



CHRISTIAN LEGAL SOCIETY

RC ID # 2020-012 aa

Seeking Justice with the Love of God

November 2, 2020

The Honorable Andrew J. McDonald, Chair
The Honorable Holly Abery-Wetstone
The Honorable Barbara N. Bellis
The Honorable Susan Quinn Cobb
The Honorable John B. Farley
The Honorable Alex V. Hernandez
The Honorable Tammy T. Nguyen-O'Dowd
The Honorable Sheila M. Prats
The Honorable Anthony D. Truglia, Jr.
Rules Committee of the Superior Court

Attn: Joseph DelCiampo, Esq.

By email (joseph.delciampo@jud.ct.gov) and UPS two-day delivery

RE: Opposing Adoption of Connecticut Proposed Rule of Professional Conduct 8.4(7)

Dear Justice McDonald, Judge Abery-Wetstone, Judge Bellis, Judge Cobb, Judge Farley, Judge Hernandez, Judge Nguyen-O'Dowd, Judge Prats, and Judge Truglia:

This comment letter is filed to assist the members of the Rules Committee in their consideration of amending the Connecticut Rules of Professional Conduct to include a controversial new rule, Proposed Rule 8.4(7). Because Proposed Rule 8.4(7) is rooted in the deeply flawed and highly criticized ABA Model Rule 8.4(g), it should not be imposed on Connecticut attorneys. Leading scholars have determined ABA Model Rule 8.4(g) to be a speech code for lawyers.¹ A thoughtful recent analysis of ABA Model Rule 8.4(g) by Professor Michael McGinniss, Dean of the University of North Dakota School of Law, entitled *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J. L. & Pub. Pol'y 173 (2019), "examine[s] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, [and] socially conservative lawyers' justified distrust of new speech restrictions."² In the four years that ABA Model Rule 8.4(g) has been urged upon state supreme

¹ Eugene Volokh, *A Nationwide Speech Code for Lawyers?*, The Federalist Society (May 2, 2017), <https://www.youtube.com/watch?v=AfpdWmlOXbA>. See *infra* Part I, pp. 6-9 (scholars' criticisms of ABA Model Rule 8.4(g)); Part IV, pp. 22-28 (recent United States Supreme Court free speech decisions regarding regulation of professional speech and viewpoint discrimination).

² Michael McGinniss, *Expressing Conscience with Candor: Saint Thomas More and First Freedoms in the Legal Profession*, 42 Harv. J.L. & Pub. Pol'y 173, 173 (2019), https://law.und.edu/_files/docs/features/mcginniss-expressingconsciencewithcandor-harvardjlp-2019.pdf. A copy is enclosed with this letter.

courts, only two states have adopted it, and fourteen state supreme courts or state bar committees have rejected or abandoned it.³

Due to free speech concerns, as well as prudential policy considerations, Christian Legal Society (CLS) urges the Committee not to adopt Proposed Rule 8.4(7) because it will inevitably have a chilling effect on Connecticut attorneys' speech. CLS is a national association of Christian attorneys, law students, and law professors, founded in 1961, to help lawyers and law students integrate their faith with their practice of law. CLS' membership includes attorneys who practice law in Connecticut. Women constitute a significant percentage of CLS' attorney and law student leaders and members, including CLS' two immediate past presidents who are women who have practiced law for a number of years. CLS opposes harassment and discrimination against women or any member of a minority in the legal profession.

Adoption of Proposed Rule 8.4(7) would create far more problems than it would resolve. Moreover, it is unnecessary given that Connecticut Rule of Professional Conduct 8.4(4) already makes it "professional misconduct for a lawyer to [e]ngage in conduct that is prejudicial to the administration of justice." The Official Commentary for Connecticut Rule of Professional Conduct 8.4(4) instructs that "[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 subdivision (4) when such actions are prejudicial to the administration of justice."

Current Rule 8.4(4) is sufficient to address any professional misconduct that requires disciplinary action. Rather than urging premature adoption of Proposed Rule 8.4(7), this Committee should wait to see whether the widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out, if and when it is adopted in several other states. There is no reason to rush into making Connecticut attorneys the subject of the novel experiment that ABA Model Rule 8.4(g) and Proposed Rule 8.4(7) represent.

Indeed, Proposed Rule 8.4(7) undermines the wisdom found in the Preamble to the Connecticut Rules of Professional Conduct: "An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."⁴

Summary

Rooted in the deeply flawed and highly criticized ABA Model Rule 8.4(g), Proposed Rule 8.4(7) will inevitably have a chilling effect on Connecticut attorneys' speech regarding

³ See *infra* Part VI, pp. 29-34 (describing states' responses to ABA Model Rule 8.4(g)).

⁴ The Commission on Official Legal Publications, Connecticut Practice Book 2, Preamble, Rules of Professional Conduct (2020), <https://www.jud.ct.gov/publications/PracticeBook/PB.pdf>.

political, ideological, religious, and social issues to the detriment of Connecticut attorneys, their clients, and society in general.

A free society requires attorneys who speak their minds freely without fear of losing their license to practice law. In his law review article, Professor Michael McGinniss “examine[s] multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule’s background and deficiencies, states’ reception (and widespread rejection) of it, [and] socially conservative lawyers’ justified distrust of new speech restrictions.”⁵ But liberal lawyers should also be concerned about Proposed Rule 8.4(7)’s disturbing implications for their ability to practice law. For example, attorneys who serve on their firms’ hiring committees and make employment decisions in which, in order to achieve diversity goals, even modest preference is given based on race, sex, religion, or sexual orientation would be in violation of Proposed Rule 8.4(7).⁶ Or an attorney who tweets a common but hurtful sexual term aimed at the President’s spokeswoman could be subject to discipline under the proposed rule.⁷ Or a law professor whose comments to the media inaccurately stereotype, by race and gender, the critics of ABA Model Rule 8.4(g) could be subject to discipline under the proposed rule.⁸ Because the terms “harassment” and “discrimination” are difficult to define and hold greatly dissimilar meanings for different people, ABA Model Rule 8.4(g) and Proposed Rule 8.4(7) threaten lawyers’ speech across the political, ideological, social, and religious spectrum.

⁵ McGinniss, *supra* note 2, at 173.

⁶ Thomas Spahn, a highly respected professional ethics expert, has concluded that ABA Model Rule 8.4(g) “prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc.” He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:

Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a “plus” when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms’ head count on the basis of such attributes – but it is nevertheless discrimination. *In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.*

The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues 5-7* (July 12, 2018) (emphasis supplied). See *infra* at pp. 34-35 (explaining why diversity programs cannot be protected).

⁷ Debra Cassens Weiss, *Big Law Partner Deletes Twitter Account after Profane Insult Toward Sarah Huckabee Sanders*, ABA Journal, Oct. 1, 2018 (lawyer, honored in 2009 by the ABA Journal “for his innovative use of social media in his practice,” apologized to firm colleagues, saying no “woman should be subjected to such animus”), https://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

⁸ Eugene Volokh, *Professor Stephen Gillers (NYU) Unwittingly Demonstrates Why ABA Model Rule 8.4(g) Chills Protected Speech*, The Volokh Conspiracy, June 17, 2019, <https://reason.com/2019/06/17/professor-stephen-gillers-nyu-unwittingly-demonstrates-why-aba-model-rule-8-4g-chills-protected-speech/>. The article explains that in a media interview regarding ABA Model Rule 8.4(g), a proponent of the Rule (inaccurately) stereotyped critics of the Rule by race and gender, and suggests that the same comment made in the context of a bar association debate might be grounds for discipline under ABA Model Rule 8.4(g).

Sadly, we live at a time when many people, including lawyers, are increasingly willing to suppress the free speech of those with whom they disagree. Some lawyers purportedly have filed bar complaints in order to harass officeholders whose political views they dislike.⁹ Yale law students have described significant harassment by fellow law students simply because they hold religious or conservative ideas.¹⁰

In July 2020, the Judicial Conference Committee on Codes of Conduct withdrew a draft advisory opinion that had said it was improper for judges to be members of the Federalist Society or the American Constitution Society, but permissible to belong to the American Bar Association. A comment letter signed by 210 federal judges took exception to the opinion's underlying "double standard" and "untenable" "disparate treatment" as reflected in "the Committee[']s oppos[ing] judicial membership in the Federalist Society while permitting membership in the ABA."¹¹ In withdrawing its proposal, the Judicial Conference Committee noted that "judges confront a world filled with challenges arising out of emerging technologies, deep ideological disputes, a growing sense of mistrust of individuals and institutions, and an ever-changing landscape of competing political, legal and societal interests."¹² Far less sheltered from these competing interests, lawyers daily confront such a world in their practice of law.

Many proponents of ABA Model Rule 8.4(g) and its derivative rules, such as Proposed Rule 8.4(7), sincerely believe that the Rule will only be used to punish lawyers who are bad actors. Unfortunately, we have recently witnessed too many times when people have lost their livelihoods for holding traditional religious views that may be currently disfavored by the popular culture. For example, the Fire Chief of Atlanta, an African-American man who had been appointed National Fire Marshal by President Obama, was fired because he wrote a book that

⁹ See Brian Sheppard, *The Ethics Resistance*, 32 Geo. J. Legal Ethics 235, 238 (2018):

Ordinary ethics complaints have the capacity to ruin individual law careers and serve as cautionary examples to other lawyers. Ethics Resistance complaints have the additional capacity to prompt official action, alter staffing decisions at the highest levels of government, influence high-ranking lawyers' willingness to comply with investigations, and terminate or preempt relationships between lawyers and the politically powerful. Most importantly, they can change public perception regarding the moral integrity of an administration. And they can do this even if they do not result in a sanction.

¹⁰ See, e.g., Aaron Haviland, "I Thought I Could Be a Christian and Constitutionalist at Yale Law School. I Was Wrong," *The Federalist* (Mar. 4, 2019), <https://thefederalist.com/2019/03/04/thought-christian-constitutionalist-yale-law-school-wrong/> (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students and student organizations because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

¹¹ Letter from 210 Federal Judges to Robert P. Deyling, Ass't Gen. Counsel, Administrative Off. of the U.S. Courts (Mar. 18, 2020), <https://int.nyt.com/data/documenthelper/6928-judges-respond-to-draft-ethics/53eaddfaf39912a26ae7/optimized/full.pdf>.

¹² Memorandum from James C. Duff, Director, Administrative Office of the United States Courts to All United States Judges, "Update Regarding Exposure Draft – Advisory Opinion No. 117 Information" (July 30, 2020), <https://aboutblaw.com/SkA>.

briefly referred to his religious beliefs regarding marriage and sexual conduct.¹³ The CEO of Mozilla lost his position because he made a contribution that reflected his religious beliefs to one side of a political debate regarding marriage laws.¹⁴

Simply supporting the concept of freedom of speech has itself become controversial, as became obvious this July when well-known liberal signatories to a public letter in support of freedom of speech were publicly pressured to recant their support for free speech and its concomitant corollary of tolerance for others who hold different beliefs.¹⁵

Given the current climate, lawyers who hold classical liberal, conservative, libertarian, or religious viewpoints, understandably, are unwilling to support a black letter rule that could easily be misused to deprive them of their license to practice law. As a nationally recognized First Amendment expert has explained, ABA Model Rule 8.4(g) is a speech code that threatens lawyers' speech.¹⁶

Perhaps this is why after four years of deliberations by state supreme courts and state bar associations in many states across the country, Vermont and New Mexico are the only states to have adopted ABA Model Rule 8.4(g). In contrast, at least fourteen states have concluded, after careful study, that ABA Model Rule 8.4(g) is unconstitutional or unworkable. Many of those states have opted to take the prudent course of letting other states experiment with ABA Model Rule 8.4(g) in order to evaluate its actual effect on the lawyers in those states before imposing it on lawyers in their states.

This letter explains the numerous reasons why Proposed Rule 8.4(7) should not be recommended for adoption, including:

1. Scholars' criticism of its source, ABA Model Rule 8.4(g), as a speech code for lawyers (Part I, pp. 6-9);
2. Why current Connecticut Rule of Professional Conduct 8.4(4) with its accompanying commentary adequately addresses bias and prejudice in the legal profession (Part II, pp. 10-11);
3. Proposed Rule 8.4(7)'s overreach into attorneys' lives, particularly its chilling effect on their speech and religious exercise, which is exacerbated by its use of a negligence rather than knowledge standard (Part III, pp. 11-21);

¹³ *Testimony Before the House Committee on Oversight and Government Reform on Religious Freedom & The First Amendment Defense Act*, 114th Cong. (July 12, 2016) (statement of Kelvin J. Cochran).

¹⁴ "Did Mozilla CEO Brendan Eich Deserve to Be Removed from His Position?" *Forbes* (Apr. 11, 2014), <https://www.forbes.com/sites/quora/2014/04/11/did-mozilla-ceo-brendan-eich-deserve-to-be-removed-from-his-position-due-to-his-support-for-proposition-8/#483d85c02158>.

¹⁵ "J.K. Rowling Joins 150 Public Figures Warning Over Free Speech," *BBC* (July 8, 2020), <https://www.bbc.com/news/world-us-canada-53330105>.

¹⁶ Volokh, *supra* note 1.

4. Proposed Rule 8.4(7)'s unconstitutionality under the analyses in three recent United States Supreme Court decisions, which ABA Formal Opinion 493 ignored (Part IV, pp. 22-28);
5. The fact that only Vermont and New Mexico have adopted ABA Model Rule 8.4(g), contrary to an inaccurate claim that 24 states have a similar rule (Part V, pp. 28-29);
6. The fact that official bodies in Alaska, Arizona, Idaho, Illinois, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas have rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada have abandoned proposals to adopt it (Part VI, pp. 29-34);
7. Proposed Rule 8.4(7)'s unintended consequence of making it professional misconduct for law firms to engage in hiring practices intended to achieve certain diversity goals in law firms (Part VII, pp. 34-35);
8. Its ramifications for lawyers' ability to accept, decline, or withdraw from a representation (Part VIII, pp. 35-37); and
9. Whether the Office of Chief Disciplinary Counsel has adequate resources to meet the potential increase in employment and other discrimination and harassment grievance complaints against attorneys and firms (Part IX, pp. 37-40).

I. Scholars have explained that ABA Model Rule 8.4(g) is a speech code for lawyers.

A number of scholars have accurately characterized ABA Model Rule 8.4(g) as a speech code for lawyers. For example, Professor Eugene Volokh of UCLA School of Law, a nationally recognized First Amendment expert, has summarized his view, in a two-minute video, that ABA Model Rule 8.4(g) is a speech code that will have a serious impact on attorneys' speech.¹⁷ Professor Volokh also explored its many flaws in a debate with a proponent of the model rule.¹⁸

Professor Margaret Tarkington, who teaches professional responsibility at Indiana University Robert H. McKinney School of Law, has raised strong concerns about ABA Model Rule 8.4(g)'s impact on attorneys' speech. She stresses that "[h]istorically it has been disfavored groups and minorities that have been negatively affected—and even targeted—by laws that restrict lawyers' First Amendment rights, including African Americans during desegregation, alleged terrorists following 9/11, communists in the 1950s, welfare recipients, debtors, and criminal defendants."¹⁹ She insists that "lawyer speech, association, and petitioning" are "rights [that] must be protected" because they "play a major role in checking the use of governmental and non-governmental power in the United States."²⁰ Or in the words of the Preamble to the Connecticut Rules of Professional Conduct: "An independent legal profession is an important

¹⁷ *Id.*

¹⁸ *Debate: ABA Model Rule 8.4(g)*, The Federalist Society (Mar. 13, 2017), <https://www.youtube.com/watch?v=b074xW5kvB8&t=50s>.

¹⁹ Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 Tex. Rev. L. & Pol. 41, 80 (2019).

²⁰ *Id.*

force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”²¹

The late Professor Ronald Rotunda, a highly respected scholar in both constitutional law and legal ethics, warned that ABA Model Rule 8.4(g) threatens lawyers’ First Amendment rights.²² Regarding the new rule, he and Professor John S. Dzienkowski wrote, in the 2017-2018 edition of *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, “[t]he ABA’s efforts are well intentioned, but . . . raise problems of vagueness, overbreadth, and chilling protected speech under the First Amendment.”²³ They observed that “[t]he language the ABA has adopted in Rule 8.4(g) and its associated Comments are similar to laws that the Supreme Court has invalidated on free speech grounds.”²⁴ In a *Wall Street Journal* commentary entitled *The ABA Overrules the First Amendment*, Professor Rotunda explained:

In the case of Rule 8.4(g), the standard, for lawyers at least, apparently does not include the First Amendment right to free speech. Consider the following form of “verbal” conduct when one lawyer tells another, in connection with a case, “I abhor the idle rich. We should raise capital gains taxes.” The lawyer has just violated the ABA rule by manifesting bias based on socioeconomic status.²⁵

Professor Josh Blackman has explained that “Rule 8.4(g) is unprecedented, as it extends a disciplinary committee’s jurisdiction to conduct merely ‘related to the practice of law,’ with only the most tenuous connection to representation of clients, a lawyer’s fitness, or the administration of justice.”²⁶

²¹ See *supra* note 4.

²² Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting ‘Diversity’ But Not Diversity of Thought*, The Heritage Foundation (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>. Professor Rotunda and Texas Attorney General Ken Paxton debated two proponents of Rule 8.4(g) at the 2017 Federalist Society National Lawyers Convention. *Using the Licensing Power of the Administrative State: Model Rule 8.4(g)*, The Federalist Society (Nov. 20, 2017), <https://www.youtube.com/watch?v=V6rDPjqBcQg>.

²³ Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, ed. April 2017 [hereinafter “Rotunda & Dzienkowski”], “§ 8.4-2(j) Racist, Sexist, and Politically Incorrect Speech” & “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise” in “§ 8.4-2 Categories of Disciplinable Conduct.”

²⁴ *Id.* at “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

²⁵ Ron Rotunda, “*The ABA Overrules the First Amendment: The legal trade association adopts a rule to regulate lawyers’ speech*,” *The Wall Street Journal*, Aug. 16, 2016, <https://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418>.

²⁶ Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 Geo. J. Legal Ethics 241, 243 (2017). See also, George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 Notre Dame J.L. Ethics & Pub. Pol’y 135 (2018).

Professor Michael S. McGinniss, the Dean of the University of North Dakota School of Law who teaches professional responsibility, warns against “the widespread ideological myopia about what it truly means to have a diverse and inclusive profession” that seems to be an impetus for ABA Model Rule 8.4(g).²⁷ He explains that a genuinely “diverse and inclusive profession . . . does not mean silencing or chilling diverse viewpoints on controversial moral issues on the basis that such expression manifests ‘bias or prejudice,’ is ‘demeaning’ or ‘derogatory’ because disagreement is deemed offensive, or is considered intrinsically ‘harmful’ or as reflecting adversely on the ‘fitness’ of the speaker.”²⁸

In a thorough examination of the rule’s legislative history, practitioners Andrew Halaby and Brianna Long conclude that ABA Model Rule 8.4(g) “is riddled with unanswered questions, including but not limited to uncertainties as to the meaning of key terms, how it interplays with other provisions of the Model Rules, and what disciplinary sanctions should apply to a violation; as well as due process and First Amendment free expression infirmities.”²⁹ They recommend that “jurisdictions asked to adopt it should think long and hard about whether such a rule can be enforced, constitutionally or at all.”³⁰ They conclude that “the new model rule cannot be considered a serious suggestion of a workable rule of professional conduct to which real world lawyers may be fairly subjected.”³¹

In adopting ABA Model Rule 8.4(g), the ABA largely ignored over 480 comment letters,³² most opposed to the new rule. Even the ABA’s own Standing Committee on Professional Discipline filed a comment letter questioning whether there was a demonstrated need for the rule and raising concerns about its enforceability, although the Committee dropped its opposition immediately prior to the House of Delegates’ vote.³³

²⁷ McGinniss, *supra* note 2, at 249.

²⁸ *Id.*

²⁹ Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. Legal. Prof. 201, 257 (2017).

³⁰ *Id.*

³¹ *Id.* at 204.

³² American Bar Association website, Comments to Model Rule 8.4,

http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments.html.

³³ Halaby & Long, *supra* note 29, at 220 & n.97 (listing the Committee’s concerns as including: lack of empirical evidence of need for Rule; vagueness of key terms; enforceability; constitutionality; coverage of employment discrimination complaints; mens rea requirement; and potential limitation on ability to decline representation), *citing* Letter from Ronald R. Rosenfeld, Chair ABA Standing Committee On Professional Responsibility, to Myles Lynk, Chair ABA Standing Committee On Ethics and Professional Responsibility, Mar. 10, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/20160310%20Rosenfeld-Lynk%20SCPD%20Proposed%20MABA%20MODEL%20RULE%208-4%20g%20Comments%20FINAL%20Protected.authcheckdam.pdf.

A recurrent concern in many of the comments was the threat that ABA Model Rule 8.4(g) poses to attorneys' First Amendment rights.³⁴ But little was done to address these concerns. In their meticulous explication of the legislative history of ABA Model Rule 8.4(g), Halaby and Long conclude that "the new model rule's afflictions derive in part from indifference on the part of rule change proponents, and in part from the hasty manner in which the rule change proposal was pushed through to passage."³⁵ Specifically, the rule went through five versions, of which three versions evolved "in the two weeks before passage, none of these was subjected to review and comment by the ABA's broader membership, the bar at large, or the public."³⁶ Halaby and Long summarized the legislative history of the rule:

Model Rule 8.4(g) and its associated comments evolved rapidly between the initial letter from the Goal III entities in July 2014, through initial circulation of Version 1 in July 2015, to final adoption of Version 5 the following August. There was solicitation of public input only on Version 2, with only one public hearing, and ultimately with no House debate at all.³⁷

These scholars' red flags should not be ignored. ABA Model Rule 8.4(g) and its progeny, like Proposed Rule 8.4(7), would dramatically shift the disciplinary landscape for Connecticut attorneys.

A similar red flag arises from the fact that Proposed Rule 8.4(7) has been rushed through the normal processes for significantly amending the Rules of Professional Conduct. The rushed process itself is troubling because it has preempted the careful study that Proposed Rule 8.4(7) warrants given its potential to negatively impact Connecticut attorneys. Given the haste with which Proposed Rule 8.4(7) has been rushed through a subcommittee and the county bar associations, we respectfully suggest that the Committee and Connecticut lawyers would benefit from a more widely publicized comment period. Extension of the comment period would ensure fairness for the many Connecticut lawyers who have been unaware of the expedited push to adopt Proposed Rule 8.4(7) and provide them with an adequate opportunity to be heard by the Committee.

³⁴ Halaby & Long, *supra* note 29, at 216-223 (summarizing concerns expressed at the only public hearing on an early version of ABA Model Rule 8.4(g), as well as the main concerns expressed in the comment letters).

³⁵ *Id.* at 203.

³⁶ *Id.*

³⁷ *Id.* at 233.

II. Proposed Rule 8.4(7) would impose a significantly heavier burden on Connecticut attorneys than does current Rule of Professional Conduct 8.4(4).

Current Connecticut Rule of Professional Conduct 8.4(4) states: “[I]t is professional misconduct for a lawyer to . . . (4) Engage in conduct that is prejudicial to the administration of justice[.]” Its accompanying Commentary states: “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 subdivision (4) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate subdivision (4).”

The scope of Proposed Rule 8.4(7) is significantly broader than current Rule 8.4(4) and its accompanying comment (“Current Rule 8.4(4)”) in several critical aspects, including:

A. Proposed Rule 8.4(7) is substantially broader in the conduct it regulates: The Current Rule 8.4(4) is limited to when a lawyer is acting “in the course of representing a client,” whereas Proposed Rule 8.4(7) applies more broadly to when a lawyer is acting “in conduct related to the practice of law.” Proposed Rule 8.4(7) in its commentary defines “conduct related to the practice of law” extremely broadly to reach far beyond conduct “in the course of representing clients.” It defines “conduct related to the practice of law” to “*include*” (in other words, not limited to): “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 professional activities or events in connection with the practice of law.*” (Emphasis supplied.) Proposed Rule 8.4(7) applies to *nearly everything that a lawyer does that is arguably related to the practice of law*. And it applies to *anyone* that a lawyer interacts with during any conduct arguably related to the practice of law. *See infra* pp.11-18.

B. Proposed Rule 8.4(7) is not limited to conduct that is “prejudicial to the administration of justice”: Current Rule 8.4(4) requires that a lawyer’s actions be “prejudicial to the administration of justice.” Proposed Rule 8.4(7) abandons this traditional limitation, making a lawyer subject to disciplinary liability even though his or her conduct has not prejudiced the administration of justice. This greatly expands the regulatory reach of the proposed rule.

C. Proposed Rule 8.4(7) dispenses with the mens rea requirement of the Current 8.4(4): Current Rule 8.4(4) requires that a lawyer “knowingly” manifest bias or prejudice, whereas Proposed Rule 8.4(7) adopts a negligence standard by substituting “knows or reasonably should know.” A lawyer could violate Proposed Rule 8.4(7) without even realizing he or she has done so. This change is particularly perilous because the list of words and conduct that are deemed “harassment” or “discrimination” is constantly expanding in novel and unanticipated ways. *See infra* pp. 18-20.

D. Proposed Rule 8.4(7) adds an additional eight protected categories: Current Rule 8.4(4) already protects “race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.” Proposed Rule 8.4(7) would add eight protected classes—gender identity, gender expression, marital status, ethnicity, color, veteran status, pregnancy, and ancestry—for a total of fifteen protected classes.³⁸

III. Proposed Rule 8.4(7) Would Greatly Expand the Reach of the Professional Rules of Conduct into Connecticut Attorneys’ Lives and Chill Their Speech.

A. Proposed Rule 8.4(7) would regulate lawyers’ interactions with anyone while engaged in conduct related to the practice of law or in connection with the practice of law.

1. Who is reached: Proponents of ABA Model Rule 8.4(g) candidly observed that they sought a new black letter rule precisely because they wanted to regulate nonlitigating lawyers, such as “[a]cademics, nonprofit lawyers, and some government lawyers,” as well as “[t]ax lawyers, real estate lawyers, intellectual property lawyers, lobbyists, academics, corporate lawyers, and other lawyers who practice law outside the court system.”³⁹ But its reach and that of Proposed Rule 8.4(7) is a regulatory expansion that goes far beyond *who* is covered to *which* of a lawyer’s activities are covered.

Proposed Rule 8.4(7) would make professional misconduct *any* “conduct related to the practice of law” “that the lawyer knows *or reasonably should know* is harassment or discrimination” on fifteen separate bases (“race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital status”). According to its Official Commentary, Proposed Rule 8.4(7)’s scope “includes,” but is not limited to, whenever a lawyer is: “representing clients; interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business *or professional activities or events in connection with the practice of law.*” (Emphasis supplied.)

Simply put, Proposed Rule 8.4(7) would regulate any “conduct . . . while . . . *interacting with . . . others* while engaged in the practice of law . . . or participating in bar association, business or professional activities or events *in connection with* the practice of law.”

2. What is reached: The compelling question becomes: *What conduct doesn’t Proposed Rule 8.4(7) reach?* Virtually everything a lawyer does can be characterized as conduct

³⁸ “Socioeconomic status,” which is protected by Current Rule 8.4(4), is not protected in Proposed Rule 8.4(7).

³⁹ ABA Commission on Sexual Orientation and Gender Identity, *Memorandum to Standing Committee on Ethics and Professional Responsibility: Proposed Amendment to ABA Model Rule of Professional Conduct 8.4*, at 5, 7 (Oct. 22, 2015), <https://www.clsnet.org/document.doc?id=1125>.

while interacting with others while engaged in the practice of law.⁴⁰ Much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients. *See infra* at pp. 13-17.

This is of particular concern when “conduct” is euphemistically defined to include “harmful verbal conduct,” which is speech. The Official Commentary for Proposed Rule 8.4(7) defines “harassment” and “discrimination” to include “harmful verbal conduct.” Thus, like ABA Model Rule 8.4(g), Proposed 8.4(7) would regulate pure speech.

But of even greater concern, the Official Commentary seems to indicate that the operating assumption underlying Proposed Rule 8.4(7) is that most conduct falling within its scope, including “verbal conduct,” is presumed to be discrimination. The Official Commentary states that “[n]ot *all* conduct that involves consideration of these characteristics [i.e., the fifteen protected categories] manifests bias or prejudice: there *may* be a legitimate nondiscriminatory basis for the conduct.” Rather than providing reassurance, this statement amplifies the First Amendment problems with Proposed Rule 8.4(7): Whereas, the First Amendment presumes that speech is protected, Proposed Rule 8.4(7) seems to presume speech is not protected.

And who will determine whether there is “a legitimate nondiscriminatory basis for the conduct”? Who decides which speech is “legitimate” and which speech is “illegitimate”? By what standards? Whether speech or conduct does or does not have “a legitimate nondiscriminatory basis” completely depends on the beholder's—a government official's—subjective beliefs.

For example, consider a law firm's efforts to promote diversity in its partnership ranks, or a lawyer's participation in a panel discussion of affirmative action in college admissions. Where one person sees inclusion, another sees exclusion. Where one person sees diversity and inclusion, another may equally sincerely see discrimination. Are these the types of decisions that the staff of the Office of Chief Disciplinary Counsel really want to make or even should make?

Because enforcement of Proposed Rule 8.4(7) would give government officials unbridled discretion to determine which speech is “legitimate” and which is not “legitimate,” it countenances viewpoint discrimination based on governmental officials' subjective biases. As courts have recognized, giving government officials unbridled discretion to suppress citizens' free speech is a form of unconstitutional viewpoint discrimination.⁴¹

⁴⁰ *See Halaby & Long, supra* note 29, at 226 (“The proposed comment of Version 3 [of ABA Model Rule 8.4(g)] expanded the ambit of ‘conduct related to the practice of law’ to include virtually anything a working lawyer might do.”)

⁴¹ *See, e.g., Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 384 (4th Cir. 2006); *DeBoer v. Village of Oak Park*, 267 F.3d 558, 572-574 (7th Cir. 2001).

Finally, note that while the Official Commentary adds that “[d]iscrimination *includes* harmful verbal. . . conduct” “directed at an individual or individuals that manifests bias or prejudice on the basis of one or more of the protected categories,” Proposed Rule 8.4(7) does not limit the potential complainants to the individuals to whom the speech is directed. Anyone hearing or reading a Connecticut lawyer’s speech may file a grievance complaint. Needless to say, it is not good for the profession, or for a robust civil society, for a lawyer to be potentially subject to disciplinary action every time she speaks or writes on a topic that may cause anyone who hears or reads her words and disagrees with her ideas to file a disciplinary complaint.

At bottom, ABA Model Rule 8.4(g) and Proposed Rule 8.4(7) share a “fundamental defect” because each “wrongly assumes that the only attorney speech that is entitled to First Amendment protection is purely private speech that is entirely unrelated to the practice of law. But the First Amendment provides robust protection to attorney speech.”⁴² ABA Model Rule 8.4(g) and Proposed Rule 8.4(7) create doubt as to whether particular speech is permissible or “legitimate” and, therefore, will inevitably chill lawyers’ public speech.⁴³ In all likelihood, it will chill speech on one side of current political and social issues, while simultaneously creating little disincentive for lawyers who speak on the opposing side of these controversies.⁴⁴ If so, public discourse, civil society, and clients will suffer from the ideological straitjacket that ABA Model Rule 8.4(g) and Proposed Rule 8.4(7) will impose on lawyers.

B. Proposed Rule 8.4(7) would dramatically increase Connecticut lawyers’ exposure to disciplinary sanctions for their speech.

Proposed Rule 8.4(7) is a minefield for Connecticut lawyers who frequently speak to community groups, classes, and other audiences about current legal issues of the day. Lawyers frequently participate in panel discussions, present CLEs, write op-eds, or record podcasts regarding sensitive social and political issues. Their commentary is sought by the media regarding controversial issues in their community, state, and nation. Lawyers are asked to speak *because they are lawyers*. A lawyer’s speaking engagements often have a dual purpose of increasing the lawyer’s visibility in order to create new professional opportunities.

⁴² Tenn. Att’y Gen. Letter, Letter from Attorney General Slatery to Supreme Court of Tennessee (Mar. 16, 2018) at 7 (hereinafter “Tenn. Att’y Gen. Letter”), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf>. (“[T]he goal of the proposed rule is to *subject* to regulatory scrutiny all attorney expression that is in any way connected with the practice of law. That approach is wholly inconsistent with the First Amendment.”) (Emphasis in original.) The letter is incorporated into Tennessee Attorney General Opinion 18-11; however, for purposes of quoting the letter, we cite to the page numbers of the letter rather than the opinion.

⁴³ *Id.* at 8 (“Even if the [Board of Professional Responsibility] may ultimately decide not to impose disciplinary sanctions on the basis of such speech, or a court may ultimately invalidate on First Amendment grounds any sanction imposed, the fact that the rule on its face would apply to speech of that nature would undoubtedly chill attorneys from engaging in speech in the first place.”).

⁴⁴ McGinniss, *supra* note 2, at 217-249 (explaining the “justified distrust of speech restrictions” such as Model Rule 8.4(g), in light of its proponents’ stated desire “for a cultural shift . . . to be captured in the rules of professional conduct”).

For example, Proposed Rule 8.4(7) raises numerous questions about whether various routine expressive activities could expose a lawyer to potential disciplinary action, including:

- Is a lawyer subject to discipline for her discussion of hypotheticals while presenting a CLE course?⁴⁵
- Is a lawyer subject to discipline when participating in legal panel discussions that touch on controversial political, religious, and social viewpoints?⁴⁶
- Is a law professor or adjunct faculty member subject to discipline for a law review article or a class discussion that explores controversial topics or expresses unpopular viewpoints?
- Must lawyers abstain from writing blogposts or op-eds because they risk a grievance complaint by an offended reader?
- Must lawyers forgo media interviews on topics about which they have some particularly insightful comments because anyone hearing the interview could file a grievance complaint?⁴⁷
- Can a lawyer lose his license to practice law for a tweet calling a female public official a derogatory sexist term?⁴⁸
- Is a lawyer subject to discipline for employment decisions made by religious or other charitable nonprofits if she sits on its board and ratifies its decisions or employment policies?⁴⁹
- May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of various groups as protected classes in a nondiscrimination law being debated in the state legislature?
- Is a lawyer at risk if she provides legislative testimony in favor of adding new protected classes to state or local civil rights laws, but only if religious exemptions (which some regard as “a license to discriminate”) are also added?⁵⁰

⁴⁵ See, e.g., Kathryn Rubino, *Did D.C. Bar Course Tell Attorneys That It's Totally Cool to Discriminate If that's What the Client Wants?*, Above the Law (Dec. 12, 2018) (reporting on attendees' complaints regarding an instructor's discussion of a hypothetical about sex discrimination and the applicability of the ethical rules during the mandatory D.C. Bar Professional Ethics course for newly admitted D.C. attorneys), <https://abovethelaw.com/2018/12/did-d-c-bar-course-tell-attorneys-its-totally-cool-to-discriminate-if-thats-what-the-client-wants/>.

⁴⁶ Volokh, *supra* note 8 (in a media interview regarding ABA Model Rule 8.4(g), a proponent of the Rule (wrongly) stereotyped opponents of the Rule by race and gender).

⁴⁷ See *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Com'n. (May 15, 2018) discussed *infra* note 56.

⁴⁸ Debra Cassens Weiss, *supra* note 7 (lawyer, honored in 2009 by the ABA Journal “for his innovative use of social media in his practice,” apologized to firm colleagues for his sexist tweet at the President’s spokeswoman), https://www.abajournal.com/news/article/biglaw_partner_deletes_twitter_account_after_profane_insult_toward_sarah_hu.

⁴⁹ See D.C. Bar Legal Ethics, Opinion 222 (1991) (punting the issue of whether a lawyer could be disciplined for arguably discriminatory employment decisions made by his church or a religious nonprofit while he was on its board), <https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion222.cfm>.

⁵⁰ The Montana Legislature passed a resolution expressing its concerns about the impact of ABA Model Rule 8.4(g) on “the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of

- Is a lawyer subject to discipline for comment letters she writes as a lawyer expressing her personal views on proposed Title IX regulations, immigration issues, census questions, re-districting proposals, or capital gains tax proposals?
- Is a lawyer subject to discipline for refusing to use “preferred” pronouns that she believes are not objectively accurate?⁵¹
- Is a lawyer subject to discipline for serving on the board of an organization that discriminates based on sex, such as a social fraternity or sorority?
- Is a lawyer at risk for volunteer legal work for political candidates who take controversial positions?
- Is a lawyer at risk for any pro bono work that involves advocating for or against controversial socioeconomic, religious, social, or political positions?⁵²

Professor Eugene Volokh has explored whether discipline under ABA Model Rule 8.4(g) could be triggered by conversation on a wide range of topics at a local bar dinner, explaining:

Or say that you’re at a lawyer social activity, such as a local bar dinner, and say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.

Again, you’ve engaged in “verbal . . . conduct” that the bar may see as “manifest[ing] bias or prejudice” and thus as “harmful.” This was at a “social activit[y] in connection with the practice of

Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees.” See *infra* notes 141 & 142.

⁵¹ See, e.g., *Meriwether v. Shawnee State University*, 2020 WL 704615 (S.D. Ohio 2020), *on appeal*, No. 20-3289 (6th Cir., Mar. 16, 2020) (tenured professor disciplined by university for violating its nondiscrimination policies because he refused to address a transgender student using the student’s preferred gender identity title and pronouns).

⁵² *Whether adoption of the American Bar Association’s Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney’s statutory or constitutional rights (RQ-0128-KP)*, Tex. Att’y Gen. Op. KP-0123 (Dec. 20, 2016) at 3, <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf>. (“Given the broad nature of this rule, a court could apply it to an attorney’s participation in a continuing legal education panel discussion, authoring a law review article, or informal conversations at a bar association event.”); *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*, 17 La. Att’y Gen. Op. 0114 (Sept. 8, 2017) at 4, <https://lalegaethics.org/wp-content/uploads/2017-09-08-LA-AG-Opinion-17-0114-re-Proposed-Rule-8.4f.pdf?x16384>, at 6 (“[A] lawyer who is asked his opinions, thoughts, or impressions on legal matters taking place in the news at a social function could also be found to be engaged in conduct related to the practice of law.”).

law.” The state bar, if it adopts this rule, might thus discipline you for your “harassment.”⁵³

Professor Josh Blackman similarly has a thought-provoking list of CLE topics that would expose their presenters to grievance complaints by persons who disagree with the ideas or beliefs that a lawyer expresses.⁵⁴

As already noted, many people, including lawyers, seem eager to suppress the free speech of those with whom they disagree.⁵⁵ Many examples have already been noted *supra* at pp. 3-5. Yet another troubling situation arose two years ago in Alaska, when the Anchorage Equal Rights Commission (AERC) filed a complaint against an Anchorage law firm, alleging that the firm violated a municipal nondiscrimination law. The firm represented a religiously-affiliated nonprofit shelter for homeless women, many of whom had been abused by men. The firm represented the shelter in a proceeding arising from a discrimination complaint filed with the AERC, alleging that the shelter had refused admission to a biological man who identified as a woman. The shelter explained that it had not admitted the individual because of its policy against admitting inebriated persons, but acknowledged that it also had a policy against admitting biological men. The law firm responded to an unsolicited request for a media interview. When the interview was published providing the shelter’s version of the facts, the AERC brought a discrimination claim against the law firm, alleging it had published a discriminatory policy. The AERC complaint was eventually dismissed, but only after several months of legal proceedings.⁵⁶

Because lawyers frequently are the spokespersons and leaders in political, social, religious, or cultural movements, a rule that can be employed to discipline a lawyer for his or her speech on controversial issues should be rejected as a serious threat to a civil society in which freedom of speech, free exercise of religion, and freedom of political belief flourish. In a time when respect for First Amendment rights seems to diminish daily, lawyers can ill-afford to wager their licenses on a rule that may be utilized to punish their speech.

⁵³ Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express ‘Bias,’ including in Law-Related Social Activities*, The Washington Post, Aug. 10, 2016,

https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

⁵⁴ Blackman, *supra* note 26 at 246.

⁵⁵ See, e.g., Haviland, *supra* note 10 (student president of Yale Law School chapter of the Federalist Society describing significant harassment by other Yale Law students because they did not like the ideas that they ascribed (accurately or inaccurately) to Federalist Society members and guest speakers).

⁵⁶ *Basler v. Downtown Hope Center, et al.* Case No. 18-167, Anchorage Equal Rights Com’n (May 15, 2018).

C. Attorneys could be subject to discipline for guidance they offer when serving on the boards of their congregations, religious schools and colleges, or other nonprofit charities.

Many lawyers sit on the boards of their congregations, religious schools and colleges, and other religious nonprofit organizations. These organizations provide incalculable good to people in their local communities, as well as nationally and internationally. They also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.⁵⁷

As a volunteer on a charitable institution's board, a lawyer arguably is engaged "in conduct related to the practice of law" when serving on the risk management committee or providing legal input during a board discussion about the institution's policies. For example, a lawyer may be asked to help craft her congregation's policy regarding whether its clergy will perform marriages or whether the institution's facilities may be used for wedding receptions that are contrary to its religious beliefs. A religious college may ask a lawyer who serves on its board of trustees to review its housing policy or its student code of conduct. Drafting and reviewing legal policies may qualify as "conduct related to the practice of law," but surely a lawyer should not fear being disciplined for pro bono legal work that she performs for her church or her alma mater.⁵⁸ By making Connecticut lawyers hesitant to serve on these nonprofit boards, Proposed Rule 8.4(7) would do real harm to religious and charitable institutions and hinder their good works in their communities.

D. Attorneys' membership in religious, social, or political organizations could be subject to discipline.

Proposed Rule 8.4(7) could chill lawyers' willingness to associate with political, cultural, or religious organizations that promote traditional values regarding sexual conduct and marriage. Would Proposed Rule 8.4(7) subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage?⁵⁹ Would lawyers be subject to disciplinary action for belonging to political organizations that advocate for laws that promote traditional values regarding sexual conduct and marriage?

⁵⁷ Tex. Att'y Gen. Op., *supra* note 52, at 4 ("Model Rule 8.4(g) could also be applied to restrict an attorney's religious liberty and prohibit an attorney from zealously representing faith-based groups.").

⁵⁸ See D.C. Bar Legal Ethics, Opinion 222, *supra* note 50. See also, Tenn. Att'y Gen. Letter, *supra* note 42, at 8 n.8 ("statements made by an attorney in his or her capacity as a member of the board of a nonprofit or religious organization" "could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)").

⁵⁹ For example, in 2015, the California Supreme Court adopted a disciplinary rule that prohibited all California state judges from participating in Boy Scouts. Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, https://www.courts.ca.gov/documents/sc15-Jan_23.pdf.

The late Professor Rotunda and Professor Dzienkowski expressed concern that ABA Model Rule 8.4(g) would subject lawyers to discipline for attending events sponsored by the St. Thomas More Society, an organization of Catholic lawyers and judges who meet together to share their faith.⁶⁰ State attorneys general have voiced similar concerns.⁶¹ Several attorneys general have warned that “serving as a member of the board of a religious organization, participating in groups such as Christian Legal Society or even speaking about how one’s religious beliefs influence one’s work as an attorney” could “be deemed conduct ‘related to the practice of law.’”⁶²

E. Proposed Rule 8.4(7)’s potential for chilling Connecticut attorneys’ speech is compounded by its use of a negligence standard rather than a knowledge requirement.

The lack of a knowledge requirement is a serious flaw: “[T]he proposed rule would subject an attorney to professional discipline for uttering a statement that was not actually known to be or intended as harassing or discriminatory, simply because someone might construe it that way.”⁶³

Professor Dane Ciolino, an ethics law professor at Loyola University New Orleans College of Law, has explained:

[ABA Model Rule 8.4(g)] subjects to discipline not only a lawyer who *knowingly* engages in harassment or discrimination, but also a lawyer who *negligently* utters a derogatory or demeaning comment. So, a lawyer who did not *know* that a comment was offensive will be disciplined if the lawyer *should have known* that it was. It will be interesting to see how the ‘objectively reasonable lawyer’ will be constructed for purposes of making this determination.⁶⁴

Proposed Rule 8.4(7) is perilous because the list of words and conduct deemed “discrimination” or “harassment” is ever shifting in often unanticipated ways. Its negligence

⁶⁰ Rotunda & Dzienkowski, *supra* note 23, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

⁶¹ Tex. Att’y Gen. Op., *supra* note 52, at 5 (“Many attorneys belong to faith-based legal organizations, such as a Christian Legal Society, a Jewish Legal Society, or a Muslim Legal Society, but Model Rule 8.4(g) could curtail such participation for fear of discipline.”); La. Att’y Gen. Op., *supra* note 52, at 6 (“Proposed 8.4(h) could apply to many of the faith-based legal societies such as the Christian Legal Society, Jewish Legal Society, and Muslim Legal Society.”).

⁶² Tenn. Att’y Gen. Letter, *supra* note 42, at 10.

⁶³ *Id.* at 5. See Halaby & Long, *supra* note 29, at 243-245.

⁶⁴ Prof. Dane S. Ciolino, *LSBA Seeks Public Comment on Proposed Anti-Discrimination Rule of Professional Conduct*, Louisiana Legal Ethics (Aug. 6, 2017) (emphasis in original), <https://lalegaethics.org/lsba-seeks-public-comment-on-proposed-anti-discrimination-rule-of-professional-conduct/>.

standard makes it entirely foreseeable that it could reach communication or conduct that demonstrates “implicit bias.”⁶⁵ Nothing in Proposed Rule 8.4(7) prevents punishing a lawyer for communication based on implicit bias if someone thinks the lawyer “reasonably should have known” the communication was discriminatory.

F. Proposed Rule 8.4(7) does not preclude a finding of professional misconduct based on a lawyer’s “implicit bias.”

Dean McGinniss notes that “this relaxed mens rea standard” might even be used to “more explicitly draw lawyers’ speech reflecting unconscious, or ‘implicit,’ bias within the reach of the rule.”⁶⁶ Acting Law Professor Irene Oritseweyinmi Joe recently argued that while ABA Model Rule 8.4(g) “addresses explicit attorney bias, . . . it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias.”⁶⁷ She explains that “the rule’s use of ‘knows or reasonably should know’ arguably includes an understanding and reflection of unconscious bias and its effects.”⁶⁸

The proponents of ABA Model Rule 8.4(g) frequently emphasize their concerns about implicit bias, that is, conduct or speech that the lawyer is not consciously aware may be discriminatory.⁶⁹ On its webpages devoted to its “Implicit Bias Initiative,” the ABA defines “implicit bias” and “explicit biases” as follows:⁷⁰

Explicit biases: Biases that are directly expressed or publicly stated or demonstrated, often measured by self-reporting, *e.g.*, “I believe homosexuality is wrong.” A preference (positive or negative) for a group based on stereotype.

Implicit bias: A preference (positive or negative) for a group based on a stereotype or attitude we hold that *operates outside of human awareness* and can be understood as a lens through which a person views the world

⁶⁵ At its mid-year meeting in February 2018, the ABA adopted Resolution 302, a model policy that “urges . . . all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity.” ABA Res. 302 (Feb. 5, 2018), <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/302.pdf>.

⁶⁶ McGinniss, *supra* note 2, at 205 & n.135.

⁶⁷ Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 Calif. L. Rev. 965, 975 (2020) (ABA Model Rule 8.4(g) “addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias.”).

⁶⁸ *Id.* at 978 n.70.

⁶⁹ See Halaby & Long, *supra* note 29, at 216-217, 243-245. Halaby and Long eventually conclude that implicit-bias conduct probably would not fall within the “reasonably should know” standard. *Id.* at 244-245. We are not so certain.

⁷⁰ ABA Section on Litigation, *Implicit Bias Initiative, Toolbox, Glossary of Terms* (Jan. 23, 2012), <https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox/glossary/#23>

that automatically filters how a person takes in and acts in regard to information. Implicit biases are usually measured indirectly, often using reaction times.

One can agree that implicit bias exists and still believe that bias “outside of human awareness” should not be grounds for a lawyer’s loss of licensure or her suspension, censure, or admonition.⁷¹ But nothing would prevent a charge of discrimination based on “implicit bias” from being brought against an attorney under Proposed Rule 8.4(7).⁷² Such charges are foreseeable given that ABA Model Rule 8.4(g)’s “proponents repeatedly invoked that concept [of implicit bias] in arguing against any knowledge qualifier at all.”⁷³

G. Despite its nod to speech concerns, Proposed Rule 8.4(7) will chill speech and cause lawyers to self-censor in order to avoid grievance complaints.

Proposed Rule 8.4(7) itself recognizes its potential for silencing lawyers when it includes in its Official Commentary that “[a] lawyer’s conduct does not violate paragraph (7) when the conduct in question is protected under the First Amendment of the Constitution of the United States or Article First, Section 4 of the Connecticut Constitution.” This provision affords no substantive protection for attorneys’ speech: It merely asserts that the rule does not do what it in fact does.

Nor is it enough for government officials to promise to be careful in their enforcement of a rule that lawyers have reason to fear will suppress their speech. As the Supreme Court has observed, “The First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”⁷⁴ Instead, the Court has rejected “[t]he Government’s assurance that it will apply [a statute] far more restrictively than its language provides” because such an assurance “is pertinent only as an *implicit acknowledgment of the potential constitutional problems* with a more natural reading.”⁷⁵

⁷¹ Halaby & Long, *supra* note 29, at 245 (“Even crediting the existence of implicit bias as well as corresponding concerns over its impact on the administration of justice, one recoils at the dystopian prospect of punishing a lawyer over unconscious behavior.”). *See also*, McGinnis, *supra* note 2, at 204-205; Dent, *supra* note 26, at 144.

⁷² *See, e.g.*, Joe, *supra* note 67 (ABA Model Rule 8.4(g) “addresses explicit attorney bias, but I argue that it also provides a vehicle for those tasked with governing attorney behavior to address implicit bias.”); *id.* at 978n.70 (“[T]he rule’s use of ‘knows or reasonably should know’ arguably includes an understanding and reflection of unconscious bias and its effects.”).

⁷³ Halaby & Long, *supra* note 29, at 244 (“When a new anti-bias rule proved unsaleable without a knowledge qualifier, one was added, but only with the alternative ‘reasonably should know’ qualifier alongside. That addition was not subjected to comment by the public or by the bar or the ABA’s broader membership.”) (footnote omitted).

⁷⁴ *United States v. Stevens*, 599 U.S. 460, 480 (2010).

⁷⁵ *Id.* (emphasis added).

In the landmark case, *National Association for the Advancement of Colored People v. Button*,⁷⁶ involving regulation of attorneys' speech, the Supreme Court ruled that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," explaining:

If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.⁷⁷

Proposed Rule 8.4(7) fails to protect a lawyer from complaints being filed against her based on her speech. It fails to protect a lawyer from an investigation into whether her speech is "harmful" and "manifests bias or prejudice on the basis of one or more of the [fifteen] protected categories." The provision fails to protect a lawyer from the expense of protracted litigation to defend her speech as protected speech. Litigation in free speech cases often lasts for years. It extracts great personal expense and a significant emotional toll. Even if the investigation or litigation eventually concludes that the lawyer's speech was protected by the First Amendment, the lawyer has had to inform courts that a complaint has been brought and she is under investigation whenever she applies for admission to another bar or seeks to appear pro hac vice in a case. In the meantime, her personal reputation will suffer damage through media reports.

The process will be the punishment, which brings us to the real problem with Proposed Rule 8.4(7). Rather than risk a prolonged investigation with an uncertain outcome, and then lengthy litigation, a rational, risk-adverse lawyer will self-censor. Because a lawyer's loss of her license to practice law is a staggering penalty, the calculus is entirely predictable: Better to censor one's own speech than to risk a grievance complaint under Proposed Rule 8.4(7). The losers are not just the lawyers, but our free civil society that depends on lawyers to protect—and contribute to—the free exchange of ideas, which is its lifeblood.

IV. ABA Formal Opinion 493 Ignores Three Recent Supreme Court Decisions that Demonstrate the Likely Unconstitutionality of Rules Like Proposed Rule 8.4(7).

Since the ABA adopted Model Rule 8.4(g) in 2016, the United States Supreme Court has issued three free speech decisions that make clear that it unconstitutionally chills attorneys' speech: *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018); and *Matal v. Tam*, 137 S. Ct. 1744 (2017). The *Becerra* decision clarified that the First Amendment protects "professional speech" just as fully as other speech. That is, there is no free speech carve-out that countenances content-

⁷⁶ *NAACP v. Button*, 371 U.S. 415 (1963).

⁷⁷ *Id.* at 438-39.

based restrictions on professional speech. The *Matal* and *Iancu* decisions affirm that the terms used in Proposed Rule 8.4(7) create unconstitutional viewpoint discrimination.

A. *NIFLA v. Becerra* protects lawyers' speech from content-based restrictions.

Under the Court's analysis in *Becerra*, ABA Model Rule 8.4(g) is an unconstitutional *content*-based restriction on lawyers' speech. The Court held that government restrictions on professionals' speech—including lawyers' professional speech—are generally subject to strict scrutiny because they are content-based speech restrictions and, therefore, presumptively unconstitutional. That is, a government regulation that targets speech must survive strict scrutiny—a close examination of whether the regulation is narrowly tailored to achieve a compelling government interest.

The Court explained that “[c]ontent-based regulations ‘target speech based on its communicative content.’”⁷⁸ “[S]uch laws ‘are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.’”⁷⁹ As the Court observed, “[t]his stringent standard reflects the fundamental principle that governments have ‘no power to restrict expression because of its message, its ideas, its subject matter, or its content.’”⁸⁰

The Court firmly rejected the idea that professional speech is less protected by the First Amendment than other speech. As already noted, this is the operative assumption underlying ABA Model Rule 8.4(g) and Proposed Rule 8.4(7).

To illustrate its point, the Court noted three recent federal courts of appeals that had ruled that “‘professional speech’ [w]as a separate category of speech that is subject to different rules” and, therefore, less protected by the First Amendment.⁸¹ The Court then abrogated those decisions, stressing that “*this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not unprotected merely because it is uttered by ‘professionals.’*”⁸² The Court rejected the idea that “professional speech” was an exception “from the rule that content-based regulations of speech are subject to strict scrutiny.”⁸³

Instead, the Court was clear that a State's regulation of attorney speech would be subject to strict scrutiny to ensure that any regulation is narrowly tailored to achieve a compelling interest. The Court reaffirmed that its “precedents have long protected the First Amendment

⁷⁸ *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018), quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

⁷⁹ *Id.*

⁸⁰ *Id.*, quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

⁸¹ *Id.* at 2371.

⁸² *Id.* at 2371-72 (emphasis added).

⁸³ *Id.* at 2371.

rights of professionals” and “has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers.”⁸⁴

B. ABA Formal Opinion 493 and Professor Aviel’s article fail to address the Supreme Court’s decision in *NIFLA v. Becerra*.

1. ABA Formal Opinion 493 fails even to mention *Becerra*.

The ABA Section of Litigation recognized *Becerra*’s impact in a recently published article. Several section members understood that the decision raised grave concerns about the overall constitutionality of ABA Model Rule 8.4(g):

Model Rule 8.4(g) “is intended to combat discrimination and harassment and to ensure equal treatment under the law,” notes Cassandra Burke Robertson, Cleveland, OH, chair of the Appellate Litigation Subcommittee of the Section’s Civil Rights Litigation Committee. While it serves important goals, “*the biggest question about Rule 8.4(g) has been whether it unconstitutionally infringes on lawyers’ speech rights—and after the Court’s decision in Becerra, it increasingly looks like the answer is yes,*” Robertson concludes.⁸⁵

But on July 15, 2020, the ABA’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 493, “Model Rule 8.4(g): Purpose, Scope, and Application.” The document serves to underscore the breadth of ABA Model Rule 8.4(g) and the fact that it is intended to restrict lawyers’ speech.⁸⁶ The opinion reassures that it will only be used for “harmful” conduct, which the rule makes clear includes “verbal conduct” or “speech.”⁸⁷

Formal Opinion 493 explains that the Rule’s scope “is *not* restricted to conduct that is severe or pervasive.”⁸⁸ Violations will “*often* be intentional and *typically* targeted at a particular individual or group of individuals.” This merely confirms that a lawyer can be disciplined for speech that is not necessarily intended to harm and that does not “target” a particular person or

⁸⁴ *Id.* at 2374.

⁸⁵ C. Thea Pitzen, *First Amendment Ruling May Affect Model Rules of Professional Conduct: Is Model Rule 8.4(g) Constitutional?*, ABA Section of Litigation Top Story (Apr. 3, 2019), <https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/first-amendment-ruling-may-affect-model-rules-prof-cond/> (emphasis added).

⁸⁶ American Bar Association Standing Comm. on Ethics and Prof. Resp., Formal Op., 493, *Model Rule 8.4(g): Purpose, Scope, and Application* (July 15, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-493.pdf.

⁸⁷ *Id.* at 1.

⁸⁸ *Id.* (emphasis added).

group.⁸⁹ Formal Opinion 493 runs directly counter to Proposed Rule 8.4(7)'s commentary that claims to cabin "harassment" to "severe or pervasive derogatory or demeaning" speech. (Note, however, that the operative word in Proposed Rule 8.4(7)'s commentary is "includes." That is "[h]arassment includes severe or pervasive derogatory or demeaning verbal or physical conduct" rather than language that confines "harassment" to "severe or pervasive derogatory or demeaning" speech.)

Formal Opinion 493 claims that "[t]he Rule does not prevent a lawyer from freely expressing opinions and ideas on matters of public concern." But that is hardly reassuring because "matters of public concern" is a term of art in free speech jurisprudence that appears in the context of the broad limits that the government is allowed to place on its employees' free speech. The category actually provides *less* protection for free speech rather than more protection.⁹⁰ And it may even reflect the notion that lawyers' speech is akin to government speech, a topic that Professor Aviel briefly mentions in her article.⁹¹ If lawyers' speech is treated as if it were the government's speech, then lawyers have minimal protection for their speech.

Formal Opinion 493 claims that ABA Model Rule 8.4(g) does not "limit a lawyer's speech or conduct in settings unrelated to the practice of law," but fails to grapple with just how broadly the Rule defines "conduct related to the practice of law," for example, to include social settings.⁹² In so doing, Formal Opinion 493 ignores the Court's instruction in *Becerra* that lawyers' *professional* speech – not just their speech "unrelated to the practice of law" – is protected by the First Amendment under a strict scrutiny standard.

Perhaps most baffling is the fact that *Formal Opinion 493 does not even mention the Supreme Court's Becerra decision*, even though it was handed down two years earlier and has been frequently relied upon to illuminate ABA Model Rule 8.4(g)'s constitutional deficiencies. This lack of mention, let alone analysis, of *Becerra* is inexplicable. Formal Opinion 493 has a four-page section that discusses "Rule 8.4(g) and the First Amendment," yet never mentions the United States Supreme Court's on-point decisions in *Becerra*, *Matal*, and *Iancu*. Like the proverbial ostrich burying its head in the sand, the ABA adamantly refuses to see the deep flaws of Model Rule 8.4(g).⁹³ This Committee does not have that luxury.

⁸⁹ *Id.*

⁹⁰ *Garcetti v. Cabellos*, 547 U.S. 410, 417 (2006) ("the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern"); *id.* at 418 ("To be sure, conducting these inquiries sometimes has proved difficult.").

⁹¹ Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. L. Ethics 31, 34 (2018) ("[L]awyers have such an intimate relationship with the rule of law that they are not purely private speakers. Their speech can be limited along lines analogous with government actors because, in a sense, they embody and defend the law itself"). The mere suggestion that lawyers' speech is akin to government actors' speech, which is essentially government speech that is unprotected by the First Amendment, is deeply troubling and should be soundly rejected.

⁹² Formal Op. 493, *supra* note 86, at 1.

⁹³ *Id.* at 9-12.

Formal Opinion 493 concedes that its definition of the term “harassment” is not the same as the EEOC uses,”⁹⁴ citing *Harris v. Forklift Systems, Inc.*, which ruled that “[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII’s purview.”⁹⁵ ABA Model Rule 8.4(g)’s definition of “harassment” in Comment [3] includes “derogatory or demeaning verbal or physical conduct.” Of course, this definition runs headlong into the Supreme Court’s ruling that the mere act of government officials determining whether speech is “disparaging” is viewpoint discrimination that violates freedom of speech. In Formal Opinion 493, the ABA offers a new definition for “harassment” (“aggressively invasive, pressuring, or intimidating”) that is not found in ABA Model Rule 8.4(g). Formal Opinion 493 signifies that the ABA itself recognizes that the term “harassment” is the Rule’s Achilles’ heel.

2. The Aviel article fails to mention *Becerra* and, therefore, is not a reliable source of information on the constitutionality of Proposed Rule 8.4(7).

Professor Rebecca Aviel’s article, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 Geo. J. L. Ethics 31 (2018), should not be relied upon in assessing Proposed Rules 8.4(7)’s chilling effect on lawyers’ freedom of speech because it also fails to mention *Becerra*. It seems probable that the article was written before the Supreme Court issued *Becerra*. For that reason, the article is not helpful in assessing the constitutionality of a rule that involves lawyers’ speech.

Of critical importance, Professor Aviel’s article rests on the assumption that “regulation of the legal profession is legitimately regarded as a ‘carve-out’ from the general marketplace” that “appropriately empowers bar regulators to restrict the speech of judges and lawyers in a manner that would not be permissible regulation of the citizenry in the general marketplace.”⁹⁶ *But this is precisely the assumption that the Supreme Court rejected in Becerra.* Contradicting Professor Aviel’s assumption, the Court explained in *Becerra* that the First Amendment does not contain a carve-out for “professional speech.”⁹⁷ Instead, the Court used lawyers’ speech as an example of protected speech.

Interestingly, even without the *Becerra* decision to guide her, Professor Aviel conceded that ABA Model Rule 8.4(g) with its comments’ “expansiveness may well raise First Amendment overbreadth concerns.”⁹⁸ But because she wrote without the benefit of *Becerra* and relied on basic assumptions repudiated by the Court in *Becerra*, her free speech analysis cannot be relied upon as authoritative.

⁹⁴ *Id.* at 4 & n.13.

⁹⁵ 510 U.S. 17, 21 (1993)

⁹⁶ Aviel, *supra* note 91, at 39 (citation and quotation marks omitted); *see also id.* at 44.

⁹⁷ *Becerra*, 138 S. Ct. at 2371.

⁹⁸ Aviel, *supra* note 91, at 48.

C. Under *Matal v. Tam* and *Iancu v. Brunetti*, Proposed Rule 8.4(7) fails viewpoint-discrimination analysis.

Under the Court's analysis in *Matal*, ABA Model Rule 8.4(g) is an unconstitutional *viewpoint*-based restriction on lawyers' speech. In *Matal*, a unanimous Court held that a federal statute was facially unconstitutional because it allowed government officials to penalize "disparaging" speech. In his concurrence, Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, observed that it is unconstitutional to suppress speech that "*demeans* or offends."⁹⁹ The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.¹⁰⁰

All justices agreed that a provision of a longstanding federal law, the Lanham Act, was unconstitutional because it allowed government officials to deny trademarks for terms that may "disparage or bring into contempt or disrepute" living or dead persons. Allowing government officials to determine what words do and do not "disparage" a person "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend."¹⁰¹ Justice Alito, writing for a plurality of the Court, noted that "[s]peech that *demeans* on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"¹⁰²

In his concurrence, joined by Justices Ginsburg, Sotomayor, and Kagan, Justice Kennedy stressed that "[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate," particularly "if the ideas or perspectives are ones a particular audience might think offensive."¹⁰³ Justice Kennedy closed with a sober warning:

A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.¹⁰⁴

⁹⁹ *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring) (emphasis supplied).

¹⁰⁰ *Id.* at 1753-1754, 1765 (plurality op.).

¹⁰¹ *Id.* at 1751 (quotation marks and ellipses omitted).

¹⁰² *Id.* at 1764, quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting) (emphasis supplied).

¹⁰³ *Id.* at 1767 (Kennedy, J., concurring).

¹⁰⁴ *Id.* at 1769 (Kennedy, J., concurring).

Justice Kennedy explained that the federal statute was unconstitutional viewpoint discrimination because the government permitted “a positive or benign mark but not a *derogatory* one,” which “reflects the Government’s disapproval of a subset of messages it finds offensive,” which is “the essence of viewpoint discrimination.”¹⁰⁵ And it was viewpoint discriminatory even if it “applies in equal measure to any trademark that *demeans* or offends.”¹⁰⁶

In 2019, the Supreme Court reaffirmed its rigorous rejection of viewpoint discrimination. The challenged terms in *Iancu* were “immoral” and “slandorous” and, once again, the Court found the terms were viewpoint discriminatory because they allowed government officials to pick and choose which speech to allow.

In her opinion for the Court, Justice Kagan explained that “immoral” and “scandalous” insert a “facial viewpoint bias in the law [that] results in viewpoint-discriminatory application.”¹⁰⁷ The Lanham Act, was unconstitutional because:

[I]t allows registration of marks when their messages accord with, but not when their messages defy, society’s sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter.¹⁰⁸

D. Proposed Rule 8.4(7)’s terms “harassment” and “discrimination” are viewpoint discriminatory.

Proposed Rule 8.4(7) cannot withstand viewpoint-discrimination analysis under the *Matal* and *Inacu* analyses. The definition of “harassment” in the proposed Official Commentary states:

Harassment *includes* severe or pervasive *derogatory or demeaning verbal* or physical conduct. Harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. (Emphasis supplied.)

But in *Matal*, the Supreme Court unanimously held that a federal statute was facially unconstitutional because it allowed government officials to penalize “disparaging” speech. The Court made clear that a government prohibition on disparaging, derogatory, demeaning, or

¹⁰⁵ *Id.* at 1766 (Kennedy, J., concurring) (emphasis supplied).

¹⁰⁶ *Id.* (emphasis supplied).

¹⁰⁷ *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019).

¹⁰⁸ *Id.*

offensive speech is blatant viewpoint discrimination and, therefore, unconstitutional.¹⁰⁹ Justice Kennedy stressed that “[t]he danger of viewpoint discrimination is that the government is attempting to remove certain ideas or perspectives from a broader debate,” particularly “if the ideas or perspectives are ones a particular audience might think offensive.”¹¹⁰ Justice Alito reminded that “[s]peech that *demeans* on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”¹¹¹

Like its definition of “harassment,” Proposed Rule 8.4(7)’s definition of “discrimination” is unconstitutional viewpoint discrimination. The Official Commentary states that “[d]iscrimination includes harmful verbal or physical conduct directed at an individual or individuals that manifests bias or prejudice on the basis of one or more of the protected categories.” But a rule that permits government officials to punish lawyers for speech that the government determines to be “harmful” is the epitome of an unconstitutional rule.

Besides creating unconstitutional viewpoint discrimination, the vagueness in the terms “harassment” and “discrimination” in Proposed Rule 8.4(7) necessarily will chill lawyers’ speech. Compounding the unconstitutionality, the terms fail to give lawyers fair notice of what speech might subject them to discipline. Proposed Rule 8.4(7) does not provide the clear enforcement standards that are necessary when the loss of one’s livelihood is at stake.

V. The ABA’s Original Claim that 24 States have a Rule Similar to ABA Model Rule 8.4(g) is not Accurate Because only Vermont and New Mexico have Fully Adopted ABA Model Rule 8.4(g).

When the ABA adopted Model Rule 8.4(g), it claimed that “as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers.”¹¹² But this claim has been shown to be factually incorrect. As the 2019 edition of the *Annotated Rules of Professional Conduct* states: “Over half of all jurisdictions have a specific rule addressing bias and/or harassment – *all of which differ in some way from the Model Rule [8.4(g)] and from each other.*”¹¹³

¹⁰⁹ 137 S. Ct. at 1753-1754, 1765 (plurality op.); *see also, id.* at 1766 (unconstitutional to suppress speech that “demeans or offends”) (Kennedy, J., concurring, joined by JJ. Ginsburg, Sotomayor, and Kagan).

¹¹⁰ *Id.* at 1767.

¹¹¹ *Id.* at 1764 (plurality op.), quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)(emphasis supplied).

¹¹² *See, e.g.,* Letter from John S. Gleason, Chair, Center for Professional Responsibility Policy Implementation Committee, to Chief Justice Pleicones, Chief Justice, Supreme Court of South Carolina, September 29, 2016, https://www.scbart.org/media/filer_public/f7/76/f7767100-9bf0-4117-bfeb-c1c84c2047eb/hod_materials_january_2017.pdf, at 56-57.

¹¹³ Ellen J. Bennett & Helen W. Gunnarsson, Ctr. for Prof. Resp., American Bar Association, *Annotated Model Rules of Professional Conduct* 743, (9th ed. 2019) (emphasis supplied).

No empirical evidence, therefore, supports the claim that ABA Model Rule 8.4(g) will not impose an undue burden on lawyers. As even its proponents have conceded, ABA Model Rule 8.4(g) does not replicate any black letter rule adopted by a state supreme court before 2016. Twenty-four states and the District of Columbia had adopted some version of a black letter rule dealing with “bias” issues before the ABA promulgated Model Rule 8.4(g) in 2016; *however, each of these black letter rules was narrower than ABA Model Rule 8.4(g).*¹¹⁴ Thirteen states had adopted a comment rather than a black letter rule to deal with bias issues. Fourteen states had adopted neither a black letter rule nor a comment.

A proponent of ABA Model Rule 8.4(g), Professor Stephen Gillers, wrote that “[a]lthough courts in twenty-five American jurisdictions (twenty-four states and Washington, D.C.) have adopted anti-bias rules in some form, these rules differ widely.”¹¹⁵ He then highlighted the primary differences between these pre-2016 rules and ABA Model Rule 8.4(g):

Most contain the nexus “in the course of representing a client” or its equivalent. Most tie the forbidden conduct to a lawyer’s work in connection with the “administration of justice” or, more specifically, to a matter before a tribunal. Six jurisdictions’ rules require that forbidden conduct be done “knowingly,” “intentionally,” or “willfully.” Four jurisdictions limit the scope of their rules to conduct that violates federal or state anti-discrimination laws and three of these require that a complainant first seek a remedy elsewhere instead of discipline if one is available. Only four jurisdictions use the word “harass” or variations in their rules.¹¹⁶

VI. Official Entities in Alaska, Arizona, Idaho, Illinois, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, Tennessee, and Texas have Rejected ABA Model Rule 8.4(g), and Louisiana, Minnesota, and Nevada have Abandoned Efforts to Impose it on Their Attorneys.

Federalism’s great advantage is that one state can reap the benefit of other states’ experience. Prudence counsels waiting to see whether states, besides Vermont and New Mexico, adopt ABA Model Rule 8.4(g), and then observing the effects of its real-life implementation on

¹¹⁴ *Working Discussion Draft – Revisions to Model Rule 8.4 Language Choice Narrative* (July 16, 2015), App. B, *Anti-Bias Provisions in State Rules of Professional Conduct*, at 11-32, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf.

¹¹⁵ 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, 208 (2017) (footnotes omitted). Professor Gillers notes that his spouse “was a member of the [ABA] Standing Committee on Ethics and Professional Responsibility, the sponsor of the amendment [of ABA Model Rule 8.4].” *Id.* at 197 n.2.

¹¹⁶ *Id.* at 208.

attorneys in those states. This is particularly true when ABA Model Rule 8.4(g) has failed to survive close scrutiny by official entities in many states.¹¹⁷

A. Several State Supreme Courts have rejected ABA Model Rule 8.4(g).

The Supreme Courts of **Arizona, Idaho, New Hampshire, South Dakota, Tennessee, and South Carolina** have officially rejected adoption of ABA Model Rule 8.4(g). In August 2018, after a public comment period, the **Arizona** Supreme Court rejected a petition from the Central Arizona Chapter of the National Lawyer Guild urging adoption of ABA Model Rule 8.4(g).¹¹⁸ In September 2018, the **Idaho** Supreme Court rejected a resolution by the Idaho State Bar Association to adopt a modified version of ABA Model Rule 8.4(g).¹¹⁹ In April 2018, after a public comment period, the Supreme Court of **Tennessee** denied a petition to adopt a slightly modified version of ABA Model Rule 8.4(g).¹²⁰ The petition had been filed by the Tennessee Bar Association and the Tennessee Board of Professional Responsibility. The Tennessee Attorney General filed a comment letter, explaining that a black letter rule based on ABA Model Rule 8.4(g) “would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct.”¹²¹ In June 2017, the Supreme Court of **South Carolina** rejected adoption of ABA Model Rule 8.4(g).¹²² The Court acted after the state bar’s House of Delegates, as well as the state attorney general, recommended against its adoption.¹²³ In July 2019, the **New Hampshire** Supreme Court “decline[d] to adopt the rule proposed by the Advisory Committee on Rules.”¹²⁴ In March 2020, the Supreme Court of **South Dakota**

¹¹⁷ McGinniss, *supra* note 2, at 213-217.

¹¹⁸ Arizona Supreme Court Order re: No. R-17-0032 (Aug. 30, 2018), https://www.clsreligiousfreedom.org/sites/default/files/site_files/Rules%20Agenda%20Denial%20of%20Amending%208.4.pdf.

¹¹⁹ Idaho Supreme Court, Letter to Executive Director, Idaho State Bar (Sept. 6, 2018), [https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4\(g\).pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ISC%20Letter%20-%20IRPC%208.4(g).pdf).

¹²⁰ The Supreme Court of Tennessee, *In Re: Petition for the Adoption of a New Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, Order No. ADM2017-02244 (Apr. 23, 2018), https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf.

¹²¹ Tenn. Att’y Gen. Letter, *supra* note 42, at 1.

¹²² The Supreme Court of South Carolina, *Re: Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct Appellate Case No. 2017-000498*, Order (June 20, 2017), <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> (if arrive at South Carolina Judicial Department homepage, select “2017” as year and then scroll down to “2017-06-20-01”).

¹²³ South Carolina Op. Att’y Gen. (May 1, 2017), <http://www.scag.gov/wp-content/uploads/2017/05/McCravy-J.-OS-10143-FINAL-Opinion-5-1-2017-01331464xD2C78-01336400xD2C78.pdf>.

¹²⁴ Supreme Court of New Hampshire, Order (July 15, 2019), <https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf>. The court instead adopted a rule amendment that had been proposed by the Attorney Discipline Office and is unique to New Hampshire.

unanimously decided to deny the proposed amendment to Rule 8.4 because the court was “not convinced that proposed Rule 8.4(g) is necessary or remedies an identified problem.”¹²⁵

In May 2019, the **Maine** Supreme Court announced that it had adopted a modified version of ABA Model Rule 8.4(g).¹²⁶ The Maine rule is significantly narrower than the ABA Model Rule in several ways. First, the Maine rule’s definition of “discrimination” differs from the ABA Model Rule’s definition of “discrimination.” Second, its definition of “conduct related to the practice of law” also differs. Third, it covers fewer protected categories. Despite these modifications, if challenged, the Maine rule will likely be found unconstitutional because it overtly targets protected speech. *See supra* pp. 21-25.

In June 2020, the **Pennsylvania** Supreme Court adopted a highly modified version to take effect December 8, 2020.¹²⁷ The novel new rule is not limited to specific protected classes, but instead seems to prohibit any “words or conduct” that “knowingly manifest bias or prejudice, or engage in harassment or discrimination” against *anyone*. Furthermore, the terms “bias,” “prejudice,” harassment,” or discrimination” are defined by “applicable federal, state, or local statutes or ordinances,” which seems to mean that words and conduct that are professional misconduct for a lawyer in Pittsburgh may not be for a lawyer in Lancaster.

In September 2017, the Supreme Court of **Nevada** granted the request of the Board of Governors of the State Bar of Nevada to withdraw its petition urging adoption of Model Rule 8.4(g).¹²⁸ In a letter to the Court, the State Bar President explained that “the language used in other jurisdictions was inconsistent and changing,” and, therefore, “the Board of Governors

¹²⁵ Letter from Chief Justice Gilbertson to the South Dakota State Bar (Mar. 9, 2020), [https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4\(g\)/Proposed_8.4_Rule_Letter_3_9_20.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Proposed_8.4_Rule_Letter_3_9_20.pdf).

¹²⁶ State of Maine Supreme Judicial Court Amendment to the Maine Rules of Professional Conduct Order, 2019 Me. Rules 05 (May 13, 2019), https://www.courts.maine.gov/rules_adminorders/rules/amendments/2019_mr_05_prof_conduct.pdf. Alberto Bernabe, *Maine Adopts (a Different Version of) ABA Model Rule 8.4(g)-Updated*, Professional Responsibility Blog, June 17, 2019 (examining a few differences between Maine rule and ABA Model Rule 8.4(g)), <http://bernabepr.blogspot.com/2019/06/maine-becomes-second-state-to-adopt-aba.html>. *See* The State of New Hampshire Supreme Court of New Hampshire Order 1, July 15, 2019, (“As of this writing, only one state, Vermont, has adopted a rule that is nearly identical to the model rule. Maine has adopted a rule that is similar, but is not nearly identical, to Model Rule 8.4(g).”), <https://www.courts.state.nh.us/supreme/orders/7-15-19-order.pdf>.

¹²⁷ Supreme Court of Pennsylvania, Order, *In re Amendment of Rule 8.4 of the Pennsylvania Rules of Professional Conduct* (June 8, 2020), <http://www.pacourts.us/assets/opinions/Supreme/out/Order%20Entered%20-%20104446393101837486.pdf?cb=1>.

¹²⁸ The Supreme Court of the State of Nevada, *In the Matter of Amendments to Rule of Professional Conduct 8.4*, Order (Sep. 25, 2017), <https://www.nvbar.org/wp-content/uploads/ADKT-0526-withdraw-order.pdf>.

determined it prudent to retract [the Petition] with reservation to refile [it] when, and if the language in the rule sorts out in other jurisdictions.”¹²⁹

B. State Attorneys General have identified core constitutional issues with ABA Model Rule 8.4(g).

In December 2016, the **Texas** Attorney General issued an opinion opposing ABA Model Rule 8.4(g). The Texas Attorney General stated that “if the State were to adopt Model Rule 8.4(g), its provisions raise serious concerns about the constitutionality of the restrictions it would place on members of the State Bar and the resulting harm to the clients they represent.”¹³⁰ The opinion declared that “[c]ontrary to . . . basic free speech principles, Model Rule 8.4(g) would severely restrict attorneys’ ability to engage in meaningful debate on a range of important social and political issues.”¹³¹

In 2017, the Attorney General of **South Carolina** determined that “a court could well conclude that the Rule infringes upon Free Speech rights, intrudes upon freedom of association, infringes upon the right to Free Exercise of Religion and is void for vagueness.”¹³² In September 2017, the **Louisiana** Attorney General concluded that “[t]he regulation contained in ABA Model Rule 8.4(g) is a content-based regulation and is presumptively invalid.”¹³³ Because of the “expansive definition of ‘conduct related to the practice of law’” and its “countless implications for a lawyer’s personal life,” the Attorney General found the Rule to be “unconstitutionally overbroad as it prohibits and chills a substantial amount of constitutionally protected speech and conduct.”¹³⁴

In March 2018, the Attorney General of **Tennessee** filed Opinion 18-11, *American Bar Association’s New Model Rule of Professional Conduct Rule 8.4(g)*, attaching his office’s comment letter to the Supreme Court of Tennessee, opposing adoption of a proposed rule closely modeled on ABA Model Rule 8.4(g).¹³⁵ After a thorough analysis, the Attorney General concluded that the proposed rule “would violate the constitutional rights of Tennessee attorneys and conflict with the existing Rules of Professional Conduct.”¹³⁶

In May 2018, the **Arizona** Attorney General filed a comment letter urging the Arizona Supreme Court to heed the opposition of other states, state attorneys general, and state bar

¹²⁹ Letter from Gene Levery, State Bar of Nevada President, to Chief Justice Michael Cherry, Nevada Supreme Court (Sept. 6, 2017), <https://www.clsnet.org/document.doc?id=1124>.

¹³⁰ Tex. Att’y Gen. Op., *supra* note 52, at 3.

¹³¹ *Id.*

¹³² South Carolina Att’y Gen. Op., *supra* note 123, at 13.

¹³³ La. Att’y Gen. Op., *supra* note 52.

¹³⁴ *Id.* at 6.

¹³⁵ *American Bar Association’s New Model Rule of Professional Conduct 8.4(g)*, 18 Tenn. Att’y Gen. Op. 11 (Mar. 16, 2018), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf>.

¹³⁶ Tenn. Att’y Gen. Letter, *supra* note 42, at 1.

associations to adoption of ABA Model Rule 8.4(g). He also noted the constitutional concerns that ABA Model Rule 8.4(g) raises as to free speech, association, and expressive association.¹³⁷ In August 2019, the **Alaska** Attorney General provided a letter to the Alaska Bar Association during a public comment period that it held on adoption of a rule modeled on ABA Model Rule 8.4(g). The letter identified numerous constitutional concerns with the proposed rule.¹³⁸ The Bar Association's Rules of Professional Conduct recommended that the Board not advance the proposed rule to the Alaska Supreme Court but instead remand it to the committee for additional revisions after "[t]he amount of comments was unprecedented."¹³⁹ A second public comment period closed August 10, 2020.

C. The Montana Legislature recognized the problems that ABA Model Rule 8.4(g) poses for legislators, witnesses, staff, and citizens.

On April 12, 2017, the **Montana** Legislature adopted a joint resolution expressing its view that ABA Model Rule 8.4(g) would unconstitutionally infringe the constitutional rights of Montana citizens, and urging the Montana Supreme Court not to adopt ABA Model Rule 8.4(g).¹⁴⁰ The impact of Model Rule 8.4(g) on "the speech of legislative staff and legislative witnesses, who are licensed by the Supreme Court of the State of Montana to practice law, when they are working on legislative matters or testifying about legislation before Legislative Committees" greatly concerned the legislature.¹⁴¹

D. Several state bar associations have rejected ABA Model Rule 8.4(g).

On December 10, 2016, the **Illinois** State Bar Association Assembly "voted overwhelmingly to oppose adoption of the rule in Illinois."¹⁴² On September 15, 2017, the **North Dakota** Joint Committee on Attorney Standards voted not to recommend adoption of ABA

¹³⁷ Attorney General Mark Brnovich, *Attorney General's Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court* (May 21, 2017), <https://www.clsnet.org/document.doc?id=1145>.

¹³⁸ Letter from Alaska Attorney General to Alaska Bar Association Board of Governors (Aug. 9, 2019), <http://www.law.state.ak.us/pdf/press/190809-Letter.pdf>.

¹³⁹ Letter from Chairman Murtagh, Alaska Rules of Professional Conduct to President of the Alaska Bar Association (Aug. 30, 2019), [https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4\(g\)/Report.ARPCcmte.on8_4f.pdf](https://www.clsreligiousfreedom.org/sites/default/files/site_files/ABA%208.4(g)/Report.ARPCcmte.on8_4f.pdf).

¹⁴⁰ *A Joint Resolution of the Senate and the House of Representatives of the State of Montana Making the Determination that it would be an Unconstitutional Act of Legislation, in Violation of the Constitution of the State of Montana, and would Violate the First Amendment Rights of the Citizens of Montana, Should the Supreme Court of the State of Montana Enact Proposed Model Rule of Professional Conduct 8.4(G)*, SJ 0015, 65th Legislature (Mont. Apr. 25, 2017), <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf>.

¹⁴¹ *Id.* at 3. The Tennessee Attorney General similarly warned that "[e]ven statements made by an attorney as a political candidate or a member of the General Assembly could be deemed sufficiently 'related to the practice of law' to fall within the scope of Proposed Rule 8.4(g)." Tenn. Att'y Gen. Letter, *supra* note 42, at 8 n.8.

¹⁴² Mark S. Mathewson, *ISBA Assembly Oks Futures Report, Approves UBE and Collaborative Law Proposals*, Illinois Lawyer Now, Dec. 15, 2016, <https://www.isba.org/barnews/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals>.

Model Rule 8.4(g), expressing concerns that it was “overbroad, vague, and imposes viewpoint discrimination” and that it might “have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views.”¹⁴³ On October 30, 2017, the Louisiana Rules of Professional Conduct Committee, which had spent a year studying a proposal to adopt a version of Model Rule 8.4(g), voted “not to recommend the proposed amendment to Rule 8.4 to either the House of Delegates or to the Supreme Court.”¹⁴⁴

VII. Proposed Rule 8.4(7) Would Make it Professional Misconduct for Attorneys to Engage in Hiring Practices that Favor Persons Because they are Women or Belong to Racial, Ethnic, or Sexual Minorities.

A highly regarded professional ethics expert, Thomas Spahn, has explained that “ABA Model Rule 8.4(g)’s flat prohibition covers any discrimination on the basis of race, sex, or any of the other listed attributes” and “extends to any lawyer conduct ‘related to the practice of law,’ including ‘operating or managing a law firm or law practice.’”¹⁴⁵ In written materials for a CLE presentation, Mr. Spahn concluded that ABA Model Rule 8.4(g) “thus prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc.”¹⁴⁶

He further concluded that ABA Model Rule 8.4(g) would prohibit any discrimination in hiring practices:¹⁴⁷

[L]awyers will also have to comply with the new per se discrimination ban in their personal hiring decisions. Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a “plus” when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms’ head count on the basis of such attributes – but it is nevertheless discrimination. In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation.

¹⁴³ Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. n Att’y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (Dec. 14, 2017), at <https://perma.cc/3FCP-B55J>.

¹⁴⁴ Louisiana State Bar Association, *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, Oct. 30, 2017, <https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892>.

¹⁴⁵ The District of Columbia Bar, Continuing Legal Education Program, *Civil Rights and Diversity: Ethics Issues 5-6* (July 12, 2018) (quoting Comment [4] to ABA Model Rule 8.4(g)). The written materials used in the program are on file with Christian Legal Society and may be purchased from the D.C. Bar CLE program.

¹⁴⁶ *Id.* at 6.

¹⁴⁷ *Id.* at 7 (emphasis supplied).

Mr. Spahn dismissed the idea that Comment [4] of ABA Model Rule 8.4(g) would allow these efforts to promote certain kinds of diversity to continue. Even though Comment [4] states that “[l]awyers may engage in conduct undertaken to promote diversity and inclusion . . . by . . . implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations,” as the ethics expert explained, “[t]his sentence appears to weaken the blanket anti-discrimination language in the black letter rule, but on a moment’s reflection it does not – and could not – do that.”¹⁴⁸

Mr. Spahn provided three reasons for his conclusion that efforts to promote certain kinds of diversity would violate the rule and, therefore, would need to cease. *First*, the language in the comments is only guidance and not binding. The same is true for Proposed Rule 8.4(7)’s Commentary that attempts to save diversity programs from the blanket prohibition of the black letter rule. *Second*, the drafters of the rule “clearly knew how to include exceptions to the binding black letter anti-discrimination rule” because two exceptions actually are contained in the black letter rule itself, so “[i]f the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule.” *Third*, the comment “says nothing about discrimination” and “does not describe activities permitting discrimination on the basis of the listed attributes.” The references could be to “political viewpoint diversity, geographic diversity, and law school diversity” which “would not involve discrimination prohibited in the black letter rule.” The same is true of Proposed Rule 8.4(7)’s discussion of diversity programs.

Proposed Rule 8.4(7)’s consequences for Connecticut lawyers’ and their firms’ efforts “to promote diversity, equity, and inclusion” provide yet another reason to reject the proposed rule. The substantial value of firms’ programs to promote diversity, equity, and inclusion, as well as the importance of affinity legal groups based on gender, race, sexual identity, or other protected classes, would seem to far outweigh any practical benefits likely to come from Proposed Rule 8.4(7).

VIII. Proposed Rule 8.4(7) Could Limit Connecticut Lawyers’ Ability to Accept, Decline, or Withdraw from a Representation.

The proponents of ABA Model Rule 8.4(g) generally claim that it will not affect a lawyer’s ability to refuse to represent a client. They point to the language in the rule that it “does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.” But in the one state to have adopted ABA Model Rule 8.4(g), the Vermont Supreme Court explained in its accompanying Comment [4] that “[t]he optional

¹⁴⁸ *Id.* at 5. *See also, id.* at 5-6 (“Perhaps that sentence was meant to equate ‘diversity’ with discrimination on the basis of race, sex, etc. But that would be futile – because it would fly in the face of the explicit authoritative prohibition in the black letter rule. It would also be remarkably cynical, by forbidding discrimination in plain language while attempting to surreptitiously allow it by using a code word.”)

grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule.” The Vermont Supreme Court further explained that, under the mandatory withdrawal provision of Rule 1.16(a), “a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g).”¹⁴⁹

As Professor Rotunda and Professor Dzienkowski explained, Rule 1.16 actually “deals with when a lawyer must or may *reject* a client or *withdraw* from representation.”¹⁵⁰ Rule 1.16 does not address *accepting* clients.¹⁵¹ Moreover, as Professor Rotunda and Professor Dzienkowski have observed, Comment [5] to ABA Model Rule 8.4(g) would seem to limit any right to decline representation, if permitted at all, to “limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations.”¹⁵²

Dean McGinniss agrees that “[d]espite its ostensible nod of non-limitation, Model Rule 8.4(g) offers lawyers no actual protection against charges of ‘discrimination’ based on their *discretionary* decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer.”¹⁵³ Because Model Rule 1.16 “addresses only when lawyers *must* decline representation, or when they may or must *withdraw* from representation” but not when they “are *permitted* to decline client representation,” Model Rule 8.4(g) seems only to allow what was already required, not declinations that are discretionary. Dean McGinniss warns that “if state bar authorities consider a lawyer’s declining representation . . . as ‘manifest[ing] bias or prejudice,’ they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g).”¹⁵⁴

The New York State Bar Association Committee on Professional Ethics issued an opinion in January 2017 that concluded that “[a] lawyer is under no obligation to accept every person who may wish to become a client *unless the refusal to accept a person amounts to unlawful discrimination*.”¹⁵⁵ The facts before the Committee were that a lawyer had been requested to represent a claimant against a religious institution. Because the lawyer was of the

¹⁴⁹ Vermont Supreme Court, *Order Promulgating Amendments to the Vermont Rules of Professional Conduct*, July 14, 2017, at 3, [https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPr8.4\(g\).pdf](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPr8.4(g).pdf) (emphasis supplied).

¹⁵⁰ Rotunda & Dzienkowski, *supra* note 23, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise” (emphasis supplied by the authors).

¹⁵¹ A state attorney general concurs that “[a]n attorney who would prefer not to represent a client because the attorney disagrees with the position the client is advocating, but is not required under Rule 1.16 to decline the representation, may be accused of discriminating against the client under Proposed Rule 8.4(g).” Tenn. Att’y Gen. Letter, *supra* note 42, at 11.

¹⁵² See Rotunda & Dzienkowski, *supra* note 23.

¹⁵³ McGinniss, *supra* note 2, at 207-209.

¹⁵⁴ *Id.* at 207-208 & n.146, citing Stephen Gillers, *supra* note 115, at 231-32, as, in Dean McGinniss’ words, “conceding that the United States Conference of Catholic Bishops’ concerns about religious lawyers’ loss of freedom in client selection under Model Rule 8.4(g) are well founded, though not a basis for objecting to the rule.”

¹⁵⁵ N.Y. Eth. Op. 1111, N.Y. St. Bar Assn. Comm. Prof. Eth., 2017 WL 527371 (Jan. 7, 2017) (emphasis supplied.).

same religion as the institution, he or she was unwilling to represent the claimant against the institution. Calling the definition of “unlawful discrimination” for purposes of New York’s Rule 8.4(g) a question of law beyond its jurisdiction, the Committee declined to “opine on whether a lawyer’s refusal to represent a prospective client in a suit against the lawyer’s own religious institution constitutes ‘unlawful discrimination’” for purposes of New York’s Rule 8.4(g).¹⁵⁶

In *Stropnick v. Nathanson*,¹⁵⁷ the Massachusetts Commission Against Discrimination found a law firm that specialized in representing women in divorce cases had violated state nondiscrimination law when it refused to represent a man.¹⁵⁸ As these examples demonstrate, reasonable doubt exists that Rule 1.16 provides adequate protection for attorneys’ ability to accept, decline, or withdraw from a representation.

In addressing representation issues, Proposed Rule 8.4(7) substituted the phrase “consistent with other Rules” for ABA Model Rule 8.4(g)’s phrase “in accordance with Rule 1.16.” It is unclear whether this solves the problem because it is not clear what “consistent with other Rules” means in the context of a lawyer’s ability “to accept, decline, or withdraw from representation.” If the intent of Proposed Rule 8.4(7) is to ensure that lawyers are completely free to accept, decline, or withdraw from representation if it is adopted, then the phrase “consistent with these Rules” fails to protect.

IX. Does the Office of Disciplinary Counsel have Adequate Resources to Process an Increased Number of Discrimination and Harassment Claims, Including Employment Discrimination Claims?

Concerns have been expressed by some state bar disciplinary counsel as to whether bar disciplinary offices have adequate financial and staff resources for adjudicating complex harassment and discrimination claims, particularly employment discrimination claims. For example, the Montana Office of Disciplinary Counsel (ODC) voiced concerns about the breadth of ABA Model Rule 8.4(g).¹⁵⁹ The ODC quoted from a February 23, 2016, email from the National Organization of Bar Counsel (“NOBC”) to its members explaining that the NOBC Board had declined to take a position on then-proposed ABA Model Rule 8.4(g) because “there

¹⁵⁶ *Id.* New York’s Rule 8.4(g) was adopted before ABA Model Rule 8.4(g) and is narrower.

¹⁵⁷ 19 M.D.L.R. 39 (M.C.A.D. 1997), affirmed, *Nathanson v. MCAD*, No. 199901657, 2003 WL 22480688, 16 Mass. L. Rptr. 761 (Mass. Super. Ct. 2003).

¹⁵⁸ Rotunda & Dzienkowski, *supra* note 23, in “§ 8.4-2(j)-2. The New Rule 8.4 and the Free Speech Problems It May Raise.”

¹⁵⁹ Office of Disciplinary Counsel, *In re the Model Rules of Professional Conduct: ODC’s Comments re ABA Model Rule 8.4(g)*, filed in Montana Supreme Court, No. AF 09-0688 (Apr. 10, 2017), at 3, https://www.clsreligiousfreedom.org/sites/default/files/site_files/MT%20Letter%20of%20Chief%20Disciplinary%20Counsel%20Opposing%208.4.pdf.

were a number of simple regulatory issues, not the least of which is the possibility of diverting already strained resources to investigate and prosecute these matters.”¹⁶⁰

The Montana ODC thought that “any unhappy litigant” could claim that opposing counsel had discriminated on the basis of “one or more of the types of discrimination named in the rule.”¹⁶¹ The ODC also observed that ABA Model Rule 8.4(g) did not require “that a claim be first brought before an appropriate regulatory agency that deals with discrimination.”¹⁶² In that regard, the ODC recommended that the court consider “Illinois’ rule [that] makes certain types of discrimination unethical and subject to discipline” because it required that “the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or administrative agency” and required that “the conduct must reflect adversely on the lawyer’s fitness as a lawyer.”¹⁶³

Proposed Rule 8.4(7) generates similar concerns. Increased demand may drain the resources of the Office of Disciplinary Counsel as it serves as the tribunal of first resort for an increased number of discrimination and harassment claims against lawyers and law firms. Serious questions arise about the evidentiary or preclusive effects that a state bar proceeding might have on other tribunals’ proceedings. State bar tribunals have their own rules of procedure and evidence that may be significantly different from state and federal court rules. Often, discovery is more limited in bar proceedings than in civil court. And, of course, there is no right to a jury trial in state bar proceedings.

In addition, Proposed Rule 8.4(7)’s Commentary is both confusing and concerning. It seems to require the Office of Disciplinary Counsel to understand complicated federal and state antidiscrimination and antiharassment laws well enough to apply them to discriminatory and harassment complaints brought under Proposed Rule 8.4(7). The Commentary instructs that “[t]he substantive law of antidiscrimination or antiharassment statutes and case law *should* guide application of [the rule], *where applicable*.” (Note the less protective term “should” rather than “shall.”) The Commentary continues that “[w]here the conduct in question is subject to federal or state antidiscrimination or antiharassment law, a lawyer’s conduct does not violate [the rule] when the conduct does not violate such law.” Essentially, the Office of Disciplinary Counsel will have to conduct their own trials to determine whether federal and state antidiscrimination or antiharassment laws have been violated. This is an extreme burden to place on that Office. This is why the Montana ODC recommended the Illinois rule which provides that “the lawyer disciplinary process cannot be initiated until there is a finding to that effect by a court or

¹⁶⁰ *Id.* at 3-4.

¹⁶¹ *Id.*

¹⁶² *Id.* at 3.

¹⁶³ *Id.* at 5.

administrative agency.”¹⁶⁴ The Illinois rule further requires that “any right of judicial review has been exhausted” before a disciplinary complaint can be acted upon.¹⁶⁵

Moreover, an attorney may be disciplined regardless of whether her conduct is a violation of any other law. Professor Rotunda and Professor Dzienkowski warn that Rule 8.4(g) “may discipline the lawyer who does not violate any statute or regulation [except Rule 8.4(g)] dealing with discrimination.”¹⁶⁶ Nor is “an allegedly injured party [required] to first invoke the civil legal system” before a lawyer can be charged with discrimination or harassment.¹⁶⁷

The threat of a complaint under Proposed Rule 8.4(7) could also be used as leverage in other civil disputes between a lawyer and a former client. Proposed Rule 8.4(7) even may be the basis of an implied private right of action against an attorney. Professor Rotunda and Professor Dzienkowski note this risk:

If lawyers do not follow this proposed Rule, they risk discipline (e.g., disbarment, or suspension from the practice of law). In addition, courts enforce the Rules in the course of litigation (e.g., sanctions, disqualification). Courts also routinely imply private rights of action from violation of the Rules – malpractice and tort suits by third parties (non-clients).¹⁶⁸

Unsurprisingly, Professor Rotunda and Professor Dzienkowski disagree with the rule’s proponents that lawyers “should rely on prosecutorial discretion because disciplinary boards do not have the resources to prosecute every violation.” They warn that “[d]iscretion, however, may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas.”¹⁶⁹

A lawyer’s loss of his or her license to practice law is a staggering penalty and demands a stringent process, one in which the standards for enforcement are clear and respectful of the attorneys’ rights, as well as the rights of others. Proposed Rule 8.4(7) does not provide the clear enforcement standards that are necessary when the loss of one’s livelihood is at stake.

Conclusion

Because Proposed Rule 8.4(7) will drastically chill lawyers’ freedom to express their viewpoints on political, social, religious, and cultural issues, and for the additional reasons given in this letter, it should be rejected. At a minimum, the Court should wait to see whether the

¹⁶⁴ *Id.* (referring to ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j)).

¹⁶⁵ ILCS S. Ct. Rules of Prof. Conduct Rule 8.4(j).

¹⁶⁶ Rotunda & Dzienkowski, *supra* note 23 (parenthetical in original).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

widespread prediction that ABA Model Rule 8.4(g) will operate as a speech code for attorneys is borne out if and when it is adopted in several other states. There is no reason to subject Connecticut attorneys to the ill-conceived experiment that ABA Model Rule 8.4(g) represents. A decision to not recommend Proposed Rule 8.4(7) can always be revisited, but the damage its premature adoption may do to Connecticut attorneys cannot be undone.

Given the haste with which Proposed Rule 8.4(7) has been rushed through a subcommittee and the county bar associations, we respectfully suggest that the Committee and Connecticut lawyers would benefit from a more widely publicized comment period. Extension of the comment period would ensure fairness for the many Connecticut lawyers who have been unaware of the expedited push to adopt Proposed Rule 8.4(7) and provide them with an adequate opportunity to be heard by the Committee.

Christian Legal Society thanks the Committee for considering its comments.

Respectfully submitted,

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EXPRESSING CONSCIENCE WITH CANDOR: SAINT THOMAS MORE AND FIRST FREEDOMS IN THE LEGAL PROFESSION

This Article explores recent challenges to lawyers' "first freedoms" under the First Amendment to the United States Constitution, especially freedom of speech, with particular attention to the ABA's 2016 adoption of Rule 8.4(g) of the Model Rules of Professional Conduct. It begins with a brief reflection on sixteenth-century England's Thomas More, patron saint of lawyers, and the meaning that his life and example may offer for lawyers today. Next, it analyzes a profoundly flawed 1996 Tennessee ethics opinion advising a lawyer who was court appointed to represent minors seeking abortions, and its troubling implications for lawyers with traditional religious and moral views relating to their practice of law. It then examines multiple aspects of the ongoing Model Rule 8.4(g) controversy, including the rule's background and deficiencies, states' reception (and widespread rejection) of it, socially conservative lawyers' justified distrust of new speech restrictions, and the impact of the United States Supreme Court's 2018 decision in *National Institute of Family & Life Advocates v. Becerra* on "professional speech" under the First Amendment. It concludes with a call for the American legal profession to embrace a vision of diversity that includes, rather than excludes, socially conservative lawyers who dissent from its currently dominant moral views, including on matters of sexual ethics.

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*175 INTRODUCTION

I do none harm, I say none harm, I think none harm.

--Thomas More, in *A Man for All Seasons*¹

It isn't difficult to keep alive, friends--just don't *make* trouble--or if you must make trouble, make the sort of trouble that's expected.

--The Common Man, in *A Man for All Seasons*²

*176 In June 1996, the Board of Professional Responsibility of the Supreme Court of Tennessee issued an ethics opinion (the “1996 Tennessee Ethics Opinion”)³ that marked a new and troubling turning point in the already ongoing cultural movement in the legal profession to marginalize and deter its traditionalist moral dissenters. It involved a “devout Catholic” lawyer who had been court appointed to represent a client who was requesting a judicial bypass to Tennessee's statutory parental-consent requirement for minors seeking abortions.⁴ In sum, the Board advised the lawyer: (1) it would be ethically improper to seek relief from the appointed representation on religious and moral grounds; and (2) it would be ethically suspect to offer counseling to the client with insights borne of the lawyer's religious and moral convictions concerning abortion, including the possible benefits of notifying her parents instead of pursuing the judicial bypass.⁵

Twenty years later, in August 2016, the House of Delegates of the American Bar Association (“ABA”) adopted Rule 8.4(g) of the Model Rules of Professional Conduct (the “Model Rules”). Its provisions, which elicited strong external opposition and rapidly evolved only weeks before the vote occurred, included broad language prohibiting “discrimination” and “harassment” by lawyers in conduct “related to the practice of law.”⁶ The Comment to Model Rule 8.4(g) defines “discrimination” as including “verbal ... conduct” (that is, speech) that “manifests bias or prejudice towards others” and “harassment” as including “derogatory or demeaning verbal ... conduct” (that is, speech).⁷ Many lawyers and legal academics, both before and after its adoption, recognized Model Rule 8.4(g)'s deliberately broad prohibitions on lawyers' “manifest[ing] bias or prejudice towards others” and “verbal ... conduct” not involving *177 the representation of clients as effectively creating an ideological speech code for the American legal profession.⁸

This Article explores the need to sustain strong protections for lawyers in maintaining their personal integrity relating to the practice of law,⁹ and examines how recent developments in the legal profession are imperiling lawyers' “first freedoms” under the First Amendment to the United States Constitution.¹⁰ It advocates for a robust understanding of lawyers' freedom to speak (or not speak) consistently with their religious and moral convictions. Part I sets the stage by considering the example of Saint Thomas More (1478-1535), who served as Lord Chancellor of England during the tumultuous reign of King Henry VIII¹¹ and was canonized as a saint in the Catholic Church in 1935, four hundred years after his martyrdom.¹² Part II considers the 1996

Tennessee Ethics Opinion in detail, including academic scholarship that has criticized its narrow vision of the lawyer's role as one separated from moral considerations, and its implicit expectations that lawyers must consistently subordinate and set aside their religious faith in deference to the positive law of lawyering. Part III examines Model Rule 8.4(g) and its reception in state courts, the practicing bar, and legal academia. It also considers how Model Rule 8.4(g) constitutes an armed-and-ready weapon for marginalizing and deterring expression by lawyers whose traditional religious and moral convictions on matters of sexual ethics dissent from those endorsed by the organized bar and currently dominant in the American legal profession. It also explains why the rule's history and its advocates' expressed objectives for a "cultural shift" in the legal profession make its adoption a significant risk to lawyers with such traditional views. Finally, it briefly considers the 2018 United States Supreme Court decision in *National Institute of Family & Life Advocates v. Becerra*,¹³ how the Court's decision reinforces Model Rule 8.4(g)'s First Amendment infirmities, and why states should reject such a rule.

I. SAINT THOMAS MORE: SILENCE FOR CONSCIENCE'S SAKE

Saint Thomas More is venerated in the Catholic Church for his martyrdom, which followed his steadfast refusal to take the Oaths of Succession and Supremacy as required by successive acts of the English Parliament during the sixteenth-century reign of King Henry VIII.¹⁴ After years resisting the King's coercion under color of law, including long imprisonment in the Tower of London, More was convicted of treason based on perjured testimony.¹⁵ He was first sentenced to death by evisceration¹⁷⁹ and hanging, a horrific process of prolonged torture, but the King commuted the sentence to death by beheading.¹⁶ The King's executioner brought his axe down upon More's neck and killed him on a summer day in 1535.¹⁷

Why did More persist in refusing to take the Oaths? The answer begins with the words More is said to have spoken to the crowd before his beheading: "I die His Majesty's good servant, but God's first."¹⁸ The journey that led him there commenced with More's appointment as Lord Chancellor in 1529.¹⁹ Shortly thereafter, the King asked him to confer with certain scholars and theologians who were already pursuing the "great matter" of the King's desired annulment of his marriage to Catherine of Aragon.²⁰ In 1530, the King sent a petition to Pope Clement urging the grant of an annulment, with More conspicuously missing from its signatories.²¹ Historian Peter Ackroyd notes that "[a]lthough [More] may have refused to sign, it is more likely that his opinions were so well known that he was not asked to put his name to the letter; but already it is possible to sense the isolation and exclusion into which he would eventually be drawn."²² Receiving no relief, the King issued "a proclamation against the entry of any papal bulls detrimental to [his] concerns."²³ From this foray ensued a series of challenges by the King to the Pope's authority, which soon spurred More's resignation as Lord Chancellor;²⁴ then, More's silence in response¹⁸⁰ to the Acts of Succession and Supremacy and their mandatory oaths;²⁵ and, finally, his martyrdom.²⁶

Robert John Araujo has described More as "a scrupulous lawyer, husband, father, statesman, legislator, judge, and saint."²⁷ He had mastered and revered the positive law and respected the authority of the English government, but he would neither utter a falsehood for its sake nor compromise his faith convictions to comply with its orders:

If Parliament had said that the King was God, [More] would have done nothing to interfere; however, when Parliament said the King rather than the Pope was head of the Church and commanded More to publicly declare his agreement by taking an oath that would conflict with his convictions about the respective authorities of the Church and the King, More could not do this because of conscience. For More was also subject to God's law, which said such a declaration would¹⁸¹ violate the higher law that is beyond the competence of the state.²⁸

For the ancient Greek philosopher Socrates, seeking the "whole truth" and pursuing the good were what made life worth living.²⁹ More's conscience was likewise grounded in his uncompromising devotion to sacred and eternal Truth.³⁰

Saint Thomas More's story became more popularly known when Robert Bolt's *A Man for All Seasons* premiered in London in 1960 and then in New York in 1961.³¹ Bolt's vivid portrait of More as a paragon of virtue who refused to surrender his convictions--even unto death--resonated with theatergoers and readers from many walks of life, but particularly with lawyers. One of them was Antonin Scalia. At the time, Scalia had just graduated *magna cum laude* from Harvard Law School and married Radcliffe graduate Maureen McCarthy. He also had been awarded a fellowship that enabled them to travel to Europe over the next year.³² During their visit to London, they *182 saw Bolt's new play with its compelling depiction of More "combining a life of faith with a firm commitment to the rule of law."³³ According to Mrs. Scalia, More's example "made a strong impression on them and 'grew in significance to us over the years.'"³⁴ During his several decades as an Associate Justice of the United States Supreme Court, Justice Scalia spoke often to lawyers, judges, and law students in local chapters of the St. Thomas More Society.³⁵ In a 2010 speech, Justice Scalia concluded his remarks by encouraging legal professionals with traditional Christian beliefs--who may be scorned by their contemporaries as foolish or weak minded--to look to the courageous faith of Saint Thomas More as a source of inspiration:

It is the hope of most speakers to impart wisdom. It has been my hope to impart, to those already wise in Christ, the courage to have their wisdom regarded as stupidity. Are we thought to be fools? No doubt. But, as St. Paul wrote to the Corinthians, "We are fools for Christ's sake." And are we thought to be "easily led" and childish? Well, Christ did constantly describe us as, of all things, his sheep, and said we would not get to heaven unless we became like little children. For the courage to suffer the contempt of the sophisticated world for these seeming failings of ours, we lawyers and intellectuals--who do not like to be regarded as unsophisticated--can have no greater model than the patron of this society, the great, intellectual, urbane, foolish, childish man that he was. St. Thomas More, pray for us.³⁶

Blake Morant has also examined More's dilemma of conscience through the lens of conflict between a lawyer's personal moral convictions and professional expectations.³⁷ This conflict requires a lawyer to choose whether, "like Thomas More, she might adhere strictly to her beliefs and suffer the consequences from her failure to accommodate the sovereign's goals; alternatively, *183 she might take a more pragmatic stance that accommodates professional expectations without the complete abandonment of personal beliefs."³⁸ Although More disagreed with his client, the King, about the Acts of Succession and Supremacy, "he attempted to appease the King, and himself, through [his] code of silence."³⁹ Morant observes that this course of "action, though mild and designed to reduce the dissonance associated with frustrating the expectations of the King to whom he owed a duty, must have caused More some measure of dissonance. He undoubtedly suffered discomfort from his silence on such a blatant violation of his core beliefs."⁴⁰ Only when he had been convicted of treason and "the policy of silence [had] failed," did More "finally express[] publicly the illegality of the King's proclamations and ultimately act[] in accordance with his personally held beliefs."⁴¹

Thus, Saint Thomas More expressed his conscience about the Acts and the King's marriage with candor only when his silence under the law failed to preserve his life.⁴² Although More's adherence to religious conscience when confronted by government mandates was exemplary in its courage and personal integrity, his self-imposed silence in response to legal coercion should never become the normative practice for American lawyers with traditional religious and moral views. But socially conservative lawyers are coming under increasing pressure to compartmentalize their lives and separate their religious and moral convictions from their law practices, especially *184 when those convictions dissent from the dominant views within the organized bar.

II. THE 1996 TENNESSEE ETHICS OPINION: COMPELLED ADVOCACY AND ADVICE AGAINST PRO-LIFE ADVICE

In the 1996 Tennessee Ethics Opinion, the Board of Professional Responsibility of the Supreme Court of Tennessee (the “Board”) addressed an inquiry by a Catholic lawyer who regularly practiced in juvenile court.⁴³ The lawyer was appointed to represent minors requesting a judicial bypass from Tennessee’s statutory parental-consent requirement for minors seeking an abortion.⁴⁴ At the time, Tennessee’s rules of professional conduct for lawyers (the “Tennessee Code”) were still based on the 1969 ABA Model Code of Professional Responsibility (the “Model Code”), rather than the Model Rules.⁴⁵ The Board opined that: (1) it would be ethically improper to seek relief from the appointed representation on religious and moral grounds; and (2) it would be ethically suspect to offer counseling to the minor client with insights borne of the lawyer’s religious and moral convictions concerning abortion, including the possible benefits of consulting with her parents instead of pursuing the judicial bypass.⁴⁶ The Board’s conclusions were profoundly flawed both as a matter of law and in their failure to justly treat deeply convicting matters of moral responsibility for Catholic lawyers.

A. Compelled Advocacy: “But Let Us at Least Refuse to Say What We Do Not Think”⁴⁷

The lawyer informed the Board that “he is a devout Catholic and cannot, under any circumstances, advocate a point of view *185 ultimately resulting in what he considers to be the loss of human life.”⁴⁸ The Board acknowledged that the lawyer’s “religious beliefs are so compelling that [he] fear[ed] his own personal interests will subject him to conflicting interests and impair his independent professional judgment in violation of [Tennessee Code] DR 5-101(A).”⁴⁹ Because of this potential conflict, the lawyer was concerned these representations could expose him to malpractice liability and believed declining the appointments would avoid that risk.⁵⁰ Finally, the Board recognized the lawyer’s “deep[-]seated, sincere belief that appointments in such cases constitute state action violative of his free exercise of religion rights guaranteed by the First Amendment to the United States Constitution.”⁵¹

Although the Board did not categorically state that seeking to avoid such court appointments would subject the lawyer to discipline, it strongly suggested it would be unethical under the Tennessee Code.⁵² First, the Board purported to resolve the malpractice liability concern by citing the Code’s Disciplinary Rule (“DR”) 6-102(A), stating “a lawyer should not attempt to exonerate himself from or limit his liability to his client for personal malpractice.”⁵³ This reliance was entirely misplaced. Like *186 its counterpart in Model Rule 1.8(h), Tennessee Code DR 6-102(A) merely restricted a lawyer in seeking from a client contractual waivers of malpractice liability.⁵⁴ It did *not* support any notion that a lawyer acted unethically by limiting law practice or selection of client matters to avoid foreseeable problems that could result in future malpractice liability. Nevertheless, the Board concluded the lawyer’s concerns did “not appear to be a sufficient ground for declining such appointments.”⁵⁵

The Board’s analysis focused primarily on the weight (if any) that should be given to the lawyer’s religious and moral convictions. At the time, Tennessee had not adopted Model Rule 6.2, which provides:

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
 (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law ... or
 (c) the client *or the cause* is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.⁵⁶

The Board thus turned to a non-binding Ethical Consideration (“EC”), Tennessee Code EC 2-29, which the Board said “exhorts appointed counsel to refrain from withdrawal where a person is unable to retain counsel, except for compelling reasons.”⁵⁷ As far as the Board was concerned, the lawyer’s religious and moral convictions opposing abortion, though “clearly fervently held,” were not reasons sufficiently “compelling” to avoid the imposition of state-compelled legal advocacy.⁵⁸ As support, it

pointed to EC 2-29's examples of non-compelling reasons for relief from appointment, which included "the repugnance of the subject matter of the proceeding."⁵⁹

*187 Even under the Code, the Board's approach is unconvincing for at least two reasons. First, a lawyer finding a proceeding's "subject matter" to be "repugnant" (e.g., representing a defendant charged with a particularly heinous violent crime) is distinguishable from a lawyer finding the client's *objectives* for the representation (i.e., obtaining an abortion) to be "repugnant." Second, EC 2-30 states clearly: "a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client."⁶⁰ The Board ignored these considerations. Instead, the Board closed its analysis by citing two Tennessee Supreme Court cases allegedly casting "serious doubt" on whether the lawyer could be relieved of these appointments.⁶¹ Both involved lawyers appointed to represent criminal defendants; and though the Board stated that the court indicated "it would have scant sympathy for an attorney who sought to avoid representation merely because the defendant's cause was unpopular, or because the crime of which he was accused was distasteful,"⁶² neither of these grounds matched those asserted by the inquiring Catholic lawyer. Rather, his objections were squarely founded on his faith-based moral convictions against complicity in abortion, not on community unpopularity or distaste for a client's past actions.

Finally, the Board incorrectly relied on what it called an "instructive" 1984 Tennessee ethics opinion involving the "ethical obligations of counsel in first[-]degree murder cases."⁶³ The 1984 opinion concerned a criminal defendant who insisted that counsel not seek to mitigate or argue against the death penalty.⁶⁴ From this opinion, the 1996 Board extracted two ethical principles: (1) "[c]ounsel's moral beliefs and usually acceptable *188 ethical standards and duties must yield to the moral beliefs and legal rights of the defendant"; and (2) "[c]ounsel is ethically obligated to follow the law and to do nothing in opposition to the client's moral and legal choices."⁶⁵ But what actually makes the 1984 opinion "instructive" is the language sandwiched between these statements and conspicuously omitted by the 1996 Board: "Counsel is not ethically required to accept the moral and legal choices of the client and has no ethical obligation, in this instance, to advocate those choices on behalf of the client."⁶⁶ So, the 1984 lawyer was properly advised to "move the court to withdraw from representation during the portion of the trial where the conflict is manifested."⁶⁷ Although the 1996 Board quoted from this sentence,⁶⁸ it clearly regarded the first two quotations as the most significant for the lawyer's circumstances. In her exhaustive critique of the Board's "corrupt, and corrupting, understanding of the lawyer's professional obligations," Teresa Stanton Collett expresses the crux of the problem:

The distorted quotation in Opinion 96-F-140 suggests a vision of lawyering far removed from the vision contained in Opinion 84-F-73. In contrast to the earlier opinion's vision of lawyers and clients as persons of equal moral dignity, Opinion 96-F-140 suggests that lawyers are only the means to achieving clients' objectives. According to this vision, lawyers have no independent standing as moral actors. Instead they are merely the mouthpiece through which the clients' claims are presented to the court. This conversion of human beings into the moral equivalent of talking Westlaw machines is itself immoral.⁶⁹

Even more pointedly, Collett observes: "[T]he problem is [ultimately] not with the Tennessee Board's selective quotation of authority. The problem is with the Board's linguistic sleight of hand that converted an inquiry based on assertions of justice *189 and objective truth to one of personal exemption or subjective beliefs."⁷⁰

Turning briefly to the lawyer's Free Exercise Clause concerns about compelled advocacy for his client's objective to obtain an abortion, the Board opined, without explanation, that two federal cases "under analogous facts" were "pessimistic" as to whether a lawyer's rights were "unconstitutionally burdened."⁷¹ But neither case cited by the Board actually provides any meaningful support for this dismissive conclusion.⁷² After examining (1) the federal case law more relevant to lawyers⁷³ and

professional obligations and (2) the teachings of the Catholic Church regarding cooperation with procurement of abortion,⁷⁴ Collett rightly concludes that “[t]he refusal of the Board *190 to recognize the deeply held religious beliefs of the inquiring lawyer and accept those beliefs as a ‘compelling reason’ to decline the appointment unconstitutionally burdens the lawyer’s ability to act in accordance with his religious beliefs.”⁷⁵ Overall, the Board’s opinion reflects a strikingly narrow vision of the lawyer’s professional role and a disturbing level of disregard for the indispensable role that religious faith plays in the lives of many lawyers.⁷⁶

*191 Although the lawyer did not specifically inquire about the Free Speech Clause of the First Amendment, the 1996 Tennessee Ethics Opinion conflicts with this constitutional restraint as well. As Collett explains, “There is substantial precedent affirming that attorneys enjoy some level of constitutional protection of their right to free speech,” and this right “encompasses both the right to speak and the right to remain silent.”⁷⁷ When the Board insisted the Catholic lawyer had a professional duty to accept a court appointment compelling his legal advocacy leading to an abortion, it utterly failed to respect the lawyer’s First Amendment right to remain silent.⁷⁸

At the heart of the injustice caused by the state-compelled legal advocacy favored by the Board is the principle expressed so memorably in 1943 by Justice Robert Jackson in *West Virginia State Board of Education v. Barnette*: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”⁷⁹ Unlike judicial proceedings involving defenses of a client’s alleged past actions, the judicial bypass procedure for minors seeking an abortion requires the lawyer to engage in advocacy to promote a client’s ability to perform a future action.⁸⁰ As Collett puts it, “The inquiring lawyer has a right not to be forced to defend a *future act* as ‘legal’ when he believes the act is intrinsically evil.”⁸¹ And, in effect, the Board “has either adopted ‘abortion *192 rights’ or ‘the lawyer as mouthpiece’ as the orthodox position to which all lawyers must subscribe. The ‘confession of faith’ required by the opinion cannot withstand scrutiny under the Free Speech Clause of the First Amendment.”⁸²

B. Advice Against Pro-Life Advice: Your Client Has a Right to Your Silence

The 1996 Tennessee Ethics Opinion offered other advice incompatible with robust freedom of speech and conscience for lawyers with traditional religious and moral convictions. The lawyer asked whether, if he was not relieved of the compulsory judicial bypass representations of minors seeking abortions, he could at least advise the client “about alternatives and/or advise her to speak with her parents or legal guardian about the potential abortion.”⁸³ The Board began with Tennessee Code DR 7-101(A)(3), stating a lawyer has a positive duty to “‘explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.’”⁸⁴ It then suggested duties of zeal and loyalty constrain the already-conscripted lawyer to withhold any advice that might lead the minor to reconsider the planned abortion:

Whether informing the minor about alternatives to abortion and suggesting that she discuss the potential procedure with her parents or legal guardian is ethically appropriate may depend on a case-by-case analysis. If the minor is truly mature and well-informed enough to go forward and make the *193 decision on her own, then counsel’s hesitation and advice for the client to consult with others could possibly implicate a lack of zealous representation under DR 7-101(A)(4)(a) and (c) (a lawyer shall not intentionally fail to seek the client’s lawful objectives, or prejudice or damage his client during the course of the professional relationship). Counsel also has a duty of undivided loyalty to his client, and should not allow any other persons or entities to regulate, direct, compromise, control or interfere with his professional judgment. To the extent that counsel strongly recommends that his client discuss the potential abortion with her parents or with other individuals or entities which are known to oppose such a choice, compliance with Canon 5 is called into question.⁸⁵

The Board's assessment is disturbing. First, it treats lawyers as "mouthpieces" who cannot legitimately bring moral considerations to bear on their advice to clients without unjustly intruding on client autonomy.⁸⁶ But silencing the lawyer is consistent with client "autonomy" only if autonomy merely means, as Collett states, "the client's right to do anything not forbidden by the law."⁸⁷ By hypothesizing a client who is already "well-informed" (of what relevant considerations?) and is "truly mature" (in what relevant respects?), the Board fundamentally begs the question about communication. The lawyer's duty of "undivided loyalty" entails a sincere and devoted commitment to the client's well-being in both the short and long terms.⁸⁸ The Board seemingly presupposes that if a "mature" minor client comes to the lawyer seeking a judicial bypass, abortion is necessarily in the client's best interests. On the contrary, without parental involvement, the lawyer's role in counseling the minor client assumes even greater importance. In such cases, a lawyer loyal to the client's well-being should engage in a searching and attentive dialogue, one that would properly include exploring the client's reasons for seeking the judicial bypass and her openness to considering alternative *194 courses of action.⁸⁹ Even looked at in its most favorable light, the Board's advice against pro-life advice manifests what Howard Lesnick has called "a wooden and impoverished view of the lawyer's counseling function," and reflects "an inhospitality to the 'personal' norms of individual lawyers" that, in the context of a religiously pluralistic legal profession, is fairly described as "statist."⁹⁰

At the time, Tennessee had yet to adopt Model Rule 2.1, which addresses the lawyer's role as an "Advisor" and provides, "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice."⁹¹ The Board did, however, invoke Canon 5 of the Code,⁹² which states, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."⁹³ Confronted with a self-described "devout Catholic" lawyer, it is telling that the Board did not base its non-independence theory on the lawyer's "personal interest" in opposing abortion. Rather, the Board insisted that the lawyer must "not allow *any other persons or entities*"-- *195 including, presumably, the Catholic Church--"to regulate, direct, compromise, control or interfere with his professional judgment."⁹⁴ Thus, when the Board warned the lawyer that "strong" recommendation to the client to consult with a person known to oppose abortion would be ethically suspect under Canon 5, it demeaned the lawyer's Catholic faith as a *disloyal* motive, and then treated that alleged disloyalty as a legitimate ground for silencing the lawyer from fully exploring with the client her options in a life-changing legal and moral situation.

Today's Model Rule 2.1 makes the proper course of action for a lawyer in similar circumstances all the clearer, expressly creating an affirmative duty of candor in advising a client and a discretionary authority to "refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."⁹⁵ In discouraging the lawyer from offering moral counseling, the Board diminished the candor of the lawyer's prospective advice. Candor requires a lawyer to engage in genuine, frank discussion of the fundamental substantive matters involved with the client's objectives and the means to accomplish them.⁹⁶ Especially in the context of legal matters involving matters of high moral significance--which include a client's decision about whether and how to engage in a legal and medical process that leads to the death of an unborn child--a lawyer's candid advice should not be limited merely to technical matters of court procedure.⁹⁷

In other scholarship, I have proposed the moral ideal of the "trustworthy neighbor" as a model for lawyers serving in the advising role.⁹⁸ This concept of the lawyer's responsibility in *196 the advising relationship is one in which "[t]he lawyer loves and respects the client as a neighbor in need who should be served in a manner worthy of trust, and who possesses an essential dignity and personality deserving of the lawyer's devotion of time, energy, and counsel."⁹⁹ Whether court-appointed or otherwise, a lawyer whose conscience is engaged and who recognizes the moral stakes involved in a client's decision should have the freedom to invite conversation and share, in a thoughtful dialogue, the benefits of the lawyer's insights and experience.¹⁰⁰ As for the 1996 Tennessee Ethics Opinion, the lawyer simply asked if he could properly advise the client about "alternatives" to abortion or about the potential value in discussing the decision with her parents.¹⁰¹ Yet the Board deemed even these modestly stated suggested topics--not even broaching the lawyer's own views on the morality of abortion--to be ethically dubious.¹⁰²

And, as Robert Vischer has observed, *197 urging lawyers to censor their candid expression of moral convictions (whether religiously based or otherwise) risks not only creating an unsettling “sense of personal incoherence” in the lawyer, but also inhibiting truly informed decision-making by the client.¹⁰³

C. The Continued Importance of the 1996 Tennessee Ethics Opinion

Many years later, the 1996 Tennessee Ethics Opinion continues to receive significant attention in legal ethics circles.¹⁰⁴ In addition to vividly revealing how a narrow vision of the lawyer's role can be used to justify imposing on dissenting lawyers a narrow range of permitted speech and action, it provides a striking example of how malleable the language of professional conduct rules can be in the hands of state bar authorities. This apprehension is especially heightened when those rules implicate moral issues in which the opinions of many lawyers today--and, in some cases, the official positions of national or state bar associations--differ from lawyers with traditional religious and moral convictions.¹⁰⁵ In such cases, the lawyer may be chilled from candid expression on matters of conscience, out of real fear that such speech may be the subject of disciplinary proceedings impacting the lawyer's license to practice law. *198 Stated simply: the 1996 Tennessee Ethics Opinion illustrates why “trust us” is a wholly inadequate response to the oft-stated concerns that 2016's Model Rule 8.4(g) is a weapon which adopting states could wield with animosity against ideologically disfavored lawyers, especially those with traditional views on matters of sexual ethics.¹⁰⁶

III. MODEL RULE 8.4(G) AND THE MOVEMENT TO MARGINALIZE SOCIALLY CONSERVATIVE LAWYERS AND DETER THEIR SPEECH

Model Rule 8.4(g) provides:

It is professional misconduct for a lawyer to ... engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.¹⁰⁷

The new Comments [3], [4], and [5] to Model Rule 8.4 provide, in their most pertinent parts:

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession *199 and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

[5] A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of paragraph (g). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. See Rule 1.2(b).¹⁰⁸

A. Model Rule 8.4(g): Its Background and Its Deficiencies

In August 2016, the ABA House of Delegates approved Model Rule 8.4(g).¹⁰⁹ Its proponents hailed the absence of floor opposition prior to its passage by voice vote as indicative of broad acceptance.¹¹⁰ But in reality, its adoption was strongly opposed by numerous lawyers and legal organizations in written *200 comments on its December 22, 2015 draft version;¹¹¹ in written submissions when the draft was changed in substantive ways during the final days before passage,¹¹² and in short pieces published by prominent legal academics such as Eugene Volokh,¹¹³ Josh Blackman,¹¹⁴ and the late Ronald Rotunda,¹¹⁵ both before and immediately after the vote.

Prior to the ABA's adoption of Model Rule 8.4(g), the black-letter text of the Model Rules did not prohibit lawyers from engaging in “harassment” or “discrimination.” Instead, Model Rule 8.4(d)—which prohibits lawyers from engaging in “conduct that is prejudicial to the administration of justice”—was accompanied by a former version of Comment [3], stating that the rule might be violated by “[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” *if* those words or conduct were “prejudicial to the administration of justice.”¹¹⁶ Thus, its disciplinary enforcement was *201 limited to conduct in the course of client representation and required a showing that the lawyer's behavior had an actual or potential adverse impact on the fair administration of justice in a specific legal matter.¹¹⁷

In the more than two years since Model Rule 8.4(g) was adopted, it has been subject to strong and sustained critiques from academics, practitioners, and public interest organizations in the legal profession.¹¹⁸ Seven aspects of the new rule are particularly noteworthy for the risks they pose to lawyers' freedom of speech and highlight why so many commentators have recognized Model Rule 8.4(g) in its current form as an unacceptable “speech code.”¹¹⁹

1. What Is “Conduct Related to the Practice of Law”?

Rather than being limited to a lawyer's conduct while engaged in client representation or otherwise practicing law, Model Rule 8.4(g) applies far more broadly to a lawyer's “conduct *related to* the practice of law.”¹²⁰ Although Comment [4] offers a non-exclusive list of what this may “include[],”¹²¹ legal commentators have pointed out that many unlisted activities lawyers perform “relate” to law practice and implicate core *202 written and oral speech activities traditionally protected by the First Amendment (e.g., continuing legal education or legal symposium events, social events involving legal groups such as the Federalist Society or the NAACP, volunteer service on a religious organization's board of trustees, law review articles, and law school classroom discussions).¹²²

2. What Are “Discrimination” and “Harassment”?

This Article emphatically takes as a given (and, in fact, vigorously supports) the principle that lawyers ought not to engage in any unlawful acts of discrimination or harassment, either in their law practices, law-related activities, or any other aspect of

their daily lives. This basic premise, however, leaves two fundamental questions unresolved: (1) what conduct should the civil law deem to be “unlawful” acts of discrimination and harassment, particularly in light of critically important First Amendment freedoms of speech, religious exercise, and association?;¹²³ and (2) how broad a meaning ought a rule of professional conduct such as Model Rule 8.4(g) give to the terms “discrimination” and “harassment,” particularly in a diverse legal profession concerned with maintaining inclusiveness for dissenting moral viewpoints? The first question raises *203 significant issues of public policy that are beyond the intended scope of this Article, but the second one bears further attention and analysis.

New Comment [3] to Model Rule 8.4 defines “discrimination” as including “harmful verbal ... conduct” (that is, speech) that “manifests bias or prejudice towards others” relating to one or more of the characteristics identified in the black-letter text.¹²⁴ The rule does not define what it means for a lawyer's speech to be “harmful” to the reader(s) or listener(s).¹²⁵ Nor does the rule require that the words be directed “towards” the reader(s) or listener(s), but rather they could violate the rule merely by being written or spoken about “others” who are not present at the time the words are received.¹²⁶ “Harassment,” as defined in the Comment, “includes ... derogatory or demeaning verbal ... conduct” (that is, speech) relating to one or more of the same characteristics that can give rise to a violation for “discrimination.”¹²⁷ Comment [3] states the “substantive law of antidiscrimination and anti-harassment statutes and case law *may guide* application of paragraph (g).”¹²⁸ Accepting such guidance is thus purely optional, and the Comment language conspicuously fails to require a showing of severity or pervasiveness--generally necessary for civil harassment claims in employment law--for a lawyer to be found guilty of Model Rule 8.4(g) “harassment.”¹²⁹ Thus, a single comment relating to a person or a group (not even necessarily the reader or listener) that the lawyer knows or reasonably should know will be considered “demeaning” or “derogatory” by someone concerning *204 a protected characteristic appears to be sufficient to violate the rule.¹³⁰

3. *Mens Rea Requirement: “Knows,” “Reasonably Should Know,” or None at All?*

Under Model Rule 8.4(g), disciplinary authorities need not prove that the lawyer knows the speech in question constitutes “discrimination” or “harassment.”¹³¹ Rather, it is sufficient if, in the eyes of the state bar authorities reviewing the facts, the lawyer *reasonably should have known* the speech falls within the broad standards described in Comment [3] (i.e., for “discrimination,” if the words and ideas they express are deemed “harmful” or “manifest bias or prejudice”; and for “harassment,” if a reader or listener would deem expressed words and ideas to be “demeaning” or “derogatory”). An earlier draft of Model Rule 8.4(g)--strongly urged on the ABA Standing Committee on Ethics and Professional Responsibility by “Goal III Commission” entities within the ABA--included no mens rea requirement of any kind.¹³² Only in the final weeks before *205 its adoption in August 2016, and at the urging of other groups within the ABA, was the “knows or reasonably should know” language added.¹³³ Legal scholarship has already criticized even this relaxed mens rea standard and proposed additional Comment amendments that would more explicitly draw lawyers' speech reflecting unconscious, or “implicit,” bias within the reach of the rule.¹³⁴ And as George Dent notes, “Political correctness condemns microaggressions, which may be committed ‘unconsciously,’ but perhaps a lawyer ‘reasonably should know’ what behavior constitutes a microaggression [T]he politically correct definition of bias is continuously and rapidly expanding, so lawyers may have to update themselves constantly about what is the new taboo.”¹³⁵

*206 4. *Is Model Rule 8.4(g) a Content-Based Speech Prohibition That, on the Face of its Comment, Discriminates Based on Viewpoint?*

Model Rule 8.4(g) is a content-based speech prohibition and is not viewpoint neutral. In fact, on its face (via its explanatory Comment), it discriminates against disfavored viewpoints relating to the characteristics it identifies for protection. For example, Comment [4] states “[l]awyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.”¹³⁶ As Josh Blackman notes, this “well-intentioned” language expressly “sanctions one

perspective on a divisive issue--affirmative action--while punishing those who take the opposite perspective.”¹³⁷ It also strengthens concerns that “discrimination” and “harassment” relating to the characteristics identified in the text of Model Rule 8.4(g) will be interpreted and enforced in an ideologically one-sided, “politically correct” manner (i.e., only to protect subgroups the state bar authorities deem worthy of protection for historical, political, or cultural reasons, rather than evenhandedly to all persons regarding that characteristic).¹³⁸ “Diversity” and “inclusion” are “left undefined” by the rule,¹³⁹ and considering the progressive advocacy by the Goal III Commission entities during its drafting history,¹⁴⁰ there is no basis to infer any intent or desire to safeguard inclusion in the profession of lawyers with traditional religious and moral convictions.¹⁴¹

***207 5. Does Model Rule 8.4(g) Actually Protect Lawyers' Freedom of Client Selection, Including Declinations Based on Their Moral Objections to Client Objectives?**

Despite its ostensible nod of non-limitation, Model Rule 8.4(g) offers lawyers no actual protection against charges of “discrimination” based on their *discretionary* decision to decline representation of clients, including ones whose objectives are fundamentally disagreeable to the lawyer. Although the new rule states it “does not limit the ability of a lawyer to accept, decline or withdraw from a representation *in accordance with Rule 1.16*,”¹⁴² Model Rule 1.16 itself provides no standard for when lawyers are *permitted* to decline client representation; rather, it addresses only when lawyers *must* decline representation, or when they may or must *withdraw* from representation.¹⁴³ So Model Rule 8.4(g)'s approval for lawyers to “decline” representation “in accordance with Rule 1.16” seems, on the face of the two rules, to allow only what was already required. And, as Ronald Rotunda observed, even if this new black-letter language does protect or acknowledge *some* right of lawyers to decline representation, Comment [5] “appears to interpret this right ... narrowly,”¹⁴⁴ stating a lawyer commits no violation “by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved *208 populations in accordance with these Rules and other law.”¹⁴⁵ Thus, if state bar authorities consider a lawyer's declining representation--including a lawyer's moral objections to the client's objectives--as “manifest[ing] bias or prejudice,” they may choose to prosecute the lawyer for violating their codified Model Rule 8.4(g).¹⁴⁶

The risk that Model Rule 8.4(g) will interfere with lawyers' conscience-based decisions to decline representation is heightened by the adjacent statement in Comment [5] that “[a] lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities.”¹⁴⁷ Although this language reiterates a concept of moral non-accountability already expressed in Model Rule 1.2(b),¹⁴⁸ its conspicuous placement in this Comment could be construed as meaning to deprive a lawyer charged with discrimination of any defense based on avoiding complicity with client objectives that conflict with the lawyer's religious or moral convictions.¹⁴⁹ *209 In this respect, the Board's dismissive treatment of the Catholic lawyer's moral objections to abortion in the 1996 Tennessee Ethics Opinion is particularly instructive of how state bar authorities might utilize this Comment language in support of discrimination charges.¹⁵⁰

6. What Does Model Rule 8.4(g) Mean by “Legitimate Advice or Advocacy,” and Whose Standard of “Legitimacy” Will Be Applied?

Model Rule 8.4(g) states that it “does not preclude legitimate advice or advocacy consistent with these Rules.”¹⁵¹ What makes advice or advocacy “legitimate” (or not) is neither defined nor elucidated in the Comment, although some guidance about relevance and materiality to the facts or law in representation had been offered in earlier Comment drafts.¹⁵² As Andrew Halaby and Brianna Long explain, the word “cries for definition,” particularly where “the subject matter is socially, culturally, and politically sensitive.”¹⁵³ Looking to the “consistent with these *210 Rules” limitation, they point to Model Rule 2.1 and its requirements that advice be “candid” and its allowing for “advice” that refers “not only to the law but to other considerations,” such as moral ones.¹⁵⁴ Presumably, the “legitimate advice” language in Model Rule 8.4(g) protects the full-spectrum of “candid advice” required and permitted under Model Rule 2.1.¹⁵⁵ But the lack of definition or explanation in the rule itself, and the

circularity of “consistent with these Rules” (including other parts of Model Rule 8.4(g)), makes this harbor far from safe.¹⁵⁶ This is especially so for lawyers with traditional religious or moral convictions, often disparaged as so-called bigotry in contemporary political and popular culture and which may be deemed illegitimate by state bar authorities.¹⁵⁷ Moreover, considering that Model Rule 8.4(g) covers not only speech made in the course of representing clients or practicing law, but also speech “related to the practice of law,” it is not clear whether a lawyer’s “advocacy” on matters of law and public policy in an individual or organizational capacity will be *211 safeguarded from disciplinary challenge if it is deemed morally offensive and therefore “harmful.”¹⁵⁸

***212 7. Why Was the Exclusion for “Conduct ... Protected by the First Amendment” Removed from the New Comment, and What Does this Deliberate Silence Betoken¹⁵⁹ for its Intended Application to (and Chilling Effects on) Lawyers’ Speech?**

Although Model Rule 8.4(g) creates an unprecedentedly broad range of speech subjecting lawyers to disciplinary action, the final version of its Comment dropped earlier draft language assuring writers and speakers on matters relating to the law that the rule “does not apply to conduct ... protected by the First Amendment.”¹⁶⁰ The December 2015 report accompanying that earlier draft language “ma[d]e clear that a lawyer does retain a ‘private sphere’ where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment.”¹⁶¹ As Josh Blackman notes, the history behind its omission from the final version of the Comment suggests a “deliberate effort” to de-emphasize lawyers’ *213 First Amendment rights.¹⁶² In any case, neither Model Rule 8.4(g), the new Comment language, nor the final ratified report contains even a passing mention of the First Amendment and the need to guard against overreaching disciplinary enforcement.¹⁶³ This development also reinforced the strong distrust its opponents already felt about the ultimate objectives for such a purposefully expansive rule and deepened their concerns about its potential abuse in targeting lawyers expressing disfavored traditional religious and moral viewpoints.¹⁶⁴

B. States’ Reception (and Widespread Rejection) of Model Rule 8.4(g)

In the more than two years since the ABA House of Delegates approved Model Rule 8.4(g) and the new Comment language, only one state, Vermont, has adopted it substantially as written.¹⁶⁵ A continually growing number of other state courts *214 and bar association committees have considered whether to adopt Model Rule 8.4(g) and have declined to do so.¹⁶⁶ The circumstances involved and the reasons for these declinations have been varied, but common themes have also emerged.¹⁶⁷

Before August 2016, twenty-three states and the District of Columbia had already adopted black-letter rules of professional conduct addressing issues relating to bias in the legal profession.¹⁶⁸ For example, in December 2016, the Illinois State Bar Association recommended that its Supreme Court retain existing rules prohibiting lawyers from engaging in “discrimination” violating established civil law standards and only after a civil claim has been successfully adjudicated against the lawyer.¹⁶⁹ Model Rule 8.4(g) has been considered either by petition or bar association rules committee review in many other states, including Nevada (where those proceedings concluded with- *215 out changes to existing rules)¹⁷⁰ and Maine (which rejected Model Rule 8.4(g) in favor of a far narrower rule).¹⁷¹

The most dramatic intragovernmental conflict thus far occurred in Montana. When, despite vocal and vigorous opposition, the Montana Supreme Court initiated and continued a notice and comment process on Model Rule 8.4(g), the Montana Legislature passed a joint resolution in April 2017 resolving that the proposed rule, if adopted, would violate the Constitutions of the United States (First Amendment) and Montana (separation of powers and exceeding judicial authority “to regulate the speech and conduct of attorneys”).¹⁷² Moreover, the attorneys general of Texas (December 2016), South Carolina (May 2017), Louisiana (September 2017), and Tennessee (March 2018) each issued a detailed legal opinion concluding that Model Rule 8.4(g) would

violate the First Amendment if adopted by their courts.¹⁷³ In Texas, that was the end of the story, *216 and the state retained its existing anti-bias rule.¹⁷⁴ Subsequently, the Supreme Courts of South Carolina (June 2017)¹⁷⁵ and Tennessee (April 2018)¹⁷⁶ issued orders rejecting Model Rule 8.4(g).¹⁷⁷

In some jurisdictions, Model Rule 8.4(g) has been rejected for reasons that combined preference for an existing state rule and great concerns about First Amendment problems and potential chilling effects on lawyers' speech. For example, in September 2017, North Dakota's Joint Committee on Attorney Standards *217 recommended against the adoption of Model Rule 8.4(g)¹⁷⁸ in preference for its Supreme Court's existing black-letter rule prohibiting "conduct that is prejudicial to the administration of justice."¹⁷⁹ In North Dakota's rule, such conduct includes to "knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel, or others, except when those words or conduct are legitimate advocacy because [one of those characteristics] is an issue in the proceeding."¹⁸⁰ In addition, North Dakota's Committee members stated serious concerns that Model Rule 8.4(g) is "overbroad, vague, and imposes viewpoint discrimination" and "may have a chilling effect on free discourse by lawyers with respect to controversial topics or unpopular views," and expressed "uncertainty with how the phrase 'conduct relat[ed] to the practice of law' would be interpreted."¹⁸¹

C. Justified Distrust of Speech Restrictions: "Cultural Shift" in the Legal Profession against Socially Conservative Viewpoints

In his leading 2017 article on Model Rule 8.4(g) and the First Amendment, Josh Blackman recounts a story that illustrates the clash of perspectives on whether the risks that the new rule poses to lawyers' freedom of speech are real and worthy of concern:

During the 2016 Federalist Society National Lawyers Convention, Professors Eugene Volokh and Deborah Rhode debated how the new rule [8.4(g)] interacted with the First *218 Amendment Professor Volokh worried that complaints could be filed against a speaker at a CLE event who critiques the Supreme Court's decision in *Obergefell v. es.*¹⁸² ... Volokh stressed that what the drafters of the rule "are getting is exactly what they are intending. They are intending to suppress particular views in these kinds of debates."

Professor Rhode was not particularly concerned with the potential for abuse. From her experiences, disciplinary committees "don't have enough resources to go after people who steal from their clients' trust fund accounts." She found "wildly out of touch with reality" the "notion that they are going to start policing social conferences and go after people who make claims about their own views about" religion or sexual orientation She concluded her remarks, "*We're a profession that knows better than that.*" Rhode paused. "*I would hope.*"

Moments later, [moderator] Judge [Jennifer] Walker Elrod asked whether Professor Rhode's position "would depend on a trust ... that the organizations would not be going after people that they don't like, such as ... conservatives." She asked, "We would have to just trust them?" The Federalist Society luncheon, packed with right-of-center lawyers, laughed aloud. Professor Rhode interjected that Rule 8.4(g) did not depend on trusting the disciplinary crowds alone. "And the Courts!" she added. "My [G]od, I never thought I'd be saying this at a Federalist Society conference, the Rule of Law people, it's still out there!" Professor Rhode concluded, "*I don't think we'd see a lot of toleration for those aberrant complaints.*" In other words, trust the bar such that the rules would not be abused.¹⁸³

Blackman elaborates on the Volokh/Rhode debate and reaches a well-justified conclusion:

During her remarks at the Federalist Society conference, Professor Rhode admitted that she viewed Rule 8.4(g) as “a largely symbolic gesture,” and that “the reason why proponents wanted it in the Code was as a matter of educating the next generation of lawyers as well as a few practitioners in *219 this one about *other* values besides First Amendment expression.” Her answer is quite revealing. Even before Rule 8.4(g) was adopted, attorneys who engaged in sexual harassment and other forms of discrimination were already subject to liability under federal, state, and local employment law, which extend beyond the actual workplace

What Rule 8.4(g) does accomplish is “educating the next generation of lawyers” about what sorts of speech are permitted, and what sorts of speech are not At bottom, this rule, and its expansion of censorship to social activities with only the most tenuous connection with the delivery of legal services, is not about education. It is about reeducation.¹⁸⁴

Other legal ethics scholars, such as Stephen Gillers, have echoed Rhode's sanguinity in response to arguments against Model Rule 8.4(g) for contravening First Amendment freedoms and values.¹⁸⁵ One 2018 article by lawyer Robert Weiner has gone so far as to assert in its title, and insist in its analysis, that there is “*Nothing to See Here*” for those who value the letter and spirit of the First Amendment.¹⁸⁶ In a 2018 article providing a comprehensive First Amendment Free Speech Clause study of Model Rule 8.4(g), however, Rebecca Aviel identifies an overbreadth problem stemming from its expansive Comment language on “harassment.”¹⁸⁷ She advises reinstating an earlier *220 draft's black-letter rule requirement that neither “discrimination” nor “harassment” is a violation unless it is “against a person.”¹⁸⁸ But in other respects, Aviel concludes that the rule is facially constitutional and insisted that lawyers, rather than objecting to its adoption as an infringement of their freedoms, should simply defend themselves against abuses of the rule by asserting constitutional violations on an as-applied basis.¹⁸⁹ Her arguments on First Amendment Free Speech Clause issues involving Model Rule 8.4(g) are distinctive insofar as she “engages in the close textual analysis that is necessary to assess whether Rule 8.4(g) is overbroad.”¹⁹⁰ But ultimately her assurances that the rule is only a modest revision away from constitutional security, and her insistence that its reach into the “illusive private sphere” is “neither unprecedented nor particularly troubling against the existing backdrop of lawyer regulation,” offer little comfort for socially conservative lawyers.¹⁹¹

In any case, the powerful distrust exhibited by many lawyers and scholars about the scope of the agenda for--and what could go wrong with--Model Rule 8.4(g) has remained deep *221 and persistent. Why have organizations such as the United States Conference of Catholic Bishops¹⁹² and the Christian Legal Society¹⁹³ written in opposition to the breadth of the new rule, not to mention a cascade of individual lawyers submitting comments first to the ABA's Standing Committee on Ethics and Professional Responsibility,¹⁹⁴ and then to state supreme courts around the country?¹⁹⁵ To understand why, it is necessary to consider how the rule's development, adoption, and attempted implementation in the states has occurred alongside the legal profession's efforts in other areas to marginalize social conservatives, including lawyers holding and expressing traditional religious and moral views on matters of sexual ethics.

In the December 2015 report accompanying the only draft version of Model Rule 8.4(g) for which opportunities for public comment and a hearing were offered, the ABA Standing Committee on Ethics and Professional Responsibility quoted with approval an earlier supportive comment--on an analogous proposal for the ABA Young Lawyers Division Assembly--that it had received from the Oregon New Lawyers division: “There is a need for a *cultural shift* in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the *222 rules of professional conduct.”¹⁹⁶ The concept of promoting and

increasing civility and respectfulness in lawyers' interactions with others is not only entirely uncontroversial, but also entirely deserving of enthusiastic support and promotion, especially with respect to persons who have historically been marginalized in the legal profession. For example, for lawyers who are faithful Catholics, the intrinsic value and dignity of all human beings--born and unborn--is a foundational principle of the moral law,¹⁹⁷ and this understanding should impact each communication they have with others in their personal and professional lives. But asserting “cultural shift” within the legal profession as a broader goal for Model Rule 8.4(g) has raised social conservatives' suspicions that, if adopted by the states, it could be employed to discipline lawyers for (1) expressing viewpoints on law and morality that are disfavored by state bar authorities and courts, or (2) declining client representations for religious and moral reasons that may be deemed to reflect adversely on their “fitness” for the practice of law.¹⁹⁸

***223** The anxiety among socially conservative lawyers has been increasingly acute as growing numbers of lawyers and academics have been promoting a wave of intolerance for viewpoint diversity and religious liberty. In its 2015 decision in *Obergefell v. Hodges*, the United States Supreme Court concluded that the Constitution requires states to issue licenses for same-sex civil marriages and recognize them under the law equally with opposite-sex civil marriages.¹⁹⁹ At the time of the decision, high-profile litigation was already well underway against business owners, such as photographers, bakers, and florists, for declining on religious grounds to provide artistically expressive services for same-sex weddings.²⁰⁰ Then, in May 2016, with the U.S. presidential election approaching and surely anticipating Democrat Hillary Rodham Clinton would prevail over Republican Donald J. Trump, law professor Mark Tushnet advocated that liberals adopt a scorched-earth approach to vanquishing moral traditionalists in the courts:

*The culture wars are over; they lost, we won For liberals, the question now is how to deal with the losers in the culture wars Trying to be nice to the losers didn't work well after the Civil War, nor after *Brown [v. Board of Education]*²⁰¹]. (And taking a hard line seemed to work reasonably well in Germany and Japan after 1945.) ... When specific battles in the culture wars were being fought, it might have made sense to try to be accommodating after a local victory, because other related fights were going on, and a hard line might have stiffened the opposition in those fights. But the war's over, and we won.*²⁰²

***224** After President Trump's election in November 2016, Randy Barnett responded to Tushnet's provocative declaration of legal Armageddon against socially conservative Americans, whom Tushnet called “the losers” after years of ideological “lawfare” and whom he demeaned as deplorable enemies comparable to the Confederacy, the Jim Crow South, Nazi Germany, and the expansionist Japanese Empire in World War II:²⁰³

While Tushnet attributes the origination of the “culture war” metaphor to [Justice Scalia's dissent in *Romer v. Evans*²⁰⁴], Scalia was only candidly acknowledging and labeling an already existing “state of war,” not declaring a new one. And in stark contrast with Tushnet, Scalia was faulting judges for taking sides in the culture war taking place outside the courts. Contrary to Scalia, then, Tushnet wants the courts to ram his side of the culture war down the throats of any recalcitrant Americans he calls “losers.” But the Trump victory represents a repudiation of Tushnet's claim that the culture war has already been won by the Left. The “losers” have struck back.²⁰⁵

Pronouncements such as Tushnet's, when combined with aggressive litigation in civil rights commissions and the courts,²⁰⁶ reinforced fears among socially conservative lawyers ***225** that dominant forces in the American bar were willing to use their authority through the courts to exact conformity or silence as the price of their continued licensure and inclusion in the legal profession.²⁰⁷ For the sake of progressives' desired “cultural shift,” diverse expression and exercise of conscience by socially conservative moral dissenters could be chilled, at best, and retaliated against, at worst. And Model Rule 8.4(g)--with the ardent

resolution from Goal III Commission entities that its restrictions must be broad and that a narrowly tailored approach was unacceptable²⁰⁸ --became emblematic of that larger cultural effort to marginalize and deter conscientious objectors on matters relating to the law and sexual ethics.

The backdrop of elements that combined to feed and sustain the strong resistance to the adoption of Model Rule 8.4(g) is multifaceted, and includes: (1) the ABA's support for extensive abortion rights under the law, and progressive lawyers' longstanding advocacy for broad restrictions on speech opposing abortion; (2) recent advocacy of speech restriction and compulsion relating to same-sex marriage, including a state judicial conduct commission's hyper-aggressive efforts to remove from the bench a Wyoming municipal judge and part-time magistrate; and (3) rising opposition to free speech on college campuses and, increasingly, even in law schools.

1. The ABA's Support for Expansive Abortion Rights, and Progressive Lawyers' Longstanding Advocacy for Broad Restrictions on Speech Opposing Abortion

For decades, the ABA as an organization has been far from neutral on the issue of American law on abortion rights and *226 related public policy.²⁰⁹ In fact, it has a long history of advocacy in support of expansive abortion rights under the law. In 1972, one year before the United States Supreme Court decided *Roe v. Wade*,²¹⁰ the ABA supported states' adoption of the Uniform Abortion Act, which would have placed no limitations on abortion during the first twenty weeks of pregnancy.²¹¹ At the midyear meeting in 1990, the ABA House of Delegates adopted and then, after receiving vociferous objections and mass resignations of members, promptly rescinded a resolution expressing the ABA's opposition to any law that "interferes" with the decision to obtain an abortion for any reason "at any time before the fetus is capable of independent life."²¹² But in 1992, in the aftermath of *Planned Parenthood of Southeastern Pennsylvania v. Casey*²¹³ and leading up to the U.S. presidential election,²¹⁴ the ABA House of Delegates, by a vote of 276-168, adopted a resolution reflecting the organization's position on abortion law that tracked the broad language of a "Freedom of Choice Act" then pending before Congress.²¹⁵ ABA President Talbot *227 D'Alemberte and other speakers sought to defend the organization's break from its years of neutrality on this contentious issue by favorably comparing the securing of broad legal rights for abortion to the 1950s and 1960s battles for civil rights laws combating racial discrimination.²¹⁶ The deeply offensive implied message--that lawyers who wished to secure protections and justice under the law for unborn humans were the moral equivalent of Jim Crow-era opponents to civil rights for African-Americans-- provided no reason for pro-life and other socially conservative lawyers to mitigate their strong apprehensions about the direction that the ABA was taking as the "national representative of the legal profession."²¹⁷ Attorney General William Barr spoke for many when, soon before the annual meeting where the House of Delegates was to vote on the resolution, he wrote a letter to ABA President D'Alemberte with these words:

It is difficult to understand why the ABA should feel compelled to take a position on this divisive political issue. As a professional association, the ABA is an important voice in the consideration of policies that affect the work of America's lawyers. By adopting the resolution and thereby endorsing one side of this debate, the ABA will endanger the perception that it is an impartial and objective professional association. It seems to me that this perception of impartiality and political neutrality is essential if the ABA is to fulfill the various roles and functions it seeks to perform on behalf of the bar.²¹⁸

*228 In the years that followed, although the ABA refrained from direct involvement as amicus curiae in the Supreme Court in cases involving abortion or First Amendment cases on speech restrictions relating to pro-life advocacy,²¹⁹ its steadfast opposition to even the most basic humanitarian measures to protect unborn children has never been in doubt. And the 1990-1992 campaign within the ABA to ensconce abortion rights as a featured policy of the organization left scars that were exposed when the movement to adopt Model Rule 8.4(g) was undertaken almost a quarter-century later. In essence, when the ABA

advocates for creating a “cultural shift” in the legal profession using rules of professional conduct enforceable by disciplinary action, it approaches that conversation with its credibility among socially conservative lawyers already long and profoundly damaged.²²⁰ This sorely depleted trust is a price the ABA has paid for its ideologically one-sided activism on matters of law and public policy. “Trust us and our fairness and restraint” are words no longer heeded; “conform or else” is the message received.

Moreover, there are no reasonable assurances that pro-life speech and advocacy will remain safe in the long run from bar authorities and courts in states that adopt Model Rule 8.4(g). The rule's overbroad account of what “discrimination” and “harassment” include--that is, derogatory or biased speech--will open the door selectively to prosecute lawyers who express opposition to abortion or abortion rights in contexts that are “related to the practice of law” yet deemed somehow “illegitimate.” Aside from the often-heard (and entirely wrongful ^{*229} and unjust) accusations that pro-life advocates are hostile or, at best, indifferent to the interests and well-being of women, there are hints to be found in the history of abortion litigation as to how such a disciplinary charge might proceed. The United States Supreme Court's 1993 case of *Bray v. Alexandria Women's Health Clinic*²²¹ involved abortion clinics and supporting organizations that sued Operation Rescue and various individuals for physically obstructing women's access to the clinics.²²² Thus, *Bray* was not a speech or pro-life advocacy case. What makes the case relevant to Model Rule 8.4(g) is the argument the plaintiffs urged the Court to accept: that the defendants were liable under the federal Civil Rights Act of 1871 (commonly referred to as the “Ku Klux Klan Act”) *because their goal of preventing abortion* constituted an “invidiously discriminatory animus” on the basis of sex.²²³ Writing for the 5-4 majority, Justice Scalia emphatically rejected this contention:

Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself ... does not remotely qualify for such harsh description, and for such derogatory association with racism. To the contrary, we have said that “a value judgment favoring childbirth over abortion” is proper and reasonable enough to be implemented by the allocation of public funds, and Congress itself has, with our approval, discriminated against abortion in its provision of financial support for medical procedures. This is not the stuff out of which ... “invidiously discriminatory animus” is created.²²⁴

Nevertheless, it is unsettling that the plaintiffs succeeded in persuading the Eastern District of Virginia, the Fourth Circuit Court of Appeals, and three Supreme Court Justices that the plaintiffs had satisfied the requirement of showing the defendants' conduct reflected “invidiously discriminatory animus” against women *because of* their sex, and the record supporting this finding was based on the defendants' goal of preventing abortion.²²⁵ The closeness of the outcome in *Bray* reflects just ^{*230} how readily state bar authorities could, if so disposed, conclude that lawyers who express disfavored viewpoints opposing abortion or abortion rights in contexts “related to the practice of law” have “manifest[ed] bias or prejudice” on the basis of sex and violated Model Rule 8.4(g).²²⁶ Expressing such viewpoints before a court might reluctantly be deemed “legitimate advocacy” so that pro-life parties may have representation of counsel; but, as the 1996 Tennessee Ethics Opinion foreshadowed, conversations with clients or colleagues might not be protected as “legitimate advocacy or advice.”²²⁷ The prospects for selective prosecution and abuse of the disciplinary process should not be discounted, particularly when “cultural shift” is a stated objective for the rule.²²⁸

The Court's precedents in the area of free speech challenges to pro-life advocacy in the vicinity of abortion clinics illustrate this concern about disparate treatment. Justice Scalia often pointed to the ways in which the Court's abortion jurisprudence had distorted its rulings in other related areas, and especially with freedom of speech.²²⁹ In cases such as *McCullen v. Coakley*,²³⁰ *Hill v. Colorado*,²³¹ and *Madsen v. Women's Health Center, Inc.*,²³² Justice Scalia detailed how the Court's tendency to be biased against pro-life advocacy and in favor of abortion impacted its review of state or local laws restricting speech. In his *Hill* dissent, he memorably concluded:

What is before us ... is a speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the “ad hoc nullification machine” that the Court has set in motion to push aside whatever doctrines of constitutional law stand in the way of that highly favored practice. Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong. Because, like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.²³³

Although the Court's most recent First Amendment decisions suggest at least some reason for greater optimism about future abortion-related speech cases,²³⁴ it would be extremely unwise for pro-life lawyers to assume that their ability to express their conscience with candor will remain safe in the *232 American legal profession. The lack of protections for expressing pro-life viewpoints in fellow Western nations such as England²³⁵ and France²³⁶ illustrates the need for constant vigilance in defending First Amendment freedoms and values against persistent and increasingly forceful challenges.²³⁷ Provincial bar authorities in Canada (the Law Society of Ontario) have already leapt beyond Model Rule 8.4(g)-style speech restrictions and into the realm of compelled speech.²³⁸ In December 2016, the governing authorities for the Law Society of Ontario approved a requirement that every bar licensee adopt and abide *233 by a mandatory “Statement of Principles,” asserting agreement with specific ideas relating to “equality, diversity, and inclusion,” and state they are committing themselves to “promote equality, diversity, and inclusion generally, and in their behavior towards colleagues, employees, clients and the public.”²³⁹ Similarly to Model Rule 8.4(g), the opposition to such mandates stems not from a lack of general agreement that equality, diversity, and inclusion are vitally important in the legal profession. They most certainly are. Rather, the opposition stems from fundamental principles of freedom and liberty and a fully justified resistance to compelled conformity. Lawyers must be free to hold and express diverse points of views about the law and morality. Government-imposed restrictions and mandates jeopardize the rights of moral dissenters to themselves be included as equal members of the legal profession without being screened out through admissions processes, identified for exclusion through an annual “test” (such as Ontario's “Statement of Principles”), or silenced by rules of professional conduct that create opportunities for selective prosecution and imposition of sanctions (Model Rule 8.4(g)).

2. Recent Advocacy of Speech Restrictions and Compulsions Relating to Same-Sex Marriage

In its June 2018 decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,²⁴⁰ the United States Supreme Court held the Colorado Civil Rights Commission violated custom wedding cake baker Jack Phillips's rights under the First Amendment Free Exercise Clause, because its “consideration of this case was inconsistent with the State's obligation of religious neutrality.”²⁴¹ The record reflected that “based on his sincere religious beliefs and convictions,”²⁴² Phillips had declined a request to create a custom-designed wedding cake for celebration of a same-sex marriage.²⁴³ The record also showed that *234 the Commission had exhibited “clear and impermissible hostility toward the sincere religious beliefs that motivated his objection,”²⁴⁴ based on (1) several disparaging statements made by commissioners relating to Phillips's religious faith and (2) “the difference in treatment between Phillips's case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.”²⁴⁵ Although the Court's majority opinion did not reach Phillips's argument that application of Colorado public-accommodations law to compel his artistic expression violated his rights under the Free Speech Clause, Justice Thomas's concurrence (joined by Justice Gorsuch) made a compelling argument that it did:

This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about *235 the correctness of *Obergefell* and the morality of same-sex marriage. *Obergefell* itself emphasized that the traditional understanding of marriage “long has been held--and continues to be held--in good faith by reasonable and sincere people here and throughout the

world.” If Phillips' continued adherence to that understanding makes him a minority after *Obergefell*, that is all the more reason to insist that his speech be protected.²⁴⁶

As *Masterpiece Cakeshop* was proceeding through the court system, another significant case was being prosecuted in Wyoming, this one against a municipal judge and part-time magistrate, Ruth Neely, who in a telephone interview initiated by a local reporter, expressed her religiously based objection to officiating a same-sex marriage if this was requested of her.²⁴⁷ The prosecutor for the Wyoming Commission on Judicial Conduct and Ethics charged her with multiple violations of the Wyoming Code of Judicial Conduct (“Wyoming Code”) and sought her removal from the bench.²⁴⁸ In March 2017, in a 3-2 decision, the Wyoming Supreme Court concluded that Judge Neely had violated Wyoming Code Rules 1.2,²⁴⁹ 2.2,²⁵⁰ and 2.3(B)²⁵¹ simply by “*announcing* that her religious beliefs prevent her from officiating same-sex marriages.”²⁵² The court imposed a public censure, rejecting the Commission's extreme recommendation that Judge Neely should be removed from the bench (the judicial equivalent of lawyers' disbarment).²⁵³ The majority rejected Judge Neely's arguments that the Commission's prosecution violated her rights under the Free Speech and Free Exercise Clauses of the First Amendment and their counterparts under the Wyoming Constitution,²⁵⁴ including the state's strong prohibition against imposing religious tests for public office.²⁵⁵ In a “respectful[], but vigorous [] dissent,” two justices framed the issues quite differently from the majority, maintaining that “[c]ontrary to the position asserted by the majority opinion, this case *is* about religious beliefs and same[-]sex marriage.”²⁵⁶ This case would, in fact, “determine whether there is a religious test for who may serve as a judge in Wyoming” and “whether a judge may be precluded from one of the functions *237 of office not for her actions, but for her statements about her religious views.”²⁵⁷ Gerard Bradley captures quite well the heart of the Commission's attack on Judge Neely's traditional religious and moral convictions:

The Commission admitted ... that it would remove Judge Neely because of her “statements” expressing her religious opinion about marriage. This is to say that she would be removed for possessing, or at least for being known to possess, the religious belief of her church that marriage is a relationship which by its natural orientation towards procreation is limited to unions of a man and a woman. In other words, Judge Neely is unfit because she is a Lutheran.²⁵⁸

The dissent made a detailed and highly persuasive case for why Judge Neely had violated none of the charged Wyoming Code Rules, and why the sanctions against her violated the cited provisions of the federal and state constitutions.²⁵⁹ Most relevant to Model Rule 8.4(g), the dissent emphatically refuted the charge that Judge Neely violated Wyoming Code Rule 2.3(B) when she allegedly, “in the performance of judicial duties, by words or conduct manifested bias or prejudice on the basis of ... sexual orientation.”²⁶⁰ As the dissent correctly explained, “Judge Neely's religious belief about who may be married has no relationship to her view of the worth of any individual or class of individuals. The overwhelming evidence in the record indicates that Judge Neely does not hold any bias or prejudice *238 against any person or class of persons.”²⁶¹ Although “[t]he majority opinion hinges on its conclusions that Judge Neely's statements would cause reasonable persons to question her impartiality, and would conclude she exhibited bias and prejudice toward homosexuals,” the dissent observed that “[t]hose are not conclusions that would be reached by a reasonable person apprised of the appropriate facts.”²⁶²

On the Free Exercise and Free Speech Clause issues, the dissent's analysis is directly applicable to lawyers who wish to decline client representations based on moral objections to the client's objectives (prerogatives placed at risk under Model Rule 8.4(g)). Although the State of Wyoming “has a compelling interest in assuring that every person is treated equally and that judges do not display bias or prejudice,” the dissent noted “[t]his interest comes into play when a judge demonstrates actual bias or

prejudice.”²⁶³ But the record did not support any such finding about Judge Neely: “To assure that judges do not display bias or partiality, our rules permit a judge to assign a particular case to another judge. That is just what Judge Neely proposed to do.”²⁶⁴

In concluding, the dissent sounded a call for the legal profession and the judiciary to respect diversity and inclusion for members who hold dissenting views on matters of law and morality, particularly on religiously based convictions concerning sexual ethics:

In our pluralistic society, the law should not be used to coerce ideological conformity. Rather, on deeply contested moral issues, the law should “create a society in which both *239 sides can live their own values.”²⁶⁵ That is precisely how Wyoming has approached the matter since its founding.

The *Obergefell* decision affirms this approach for the issue of same[-]sex marriage. It emphasized that the constitutional problem arose not from the multiplicity of good faith views about marriage, but from the enshrining of a single view into law which excluded those who did not accept it as “outlaw[s]” and “outcast[s].” Unfortunately, the majority opinion does just that for Judge Neely and others who share her views. Caring, competent, respected, and impartial individuals like Judge Neely should not be excluded from full participation in the judiciary. Judge Neely’s friends who actually obtained a same[-]sex marriage recognized this and observed that it is “obscene” to impose discipline in this case.²⁶⁶

In January 2018, the United States Supreme Court denied a petition for writ of certiorari filed by Judge Neely to appeal her public censure by the Wyoming Supreme Court.²⁶⁷ Judge *240 Neely’s counsel had argued the Court should, “at a minimum, hold [the] petition pending resolution of *Masterpiece Cakeshop*, No. 16-111, which raises related First Amendment issues”,²⁶⁸ and based on the Court’s reasoning in its June 2018 decision in that case,²⁶⁹ Judge Neely’s case for vacating her sanction would have been even stronger. For example, the record contained evidence of animus and hostility to Judge Neely’s religious faith and convictions similar in nature to the animus and hostility involved in *Masterpiece Cakeshop*.²⁷⁰ Moreover, analogously to Colorado’s preferential treatment of custom-design bakers who refused to make cakes with religious messages they found offensive,²⁷¹ the *Neely* record reflected that Wyoming would allow magistrates to decline officiating for marriages for any secular reason or no reason at all, but sanctioned Judge Neely *241 merely for announcing her religiously based objections for doing so.²⁷²

The *Neely* case is a troubling landmark for many reasons, as recounted so well by the Wyoming Supreme Court’s dissenting justices. But regarding Model Rule 8.4(g), there is a particularly vital moral to the story: socially conservative lawyers should take no comfort from assurances that state bar authorities with limited resources will not prosecute them for “manifest[ing] bias or prejudice” in expressing disfavored traditional viewpoints on matters of sexual ethics, or that either those authorities or the courts will respect their freedoms under the First Amendment or their state constitutions. The Commission deemed Judge Neely, with no disciplinary record and an undisputed sterling reputation in her community, to be “unfit” for the judiciary solely for her out-of-court statements borne of religious conviction. And even after receiving the Court’s sharp rebuke of its manifested hostility to Jack Phillips’s traditional religious and moral beliefs in *Masterpiece Cakeshop*, the Colorado Civil Rights Commission quickly approved new charges against him: this time, the Commission alleged antidiscrimination law violations because Phillips had declined on religious grounds to make a custom cake designed for the customer’s stated purpose of celebrating gender identity transition.²⁷³

*242 There is no reason to believe these will be isolated cases, or that progressives will refrain from using the disciplinary process to make cautionary examples of selectively chosen lawyers who, like small-town municipal judge and part-time magistrate Ruth Neely and custom-cake baker Jack Phillips, they regard as moral villains deserving of professional

destruction.²⁷⁴ “Trust us” or “just litigate as-applied abuses” should no longer be accepted as adequate assurances, if they ever would have been, and creating such a sword of Damocles for the bar to hold over lawyers' heads like the axe of Saint Thomas More's executioner becomes even more clearly perilous.²⁷⁵

***243 3. Rising Opposition to Free Speech on College Campuses and in Law Schools**

In April 2016, I presented to the students of the University of North Dakota School of Law remarks entitled *A Tribute to Justice Antonin Scalia*.²⁷⁶ Inspired by Justice Scalia's jurisprudence on our First Amendment freedom of speech, and well aware of the ongoing debate over the draft Model Rule 8.4(g), I offered these comments:

Around the country, it has become all too common to encounter not only students, but also faculty and school administrators, promoting policies of increasing campus censorship (whether *de jure* or *de facto*) of ideas or speakers they disfavor. It has also become all too common to hear about intimidating tactics and suppression of the speech of those whose opinions are contrary to the general will of the campus academic subculture and the viewpoints it may prefer. In our national political culture, it has become too common for figures who lead emerging majorities or similarly powerful factions to pronounce that the time for debate is over, and that those who have opposed them must either be silent or suffer retribution for their speech Whether the prevailing ideas are liberal or conservative, left or right, the urges and actions to silence disagreement about ideas are absolutely wrong, and terribly contrary to our founding constitutional principles and our American traditions.²⁷⁷

Since then, and particularly in the aftermath of the 2016 U.S. presidential election, opposition to free speech on college campuses and even in law schools has continued to escalate. The *244 challenges have included “no-platform” social justice advocates, who engage in efforts to prevent visiting speakers from being heard through disinvitation campaigns, or by using blockades or extreme noise (or both),²⁷⁸ and violent anti-free-speech groups such as Antifa, who threaten and physically attack others at the events.²⁷⁹ In the 2017-2018 academic year, there were at least two nationally-reported “no-platform” disruptions at American law schools: (1) American Enterprise Institute scholar Christina Hoff Sommers's guest speaking event at Lewis & Clark²⁸⁰ and (2) South Texas law professor Josh Blackman's event at CUNY (ironically, on the importance of free speech).²⁸¹ The ideologically based justifications law students offered for “no-platforming” Sommers and Blackman echoed concepts from Model Rule 8.4(g) and its Comment language: they claimed the hosting and very presence at their law schools of speakers whose opinions on law-related questions were seen by some students as offensive and degrading (*cf.* “demeaning” and “derogatory”) would have an adverse (even “violent”) impact on those students (*cf.* “harmful”).²⁸² In a later *245 interview, Blackman remarked that these law students will be among those enforcing Model Rule 8.4(g) in a few years, and “‘if you give these kids a loaded weapon, they'll use it to discipline people who speak things they don't like.’”²⁸³ In an era when surveys are reflecting diminishing support for First Amendment freedom of speech among younger generations,²⁸⁴ the risk of future selective prosecutions and abuses of an overbroad black-letter rule of professional conduct such as Model Rule 8.4(g) becomes all the greater.²⁸⁵

D. “Professional Speech” and Model Rule 8.4(g): *National Institute of Family & Life Advocates v. Becerra*

In June 2018, in *National Institute of Family & Life Advocates v. Becerra* (“NIFLA”), the United States Supreme Court held that the petitioners, who had requested a preliminary injunction against enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (“FACT Act”), were likely to succeed on the merits of their claim under the First Amendment's Free Speech Clause.²⁸⁶ As Justice Thomas's opinion for the Court's 5-4 majority summarized the requirements of the FACT Act, “[l]icensed clinics [that *246 primarily serve pregnant women] must notify [those] women that

California provides free or low-cost services, including abortions, and give them a phone number to call,” and “[u]nlicensed clinics must notify women that California has not licensed the clinics to provide medical services.”²⁸⁷ Although the Court noted “serious concerns that both the licensed and unlicensed notices discriminate based on viewpoint,” it did not need to reach that issue “[b]ecause the notices are unconstitutional either way.”²⁸⁸

In a powerful concurring opinion, Justice Kennedy underscored the “serious constitutional concern” about the “apparent viewpoint discrimination” in the case:

This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these

The California Legislature included in its official history the congratulatory statement that the Act was part of California's legacy of “forward thinking.” But it is not forward thinking to force individuals to “be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.” It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.²⁸⁹

*247 The aspect of *NIFLA* that connects most specifically to the Model Rule 8.4(g) controversy is how Justice Thomas's opinion responded to the Ninth Circuit's asserted justification for lenient First Amendment review of the notice requirements--i.e., that they were merely “professional speech” that “involves personalized services and requires a professional license from the state.”²⁹⁰ Treating “professional speech” as a “separate category of speech that is subject to different rules,” the Court said, “gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement.”²⁹¹ The Court specifically identified “lawyers” as one of several categories of state-licensed individuals over whom the government may not exercise such “unfettered power” to regulate speech.²⁹² The Court identified two limited exceptions: “some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech’”²⁹³ and “professional conduct, even though that conduct incidentally involves speech.”²⁹⁴ Only the latter of these directly relates to Model Rule 8.4(g). And because the broad range of “verbal ... conduct” that the rule purports to prohibit is not “conduct” that “incidentally involves speech,” but is instead *speech that incidentally involves professional conduct* (especially when such speech is merely “related to the practice of law”), it provides states with no escape from heightened scrutiny for content-based rules.²⁹⁵ The Court then elaborated on its broader concerns about the government imposing speech requirements or restraints under the guise of professional regulation:

*248 Outside of these two contexts, the Court's precedents have long protected the First Amendment rights of professionals. The Court has applied strict scrutiny to content-based laws regulating the noncommercial speech of lawyers,²⁹⁶ professional fundraisers, and organizations providing specialized advice on international law [I]n the context of professional speech, ... content-based regulation poses the ... “risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.” When the government

polices the content of professional speech, it can fail to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” Professional speech is also a difficult category to define with precision. If States could choose the protection that speech receives simply by requiring a license, they would have a powerful tool to impose “invidious discrimination of disfavored subjects.”²⁹⁷

The Court's emphatic rejection of the notion that “professional speech” is a separate category from private speech and intrinsically more susceptible to increased content-based regulation badly undercuts such defenses offered for Model Rule 8.4(g).²⁹⁸ In combination with its other highly free-speech-protective opinion issued in the same month, *Janus v. American Federation of State, County, & Municipal Employees*,²⁹⁹ the Court's ruling sends a strong signal to state supreme courts that they must fully respect lawyers' First Amendment freedoms. To ensure this occurs and that state bar authorities will exercise similar restraint, particularly concerning lawyers with views unpopular with their dominant peer groups in the legal profession, those courts should continue to reject Model Rule 8.4(g).³⁰⁰

*249 IV. CONCLUSION

Model Rule 8.4(g)'s proponents consistently defend it as both a necessary tool and an important symbol in the organized bar's continuing efforts to promote and increase its diversity and inclusion.³⁰¹ These are surely very worthy objectives, but the fairness and justice of their pursuit have suffered from the widespread ideological myopia about what it truly means to have a diverse and inclusive profession. It does not mean silencing or chilling diverse viewpoints on controversial moral issues on the basis that such expression manifests “bias or prejudice,” is “demeaning” or “derogatory” because disagreement is deemed offensive, or is considered intrinsically “harmful” or as reflecting adversely on the “fitness” of the speaker. It does mean embracing a vision of diversity that includes, rather than excludes, socially conservative lawyers who dissent from the dominant moral views of the American legal profession, including on matters of sexual ethics.³⁰² The impulses within the legal profession to coerce viewpoint conformity and marginalize and deter dissenters, evidenced in the 1996 Tennessee Ethics Opinion and then further animated and expanded in Model Rule 8.4(g), should be resisted by members of the bench and bar who cherish liberty. The zealous energy of progressive activism *250 should be redirected away from authoritarian efforts to silence and exclude traditionalist moral dissenters through campus and professional speech codes, and toward civil and tolerant efforts to persuade others of their views on law and social justice.

The long-term preservation of our first freedoms in the American legal profession will require a new and sustained commitment to what John Inazu has called “confident pluralism.”³⁰³ This ideal draws upon strong premises of both *inclusion* (“[a]iming for basic membership in the political community to those within our boundaries”) and *dissent* (asserting “[w]e must be able to reject the norms established by the broader political community within our own lives and voluntary groups”).³⁰⁴ Although “the precise contours of inclusion and dissent are contested,” and these disagreements “strain[] our modest unity,” Inazu insists negotiating this challenging path is a worthy effort in our ideologically-divided culture: “Confident pluralism argues that we can, and we must, learn to live with each other in spite of our deep differences. It requires a tolerance for dissent, a skepticism of government orthodoxy, and a willingness to endure strange and even offensive ways of life.”³⁰⁵ Faced with these conflicts, lawyers should find encouragement from Saint Thomas More, both from his moral courage when faced with compulsions the government brought to bear upon his conscience, and from his lifelong commitment to the law and the recourses to justice it provides. As Thomas Shaffer once wrote:

*251 More's hope that he could use the law to save himself, his family, and his country was foreshadowed in his book *Utopia*. There is a debate there between Raphael, who does not believe that a good man can serve princes, and More, who says that good men can serve princes: “You cannot pluck up [wrongheaded opinions] by the root,”

More says, “Don't give up the ship in a storm because you cannot direct the winds [W]hat you cannot turn to good, you ... make as little bad as you can.”³⁰⁶

Today's lawyers with traditional religious and moral convictions should not “give up the ship” because they “cannot direct the winds” of cultural change or because the dominant forces of the organized bar may seek to marginalize or even exclude them. Like More, they should persevere and remain “the King's good servant, but God's first.” Unlike More, they should be free to express their consciences with candor.

Footnotes

- a1 Associate Professor of Law, University of North Dakota School of Law. I dedicate this Article in memory of the Honorable Justice Antonin Scalia, good and faithful servant of the United States Constitution and First Amendment freedom of speech, but God's first. His life and example have positively influenced my journey in the legal profession, and his passing in February 2016 inspired in me further self-reflection, prayerful study, and conversations that led to my entering the Catholic Church at the Easter Vigil in April 2018.
- 1 ROBERT BOLT, A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS 160 (First Vintage International ed., Vintage Books 1990) (1960) (from the playwright's account of Thomas More's words spoken before receiving his sentence of death for “High Treason”).
- 2 *Id.* at 162-63 (from his concluding narrative comments after More's execution).
- 3 Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 96-F-140 (Appointed Counsel for Minor in Abortion Case) (1996) [hereinafter 1996 Tennessee Ethics Opinion], [1996 WL 34565491](https://www.tbpr.org/ethic_opinions/96-f-140), https://www.tbpr.org/ethic_opinions/96-f-140 [<https://perma.cc/3NCX-KX5Q>].
- 4 *Id.* at *1, *3.
- 5 *Id.* at *2-4.
- 6 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018).
- 7 *Id.* r. 8.4 cmt. 3.
- 8 *See, e.g.*, RONALD D. ROTUNDA, THE ABA DECISION TO CONTROL WHAT LAWYERS SAY: SUPPORTING “DIVERSITY” BUT NOT DIVERSITY OF THOUGHT (Heritage Found., Legal Memorandum No. 191, 2016) [hereinafter ROTUNDA, SUPPORTING “DIVERSITY” BUT NOT DIVERSITY OF THOUGHT], <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf> [<https://perma.cc/8PBW-VEPP>]; RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 8.4-2(j) (2018-2019 ed.); Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241 (2017) [hereinafter Blackman, *A Pause for State Courts*]; George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 135 (2018); Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201 (2017).
- 9 *See generally* Michael S. McGinniss, *The Character of Codes: Preserving Spaces for Personal Integrity in Lawyer Regulation*, 29 GEO. J. LEGAL ETHICS 559 (2016).
- 10 “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. Although “first freedoms” traditionally refers to religious liberties under the Free Exercise Clause, the contemporary legal debates addressed in this Article illustrate how the core freedoms of religious exercise and speech are closely intertwined. For the purposes of this Article, they share “United Status” as our “first freedoms.”

- 11 See generally PETER ACKROYD, *THE LIFE OF THOMAS MORE* (1998) (offering a comprehensive narrative of More's life from birth to death).
- 12 Veryl Victoria Miles, *A Legal Career for All Seasons: Remembering St. Thomas More's Vocation*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419, 420 n.3 (2006) (citing Robert F. Drinan, *Renaissance Lawyer, Renaissance Man*, 99 HARV. L. REV. 499 (1985)).
- 13 138 S. Ct. 2361 (2018).
- 14 ACKROYD, *supra* note 11, at 385-87. The Oath of Supremacy was intended by King Henry VIII to “negate Papal supremacy” over the Church of England. William G. Bassler, *More on More*, 41 CATH. LAW. 297, 297 & n.3 (2002) (citing ANTHONY KENNY, THOMAS MORE 91 (1983)). As Veryl Victoria Miles and others have noted, “More could have taken the oath with some legal qualification or reservation, as many Catholics of the time did in fact do. But he did not.” Miles, *supra* note 12, at 423 (citing, e.g., G. Roger Hudleston, *Thomas More*, in 14 THE CATHOLIC ENCYCLOPEDIA 689, 689-93 (Charles G. Herbermann et al. eds., 1912), <http://www.newadvent.org/cathen/14689c.htm> [<https://perma.cc/Q3B3-SNLV>]).
- 15 ACKROYD, *supra* note 11, at 395-400.
- 16 *Id.* at 403.
- 17 *Id.* at 406.
- 18 See *id.* at 405 (noting that, according to More's son-in-law William Roper, he asked the crowd “‘to bear witness with him that he should now there suffer death in and for the faith of the Holy Catholic Church’ ...; but a contemporary account suggests that ‘Only he asked the bystanders to pray for him in this world, and he would pray for them elsewhere. He then begged them earnestly to pray for the King, that it might please God to give him good counsel, protesting that he died the King's good servant but God's first.’”); see also A MAN FOR ALL SEASONS (Columbia Pictures 1966).
- 19 ACKROYD, *supra* note 11, at 313.
- 20 *Id.* at 313-14.
- 21 *Id.* at 314.
- 22 *Id.*
- 23 *Id.* at 314-15.
- 24 *Id.* at 315, 327-29. “More's resignation was not precisely over the marriage of Henry VIII to Catherine of Aragon For whatever reason-- canonical or political--the annulment of Henry's marriage seemed impossible to More, but that was not what led to his principled resignation.” Edward McGlynn Gaffney, Jr., *The Principled Resignation of Thomas More*, 31 LOY. L.A. L. REV. 63, 72 (1997). Rather, “[t]he problem of conscience was on a different level, the claim of the Crown to absolute authority over the church [that is, the Oath of Supremacy]. That was for More a principle worth resigning over and even worth dying for.” *Id.* at 72-73.
- 25 The Act of Succession (1534) “pronounced the marriage between Henry and Catherine of Aragon to be ‘void and annulled’ and then, in a curious but consistent extension of policy, dealt with the matter of all such ‘prohibited’ marriages.” ACKROYD, *supra* note 11, at 356. “It was claimed that no power on earth could sanction them, and in one sentence the Act thereby destroyed the jurisdiction and authority of the Pope.” *Id.* At its conclusion “came the stipulation that eventually took More to his death on the scaffold: all the king's subjects ‘shall make a corporal oath’ to maintain ‘the whole effects and contents of this present Act.’” *Id.* Although Parliament later adopted a second Act of Succession with a new oath “remedying the defect which More had found in the first and too broadly inclusive oath,” it also introduced the Act of Supremacy, “proclaiming Henry to be ‘the only supreme head in earth of the Church of England, called *Anglicana Ecclesia*.’” *Id.* at 378-79. “But there followed other proposals which touched upon More directly, as surely as if the king had run upon him in a tilting yard,” including the Treason Act, which “made it a capital offence to ‘maliciously wish, will, or desire, by words or writing’ to deprive the royal family of their ‘dignity, title, or name of their royal estates’, or to declare the king ‘heretic, schismatic, tyrant, infidel.’ To call Henry a schismatic, therefore, would be to incur the penalty of a lingering death.” *Id.* at 379.
- 26 ACKROYD, *supra* note 11, at 360-64, 373-75, 387, 400.

- 27 Robert John Araujo, *Conscience, Totalitarianism, and the Positivist Mind*, 77 MISS. L.J. 571, 575 (2007).
- 28 *Id.* at 572-73.
- 29 See PLATO, SOCRATES' DEFENSE (APOLOGY) 17b-c, 38a-39a (c. 399-390 B.C.), reprinted in THE COLLECTED DIALOGUES OF PLATO 3, 4, 23-24 (1963) (Edith Hamilton & Huntington Cairns eds., Hugh Tredennick trans., 1961); see also Araujo, *supra* note 27, at 572 ("Socrates, Thomas More, Rosa Parks, each was brought before the law because of their disagreement with some rule, and each stood their ground, often in a quiet, even private way, with the force of reason and conscience reinforcing their position It was accomplished ... through the synthesis of mind and soul working in harmony.").
- 30 Steven Smith explains this point well:
 ... [F]or More, conscience was inseparably connected to truth--even, to use a modern designation, to Truth. As a matter of *meaning*, to say that something was a reason of conscience was to say that it arose from a belief about some matter of vital truth. And as a *normative* matter, the preeminent value of conscience was connected to the sacred value of truth. For better (as I suspect) or worse, that insistence on the connection between conscience and Truth would seem to distance More's conception of conscience from some of the notions that go under that name today.
 Steven D. Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580, 603 (2003).
- 31 See BOLT, *supra* note 1, at xxi. The film version, A MAN FOR ALL SEASONS (Columbia Pictures 1966), received eight Academy Award nominations and won in six categories, including Best Picture. *The 37th Annual Academy Awards*, ACADEMY OF MOTION PICTURE ARTS AND SCIENCES, <https://www.oscars.org/oscars/ceremonies/1967> [<https://perma.cc/AP6M-VESK>].
- 32 Antonin Scalia, *The Christian as Cretin*, in SCALIA SPEAKS: REFLECTIONS ON LAW, FAITH, AND LIFE WELL LIVED 107, 107 (Christopher J. Scalia & Edward Whelan eds., 2017).
- 33 *Id.*
- 34 *Id.*
- 35 *Id.*
- 36 *Id.* at 115-16; see also Michael S. McGinniss, *A Tribute to Justice Antonin Scalia*, 92 N.D. L. REV. 1, 10-11 (2016) (discussing the importance to Justice Scalia of his devout Catholic faith).
- 37 Blake D. Morant, *Lessons from Thomas More's Dilemma of Conscience: Reconciling the Clash Between a Lawyer's Beliefs and Professional Expectations*, 78 ST. JOHN'S L. REV. 965 (2004).
- 38 *Id.* at 969.
- 39 *Id.* at 1002.
- 40 *Id.* at 1002-03.
- 41 *Id.* at 1003.
- 42 In Bolt's play, More's speech after his conviction is powerfully rendered:
 The indictment is grounded in an Act of Parliament which is directly repugnant to the Law of God. The King in Parliament cannot bestow the Supremacy of the Church because it is a Spiritual Supremacy! And more to this the immunity of the Church is promised both in Magna Carta and the King's own Coronation Oath!
 ... I am the King's true subject, and pray for him and all the realm I do none harm, I say none harm, I think none harm. And if this be not enough to keep a man alive, in good faith I long not to live Nevertheless, it is not for the Supremacy that you have sought my blood--but because I would not bend to the marriage!
 BOLT, *supra* note 1, at 159-60.
- 43 1996 Tennessee Ethics Opinion, *supra* note 3, at *1, *3.
- 44 *Id.* at *1.

- 45 *Id.* at *2. *See generally* MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1969).
- 46 1996 Tennessee Ethics Opinion, *supra* note 3, at *2-4.
- 47 ALEXANDER SOLZHENITSYN, *Live Not By Lies* (1974), in THE SOLZHENITSYN READER: NEW AND ESSENTIAL WRITINGS, 1947-2005, at 556, 558 (Edward E. Ericson, Jr. & Daniel J. Mahoney eds., 2006) ("We are not called upon to step out onto the square and shout out the truth, to say out loud what we think--this is scary, we are not ready. But let us at least refuse to say what we *do not* think!").
- 48 1996 Tennessee Ethics Opinion, *supra* note 3, at *3. Although the Board described the consequence of abortion in terms of the lawyer's subjective belief, it bears mention that every abortion, objectively and scientifically speaking, involves "the loss of human life." *See, e.g.*, KEITH L. MOORE ET AL., THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 11 (10th ed. 2016) ("Human development begins at fertilization ... when a sperm fuses with an oocyte to form a single cell, the zygote. This highly specialized, *totipotent cell* ... marks the beginning of each of us as a unique individual.").
- 49 1996 Tennessee Ethics Opinion, *supra* note 3, at *3. This Tennessee Code provision was identical to its counterpart in the Model Code. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101(A) (AM. BAR ASS'N 1980) ("Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."); *cf.* MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2018) ("A concurrent conflict of interest exists if ... there is a significant risk that the representation of one or more clients will be materially limited ... by a personal interest of the lawyer.").
- 50 1996 Tennessee Ethics Opinion, *supra* note 3, at *2.
- 51 *Id.* at *3.
- 52 *See id.*
- 53 *Id.* (citing TENN. CODE OF PROF'L RESPONSIBILITY DR 6-102(A) (1995)).
- 54 *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(h)(1) (AM. BAR ASS'N 2018) ("A lawyer shall not ... make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement."); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY EC 6-6 (AM. BAR ASS'N 1969).
- 55 1996 Tennessee Ethics Opinion, *supra* note 3, at *3.
- 56 MODEL RULES OF PROF'L CONDUCT r. 6.2(a), (c) (AM. BAR ASS'N 2018) (emphasis added).
- 57 1996 Tennessee Ethics Opinion, *supra* note 3, at *3.
- 58 *Id.*
- 59 *Id.* (quoting TENN. CODE OF PROF'L RESPONSIBILITY EC 2-29 (1995)).
- 60 MODEL CODE OF PROF'L RESPONSIBILITY EC 2-30 (AM. BAR ASS'N 1969).
- 61 1996 Tennessee Ethics Opinion, *supra* note 3, at *3 (citing *State v. Jones*, 726 S.W.2d 515, 518-19 (Tenn. 1987) and *State v. Maddux*, 571 S.W.2d 819 (Tenn. 1978)).
- 62 *Id.* (citing *Maddux*, 571 S.W.2d at 831).
- 63 *Id.* at *4 (citing Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 84-F-73).
- 64 Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 84-F-73 (1984) [hereinafter 1984 Tennessee Ethics Opinion], https://www.tbpr.org/ethic_opinions/84-f-73 [<https://perma.cc/R5N3-JW2E>] (Murder defendant insists no argument against the death penalty).
- 65 1996 Tennessee Ethics Opinion, *supra* note 3, at *4 (quoting 1984 Tennessee Ethics Opinion).

- 66 1984 Tennessee Ethics Opinion, *supra* note 64, at *3; *see also* Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 644 (1997).
- 67 1984 Tennessee Ethics Opinion, *supra* note 64, at *3.
- 68 1996 Tennessee Ethics Opinion, *supra* note 3, at *4.
- 69 Collett, *supra* note 66, at 644-45 (footnotes omitted).
- 70 *Id.* at 642-43; *see also* *Ind. Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983) (stating that “we would certainly expect an attorney who held such beliefs [that abortion is immoral] not to accept a court appointment”).
- 71 1996 Tennessee Ethics Opinion, *supra* note 3, at *4 (citing *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *United States v. Greene*, 892 F.2d 453, 456 (6th Cir. 1989)).
- 72 As Collett explains, in *Mozert* “[t]here was no evidence that the conduct required of the students [that is, studying a reading series chosen by school authorities] was forbidden by their religion. The [Sixth Circuit] clearly repudiate[d] compelled speech violating the speaker’s religious beliefs.” Collett, *supra* note 66, at 658 (quoting and citing *Mozert*, 827 F.2d at 1070); *cf.* *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (concluding that a compelled Pledge of Allegiance by school children in violation of religious beliefs violated the Free Exercise Clause). “Similarly,” Collett notes, *United States v. Greene* involved a federal court’s rejection of a Free Exercise defense to a criminal charge for use and sale of a controlled substance. Collett, *supra* note 66, at 658 (citing *Greene*, 892 F.2d at 453). Because “[r]efusal to accept court-appointed representation is not criminal conduct, nor is the pro-life position of the lawyer a unique interpretation of Catholic teaching,” she concludes that “the Board’s attempted analogy fails.” *Id.* at 659.
- 73 Collett, *supra* note 66, at 659-60 (citing and discussing *In re Summers*, 325 U.S. 561, 572 (1945) and *Nicholson v. Bd. of Comm.*, 338 F. Supp. 48 (M.D. Ala. 1972)).
- 74 *Id.* at 660-65; *see also id.* at 664 (“Representing a girl who seeks judicial authority to obtain an abortion would be collaborating with the application of the positive law permitting procured abortion.”). Collett notes “[t]his is true, notwithstanding the legal profession’s statement [in Model Rule 1.2(b)] that a ‘lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.’” *Id.* at 664-65 (quoting MODEL RULES OF PROF’L CONDUCT r. 1.2(b) (AM. BAR ASS’N 1995)). She asserts:
By accepting the court appointment in judicial bypass proceedings, the lawyer would be agreeing to publicly defend the act of abortion and to make that act possible through obtaining a court order authorizing the procedure. Every conscientious Catholic lawyer must refuse such appointment to be faithful to God and Church teaching.
Id. at 665; *see also* Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 FORDHAM L. REV. 1339, 1359 (1998) [hereinafter Collett, *Client Selection*] (“Representation that requires the lawyer to advocate the performance of evil acts, or the total disregard of religious obligations, or the irrelevance of religious beliefs, results in evil acts by the lawyer, and thus such representation cannot be accepted by the Catholic lawyer.”); Larry Cunningham, *Can a Catholic Lawyer Represent a Minor Seeking a Judicial Bypass for an Abortion? A Moral and Canon Law Analysis*, 44 J. CATH. LEG. STUD. 379 (2005).
- 75 Collett, *supra* note 66, at 665. Expressing strong objections to the Board’s effective treatment of “Pro-life Lawyers as Second-Class Citizens,” *id.* at 651, Collett emphasizes that in a religiously pluralistic society with diverse views on the morality of abortion, “it is important to recognize that personal opposition to conduct that courts will not permit to be outlawed is meaningless unless individuals remain free to act upon their beliefs in conducting their affairs.” *Id.* at 653. The Board “ignored this distinction” and effectively opined that “by becoming a licensed attorney the lawyer accepted the positive law as the sole measure of what conduct she would use her professional expertise to further.” *Id.*
- 76 After critiquing the “bleaching out” concept of the lawyer’s role reflected in the 1996 Tennessee Ethics Opinion, Russell Pearce and Amelia Uelmen encourage a more tolerant posture toward traditionally religious lawyers, one far more consistent with the ideal of a truly diverse and inclusive legal profession:
The problem with the argument that personal attributes such as religion are irrelevant to the practice of law is that it runs counter to experience. Lawyers are neither fungible nor neutral. They differ in their abilities, as well as in the ways that their identities and experiences influence their conduct. The religious lawyering movement insists that we should not ignore this reality. While it acknowledges that as a community lawyers must seek to improve our system so that all people receive impartial treatment, it

nonetheless insists that this must occur within a framework that respects that lawyers are not “neutral” interchangeable parts. It emphasizes that it is important for lawyers to honestly acknowledge their differences and to strive together to manage those differences in service of the shared goal of rule of law.

Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RES. L. REV. 127, 144-45 (2004) (footnotes omitted); see also Robert K. Vischer, *Faith, Pluralism, and the Practice of Law*, 43 CATH. LAW. 17 (2004).

77 Collett, *supra* note 66, at 666. In *Nat'l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), the Court has moved its precedent from providing “some level of constitutional protection,” Collett, *supra* note 66, at 666, to providing strong First Amendment protection for lawyers' freedom of speech. See *infra* Part III.D.

78 See Collett, *supra* note 66, at 666.

79 319 U.S. 624, 642 (1943).

80 Collett, *supra* note 66, at 666.

81 *Id.* at 667 (emphasis added). Moreover, she points out “[i]t is constitutionally irrelevant that the lawyer's advocacy may not be mistaken for the personal views of the lawyer.” *Id.* (citing MODEL RULES OF PROF'L CONDUCT r. 1.2(b) (AM. BAR ASS'N 1995)); see also Howard Lesnick, *The Religious Lawyer in a Pluralist Society*, 66 FORDHAM L. REV. 1469, 1491 (1998) (analyzing the 1996 Tennessee Ethics Opinion in light of Model Rule 1.2(b), and commenting “[s]ome find in this principle a sufficient basis to permit attorneys to deny responsibility, while others do not, but what is the justification for a rule imposing the principle on one for whom it rings hollow?”).

82 Collett, *supra* note 66, at 668; see also Jennifer Tetenbaum Miller, Note, *Free Exercise v. Legal Ethics: Can a Religious Lawyer Discriminate in Choosing Clients?*, 13 GEO. J. LEGAL ETHICS 161, 166-67 (1999) (“The emerging trend in legal ethics unrealistically expects a person to divorce her personal religious or moral beliefs from her professional responsibilities The Tennessee Board clearly suggests that legal ethics outweigh personal considerations such as religion and a relationship with God.”).

83 1996 Tennessee Ethics Opinion, *supra* note 3, at *2.

84 *Id.* at *2 (quoting TENN. CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(3) (1995)); cf. MODEL RULES OF PROF'L CONDUCT r. 1.4(b) (AM. BAR ASS'N 2018) (identical language).

85 1996 Tennessee Ethics Opinion, *supra* note 3, at *2 (internal citations omitted).

86 See Collett, *supra* note 66, at 644-48.

87 *Id.* at 645.

88 See Michael S. McGinniss, *Virtue and Advice: Socratic Perspectives on Lawyer Independence and Moral Counseling of Clients*, 1 TEX. A&M L. REV. 1, 38-45 (2013).

89 In his article criticizing the 1996 Tennessee Ethics Opinion for devaluing religious pluralism in the legal profession, Lesnick states that because the client's objective should not be assumed to be as fixed or certain as initially expressed, the lawyer may ethically invite the client to reflect and engage in dialogue relating to the wisdom or moral rightness of proceeding with the stated objective. Lesnick, *supra* note 81, at 1493-95; see also Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 48 (1997) (describing Lesnick's point as being “that considerable room remains for client counseling that gives expression to the lawyer's moral and religious beliefs in a manner that invites genuine mutual exploration”). Lesnick notes the lawyer should exercise restraint and sensitivity in this dialogue, leaving open the possibility of accepting the client's objectives and respecting the client's wish to conclude the conversation. Lesnick, *supra* note 81, at 1495.

90 Lesnick, *supra* note 81, at 1471. As Lesnick puts it, the Board “sees the pluralist quality of our society as calling on the lawyer to accommodate his or her religion to the official norms of the legal profession, rather than the reverse.” *Id.* This approach is consistent with what Sanford Levinson describes as the “bleaching out” of lawyers' consciences in the standard conception of the lawyer's role. See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578-79 (1993) (describing the goal of the “standard version of the professional project” as “the creation, by virtue of

professional education, of almost purely fungible members of the respective professional community”); *see also* McGinniss, *supra* note 9, at 559, 566-67 n.48.

91 MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

92 1996 Tennessee Ethics Opinion, *supra* note 3, at *2 (citing “Canon 5”);

93 MODEL CODE OF PROF'L RESPONSIBILITY Canon 5 (AM. BAR ASS'N 1980).

94 1996 Tennessee Ethics Opinion, *supra* note 3, at *2 (emphasis added).

95 MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

96 *See* McGinniss, *supra* note 88, at 14-16 (discussing what makes advice “candid” for purposes of Model Rule 2.1).

97 *Cf.* MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 2 (AM. BAR ASS'N 2018) (stating that an advising lawyer’s “[p]urely technical legal advice ... can sometimes be inadequate”).

98 *See* McGinniss, *supra* note 88, at 6, 38-45; *see also id.* at 44 (“Whether following a Socratic or a Christian path, lawyers should aspire to an ethic of care that deeply values moral goodness, both within themselves and, as their words and conduct may have an influence upon them, within their ‘neighbor’ clients.”) (footnote omitted); Michael S. McGinniss, *Advice in the Lawyer-Client Relationship*, in THE OXFORD HANDBOOK OF ADVICE 277, 296 (Erina L. MacGeorge & Lyn M. Van Swol eds., 2018) (encouraging advising lawyers to “strive to establish relationships with their clients founded on subject-to-subject trust and care for client well-being”).

99 McGinniss, *supra* note 88, at 45.

100 Lawyer-client counseling on moral considerations may originate from either party to the dialogue:

In a lawyer's advising relationship with a client, it may be the lawyer's conscience that must first be awakened, so as to recognize and grasp the moral issue to discuss with the client. Or the recognition of the moral issue may begin with the stirring of the client's conscience, awakened to the point that the client seeks the lawyer's counsel as to how the moral issue should be addressed. However the moral conversation is initiated, for its outcome to be fruitful the advising lawyer should understand the need to help the client “recollect” the values and convictions that form the client's identity independent of the legal situation. This recollection may result in an adherence to those values and convictions, or in changes to the client's moral perspective through the process of dialogue with the lawyer and, perhaps, also with other persons the client trusts. Whatever the outcome may be, the client will have been afforded the best opportunity to make a conscious choice about how to apply moral values to the law.

Id. at 50 (footnotes omitted).

101 *See* 1996 Tennessee Ethics Opinion, *supra* 3, at *1.

102 Addressing his view of the lawyer's responsibility if the broader dialogue on the morality of abortion were to be engaged, Lesnick explains that “[t]he challenge to the attorney is to integrate strong conviction with a lively awareness that in a pluralist society even the strongest conviction is personal, and that the manner of counseling must reflect the realities of a client's vulnerabilities.” Lesnick, *supra* note 81, at 1496-97. “The task,” he observes, “is to seek to engage *the client's* moral agency” *Id.* at 1497.

103 ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 274 (2010); *see also id.* (“Especially in cases in which the law is indeterminate, an attorney's conscience will often shape the advice she gives, and clients will be better off if the attorney's moral perspective is articulated openly and deliberately instead of being left to operate beneath the surface of the attorney-client dialogue.”).

104 *Id.* at 273. Observing that “[r]esistance to [the] amoral lawyering paradigm is evidenced in part by the tension between the compulsions of conscience and the compulsions of the profession,” Vischer illustrates his point by noting that “[t]he tension is unmistakable when a state ethics board, in requiring a devout Christian lawyer to represent a minor seeking an abortion without parental consent, reasons that religious beliefs are not a legitimate basis for declining a court appointment.” *Id.* (citing 1996 Tennessee Ethics Opinion, *supra* note 3); *see also* RUSSELL G. PEARCE ET AL., PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 86, 174 (3d ed. 2017) (quoting two excerpts from the 1996 Tennessee Ethics Opinion to illustrate points relating to court appointments and advising on non-legal considerations, respectively).

- 105 See *infra* Part III.C.1 (discussing the ABA's support for expansive abortion rights, and progressive lawyers' longstanding advocacy for broad restrictions on speech opposing abortion).
- 106 “Sexual ethics” is a subtopic of bioethics addressing a broad range of issues relating to human sexuality, and which “considers standards for intervention in physical processes, rights of individuals to self-determination, ideals for human flourishing, and the importance of social context for the interpretation and regulation of sexual behavior.” *Sexual Ethics*, *ENCYCLOPEDIA OF BIOETHICS* (2004), <https://www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-and-maps/sexual-ethics> [<https://perma.cc/6PAY-4AR5>]. Sexual ethics includes issues of procreative morality, including abortion and contraception. See *id.* Sexual ethics is a topic of fundamental importance in many religious faith traditions. For example, the core Catholic doctrines on sexual ethics are expressed in detail in the Catechism, and are based on Scripture, sacred tradition, and Thomistic natural-law moral philosophy. See, e.g., *CATECHISM OF THE CATHOLIC CHURCH* ¶¶ 2332, 2335, 2337, 2362 (Geoffrey Chapman trans., Cassell 1994). From a Catholic perspective, sexual ethics also includes doctrine relating to the sacramental nature of marriage and the unitive and procreative purposes of conjugal sexual union in marriage. See, e.g., *id.* ¶¶ 1614, 1652, 2249, 2335, 2363.
- 107 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018).
- 108 *Id.* r. 8.4 cmts. 3-5.
- 109 Halaby & Long, *supra* note 8, at 204-05.
- 110 See, e.g., Andrew Burger, *Attorney: Scathing criticism of new ABA harassment and discrimination rule ill-founded*, *LEGAL NEWSLINE* (Sept. 9, 2016), <https://legalnewsline.com/stories/511004265-attorney-scathing-criticism-of-new-aba-harassment-and-discrimination-rule-ill-founded> [<https://perma.cc/26W3-G78F>].
- 111 Halaby & Long, *supra* note 8, at 218-23.
- 112 *Id.* at 227-32.
- 113 See Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, *WASH. POST: VOLOKH CONSPIRACY* (Aug. 10, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/> [<https://perma.cc/9E4P-5CRB>]. David French, a lawyer long active in First Amendment litigation and a well-known essayist on law and politics, also penned a short piece describing and critiquing Model Rule 8.4(g) as a “speech code” for lawyers. David French, *A Speech Code for Lawyers*, *NAT'L REV.* (Aug. 11, 2016, 7:46 PM), <https://www.nationalreview.com/2016/08/free-speech-lawyers-american-bar-association-model-rules-professional-conduct/> [<https://perma.cc/Y3WL-T6AP>].
- 114 See Josh Blackman, *Model Rule 8.4(g) and the First Amendment: Trust the Disciplinary Committees*, *JOSH BLACKMAN'S BLOG* (Nov. 21, 2016), <http://joshblackman.com/blog/2016/11/21/model-rule-8-4g-and-the-first-amendment-trust-the-disciplinary-committees/> [<https://perma.cc/ZE57-8PQS>].
- 115 See Ron Rotunda, Opinion, *The ABA Overrides the First Amendment: The legal trade association adopts a rule to regulate lawyers' speech*, *WALL ST. J.* (Aug. 16, 2016), <http://www.wsj.com/articles/the-aba-overrules-the-first-amendment-1471388418> [<https://perma.cc/JF6W-BNKG>]. Rotunda, a renowned scholar of legal ethics and constitutional law for many decades, passed in March 2018. See *In Memoriam: Ronald Rotunda*, *FEDERALIST SOC'Y* (Mar. 16, 2018), <https://fedsoc.org/commentary/blog-posts/in-memoriam-ronald-rotunda> [<https://perma.cc/PB9F-EMH7>].
- 116 MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2015).
- 117 See Lindsey Keiser, Note, *Lawyers Lack Liberty: State Codifications of Comment 3 of Rule 8.4 Impinge on Lawyers' First Amendment Rights*, 28 *GEO. J. LEGAL ETHICS* 629, 632 (2015) (“Determining when a lawyer's conduct is prejudicial to the administration of justice is essential to determining when a lawyer's speech can be restricted.”).
- 118 See, e.g., ROTUNDA, SUPPORTING “DIVERSITY” BUT NOT DIVERSITY OF THOUGHT, *supra* note 8; ROTUNDA & DZIENKOWSKI, *supra* note 8; Blackman, *A Pause for State Courts*, *supra* note 8; Dent, *supra* note 8; Halaby & Long, *supra* note 8; Caleb C. Wolanek, Note, *Discriminatory Lawyers in a Discriminatory Bar: Rule 8.4(g) of the Model Rules of Professional Responsibility*, 40 *HARV. J.L. & PUB. POL'Y* 773 (2017); cf. Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing*

between Discrimination and Free Speech, 31 GEO. J. LEGAL ETHICS 31 (2018) (providing a generally favorable view of Model Rule 8.4(g) and its constitutionality, but acknowledging facial First Amendment overbreadth problems with the rule and comment that justify making revisions). *But cf.* 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 (2017); Robert N. Weiner, “Nothing to See Here”: *Model Rule of Professional Conduct 8.4(g) and the First Amendment*, 41 HARV. J.L. & PUB. POL’Y 125 (2018).

119 Wolanek, *supra* note 118, at 775.

120 MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018) (emphasis added).

121 *Id.* r. 8.4 cmt. 4.

122 See Blackman, *A Pause for State Courts*, *supra* note 8, at 246-48; Dent, *supra* note 8, at 142-43.

123 For example, anticipating the United States Supreme Court’s 2018 decision in *Masterpiece Cakeshop* (discussed *infra* Part III.C.2), Ryan Anderson has pointed out critically important distinctions between same-sex and interracial marriage for purposes of enforcing anti-discrimination laws:

Exemptions from laws banning discrimination on the basis of race run the risk of undermining the valid purposes of those laws--such as eliminating the public effects of racist bigotry--by perpetuating the myth that blacks are inferior to whites [But] [a] ruling in favor of Jack Phillips [the baker in *Masterpiece Cakeshop*] sends no message about the supposed inferiority of people who identify as gay--indeed, it sends no message about them or their sexual orientations at all. It would simply say that citizens who support the historic understanding of marriage are not bigots, and that the state may not drive them out of business or civic life. Such a ruling doesn’t threaten the social status of people who identify as gay or their community’s profound and still-growing political influence.

Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J. L. & PUB. POL’Y 123, 125 (2018). See generally Ryan T. Anderson & Sherif Girgis, *Against the New Puritanism*, in DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 108 (2017).

124 MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2018).

125 The concept of “harm” alleged to have been caused by speech the reader or listener finds disagreeable or offensive has expanded in recent years, especially with respect to historically marginalized groups and in particular on college campuses. See generally Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 741-44 (2017); see also Dent, *supra* note 8, at 154-56 (“Does the Rule Require Proof of Harm?”); *infra* Part III.C.3.

126 MODEL RULES OF PROF’L CONDUCT r. 8.4(g) cmt. 3 (AM. BAR ASS’N 2018).

127 *Id.*

128 *Id.* (emphasis added).

129 See Blackman, *A Pause for State Courts*, *supra* note 8, at 245 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)); see also ROTUNDA, SUPPORTING “DIVERSITY” BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 4 (citing *Davis Next Friend LaShonda D. v. Monroe City Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

130 “Black’s Law Dictionary defines ‘demeaning’ as ‘[e]xhibiting less respect for a person or a group of people than they deserve, or causing them to feel embarrassed, ashamed, or scorned.’” Blackman, *A Pause for State Courts*, *supra* note 8, at 245 (quoting *Demeaning*, BLACK’S LAW DICTIONARY (10th ed. 2014)). “Random House defines ‘derogatory’ as ‘tending to lessen the merit or reputation of a person or thing; disparaging; depreciatory.’” *Id.* (quoting RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 537 (2d ed. 1998)). The *Oxford Living Dictionary* defines “derogatory” as “[s]howing a disrespectful or critical attitude” *Id.* (quoting *Derogatory*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/derogatory/> [https://perma.cc/U28W-PXB8] (last visited Apr. 20, 2017)).

131 See MODEL RULES OF PROF’L CONDUCT r. 8.4(g) (AM. BAR ASS’N 2018); *id.* r. 1.0(f) (defining “knows” as “denot[ing] actual knowledge of the fact in question,” which “may be inferred from the circumstances”); *cf.* MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 2015) (requiring for a possible violation of Model Rule 8.4(d) that the lawyer “knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status”) (emphasis added).

- 132 This emphatic advocacy for rejecting a mens rea requirement continued from multiple speakers at the February 2016 hearing before the ABA Standing Committee on Ethics and Professional Responsibility. *See* Halaby & Long, *supra* note 8, at 216-18 (reciting testimony, including ABA Section of Civil Rights and Social Justice member Robert Weiner's statement that "[m]any people who are racists or misogynists or anti-gay don't realize they are"); *see also id.* at 211-12, 218, 226 (discussing Goal III: Eliminate Bias and Enhance Diversity, and the role that members of the Goal III Commission entities played in promoting Model Rule 8.4(g) and, in particular, urging "that any knowledge qualifier be deleted" and for "the ambit of covered lawyer conduct to be broad").
- 133 Halaby & Long, *supra* note 8, at 227-31.
- 134 *See* Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 367, 402-05 (2017) (stating that she "would have supported the elimination of the word 'knowingly' from" Model Rule 8.4(g), and asserting that lawyers should be required by professional conduct standards "to refrain from manifestations of bias, whether those manifestations come from their conscious or unconscious bias"). Chopp, however, insists that her proposed supplement to Comment [3] to address "unconscious biases" has educational rather than disciplinary objectives, and responds to potential concerns about "grievance procedures for unknowingly manifesting bias" with assurances that "it is the text of the rule that is authoritative, not the commentary to the rule." *Id.* at 404-05 (citing MODEL RULES OF PROF'L CONDUCT Preamble and Scope [21] (AM. BAR. ASS'N 2016)). But these assurances ring hollow, as pairing explicit Comment language on "unconscious biases" with black-letter text supporting disciplinary action against lawyers for what they "reasonably should know" would very likely impact the interpretation and application of the rule. *Cf.* Halaby & Long, *supra* note 8, at 245 ("Even crediting the existence of implicit bias as well as corresponding concerns over its impact on the administration of justice, one recoils at the dystopian prospect of punishing a lawyer over unconscious behavior.").
- 135 Dent, *supra* note 8, at 144 (footnote omitted) (citing Hannah Yi, *What Exactly Is a Microaggression? Let These Examples from Hollywood Movies Explain*, QUARTZ (Sept. 22, 2016), <https://qz.com/787504/what-exactly-is-a-microaggression-let-these-examples-from-hollywood-movies-explain/> [<https://perma.cc/XPA8-TTXX>]); *cf.* Latonia Haney Keith, *Cultural Competency in a Post-Model Rule 8.4(g) World*, 2 DUKE J. GENDER L. & POL'Y 1, 41 (2017) (advocating that Model Rule 8.4(g) should be enforced by invoking "the 'reasonably culturally competent lawyer,' a mindful, self-aware lawyer of 'reasonable prudence and [cultural] competence,'" rather than "through the lens of the 'reasonable lawyer,' which is unfortunately a homogenous being capable of infusing bias in such decisions").
- 136 MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 4 (AM. BAR ASS'N 2018).
- 137 Blackman, *A Pause for State Courts*, *supra* note 8, at 259.
- 138 *See* ROTUNDA, SUPPORTING "DIVERSITY" BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 7 (stating that "[t]he ABA rule is not about forbidding discrimination based on sex or marital status; it is about punishing those who say or do things that do not support the ABA's particular view of sex discrimination or marriage.").
- 139 *See* Halaby & Long, *supra* note 8, at 240.
- 140 *See supra* note 132 and accompanying text (discussing Goal III Commission entities and their influence on the drafting of Model Rule 8.4(g)).
- 141 *Cf.* Aviel, *supra* note 118, at 58 n.139 (suggesting that because the text of the Comment *could* be construed as including ideological diversity, there is no viewpoint discrimination in the rule).
- 142 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (emphasis added).
- 143 *Id.* r. 1.16(a), (b) (mandating when "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client," and stating when "a lawyer may withdraw from representing a client"); *see also* ROTUNDA & DZIENKOWSKI, *supra* note 8; Dorothy Williams, Note, *Attorney Association: Balancing Autonomy and Anti-Discrimination*, 40 J. LEGAL PROF. 271 (2016); Bradley Abramson, *Gagging Attorneys: A Critical Look at the ABA "Anti-Discrimination" Rule*, JURIST (July 31, 2017, 2:17 PM), <https://www.jurist.org/commentary/2017/07/bradley-abramson-aba-rule> [<https://perma.cc/6EK4-U877>]. Lawyers' essentially unrestricted freedom in initial client selection (outside the context of court appointments or violations of other law) has not been grounded in the black-letter text of the professional conduct rules; rather, it comes from the longstanding traditions, customs, and accepted ethical practices of the legal profession. *See* Collett, *Client Selection*, *supra* note 74, at 652 n.67;

Dent, *supra* note 8, at 163 n.202; Williams, *supra*, at 271 (citing CHARLES WOLFRAM, MODERN LEGAL ETHICS § 10.2.2 (1986)).

144 ROTUNDA, SUPPORTING “DIVERSITY” BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 5.

145 MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS'N 2018).

146 There is already reason for concern that states adopting Model Rule 8.4(g) will apply it broadly and strictly (albeit unpredictably) to regulate client selection decisions by lawyers. As Bradley Abramson explains, “In the Reporter's Notes appended to Vermont's new rule, the Vermont Supreme Court expressly states that ‘Rule 1.16 must also be understood in light of Rule 8.4(g)’ and that an attorney's client selection or withdrawal decisions ‘cannot be based on discriminatory or harassing intent without violating the rule.’” Abramson, *supra* note 143. “The lesson,” he concludes, “is that--contrary to the representations of the rule's proponents--a regime governed by the new Model Rule will, in fact, require attorneys to represent clients they do not want to represent, and will subject them to possible discrimination claims from anyone whose representation the attorney declines.” *Id.*; see also Gillers, *supra* note 118, at 231-32 (conceding that the United States Conference of Catholic Bishops' concerns about religious lawyers' loss of freedom in client selection under Model Rule 8.4(g) are well founded, though not a basis for objecting to the rule, and asserting “the prospect of a successful First Amendment defense under the Free Exercise Clause for violating [the rule] may be remote”).

147 MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 5 (AM. BAR ASS'N 2018).

148 *Id.* r. 1.2(b); see McGinniss, *supra* note 88, at 7-8 (discussing Model Rule 1.2(b) and its “principle of non-accountability”).

149 See Bradley S. Abramson, *6 Reasons States Should Shun ABA Attorney Misconduct Rule*, LAW 360 (Sept. 6, 2016, 10:17 PM), <https://www.law360.com/texas/articles/836505/6-reasons-states-should-shun-aba-attorney-misconduct-rule> [<https://perma.cc/TH3R-WCMM>] (“[O]ne would have to be obtuse not to grasp the fact that--by preemptively depriving attorneys of the claim that representing a client will make them complicit in a client's behavior--the ABA's very purpose in adopting this rule is to foreclose attorneys from being able to assert religious or moral considerations in making client selection decisions, thereby forcing attorneys to either act against their conscience or face professional discipline. No state should adopt a rule that would do that.”).

150 See *supra* Part II.

151 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018). Former Comment [3] to Model Rule 8.4 stated “[l]egitimate advocacy respecting [race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status] does not violate paragraph (d).” MODEL RULES OF PROF'L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2015). It also specified “[a] trial judge's finding that preemptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.” *Id.* This caveat about racially-discriminatory preemptory challenges remained in new Comment [5]. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018); see ROTUNDA, SUPPORTING “DIVERSITY” BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 6 (observing that the rule “does not tell us what is ‘legitimate’ advice or advocacy,” but “a racially motivated preemptory challenge apparently may be legitimate”).

152 In the April 2016 draft, Comment [3] stated “[p]aragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation.” Halaby & Long, *supra* note 8, at 215-16. After further revision to this Comment in July 2016, it was finally dropped in August 2016 when the ABA Standing Committee on Ethics and Professional Responsibility added the “legitimate advice and advocacy” language to the black-letter text. *Id.* at 227-32.

153 Halaby & Long, *supra* note 8, at 237-38; see also Michael William Fires, Note, *Regulating Conduct: A Model Rule against Discrimination and the Importance of Legitimate Advocacy*, 30 GEO. J. LEGAL ETHICS 735, 741 (2017) (“[S]ince the inclusion of the term ‘legitimate advocacy’ in the original Comment 3 to Rule 8.4, scholars have not only disagreed on an appropriate definition of ‘legitimate advocacy’ but have also struggled to create a simple way to distinguish ‘legitimate advocacy’ from illegitimate advocacy.”).

154 Halaby & Long, *supra* note 8, at 242-43 (quoting MODEL RULES OF PROF'L CONDUCT r. 2.1).

155 But cf. Claudia E. Haupt, *Antidiscrimination in the Legal Profession and the First Amendment: A Partial Defense of Model Rule 8.4(g)*, U. PA. J. CONST. L. ONLINE, Apr. 2017, at 1, 12-17 (sketching restrictive boundaries for what constitutes “professional advice” under Model Rule 8.4(g)). The only “advice” that Haupt deems “professional” is advice “based on the accepted methodology

of the knowledge community, that is ... legal doctrine,” rather than on “exogenous justifications” such as “religious, political, or philosophical” beliefs of the professional, recourse to which is contrary to clients’ expectations and also places lawyers “outside of the knowledge community.” *Id.* at 12-13. In critiquing Haupt’s narrow vision of “legitimate advice,” Dent observes that she provides “no evidence that this is true of all clients,” and adds “many prominent lawyers have viewed their role as not just technicians of positive law, but as wise counselors advising their clients on ethics and prudence as well as the law.” Dent, *supra* note 8, at 175-76, 176 n.295. In any event, Haupt’s claim certainly “underscores the uncertain meaning of ‘legitimate advice or advocacy’” in Model Rule 8.4(g). *Id.* at 176.

156 See ROTUNDA, SUPPORTING “DIVERSITY” BUT NOT DIVERSITY OF THOUGHT, *supra* note 8, at 6-7.

157 See *id.* at 7 (“The ABA rule is ... about punishing those who say or do things that do not support the ABA’s particular view.”).

158 See Blackman, *A Pause for State Courts*, *supra* note 8, at 246-47, 258; see also Dent, *supra* note 8, at 154 (“Even if some harm is required, the comments do not indicate what *kind* of harm qualifies.”). The only state thus far to have adopted Model Rule 8.4(g), Vermont, included Reporter’s Notes suggesting its intent to construe narrowly the term “legitimate ... advocacy”: Rule 8.4(g) permits “legitimate advice or advocacy” consistent with the rules. Essentially, as new Comment [5] suggests, this language calls on the lawyer not to forget that even the client whose views or conduct would violate legal prohibitions against discrimination or harassment applicable to him or her may deserve representation under Rules 6.1 and 6.2. As Rule 1.2 makes clear, representation does not constitute endorsement of a client’s views and may include efforts to assist the client to avoid unlawful activity. *The effect of Rule 8.4(g) is to prohibit the lawyer from expressing views as his own that would violate that rule.* Order Promulgating Amendments to the Vermont Rules of Professional Conduct, slip op. at 3 (Vt. July 14, 2017), <https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4%28g%29.pdf> [<https://perma.cc/L9SD-CM7N>] (emphasis added). Not only does this Reporter’s Note indicate Vermont deems expression of “views” as violating its Rule 8.4(g), it also appears to remove any legitimacy-based safe harbor for lawyers who express (i.e., advocate for) their “own” views on moral questions relating to the law.

159 In honor of this Article’s protagonist, Saint Thomas More, “betoken” alludes to prosecutor Thomas Cromwell’s argument that More was guilty of treason notwithstanding his silence:
CROMWELL: Now, Sir Thomas, you stand upon your silence.
MORE: I do.

CROMWELL: But, Gentleman of the Jury, there are many kinds of silence. Consider first the silence of a man when he is dead. Let us say we go into the room where he is lying; and let us say it is in the dead of night-- there’s nothing like darkness for sharpening the ear; and we listen. What do we hear? Silence. What does it betoken, this silence? Nothing. This is silence, pure and simple. But consider another case. Suppose I were to draw a dagger from my sleeve and make to kill the prisoner with it, and suppose their lordships there, instead of crying out for me to stop or crying out for help to stop me, maintained their silence. That *would* betoken! It would betoken a willingness that I should do it, and under the law they would be guilty with me. So silence can, according to circumstances, speak. BOLT, *supra* note 1, at 151.

160 Halaby & Long, *supra* note 8, at 215.

161 STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY, AM. BAR ASS’N, DRAFT PROPOSAL TO AMEND MODEL RULE 8.4, at 5 (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.pdf [<https://perma.cc/US3Z-F9BJ>]. The committee considered this language to be “a useful clarification” that “would appropriately address” some of the “possible First Amendment challenges” that could arise when “state courts adopted similar black letter provisions.” *Id.*

162 See Blackman, *A Pause for State Courts*, *supra* note 8, at 248-50. He describes testimony at the committee’s February 2016 hearing urging the removal of the “First Amendment” language “because it ‘take[s] away’ from the purpose of the rule.” *Id.* at 249 (alteration in original) (quoting Am. Bar Ass’n House of Delegates, Tr. of Proceedings at 43 (Feb. 7, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/february_2016_public_hearing_transcript.authcheckdam.pdf [<https://perma.cc/WNZ3-BA4Y>]).

163 See Blackman, *A Pause for State Courts*, *supra* note 8, at 250.

- 164 See, e.g., Dent, *supra* note 8, at 178 (“Perhaps proponents of Rule 8.4(g) do not intend to comply with First Amendment precedent; perhaps they intend to initiate a ‘cultural shift’ in the meaning of the First Amendment and of the role of free speech in our society.”).
- 165 Order Promulgating Amendments to the Vermont Rules of Professional Conduct, slip op. at 3 (Vt. July 14, 2017), [https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4\(g\).pdf](https://www.vermontjudiciary.org/sites/default/files/documents/PROMULGATEDVRPrP8.4(g).pdf) [https://perma.cc/Z8AU-8KHU]. The Vermont Supreme Court, in fact, made the rule’s restrictions on lawyers even greater, adding language to Comment [4] to emphasize its clear intent to prohibit lawyers from making an otherwise *discretionary withdrawal* from representation: “The optional grounds for withdrawal set out in Rule 1.16(b) must also be understood in light of Rule 8.4(g). They cannot be based on discriminatory or harassing intent without violating that rule.” *Id.* It further explained that, under the mandatory withdrawal provision of Rule 1.16(a), “a lawyer should withdraw if she or he concludes that she or he cannot avoid violating Rule 8.4(g).” *Id.*; see also Andrew Strickler, *Vermont’s Anti-Bias Rule Vote an Outlier in Heated Debate*, LAW 360 (Aug. 14, 2017), <https://www.law360.com/articles/953530/vermont-s-anti-bias-rule-vote-an-outlier-in-heated-debate> [https://perma.cc/LRK9-93WD].
- 166 See Am. Bar Ass’n Ctr. for Prof. Responsibility, Pol’y Implementation Comm., *Jurisdictional Adoption of Rule 8.4(g) of the ABA Model Rules of Professional Conduct*, AM. BAR ASS’N (Sept. 19, 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_adopt_8_4_g.authcheckdam.pdf [https://perma.cc/T3KD-4DFB].
- 167 See David L. Hudson Jr., *States split on new ABA Model Rule limiting harassing or discriminatory conduct*, A.B.A. J. (Oct. 2017), http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct/ [https://perma.cc/MU8J-PNTC].
- 168 *Comparison of State Black-Letter Rules to Model Rule 8.4(g)*, CHRISTIAN LEGAL SOC’Y, <https://www.christianlegalsociety.org/pdfs/1004.pdf> [https://perma.cc/J6PG-6LSC] (last visited Dec. 3, 2018); see also MODEL RULES OF PROF’L CONDUCT r. 8.4 app. B (AM. BAR ASS’N, Discussion Draft July 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/language_choice_narrative_with_appendices_final.authcheckdam.pdf [https://perma.cc/VA89-4UPQ] (cataloging anti-bias provisions in state rules of professional conduct).
- 169 See ILL. RULES OF PROF’L CONDUCT r. 8.4(d), (j) (2018), http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#8.4 [https://perma.cc/2K7K-F68B]; Mark S. Mathewson, *ISBA Assembly OKs futures report, approves UBE and collaborative law proposals*, ILL. ST. BAR ASS’N: ILL. LAW. NOW (Dec. 15, 2016), <https://www.isba.org/iln/2016/12/15/isba-assembly-oks-futures-report-approves-ube-and-collaborative-law-proposals> [https://perma.cc/59W3-2YG7]. The Court requested and received comments from the public, and as of July 2018 the issue remained pending. See *ABA Model Rule 8.4(g) Efforts in Illinois*, CHRISTIAN LEGAL SOC’Y, <https://www.christianlegalsociety.org/aba-model-rule-illinois> [https://perma.cc/YKV8-VK2R] (last visited Dec. 3, 2018).
- 170 Order in the Matter of Amendments to Rule of Prof’l Conduct 8.4, ADKT-0526 (Nev. Sept. 25, 2017), <https://www.nvbar.org/wpcontent/uploads/ADKT-0526-withdraw-order.pdf> [https://perma.cc/6UPK-B9GU].
- 171 Order Issuing Proposed Amendment to the Me. Rules of Prof’l Conduct (Me. Nov. 30, 2017), http://courts.maine.gov/rules_adminorders/rules/proposed/mr_prof_conduct_proposed_amend_2017-11-30.pdf [https://perma.cc/BV88-484B] (adding new Maine Rule 8.4(g) prohibiting a lawyer from “engag[ing] in unlawful harassment or unlawful discrimination”; also explaining that “Maine has considered, but not adopted, the ABA Model Rule 8.4(g)” and that “Maine’s version makes a statement to all attorneys that the profession does not tolerate unlawful harassment or unlawful discrimination”). See generally *A Misguided Proposed Ethics Rule Change: ABA Model Rule 8.4(g) and the States*, CHRISTIAN LEGAL SOC’Y: CTR. FOR L. & RELIGIOUS FREEDOM, <https://www.clsreligiousfreedom.org/resources/aba-model-rule-84g-and-states> [https://perma.cc/XXS8-AFU5] (last visited July 30, 2018). For an excellent summary of arguments made in opposition to Model Rule 8.4(g) in response to state supreme courts’ requests for comments, see Christian Legal Soc’y, *Comment Letter Opposing Adoption of Model Rule 8.4(g)* (May 3, 2018), <https://www.clsnet.org/document.doc?id=1126> [https://perma.cc/8NZH-NG9U].
- 172 S.J. Res. 15, 65th Leg. (Mont. 2017), <http://leg.mt.gov/bills/2017/BillPdf/SJ0015.pdf> [https://perma.cc/9DRA-JSRG].
- 173 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, La. Att’y Gen. Op. 17-0114 (Sept. 8, 2017), <https://www.ag.state.la.us/Opinions> [https://perma.cc/9TWR-8GY9] (select “Search Released Opinions”; then enter “17-0114”); S.C. Att’y Gen. Op. Letter to Hon. John R. McCravy III, S.C. House of Representatives (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]; American Bar

Association's New Model Rule of Professional Conduct 8.4(g), Tenn. Att'y Gen. Op. 18-11 (Mar. 16, 2018), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2018/op18-11.pdf> [<https://perma.cc/DZY2-YG23>]; Whether adoption of the American Bar Association's Model Rule of Professional Conduct 8.4(g) would constitute violation of an attorney's statutory or constitutional rights (RQ-0128-KP), *Tex. Att'y Gen. Op. KP-0123* (Dec. 20, 2016), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/op/2016/kp0123.pdf> [<https://perma.cc/M248-HKGG>].

174 See TEXAS DISCIPLINARY RULES OF PROF'L CONDUCT r. 5.08 (2018), <https://www.texasbar.com/AM/Template.cfm?Section=Home&ContentID=27271&Template=/CM/ContentDisplay.cfm> [<https://perma.cc/U429-8VG9>].

175 Order Declining to Incorporate Proposed Amendments to Rule 8.4 of the Rules of Professional Conduct, No. 2017-000498 (S.C. June 20, 2017), <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2017-06-20-01> [<https://perma.cc/5WfV-65PS>].

176 Order Denying Petition for the Adoption of a New *Tenn. Sup. Ct. R. 8, RPC 8.4(g)*, No. ADM2017-02244 (Apr. 23, 2018), https://www.tncourts.gov/sites/default/files/order_denying_8.4g_petition_.pdf [<https://perma.cc/6HBN-7TAA>]; see also Mindy Rattan, *Tennessee Again Rejects Anti-Discrimination Ethics Rule*, BLOOMBERG LAW (Apr. 27, 2018), <https://www.bna.com/tennessee-again-rejects-n57982091727/> [<https://perma.cc/EG95-X7PA>].

177 The Supreme Courts of Arizona (August 2018) and Idaho (September 2018) also have issued orders rejecting Model Rule 8.4(g). See Kim Colby, *Two More State Supreme Courts Reject ABA Model Rule 8.4(g)*, FEDERALIST SOC'Y (Sept. 17, 2018), <https://fedsoc.org/commentary/blog-posts/two-more-state-supreme-courts-reject-aba-model-rule-8-4-g> [<https://perma.cc/63Y9-ANK6>]. Following its attorney general's opinion, Louisiana's State Bar Association Committee on the Rules of Professional Conduct voted not to proceed with either Model Rule 8.4(g) or an alternative rule draft proposed by its subcommittee. See *LSBA Rules Committee Votes Not to Proceed Further with Subcommittee Recommendations Re: ABA Model Rule 8.4(g)*, LA. ST. BAR ASS'N (Oct. 30, 2017), <https://www.lsba.org/BarGovernance/CommitteeInfo.aspx?Committee=01fa2a59-9030-4a8c-9997-32eb7978c892> [<https://perma.cc/74SP-Z3TH>].

178 Letter from Hon. Dann E. Greenwood, Chair, Joint Comm. on Att'y Standards, to Hon. Gerald E. VandeWalle, Chief Justice, N.D. Sup. Ct. (Dec. 14, 2017) [hereinafter N.D. Att'y Standards Letter], <https://perma.cc/3FCP-B55J>.

179 N.D. RULE OF PROF'L CONDUCT r. 8.4(f) (2018), <http://www.ndcourts.gov/rules/conduct/frameset.htm> [<https://perma.cc/6LDY-ZU5B>].

180 *Id.*

181 N.D. Att'y Standards Letter, *supra* note 178; see also Meeting Minutes, Joint Comm. on Att'y Standards (Sept. 15, 2017), http://www.ndcourts.gov/court/committees/Jt_ASC/MinutesSept2017.pdf [<https://perma.cc/HYA5-A5EC>]; Meeting Minutes, Joint Comm. on Att'y Standards (Mar. 24, 2017), http://www.ndcourts.gov/court/committees/Jt_ASC/MinutesMarch2017.pdf [<https://perma.cc/55DG-APSZ>].

182 135 S. Ct. 2584 (2015).

183 Blackman, *A Pause for State Courts*, *supra* note 8, at 261 (final two ellipses in original) (emphases added) (footnotes omitted).

184 *Id.* at 264-65.

185 Similar to Rhode, Gillers insists that “[e]xperience teaches us that the kind of biased or harassing speech that will attract the attention of disciplinary counsel will not enjoy First Amendment protection.” Gillers, *supra* note 118, at 235. Yet in this same article, he uses broad language to describe his view of the scope of sanctionable violations under Model Rule 8.4(g) that would purportedly withstand First Amendment scrutiny by the courts. See *id.* at 237 (“No lawyer has a First Amendment right to *demean* another lawyer (or anyone involved in the legal process).”) (emphasis added). Although he does not “foreclose the possibility of improvement” in its drafting, *id.* at 238, Gillers concludes that the rule is not overbroad or vague despite its use of general, sweeping terms such as “demeaning” and “derogatory” to describe what kind of “harassment” will be prosecutable. That Gillers provides just one extreme example—i.e., “if one were to seek to discipline a lawyer who said ‘ladies first’ when opening a door for a woman”—as his step too far for prosecution under the First Amendment provides little reassurance about his view of the rule's proper scope and potential enforcement. *Id.* at 237; see also Dent, *supra* note 8, at 20 (“Gillers lists some examples that he says would not violate the rule, but these are so innocuous as to give little reassurance about the scope of the rule.”).

- 186 See Weiner, *supra* note 118, at 125.
- 187 See Aviel, *supra* note 118, at 38.
- 188 See *id.* at 58.
- 189 See *id.* at 74; cf. Dent, *supra* note 8, at 178 (“This is not how the First Amendment works. Those subject to speech restrictions are entitled to know *in advance* what the boundaries are; they cannot be forced into case-by-case Russian roulette in which a wrong guess about the scope of a rule can destroy one’s career.”).
- 190 Aviel, *supra* note 118, at 45. Although Gillers exhibits little concern with accommodating the consciences of lawyers with traditional religious and moral views relating to the law, Aviel at least recognizes the genuine risks that the overbreadth problems with Model Rule 8.4(g) could pose. Compare Gillers, *supra* note 118, at 232 with Aviel, *supra* note 118, at 56.
- 191 See Aviel, *supra* note 118, at 63, 74. Recent developments in American legal advocacy and the culture of the legal profession also reflect it would be unwise for socially conservative lawyers to support Model Rule 8.4(g) on the optimistic assumption that all state bar authorities, state courts, and federal courts will always rigorously adhere to the most speech-protective precedents of the United States Supreme Court, and, moreover, that those precedents will never be weakened by any subsequent Court decision on the First Amendment (including by tomorrow’s Justices, who may well be drawn from the ranks of today’s anti-free-speech legal activists). See *infra* Part III.C.3 (Rising Opposition to Free Speech on College Campuses and in Law Schools); see also Dent, *supra* note 8, at 179 (“The speech code imposed by 8.4(g) may not be the end goal but merely one more step in the campaign to end free speech and to substitute a standard of partisan political correctness for what any American is allowed to say.”).
- 192 See United States Conference of Catholic Bishops, Comment Letter on Proposed Amendment to Model Rule 8.4 (Mar. 10, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/amos_3_11_16.authcheckdam.pdf [https://perma.cc/KKS4-KJQZ].
- 193 See, e.g., Christian Legal Soc’y, Comment Letter on Proposed Rule 8.4(g) and Comment 3 (Mar. 10, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/nammo_3_10_16.authcheckdam.pdf [https://perma.cc/Y8Q2-KSF9].
- 194 See *Model Rule 8.4 Comments*, AM. BAR ASS’N (July 12, 2016), https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4/mr_8_4_comments/ [https://perma.cc/6HSZ-59GU].
- 195 See, e.g., Rattan, *supra* note 176 (noting that the proposed Rule 8.4(g) in Tennessee “generated voluminous comments from law professors, practitioners, and religious groups” before its rejection by the Tennessee Supreme Court).
- 196 STANDING COMM. ON ETHICS & PROF’L RESPONSIBILITY, *supra* note 161, at 2 (emphasis added) (quoting a proposal from the Oregon New Lawyers Division).
- 197 See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 106, ¶ 1700 (“The dignity of the human person is rooted in his creation in the image and likeness of God.”); *id.* ¶ 1978 (“The natural law is a participation in God’s wisdom and goodness by man formed in the image of his Creator. It expresses the dignity of the human person and forms the basis of his fundamental rights and duties.”); see also *id.* ¶ 2270 (“Human life must be respected and protected absolutely from the moment of conception.”).
- 198 Cf. MODEL RULES OF PROF’L CONDUCT r. 8.4(b), (c) (AM. BAR ASS’N 2018) (providing that it is professional misconduct for a lawyer to “commit a criminal act that reflects adversely on lawyer’s honesty, trustworthiness or fitness as a lawyer” or to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”). Aviel defends the scope of Model Rule 8.4(g) by pointing to these two rules, both of which apply to lawyers’ behavior outside of law practice. Aviel, *supra* note 118, at 64-67. For Model Rule 8.4(b), however, there is a check on the discretion of state bar authorities’ “fitness” analysis because the underlying conduct must constitute an actual crime (i.e., be unlawful), a requirement that does not exist under Model Rule 8.4(g). As for Model Rule 8.4(c), Aviel is right that the rule “simply assumes” lawyers’ deceptions—in practicing law or otherwise—raise professional “fitness” concerns. *Id.* at 64. However, because honesty/dishonesty is an ideologically-neutral character trait (unlike the socially and politically charged issues Model Rule 8.4(g) implicates), Model Rule 8.4(c) presents far less risk of selective prosecution based on viewpoint.

- 199 135 S. Ct. 2584, 2607 (2015).
- 200 See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015) (bakers), *cert. denied sub nom. Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *rev'd*, 138 S. Ct. 1719 (2018); *Elane Photography, LLC v. Willock*, No. CV-2008-06632, 2009 WL 8747805 (N.M. Dist. Ct. Dec. 11, 2009) (photographers), *aff'd*, 284 P.3d 428 (N.M. Ct. App. 2012), *aff'd*, 309 P.3d 53 (N.M. 2013); *State v. Arlene's Flowers, Inc.*, 2015 WL 720213 (Wash. Super. Ct. Feb. 18, 2015) (florists), *aff'd*, 389 P.3d 543 (Wash. 2017), *cert. granted & judgment vacated*, 138 S. Ct. 2671 (2018).
- 201 347 U.S. 483 (1954).
- 202 Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BLOGSPOT: BALKINIZATION (May 6, 2016), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/4NQW-8HLF>].
- 203 *Id.*
- 204 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (“I think it no business of the courts (as opposed to the political branches) to take sides in this culture war.”).
- 205 Randy Barnett, *Abandoning Defensive Crouch Conservative Constitutionalism*, WASH. POST: VOLOKH CONSPIRACY (Dec. 12, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/12/abandoning-defensive-crouch-conservative-constitutionalism> [<https://perma.cc/4JLL-4FE2>]; see also *id.* (“To be clear, I strongly support the fundamental liberties and equal rights of all, including LGBT. But I also support the liberty of those with different moral and religious views.”).
- 206 See, e.g., *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) (religious freedom litigation based on Obama Department of Health and Human Services regulations mandating that religiously affiliated institutions, including the Little Sisters of the Poor and Christian colleges and universities, act to make insurance coverage for contraceptives available to their employees or provide a form stating their objections on religious grounds); see also MARY EBERSTADT, *IT'S DANGEROUS TO BELIEVE: RELIGIOUS FREEDOM AND ITS ENEMIES* 93 (2016) (describing the Obama Administration's aggressive litigation to enforce its contraceptive regulatory mandates against the Little Sisters of the Poor and “make [them] knuckle under to whatever is demanded in the sexual revolution's name”).
- 207 See, e.g., Ryan T. Anderson, *Harvard Law Professor Says Treat Conservative Christians Like Nazis*, DAILY SIGNAL (May 9, 2016), <https://www.dailysignal.com/2016/05/09/harvard-law-professor-says-treat-conservative-christians-like-nazis> [<https://perma.cc/GWN7-AHSG>]; see also Anderson & Girgis, *supra* note 123, at 205 (observing “[t]he hardening of a *consensus* against compromise” on issues such as religious accommodations relating to same-sex marriage, and opining that the reason for these aggressive strategies is “less to empower some than to encumber others: to delegitimize those convictions and actions that it is gratuitous to crush”).
- 208 See Halaby & Long, *supra* note 8, at 216-18, 226.
- 209 See, e.g., David M. Leonard, Note, *The American Bar Association: An Appearance of Propriety*, 16 HARV. J.L. & PUB. POL'Y 537, 548, 551-55 (1993).
- 210 410 U.S. 113 (1973).
- 211 Leonard, *supra* note 209, at 548. For details on the Uniform Abortion Act, see *Roe*, 410 U.S. at 146-47 n.40.
- 212 Leonard, *supra* note 209, at 551-52.
- 213 505 U.S. 833 (1992).
- 214 See Leonard, *supra* note 209, at 550. At the 1992 ABA Annual Meeting, Hillary Rodham Clinton was invited to be the keynote speaker at a luncheon honoring Anita Hill. *Id.* Published accounts reflect little effort to disguise the political partisanship involved: Although Vice President Quayle had requested the opportunity to speak, he was denied an invitation. Philadelphia attorney Jerome Shestack, a former aide to Senator Joseph Biden and a member of the powerful ABA Board of Governors, claimed that Vice President Quayle would have been invited if he were “a person of personal stature or legal ability, but there wasn't anything of enlightenment that he could contribute, and the members already know how to spell.” This condescending attitude speaks for itself.

Id. (footnote omitted).

- 215 *Id.* at 552. The text of the resolution stated:
BE IT RESOLVED, That the American Bar Association opposes state or federal legislation which restricts the right of a woman to choose to terminate a pregnancy (i) before fetal viability; or (ii) thereafter, if such termination is necessary to protect the life or health of the woman.
BE IT FURTHER RESOLVED, That the American Bar Association supports state and federal legislation which protects the right of a woman to choose to terminate a pregnancy (i) before fetal viability; or (ii) thereafter, if such termination is necessary to protect the life or health of the woman.
Id. (quoting AM. BAR ASS'N, SUMMARY OF ACTION TAKEN BY THE HOUSE OF DELEGATES OF THE AMERICAN BAR ASSOCIATION 56 (1992)); *see also* Don J. DeBenedictis, *ABA Supports Abortion Rights*, A.B.A. J., Oct. 1992, at 32, 32; Mark Hansen, *Abortion Rights Before ABA House: Opponents Promise A Fight To Retain Neutrality Position Adopted In 1990*, A.B.A. J., Aug. 1992, at 22, 22.
- 216 DeBenedictis, *supra* note 215.
- 217 *ABA Mission and Goals*, AM. BAR ASS'N (June 11, 2018), https://www.americanbar.org/about_the_aba/aba-mission-goals.html [<https://perma.cc/E5LL-VBKY>].
- 218 Leonard, *supra* note 209, at 555 (quoting Letter from William Barr, U.S. Attorney General, to Talbot D'Alemberte, ABA President (Aug. 7, 1992)).
- 219 *See Amicus Curiae Briefs*, AM. BAR ASS'N, <https://www.americanbar.org/groups/committees/amicus.html> [<https://perma.cc/4X52-HVHQ>] (last visited Dec. 3, 2018). *But cf.* Ben Sasse, *Group That Rates Trump's Judicial Nominees Has History of Liberal Advocacy*, DAILY SIGNAL (Nov. 17, 2017), <https://www.dailysignal.com/2017/11/17/sasse-to-aba-the-american-bar-association-is-not-neutral> [<https://perma.cc/K9J9-8M8C>] (providing examples of the ABA's amicus curiae briefs on contentious constitutional questions consistently taking what “can only be described as left-of-center positions”).
- 220 *See, e.g.*, Amy E. Swearer, *The ABA is Against You and Other Things No One Tells Conservative or Christian Law Students*, FEDERALIST SOC'Y (Feb. 14, 2018), <https://fedsoc.org/commentary/blog-posts/the-aba-is-against-you-and-other-things-no-one-tells-conservative-or-christian-law-students> [<https://perma.cc/6PXH-RVZV>].
- 221 506 U.S. 263 (1993).
- 222 *Id.* at 266.
- 223 *Id.* at 267-79.
- 224 *Id.* at 274 (internal citations omitted).
- 225 *See id.* at 307, 322-26 (Stevens, J., joined by Blackmun, J., dissenting); *id.* at 345, 347-52 (O'Connor, J., joined by Blackmun, J., dissenting); *Nat'l Org. for Women v. Operation Rescue*, 914 F.2d 582, 585 (4th Cir. 1990); *Nat'l Org. for Women v. Operation Rescue*, 766 F. Supp. 1483, 1492-93 (E.D. Va. 1989); *see also Bray*, 506 U.S. at 272 n.4 (Justice Scalia, for the majority, responding to Justice Stevens's and Justice O'Connor's dissents on this issue). Justice O'Connor's dissent also considered the defendants' “use of unlawful means” to achieve their goal of preventing abortion as being relevant to the class-based animus/motivation issue. *Id.* at 351 (O'Connor, J., dissenting).
- 226 *See Dent*, *supra* note 8, at 152 (noting that “opposition to abortion is often characterized as discrimination against women and might be claimed to violate” Model Rule 8.4(g)) (citing Twiss Butler, *Abortion Law: “Unique Problem for Women” or Sex Discrimination?*, 4 YALE J.L. & FEMINISM 133, 145 (1991)).
- 227 *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (“This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.”); *see also supra* Part II (discussing the 1996 Tennessee Ethics Opinion, *supra* note 3).
- 228 *See* ROTUNDA & DZIENKOWSKI, *supra* note 8 (observing that “[d]iscretion ... may lead to abuse of discretion, with disciplinary authorities going after lawyers who espouse unpopular ideas”).

- 229 See generally Timothy Zick, *Justice Scalia and Abortion Speech*, 15 FIRST AMEND. L. REV. 288, 291-98 (2017).
- 230 134 S. Ct. 2518, 2541 (2014) (Scalia, J., concurring) (“Today’s opinion carries forward this Court’s practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion.”)
- 231 530 U.S. 703, 741 (2000) (Scalia, J., dissenting).
- 232 512 U.S. 753, 785 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) (“The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal. But the context here is abortion Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.”)
- 233 *Hill*, 530 U.S. at 741-42 (Scalia, J., dissenting) (internal citation omitted). In *McCullen*, the most recent of these cases and the last on which he wrote, Justice Scalia concurred in the Court’s judgment that a Massachusetts criminal statute creating a 35-foot “buffer zone” for public spaces around abortion clinics was facially unconstitutional under the Free Speech Clause of the First Amendment, but he vigorously objected to the majority’s opinion that the statute was neither content-based nor viewpoint discriminatory against pro-life speech. 134 S. Ct. at 2541-49 (Scalia, J., concurring); see also *id.* at 2549 (Alito, J., concurring) (“As the Court recognizes, if the Massachusetts law discriminates on the basis of viewpoint, it is unconstitutional, and I believe the law clearly discriminates on this ground.” (internal citation omitted)).
- 234 See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), discussed *infra* Part III.D.
- 235 See, e.g., *High Court Upholds Ban on Praying Outside Abortion Clinic*, CATH. HERALD (July 2, 2018), <http://catholicherald.co.uk/news/2018/07/02/high-court-upholds-ban-on-praying-outside-abortion-clinic> [https://perma.cc/FZM2-5U FK]. An effort by New York’s former Attorney General Eric Schneiderman to prosecute peaceful sidewalk counselors and prayer vigil participants outside an abortion clinic in New York City was recently dismissed for lack of evidence of “intent to harass, annoy, or alarm” women entering the clinic. Jonathan S. Tobin, *An Inconvenient Amendment*, NAT’L REV. (July 24, 2018, 6:30 AM), <https://www.nationalreview.com/2018/07/new-york-abortion-protest-case-leaves-free-speech-double-standard> [https://perma.cc/V9F8-3W2F]. This deficient record existed despite “a year’s worth of surveillance” directed by Schneiderman at the clinic, with tactics including “a camera outside the site, sen[d]ing in decoys who could serve as bait for those looking to harass or intimidate women seeking abortions, and hid[ing] microphones on the women’s escorts.” *Id.* The court’s ruling was nevertheless decried by the *New York Times* as another example of conservatives “weaponizing” the First Amendment. See *id.* (citing Jeffery C. Mays, *Anti-Abortion Protestors at Queens Clinic Do Not Harass Patients, Judge Rules*, N.Y. TIMES (July 22, 2018), <https://www.nytimes.com/2018/07/22/nyregion/anti-abortion-protesters-queens-clinic.html> [https://nyti.ms/2O4B9t4]).
- 236 See, e.g., Alexandra DeSanctis, *In France, a Defeat for Free Speech and the Right to Life*, NAT’L REV. (Dec. 9, 2016, 9:29 PM), <https://www.nationalreview.com/2016/12/abortion-france-parliament-law-criminalize-pro-life-advocacy-internet/> [https://perma.cc/DB2Z-QTQ2].
- 237 The relentless and increasing efforts to weaken conscience protections in the American medical profession offer troubling indications of the path the American legal profession could take in preventing “discrimination” by lawyers. See, e.g., E. Christian Brugger, *Whose Conscience? What Protections? Conscience Provisions in Healthcare and Elsewhere*, PUB. DISCOURSE (May 30, 2018), <http://www.thepublicdiscourse.com/2018/05/21432/> [https://perma.cc/FY5P-TLUU]. See generally ROBERT P. GEORGE, CONSCIENCE AND ITS ENEMIES: CONFRONTING THE DOGMAS OF LIBERAL SECULARISM 155-64 (2013).
- 238 See Arthur J. Cockfield, *Limiting Lawyer Liberty: How the Statement of Principles Coerces Speech* (Queen’s Law Research Paper Series, Paper No. 2018-100, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3141561 [https://perma.cc/KF5W-X34M].
- 239 See *id.* at 2.
- 240 138 S. Ct. 1723 (2018).
- 241 *Id.* at 1723.
- 242 *Id.*

- 243 *See id.* at 1740 (Thomas, J., concurring) (explaining that although “the parties dispute whether Phillips refused to create a custom wedding cake for the individual respondents, or whether he refused to sell them any wedding cake (including a premade one),” the Colorado Court of Appeals had already “resolved this factual dispute in Phillips’ favor” by describing “his conduct as a refusal to ‘design and create a cake to celebrate [a] same-sex wedding’” (quoting *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015))).
- 244 *Id.* at 1729 (majority opinion). For example, the Court pointed to a statement on the record by one of the commissioners explicitly denigrating Phillips’s religious faith:
To describe a man’s faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical--something insubstantial and even insincere. The commissioner even went so far as to compare Phillips’ invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law--a law that protects against discrimination on the basis of religion as well as sexual orientation.
Id.
- 245 *Id.* at 1730 (observing that “on at least three other occasions” the Colorado Civil Rights Division “had considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text”; and “[e]ach time, the Division found that the baker acted lawfully in refusing service” because “the requested cake included ‘wording and images [the baker] deemed derogatory.’”); *see also* John C. Eastman, *Why The Masterpiece Ruling Is Truly a Major Win For Religious Liberty*, FEDERALIST (June 7, 2018), <http://thefederalist.com/2018/06/07/masterpiece-ruling-truly-major-win-religious-liberty> [<https://perma.cc/F5B4/WJGN>]; Sherif Girgis, *Filling in the Blank Left in the Masterpiece Ruling: Why Gorsuch and Thomas Are Right*, PUB. DISCOURSE (June 14, 2018), <http://www.thepublicdiscourse.com/2018/06/21831/> [<https://perma.cc/BVA4/2V6Y>].
- 246 *Masterpiece Cakeshop*, 138 S. Ct. at 1747 (Thomas, J., concurring) (internal citations omitted). *See generally* Steven Smith, *Why the Government Shouldn’t Force Bakers--Or Anyone--to Express Support for Same-Sex Marriage*, PUB. DISCOURSE (Oct. 25, 2017), <http://www.thepublicdiscourse.com/2017/10/20215/> [<https://perma.cc/A266/A23P>].
- 247 *In re Neely*, 390 P.3d 728 (Wyo. 2017), *cert. denied*, 138 U.S. 639 (2018). The reporter who had contacted Judge Neely and taken her statements “offered to not publish the story if Judge Neely would state a willingness to perform same-sex marriages,” but “Judge Neely declined.” *Id.* at 755 (Kautz, J., dissenting). Judge Neely was well-known in her small community of Pinedale, Wyoming as a devout Christian and member of the Lutheran Church, Missouri Synod, a conservative Protestant denomination. Rod Dreher, *Wyoming Goliath vs. Small-Town Judge*, AM. CONSERVATIVE (May 10, 2016, 4:23 PM), <http://www.theamericanconservative.com/dreher/wyoming-goliath-ruth-neely-judge-lgbt/> [<https://perma.cc/YPL2/8WPK>].
- 248 *In re Neely*, 390 P.3d at 747-51.
- 249 Wyoming Code Rule 1.2 tracks the ABA Model Code of Judicial Conduct (“Model Code”), and provides: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” WYO. CODE JUDICIAL CONDUCT r. 1.2 (2018).
- 250 Wyoming Code Rule 2.2 tracks the Model Code, and provides: “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” WYO. CODE JUDICIAL CONDUCT r. 2.2 (2018).
- 251 Wyoming Code Rule 2.3 tracks the Model Code, and provides:
(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.
WYO. CODE OF JUDICIAL CONDUCT r. 2.3(B) (2018).
- 252 *In re Neely*, 390 P.3d at 735, 741 (emphasis added).
- 253 *See id.* at 752-53.
- 254 U.S. CONST. amend. I; WYO. CONST. art. I, §§ 18, 20.

- 255 Wyoming's ban on religious tests "is significantly broader than the similar provision in the United States Constitution--'but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.'" *In re Neely*, 390 P.3d at 742 (quoting U.S. CONST. art. VI, cl. 3). The Wyoming Constitution provides, in part:
... The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, and *no person shall be rendered incompetent to hold any office of trust or profit, or to serve as a witness or juror, because of his opinion on any matter of religious belief whatever*; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.
WYO. CONST. art. 1, § 18 (emphasis added). See generally Kimberlee Wood Colby, *Resuscitating Intolerance through Religious Tests for Judges*, 7 J. CHRISTIAN LEGAL THOUGHT 27 (2017) (discussing the *Neely* case).
- 256 *In re Neely*, 390 P.3d at 753 (Kautz, J., dissenting).
- 257 *Id.* at 753-54.
- 258 Gerard V. Bradley, *Today's Challenges to Religious Liberty in Historical Perspective*, 21 TEX. REV. L. & POL'Y 341, 369 (2017) (footnotes omitted). As Bradley further explains:
Judge Neely did not dispute that the law recognizes same-sex marriage. In fact, the Commission distorted the obvious meaning of these provisions [i.e., Rule 1.2 and 2.2]--which is that a judge must perform with integrity all the duties which she undertakes to perform--to mean instead that no judge may ever seek to recuse herself from performing a duty because of a conflict in conscience (at least where the judge holds a conscientious view of which the Commission disapproves). But no rule of judicial conduct in Wyoming--or anywhere else, for that matter--requires every judge to perform every task that comes across the transom.
Id. at 369 n.146.
- 259 *In re Neely*, 390 P.3d at 753-69 (Kautz, J., dissenting).
- 260 WYO. CODE JUDICIAL CONDUCT r. 2.3(B) (2018).
- 261 *In re Neely*, 390 P.3d at 762 (Kautz, J., dissenting).
- 262 *Id.* at 762-63.
- 263 *Id.* at 767.
- 264 *Id.* at 767 (internal citations omitted); see also *id.* at 769 ("The strict scrutiny/compelling state interest analysis discussed above for Judge Neely's right to free exercise of religion applies equally to her right of free speech."); *id.* at 767 ("Apparently some individuals might find it offensive that Judge Neely said she would decline to personally perform a same-sex marriage and instead would refer them to someone else. There is no compelling state interest in shielding individuals from taking such an offense.").
- 265 Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 877 (2014).
- 266 *In re Neely*, 390 P.3d at 769 (Kautz, J., dissenting) (internal citations omitted). Grave public concerns about progressives seeking to impose religious tests for public office have also been raised in the context of confirmation hearings before the United States Congress, including most prominently in the September 2017 Senate Judiciary Committee confirmation hearing for Amy Coney Barrett, a devout Catholic, to be appointed as a federal judge on the Seventh Circuit Court of Appeals. See Emma Green, *Should a Judge's Nomination Be Derailed by Her Faith?*, ATLANTIC (Sept. 8, 2017), <https://www.theatlantic.com/politics/archive/2017/09/catholics-senate-amy-barrett/539124/> [<https://perma.cc/PB5M-6XES>]; Noah Feldman, *Feinstein's Anti-Catholic Questions Are an Outrage*, BLOOMBERG (Sept. 11, 2017, 12:22 PM), <https://www.bloomberg.com/view/articles/2017-09-11/feinstein-s-anti-catholic-questions-are-an-outrage> [<https://perma.cc/ZJ5P-VK8D>]. They also came to the forefront during the June 2017 Senate Budget Committee confirmation hearing for Russell Vought, an evangelical Protestant, to be appointed as Deputy Director of the White House Office of Management and Budget. See Johnny Rex Buckles, *Unashamed of the Gospel of Jesus Christ: On Public Policy and Public Service by Evangelicals*, 41 HARV. J.L. & PUB. POL'Y 813, 815-21 (2018); see also Emma Green, *Bernie Sanders's Religious Test for Christians in Public Office*, ATLANTIC (June 8, 2017), <https://www.theatlantic.com/politics/archive/2017/06/bernie-sanders-chris-van-hollen-russell-vought/529614/> [<https://perma.cc/ZY6Y-LJSE>]; John Daniel Davidson, *Bernie Sanders Doesn't Think Christians Are Fit for Public Office*, FEDERALIST (June 9, 2017), <http://thefederalist.com/2017/06/09/bernie-sanders-doesnt-think-christians-fit-public-office/> [<https://perma.cc/8P9X-4U4G>].

- 267 Neely v. Wyo. Comm'n on Judicial Conduct & Ethics, 138 S. Ct. 639 (2018).
- 268 Petition for a Writ of Certiorari at 39, Neely v. Wyo. Comm'n on Jud. Conduct & Ethics, 138 U.S. 639 (2018) (No. 17-196), 2017 WL 7689870 [hereinafter *Neely* Petition for Certiorari].
- 269 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).
- 270 See Amicus Brief of The Becket Fund for Religious Liberty in Support of the Honorable Ruth Neely's Petition Objecting to the Commission's Recommendations at 17, *In re Neely* 390 P.3d 728 (Wyo. 2017) (No. J-16-0001), https://s3.amazonaws.com/becketpdf/Becket-Fund_Judge-Neely-Amicus-Brief_Signed.pdf [<https://perma.cc/S565-W75S>] (noting that “the Commission's prosecutor--who acts on behalf of the Commission--... condemned Judge Neely's religious beliefs as ‘every bit as repugnant as I found the Mormon Church's position on black people,’” and “recommended sanctioning her \$40,000 because of what he called her ‘holy war’”). Moreover, Judge Neely was originally charged with a separate judicial misconduct violation simply because she obtained the pro bono legal assistance of Alliance Defending Freedom, “a faith-based legal organization that shares her beliefs about marriage.” See *Neely* Petition for Certiorari, *supra* note 268, at 28. The Commission later “admitted its overreach on this point by ‘conced[ing] Judge Neely's motion to dismiss’” this charge. *Id.* at 28 n.11; see also Jonathan G. Lange, *Dissent Will Not Be Tolerated: What the Case of a Wyoming Judge Means for All of Us*, PUB. DISCOURSE (Aug. 30, 2016), <http://www.thepublicdiscourse.com/2016/08/17733/> [<https://perma.cc/862Q-9X4f>] (noting that Judge Neely's church, the Lutheran Church, Missouri Synod, “was called ‘repugnant’ in open court” and that the prosecutor filed additional charges against Judge Neely “for ‘affiliating with a discriminatory organization’” when “Alliance Defending Freedom asked to represent her”).
- 271 See *Masterpiece Cakeshop*, 138 S. Ct. at 1730-32.
- 272 See *In re Neely*, 390 P.3d at 756-57 (Kautz, J., dissenting); see also Colby, *supra* note 255, at 28.
- 273 See Verified Complaint Ex. A, Masterpiece Cakeshop Inc. v. Elenis, (D. Colo. Aug. 14, 2018) (C.A. No. 2074-WYD) [hereinafter *Masterpiece Cakeshop* Phillips Complaint], <https://www.courthousenews.com/wpcontent/uploads/2018/08/Masterpiece-Cakeshop-II-COMPLAINT.pdf> [<https://perma.cc/3NMK-6PL7>]. The Commission's determination of probable cause for new charges against Phillips came only twenty-four days after the Court's decision in *Masterpiece Cakeshop*. *Id.* Ex. A at 4. In response, Alliance Defending Freedom again came to Phillips's aid, this time by filing a lawsuit in the United States District Court for the District of Colorado asserting violations of his constitutional rights to free exercise of religion, freedom of speech, due process, and equal protection. *Id.* at 39-47; see also David French, *Colorado Defies the Supreme Court, Renews Persecution of a Christian Baker*, NAT'L REV. (Aug. 15, 2018, 3:19 PM), <https://www.nationalreview.com/2018/08/colorado-civil-rights-commission-jack-phillips-case/> [<https://perma.cc/9LFX-967L>]. In the complaint, Phillips alleges he “declined to create [the requested] cake with [a] blue and pink design because it would have celebrated messages contrary to his religious belief that sex--the status of being male or female--is given by God, is biologically determined, is not determined by perception or feelings, and cannot be chosen or changed.” *Masterpiece Cakeshop* Phillips Complaint, *supra*, at 4. He also alleges his belief that “the same Colorado lawyer” who called his shop and requested a cake to “visually depict and celebrate a gender transition” made other custom-cake requests he had received targeting him for his traditional religious beliefs in the year the Court was hearing his case. *Id.* These had included requests for “cakes celebrating Satan, featuring Satanic symbols, depicting sexually explicit materials, and promoting marijuana use.” *Id.*; see also Rod Dreher, *The Persecution of Jack Phillips*, AM. CONSERVATIVE (Aug. 15, 2018, 6:25 PM), <https://www.theamericanconservative.com/dreher/the-persecution-of-jack-phillips/?print=1> [<https://perma.cc/4E9S-YWYP>].
- 274 Writing in 2013, Robert George predicted the widespread assurances of tolerance and respectful accommodation for “the traditional view of marriage as a conjugal union” would prove themselves tactical rather than principled and enduring. GEORGE, *supra* note 237, at 142-46; see also *id.* at 144 (“[A]dvocates of redefinition [of marriage] are increasingly open in saying that they do not see disputes about sex and marriage as honest disagreements among reasonable people of goodwill. They are, rather, battles between the forces of reason, enlightenment, and equality, on one side, and those of ignorance, bigotry, and discrimination, on the other.”).
- 275 Further validating the concern about the direction the United States is heading is the Supreme Court of Canada's 2018 decision that the law societies of Ontario and British Columbia could lawfully deny accreditation to a law school formed at Trinity Western University, solely because its students enter into a required Christian-faith-based community covenant to refrain from engaging in sexual activity outside of heterosexual marriage. See *Trinity W. Univ. v. Law Soc'y of Upper Canada*, 2018 SCC 33 (Can. June 15, 2018), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/17141/1/document.do> [<https://perma.cc/AF56-NJ9V>]. A 7-2 majority of the court held that denying accreditation was a “proportionate” and “reasonable” limitation on religious freedoms that upheld,

rather than violated, the values of the Canadian Charter of Rights and Freedoms. *Id.* ¶ 3. In the court's view, principles of equality and inclusion required denying students the choice to study the law at a religiously-affiliated educational institution committed to traditional moral doctrines and accompanying expectations of student conduct relating to sexual ethics. It is easy to foresee where such an exclusionary attitude toward social conservatives could lead in the United States in the years ahead, especially in light of the ABA's adoption of Model Rule 8.4(g) as a professional standard in a rule in which "fitness" features prominently. *See generally* Derek Ross, *Trinity Western and the Endangerment of Religious Pluralism in Canada*, PUB. DISCOURSE (July 22, 2018), <http://www.thepublicdiscourse.com/2018/07/22222/> [<https://perma.cc/X5NM-XKSH>].

276 McGinniss, *supra* note 36, at 1.

277 *Id.* at 15-16 (footnotes omitted); *see also* Charles Krauthammer, Opinion, *Thought police on patrol*, WASH. POST (Apr. 10, 2014), https://www.washingtonpost.com/opinions/charles-krauthammer-thought-police-on-patrol/2014/04/10/2608a8b2-c0df-11e3-b195-dd0c1174052c_story.html?utm_term=.5d6d20ae9cde [<https://perma.cc/KA6A-MYUG>] ("What's at play is sheer ideological prejudice--and the enforcement of the new totalitarian norm that declares, unilaterally, certain issues to be closed. Closed to debate. Open only to intimidated acquiescence."); EBERSTADT, *supra* note 206, at 44-69 (chapter entitled "Acclaiming 'Diversity' vs. Hounding the Heretics").

278 *See, e.g.*, Jonathan V. Last, *Charles Murray and the Middlebury Mob*, WEEKLY STANDARD (Mar. 9, 2017, 5:46 PM), <https://www.weeklystandard.com/charles-murray-and-the-middlebury-mob/article/2007134> [<https://perma.cc/8TBV-TRB2>].

279 *See, e.g.*, Javier Panzar & Alene Tchekmedyan, *9 arrested as protesters gather at UC Berkeley for talk by conservative speaker Ben Shapiro*, L.A. TIMES (Sept. 15, 2017, 7:35 AM), <http://www.latimes.com/local/california/la-me-berkeley-protest-shapiro-20170914.htmlstory.html> # [<https://perma.cc/YDR5-5P7J>].

280 *See* Nicole Neily, *The Speech Police Go to Law School--And Fail to Learn Anything*, THE HILL (Mar. 8, 2018 10:33 PM EST), <http://thehill.com/opinion/civil-rights/377551-the-speech-police-go-to-law-school-and-fail-to-learn-anything> [<https://perma.cc/LS2T-LNMG>].

281 Josh Blackman, *Students at CUNY Law Protested and Heckled my Lecture about Free Speech on Campus*, NAT'L REV. (Apr. 12, 2018, 12:27 PM), <https://www.nationalreview.com/2018/04/students-at-cuny-law-protested-and-heckled-my-lecture-about-free-speech-on-campus/> [<https://perma.cc/6MWM-YE8X>]; Robby Soave, *CUNY Students Tried to Shout Down Josh Blackman. Here's Why They Failed.*, REASON (Apr. 12, 2018, 5:01 PM), <https://reason.com/blog/2018/04/12/cuny-josh-blackman-students-speech> [<https://perma.cc/6B6C-3GYV>].

282 *See* Neily, *supra* note 280 (students objecting to Sommers wrote: "Free speech is certainly an important tenet to a free healthy society, but that freedom stops when it has a negative and violent impact on other individuals."); Soave, *supra* note 281 ("The student activists believed the airing of an opinion with which they disagreed was tantamount to physical violence against marginalized communities."); *cf.* Dent, *supra* note 8, at 154-56 (discussing the broad potential meaning of "harmful" under Model Rule 8.4(g)).

283 Rattan, *supra* note 176.

284 *See* David French, *A New Campus Survey Reveals Just How Students Are 'Unlearning Liberty,'* NAT'L REV. (Mar. 13, 2018, 3:32 PM), <https://www.nationalreview.com/2018/03/a-new-campus-survey-reveals-just-how-students-are-unlearning-liberty/> [<https://perma.cc/NEZ2-BVWP>].

285 Law schools must also do much more to promote respect for First Amendment freedoms and resist the powerful tides of ideological conformity and progressive "political correctness." *Cf.* Martin J. Salvucci, *Political Correctness at Stanford Law*, NAT'L REV. (May 25, 2018), <https://www.nationalreview.com/2018/05/stanford-law-school-political-correctness-intolerance-conservative-views/> [<https://perma.cc/WNH6-TV24>]. These efforts should include strongly encouraging and supporting intellectual and viewpoint diversity among faculty and students alike. *See* Randy Barnett, *Our Letter to the American Association of Law Schools*, WASH. POST: VOLOKH CONSPIRACY (Feb. 25, 2017, 11:32 AM), <https://reason.com/volokh/2017/02/25/our-letter-to-the-association> [<https://perma.cc/7F2D-VYEQ>] (noting a "growing awareness that conservative and libertarian scholars are grossly underrepresented in American colleges and universities and that this imbalance results from political discrimination"). *See generally* George W. Dent, Jr., *Toward Improved Intellectual Diversity in Law Schools*, 37 HARV. J.L. & PUB. POL'Y 165 (2014).

286 138 S. Ct. 2361, 2378 (2018).

- 287 *Id.* at 2368.
- 288 *Id.* at 2370 n.2.
- 289 *Id.* at 2379 (Kennedy, J., joined by Roberts, C.J., and Alito and Gorsuch, JJ., concurring) (internal citations omitted).
- 290 *Id.* at 2375 (majority opinion); *see also* Josh Blackman, *The Constitutionality of Rule 8.4(g) after NIFLA v. Becerra*, JOSH BLACKMAN'S BLOG (July 13, 2018), <http://joshblackman.com/blog/2018/07/13/the-constitutionality-of-rule-8-4g-after-nifla-v-becerra/> [<https://perma.cc/XLX9-7YUX>].
- 291 *NIFLA*, 138 S. Ct. at 2365, 2375.
- 292 *Id.* at 2375.
- 293 *Id.* at 2372 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).
- 294 *Id.*
- 295 MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (emphasis added); *cf.* Blackman, *supra* note 290 (discussing his comments submitted to the Pennsylvania Supreme Court on its Disciplinary Board's proposed variation of Model Rule 8.4(g)).
- 296 *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015).
- 297 138 S. Ct. at 2366 (internal citations omitted) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994); *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 n. 19 (1993)).
- 298 *See, e.g., Haupt, supra* note 155, at 12-17 and discussion *supra* note 155.
- 299 138 S. Ct. 2248 (2018) (holding that Illinois' union agency-fee scheme violated the Free Speech Clause of the First Amendment of nonmembers by compelling them to subsidize private speech on matters of substantial public concern).
- 300 The outcomes in *NIFLA* and *Janus* have fueled contentions by progressives that conservatives have “weaponized” the First Amendment. *See, e.g.,* Adam Liptak, *How Conservatives Weaponized the First Amendment*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/politics/first-amendment-conservatives-supreme-court.html?login=email&auth=login-email> [<https://nyti.ms/2ID0Wov>]; *see also* Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2219 (2018) (answering the question “No,” based on “the American context, with all the historical, sociological, and philosophical baggage that comes with the modern, American free speech right,” considering desired “progressive” results). But shielding dissenters from government compulsions relating to speech is, in fact, a fully justified defensive strategy well in keeping with our American traditions, and serves to protect both social conservatives and progressives in times when their views are popularly disfavored. *See, e.g.,* Ryan T. Anderson, *Shields, Not Swords*, NAT'L AFFAIRS, Spring 2018, at 74.
- 301 *See, e.g., Keith, supra* note 135, at 2, 17-22.
- 302 *See Wolanek, supra* note 118, at 789 (“If the ABA is committed to institutional diversity, it will not encourage jurisdictions to formally discipline those who disagree with certain moral judgments.”); *see also id.* (noting that if Model Rule 8.4(g) “[e]xcludes (in the name of diversity) those with unpopular views, the legal profession ironically experiences a *decrease* in diversity,” which “affects non-lawyers because it makes it difficult for ‘biased’ citizens to find like-minded attorneys.”).
- 303 JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH DEEP DIFFERENCE (2016).
- 304 *Id.* at 26, 30. As Inazu notes, “One reason for the inclusion premise is that confident pluralism depends upon both a willingness *and* an ability to partner toward the possibility of mutual coexistence.” *Id.* at 26. He also observes “[t]his value of dissent entails risk because it strengthens a genuine pluralism against majoritarian demands for consensus.” *Id.* at 30.
- 305 *Id.* at 125; *see also* STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDITATION ON LAW, RELIGION, AND LOYALTY 16 (1998) (“It is as though we have forgotten the advice of James Madison in Federalist No. 10, that ‘the first object of

government' is to protect our ability to reach different conclusions, because the alternative is to create a society in which every citizen holds 'the same opinions, the same passions, and the same interests.'").

306 Thomas L. Shaffer, *More's Skill*, 9 WIDENER J. PUB. L. 295, 301 (2000) (quoting THOMAS MORE, UTOPIA 36 (George M. Logan & Robert M. Adams eds., Cambridge Univ. Press 1989) (1516)).

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