psyched/201301/the-weapons-effect> [<https://perma.cc/WGY2-5YSW>] (“A review of 56 published studies reported that the mere sight of weapons increases aggression in both angry and nonangry individuals.”).

151. See Leonard Berkowitz & Anthony LePage, *Weapons As Aggression-Eliciting Stimuli*, 7 J. PERSONALITY & SOC. PSYCHOL. 202, 206 (1967) (documenting the “weapons effect”).

152. David Hemenway et al., *Is an Armed Society a Polite Society? Guns and Road Rage*, 38 ACCIDENT ANALYSIS & PREVENTION 687,688–90 (2006).

biased test subjects to perceive that others were armed.<sup>153</sup> According to yet another recent scientific study, merely *holding* a gun raises the testosterone level in the blood immediately,<sup>154</sup> flooding the system with a surge of empowerment, ambition, and, if unchecked, raw aggression. Other writers, of course, have talked about the link between guns and machismo, that is, toxic masculinity.<sup>155</sup> The point here is that we should move beyond thinking of guns as neutral, inanimate objects that are mere instruments in the hands of an autonomous actor. Carrying a gun affects the person carrying it—how the carrier feels, thinks, and the perception of oneself and others.<sup>156</sup> Empowerment is not always a healthy feeling. We have a colloquial term in our language for unhealthy empowerment feelings—a “power trip”—but we do not have a word marking the line, or the qualitative difference, between healthy self-empowerment and the “power trip” that we all disdain.

If an armed person, including attorneys, approaches an interpersonal confrontation with elevated bravado, it is easier for the situation to take an unexpected turn and end badly for one or both parties.<sup>157</sup> A gun also makes one more confident about carrying large sums of cash, valuables, or a client’s extremely sensitive documents. Conversely, an unarmed person, including attorneys, may be more likely to exercise caution or avoid conflict, at least

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153. Jessica K. Witt & James R. Brockmole, *Action Alters Object Identification: Wielding a Gun Increases the Bias to See Guns*, 38 J. EXPERIMENTAL PSYCHOL. 1159, 1160 (2012); see Adam T. Biggs et al., *Armed and Attentive: Holding a Weapon Can Bias Attentional Priorities in Scene Viewing*, 75 ATTENTION PERCEPTION & PSYCHOPHYSICS 1715, 1721 (2013) (“In summary, under free-viewing conditions, holding a gun can substantially alter the manner in which attention is allocated within scenes.”); David DiSalvo, *Study: Holding a Gun Influences You to Think Others Are Armed*, FORBES (Mar. 12, 2012, 4:35 PM), <https://www.forbes.com/sites/daviddisalvo/2012/03/21/study-holding-a-gun-influences-you-to-think-others-are-armed/#1e8f73ed5e37> [<https://perma.cc/JS4E-HDQR>] (“[P]eople holding a gun would tend to assume others are as well.”).

154. Jennifer Klimesmith et al., *Guns, Testosterone, and Aggression: An Experimental Test of a Mediation Hypothesis*, 17 PSYCHOL. SCI. 568, 570 (2006).

155. See, e.g., F. Carson Mencken & Paul Froese, *Gun Culture in Action*, 66 SOC. PROBS. 3, 4 (2019) (“We find that American gun owners vary greatly in their sense of empowerment from guns; most dramatically, white respondents who have undergone or fear economic distress tend to derive self-esteem and moral rectitude from their weapons.”).

156. See Chelsey Kivland, *What Guns Do to Our State of Mind*, PAC. STANDARD (Apr. 19, 2019), <https://psmag.com/social-justice/how-guns-change-us> [<https://perma.cc/SHK4-SUSY>] (describing the different cultures of gun possession).

157. See Timothy W. Luke, *Counting Up Ar-15s: The Subject of Assault Rifles and the Assault Rifle As Subject*, in THE LIVES OF GUNS 70, 75 (Jonathan Obert et al., eds., 2019) (“Beyond violence, are [people] fully aware of the multiple American subjectivities shaped by shooting, owning, handling, or appreciating guns?”).

at the margins. Disparate outcomes can arise from the margins. Suppose that openly carrying a gun leads a person to take even a few more risks, be a little less cautious, or sometimes react more aggressively in their interactions with others; if so, wearing a gun may make the individual far less safe than they realize.<sup>158</sup> Wearing a sidearm for self-defense creates a moral hazard problem, so the likelihood of a violent altercation increases. Moreover, when the rare situation arises when self-defense is necessary, the armed person is more likely to take risks in that instant—for example, less likely to retreat without resisting, and less likely to acquiesce, because they already have a gun in hand. To the extent that an armed individual feels emboldened, or at least less risk-averse, having the weapon on their person can end up increasing the likelihood that the armed person will become the target of an attempted crime.<sup>159</sup>

Open carry also implicates adverse selection problems.<sup>160</sup> Screening effects among the armed-in-advance group yielded results that skew toward more fatalities, because those who arm themselves in advance for self-defense are, at least marginally, more likely to anticipate dangerous confrontations, or are potentially paranoid, insecure, aggressive, or vengeful.<sup>161</sup>

Lawyers with guns are not necessarily the “good guy with a gun.”<sup>162</sup> In December 2017, Erik Graeff, an attorney in Portland, Oregon, fired six rounds at the office of Terrence Hogan, a lawyer in Beaverton, after a caustic email exchange about Graeff’s handling of a particular case.<sup>163</sup> In October 2018, a disbarred lawyer in South Carolina shot seven law

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158. An adverse selection problem also applies to the more-guns-less-crime collective action theory, if the people most likely to misuse their firearm in extenuating circumstances (due to their innate aggressiveness, their values, or their environment) are also more likely to buy weapons or buy them sooner than others.

159. See Donohue, *supra* note 144, at 210 (“Presumably, criminals would respond in a similar fashion, leading them to arm themselves more frequently, attack more harshly, and shoot more quickly when citizens are more likely to be armed.”).

160. See COOTER & ULEN, *supra* note 145, at 54–55 (explaining adverse selection primarily from an insurance or risk-management perspective).

161. See Donohue, *supra* note 144, at 203–07 (discussing possible negative consequences of legally carrying guns).

162. Eric M. Ruben, *Justifying Perceptions in First and Second Amendment Doctrine*, 80 LAW & CONTEMP. PROBS. 149, 170 (2017); Joseph Blocher & Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 353 (2016).

163. Debra Cassens Weiss, *Lawyer Gets Prison Time for Shooting into Another Lawyer's Office*, A.B.A. J. (Jan. 25, 2019, 9:32 AM), <http://www.abajournal.com/news/article/lawyer-gets-prison-time-for-shooting-into-another-lawyers-office> [https://perma.cc/NEJ8-ESLQ].

enforcement officers, according to reports.<sup>164</sup> The *ABA Journal* recently reported an increase in disciplinary actions against lawyers for domestic violence incidents.<sup>165</sup> Numerous court decisions and disciplinary actions report lawyers resorting to violence<sup>166</sup> or engaging in dangerous use of firearms.<sup>167</sup> Are those who openly carry their firearms self-selected for a

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164. Debra Cassens Weiss, *Disbarred Lawyer Suspected in Shooting of 7 South Carolina Law Enforcement Officers*, A.B.A. J., (Oct. 4, 2018, 9:15 AM), [http://www.abajournal.com/news/article/suspect\\_in\\_south\\_carolina\\_officers\\_shooting\\_is\\_a\\_disbarred\\_lawyer](http://www.abajournal.com/news/article/suspect_in_south_carolina_officers_shooting_is_a_disbarred_lawyer) [https://perma.cc/FBN5-7DGP].

165. David L. Hudson Jr., *Disciplinary Actions Against Lawyers Who Commit Acts of Domestic Violence Appear to Be on the Rise*, A.B.A. J. (Nov. 1, 2015, 2:30 AM), [http://www.abajournal.com/magazine/article/disciplinary\\_actions\\_against\\_lawyers\\_who\\_commit\\_acts\\_of\\_domestic\\_violence\\_a](http://www.abajournal.com/magazine/article/disciplinary_actions_against_lawyers_who_commit_acts_of_domestic_violence_a) [https://perma.cc/4X73-LM7W] (“Unfortunately, the legal profession has not been immune to domestic violence incidents . . .”); see *People v. Knight*, 883 P.2d 1055, 1055 (Colo. 1994) (en banc) (reporting a domestic violence conviction results in six-month suspension).

166. See *Cook v. Am. S.S. Co.*, 134 F.3d 771, 772–74 (6th Cir. 1998) (discussing how a lawyer struck opposing counsel, resulting in a mistrial and the lawyer being sanctioned); *People v. Musick*, 960 P.2d 89, 89 (Colo. 1998) (en banc) (stating a domestic violence conviction resulted in a one-year-and-one-day suspension); *In re Davidson*, 761 N.E.2d 854, 854–55 (Ind. 2002) (per curiam) (describing when a lawyer assaulted a police officers during his arrest for public intoxication); *In re Moore*, 665 N.E.2d 40, 40 (Ind. 1996) (per curiam) (disciplining attorney who struck opposing counsel with a sixty-day suspension); *Iowa Supreme Court Att’y Disciplinary Bd. v. Blessum*, 861 N.W.2d 575, 578 (Iowa 2015) (relaying when an attorney engaged in a sexual relationship with a client and eventually assaulted her); *Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Polson*, 569 N.W.2d 612, 612–13 (Iowa 1997) (reviewing a lawyer’s domestic abuse of his wife); *In re Sutton*, 959 P.2d 904, 904 (Kan. 1998) (per curiam) (describing a lawyer’s altercation with a road construction worker when the lawyer threw a full soda bottle at him); *People v. Pastor*, 73 N.Y.S.3d 567, 567–68 (N.Y. App. Div. 2018) (stating a lawyer would beat his girlfriends’ dogs to death after breakups); *In re Burns*, 572 N.Y.S.2d 48, 48–50 (N.Y. App. Div. 1991) (per curiam) (disbarring a lawyer on multiple grounds, including assault and battery upon another attorney, which required reconstructive surgery and later surgery to remove scar tissue); *Office of Disciplinary Counsel v. Lucey*, 586 N.E.2d 78, 78–79 (Ohio 1992) (suspending an attorney indefinitely after he was convicted for aggravated assault); *State ex rel. Okla. Bar Ass’n v. Zannotti*, 330 P.3d 11, 11–14 (Okla. 2014) (explaining how a lawyer attacked a former client he was dating); *In re Disciplinary Proceedings Against Perez-Pena*, 168 P.3d 408, 415 (Wash. 2007) (en banc) (discussing how a lawyer assaulted his own client during a heated exchange); *Lawyer Disciplinary Bd. v. Robinson*, 736 S.E.2d 18, 21 (W. Va. 2012) (explaining how an attorney beat his own client with a baseball bat).

167. See *In re Gelof*, No. 112424–B, 2016 WL 3419111, at \*2-3 (Del. Jun. 10, 2016) (per curiam) (reporting a deputy attorney general convinced a security officer to pull a gun on a colleague in the courthouse witness room as a practical joke); *In re Funk*, 742 A.2d 851, 851–52 (Del. 1999) (holding disbarment was warranted by conviction for possession of a firearm by an unlawful drug user); *Comm. on Prof’l Ethics & Conduct of the Iowa State Bar Ass’n v. Sturgeon*, 487 N.W.2d 338, 338–39 (Iowa 1992) (per curiam) (describing how a lawyer threatened to kill persons believed responsible for his wife’s drug problems, carried loaded weapons without permit, and attempted to break down the door of the intended victims); *In re Brown*, 674 So. 2d 243, 244 (La. 1996) (convicting and disbarring a lawyer who shot and killed her lover during an argument, allegedly accidentally); *Att’y Grievance Comm’n of Md. v. Reno*, 83 A.3d 781, 785 (Md. 2014) (showing an attorney gave her former client a

desire to intimidate others? When Oklahoma changed its laws in 2012 to allow open carry, gun dealers were thrilled with the new business open carry would bring; gun shops saw a surge in customers “buying larger weapons, with longer barrels and with magazines that hold additional rounds, as they prepare to wear their guns unconcealed.”<sup>168</sup> Firmin DeBrabander commented that the customers wanted to wear “something truly massive and intimidating.”<sup>169</sup>

## II. ETHICAL RESTRAINTS AND THE SECOND AMENDMENT

In the years since the Supreme Court's *Heller* decision, a circuit split has emerged on the constitutionality of restrictions on carrying firearms, whether openly or concealed, with most courts upholding various state restrictions on carrying guns in public. The First,<sup>170</sup> Second,<sup>171</sup> Third,<sup>172</sup>

gun despite knowing the state police had recently denied his gun application); Office of Disciplinary Counsel v. Colburn, 538 N.E.2d 110, 110 (Ohio 1989) (per curiam) (discussing how a lawyer shot his wife's former husband); *In re Hubatch*, 839 N.W.2d 579, 580 (Wis. 2013) (per curiam) (relaying how a lawyer robbed a credit union with a toy replica gun).

168. DEBRABANDER, *supra* note 30, at 11 (quoting Manny Fernandez, *Oklahomans Prepare for a New Law that Will Make Guns a Common Sight*, N.Y. TIMES (Oct. 30, 2012), <https://www.nytimes.com/2012/10/31/us/oklahoma-prepares-for-open-carry-gun-law.html> [<https://perma.cc/T9N6-RHHB>]).

169. *Id.* at 12.

170. *See* Gould v. Morgan, 907 F.3d 659, 676–77 (1st Cir. 2018) (upholding the license-to-carry regime that included discretionary restrictions on places and purposes for carrying firearms), *cert. filed*, Petition for Writ of Certiorari, *Gould*, (No. 18-1272).

171. *See* Burgess v. Town of Wallingford, 569 F. App'x. 21, 23 (2d Cir. 2014) (“[T]he right to carry a firearm openly outside the home—is not clearly established law.”); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (“[W]e do not know . . . the scope of [the Second Amendment] right beyond the home and the standards for determining when and how the right can be regulated by a government. This vast ‘terra incognita’ has troubled courts since *Heller* was decided.”), *cert. denied sub nom. Kachalsky v. Cacace*, 569 U.S. 918 (2013).

172. *See* Drake v. Filko, 724 F.3d 426, 431 (3d Cir. 2013) (noting “the Second Amendment’s individual right to bear arms may have some application beyond the home” but “declin[ing] to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home”). In *Drake*, a New Jersey law (N.J. ADMIN. CODE § 13:54–2.4(d)(1)) requiring concealed carry applicants to demonstrate a “justifiable need” for self-defense was upheld by the Third Circuit, as it did not give licensing officials too much discretion. *Id.* at 427. Applying intermediate scrutiny, the court upheld the permit regulation, finding that it directly advanced a justifiable government interest, i.e., to decrease the demonstrated risk and danger posed to the public by persons openly carrying a handgun. *Id.* at 440. Although Judge Hardiman stated in the dissent that the “justifiable need requirement” does not comply with the Second Amendment, he acknowledges that intermediate scrutiny rather than strict scrutiny is the proper framework. *Id.* at 457. In addition, Judge Hardiman joined the majority in dismissing the plaintiff’s prior restraint comparison. *Id.* at 452. In sum, the dissent departs from the majority by demanding further evidence must be provided by the state in order to meet its burden under an intermediate scrutiny analysis. *Id.* at 453. In sum, the dissent admits



Fourth,<sup>173</sup> Tenth,<sup>174</sup> and Eleventh<sup>175</sup> Circuits have held that the Second Amendment does not necessarily guarantee a right to carry a firearm openly outside the home. The Fifth Circuit has upheld age restrictions on publicly carrying firearms<sup>176</sup> and prohibitions on carrying a gun on postal service grounds.<sup>177</sup>

The position of the Ninth Circuit is currently unsettled. In 2016, in *Peruta v. City of San Diego*,<sup>178</sup> the court, sitting en banc, held that the Second Amendment does not include a right to concealed carrying of firearms in public.<sup>179</sup> More recently, however, in *Young v. Hawaii*,<sup>180</sup> a three-judge panel from the Ninth Circuit held that the Second Amendment includes a right to carry a firearm openly in public for self-defense<sup>181</sup> in a challenge to Hawaii's open-carry licensing regime.<sup>182</sup> The District Court upheld the statute's limitations by interpreting *Heller* narrowly to protect the right of individuals to bear arms in their homes, which passed intermediate

that the courts should grant some level of deference to the legislature on how they choose to promote safety but requires a greater showing of necessity. *Id.* at 457.

173. See *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (upholding a Maryland statute that required a "good and substantial reason" for obtaining a permit to carry a handgun outside the home); *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011) (noting that "as we move outside the home, firearm rights have always been more limited," as shown by court decisions upholding bans on concealed carry).

174. See *Sandberg v. Englewood*, 727 F. App'x. 950, 962 (10th Cir. 2018) ("[It is] not clearly established that the Second Amendment guaranteed a citizen the right to openly carry a firearm in public without risk of facing police action."); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015) (holding a federal regulation prohibiting firearms in federal buildings is constitutional); *Peterson v. Martinez*, 707 F.3d 1197, 1209 (10th Cir. 2013) (holding the Second Amendment does not guarantee the right to carry a concealed firearm in public).

175. See *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1244 (11th Cir. 2012) (upholding state law prohibiting firearms in houses of worship).

176. See *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 350 (5th Cir. 2013) (upholding a state-mandated age restriction on publicly carrying handguns).

177. See *United States v. Dorosan*, 350 F. App'x. 874, 875 (5th Cir. 2009) (affirming a conviction for bringing a handgun onto property belonging to the United States Postal Service).

178. *Peruta v. City of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc).

179. *Id.* at 939; see *Constitutional Law—Second Amendment—Ninth Circuit Holds That Concealed Carry Is Not Protected by the Second Amendment*, 130 HARV. L. REV. 1024, 1025–26 (2017) (stating the Ninth Circuit affirmed the judgments of the district courts prohibiting carrying handguns for self-defense outside of the home).

180. *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *reb'g granted*, 915 F.3d 681 (9th Cir. 2019) (Mem.).

181. *Id.* at 1068.

182. *Id.*; see HAW. REV. STAT. ANN. § 134–9(a) (West 2007) (providing Hawaii's first "license to carry" law), *declared unconstitutional by Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018).

scrutiny.<sup>183</sup> The Circuit Court panel reversed, concluding that “keeping arms” implies a right to carry arms into the home, as this was necessary in order to “carry them home from the place of purchase and occasionally move them from storage place to storage place.”<sup>184</sup> The Ninth Circuit has since granted a rehearing en banc,<sup>185</sup> which is still pending.<sup>186</sup>

The Seventh Circuit has issued decisions going both ways, in certain cases striking down statutes or ordinances that restrict gun carrying,<sup>187</sup> while more recently upholding laws like the Illinois statute which denies nonresidents reciprocal concealed carry licenses because their states of residency did not have licensing standards substantially similar to those of Illinois.<sup>188</sup> The D.C. Circuit, on the other hand, struck down a special-need requirement for obtaining a concealed carry permit.<sup>189</sup> Some state supreme courts have also upheld bans or limitations on openly carrying firearms, even under a Second Amendment analysis.<sup>190</sup> Particularly relevant to the topic of this Essay, but predating the changes in Second Amendment jurisprudence ushered in by *Heller*, is the 1997 Eighth Circuit decision *Gross v. Norton*,<sup>191</sup> in which a local city attorney (not a prosecutor) sued, unsuccessfully, for the right to carry a gun while at work.<sup>192</sup> The Eighth Circuit has not had the opportunity to revisit this issue since *Heller*.

A legal ethics or disciplinary rule prohibiting lawyers from openly carrying firearms to adversarial meetings should survive a Second Amendment

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183. *Young v. Hawaii*, 911 F. Supp. 2d 972, 989–91 (D. Haw. 2012), *rev'd in part*, 896 F.3d 1044 (9th Cir. 2018), *reb'g granted*, 915 F.3d 681 (9th Cir. 2019) (Mem.).

184. *Young*, 896 F.3d at 1052–53.

185. *Young v. Hawaii*, 915 F.3d 681, 682 (9th Cir. 2019).

186. *Id.*

187. *See Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (“The Supreme Court has decided that the [Second] [A]mendment confers a right to bear arms for self-defense, which is as important outside the home as inside.”).

188. *See Culp v. Raoul*, 921 F.3d 646, 648–49 (7th Cir. 2019) (upholding a provision of the Illinois Firearm Concealed Carry Act “issuing licenses only to nonresidents living in states with licensing standards substantially similar to those of Illinois”), *cert. filed*, Petition for Writ of Certiorari, *Culp*, (No. 19-487).

189. *See Wrenn v. District of Columbia*, 864 F.3d 650, 664 (D.C. Cir. 2017) (holding unconstitutional the District of Columbia’s “good reason” law limiting the issuance of concealed carry licenses to those with a special need for self-defense).

190. *See Mich. Gun Owners, Inc. v. Ann Arbor Pub. Schs.*, 918 N.W.2d 756, 759 (Mich. 2018) (upholding school district bans on openly carrying firearms against preemption challenge); *Norman v. State*, 215 So. 3d 18, 22 (Fla. 2017) (holding Florida’s law prohibiting open carrying of firearms survived intermediate scrutiny and was constitutional under the Second Amendment).

191. *Gross v. Norton*, 120 F.3d 877 (8th Cir. 1997) (per curiam).

192. *Id.* at 878.

challenge as well. Such a restriction would affect only licensed attorneys, not the whole population. It would apply to a narrow set of circumstances or situations, and not trigger criminal penalties for violations,<sup>193</sup> but rather a disciplinary action such as a reprimand or temporary license suspension. Such a rule would be reasonably tailored to further legitimate state interests, such as public safety (barring firearms from already-contentious, confrontational settings) and the integrity and accessibility of the judicial system.

Existing provisions in the Model Rules or state ethical rules have survived constitutional challenges, even where the rule in question places a restraint on a constitutionally protected act, such as speech or association. As Justice Stewart wrote in his concurrence in *In re Sawyer*,<sup>194</sup> “[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.”<sup>195</sup>

To draw on a recent example, the ABA Model Code of Judicial Conduct provides a candidate for judicial office “shall not personally solicit or accept campaign contributions or personally solicit publicly stated support.”<sup>196</sup> A number of states, including Florida, have followed suit and adopted their version of the model rules imposing additional restrictions on judicial elections. In 2011, the Florida Bar commenced disciplinary action against an attorney-candidate for judicial office, Lanell Williams-Yulee, for soliciting campaign funds from clients and others.<sup>197</sup> Williams-Yulee contended that the restriction on judicial solicitations violated the First Amendment; the Florida Supreme Court, however, held the rule does not infringe on free speech because it is “narrowly tailored to serve a compelling state interest.”<sup>198</sup> On appeal, the Supreme Court of the United States affirmed the state court’s holding, concluding that the prohibition “advances the State’s compelling interest in preserving public confidence in the integrity

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193. See *In re Ruffalo*, 390 U.S. 544, 550–51 (1968) (holding attorney discipline cases are “of a quasi-criminal nature”); *In re Paschal*, 77 U.S. 483, 491–92 (1870) (holding attorney discipline cases are quasi-criminal proceedings, triggering some due process requirements, even though they are not penal in nature).

194. *In re Sawyer*, 360 U.S. 622 (1959).

195. *Id.* at 646–47 (Stewart, J., concurring).

196. MODEL CODE OF JUDICIAL CONDUCT Canon 5C(2) (AM. BAR ASS’N 2020).

197. See Fla. Bar v. Williams-Yulee, 138 So. 3d 379, 381–82 (Fla. 2014) (stating the campaign activities of the attorney-candidate occurred in 2009, but the enforcement action began thereafter, with a stay of proceedings (pending the outcome of another appeal) delaying the referee’s report until 2011), *aff’d*, 575 U.S. 433 (2015).

198. *Id.* at 383–84, 387.

of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech.”<sup>199</sup> The Court explained that although the First Amendment fully applies to the petitioner’s speech, there is a longstanding tradition of protecting the judiciary’s integrity.<sup>200</sup> The decision relied on *Caperton v. A.T. Massey Coal Co.*,<sup>201</sup> where the Court stated that protecting the judiciary furthers a vital state interest in safeguarding “public confidence in the fairness and integrity of the nation’s elected judges.”<sup>202</sup>

The Supreme Court has upheld modest ethical-disciplinary restraints on attorney communication in the context of solicitation and advertising, despite the First Amendment guarantees of free speech, though categorical bans on advertising and direct-mail solicitations are constitutionally impermissible.<sup>203</sup> In *Florida Bar v. Went For It, Inc.*,<sup>204</sup> the Court upheld a state bar restriction prohibiting targeted direct-mail solicitations for 30 days following an accident,<sup>205</sup> and in *Ohralik v. Ohio State Bar Association*,<sup>206</sup> it rejected a First Amendment challenge to the prohibition on in-person solicitation by attorneys.<sup>207</sup> A statutory (non-ethical) provision restricting the advice bankruptcy lawyers could give to clients also withstood a First Amendment challenge.<sup>208</sup> Similarly, the Supreme Court has upheld attorneys’ mandatory membership in a state bar in the face of challenges based on freedom of association.<sup>209</sup>

To summarize the points in this section, an ethical rule prohibiting lawyers from openly carrying firearms to certain representation-related

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199. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015).

200. *Id.* at 447–48.

201. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

202. *Id.* at 889 (quoting Brief for Conference of Chief Justices as Amicus Curiae 4, 11).

203. *See Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 470–71 (1988) (upholding a complete ban against a lawyer’s use of direct mail solicitations for professional employment); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 655 (1985) (upholding advertising restrictions); *In re R. M. J.*, 455 U.S. 191, 207 (1982) (upholding restrictions on advertising and direct mail solicitations); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 354, 382 (1977) (upholding advertising with listed legal fees per type of matter).

204. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

205. *Id.* at 620.

206. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978).

207. *Id.* at 459.

208. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 239 (2010).

209. *See Lathrop v. Donohue*, 367 U.S. 820, 823, 843 (1961) (declaring a state supreme court ruling requiring a lawyer “be an enrolled dues-paying member of the State Bar did not abridge his rights of freedom of associations”); *Kaimowitz v. Fla. Bar*, 996 F.2d 1151, 1153–54 (11th Cir. 1993) (upholding a similar ruling).

meetings would not infringe on lawyers' Second Amendment rights any more than other longstanding rules modestly infringe on lawyers' First Amendment rights. Courts have often upheld the latter in the face of repeated constitutional challenges. It is reasonable to expect that the rule proposed here would also survive constitutional scrutiny by the courts, because it stands at the periphery of the Second Amendment's protections.

### III. OTHER CONTEXT-RELATED FIREARM PROHIBITIONS

Even in states permitting open carry, federal statutes sanction bringing a gun to certain events, besides the well-known place prohibitions (gun-free zones). The implication is that banning guns at depositions and other adversarial meetings would be consistent with other policy judgments made by Congress where guns make certain situations more dangerous or raise the potential for unlawful acts in some way (perhaps by introducing an element of coercion, excessive risk-taking, or hostility to authorities). This Part will first explore, albeit very briefly, some longstanding situational or event-based restrictions on carrying firearms that could be relevant, that is, analogous to a situational restraint on lawyers, such as making it an ethical violation to carry a firearm to a deposition or settlement conference openly. This Part then turns to the issue of the location-based restriction on firearms, which is most relevant for lawyers and litigation—guns in the courthouse—which has become a controversial and rapidly-changing area in the last few years. The traditional courthouse bans on guns, which still apply in federal courts, could supply two points related to the ethical rule proposed here. First, many of the same policy concerns giving rise to courthouse gun prohibitions would apply to court-related (litigation-related) adversarial meetings that apply outside the courthouse; and second, as state legislatures increasingly compel courts to permit guns in court buildings, ethical guidance for litigators becomes more essential and urgent.

#### A. *Situational or Event Prohibitions*

The majority opinion in *Heller* included a crucial caveat:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in

sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>210</sup>

Some of these “presumptively lawful,”<sup>211</sup> longstanding prohibitions are in the federal statutes that impose sentencing enhancements or gradation increases in offense level for using guns in certain crimes. For example, 18 U.S.C. § 924 is a federal firearms statute that imposes penalties on the illegal use of firearms.<sup>212</sup> Section (c)(1)(A)(i) imposes a term of imprisonment of not less than five years for using or carrying a firearm during or in furtherance of any crime of violence for which a person could be prosecuted.<sup>213</sup> In other words, this violation is triggered when the perpetrator commits a predicate offense (i.e., crime of violence or drug-related crime) or when the perpetrator possesses a firearm in furtherance of a predicate offense.<sup>214</sup>

If the firearm carrier brandishes the weapon, the sentence is a minimum of seven years, and if the firearm discharges, the sentence is a minimum of ten years.<sup>215</sup> The statute defines “crime of violence” to mean a felony that:

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.<sup>216</sup>

The statute also explains that the term “brandish” means to “display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person,” even if the person does not see the gun.<sup>217</sup> First-time offenders are subject to, at the least, a

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210. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

211. *Id.* at 627 n.26.

212. 18 U.S.C. § 924 (2018).

213. *Id.* § 924(c)(1)(A)(i).

214. See CHARLES DOYLE, CONG. RESEARCH SERV., R41412, FEDERAL MANDATORY MINIMUM SENTENCING: THE 18 U.S.C. 924(C) TACK-ON IN CASES INVOLVING DRUGS OR VIOLENCE 5 (2015), <https://fas.org/sgp/crs/misc/R41412.pdf> [<https://perma.cc/3YGU-DU92>] (stating federal courts have interpreted “possession” to include either constructive or actual possession).

215. 18 U.S.C. § 924(c)(1)(A)(ii).

216. *Id.* § 924(c)(3). *But see* *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019) (holding § 924(c)(3)(B) to be unconstitutionally vague, though the remainder of the statute remains in force).

217. 18 U.S.C. § 924(c)(4).

flat five-year sentence,<sup>218</sup> whereas subsequent offenders receive twenty-five years.<sup>219</sup> Violators of this provision are not entitled to probation.<sup>220</sup> Penalties related to crimes of violence or drug-related offenses include the suspension or revocation of a license along with civil penalties, such as a maximum fine of \$2,500.<sup>221</sup>

Instances when a lawyer exposes a handgun in a deposition or during any court proceeding, may or may not be a “crime of violence,” as it is a threatened use of physical force against another person, but this depends on context and circumstances. Lawyers who brandish their weapons to opposing counsel to intimidate can be subject to a minimum of seven years under the federal statute. A court must find that there is enough evidence

218. *Id.* § 924(c)(1)(A)(i).

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years[.]

*Id.*

219. *Id.* § 924(c)(1)(B)–(C):

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

*Id.*

220. *Id.* § 924(c)(1)(D)(i).

221. *Id.* § 924(p)(1)(A)(i)–(ii).

to show “active employment of the firearm.”<sup>222</sup> The lawyer must be actively using the firearm as a means to complete the violent crime. As a result, lawyers who use these kinds of intimidation tactics can face a variety of civil penalties and up to a decade in prison.<sup>223</sup>

B. *Location-based Prohibitions Related to Lanyering*

As mentioned already, *Heller* specifically mentioned longstanding prohibitions on guns in “government buildings” as presumptively lawful,<sup>224</sup> suggesting there is no clear constitutional problem with barring guns from specific places, like courtrooms. Most states categorically prohibit guns in courtrooms, but there is a new trend toward loosening the longstanding courthouse gun bans. Out of concern for safety and security, however, legislative actions expanding gun rights in courtrooms have encountered resistance.<sup>225</sup> The new trend toward loosening the longstanding courthouse gun bans is a push coming from legislatures, not from the judiciary.<sup>226</sup> The judiciary has resisted this trend. For example, Wisconsin judges, in a statement supporting their ban on concealed weapons from a county courthouse stated that “[t]he first step in fulfilling that obligation, and in assessing safety and security threats in a courtroom, is for judges and law enforcement to be aware of who is carrying a weapon during a proceeding.”<sup>227</sup> Similarly, the Iowa Supreme Court banned guns in courthouses statewide with the justification that “[w]hen Iowans believe their courthouses and court facilities are not safe, the integrity of the entire

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222. *Bailey v. United States*, 516 U.S. 137, 144 (1995), *superseded by statute*, 18 U.S.C. § 924(c) (1998), *as recognized in*, *Welch v. United States*, 136 S. Ct. 1257 (2016).

223. See *Quick Facts: Section 924(c) Firearms Offenses*, U.S. SENT’G COMMISSION, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Section\\_924c\\_Offenders.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Section_924c_Offenders.pdf) [<https://perma.cc/4HFJ-C5ZZ>] (listing punishments for “all offenders convicted under 18 U.S.C. § 924(c)”).

224. *District of Columbia v. Heller*, 554 U.S. 570, 626–27, 627 n.26 (2008).

225. See Gersham, *supra* note 22 (“Security fears were underscored by eruptions of violence inside and outside courthouses in recent years, including shooting incidents in Delaware, Texas and South Carolina, in which gunmen opened fire at estranged relatives and, in an attack near Dallas, in which a prosecutor was targeted.”).

226. See Brendan O’Brien, *Wisconsin Judges Are Wrong to Bar Guns From Court, Prosecutor Says*, REUTERS (June 19, 2012, 7:51 PM), <https://www.reuters.com/article/us-usa-guns-courthouse/wisconsin-judges-are-wrong-to-bar-guns-from-court-prosecutor-says-idUSBRE85J01G20120620> [<https://perma.cc/EQ7E-Q4H5>] (“A Wisconsin prosecutor asked the state’s highest court on Tuesday to dismiss orders by local judges barring gun-toting attorneys from bringing concealed weapons into courtrooms.”).

227. *Id.*



justice process is compromised and undermined.”<sup>228</sup> The significant aspect of safety and security underlying both statements is the *perception* of the justice process.<sup>229</sup>

Court buildings include many areas besides courtrooms where participants in litigation interact with one another, whether in pre-planned meetings in auxiliary conference rooms, or happenstance encounters in hallways, lobbies, lunchrooms, elevators, and restrooms. Permitting guns in these areas expands the potential situations where visibly armed attorneys could meet opposing parties and counsel, witnesses, jurors, and court staff.

At its 2019 Annual Meeting, the American Bar Association’s House of Delegates passed, without opposition, Resolution 19A105—“Guns in Courtrooms.”<sup>230</sup> The ABA’s Standing Committee on Gun Violence submitted the resolution, and the Criminal Justice Section, the Civil Rights and Social Justice Section, the Commission on Domestic and Sexual Violence, and the Judicial Division co-sponsored it.<sup>231</sup> The Resolution states:

RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal courts and legislatures to develop policies and protocols as to who may carry firearms in courthouses, courtrooms, and judicial centers that allow only those persons necessary to ensure security, including approved safety officers, judges, and court personnel, have weapons in the courthouse,

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228. Gersham, *supra* note 22.

229. This focus on the perception of safety and security is distinguishable from the argument of whether (everyone or select people in the proceedings) carrying guns makes the room or building safe. The *perception* of safety and security in the courthouse affects the perception of the justice process. While some courts have expressed concern about the actual dangers presented by the presence of firearms in a courthouse, the Iowa Supreme Court statement broadens this concern to the effects of guns on the administration of justice. Thus, the real issue is how people’s perception of safety affects the justice process. The argument that guns make people safer is distinguishable and separate from this issue of how armed participants, parties, witnesses, or interested observers in courthouse or courtroom proceedings impact people’s perceptions of safety and the justice process. The argument, however true or not, that guns make people safer, fails to address the issue of the perception of safety and security as it affects the legitimacy of the justice process.

230. ABA Standing Comm. on Gun Violence, *Res. 19A105 – Guns in Courtrooms* (Aug. 2019), [https://www.americanbar.org/groups/public\\_interest/gun\\_violence/policy/19A105/](https://www.americanbar.org/groups/public_interest/gun_violence/policy/19A105/) [https://perma.cc/6DJC-3MHZ]; see Lorelei Laird, *Limit Guns in Courthouses and Train Those Who Use Them*, *ABA House of Delegates Urges*, A.B.A. J. (Aug. 12, 2019, 5:53 PM), <http://www.abajournal.com/news/article/limit-guns-in-courthouses-and-train-those-who-use-them-aba-house-of-delegates-urges> [https://perma.cc/PQG5-ZJRX] (providing a report of the presentation and discussion at the House of Delegates).

231. Laird, *supra* note 230.

courtroom, or judicial center, including common areas within the buildings as well as the grounds immediately adjacent to the justice complex, and that require training for those who are permitted to carry firearms.<sup>232</sup>

Resolution 19A105 thus seeks to (1) restrict the possession of firearms in and around buildings that contain courtrooms to only a limited group of individuals necessary for security and (2) require firearm safety training for anyone permitted to carry guns anywhere on such premises.<sup>233</sup> The Report accompanying Resolution 19A105 observes, “[c]ourtroom proceedings may sometimes become contentious and emotional, creating concerns for the safety of the litigants, as well as judges, lawyers, support staff, and law enforcement. Increasingly there have been occurrences where violence has erupted and firearms are used inside and outside of the courtroom.”<sup>234</sup> It then goes on to delineate the dramatic increase in threats and gun violence in and at courthouses in recent years—the number of incidents reported by the U.S. Marshals Service has doubled between 2003 and 2011.<sup>235</sup> A thoughtful discussion of the *Heller* decision and its progeny follows; the Report notes that “Neither *Heller* nor *McDonald* would prohibit restrictions on carrying firearms in to buildings which house court facilities or the grounds immediately surrounding the courtroom facilities,”<sup>236</sup> and adds that the Tenth Circuit explicitly upheld bans on guns in federal facilities.<sup>237</sup>

The ABA Report laments the new trend in state legislatures to permit firearms in courthouses, or even courtrooms, mentioning egregious examples from Georgia, Iowa, and Mississippi.<sup>238</sup> Courtrooms are traditionally sacrosanct, and violence in courtrooms is particularly upsetting, but the courtrooms themselves are not the most dangerous places in the courthouse, as the report notes that “the immediate areas surrounding the court facility pose the greatest danger.”<sup>239</sup> The reason has to do with the presence or absence of trained personnel: “Trained courtroom safety officers, judges and court personnel provide protection for the court personnel and litigants while inside the courtroom. However, once in the hallways or elevators or parking lots, those who were constrained within the

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232. ABA Standing Comm. on Gun Violence, *supra* note 230.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* (citing *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015)).

238. *Id.*

239. *Id.*

courtroom now are free to act out their hostilities.”<sup>240</sup> Furthermore, while most state judges may prohibit guns from their courtroom, in some states, the judge’s authority ends at the courtroom door even though the threat does not.<sup>241</sup> In light of such limitations on judges that prevent them from prohibiting guns throughout the courthouse, the ABA thus advocates for a comprehensive resolution, starting with state legislatures.<sup>242</sup> Because the dangers do not cease at the courtroom door and because allowing guns on the premises but not in a courtroom creates other issues, including the risk that a gun owner may pass the gun off to a family member with less training, the resolution advocates for prohibiting guns from the entire grounds, allowing only a very specific few (judges, security, and courtroom personnel) permission to carry after proper training.<sup>243</sup>

Of special relevance for the proposal discussed in this Essay—lawyers attending adversarial meetings related to litigation, outside of the trial itself—the report urges that states adopt gun restrictions for the various conference rooms and meeting rooms in courthouses. “These limits should apply to the courtroom, judges’ chambers, witness rooms, jury deliberation rooms, attorney conference rooms, prisoner holding cells, and similar locations except where trained courtroom safety officers, judges and court personnel possess such firearms. Such limitations have worked with federal facilities.”<sup>244</sup>

Courtsrooms and courthouses are notoriously stressful places, especially for the nonlawyers who find themselves there.<sup>245</sup> Participants and observers in litigation often hear cases that recount threats and acts of violence, and the evidence presented in these cases can produce anxiety and discomfort.<sup>246</sup> Of course, the adversarial nature of the trial process

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240. *Id.*

241. *See id.* (stating there is no uniformity when it comes to areas in which judges may limit the possession of firearms).

242. *Id.*

243. *Id.* *But see* K. L. McIff, *Weapon-Free Courthouses and the Gun Locker Dilemma*, UTAH B.J., June–July 2003, at 10 (“[T]he natural consequence of [gun lockers] would be to invite the presence of guns, especially in the older courthouses of rural Utah.”).

244. ABA Standing Comm. on Gun Violence, *supra* note 230.

245. *See, e.g.*, Gersham, *supra* note 22 (“‘Courthouses can be very emotionally charged places,’ said Bill Raftery, a senior analyst with the National Center for State Courts. ‘It’s a public building, but it’s a place that has prisoners being transported and highly charged emotional cases and situations.’”).

246. *See* Monica K. Miller et. al., *Addressing the Problem of Courtroom Stress*, JUDICATURE, Sept.–Oct. 2007, at 60 (“Courtrooms can be stressful places; legal actors and courthouse visitors experience occasional acts of violence, gruesome trial evidence, and a number of daily, low-level stressors. Each of these sources has the potential to affect both judges and jurors.”).

contributes to this stress.<sup>247</sup> Openly carried firearms in non-judicial rooms of a courthouse can affect the judges who work in the building, many of whom already have legitimate concerns about their safety, and the presence of firearms makes their workplace environment feel less secure.<sup>248</sup> There is also an escalation effect at work: there are increasing demands by prosecutors to have permission to carry guns in courtrooms because the other areas of the building “are not secured and are not even off-limits to weapons.”<sup>249</sup> Openly carried guns in non-judicial areas of the building thus ratchets up their perception of insecurity and the stress associated with the courthouse.

An individual's perceptions of the system and of the peril presented by firearms will influence the effect of seeing someone carrying a gun in the courthouse. Even well-meaning judges and prosecutors can intimidate others by virtue of having a gun;<sup>250</sup> their position of authority further complicates this problem. It is shortsighted to believe that the dangers posed within a courtroom that form the basis of courtroom gun bans stop at the courtroom doors. The adversarial nature of courtroom proceedings exists at all stages of litigation and transactional legal matters. The interactions between parties are adversarial in depositions, settlement negotiations, discussing plea agreements, mediation, etc. Expanding open and concealed carry to non-judicial areas makes judges and others, who

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247. *Id.* at 67–68.

248. *See id.* at 65 (“Violence directed at judges and their families represents a growing phenomenon and is a source of stress.”); *see also* Lauren Pack & Rick McCrabb, *Guns in Court: Local Judges, Lawyers Say Ohio Shooting Example of Why They Carry*, J.-NEWS (Aug. 28, 2017), <https://www.journal-news.com/news/guns-court-local-judges-lawyers-say-ohio-shooting-example-why-they-carry/4etwoZMFNH1DY08vJ1eoQM/#> [https://perma.cc/689X-34SE] (“Lawyers and judges in Butler and Warren counties said threats against them aren’t uncommon given . . . the sometimes passionate nature of those cases.”).

249. O’Brien, *supra* note 226. For example, one Ohio judge admitted “I am not sure carrying a firearm actually makes me any safer . . . . It does make me feel safer, sometimes,” and a prosecutor officed in the same building, but not in the secure court wing, justified being armed in his office because “there’s only so much the police can do.” Pack & McCrabb, *supra* note 247.

250. *See* Volokh, *supra* note 25, at 1521 (discussing the social intimidation and fear that results when someone openly carries a gun). The intent of the attorney or judge should be irrelevant in establishing a Model Rule prohibiting guns in adversarial meetings. For example, misconduct does not require an intent to intimidate to warrant discipline. Maryland disciplined a lawyer for calling the prosecution’s star witness in his client’s case and claiming to be a police officer with a warrant to arrest the witness. *See* Att’y Grievance Comm’n of Md. v. Smith, 950 A.2d 101, 118–19 (Md. App. 2008) (holding irrelevant whether the lawyer intended to intimidate the witness because the apparent attempt to discourage the witness from appearing and testifying violated Rules 8.4(a) through (d)).

already feel threatened, feel even less safe.<sup>251</sup> This heightened sense of insecurity increases the demand for more carry rights inside courtrooms.<sup>252</sup> Given the concerns for safety, security, the administration of justice, and the perceptions of the justice process, the trend of some states expanding their courtroom carry laws<sup>253</sup> is certainly relevant to the question of lawyers themselves openly carrying firearms.

Texas provides a high-profile example of the recent nationwide trend. Starting in 2007, Texas permitted judges, prosecutors, and certain other local government lawyers to carry guns in courtrooms<sup>254</sup> if the judge or government lawyer had a license to carry under the statutory concealed carry statute.<sup>255</sup> At the time, the prohibition for courtroom carry remained for all other license holders.<sup>256</sup> Legislators also expanded where an “active judicial officer”<sup>257</sup> may lawfully carry to include places otherwise prohibited to licensees, such bars, hospitals, civil commitment facilities, and rooms where meetings of a governmental entity are held, and effective notice

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251. *Our Survey: 1 in 4 Judges Carries a Gun*, NAT'L JUD. C. (Sept. 21, 2017), [https://www.judges.org/1\\_in\\_4/](https://www.judges.org/1_in_4/) [<https://perma.cc/4BSG-G2DV>].

252. See generally Chuck Weller, *What Judges Should Know About Court-Related Violence*, JUDGES' J., July 1, 2014, at 28 (“All judges are concerned about court-related violence.”).

253. See Gersham, *supra* note 22 (“Since 2013, more than a dozen mostly Republican-led states have considered measures easing courthouse restrictions, although generally guns are still banned inside individual courtrooms.”); William E. Raftery, *Guns in Court*, JUDICATURE, May 2017, at 5 (“The last several years have seen a reexamination of laws that permit firearms in courthouses . . . [f]or the most part, such efforts have been designed to expand the ability of individuals to carry guns into courthouses, and, in some instances, directly into courtrooms.”).

254. The formal request for an opinion letter sent by former District Attorney for Harris County, Kenneth Magidson, presents a concise yet thorough history of gun laws affecting Texas courtrooms. Unfortunately, the Attorney General's archive reflects that the opinion request RQ-0734-GA was withdrawn so the Attorney General did not issue an opinion on some of the prescient questions of law in the letter. Letter from Kenneth Magidson, Dist. Attorney, to Greg Abbott, Tex. Att'y. Gen. (Aug. 7, 2008). Kenneth Magidson voiced “significant concerns with regard to the level of training that should be required in order to permit prosecutors to safely carry firearms in the volatile environment of a criminal courthouse.” Clay Robison, *Harris County DA Aims for Limits on Aides' Guns in Court*, HOUS. CHRON. (Aug. 26, 2008, 5:30 AM), <https://www.chron.com/news/houston-texas/article/Harris-County-DA-aims-for-limits-on-aides-guns-1753163.php> [<https://perma.cc/DRG6-LQEL>].

255. TEX. PENAL CODE ANN. § 46.15(a).

256. See 20 Tex. Jur. 3d Criminal Law: Offenses Against Public Health § 27 (2019) (interpreting the statutory prohibitions on weapons in particular places as not applying to judges, government attorneys, or bailiffs licensed to carry).

257. See TEX. GOV'T CODE ANN. § 411.201(a)(1)(A)–(C) (broadly defined as judges from the highest court down to justice and municipal courts).

provides that guns prohibited.<sup>258</sup> Furthermore, the law exempted judges and (assistant) district attorneys from proficiency certification requirements for obtaining and renewing a gun license, permitting instead submission of a sworn statement from a handgun proficiency instructor indicating the licensee demonstrated proficiency.<sup>259</sup>

In 2015, following the trend in other states, the Texas legislature imposed a statutory penalty for improperly prohibiting licensed carry; this change necessitated a clarification of the definition of “courthouse.”<sup>260</sup> Concerned that their county or municipality might be exposed to fines by flatly prohibiting courthouse carry, some district attorneys sought opinions from the state Attorney General on how to interpret, among other things, the meaning of “on the premises of any government court or offices utilized by the court.”<sup>261</sup> One letter requested clarification because their “[c]ourthouse building contains courtrooms, offices for district judges, offices for court personnel, the District Clerk, the County Treasurer, facilities for the grand jury, and a portion of the probation department.”<sup>262</sup> The Attorney General, Ken Paxton, addressed the question by construing “46.03(a)(3) to encompass only government courtrooms and those offices essential to the operation of the government court.”<sup>263</sup> Paxton went further, reminding recipients of the penalties for incorrectly designating public spaces as gun-free areas.<sup>264</sup> Fines and litigation could result if any courthouse prohibited guns in an area deemed not “essential” to the court. Several counties resisted the attorney general’s opinion out of concern for the security risks, including where

“courtroom doors are made out of glass and that’s not going to stop a bullet . . . .” Courtrooms . . . are the scene of emotionally charged cases that

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258. See TEX. PENAL CODE ANN. § 46.035(h-1) (providing notable regulations as Model Rules of Professional Conduct and Code of Judicial Conduct extend to the personal lives of lawyers and judges).

259. TEX. GOV'T CODE ANN. § 411.1882(a).

260. See Certain Offenses Relating to Carrying Concealed Handguns on Property Owned or Leased by a Governmental Entity; Providing a Civil Penalty, 84th Leg., R.S., ch. 593, § 3, sec. 411.209(a), 2015 Tex. Sess. Law Serv. 2000, 2000–01 (codified at TEX. GOV'T CODE ANN. § 411.209) (conforming to open carry laws).

261. TEX. PENAL CODE ANN. § 46.03(a)(3).

262. Letter from Allison Palmer, Dist. Attorney, to Ken Paxton, Tex. Att’y Gen. (July 14, 2015).

263. Tex. Att’y Gen. Op. No. KP-0047 (2015).

264. *Id.*

have been known to erupt in violence: “people tried for murder, molesting children, victim’s families and people involved in family law disputes.”<sup>265</sup>

The City of Austin lost its attempt to defy the attorney general’s interpretation of the law expanding guns in courthouses.<sup>266</sup> Further complicating the situation was the 2015 legislative amendment that changed the baseline for licensees from a “concealed carry license” (CHL) to a “license to carry,” thus permitting licensees to openly carry as long as the licensee holstered the gun at the shoulder or belt.<sup>267</sup> These amendments generally supplanted open carry rights where a licensee previously had been permitted to carry with a CHL.<sup>268</sup>

The general trend towards permitting more guns in courthouses is occurring outside of Texas as well, though not always with as much politicized fanfare.<sup>269</sup> Some states only permit courtroom gun prohibitions if specified screening measures are in place.<sup>270</sup> Many states permit some form of carry in the non-judicial areas of the courthouse. Texas, Alaska, Minnesota, and Mississippi permit openly carrying firearms in courthouses but not in courtrooms themselves.<sup>271</sup> In at least Arkansas and Kansas,

265. Jordan Michaels, *Texas AG Sues a Houston County to Allow Concealed Firearms on Courthouse Premises*, GUNS AM. DIG. (Sept. 5, 2016), <https://www.gunsamerica.com/digest/texas-ag-sues-a-houston-county-to-allow-concealed-firearms-on-courthouse-premises/> [https://perma.cc/QQ17-ANL7].

266. *Paxton v. City of Austin, et al.*, No. D-1-GN-16-003340 (261st Dist. Ct., Travis County, Tex. Jan. 17, 2019).

267. See Tex. H.B. 910, 84th Leg., R.S. (2015) (using specific language to describe how the “court may suspend a license to carry a handgun issued” under the Government Code) (emphasis added).

268. See Anna M. Tinsley, *Open Carry Is the Law of the Land in Texas As of Jan. 1*, FORT WORTH STAR-TELEGRAM (Dec. 26, 2015, 7:31 PM), <https://www.star-telegram.com/news/politics-government/article51727345.html> [https://perma.cc/XP7B-VX9Z] (“[A]nywhere you can go with a concealed handgun you can openly carry.”).

269. See, e.g., *Holcomb v. McCraw*, 262 F. Supp. 3d 437, 441 (W.D. Tex. 2017) (introducing a § 1983 action against arresting officers who arrested gun rights activists for criminal trespass while advocating for openly carrying firearms in public by displaying fake guns at Texas State Capitol).

270. COLO. REV. STAT. ANN. § 18-12-214(4)(a)–(c) (West 2013). But see Standing Order Regarding Firearms and Other Deadly Weapons, No. 2013-03 (Colo 12th Dist. Ct. 2013) (“[C]ourts have the inherent power to regulate their own environment to provide for the safe, effective administrative of justice . . .”).

271. Alaska permits carrying guns in non-judicial areas if more than just the court system and justice-related agencies occupy the courthouse building. ALASKA STAT. ANN. § 11.61.220(a)(4)(B)(ii) (West 2007). Texas permits licensed open carry in non-judicial areas. Tex. Att’y Gen. Op. No. KP-0047 (2015). Minnesota permits carrying guns if the carrier is licensed and has consent from the sheriff. MINN. STAT. ANN. § 609.66(1g)(b)(2), (4) (West 2009). In Mississippi, judges have no authority to prohibit guns beyond his or her courtroom, however, the sheriff *may* disallow open carry in the courthouse for safety and security purposes. Miss. Att’y Gen. Op. 2013-00114 (2013).

concealed carrying, but not open carry, is permissible in non-judicial areas of courthouses.<sup>272</sup> The state-by-state variations can be bewildering: in Michigan, for example, statutory law permits licensed concealed carry in a courthouse,<sup>273</sup> but a subsequent administrative order from the Michigan Supreme Court barred firearms from courthouses in that state.<sup>274</sup> Missouri law prohibits guns in courthouses that are solely occupied by specific courts, but otherwise protects judicial areas; however, Missouri permits a “general assembly, supreme court, county or municipality” the option to prohibit concealed carry by permit holders in buildings owned or leased by the entity.<sup>275</sup> In addition, at least eleven states carve out explicit exceptions to permit some or all judges to carry guns in court: Arkansas,<sup>276</sup> Georgia,<sup>277</sup> Louisiana,<sup>278</sup> Missouri,<sup>279</sup> North Carolina,<sup>280</sup> Ohio,<sup>281</sup>

272. Arkansas permits licensed concealed carry except in a courtroom. ARK. CODE ANN. § 5-73-122(a)(3)(D)(i) (West 2017). Kansas permits concealed carry in public areas unless there are “adequate security measures to ensure that no weapons are permitted to be carried into such public area and the public area is conspicuously posted with either permanent or temporary signage approved by the governing body.” KAN. STAT. ANN. § 75-7c20(a) (2008); *see* Kan. Att’y. Gen. Op. No. 2015-3 (2015) (requiring adequate security measures to ensure no weapons are permitted in certain public places); Kan. Att’y Gen. Op. No. 2013-14 (2013) (describing the locations where carrying is not permitted).

273. MICH. COMP. LAWS ANN. § 750.234d(1)(c), (2)(c) (West 2004).

274. *See* Security Policies for Court Facilities, No. 2001-1 (Mich. 2001) (barring guns from courthouses); Mich. Gun Owners, Inc. v. Ann Arbor Pub. Schs., 897 N.W.2d 768, 775 n.8 (Mich. Ct. App. 2016) (“Despite that MCL 750.234d(2)(c) permits concealed weapon holders to carry concealed weapons in [a] court, our Supreme Court has promulgated an administrative order barring the presence of *all* weapons in court facilities unless approved by the chief judge.”), *aff’d*, 918 N.W.2d 756 (Mich. 2018).

275. MO. ANN. STAT. § 571.107(4), (6) (West 2018).

276. *See* ARK. CODE ANN. § 5-73-122(a)(3)(E) (West 2017) (permitting the carrying of a firearm in a public building “[i]f the person has a license to carry a concealed handgun . . . , is a justice of the Supreme Court or a judge on the Court of Appeals, and is carrying a concealed handgun in the Arkansas Justice Building.”).

277. *See* GA. CODE ANN. § 16-11-130(a)(12)–(12.2) (West 2015) (providing exceptions for current and retired court employees).

278. *See* LA. STAT. ANN. § 40:1379.3(N)(3) (2016) (“[A] judge may carry such a weapon in his own courtroom.”).

279. *See* MO. ANN. STAT. § 571.030(2)(10) (West 2018) (excepting government attorneys and court-appointed persons who have “completed the firearms safety training course”).

280. *See* N.C. GEN. STAT. ANN. § 14-269(b)(4d) (West 2014) (“The judge or magistrate shall secure the weapon in a locked compartment when the weapon is not on the person of the judge or magistrate[.]”).

281. *See* OHIO REV. CODE ANN. § 2923.123(C), (E) (West 2006) (allowing listed court personnel to carry firearms in a courthouse).



Oklahoma,<sup>282</sup> South Carolina,<sup>283</sup> Texas,<sup>284</sup> Utah,<sup>285</sup> and Wisconsin.<sup>286</sup> Most of the states also listed expressly exclude peace officers (to varying extents) from courthouse gun prohibitions, although Arkansas<sup>287</sup> and South Carolina<sup>288</sup> expressly except officers appearing as witnesses from this exclusion. Prosecutors may also carry guns into court in a few states: Georgia,<sup>289</sup> Kansas,<sup>290</sup> Missouri,<sup>291</sup> North Carolina,<sup>292</sup> and Wisconsin<sup>293</sup> permit prosecutors to have concealed firearms with them in court, but not other attorneys or parties. Some states explicitly exclude parking lots from gun bans.<sup>294</sup>

The trend of permitting guns in and around courthouses overlaps with the concerns outlined here about lawyers openly carrying firearms. There is an expanded number of places where lawyers could carry firearms when

282. See OKLA. STAT. ANN. tit. 21, § 1277(G)(2), (4) (West 2018) (granting an exception “when acting in the course and scope of employment within the courthouse”); *id.* § 1272(A)(4) (requiring a valid handgun license and maintenance of an Administrative Director of the Courts list).

283. See S.C. CODE ANN. § 23-31-240 (2007) (listing persons who may carry a concealed firearm anywhere within the State).

284. See TEX. PENAL CODE ANN. § 46.035(h-1) (providing a defense to prosecution if the carrier is a judge, active judicial officer, or prosecutor).

285. See UTAH CODE ANN. § 78A-2-203(1) (West 2009) (“Every court of record may make rules . . . for its own government and the government of its officers . . .”).

286. See WIS. STAT. ANN. § 175.60(16)(b)(2) (West 2016) (allowing a judge who is a licensee to carry a weapon).

287. See ARK. CODE ANN. § 5-73-122(e) (West 2017) (“An off-duty law enforcement officer may not carry a firearm into a courtroom if the off-duty law enforcement officer is a party to or a witness . . .”).

288. See Courtroom Security Order, No. 2001-07-10-01 (S.C. 2001) (“Concealed or unconcealed weapons are prohibited in the courtroom except when carried by law enforcement officers . . .”).

289. See GA. CODE ANN. § 16-11-130(a)(5) (West 2015) (allowing district attorneys and other government employees to carry firearms in courtrooms).

290. See Kan. Att’y Gen. Op. No. 2009-20 (2009) (clarifying exception allowing district and other state attorneys to carry firearms in a courtroom unless prohibited by the chief judge of the district where requisite security measures are in place); KAN. STAT. ANN. § 75-7c20(h) (West 2008) (exempting prosecutors from the prohibition against unauthorized possession of a firearm in county courthouses).

291. See MO. ANN. STAT. § 571.030(2)(10) (West 2018) (excepting prosecuting attorneys that have completed the required safety training course).

292. See N.C. GEN. STAT. ANN. § 14-269(b)(4a) (West 2014) (“[A] district attorney may carry a concealed weapon while in a courtroom . . .”).

293. See WIS. STAT. ANN. § 175.60(16)(b)(3) (West 2016) (permitting concealed carry of a weapon in a courthouse).

294. See KAN. STAT. ANN. § 21-6309(g) (West 2012) (defining a “courthouse” to exclude parking structures); MO. ANN. STAT. § 571.107(1)(4) (West 2018) (excluding parking lots from the definition of “courthouse”); N.C. GEN. STAT. ANN. § 14-269.4(6) (West 2014) (providing separate guidelines for parking lots).

meeting with opposing parties, jurors, and witnesses—the hallways, bathrooms, and auxiliary meeting rooms in courthouse facilities. In addition, the awareness that a hostile opposing party could bring a firearm (say, in a marital dissolution or child custody matter) to areas within the courthouse may induce more lawyers, or their staff or clients, to openly carry weapons as a preemptive measure. The expansion of gun-carrying rights in areas where litigation participants will encounter one another merely heightens the urgency of a clear ethical rule for lawyers in this regard.

#### IV. CONCLUSION

The report accompanying ABA Resolution 19A105 summed up the situation well: “In a society that has become increasingly volatile and where civility has diminished, the time has come for firearms to be banned from the courtroom, courthouses and court facilities except for those persons properly trained and charged with providing security at these locations.”<sup>295</sup> The same should apply to litigation-related meetings, such as depositions and settlement conferences that occur in other locations—especially for the lawyers conducting these meetings. This is not the first time the American Bar Association has ventured into the area of firearm policy. In addition to firearms in courthouses, the ABA responded to the Parkland Shooting by issuing a resolution to the House of Delegates, demonstrating its opposition to laws and policies that propose arming teachers with guns.<sup>296</sup> The ABA also published a resolution that urged the government to allow individuals to voluntarily request their name be added to the National Instant Criminal Background Check System (NICS) in order to prevent themselves from purchasing firearms.<sup>297</sup>

In previous years, the ABA has taken a stance on numerous gun violence issues. For example, the ABA is in favor of legal procedures, such as

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295. ABA Standing Comm. on Gun Violence, *supra* note 230.

296. ABA Standing Comm. on Gun Violence, *Res. 19M106A* (Jan. 2019), [https://www.americanbar.org/groups/public\\_interest/gun\\_violence/policy/19M106A/](https://www.americanbar.org/groups/public_interest/gun_violence/policy/19M106A/) [<https://perma.cc/DLK2-EC34>]. The ABA noted that a study conducted by the Division of Public Safety Leadership at Johns Hopkins University School of Education, found that arming teachers would increase the risk of students being shot at school by creating opportunities for teachers to use lethal force unnecessarily. *Id.* Additionally, the chance of bystander injury was taken into consideration, looking at the fact that even law enforcement officers who receive extensive training only hit their target successfully 18% of the time due to the psychological stress. *Id.*

297. ABA Standing Comm. on Gun Violence, *Res. 19M106B – NICS Self Reporting* (Jan. 2019), [https://www.americanbar.org/groups/public\\_interest/gun\\_violence/policy/19M106B/](https://www.americanbar.org/groups/public_interest/gun_violence/policy/19M106B/) [<https://perma.cc/9JHA-C9Q9>].

Gun Violence Restraining Orders (GRVO), which allow courts to remove guns from individuals exhibiting dangerous behaviors by authorizing a restraining order.<sup>298</sup> The ABA voiced its opposition to legislation that truncates physicians' rights to inquire about their patients' gun ownership and inform patients of the dangers of owning guns in a household.<sup>299</sup> In addition, the ABA advocated laws that impose restrictions on concealed carry while opposing laws that would require states to recognize permits issued by other states.<sup>300</sup> With respect to the NICS, the ABA has admonished the Department of Justice to rescind a memorandum allowing agencies not to report to the Federal Bureau of Investigation, which has stagnated the accuracy of the NICS.<sup>301</sup> The ABA also addressed microstamping, a new technology that enables law enforcement to solve gun-related crimes.<sup>302</sup> Specifically, the Honorable Robert B. Collings wrote a report on behalf of the ABA imploring the federal government to follow the example set by California and the District of Columbia legislatures by "requiring that all newly-manufactured semi-automatic pistols be fitted with microstamping technology."<sup>303</sup>

The ABA's contributions to our gun policy discourse have been timely, balanced, and well-reasoned. In essence, their specific policy proposals should be the gold standard for legislators when it comes to firearm

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298. ABA Standing Comm. on Gun Violence, *Res. 17A118B* (Aug. 2017), [https://www.americanbar.org/groups/public\\_interest/gun\\_violence/policy/17a118b/](https://www.americanbar.org/groups/public_interest/gun_violence/policy/17a118b/) [https://perma.cc/8YHC-Y3HG].

299. These laws, also known as "physician gag rules," implicate First Amendment freedom of speech issues for both practitioners and patients. ABA Standing Comm. on Gun Violence, *Res. 12A111* (Aug. 2012), [https://www.americanbar.org/groups/public\\_interest/gun\\_violence/policy/12a111/](https://www.americanbar.org/groups/public_interest/gun_violence/policy/12a111/) [https://perma.cc/BXY4-2D96].

300. ABA Standing Comm. on Gun Violence, *Res. 11A115* (Aug. 2011), [https://www.americanbar.org/groups/public\\_interest/gun\\_violence/policy/11A115/](https://www.americanbar.org/groups/public_interest/gun_violence/policy/11A115/) [https://perma.cc/EW98-VBLP].

301. *Id.*

302. ABA Standing Comm. on Gun Violence, *Res. 10A115* (Aug. 2010), [https://www.americanbar.org/groups/public\\_interest/gun\\_violence/policy/10A115/](https://www.americanbar.org/groups/public_interest/gun_violence/policy/10A115/) [https://perma.cc/CP43-T4XL]. The technology surpasses antiquated ballistic identification by using a unique alpha-numeric code that is linked to the firearm's model and is stamped onto an internal surface of the firearm. *Microstamping & Ballistics*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/crime-guns/microstamping-ballistics/> [https://perma.cc/466K-SW7B]. The legislation enacted in California and the District of Columbia would make it illegal for firearms dealers within the jurisdiction to sell any semiautomatic weapon without the microstamping technology readily available.

303. ABA Standing Comm. on Gun Violence, *supra* note 302; *see Nat'l Shooting Sports Found., Inc. v. State*, 420 P.3d 870, 875 (Cal. 2018) (upholding the California law requiring microstamping and rejecting the firearm association's impossibility argument on the basis of public policy and the Department of Justice's administrative determination).

regulations. For this reason, the ABA would be the ideal source of a new policy in this area, discouraging lawyers from openly carrying firearms to adversarial meetings; a co-sponsorship by the Standing Committee on Gun Violence and the Center for Professional Responsibility would be ideal. Of course, an enforceable ethical rule would have to come from each state's bar, ethics committee, or disciplinary authority. As our society becomes increasingly violent and openly carried firearms become even more prevalent, the legal profession must rise above this social decay and maintain appropriate decorum and professionalism as we provide legal representation.

An express rule prohibiting lawyers from openly carrying firearms to depositions and other adversarial meetings, or doing so through others (clients, staff, or agents), would be helpful in two ways—the same two ways that existing rules are beneficial. On the one hand, a clear rule provides a definitive benchmark for assessing complaints and grievances. Feeling intimidated by another person's visible weapon is an inherently subjective injury, difficult to measure or quantify, and can vary subtly depending on the setting and individuals involved. A bright-line rule provides necessary guidance for lawyer disciplinary authorities (say, a state grievance committee or a judge deciding whether to sanction a litigant). It can also benefit a victim, who may feel threatened and intimidated, but may also have self-doubt about the reasonableness of her concerns, or insecurity about how others would respond if the intimidated person speaks up. A clear rule signals to the affronted individual that their concerns are legitimate and that the other person's conduct is indeed objectionable. On the other hand, clear ethical rules help shape the norms of professionalism for the legal community and the individual attorney. Rather than being a ceiling on lawyers' allowable behaviors, ethical rules are a floor that lawyers aspire to rise above—there is no upper limit on professionalism. Vague rules may provide aspirational goals, but a clear rule is something to stay far above and assumes that most lawyers already aspire to professionalism and excellence.