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Conduct Relating to the Practice of Law: ABA Model Rule 8.4(G) and its History in Light of the Constitution

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ARTICLE

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Abstract. The ABA adopted a revision to the Model Rules in 2016, prohibiting harassment and discrimination against a list of protected classes. The Rule, while well-intentioned and targeted at a serious problem, was broadly phrased to include a large category of protected speech and behavior. The Rule has already faced extensive and well-crafted challenges from the perspective of the Free Speech Clause. This article argues that two additional provisions of the First Amendment—the Free Exercise Clause and Freedom of Association—further illustrate the failure of the Rule and the alarmingly wide-ranging effects of such a prohibition on attorney conduct.

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I. INTRODUCTION

In 2016, the American Bar Association ("ABA") Model Rules of Professional Responsibility were amended to include a provision that would target bias, harassment, and discrimination in the legal profession.[1] The new Rule prohibits attorneys from engaging in "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[2] The scope of this new provision includes all conduct that occurs "in connection with the practice of law," broadly defined to include all activities where the practice of law may arise.[3]

There were certainly laudable goals underlying the development of the new Model Rule, and true evils of harassment and discrimination do indeed exist through the legal system. However, that concern unfortunately led drafters of the Rule to set fundamental First Amendment protections to the wayside. Scholars have highlighted the dangers of the Rule from a free speech perspective.[4] While concurring with those critiques, this Article seeks to focus on two other fundamental problems with the ABA's new regulation.

First, the regulation violates the fundamental freedom of association by obliging individuals and organizations to associate in ways that violate their fundamental expressive rights, thereby threatening the activism of nonprofit groups, which are the backbone of American legal advocacy. Under the new Rule as it is written, attorneys for nonprofit organizations cannot choose to represent only people of a particular group or to only hire people that share their unique vision. Individual attorneys are also potentially barred from associating with groups that discriminate in their membership in any way.

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1. Samson Habte, *ABA Delegates Overwhelmingly Approve Anti-Bias Rule*, BLOOMBERG (Aug. 10, 2016), https://news.bloomberglaw.com/business-and-practice/aba-delegates-overwhelmingly-approve-anti-bias-rule [https://perma.cc/8ECW-3M98].

2. MODEL RULES OF PRO. CONDUCT R. 8.4(g) (AM. BAR ASS'N 2022).

3. *Id.* at cmt. 4.

4. *See* Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g). The First Amendment and "Conduct Related to the Practice of Law"*, 30 GEO. J. LEGAL ETHICS 241, 261 (2017) (recognizing the concerns expressed by legal scholars regarding the effects of Rule 8.4's revision); *see also* Michael S. McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 HARV. J.L. & PUB. POL'Y 173, 219–20 (2019) (describing First Amendment concerns caused by the revised Rule 8.4).

The Rules do not carve out any exceptions, even for the most obviously reasonable organizations that look for members that share their beliefs.

Second, the new Rule violates the free exercise rights of religious attorneys. This regulation sets up a system of individualized governance that is not generally applicable, but gives undue discretion to various ethics committees to determine which religious beliefs and practices are acceptable.

Discrimination, bias, and harassment can and should be prevented. But the way to do so is not through rules that illegitimately infringe constitutional rights; it is through the development of rules that are appropriately tailored to the most wrongful conduct they seek to prevent. It is possible to work for equity within the confines of the Constitution, and the ABA Rules should be modified to reflect this reality, explicitly recognizing that the fundamental dictates of conscience must be protected, not proscribed.

II. HISTORY OF THE RULE

A. *Drafting History*

As critiques of the Rule have noted, the new Model Rule was developed in a rush that left many of the underlying issues and legal questions unresolved.[5] The "legislative history" underlying the Rule demonstrates that it was developed in relative secrecy, without extensive comment on behalf of the ABA's broader membership or the bar at large, unlike previous substantial developments in the Model Rules.[6] The anti-bias provision was developed between 2014 and 2016 with five significant versions debated throughout. All versions varied significantly but none of them considered serious public comment.[7] Over the course of the Rule's development, explicit constitutional protections and limitations were removed, and the scope of the Rule broadened to cover more private activity.[8]

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5. Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and Call for Scholarship*, 41 J. LEGAL PROF. 201, 202 (2016).

6. *Id.* at 203.

7. *See id.* at 204 (explaining "Version 1" of the anti-bias provision of the Model Rules was formulated without ABA's broad membership, the bar at large, or the public).

8. *See id.* at 206–11 (outlining the incremental broadening of the anti-discrimination rule over time).

Prior to the revision of Rule 8.4, a comment on the general prohibition of "conduct that is prejudicial to the administration of justice"[9] provided:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation[,] or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).[10]

There are two key things to note about this earlier provision. First, it was contained in a comment, not in the Model Rules themselves. Many states have chosen not to adopt the comments to the Model Rules, and most of those that do, treat the comments with the same status as the Rules themselves.[11] In addition, and more pertinent to this Article, the comment was linked explicitly to conduct that is "prejudicial to the administration of justice."[12] Unlike the current language of the Rules, this comment was tailored to the context of the administration of justice.[13] The constitutional concerns raised about the current Rule would not be nearly so applicable to this earlier comment, even if this comment had been elevated to the status of a rule.

Two proposals brought forth in 1994, one from the Young Lawyers Division and one from the Standing Committee, would have added a discrimination and harassment provision to the Rules of Professional Conduct.[14] The proposal from the Young Lawyers Division would have prohibited discrimination or harassment "committed in connection with a lawyer's professional activities."[15] The Standing Committee argued that "a

9. MODEL RULES OF PROF'L CONDUCT R. 8.4(d).

10. *Id.* at cmt. 3.

11. *See, e.g.*, Aiken v. Bus. and Indus. Health Grp., Inc, 885 F. Supp. 1474, 1476 (D. Kan. 1995) (adopting comments to the Rules only "to the extent not inconsistent with" the Rules themselves (quoting Kan. Sup. Ct. R. 226)).

12. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3.

13. Halaby & Long, *supra* note 5, at 205.

14. Andrew Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 784 (1996) (recounting early efforts to introduce anti-bias requirements to the Model Rules).

15. Halaby & Long, *supra* note 5, at 206; *see also* Standing Comm. on Ethics & Pro. Resp. et. al, *Am. Bar Ass'n., Report to House of Delegates*, 2 (2016)

need for a cultural shift in understanding" justified the new Rule.[16] Both proposals were withdrawn before they could be considered by the House of Delegates.[17] In 1998, the Criminal Justice Section submitted a proposal that would have prohibited verbal or physical discriminatory acts "if intended to abuse" parties involved in the litigation.[18] Of particular note is comment 8 on this proposed rule, which reads in part:

> Excluded from paragraph (g), however, are a lawyer's advocating the racist, sexist, or otherwise discriminatory views of a client, in or out of court, or the lawyer's advocating his own discriminatory views, no matter how offensive, in bar speeches, corporate board meetings, church meetings, published writings, civic association functions, or other avenues of expression in the lawyer's personal life, or in his professional life outside of client representation. Nor would a lawyer's freedom to choose which client the lawyer will represent be affected. Similarly, confidential attorney-client communications are fully protected.[19]

This explicit exclusion emphasizes the importance of not allowing the rules to broadly apply to the personal and private lives of attorneys. The rule was also closely tied to conduct "in the course of representing a client."[20] Although this proposal was more narrowly tailored, it was still ultimately withdrawn.[21] That same year, the Standing Committee proposed an amendment through comment, rather than through a change to the Rule.[22] It noted previous attempts to "develop a clear and constitutionally enforceable black-letter rule of the professional conduct on this subject proved difficult, controversial[,] and divisive."[23] The Standing Committee noted that "manifestations of bias and prejudice sometimes include

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https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.pdf [https://perma.cc/YXN3-T3JR] (proposing to add language specifying "bias and prejudice as professional misconduct").

16. Halaby & Long, *supra* note 5, at 223 n.122.
17. *Id.* at 206, 209.
18. *Id.* at 207.
19. *Id.* at 208.
20. *Id.* at 209.
21. *Id.*
22. *Id.* at 207.
23. *Id.* at 209–10.

protected speech."[24] Therefore, the Standing Committee's proposal was narrowly limited to conduct prejudicial to the administration of justice. This proposal was adopted in the form of comment 8, discussed above.[25]

A group of ABA commissions asked the Standing Committee in 2014 "to develop a proposal to amend the Model Rules of Professional Conduct to better address issues of harassment and discrimination."[26] These commissions complained that the current Model Rule 8.4(d) "d[id] not facially address bias, discrimination, or harassment and d[id] not thoroughly address the scope of the issue in the legal profession or legal system."[27] A working group was formed that prepared a draft that it provided to the Standing Committee.[28] This draft, called the "Working Discussion Draft," prohibited harassment or discrimination in a vast variety of protected categories, "while engaged [in conduct related to] . . . the practice of law."[29] This first version began the expansion of "covered lawyer activity from conduct 'in the course of representing a client' to any conduct 'related to' or 'in the practice of law.'"[30] What is perhaps most striking is the fact that the previous comment's limitation to conduct that is prejudicial to the administration of justice is removed, and the new proposal would have been free-standing.[31]

After input was received from the Standing Committee on Professional Discipline, a revised version of the new Rule was circulated on December 22, 2015.[32] This version of the proposal would have modified Model Rule 8.4 by prohibiting harassment or knowing discrimination "in

24. *Id.* at 210.

25. *Id.* at 211.

26. *Id.* at 212 (quoting Standing Comm. on Ethics & Prof'l Resp., Am. Bar. Ass'n, *Working Discussion Draft Revisions to Model Rule 8.4: Language Choice Narrative*, at 1 (July 16, 2015)), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf [https://perma.cc/CY3L-HFMJ].

27. Halaby & Long, *supra* note 5, at 212 (quoting Letter from Goal III Commissions' Chairs to Paula J. Frederick, Chair, ABA Standing Comm. on Ethics & Pro. Resp. (May 13, 2014)).

28. Halaby & Long, *supra* note 5, at 212–13.

29. *Id.* at 212–13 (quoting Working Discussion Draft: Amendment to Model Rule 8.4 and Comment 3 (July 8, 2015)) https://www.americanbar.org/content/dam/aba/administrative/professionalresponsibility/draft07082015.pdf [https://perma.cc/8TMX-NR84].

30. *Id.* at 213 (quoting Working Discussion Draft, *supra* note 29).

31. *Id.* at 214.

32. *Id.*

conduct related to the practice of law."[33] A proposed comment on the Rule established strong constitutional limitations, saying that the new Rule "does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment."[34] The comment also clarified that the Rule is not designed to affect the circumstances in which a lawyer may withdraw or choose to accept representation.[35]

Public comment was solicited at a public hearing, the first such hearing on any proposed rules.[36] The hearing, which lasted two hours, only included one witness in opposition to the Rule.[37] The proponents expressed a desire to encompass a broad scope of prohibited conduct.[38] Likewise, the Rule's proponents argued for the complete removal of a knowledge qualifier to better target implicit bias in the profession.[39] For example, Robert Weiner a representative of the Section of Civil Rights and Social Justice, testified, "Many people who are racists or misogynists or anti-gay don't realize they are."[40] Standing Committee Chair Myles Lynk said candidly, "[T]he notion that we don't have a rule in the black letter dealing with discrimination is embarrassing to all of us."[41] David Strauss—the sole opponent of the Rule present at the hearing—critiqued the one-sidedness of the hearing and opposed extending the Rule to private conduct unrelated to the delivery of legal services.[42]

Some written responses from ABA entities expressed support and urged for the broad coverage of lawyer conduct.[43] While the civil rights sections of the ABA expressed support for comprehensive prohibitions, other ABA

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33. *Id.* (quoting Memorandum from the Standing Comm. on Ethics & Pro. Resp., Draft Proposal to Amend Model Rule 8.4, at 2 (Dec. 22, 2015)), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.pdf [https://perma.cc/X2S4-3YLY].

34. *Id.* at 215.

35. *Id.*

36. *Id.* at 216.

37. *Id.*

38. *Id.* at 216–17.

39. *Id.*

40. *Id.* at 217 (quoting Am. Bar Ass'n, *Public Hearing Transcript*, at 33 (Feb. 7, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.pdf [https://perma.cc/46RN-VQDJ]).

41. *Id.*

42. *Id.* at 216–17.

43. *Id.* at 216–18.

entities voiced their concerns.[44] Over 481 comments were filed by non-ABA entities, of which 474 were filed by individuals.[45] A great majority of the individual commenters opposed the proposal.[46] Perhaps the most significant comment was filed by the Christian Legal Society (CLS). CLS's comment highlighted the constitutional concerns of the new, broad provision.[47] CLS also highlighted the danger of attempting to impose "a 'cultural shift' on all attorneys."[48]

In response to this feedback, a third version was prepared and formally submitted as a proposed ABA Report and Resolution.[49] Without any additional hearings, the new proposal explicitly stated that it did not affect an attorney's abilities to "accept, decline, or withdraw from a representation."[50] It only applied to "conduct related to the practice of law."[51] Additionally, the knowledge requirement was removed from both harassment and discrimination.[52] The ABA Civil Rights groups advocated assertively for this exclusion.[53] By way of comment, this version further clarified, "Conduct related to the practice of law includes . . . participating in bar association, business[,] or social activities in connection with the practice of law."[54] Without explanation, the Rule no longer contained an explicit safeguard for constitutionally protected behavior under the

44. *Id.* at 219–20.

45. *Id.* at 221; *see also* Am. Bar Ass'n, *Model Rules of Pro. Conduct 8.4 Comments*, (Feb. 13, 2017), https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments/ [https://perma.cc/3SMC-W772] (listing each comment offered on the proposed rule).

46. Halaby & Long, *supra* note 5, at 221.

47. *See* Letter from David Nammo to ABA Ethics Comm. re Comments of the Christian Legal Society on Proposed Rule 8.4(g) and Comment 3, at 5 (Mar. 10, 2016), (on file with the American Bar Association Standing Committee on Ethics and Professional Responsibility) (noting the First Amendment concerns raised by the Rule's vagueness).

48. *Id.* at 2–3.

49. Halaby & Long, *supra* note 5, at 223–24.

50. *Id.* at 226 (quoting MODEL RULES OF PROF'L CONDUCT R. 8.4(G) (AM. BAR ASS'N, Proposed Draft, April 12, 2016)), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/draft_redline_04_12_2016.pdf [https://perma.cc/S7XP-J5B4] [hereinafter Model Rules Proposed Draft].

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

First Amendment.[55] The conduct within the scope of this finalized Rule includes "virtually anything a working lawyer might do."[56]

The Rule still faced significant opposition.[57] In light of this resistance, a new version was created that reintroduced a knowledge requirement.[58] Otherwise, the proposal was left largely unchanged, and the First Amendment concerns remained unaddressed.[59] Further lobbying led to the inclusion of one catchall statement: "This paragraph does not preclude legitimate advice or advocacy consistent with these Rules."[60] The scope of the role itself remained unchanged. The new proposal passed by voice vote among the delegates.[61] Unlike other substantial changes to the Model Rules, there was no debate held among the collective ABA House of Delegates held on this matter.[62] Nevertheless, the Rule passed and was considered a sweeping victory for the Rule's proponents.[63]

B. *Acceptance*

The acceptance of the new Model Rule has been very limited, and several states that have examined the Model Rule have explicitly rejected it.[64] These state responses help highlight the dangers of such a broadly worded provision with wide-ranging effects.[65] The widespread negative reaction to the ABA's proposal should encourage the ABA to reconsider.

Four states have concluded that Model Rule 8.4(g) is unconstitutional and would be unlawful if adopted in their states.[66] Texas Attorney General Ken Paxton issued an opinion regarding the constitutionality of the new Rule.[67]

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55. *See generally* Model Rules Proposed Draft, *supra* note 50 (lacking any reference to First Amendment protected activity).

56. Halaby & Long, *supra* note 5, at 226.

57. *Id.* at 227.

58. *Id.* at 227–28.

59. *Id.* at 231.

60. *Id.* (quoting Model Rules Proposed Draft, *supra* note 50).

61. *Id.* at 232.

62. *Id.* at 233.

63. *See* Habte, *supra* note 1 (noting "[o]nly a handful of 'nays' were heard" from nearly six hundred attendees of the vote).

64. Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. U. L. REV. 629, 630 (2019).

65. *See generally id.* at 630–34 (outlining the various constitutional concerns brought forth by multiple state officials and committees).

66. *Id.* at 630.

67. Tex. Att'y Gen. Op. No. KP-0123 1, 1 (Dec. 20, 2016), https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf [https://perma.cc/A72V-AA86].

Paxton found that the Rule, if adopted in Texas, would place unconstitutional restrictions on an attorney's ability to speak.[68] He particularly emphasized the manner in which the Rule would broadly apply far beyond the contexts of judicial proceedings, by invading an attorney's social activities.[69] While Paxton emphasized the Rule's impact on free speech, he also noted that such a rule would raise serious free exercise and freedom of association concerns.[70]

South Carolina Solicitor General Robert D. Cook reached a similar conclusion in May 2017, drawing on Paxton's analysis.[71] Cook acknowledged that the state does have an interest in the regulation of the lawyer's profession.[72] Citing Paxton's opinion, as well as the free speech arguments of Professor Rotunda and Eugene Volokh, Cook argued that the proposed Rule would violate the First Amendment and basic due process guarantees.[73] The Professional Responsibility Committee of the South Carolina Bar agreed.[74] The South Carolina Supreme Court came to the same conclusion.[75]

The Louisiana Attorney General Jeff Landry, likewise found that the Rule violates the Constitution.[76] Landry critiqued the Rule for applying to "a private interaction . . . at a social activity."[77] He found the proposed Rule to be a violation of the right to freedom of speech.[78] In addition, the Rule violates the Free Exercise clause: "a lawyer who acts as a legal advisor on

68. *Id.* at 3.

69. *Id.*

70. *Id.*

71. S.C. Att'y Gen. Op. No. 1, 5, 14 (May 1, 2017), http://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf [https://perma.cc/ED72-3UGM].

72. *Id.* at 4.

73. *Id.* at 8; Blackman, *supra* note 64, at 631.

74. Blackman, *supra* note 64, at 631.

75. Supreme Ct. of S.C., *Order, In re Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct*, (June 20, 2017), https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01 [https://perma.cc/F8J6-HSTU] (declining "to incorporate ABA Model Rule 8.4 within Rule 8.4, RPC, as requested by the ABA").

76. *See* La. Att'y Gen. Op. No. 17-00114, 9 (Sept. 8, 2017), https://www.ag.state.la.us/JusticeCourt/Directory [https://perma.cc/9TWR-8GY9] (opining that ABA Model Rule of Professional Conduct 8.4(g) and LSBA proposed Rule 8.4(g) violate the First and Fourteenth Amendments of the United States Constitution).

77. *See id.* at 6 (providing an example of how the rule can impose upon an attorney's personal life).

78. *Id.* at 5.

the board of their church would be engaging in professional misconduct if they . . . taught a class at their religious institution against divorce."[79] Louisiana rejected the proposed Rule.[80]

Finally, in March of 2018, Tennessee Attorney General Herbert Slattery found that the Rule was both unconstitutional and in conflict with the preexisting Rules of Professional Conduct.[81] He emphasized the broad scope of the proposed Rule.[82]

> Proposed Rule 8.4(g) would profoundly transform the professional regulation of Tennessee attorneys. It would regulate aspects of an attorney's life that are far removed from protecting clients, preventing interference with the administration of justice, ensuring attorneys' fitness to practice law, or other traditional goals of professional regulation.[83]

The scope of Rule 8.4(g) reaches "well beyond federal and state antidiscrimination laws," and is not limited to those laws.[84] Slattery also expressed a particularly strong concern about the manner Rule 8.4(g) broadens protections beyond traditionally protected categories to more controversial matters, such as sexual orientation and gender identity, about which sincerely held beliefs can and do differ.[85] He also emphasized that there is also a complete lack of religious liberty protections contained within the proposed Rule itself.[86]

A few states have more briefly considered Rule 8.4(g) and rejected it.[87] In February 2017, the Central Arizona Chapter of the National Lawyers Guild petitioned the Arizona Supreme Court to adopt ABA Model Rule 8.4(g).[88]

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79. *Id.* at 7.

80. *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations re: ABA Model Rule 8.4(g)*, LA. STATE BAR ASS'N, https://www.lsba.org/BarGovernance/CommitteeInfo.aspx [https://perma.cc/XD9V-86WB].

81. Tenn. Att'y Gen., *Comment Letter No. ADM2017-02244 Opposing Proposed Rule of Professional Conduct 8.4(g)*, 1 (Mar. 16, 2018), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf [https://perma.cc/7SYF-J3ZW].

82. *Id.* at 4, 9.

83. *Id.* at 2.

84. *Id.* at 4.

85. *Id.* at 3–4.

86. *Id.* at 4.

87. Blackman, *supra* note 64, at 641–42.

88. Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court (Feb. 23, 2017) (No. R-17-0032) https://www.azcourts.gov/Rules-Forum/aft/281 [https://perma.cc/3FK5-RYL6].

That petition was denied on August 27, 2018.[89] Nevada briefly considered a similar rule[90] but it too was rejected.[91] Montana was considering such a rule, until the Montana Legislature passed a joint resolution opposing the Rule as unconstitutional.[92] The Idaho State Bar Association proposed adopting ABA Model Rule 8.4(g) with modifications.[93] The Idaho Supreme Court later rejected the proposed resolution in September of 2018.[94] The court chose not to decide on the constitutionality of the amended Rule, but rejected it with hopes of narrowing the Rule for acceptance.[95]

Vermont is the only state that has adopted the ABA Rule in its entirety.[96] It did so without facing significant opposition.[97] Vermont broadened its rule beyond the ABA Rules, in that the ABA Rules do not explicitly apply to discretionary withdrawals from representation, while Vermont's rule includes discretionary withdrawal.[98]

In October 2016, the Pennsylvania Bar Association Women in the Profession Commission proposed adopting Rule 8.4(g).[99] The Pennsylvania's Supreme Court's Disciplinary Board found the Rule overly broad and rejected its wholesale adoption.[100] The Rule was modified in a number of ways, including by narrowing the scope of the prohibition to exclude speech arising in conduct relating to the practice of the law.[101] The

89. Blackman, *supra* note 64, at 642.

90. *Id.*

91. In the Matter of Amendments to Rule of Professional Conduct 8.4, (Nev. Sept. 25, 2017) (No. ADKT-0526), https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf [https://perma.cc/YT9X-TMUZ].

92. S.J. Res. 15, 65th Leg. (Mont. 2017).

93. Blackman, *supra* note 64, at 635.

94. Letter from Chief Justice of Idaho Sup. Ct. Roger S. Burdick, to Exec. Dir. of Idaho State Bar Diane Minnich, (Sept. 6, 2018), https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf [https://perma.cc/27VC-QY6F].

95. Blackman, *supra* note 64, at 635.

96. *Id.* at 641.

97. *Id.*

98. *Id.*

99. PA. BAR ASS'N, WOMEN IN THE PRO. COMMENT AMENDED RECOMMENDATION AND REPORT 2, https://www.christianlegalsociety.org/sites/default/files/site_files/PA%20WIP%20Proposal.pdf [https://perma.cc/CHM5-ZFJS].

100. Proposed Amendments to the Pennsylvania Rules of Professional Conduct Regarding Misconduct, PA BULL. (May 19, 2018), https://www.pabulletin.com/secure/data/vol48/48-20/773.html (last visited Oct. 13, 2021).

101. *Id.*

new Pennsylvania rule held that it is misconduct for a lawyer to "in the practice of law, by words or conduct, knowingly manifest bias or prejudice, or engage in harassment."[102]

However, the comments still contains identical language to the ABA Rule.[103] Zachary Greenberg, a member of the Pennsylvania Bar, works for the Foundation for Individual Rights in Education, and is associated with the First Amendment Lawyers Association. In *Greenberg v. Haggerty*,[104] he argued in Federal court that the new rule violated the First Amendment by imposing broad viewpoint discrimination, and that it violated the Fourteenth Amendment by being unconstitutionally vague.[105] Despite the ways the Pennsylvania law had been significantly limited in comparison with the official ABA version, the court nonetheless found it was a violation of the First Amendment as viewpoint-based discrimination.[106] The Pennsylvania rule restricts bias or prejudice based on particular statuses, while allowing tolerance or respect based on the same statuses.[107] In striking down the Pennsylvania rule, the court characterized it as the Defendants seeking "to impose their personal moral values on others by censoring all opposing viewpoints."[108]

III. CONSTITUTIONAL CHALLENGE

A. Application of the Constitution to Attorneys

Before constitutional law can be applied to the rights of attorneys, a preliminary question that arises is whether the protections of attorneys should be lessened because of their role in the legal system and their unique profession. Some scholars and courts have argued for a new "professional speech" doctrine that would reduce the First Amendment Freedom of Expression rights for attorneys and other professionals.[109] However,

102. *Id.*

103. *See id.* (comparing Pennsylvania's anti-discrimination rules with the ABA Model Rules).

104. Greenberg v. Haggerty, 491 F. Supp. 3d 12, 16 (E.D. Pa. 2020), *appeal dismissed*, No. 20-3602, 2021 WL 2577514 (3d Cir. Mar. 17, 2021).

105. *Id.* at 17.

106. *Id* at 30.

107. *Id.* at 31.

108. *Id.* at 32.

109. Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 67 (2016).

Supreme Court precedent advises that such a doctrine does not, and cannot, exist constitutionally.[110]

The Court has expressly stated, "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law."[111] It has rejected the ideas that the practice of law authorizes comprehensive restrictions, and that deference should be given to professional bodies in this area regardless of exceeding the scope of the First Amendment.[112] Such broad discretion would greatly chill the scope of protected speech for professional individuals.

More recently, the Court has categorically rejected any kind of professional speech exception in *N.I.F.L.A. v. Becerra*.[113] That case concerned whether pro-life organizations could be obligated to display advertisements for abortion.[114] The Court emphasized that "[s]peech is not unprotected merely because it is uttered by 'professionals.'"[115] Rather than acknowledging a broad category of unprotected "professional speech," the Court instead emphasized that less protection for professional speech only occurs in two circumstances, neither of which has to do with professional status.[116] First, more deferential review is applied to laws requiring disclosure of factual, noncontroversial information in professionals' commercial speech.[117] Second, regulations of professional conduct are permitted that only incidentally burden speech.[118] However, a "State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."[119]

Post *N.I.F.L.A.*, therefore, the claim that Model Rule 8.4(g) is subject to a lesser level of scrutiny—given that it is a professional regulation—requires a showing that one of the two above exceptions apply. If not, this provision

110. *Id.* at 74.

111. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1054 (1991).

112. *Id.*

113. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371–72 (2018).

114. *Id.* at 2371.

115. *Id.* at 2371–72 (citation omitted).

116. *Id.* at 2372.

117. *See id.* (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 651 (1985)) (providing case law examples of this precedent).

118. *Id.*

119. *Id.* at 2373 (citing NAACP v. Button, 371 U.S. 415, 439 (1963)).

is essentially subject to the same level of scrutiny as a regulation of the general public's conduct. Regarding the first exception, as previously noted, this Model Rule could hardly be called noncontroversial. On the contrary, it is perhaps the most controversial ethical rule ever produced by the ABA. It bears no resemblance to the disclosures of nutritional content upheld as reasonable commercial requirements. As to the second exception, this Rule could hardly be considered an incidental restriction on speech. This exception would perhaps be relevant in the present case, if the Rule were limited to professional conduct, or conduct "in the practice of law." Since the Rule is broadly applicable to all conduct of attorneys, this "professional conduct" exception cannot save the new Model Rule. As a number of scholars have aptly demonstrated, the Rule has potentially significant and extensive effects on lawyers' expressive ability.[120] In addition, while these exceptions are at times presented as broad First Amendment exceptions, they have been primarily developed in the context of speech. They are not designed to be used as limitations to the other clauses of the Constitution. Therefore, it is evident that the same doctrines and protections applicable in First Amendment jurisprudence are generally applicable in the protection of the constitutional rights of attorneys, at least in the context of this model Rule.[121]

B. Freedom of Association

Freedom of association is rooted in a variety of constitutional clauses and is not limited to one specific constitutional clause.[122] Although not described specifically in these terms, this right is rooted in the originalist understanding of liberty, particularly in the Right of Assembly.[123] In general terms, the Supreme Court has held that restrictions on associational freedom are permissible only if they serve "compelling state interests" that

120. Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 TEX. REV. L. & POL. 41, 43 (2019); McGinniss, *supra* note 4, at 201; Jack Park, *ABA Model Rule 8.4(g): An Exercise in Coercing Virtue?*, 22 Chap. L. Rev. 267, 278 (2019).

121. *See* Tarkington, *supra* note 120, at 51 (arguing First Amendment rights apply regardless of being in a professional setting).

122. John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN. L. REV. 485 (2010).

123. John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 199–200 (2010).

are "unrelated to the suppression of ideas"—interests that cannot be advanced by "significantly less restrictive [means]."[124]

The Court's most significant recent Freedom of Association cases are *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[125] and *Boy Scouts of America v. Dale*.[126] In *Dale*, the Supreme Court held that applying New Jersey's public accommodations law to the Boy Scouts violated the Scouts' right to freedom of association.[127] Chief Justice Rehnquist, writing for the majority, held "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[128] Such infringement is impermissible unless a regulation is adopted to serve compelling state interests unachievable through less restrictive means.[129] For the Freedom of Association clause to apply, "a group must engage in some form of expression, whether it be public or private."[130] The Boy Scouts were engaged in protected expressive conduct.[131] The Court emphasized the need to give deference to not only "an association's assertions regarding the nature of its expression," but also its "view of what would impair [that] expression."[132]

The Court found in favor of the Boy Scouts because "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[133] The Court laid particular emphasis on the fact that the Court's decision was not guided by public acceptance of the Boy Scouts' teachings, but on "the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message."[134] Therefore,

124. Christian Legal Soc. v. Martinez, 561 U.S. 661, 680 (2010) (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)).

125. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

126. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

127. *Id.* at 644.

128. *Id.* at 648 (citing N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13 (1988)).

129. *Id.* (quoting *Roberts*, 468 U.S. at 623).

130. *Id.*

131. *Id.* at 650 (citing *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring)).

132. *Id.* at 653 (citing Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 123–24 (1981)).

133. *Id.*

134. *Id.* at 661.

an organization cannot be compelled to accept individuals Into its membership when such acceptance would require the organization to fundamentally change its expression.

In *Hurley*, the Court held that a Boston parade was exempt from a Massachusetts public accommodations law.[135] The Court determined the parade was expressive conduct within the category of forms of speech protected by the First Amendment.[136] The participation of the gay rights group in the parade would have been an act of communicative speech.[137] The Court emphasized that requiring the inclusion of this group into the parade would alter the expressive content of the parade.[138] Because the state may not "compel affirmance of a belief with which the speaker disagrees," the government requiring the parade to allow the group to march would be unconstitutional.[139] Rather than finding that the parade served merely as a conduit for speech, the Court emphasized that "GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well."[140] The Court's associational decision also drew on the fact that "[a]lthough each parade unit generally identifies itself, each is understood to contribute something to a common theme."[141] Thus, *Hurley* demonstrates that organizations cannot be compelled to affirm beliefs with which they disagree.

NAACP v. Button[142] is particularly instructive on this matter and merits a detailed examination. This lesser-known case from early in the Court's freedom of association jurisprudence highlighted certain protections for attorneys in their critical task of legal advocacy.[143] Virginia passed several statutes affecting legal solicitation in 1956.[144] The state banned "the

135. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 566 (1995).

136. *Id.* at 569.

137. *Id.* at 569–70.

138. *Id.* at 573.

139. *Id.* (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

140. *Id.* at 575.

141. *Id.* at 576.

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

143. *See id.* at 434 (regarding the ability to secure legal counsel for individuals who are "members of an unpopular minority").

144. *Id.* at 417–18.

improper solicitation of any legal or professional business."[145] In particular, the statute was amended to include within the definition of solicitation the use of "an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability."[146]

The Virginia Supreme Court held as a matter of legal interpretation that the work of NAACP and its attorneys fell within the expanded definition of improper solicitation.[147] The court described the NAACP's work as "fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them."[148] The petitioners argued that this regulation "infringe[d] the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights."[149]

The U.S. Supreme Court concluded that the NAACP's arguments were correct, and held that the NAACP's right to engage in legal advocacy must be protected under the law.[150] It found that the NAACP's activities were particular "modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business."[151] The Court emphasized that "abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion."[152]

For nonprofit legal advocacy organizations, of which the NAACP is the first and one of the most prominent examples, litigation is a form of political expression and a means of political change.[153] According to Justice Brennan, "under the conditions of modern government, litigation

145. *Id.* at 419 (internal quotation marks omitted) (quoting 1956 Va. Acts 33, 34).

146. *Id.* at 423 (internal quotation marks omitted) (quoting 1956 Va. Acts 33, 34–35).

147. *Id.* at 424–26.

148. *Id.* (internal quotation marks omitted) (quoting NAACP v. Harrison, 116 S.E.2d 55, 66 (Va. 1960)).

149. *Id.* at 428.

150. *Id.* at 428–29.

151. *Id.*

152. *Id.* at 429 (citation omitted).

153. *Id.* at 429–30.

may well be the sole practicable avenue open to a minority to petition for redress of grievances."[154] The Court rooted its decision in *NAACP v. Alabama*,[155] the first major modern articulation of the Freedom of Association clause.[156] The Court's summary in the case is particularly applicable to current issues:

> The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.[157]

The Court made clear that organizations engaged in seeking to protect their associational rights to litigate as a form of political expression is an associational right protected by the First Amendment.[158] In fact, this organizational association is arguably the "most effective" form of political advocacy for minority groups, and thus merits particularly diligent protection under the law.

Hurley, Dale, and *Button*, taken together, demonstrate the fundamental associational rights Model Rule 8.4(g) threatens. There are two ways in which the Rule violates the fundamental freedom of association. First, the Rule ultimately serves association for purposes of expressive litigation. Second, the Rule, particularly through the wide scope affirmed in the comment, threatens the associational rights of attorneys throughout their private associations.

The Rule is an essential prohibition of expressive litigation; the same expressive litigation that has proved integral in legal change and foundational to the developments that advocates of the Rule depend on to secure their rights. No version of the Rule has ever included an exception for expressive nonprofit political organizations, such as the NAACP, and their rights to engage in so-called political litigation. Every nonprofit law firm in this country must, due to limited time and resources, choose its

154. *Id.* at 430.
155. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
156. *Button*, 371 U.S. at 430 (citing *id.*)
157. *Id.* at 431.
158. *Id.* at 434.

clients. Moreover, they also choose clients that fit their associational mission. The Supreme Court has put its seal of approval on these organizations and recognized their critical importance in affecting political change.[159] If Rule 8.4(g) were interpreted consistently, it would take away the ability of these organizations to act consistently with their associational beliefs. Of course, it is far more likely to be applied indiscriminately towards only those organizations attempting to advance unrecognized or unpopular views.[160]

This is the case, even though the new Rule claims to exclude from itself, "the ability of a lawyer to accept, decline[,] or withdraw from a representation in accordance with Rule 1.16."[161] Scholars integral to the push for acceptance of the Rule have argued that if a lawyer chooses whether or not to represent certain clients based on a discriminatory category, they have nonetheless violated the Rule.[162] As Professor Stephen Gillers noted, nothing in Rule 1.16's text addresses declining representation.[163] According to the advocates of the new Rule, discrimination in one's choice of representation is prohibited.[164]

Of course, race is one of the categories included within Rule 8.4(g)'s discrimination prohibition.[165] If Professor Gillers's argument is successful, which is perhaps likely in light of the generally broad understanding of this Rule, the NAACP is effectively barred from choosing to only represent individuals of minority groups and must be willing to also represent white people in litigation, whether or not such representation is consonant with the NAACP's mission. Likewise, a legal aid organization that wishes to focus on LGBTQ clients is now prohibited from discrimination on the basis of sexual orientation and thus, must be willing to represent any orientation, even if doing so undermines its mission.

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159. *Id.* at 431.

160. *See id.* at 435 ("It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes.").

161. MODEL RULES OF PRO. CONDUCT r. 8.4(g).

162. *See* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 233–34 (2017) (claiming the appropriate method for an attorney to decline representation for religious reasons without violating Rule 8.4(g) is for the attorney to decline to offer that particular legal service to anyone).

163. *Id.* at 226.

164. *See id.* (listing different ways lawyers can violate Rule 8.4(g) by declining to represent certain classes of people).

165. MODEL RULES OF PRO. CONDUCT r. 8.4(g).

Setting aside nonprofit organizations, Professor Gillers argued that the Rule would require a lawyer to represent a same-sex couple in an adoption, even if morally opposed to it.[166] Well, what is good for the goose is good for the gander. There are some who would believe that a religious upbringing is dangerous for a child.[167] Religion is a protected class in Model Rule 8.4(g).[168] Therefore, attorneys who sincerely hold this belief and associate with others of this belief have no choice, according to Gillers and other advocates of the Rule, but to give up the beliefs or give up the adoption business.[169] A woman who was severely harmed by an abusive husband and wants to focus her practice on protecting abused women in divorces must now be willing to represent men in divorces, even though such a representation would violate her most closely held beliefs.

There is a closely related issue here. Many nonprofit law firms, although not all, prefer to hire individuals that share at least aspects of their basic philosophy. Christian legal ministries primarily hire Christians, the Institute for Justice primarily hires people with libertarian leanings, and so on.[170] Comment 4 of the Model Rules protects "diversity and inclusion" initiatives, which includes "implementing initiatives aimed at recruiting, hiring, retaining[,] and advancing diverse employees."[171] If the Rule did not regulate hiring and firing, then the specific protection for affirmative action programs is superfluous. If a religious legal organization chooses to hire only people from its organization, its actions would almost certainly be protected under Title VII, even apart from any constitutional questions.[172] But such protections are designed for religious conscience and do not apply broadly to all closely held beliefs. Nonprofit organizations devoted to the

166. Gillers, *supra* note 162, at 233.

167. *See, e.g.*, Brea Jones, *Parents Should not Force Religion on Their Children*, PANTHER NOW (Oct. 25, 2017), http://panthernow.com/2017/10/25/parents-should-not-force-religion-on-their-children/ [https://perma.cc/6JLM-CWAE] ("Forcing a child to practice a religion they don't feel committed or connected [to] could damage the child's overall outlook on religion and can make them resent their family.").

168. MODEL RULES OF PRO. CONDUCT r. 8.4(g).

169. Gillers, *supra* note 162, at 233.

170. Steve Warren, *Christian Ministry Wins Legal Battle, Will Be Allowed to Hire Christians*, CBN NEWS (Nov. 28, 2022), https://cmsedit.cbn.com/cbnnews/us/2022/november/christian-organization-wins-legal-battle-will-be-allowed-to-hire-christians [https://perma.cc/3Q2D-GQTQ].

171. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 4.

172. 42 U.S.C. § 2000e-l(a); *cf.* Spencer v. World Vision, Inc., 570 F. Supp. 2d 1279, 1283 (W.D. Wash. 2008), *aff'd,* 619 F.3d 1109 (9th Cir. 2010) (discussing the applicable Title VII exemption to "prevent excessive government entanglement" with the hiring practices of religious organizations).

protection of women, therefore, could not exclusively hire women under this Rule. They can "promote diversity," whatever that means, but they cannot engage in a categorical determination to better implement their mission. Likewise, the NAACP has historically been operated primarily by African Americans. Under this Rule, it cannot continue to solely employ African Americans although, under Comment 4, it can at least prefer minority inclusion. However, many jurisdictions do not adopt the Comment 4, so its nuance of the comment could be lost, and even reasonable efforts at inclusion could be prohibited by a strict reading of the Rule. If all nuances are relegated to the comments, the Rule is even more likely to be interpreted with a broad scope that would entirely prevent the furtherance of an organization's mission through its hiring determinations. Again, organizations recognized for their social value in our present culture, such as the NAACP, are not likely to be targeted under the Rule; it is those less-popular organizations that are more likely to face these effects.

In this case, the final freedom of association issue in this case is raised by the scope of the Rule, which has been frequently critiqued as overbroad.[173] Comment 4 of Model Rule 8.4(g) defines conduct related to the practice of law as:

> [R]epresenting clients; interacting with witnesses, coworkers, court personnel, lawyers[,] and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business[,] or social activities in connection with the practice of law.[174]

In other words, if an action occurs involving the practice of law at all, it is included within the scope of this prohibition by the final clause. In *Dale*, the Court emphasized the need to give deference both to an association's assertions regarding the nature of its expression and its view of what would impair that expression.[175] The Court found in favor of the Boy Scouts because "Dale's presence in the Boy Scouts would . . . force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[176]

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173. *See generally* Park, *supra* note 120 (criticizing proposed Rule 8.4(g) as overly broad and constitutionally suspect).

174. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 4.

175. Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000).

176. *Id.*

Here, not only one organization is being compelled to a particular message; it is a vast host of organizations, namely, every organization that an attorney participates in through activities in connection with the practice of law. For example, attorneys would likely be barred from acting in any professional capacity for an organization with gender, religious, or racial requirements for membership.[177] In other words, under the Rule as written, an attorney could very likely be subject to discipline for being a member of a mosque that limits official membership to Muslims if he has done anything connected to the practice of law for that mosque.

Even a law student who hasn't graduated from law school can confirm that once they know anything about the law, everyone in their social and religious circle constantly asks them legal questions. For example, it would be very unusual for an attorney who is part of a religious organization not to be asked to help with that organization's tax documents, regardless of whether that attorney is a tax attorney. Under the new Rule, this mosque, and all the churches and synagogues like it, cannot have legal representation from among its own members. If such representation occurs, the attorney could face discipline under the Rule.

In short, Model Rule 8.4(g), as written, drastically effects freedom of association. Nonprofit organizations cannot choose to represent only people of a particular group, or to hire only people that share a particular vision. Individual attorneys are also, in practice, barred from associating with groups that discriminate in their membership in any way. The Rules do not carve out any exceptions, even for the most obvious and reasonable organizations, such as religious organizations limited in formal membership to individuals who share that religion. Disciplining attorneys who have done anything related to the practice of law for any such organization is an egregious infringement of the rights of attorneys to freely associate with those of like mind, which reaches far beyond the restrictions the Court struck down in *Hurley* and *Dale*. The First Amendment "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[178] Model Rule 8.4(g) is so broad that even membership in an organization that espouses views that some may consider harmful, derogatory, or demeaning could be deemed conduct related to the practice of law that is harassing or discriminatory.

177. Indiana State Bar Ass'n Legal Ethics Comm., Formal Op. 1 (2015).

178. *Dale*, 530 U.S. at 647–48 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984)).

C. Free Exercise

The Free Exercise Clause applies with equal rigor to Model Rule 8.4(g) and to the rights of individuals in groups. The need to apply the Free Exercise Clause is perhaps most striking considering how express First Amendment exceptions were removed from the Rule, as discussed above in Section II(A). The area where this problem is most likely to be acute is the prohibition of discrimination or harassment based on sexual orientation and gender identity. As the Court noted in *Obergefell v. Hodges*,[179] "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[180] The Court in *Bostock v. Clayton County*[181] likewise emphasized that free exercise claims in response to sexual orientation and gender identity requirements "merit careful consideration."[182] Model Rule 8.4(g) fails to give careful consideration, or any consideration at all, to the claims of religious belief in this area or any other.

Further analysis of the Rule reveals that it fails the standard of scrutiny set by the Court in interpreting the Constitution. It could not withstand constitutional muster, even if no Free Speech Clause existed at all. It is true that, under *Employment Division v. Smith*,[183] a neutral and generally applicable law is not subject to strict scrutiny.[184] During a recent challenge to *Smith*, all nine Justices advocated for strict scrutiny of a free exercise claim.[185] While a return to strict scrutiny for free exercise claims is laudable and necessary,[186] a free exercise challenge to Rule 8.4(g) does not necessarily require the overturning of *Smith*. Under the Court's current precedents, Rule 8.4(g) fails to meet the *Smith* standard. Once it is subjected to strict scrutiny, although preventing discrimination is certainly a compelling government interest, this Rule was in no way narrowly tailored to achieve it.

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179. Obergefell v. Hodges, 576 U.S. 644 (2015).

180. *Id.* at 672.

181. Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

182. *Id.* at 1754.

183. Emp. Div. v. Smith, 494 U.S. 872 (1990).

184. *Id.* at 882.

185. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring, joined by Kavanaugh, J. & Breyer, J.).

186. *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (analyzing the history of the concept of free exercise of religion).

Neutrality can perhaps be granted under these facts, given the absence of the legislative history that would illuminate the issue. However, even if Model Rule 8.4(g) was neutral, *Smith* also requires it to be generally applicable. In *Fulton*, the Court found that Philadelphia's non-discrimination provision was not generally applicable.[187] The provision of the contract "incorporate[d] a system of individual exemptions, made available in this case at the 'sole discretion' of the [City] Commissioner."[188] Therefore, the Court held that "the inclusion of a formal system of entirely discretionary exceptions in section 3.21 renders the contractual non-discrimination requirement not generally applicable."[189] In other words, when a requirement is left to the enforcement of the discretion of an official, that requirement is not truly generally applicable.

The Court also provided guidance regarding the nature of neutrality in *Brooklyn Diocese v. Cuomo*.[190] The Court issued a per curiam opinion prohibiting the Governor of New York from enforcing ten and twenty-five-person occupancy limits on religious worship during the Covid-19 pandemic, when the ban was not proportionate to restrictions in place on similarly situated businesses.[191] Such regulations "single out houses of worship for especially harsh treatment."[192] The Court's opinion emphasized the disparate treatment between the religious organizations and so called "essential businesses."[193] Such unequal treatment is truly not generally applicable.

These cases help elucidate why Rule 8.4(g) is not a generally applicable regulation. First, the text of the regulation itself allows for an individualized assessment, which in *Fulton* was considered dispositive evidence of a lack of true general applicability.[194] Even *Smith* recognized that a rule "that lent itself to individualized governmental assessment of the reasons for the relevant conduct" would be subject to stricter scrutiny.[195] The text of Model

187. *Fulton*, 141 S. Ct. at 1878.

188. *Id.*

189. *Id.*

190. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

191. *Id.* at 65.

192. *Id.* at 66.

193. *Id.* at 66–67.

194. *Fulton*, 141 S. Ct. at 1877.

195. Emp. Div. v. Smith, 494 U.S. 872, 884 (1990). Of course, *Smith* concerned the denial of employment benefits, and thus *Smith* itself would seem to fail the test announced in *Smith*.

Rule 8.4(g) exempts "legitimate advice or advocacy."[196] Furthermore, it claims to not "limit the ability of a lawyer to accept, decline or withdraw from a representation."[197] The Official Comment to the Rule also exempts "conduct undertaken to promote diversity and inclusion."[198]

In this way, the Rule sets up a system where "legitimate advocacy," whatever that means, is exempted from the general scope of a prohibition, and conduct aimed at "promoting diversity and inclusion," whatever that means, is not only exempted but encouraged. While there is some debate over the number of exceptions necessary for a regulation to not truly be generally applicable, the system set up by these regulations allows for an excessive amount of individualized assessment—in this case by individual state disciplinary committees, on a case-by-case basis. A state disciplinary committee is left almost completely free to determine what is and is not "legitimate advocacy" and what is or is not conduct that seeks to "promote diversity and inclusion." The Rule leaves state bars essentially free to determine for themselves the exact parameters of the Rule and how it will function in practice.

The level of discretion the Rule provides demonstrates that it, like the rule in *Fulton*, is essentially in practice "a system of individual exemptions."[199] It is both a largely subjective standard designed to be applied by the subjective determinations of bar committees. The Rule enables each disciplinary organization to decide, almost completely on its own discretion, which behavior should be prohibited and which should not. It is not a flat prohibition, but it creates a system of individualized assessments. "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct . . . ."[200] Just as the exemptions in *Fulton* were dependent on the "sole discretion" of the city commissioner, the Model Rules, especially this Rule, are inherently discretionary, providing for "individual exemptions" and determinations.[201] In short, if the state bar has authority to determine what is or is not "legitimate advocacy," it is engaged in the same individualized decision-making evidenced in *Fulton*.

196. MODEL RULES OF PRO. CONDUCT r. 8.4(g).
197. *Id.*
198. *Id.* at cmt. 4.
199. *Fulton*, 141 S. Ct. at 1878.
200. *Id.* at 1877 (internal quotations omitted).
201. *Id.* at 1878.

Even after *Smith*, if a regulation is not neutral and generally applicable it is still subject to strict scrutiny and must be justified by a compelling government interest narrowly tailored to protect that interest.[202] It cannot be seriously disputed that there is a compelling government interest in preventing discrimination and harassment. The real problem here lies with the second prong of the test: the law or regulation must be narrowly tailored. There has never been any showing that a modest accommodation to the claims of conscience and religious belief would defeat the purposes of preventing this behavior broadly in the profession. Most of the described harms the Rule seeks to address, such as harassment at bar functions or discrimination towards male associates over female, should certainly be prevented and can be done without any attacks upon religion or conscience. For example, the Rule could contain express protections for the actions of conscience to not prevent religious organizations from functioning effectively.

Moreover, there has been no showing that the Rule's scope, extending even to private behavior and religious practices, is truly necessary to prevent the harms the Rule seeks to mitigate. A previous draft of the Rule even recognized the First Amendment and intentionally limited the scope of the Rule to fall within First Amendment protections. This limitation would at least have been a step toward appropriately tailoring the law, and its removal demonstrates that the law is not appropriately tailored to target the behavior it is seeking to prevent.

IV. CONCLUSION

It may perhaps be asked, if it has already been thoroughly demonstrated that Model Rule 8.4(g) violates the First Amendment Freedom of Speech: why bother devoting pages to addressing the Rule using free exercise and the freedom of association? The answer is that applying multiple First Amendment clauses to the Rule exposes the depths of its inadequacy. The freedom of association issue highlights the inability of organizations to properly function under the new Rule. Attorneys who sincerely hold a particular belief and associate with others of this belief have no choice, according to advocates of the Rule, but to give up their beliefs, or sacrifice their careers. This spells the death of nonprofit advocacy, across the

202. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

political spectrum. The freedom of association highlights the manner in which the Rule is essentially a tool to target some practices and not others.

Likewise, the First Amendment uniquely protects religious expression, and it provides heightened protections for religious individuals and the central claims of conscience. Those protections need to be emphasized, and when regulations do not truly recognize and protect the rights of conscience, they need to be held accountable under the Constitution. In other words, the regulation not only violates the free speech rights of all attorneys, but it also violates the freedom of association of attorney organizations and the free exercise rights of religious attorneys. Because the Rule implicates multiple fundamental constitutional rights at once, it should be particularly suspect in our constitutional tradition.[203]

It is often said that the road to hell is paved with good intentions. The road to constitutional violations usually has the same pavement. The drafters of Model Rule 8.4(g) truly saw grave evils in the legal profession and sought to do what was in their power to repulse them. This Article does not seek to minimize those evils in the slightest and joins the call for appropriate rules that actively seek to prevent unconscionable behaviors. Unfortunately, passion to prevent those evils led proponents to diminish the need to maintain the rights of conscience. If the new Rule was enforced as written, organizations like the NAACP would cease to function, and attorneys could no longer be members of churches, synagogues, and mosques. This Rule requires extensive modification to bring it in accordance with basic constitutional norms, not only of freedom of speech but freedom of association and religious exercise. Its problems are not solely speech related but also concern the entirety of the First Amendment's conscience protections.

203. *See* John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 849 (2014) (describing the multiple distinct rights protected by the First Amendment).