



POINT-COUNTERPOINT

A SPEECH CODE FOR LAWYERS?

IN AUGUST 2016, THE AMERICAN BAR ASSOCIATION AMENDED ITS MODEL RULES OF PROFESSIONAL CONDUCT by banning professional conduct that constitutes harassment or discrimination. Some cheer the new rule as a noble attempt to eliminate bias, while others jeer it as a pernicious speech code aimed at silencing disfavored views.

Model Rule 8.4(g), as explained in the rule's official comments, prohibits "harmful verbal or physical conduct that manifests bias or prejudice toward others" and defines harassment as

"derogatory or demeaning verbal or physical conduct." The amended rule says it "does not preclude legitimate advice or advocacy."

Many state high courts and bar associations follow the ABA's lead when adopting model ethics rules for their jurisdictions. Do the ABA's new speech restrictions responsibly aim to boost lawyer professionalism or do they unconstitutionally aim to stifle disfavored viewpoints? Ethics counsel and professor **KEITH SWISHER** and UCLA Law Professor **EUGENE VOLOKH** discuss the new rule and its impact.

PREVIOUS RULE 8.4 STATED IT WAS "PROFESSIONAL MISCONDUCT FOR A LAWYER TO . . . ENGAGE IN CONDUCT THAT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE." HOW DOES REVISED RULE 8.4(g) DIFFER?

SWISHER:¹ Rule 8.4(d) was not revised; it still broadly prohibits conduct that is "prejudicial to the administration of justice." Rule 8.4(d) thus continues to proscribe much of the same professional misconduct that the new rule will proscribe. The difference is that the previous comment to Rule 8.4(d), which the ABA added in 1998, sought to prohibit lawyers from "manifest[ing] by words or conduct bias or prejudice" only while "representing a client," and certain

courts had further narrowed the rule's application to misconduct relating to a proceeding before a court or other tribunal. This terminology and interpretation left unaddressed a great deal of lawyers' conduct (*i.e.*, everything that lawyers do outside of representing clients in pending proceedings). In addition, although several states adopted the comment, nearly half of the states went beyond the comment to add anti-discrimination or anti-bias language directly to their black-letter ethical rules. In light of these developments, the ABA reexamined the previous comment, determined that the comment was insufficient to address discrimination and harassment, and after circulating several drafts and soliciting public comment, adopted new Rule 8.4(g). The rule now prohibits "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."

This new rule is significantly superior to the previous comment, for several reasons. First, lawyers should not be permitted to harass and discriminate in the practice of law, even when they are not technically "representing a client." Second, the previous comment was an insufficient mechanism and message for regulating discrimination and harassment. In the Model Rules, comments are merely interpretative guides, not authoritative rules, and subjects as important as discrimination and harassment should not be relegated to a comment. Third, the new rule, which prohibits and defines discrimination and harassment, is more specific and less subjective than the old comment, which purported to prohibit the vaguer concept of "manifesting bias or prejudice."²

With the new rule's arrival, the ABA has fixed an omission that inadvertently permitted partners to harass associates or opposing counsel or to discriminate against staff on the basis of gender or race (for example).³ Consistent with the Model Rules' overwhelming influence on state ethical rules, the new rule will presumably spark the remaining half of states (or at

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least a significant portion of them) without a rule to adopt the new rule. The new rule might also promote uniformity across all states, including the ones that had already crafted their own rule in the absence of an ABA Model Rule.

Perhaps most importantly, lawyers and judges have a responsibility (admittedly disputed in degree) to ensure equal justice under law. The historical context adds urgency to this responsibility: The bench and bar have excluded groups in the past and significantly lag in inclusion to this day.⁴ Continued discrimination or harassment in light of this context is particularly harmful, and it hinders access to justice for all.

VOLOKH: The revised Rule expressly applies not just to the courtroom, or to interactions with opposing parties, witnesses, or clients; it also applies to "bar association . . . or social activities in connection with the practice of law," as well as many other contexts. It would thus likely cover debates at continuing legal education programs, discussions on bar panels, and even conversations over dinner at a bar function. It is a pervasive speech code for lawyers, including on matters unrelated to any pending litigation.

The revised Rule also deals with tangible employment decisions, and not just speech. But when lawyers act as employers, they should be subject to the same rules as any other employers. They shouldn't face the state bar in addition to normal

civil lawsuits, EEOC lawsuits, state fair employment commission enforcement actions, and the like. Nor should they be subject to bans on discrimination based on sexual orientation, gender identity, marital status, or socioeconomic status in those states whose legislatures have chosen not to ban such discrimination. Whatever rules Congress and state legislatures choose to impose on employers generally should be the ones that govern lawyers as employers.

State bars can legitimately regulate the behavior of lawyers as lawyers — what they do in the litigation process using the special tools that states give lawyers. But decisions about whom to hire for a legal practice (including decisions about which support staff to hire, and not just which lawyers to hire) should be governed by ordinary state and federal employment law.

PROponents of New Rule 8.4(g) say that it is consistent with the black letter of ABA Prosecution Standard 4.16, but the prosecution standards are "aspirational and not intended to serve as the basis for the imposition of professional discipline." Should a lawyer who violates Rule 8.4(g) be subject to professional discipline?

SWISHER: The answer is yes, and discipline is consistent with other, current rules. For ▶

example, lawyers already can be (and occasionally are) disciplined for loaning money to clients in need, for not listing an office address on advertisements, or for having consensual sexual relations with clients.⁵ Compared with these examples, sexually harassing or racially discriminating against employees, colleagues, or clients generally presents a more forceful case for disciplinary treatment. Even more to the point, this rule, although new at the ABA level, is not actually new. Approximately half of the states already operate under a similar disciplinary rule. Thus, claiming that this new rule moves an aspirational standard to a disciplinary rule is partly inconsistent with existing practice.

VOLOKH: No legislature, court, or state bar should impose professional discipline simply because people engage in “verbal . . . conduct” — which is to say speech — based on the supposedly “derogatory” viewpoint that it expresses. Courts and state bars already have ample power to require civility in the courtroom, and in dealings with opposing counsel, witnesses, and the like. They have no business regulating lawyers’ speech at “bar association . . . or social activities.”

PROponents of Rule 8.4(g) also say the rule tracks the black letter of Rule 2.3 of the Model Code of Judicial Conduct, but the judicial code provision is limited to conduct “in the performance of judicial duties.” Under new Comment 4, “conduct related to the practice of law includes activities such as law firm dinners and other nominally social events at which lawyers are present solely because of their association with their law firm.” Should a lawyer be sanctioned for misconduct, including, for example, making “derogatory or demeaning verbal conduct,” outside the performance of duties representing clients, e.g., at a law-firm dinner event?

SWISHER: Both the Model Code of Judicial Conduct and the Model Rules of Professional Conduct have long prohibited certain conduct outside of the court

and the practice of law.⁶ To be sure, certain outside conduct relates less to lawyers’ fitness to practice law, but the new rule specifically requires a nexus: It regulates conduct only “in connection with the practice of law.” Some criticism of the new rule has seemed to imply that “derogatory or demeaning verbal conduct” about a protected class should be permissible. The First Amendment might protect some comments from regulation (without of course making those comments praise-worthy), but beyond that which is constitutionally protected, it is hard to discern — and opponents do not identify — the value of such conduct.⁷ In any event, the value must be weighed against the harm of discrimination and harassment in an already under-inclusive profession and against the profession’s unique responsibility to protect access to justice for all.

VOLOKH: Of course “derogatory or demeaning verbal conduct” — *i.e.*, speech — “about a protected class should be permissible.” This is America, where you’re not supposed to lose your professional license because you dare to express certain views at a Continuing Legal Education debate, or a bar association dinner.

Much such derogatory or demeaning speech may be wrong; if so, those who disapprove of it should argue that it’s wrong, and thus persuade the audience (and perhaps even the speakers) of their views. But that is the way that debate in our country and our profession should operate, not through the threat of a government entity stripping you of your livelihood when it concludes that some statements about religion, race, sexual orientation, sex, or whatever else are “derogatory or demeaning.”⁸

A lawyer violating Rule 8.4(g) is subject to professional discipline in addition to any civil liability imposed on the firm under the law. Knowing that not all hiring decisions end up well, will the risk of “double” sanctions influence decisions to hire either a white male or a woman or a member of a minority whose qualifications are similar?

SWISHER: This concern seems speculative, in part because anti-discrimination and anti-harassment law and procedure have not been disproportionately applied to law firms.⁹ To the extent the question implies that certain law firms might now consider diversity more seriously when making hiring decisions, the new rule might foster a more inclusive bar. In direct response, furthermore, the question presumes that other ethical rule violations do not risk “double” sanctions. That is incorrect. In addition to disciplinary treatment, many ethical violations may and often do lead to malpractice claims or adverse court action (e.g., monetary sanctions, disqualification, or fee disgorgement).

VOLOKH: Maybe the risk might unduly influence hiring decisions, but that’s not even the main problem; as I suggest above, the problem is that employment law for lawyers, like employment law or all other businesses and professions, should be made by state legislatures and by Congress, not by the state bar.

UNDER NEW RULE 8.4(g):

- **CAN A LAWYER DEFEND THE WESTBORO BAPTIST CHURCH WITHOUT RUNNING AFOUL OF THE RULE?**

SWISHER: The answer is yes because (as the introduction above notes) the new rule does not apply to “legitimate advice or advocacy.” The rule also does not apply to lawyers’ decisions concerning retention, termination, or withdrawal.

- **CAN A CIVIL RIGHTS LAWYER REPRESENT A MUSLIM BAKER WHO REFUSES TO BAKE A WEDDING CAKE FOR A SAME-SEX COUPLE?**

SWISHER: The answer is yes for the same reasons noted immediately above. To be sure, certain ethical rules bind all representations, controversial or not.¹⁰ But this rule is no impediment to the conduct in question.

VOLOKH: The lawyer could engage in “legitimate advice or advocacy consistent with these Rules.” But say the lawyer stops being a legal “advocate,” and starts just

talking about the case over dinner at a bar function — or in a debate at that function, at a continuing legal education event, or for that matter at a law school. If the lawyer defends his position by expressing anti-gay viewpoints, his license would be in jeopardy: He would be engaging in “verbal . . . conduct” that “manifests bias or prejudice” toward gays, and some people might view such statements as “harmful.” Under the Rule, then, there would be a large set of cases that you could take as a lawyer — but that you couldn’t safely defend in a debate or over dinner at a bar function, for fear of being subject to bar discipline because of the supposedly “harmful” viewpoints you express.

- **CAN A FIRM CHARGE ABOVE-MARKET FEES TO A CLIENT WILLING TO PAY THEM, OR CHOOSE TO HIRE ONLY FROM TIER-ONE LAW SCHOOLS, WITHOUT VIOLATING THE PROHIBITION ON SOCIOECONOMIC DISCRIMINATION?**

SWISHER: The prohibition against socioeconomic bias was included in the original comment in 1998. It is not new, and neither the previous comment nor the new rule would prohibit either example in the question. In particular, the firms do not appear to be knowingly discriminating (much less harassing) on the basis of “socioeconomic status.”¹¹ To the extent the “legislative” history is helpful in this regard, neither the drafters nor the House of Delegates expressed any intent to prohibit such conduct. To be sure, the conduct in either example might indirectly (and presumably unintentionally) discriminate on the basis of socioeconomic status. But many of the opponents have seemingly failed to read the new rule’s clarifying comments, which aim to place certain limits on the rule’s breadth. For example, the new comments note that lawyers may continue to “charge and collect reasonable fees and expenses for a representation.” The comments do not, however, directly address “tier-one law school” hiring, which of course is still a common practice. To the extent the rule does not clearly address this hiring practice,¹² an adopting state may wish to note explicitly in the rule or

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comment whether and to what extent the rule applies to this practice.¹³

VOLOKH: No. The most commonly used definition of “socioeconomic status” — interpreting a similar ban on socioeconomic-status discrimination in the Sentencing Guidelines — is “an individual’s status in society as determined by objective criteria such as education, income, and employment.” *E.g.*, *United States v. Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991). Thus, the rule would on its face bar a law firm preferring more-educated employees (both as lawyers and as staffers) over less-educated ones, or preferring employees who went to high-“status” educational institutions. After all, such discrimination is deliberate discrimination based on “status in society,” status defined by “criteria such as education.”

It would likewise bar a law firm contracting with expert witnesses and expert consultants who are especially well-educated or have had especially prestigious employment. It would bar a solo lawyer who is considering whether to team up with another solo lawyer from preferring a wealthier would-be partner over a poorer one. And it would probably bar quoting some prospective clients higher rates because they are seen as wealthier, given

that this is intentional discrimination based on client socioeconomic status, and discrimination that may not be necessary under the “collect reasonable fees” exception (so long as the lower fees charged to poorer clients would still be “reasonable”).

WHAT BENEFITS OR DRAWBACKS OF RULE 8.4(g) DO YOU FORESEE?

SWISHER: In many instances, lawyers may already be disciplined for discrimination or harassment. This new rule, finally, makes that fact clear to lawyers. That is a good, in and of itself, because it provides the licensees fair(er) notice of that which is prohibited. The new rule also serves as an important signal, stated as strongly as the ABA can in its flagship product, that discrimination and harassment will no longer be tolerated; such conduct will no longer be dismissed as merely a civil infraction unworthy of a disciplinary venue. Protecting those in the legal profession, and the public they serve, from discrimination and harassment was always an ethical matter — and now the rules have been amended accordingly. The next ethical evolution presumably will be to promote diversity and inclusion affirmatively, not simply through the threat of discipline for egregious conduct.¹⁴

VOLOKH: I foresee many lawyers being reluctant to engage in honest debates about important topics, or even organizing such debates. Say you want to organize a continuing legal education event that includes a debate on same-sex marriage; or on whether there should be limits on immigration from Muslim countries; or on whether people should be allowed to use the bathrooms that correspond to their gender identity rather than their biological sex. In the process, unsurprisingly, the debater on one side may want to say something critical of gays, Muslims, or transgender people. Will he say it, and risk a complaint to the bar, a bar investigation, and perhaps public reprimand or suspension? Or will he just not make those arguments — or perhaps not participate in the debate at all?

Government agencies are increasingly finding the expression of many political opinions to be “harassment.” See, e.g., *Sherman K. v. Brennan*, EEOC DOC 0120142089, 2016 WL 3662608 (EEOC) (holding that coworkers’ wearing Confederate flag T-shirts on occasion constituted racial harassment); *Shelton D. v. Brennan*, EEOC DOC 0520140441, 2016 WL 3361228 (EEOC) (remanding for fact-finding on whether coworker’s repeatedly wearing cap with “Don’t Tread On Me” flag constituted racial harassment); *Doe v. City of New York*, 583 F. Supp. 2d 444 (S.D.N.Y. 2008) (concluding that e-mails condemning Muslims and Arabs as supporters of terrorism constituted religious and racial harassment); *Pakizigi v. First Nat’l Bank*, 831 F.

Supp. 901, 908 (D. Mass. 1993) (describing an employee’s posting a photograph of the Ayatollah Khomeini and another “of an American flag burning in Iran” in his own cubicle as potentially “national-origin harassment” of coworkers who see the photographs). That is a trend that needs to be resisted, rather than encouraged by creating yet another viewpoint-based speech restriction that can punish or deter expression on controversial topics.

Courts have recognized that anti-harassment rules pose potential First Amendment problems if applied too broadly. See *supra* note 8. Yet the revised Rule 8.4 is broader still: In most states, harassment law doesn’t include sexual orientation, gender identity, marital status, or socioeconomic status; and it generally doesn’t cover social activities at which coworkers aren’t present — but under the proposed rule, even a solo practitioner could face discipline because something that he said at a law-related function offended someone employed by some other law firm.

Hostile-work-environment harassment law is also often defended (though in my view that defense is inadequate) on the grounds that it’s limited to speech that is so “severe or pervasive” that it creates an “offensive work environment.” This proposed rule conspicuously omits any such limitation. Though the provision that “anti-harassment . . . case law may guide application of paragraph (g)” might be seen as implicitly incorporating a “severe or pervasive” requirement, that’s not at all clear: That provision says only that the

anti-harassment case law “may guide” the interpretation of the rule, and in any event the language of paragraph (g) seems to cover any “harmful verbal . . . conduct,” including isolated statements.

Many people pointed out possible problems with this proposed rule — yet the ABA adopted it with only minor changes that do nothing to limit the rule’s effect on speech. My inference is that the ABA wants to do exactly what the text calls for: limit lawyers’ expression of viewpoints that it disapproves of. I hope that state courts and state bars, consistently with the First Amendment, reject this vague and unconstitutionally overbroad speech restriction.



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¹ Many thanks to Professor Myles Lynk, chair of the ABA’s Ethics Committee, and Dennis Rendleman, the ABA’s ethics counsel, for their insights, from which this piece liberally borrows. Any errors are mine alone, however.

² As the accompanying comment notes, moreover, the existing “substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).” MODEL RULES OF PROF’L CONDUCT R. 8.4(g) cmt. 3. While the new rule’s focus on harassment and discrimination is narrower and clearer than the previous focus on lawyers’ manifestations of bias or prejudice, the new rule is broader in other respects. As a key example, the previous comment limited itself to lawyers’ “words or conduct” in “representing a client.” The new rule prohibits discriminatory or harassing “conduct related to the practice of law.”

It is no longer the case that a lawyer who sexually harasses a firm colleague or discriminates against that colleague on the basis of race will escape discipline simply because that lawyer did not do so while representing a client. See generally ABA Revised Resolution 109 and Report to the House of Delegates, at 10 (Aug. 2016) (citing Model Rules of Prof’l Conduct pmb. 1 & 6) (“The professional roles of lawyers include conduct that goes well beyond the representation of clients before tribunals. Lawyers are also officers of the court, managers of their law practices and public citizens having a special responsibility for the administration justice. Lawyers routinely engage in organized bar-related activities to promote access to the legal system and improvements in the law. Lawyers engage in mentoring and social activities related to the practice of law. And, of course, lawyers are licensed by a jurisdiction’s highest court with the

privilege of practicing law. The ethics rules should make clear that the profession will not tolerate harassment and discrimination in any conduct related to the practice of law.”), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf.

³ Of course, other law might not have “permitted” lawyers to engage in such conduct, but the ethical rules did not address it. To be sure, a concerned disciplinary authority might have been able to cite a more general or “catch-all” ethical rule or (if mandatory in the jurisdiction) professionalism principle to discipline the conduct.

⁴ Both the bench and bar are insufficiently diverse. See, e.g., Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 *FORDHAM L. REV.* 2241 (2015); Jason P.

Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271 (2014); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011).

- ⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.8(e), (j), 7.2(c).
- ⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (prohibiting dishonesty); MODEL CODE OF JUDICIAL CONDUCT R. 3.6 (barring judges from joining organizations that practice invidious discrimination and from using such organizations' facilities).
- ⁷ It is unclear what, if any, interest exists to use discriminatory epithets in legal practice or to harass those with whom the lawyer interacts. See, e.g., *Grievance Adm'r v. Fieger*, 719 N.W.2d 123, 140 (Mich. 2006) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940)) (“Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution”); see also generally *Aguilar v. Avis Rent A Car Sys., Inc.*, 980 P.2d 846, 854 (Cal. 1999) (noting that the First Amendment does not displace Title VII and state law prohibitions against employment discrimination); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1535–36 (M.D. Fla. 1991) (concluding that offensive “pictures and verbal harassment are not protected speech because they act as discriminatory conduct in the form of a hostile work environment” and noting that even “if the speech at issue is treated as fully protected, and the Court must balance the governmental interest in cleansing the workplace of impediments to the equality of women, the latter is a compelling interest that permits the regulation

of the former and the regulation is narrowly drawn to serve this interest”); J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. (1999) (concluding that sexual harassment laws regulating workplaces do not violate the First Amendment).

- ⁸ Even traditional workplace harassment law is subject to First Amendment constraints. See, e.g., *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995) (“Where pure expression is involved, Title VII steers into the territory of the First Amendment.”); *Rodriguez v. Maricopa County Comm. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) (“There is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.”) (quoting *Saxe v. State Coll. Area School Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.)); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992). That goes double for the changes to Rule 8.4, which go beyond traditional workplace harassment law.
- ⁹ Indeed, but only anecdotally, law firms have often seemed to get a pass.
- ¹⁰ For example, if the lawyer’s claims or defenses are frivolous, that lawyer might run afoul of (the state equivalent of) Model Rule 3.1 or Rule 11.
- ¹¹ As indicative of a clash in the ABA between those who wanted no *mens rea* requirement and those who wanted one (or a particularly strong one), the resulting rule prohibits lawyers from engaging in the conduct when either they know or they reasonably should know that the conduct constitutes discrimination or harassment. This latter, objective component does not seem to change the answer to the question above, but of course, reasonable minds might differ.
- ¹² Because nowadays students from almost all socioeconomic backgrounds attend tier-one law schools, it is not clear that the firm’s hiring practice knowingly discriminates on the basis of socioeconomic status.
- ¹³ Of course, the state may wish to draft a rule that at least encourages more diverse hiring. The new comments explicitly note that the new rule is not designed to hinder diversity initiatives or the representation of underserved populations.
- ¹⁴ Diversity is a compelling state interest, and diversity is particularly compelling in the legal profession, whose members are the public’s ambassadors to the courts both as advocates and (later) as judges. See generally *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (referring to diversity as a compelling interest); *Bredesen v. Tennessee Judicial Selection Comm’n*, 214 S.W.3d 419, 438 (Tenn. 2007) (quoting Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1109, 1117 (2003) (footnote omitted)) (“The case for diversity is especially compelling for the judiciary. It is the business of the courts, after all, to dispense justice fairly and administer the laws equally. It is the branch of government ultimately charged with safeguarding constitutional rights, particularly protecting the rights of vulnerable and disadvantaged minorities against encroachment by the majority. How can the public have confidence and trust in such an institution if it is segregated — if the communities it is supposed to protect are excluded from its ranks?”); Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153 (2004) (noting “[t]he lack of racial and ethnic diversity at the capstone of the legal profession, the judiciary”).



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